Federal Court  Cour fédérale

Date: 20210420

Docket: T-980-19

Citation: 2021 FC 344

Ottawa, Ontario, April 20, 2021

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SAGKEENG FIRST NATION

Applicant

and

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

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of the May 17, 2019 decision of the Minister of Environment and Climate Change [Minister] declining to designate the Wanipigow Sand Extraction Project for an environmental assessment under the *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19, s 52 [CEAA 2012].

Background

[2] Canadian Premium Sand Inc. [Proponent] sought regulatory approval for the construction, operation, decommissioning and abandonment of the Wanipigow Sand Project [Project]. The Project would be located on provincial Crown land, approximately 160 kilometers northeast of Winnipeg, Manitoba. It contemplates a series of open pits for the extraction of high grade silica sand for use in oil and gas operations and the glass production industry. The Project would have a maximum production of capacity of approximately 1.2 million tonnes per year of sand (pre-processing), which is equivalent to 1.0 million tons per year of processed silica sand product.

[3] Section 2 of the *Regulations Designating Physical Activities*, SOR/2012-147 [CEAA Regulations], made pursuant to s 84 of CEAA 2012, stipulates that the physical activities set out in the schedule to the CEAA Regulations are designated projects for the purposes of s 2(1)(b) of CEAA 2012. Pursuant to s 16(g) of the schedule, the construction, operation, decommissioning and abandonment of a stone quarry or a gravel pit with a production capacity of 3.5 million tonnes or more per year is such a designated physical activity. As the Project contemplates production of only 1.2 million tonnes per year, it falls below the 3.5 million tonnes per year threshold and is therefore not subject to an environmental assessment.

[4] However, for physical activities that are not prescribed as designated by the CEAA Regulations the Minister may, pursuant to s 14(2) of CEAA 2012, designate that activity as a designated project. As a designated project, it would be subject to an environmental assessment

under CEAA 2012. The Minister may designate a project if, in the Minister's opinion, carrying out that physical activity may cause adverse environmental effects, or public concerns related to those effects may warrant the designation. Environmental effects that are to be taken into account in relation to a physical activity or a designated project are set out in s 5(1) of CEAA 2012.

[5] In late 2018, the Canadian Environmental Assessment Agency [Agency] undertook an analysis to advise the Minister on whether the Project should be designated. In doing so, the Agency identified nine Indigenous groups as having Aboriginal rights or uses within the Project area and invited those groups and the pubic to provide views and comments on whether the Project should be designated. In response, the Agency received eight requests for designation of the Project from the public and two requests for designation from Indigenous groups, one of which was from the Applicant, Sagkeeng First Nation [Sagkeeng]. Sagkeeng is an Indian Band as defined by the *Indian Act*, RSC 1985, c I-5 and is a signatory to Treaty 1. Sagkeeng's reserve is located in the province of Manitoba, approximately 60 kilometers south of the proposed Project site.

[6] The Agency prepared a report entitled *Requests to Designate the Wanipigow Sand Extractions Project under CEAA 2012- Agency Analysis and Recommendation* [Agency Analysis], dated April 2019. The Agency Analysis noted that the carrying out of the physical activity contemplated by the Project may cause limited adverse environmental effects within federal jurisdiction, and that members of the public and Indigenous groups had expressed concerns relating to those effects. However, the Agency concluded that the potential adverse

effects could be adequately managed including through the Proponent's mitigation measures and Manitoba's environmental assessment and licensing process. Neither the adverse environmental effects nor the public concerns relating to those effects warranted a federal environmental assessment. The Agency therefore recommended that the Minister not exercise her discretionary authority under s 14(2) of CEAA 2012 to designate the Project for federal environmental assessment.

[7] On April 25, 2019 the Agency prepared a Memorandum to the Minister entitled *Wanipigow Sand Extraction Project – External Request for Designation under the Canadian Environmental Assessment Act, 2012* (for Decision and Signature) [Memorandum]. The Memorandum, in essence, summarizes the Agency Analysis. It also recommends that the Minister not exercise her discretionary authority under s 14(2) of CEAA 2012 to designate the Project and that the Minister sign the attached letters responding to the members of the public and the Indigenous groups that requested designation, and to the Proponent, notifying them of the Minister's decision.

[8] By letter of May 17, 2019 the Minister notified Sagkeeng of her decision not to designate the Project. That decision is the subject of this judicial review.

