Federal Court Cour fédérale

**Date: 20190812**

**Docket: T-1062-18**

**Citation: 2019 FC 1067**

**Toronto, Ontario, August 12, 2019**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**INTERLAKE RESERVES TRIBAL COUNCIL,**
**DAUPHIN RIVER FIRST NATION,**
**KINONJEOSHTEGON FIRST NATION,**
**LAKE MANITOBA FIRST NATION,**
**LITTLE SASKATCHEWAN FIRST NATION**
**AND**
**PEGUIS FIRST NATION**

**Applicants**

**and**

**MINISTER OF ENVIRONMENT AND**
**CLIMATE CHANGE AND**
**MANITOBA INFRASTRUCTURE**

**Respondents**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Minister of Environment and Climate Change in which she declined to exercise her discretion to refer the environmental

assessment of a permanent flood control management project to a review panel. For the reasons set out below, I am dismissing the application.

## I. Background

### 1. *The Project*

[2] In the spring of 2011, widespread flooding occurred throughout much of southern Manitoba, resulting in unprecedented water inflows into Lake Manitoba and Lake St. Martin. This overwhelmed the capacity of the existing flood system. Water levels exceeded the desired operating ranges for the two lakes and resulted in severe flooding in surrounding communities, as well as extensive damage to property and long term evacuations affecting multiple communities including Little Saskatchewan and Dauphin River First Nations.

[3] As a result of the 2011 flood, an emergency channel, the Lake St. Martin Emergency Outlet Channel, was constructed without being subject to a provincial or federal environmental assessment [EA], because it was carried out in response to an emergency.

[4] Project proponents now seek to replace the existing emergency channel and create permanent flood protection infrastructure aimed at managing and controlling water levels in Lake Manitoba and Lake St. Martin during high water events, including the construction of several interrelated components, such as two water diversion channels, requiring numerous federal and provincial authorizations and licences [the Project]. Its primary features are summarized in the chart at Annex A to these Reasons.

[5] Designated under the *Regulations Designating Physical Activities*, SOR/2012-147, the Canadian Environmental Assessment Agency [the Agency] determined on March 9, 2018 that an EA of the Project was required pursuant to section 10 of the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, section 52 [CEAA 2012]. If approved, the Project will be located in the Interlake region of Manitoba, which is in the Treaty 2 area that includes the traditional territories of the Applicant First Nations. The Applicants who bring this judicial review are the: Dauphin River First Nation, Kinonjeoshtegon First Nation, Lake Manitoba First Nation, Little Saskatchewan First Nation, Peguis First Nation [collectively, the Member Nations] along with the Interlake Reserves Tribal Council [IRTC]. The Member Nations are also members of the IRTC.

[6] There are two Respondents defending the decision in this matter. First, there is the federal Minister of Environment and Climate Change [the Minister]. Second, there is Manitoba Infrastructure, a department within the government of Manitoba. The dual involvement is due to the fact that there is also a provincial component to the EA process, which was pending at the time this judicial review was launched.

[7] In terms of the background to that provincial process, on May 10, 2016, Manitoba Infrastructure filed an Environmental Act Proposal and Environment Assessment Scoping Document, initiating the provincial EA and licensing process. On June 19, 2018, IRTC requested a public hearing for the pending provincial process.

[8] However, it is the type of federal EA selected – namely an Agency-led assessment rather than an external review panel – that the Applicants challenge in this application, and which will be described next.

2. *The Federal EA*

[9] The Minister, under section 38 of CEAA 2012, may decide to proceed with one of two processes for the federal EA. First, she may decide to proceed with an EA process led by the Agency [Agency-led EA]. Second, she may refer the EA to an external review panel if she is of the opinion that it is in the public interest. Before choosing one or other type of EA, the Minister's selection must include a consideration of the factors enumerated at subsection 38(2) of CEAA 2012. For a list of these factors, please see section 38 below in Part III of these Reasons.

[10] On February 12, 2018, the IRTC advised the Agency of its concerns about the Project's potential adverse effects on the environment, as well as on treaty and Aboriginal rights, and requested that the Project be referred to a review panel.

[11] To assist the Minister in making a decision, the Agency wrote a March 20, 2018, memorandum to the Minister [March Memorandum]. The March Memorandum advised the Minister that an EA was required for the Project, highlighting the following key points regarding the next steps, including the two (internal or external) avenues under which this EA could proceed:

> • Four Indigenous groups have requested referral of the environmental assessment to a review panel. They are concerned that construction and operation of the Project will exacerbate the existing negative impacts that they experience from previous flood control activities.
>
> • The Project requires a provincial environmental assessment pursuant to *The Environment Act* of Manitoba. The need to refer the Project to the Manitoba Clean Environment Commission for a provincial public hearing has not yet been determined. The Agency will explore options to coordinate its processes with the province to the extent possible.
>
> • The Project is subject to an Agency-led environmental assessment unless you decide to use your discretionary authority under section 38 of CEAA 2012 to refer the Project to a review panel, if you determine that it is in the public interest to do so.
>
> (Reproduced from the March Memorandum, Application Record [AR] at p 407)

[12] On April 15, 2018, the IRTC wrote to the Agency, and commented on draft environmental impact statement guidelines for the Project [Guidelines]. The Guidelines had been posted by the Agency on its website along with the announcement of the pending EA. The IRTC also repeated its request for the Project to be referred to a review panel.

[13] On April 26, 2018, the Agency wrote a second memorandum to the Minister with respect to the federal EA process [April Memorandum]. The April Memorandum contained the following key points:

> • The Agency intends to establish a technical advisory group comprised of federal and provincial expert departments, the municipality of Grahamdale and potentially affected Indigenous groups. This type of advisory group has proven to be effective in addressing concerns of participants in Agency-led assessment processes.

> • Multiple Indigenous groups have requested that the Project undergo an assessment by a review panel, citing potentially significant environmental effects and impacts to rights. You have until May 13, 2018 to refer the Project to a review panel if you so choose.
>
> • The Honourable Ron Schuler, the Manitoba Minister of Infrastructure, requested that the Project not undergo an assessment by a review panel, encouraging an expedited and coordinated environmental assessment process to support the urgent need for integrated flood mitigation infrastructure.
>
> • It is recommended that you direct that the assessment continue through an Agency-led process. Your signature on the letter to [Manitoba's] Minister Schuler … will serve as a record of your decision not to refer the Project to a review panel.
>
> (Reproduced from the April Memorandum, AR at p 409)

[14] The Minister's undated proposed draft response, appended to the April Memorandum and responding to Manitoba's Minister Schuler [Minister's Manitoba Letter], indicated that she would not be referring the EA to an external review panel.

[15] On May 4, 2018, the Minister's decision [Decision] was communicated to potentially impacted Indigenous groups, including the Applicants, in a letter indicating that the matter would proceed by way of an Agency-led assessment. As mentioned above, that Decision is the subject of this judicial review.

## II. Issues and Standard of Review

[16] The Applicants raise two issues. First, they argue that the Minister identified the incorrect legal test under section 38 of CEAA 2012, which they argue should be reviewed on a standard of correctness. There has been some disagreement whether applying the "wrong test"

attracts a correctness or a reasonableness standard of review (for a recent discussion of this issue, including a review of relevant jurisprudence, see paragraphs 9-12 of *Azzam v. Canada (Citizenship and Immigration)*, 2019 FC 549). For the reasons explained below, the Minister did not err in the application of the legal test under either standard of review – correctness, or the reasonableness standard which governs the other issues raised.

[17] The Applicants contend that the Minister's Decision to select the Agency-led assessment was unreasonable for various reasons, outlined below. The jurisprudence has clearly established the reasonableness standard of review governs the Minister's Decision about the selection of the type of EA process, that is, whether to proceed with an internal, Agency-led review, or rather an external review panel (*Wagner v Canada (Environment and Climate Change)*, 2017 FC 560 at para 26 [*Wagner*]). The reasonableness standard applies because subsection 38(2) of CEAA 2012 is a provision that falls directly within the home statute of the Minister. Where an administrative decision-maker, such as the Minister in this case, interprets her home statute, the reasonableness standard applies (see, for instance, *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 27 [*CHRC*]).

## III. Key Legislative Provision

[18] The key provision raised in this judicial review is section 38 of CEAA 2012, which provides the Minister with the authority to decide between either (i) an Agency-led assessment or (ii) a review panel. It reads as follows:

| | |
|---|---|
| **Referral to review panel** | **Renvoi pour examen par une commission** |
| 38 (1) Subject to subsection (6), within 60 days after the notice of the commencement of the environmental assessment of a designated project is posted on the Internet site, the Minister may, if he or she is of the opinion that it is in the public interest, refer the environmental assessment to a review panel. | 38 (1) Sous réserve du paragraphe (6), dans les soixante jours suivant l’affichage sur le site Internet de l’avis du début de l’évaluation environnementale d’un projet désigné, le ministre peut, s’il estime qu’il est dans l’intérêt public que celui-ci fasse l’objet d’un examen par une commission, renvoyer l’évaluation environnementale du projet pour examen par une commission. |
| **Public interest** | **Intérêt public** |
| (2) The Minister’s determination regarding whether the referral of the environmental assessment of the designated project to a review panel is in the public interest must include a consideration of the following factors: | (2) Il tient notamment compte des éléments ci-après lorsqu’il détermine si, selon lui, il est dans l’intérêt public qu’un projet désigné fasse l’objet d’un examen par une commission : |
| (a) whether the designated project may cause significant adverse environmental effects; | a) la possibilité que le projet entraîne des effets environnementaux négatifs importants; |
| (b) public concerns related to the significant adverse environmental effects that the designated project may cause; and | b) les préoccupations du public concernant les effets environnementaux négatifs importants que le projet peut entraîner; |
| (c) opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it. | c) la possibilité de coopérer avec toute instance qui exerce des attributions relatives à l’évaluation des effets environnementaux de tout ou partie du projet. |

[19] Thus, under subsection 38(1), the Minister may refer the Project's EA to a review panel "if she is of the opinion that it is in the public interest". Her determination must include a consideration of the three factors contained in paragraphs 38(2)(a) through (c).

[20] The provisions of section 38 of CEAA 2012 "express an expectation that the Minister direct his or her mind to whether discretion should be exercised" (*Wagner* at para 4). Here, the Minister did not exercise her discretion to refer the Project to a review panel. Consequently, what lies at the core of this judicial review is whether the Minister identified the correct legal test, and in doing so properly directed her mind to the exercise of her legislated discretion.

## IV. Issue 1: The Legal Test

[21] Regarding the first issue of whether the Minister correctly identified the legal test, the Applicants submit that the Minister failed to consider all of the mandatory factors listed at subsection 38(2) of CEAA 2012, and in particular, paragraph 38(2)(a), i.e. whether the Project may cause significant adverse environmental effects. Second, the Applicants contend that the Minister, in rejecting a review panel, incorrectly focused her analysis on whether a Technical Advisory Group for the conduct of the EA is in the public interest.

[22] The Minister counters that she was aware of her discretionary authority to refer the Project to a review panel, and before doing so, considered the mandatory factors enumerated at subsection 38(2). The Minister contends that the legislation neither states that she nor the Agency has to specifically address each of the three subsection 38(2) factors in her Decision. On

the second issue, the Minister rejects the notion that she focused her analysis on whether the Technical Advisory Group – rather than referral to a review panel – is in the public interest.

[23] Manitoba Infrastructure argues that in alleging that the Minister identified the wrong legal test, the Applicants ignore express language in various documents, including the March Memorandum and the Minister's Manitoba Letter, which demonstrates that the Minister in fact identified the correct legal test. Manitoba Infrastructure further argues that the reference to the Technical Advisory Group relates to an alternative process that, in the Minister's view, would adequately satisfy the public interest, including considerations set out in subsection 38(2) of CEAA 2012. As a result, the Decision was reasonable, and the Applicants are ultimately attacking adequacy of reasons. Manitoba points out that *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 14 [*Newfoundland Nurses*] confirms that adequacy of reasons is not a standalone basis to quash a decision.

[24] I note at the outset of my analysis that the reasons in this matter, aside from those included in the Decision, also include the (i) March Memorandum, (ii) April Memorandum, and (iii) Minister's Manitoba Letter [collectively, the Reasons]. I also note that the issues raised by the Applicants on the first issue (that the Minister adopted an incorrect legal test) cross over into those raised on the second issue (that the Minister's application of the facts to the law was unreasonable). I cannot therefore avoid certain repetition in my analysis, and attempt to limit redundancy.

[25] In her Decision, the Minister correctly stated the test, writing that: "[u]nder CEAA 2012, the Minister of Environment and Climate Change has the discretionary authority to refer the environmental assessment of a project to a review panel within 60 days after the commencement of the assessment, if she is of the opinion that it is in the public interest to do so". In fact, the March Memorandum, and the Minister's Manitoba Letter, also both correctly state the test.

[26] While I agree with the Applicants that the April Memorandum focused its analysis on the benefits of a Technical Advisory Group and its composition, given the statements in the Reasons correctly outlining the test, I do not agree that the Minister misidentified the legal test. Rather, the error alleged by the Applicants – that the Minister failed to consider the three factors enumerated at subsection 38(2) of CEAA 2012 – amounts to an argument on the adequacy of reasons, which is to be reviewed on the standard of reasonableness (*Newfoundland Nurses* at para 14). While the Minister's counsel conceded that the factors are not explicitly reproduced in the Reasons, reasons do not have to recite, chapter and verse, all components of a statute's legal test in the exercise of considering and applying it. As Justice Evans held in his dissenting reasons in *Public Service Alliance of Canada v Canada Post Corporation*, 2010 FCA 56 at paragraph 163, relied on by Justice Abella in *Newfoundland Nurses* at paragraph 18, reasons neither have to be perfect nor comprehensive.

[27] Furthermore, under a reasonableness analysis, an administrative decision-maker does not have to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Newfoundland Nurses* at para 16). Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function (*Barreau du*

*Québec v Quebec (Attorney General)*, 2017 SCC 56 at para 15; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22). Here, although the Minister did not specifically address each of the section 38 factors explicitly in the Decision letter, they were nonetheless addressed in different parts of the Reasons, which must be read as a whole. As the Applicants raised these points with respect to the second issue (unreasonableness), further observations on the principles of deference, the section 38 factors, and adequacy of reasons will be made below.

[28] Concluding on the first issue raised, I find that the Minister correctly identified the legal test under section 38 of CEAA 2012. In this case, the failure to individually itemize each of the factors under section 38 in the Decision letter itself does not indicate that the Minister misidentified or misapplied the legal test, or failed to consider its elements.

## V. Issue 2: Whether the Decision was Reasonable

[29] The Applicants attack the reasonability of the Decision on four grounds. First, they contend that the Agency-led process will not be independent. Second, the Applicants submit that the Minister's Decision unreasonably failed to take into account two of the factors contained in subsection 38(2) of CEAA 2012. Third, the Applicants maintain that the Minister unreasonably focused on an irrelevant factor within her analysis, namely expediency, over the factors that she should have considered – again those listed in subsection 38(2). Finally, they claim that the Minister failed to provide justifiable, intelligible and transparent reasons.

1. *Independence of the Agency-led Assessment*

[30] Even though the Applicants did not raise independence of the process as a stand-alone issue in their Memorandum of Fact and Law, this point was raised both at the hearing and in general comments in written submissions. I will therefore discuss it as a preliminary issue regarding the reasonableness of the Minister having selected the internal, Agency-led review.

[31] The Applicants cite two major reasons for seeking a referral to a review panel: (i) its independence from the Project proponents and (ii) the fact that it allows for a public hearing.

[32] First, they argue that an Agency-led assessment will lack independence, given that the federal government is both the Project proponent and regulator. Thus, in addition to leading the assessment, it will ultimately decide whether and how the Project can move forward. The Applicants contend that these potential issues would all be avoided with referral to an independent, external review panel.

[33] Second, given that a referral to an independent review panel allows for a public hearing, the Applicants argue that referral would provide them with an opportunity to be properly heard, and allow for a more rigorous testing of the evidence, including the right to cross-examine witnesses and test expert evidence. They argue that a review panel provides more time to properly explore the public input (for instance, the timelines set out in sections 27 and 54 of CEAA 2012).

[34] The Applicants preface these arguments by noting that First Nations communities often find themselves disproportionately affected when floodwaters are diverted from municipalities, given where they tend to be located. They point to the affidavit of Hector Shorting (Chief of Little Saskatchewan First Nation and Board member of the IRTC), that sets out some of the devastating impacts of the 2011 flood experienced by the First Nations' communities, including mass evacuations (see the AR at p 9).

[35] The Minister, on the other hand, argues that the factors to be considered in the EA of a designated project are the same whether being led by the Agency or an external review panel pursuant to section 19 of CEAA 2012. Ultimately, the Minister argues that great deference must be given to her Decision, which is based on public policy considerations, and involves significant discretion. For instance, once having considered the three mandatory factors set out at subsection 38(2) of CEAA 2012, even if she found it would be in the public interest to refer the Project to a review panel, she has no obligation to do so given her broad discretion under the statute.

[36] Moreover, the Minister asserts that the Agency-led assessment consists of six key phases that involve Crown consultation with Indigenous groups throughout the process, being the (i) pre-EA planning, (ii) screening, (iii) environmental impact statement guidelines, (iv) environmental impact statement and draft EA report, (v) draft EA report review, and (vi) decision phases. Here, during the screening phase (ii), in which the Agency determined that an EA was required for the Project, the Minister points out that 22 letters were sent to Indigenous groups in Manitoba inviting them to provide initial views regarding the environmental effects of the Project on their potential or established rights (see Affidavit of Jean-Philippe Croteau,

Respondent (Minister)'s Record at p 11). The Minister asserts that Indigenous groups will continue to be consulted and heard under the Agency-led assessment, and through the Technical Advisory Group – which will include funding for participation in these consultations.

[37] For its part, Manitoba Infrastructure asserts that under sections 52 and 54 of CEAA 2012, either assessment process (independent review panel or Agency-led) will result in the same end product, which is an assessment report, followed by a final decision. Manitoba Infrastructure emphasized that different ministries in Manitoba are responsible for the provincial EA process. The Minister of Manitoba Infrastructure is the Project proponent, having oversight over water control for the province, and the Minister of Sustainable Development is responsible for the carriage of the province's *The Environment Act*, CCSM c E125, and ensuring compliance within Manitoba.

[38] Manitoba Infrastructure points out that two other Departments – Sustainable Development, and Indigenous and Municipal Relations – will be included in the Technical Advisory Group that consists of approximately 30 invited groups. It notes that the three Manitoba Departments may not all be on the same page, but even if they are, they might nonetheless be at odds with the federal government during the Agency-led assessment, which of is a separate process from the pending provincial EA. For these numerous reasons, Manitoba Infrastructure submits that the Decision was reasonable under the parameters of the legislation that governs the powers, duties and objects of the Agency, pointing to sections 103–114 of CEAA 2012.

[39] Regarding the Applicants' argument that the Project proponents and the Agency, leading the assessment, have similar views and interests, and therefore the Agency-led process will not be independent, I find there to be insufficient evidence to support that allegation. As for the argument that the federal and provincial governments, and their Ministers and/or departments will speak with one voice, even if Manitoba's two departments included in the Technical Advisory Group ultimately take a consistent position with Manitoba Infrastructure – and the Applicants maintain that any internal government divergence will indeed be resolved around the provincial Cabinet table – there is no guarantee that Manitoba will take the same position as the federal government.

[40] Should such alignment, however, occur as between the federal and provincial positions, the Agency will nonetheless obtain a broad variety of other input through the numerous stages of the EA outlined above, including through the broad stakeholder inclusion which will form part of the Technical Advisory Group consultations, including with numerous impacted First Nations communities which will be included in the EA process, and assisted with funding for participation. A diversity of input will thus be obtained, and have to be considered, by the Agency, including from communities involved in this application.

[41] Ultimately, I find that there is insufficient evidence to show that an Agency-led assessment would not be independent, or that there will not be an opportunity for the Applicants' voices and input to be heard, and agree with the responding parties that deference must be provided to the Minister. Her reasons for selecting one outcome out of two available possibilities provided by the legislation were justifiable and transparent in the circumstances.

Her selection, and reasons underlying the choice, are further analysed below in the discussion of the remaining issues.

2. *Section 38 Factors*

[42] The Applicants submit that the Minister's Decision unreasonably failed to take into account two of the factors contained in subsection 38(2) of CEAA 2012 – (i) the significant adverse environmental effects of the Project, and (ii) public concerns related to any such effects.

[43] The Minister counters that she considered the factors contained in the legislation, as demonstrated in the March and April Memoranda, and thus her Decision was not deficient.

[44] Manitoba Infrastructure echoes the Minister, noting that there was clearly an acknowledgement of public concerns and potential adverse environmental effects in the Decision, including through the many stakeholders invited to participate in the Technical Advisory Group. Furthermore, where the public interest is engaged, there is no requirement for an administrative decision-maker to provide a detailed weighing of factors in writing, or to map out for the reader exactly how competing objectives were balanced in a decision.

[45] In arriving at her selection Decision, I agree that the Minister was required to consider whether the Project may cause significant adverse environmental effects pursuant to paragraph 38(2)(a) of CEAA 2012. I note that "environmental effects" as defined at subsection 5(1) of CEAA 2012 include changes to the environment that may impact the natural environment (paragraphs 5(1)(a) and (b)), and Aboriginal peoples (paragraph 5(1)(c)).

[46] The Minister had information before her indicating possible "significant adverse environmental effects". For example, the Project description discusses the potential significant adverse environmental changes including: (i) soil erosion and contamination, and bank destabilisation; (ii) changes to water quality; (iii) impact on fish, fish habitat and wetland systems; (iv) loss of terrestrial vegetation; (v) permanent or semi-permanent loss or alteration of wetland habitats; (vi) loss of rare plants and introduction of invasive species; (vii) impact on migratory birds; and (viii) impacts on species at risk (AR at p 14).

[47] In addition, possible significant adverse impacts on Aboriginal peoples were outlined in letters sent from various Indigenous groups, including (i) impact on fish available to harvest pursuant to treaty rights and available to support their members' livelihoods as commercial fishers; (ii) changes to health and socio-economic conditions; and (iii) changes to land use and resources for the exercise of treaty and Aboriginal rights.

[48] I find the Reasons include several references to the significant adverse environmental effect factors, as contained in subsection 38(2) of CEAA 2012.

[49] First, in the March Memorandum, the Agency stated that: "[f]our Indigenous groups have requested referral of the environmental assessment to a review panel. They are concerned that construction and operation of the Project will <u>exacerbate the existing negative impacts</u> that they experience from previous flood control activities" [emphasis added].

[50] Second, in the April Memorandum, the Agency stated that "[m]ultiple Indigenous groups have requested that the Project undergo an assessment by a review panel, citing potentially significant environmental effects and impacts to rights". The Agency also stated that during its screening of the Project, "five Indigenous groups – Manitoba Metis Federation, Interlake Reserves Tribal Council, Anishnaabe Agowidiiwinan, Fisher River Cree Nation and Peguis First Nation – requested that the Project undergo an assessment by a review panel" [emphasis added].

[51] Third, also in the April Memorandum, the Agency provided a synopsis of the considerations required under paragraph 38(2)(a) (and 38(2)(b)) of CEAA 2012:

> In their requests to refer the Project to a review panel, Indigenous groups noted the potential for significant adverse environmental effects, including effects to fish and fish habitat, effects of changes to the environment on their health, social, economic and cultural conditions as well as the potential for the Project to adversely impact Aboriginal and Treaty rights. A number of Indigenous communities were traumatized by the 2011 flood and their subsequent displacement. As a result, there is decreased trust in the commitment of provincial and federal governments to the wellbeing of these communities.
>
> [Emphasis added]

[52] Fourth, in the analysis portion of the April Memorandum, the Agency noted that given the environmental, social, economic and cultural concerns about the Project identified by Indigenous groups, it will adapt its EA process.

[53] It is thus clear that potentially significant adverse environmental effects were addressed at various points in the March and April Memoranda, as was the potential for the Project to adversely impact Aboriginal and treaty rights. It was not necessary to repeat all of this in the

actual Decision letter. Rather, the memoranda, which formed part of the Reasons, sufficed. While the Minister certainly could have provided further analysis on how the potentially significant adverse environmental effects were considered in selecting the Agency-led assessment under paragraph 38(2)(a) of CEAA 2012, what was provided in the Reasons meant that choosing the Agency-led process was open to the Minister. Put the other way, deciding against the review panel was not unreasonable.

[54] Similarly, the Applicants contend that the Minister unreasonably failed to consider public concerns related to the potentially significant adverse environmental effects that the designated project may cause under paragraph 38(2)(b) of CEAA 2012. The Applicants highlight that a number of interested parties have voiced concerns to the Agency, including at least ten First Nations, three First Nation organizations, the Manitoba Metis Federation, individual First Nation members, a municipality, affected landowners, and an environmental public research organization.

[55] Again, while the Minister certainly could have undertaken a more comprehensive analysis in her consideration of this factor, the fact that the Decision did not itself address public concerns at length, and was not perfectly crafted, does not render it unreasonable. For instance, in the Decision, the Minister states, “I acknowledge specifically the concerns you raise regarding the potential permanent and significant adverse impacts on Interlake Reserves Tribal Council communities and their Aboriginal and Treaty rights”.

[56] The Applicants rely on *Wagner* for the proposition that a decision may be quashed where a decision-maker fails to consider a factor expressly required by the legislation. In *Wagner*, this Court granted the application after finding that the Minister's decision not to refer the EA to a review panel was unreasonable because, among other things, it was made without consideration of the "public concerns" factor.

[57] However, *Wagner* differs from this case. In *Wagner*, while the evidence included more than a thousand expressions of concern about the project, the decision-maker formed the opinion that the technical analysis did not point to any factors warranting a referral of the EA to a review panel. The Court stated that the decision was "devoid of expression about the evidence of 'public concerns'" (at para 39), did not provide any explanation as to the evidentiary basis for the conclusion reached, and as a result, found that the decision had been made without including consideration of the factor of public concerns as required by paragraph 38(2)(b).

[58] Here, by contrast, while the Applicants are correct that the Minister did not specifically address the public concerns received from each of the interested parties, unlike in *Wagner* there is evidence on the record – particularly in the March and April Memoranda – referencing public concerns raised by various groups expressed to the Agency about the Project.

[59] In sum, I do not agree that the Minister improperly minimized the public concerns about the Project by failing to consider public concerns related to the significant adverse environmental effect of the Project. As mentioned previously but which bears repeating, reasons need not be perfect or include all the details the reviewing judge would have preferred (*Newfoundland*

*Nurses* at para 16). The subsection 38(2) mandatory factors were reasonably addressed in the Minister's Decision and Reasons.

3. *Potential Delay that Might Be Caused by the Selection of a Review Panel*

[60] The Applicants assert that the Minister unreasonably privileged an irrelevant factor, namely expediency, over the factors listed at subsection 38(2) of CEAA 2012.

[61] The Minister responds that she was not constrained from considering other relevant information, such as expediency, and that her determination as to whether it would be in the public interest to refer the EA to a review panel was not limited to the enumerated factors in subsection 38(2). Manitoba Infrastructure also emphasizes that this provision does not preclude other considerations that factor into the public interest; the express reference to the "public interest" at subsection 38(1), rather than the specific enumerated factors at subsection 38(2), is indicative that Parliament intended the factors for decision-making to be broader than solely those in the enumerated factors (contained in paragraphs 38(2)(a) through (c)).

[62] A reasonableness review, when applied to a statutory interpretation exercise, recognizes that a delegated decision-maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute. Reviewing courts must refrain from reweighing and reassessing the evidence considered by that decision-maker (*CHRC* at para 55).

[63] Here, the Minister is uniquely situated to interpret this statute, given the underlying policy concerns and context. While she deserves a significant degree of deference in her

interpretation, I do not find the statute to be ambiguous. The English wording of subsection 38(2) of CEAA 2012 provides that "[t]he Minister's determination regarding whether the referral of the environmental assessment of the designated project to a review panel is in the public interest must include a consideration of the following factors…". The use of the words "must include", followed by three enumerated factors, does not suggest exclusion of other factors that the Minister believes are germane to the decision. Rather, the Minister is obliged to consider at least the three mandatory, enumerated factors provided in paragraphs 38(2)(a)-(c).

[64] The French version states as follows: "[i]l tient notamment compte des éléments ci-après lorsqu'il détermine si, selon lui, il est dans l'intérêt public qu'un projet désigné fasse l'objet d'un examen par une commission...". The word "notamment" means "especially, in particular, notably" (*Larousse Chambers Dictionnaire Français Anglais*, (Paris: Larousse/VUEF, 2003)).

[65] Neither the English nor the French versions of the provision preclude the Minister from considering other factors than those enumerated. Rather, both languages acknowledge that other factors could indeed be considered. Moreover, one of the purposes of CEAA 2012 as listed at subsection 4(f) is "to ensure that an environmental assessment is completed in a timely manner".

[66] In light of both the official language versions of subsection 38(2) of CEAA 2012, the Minister's consideration of expediency as a concept not explicitly enumerated in that provision was reasonable, especially given that the ultimate impact of the Project is flood mitigation, to avoid a repeat of the historic 2011 flooding. The Minister's interpretation is also consistent with the broader purposes of CEAA 2012, which include the protection of the environment, the

promotion of cooperation and coordinated action between federal and provincial governments, as well as the promotion of communication and cooperation with Aboriginal peoples and sustainable development to achieve or maintain a healthy environment and economy (see section 4(1) of CEAA 2012). These choices lie in the court of the Minister – not in mine. Nor do I have the role to reweigh those considerations, and any others she felt were relevant to the public interest (see *Sumas Energy 2 Inc v Canada (National Energy Board)*, 2005 FCA 377 at paras 23–25).

4. *Sufficiency of Reasons*

[67] The Applicants submit that the Minister failed to provide justifiable, intelligible and transparent reasons. While this has already been discussed briefly as part of the initial issue raised relating to the legal test, as mentioned above I will expand on the concept to conclude.

[68] First, I note that *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking (*Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at para 53, citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11 [*Komolafe*]). While a reviewing Court may supplement the reasons, it cannot ignore, replace or supplant them (*Delta Air Lines Inc v Lukács*, 2018 SCC 2 at para 24).

[69] However, reviewing courts may connect the dots where the lines, and the direction they are headed, may be readily drawn (*Komolafe* at para 11). Evidentiary gaps may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn.

[70] Guesswork does not play any role in reviewing this Decision. The sequence of memoranda to the Minister, and intergovernmental communications, provide a clear window into the Minister's reasons for her Decision not to refer the assessment to a review panel. This differs from a situation such as in *Wagner*, where there were "[n]o reasons […] not to refer the Assessment to a review panel […] on the Tribunal Record" (at para 33). Here, by contrast, the Minister provided a rationale in her Decision, as well as in the Reasons, including in her letter to the Manitoba Minister. Indeed, I do not need to look further than the Reasons, or speculate what the Minister might have been thinking, or provide the reasons that might have been given. Rather, the Minister's Decision, supplemented by the Reasons, provides insight into her reasoning process. For instance, she states in her Decision:

> I acknowledge specifically the concerns you raise regarding the potential permanent and significant adverse impacts on Interlake Reserves Tribal Council communities and their Aboriginal and Treaty rights.
>
> […]
>
> The Agency will establish a technical advisory group for the conduct of the environmental assessment, comprised of representatives from affected Indigenous groups, federal and provincial expert departments, and affected municipal governments. This forum will enhance engagement and interaction between expert federal and provincial departments, Indigenous groups and other governments, and would be an effective mechanism to address the complex issues identified through the environmental assessment process. Additional information, including an opportunity to contribute to the development of the terms of reference for the technical advisory group, is forthcoming from the Agency. (AR at p 185)

[71] Further, in the Minister's Manitoba Letter, she states:

> I recognise the importance of flood mitigation and the protection of Canadians and the environment. Further, I acknowledge specifically the concerns you raise with regards to flood management in the Interlakes Region of Manitoba, and the importance of Manitoba's integrated water control and flood mitigation network. (AR at p 416)

[72] In these aspects of her Decision and Reasons, among others, particularly when viewed in light of the record and its totality of evidence, the Minister reflects an awareness of the key elements she had to consider under CEAA 2012. The Minister highlights the objectives of flood mitigation and the protection of the public, as well as the desire to work collaboratively with Indigenous groups, the provincial government and other stakeholders (i.e., public interest). She speaks to what would be an effective mechanism to address the complex issues identified through the EA process, namely the perceived advantages of a Technical Advisory Group comprised of representatives from affected Indigenous groups, federal and provincial departments, and affected municipal governments.

[73] Ultimately, the Minister was tasked with making a binary choice: to refer, or not to refer to a review panel. She did not have to list all the reasons why she chose not to refer – or the converse – why she chose an Agency-led assessment. Rather, it was reasonable for her to simply state why the latter would suffice. The Reasons demonstrate that the Minister directed her mind to how she should exercise her discretion. In this highly discretionary selection of the EA process, there is not the same need for robust reasons as there would be in a quasi-judicial or judicial decision. Her Decision was reasonable.

## VI. Costs

[74] Both the Applicants and the Minister seek costs. The Applicants seek costs from the Minister fixed in the lump sum amount of $10,000, inclusive of disbursements, based on the upper range of Column III of Tariff B. They do not seek costs against Manitoba. The Minister seeks costs fixed in the lump sum amount of $3,000, inclusive of disbursements, based on the mid-range of Column III of Tariff B. Manitoba does not seek costs. Given the result, costs are awarded to the Minister in a lump sum amount of $3,000.

## VII. Conclusion

[75] While the Reasons provided by the Minister certainly could have been more complete, in reading the Decision supplemented by the other three key documents constituting the Reasons (the two Memoranda and the Minister's Manitoba Letter), along with the remainder of the record, the Court is able to understand why the Minister made her Decision, which falls within the range of possible, acceptable outcomes. As a result, the application for judicial review is dismissed. Costs, in a lump sum of $3,000, will be awarded to the Minister.

**JUDGMENT in T-1062-18**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is dismissed.
2. Costs fixed in the lump sum of $3,000 are awarded to the Minister of Environment and Climate Change.

"Alan S. Diner"

Judge

## Annex A

<table>
<tr><th>Component</th><th>Description</th></tr>
<tr><td colspan="2">Lake Manitoba Outlet Channel [LMBOC]</td></tr>
<tr><td>Outlet Channel</td><td>A diversion channel, located on private and provincial Crown land, from Lake Manitoba to Lake St. Martin.<br>• Length: 23 km<br>• Up to 100 m wide<br>• Base Width: 12.7 m<br>• Channel depth: 6 m to 12 m</td></tr>
<tr><td>Water Control Structure</td><td>A water control structure to control flows through the LMBOC. Includes six 9 m wide sluice bays, guides and sill beams, lift gates, stoplogs and an ancillary building for mechanical and electrical service.</td></tr>
<tr><td>Permanent Bridge Structures</td><td>Four new bridges for municipal roads and provincial highways that intersect with the LMBOC.</td></tr>
<tr><td colspan="2">Rock Quarries</td></tr>
<tr><td colspan="2">Temporary Construction Camp and Staging Areas</td></tr>
<tr><td>Provincial Road and Municipal Road Realignments</td><td>Realignment of provincial and municipal roads to accommodate the LMBOC.</td></tr>
<tr><td>Channel Inlet and Outlet at Lakes</td><td>Excavation of lake bottoms at channel inlet and outlets.</td></tr>
</table>

| **Lake St. Martin Outlet Channel [LSMOC]** | |
|---|---|
| Outlet Channel | A diversion channel located primarily on Provincial Crown land, from Lake St. Martin towards Lake Winnipeg through a wetland area.<br>• Length: 23 km<br>• Up to 120 m wide<br>• Base Width: 44 m<br>• Carrying capacity when operated: 326 $m^{3/}s$<br>• Channel depth: 2 m to 5 m |
| Water Control Structure | A water control structure to control flows through the LSMOC. Includes six 9 m wide bays and lift gates. |
| Drop Structures | Up to 12 drop structures to address channel velocity. |
| Rock Quarries | |
| Temporary Construction Camps and Staging Areas | |
| 24 kV Electrical Distribution Line | A 15 km long 24 kV distribution line for the construction and operation of the LSMOC water control structure. |
| Channel Inlet and Outlet at Lakes | Excavation of lake bottoms at channel inlet and outlets. |
| Access Road | Upgrading existing municipal, forestry and winter roads spanning a total of 104 km to an all season access road to facilitate construction, operation and maintenance of the LSMOC. |

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1062-18 |
| **STYLE OF CAUSE:** | INTERLAKE RESERVES TRIBAL COUNCIL, ET AL V MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, ET AL |
| **PLACE OF HEARING:** | WINNIPEG, MANITOBA |
| **DATE OF HEARING:** | MAY 29, 2019 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | AUGUST 12, 2019 |

**APPEARANCES:**

| | |
|---|---|
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| Sarah Bahir<br>Jim Koch | FOR THE RESPONDENT MANITOBA INFRASTRUCTURE |

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