Decision under review

[9] In her May 17, 2019 letter, the Minister acknowledges Sagkeeng's concerns, set out in its January 31, 2019 letter to the Agency [January Letter], and its request that the Project be designated for an environmental assessment under CEAA 2012. Specifically, Sagkeeng

expressed concerns in their January Letter as to the Project's potential adverse effects to fish and fish habitat, wildlife – including migratory birds, human health, and treaty rights including hunting, fishing and harvesting. The Minister states that she carefully considered Sagkeeng's input, and input from other Indigenous groups, provincial authorities and members of the public, as well as scientific knowledge and information provided by federal expert departments, including Environment and Climate Change Canada, Fisheries and Oceans Canada, Health Canada, Transport Canada, Parks Canada and Indigenous Services Canada.

[10] The Minister states that it was her understanding that Manitoba Sustainable Development had undertaken a provincial environmental assessment of the Project under Manitoba's *The Environment Act*, CCSM c E125 [*The Environment Act*] and that provincial regulatory mechanisms would be applied to the Project. Further, that the provincial Technical Advisory Committee had reviewed and provided comments to the Proponent on the key issues that Sagkeeng identified in its January Letter, including concerns about air quality/health.

[11] The Minister states that in making a determination on whether to designate the Project, she considered whether it may cause adverse environmental effects on areas of federal jurisdiction or whether concerns regarding those effects warranted a designation. Having also considered the existing provincial environmental assessment and federal and provincial regulatory mechanisms to mitigate any potential impacts associated with the Project, she decided not to designate the Project under CEAA 2012. The Minister states that she is confident that any potential effects to fish and fish habitat, migratory birds, health and traditional use of lands and resources would be addressed through the Proponent's mitigation measures, provincial

assessment under Manitoba's *The Environment Act* and federal regulatory requirements pursuant to the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*] and the *Migratory Birds Convention Act 1994*, SC 1994, c 22 [*Migratory Birds Convention Act*].

[12] The Minister states that it was her understanding that Sagkeeng had raised its concerns with Manitoba Sustainable Development as a part of a public comment period. Further, that Manitoba Mineral Resources Division (Mines Branch) is leading the Crown consultations associated with the environmental assessment and licensing process and the Minister understood that Mines Branch had invited Sagkeeng to identify concerns in relation to the Project.

Issues and standard of review

[13] The parties agree that the sole issue in this matter is whether the Minister's decision not to designate the Project for an environmental assessment under CEAA 2012 was reasonable.

[14] This judicial review was originally set down to be heard on January 23, 2020. On December 19, 2019 the Supreme Court of Canada rendered its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Sagkeeng requested that the hearing be adjourned and that it be permitted to amend its memorandum of fact and law to address the standard of review in light of *Vavilov*. I granted that request by Order dated January 17, 2020, adjourning the matter to June 23, 2020. I also gave the Respondent the opportunity to amend its submissions.

[15] In their respective amended memoranda of fact and law, both parties maintain their original submission that the reasonableness standard of review applies.

[16] In their amended materials, Sagkeeng also added submissions addressing how the reasonableness of a decision is to be assessed as set out in *Vavilov.* Sagkeeng also cites from a Federal Court of Appeal decision in *Coldwater Indian Band v Canada (Attorney General),* 2020 FCA 34 [*Coldwater*] issued after *Vavilov. Coldwater* analyzes whether a duty to consult had been reasonably satisfied. And, as will be discussed below, Sagkeeng also made other amendments to its submissions and added an entirely new argument to its memorandum of fact and law pertaining to consultation and reliance.

[17] The Respondent submits that *Vavilov* confirms that the reasonableness standard of review applies to this matter. However, nothing in *Vavilov* makes consultation an issue in this application when it was not previously raised, or supports the addition of a new argument without prior leave from the Court.

[18] I agree with the parties that the reasonableness standard of review applies. The Supreme Court in *Vavilov* addressed what is required of a court when performing a reasonableness review (*Vavilov* at paras 73 to 142). In sum, the reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision"

(*Vavilov* at para 99). Further, a reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker. The reasonableness standard requires that the reviewing court defer to such a decision (*Vavilov* at para 85).

Preliminary issue – admissibility of new affidavit

[19] In its amended written submissions, Sagkeeng stated that it intended to bring a motion pursuant to Rule 312 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] seeking an order granting it leave to serve and file a supplemental affidavit to "adduce evidence showing that Manitoba has continued to fail to consult with SFN (Sagkeeng)". The Respondent indicated in its responding amended memorandum of fact and law that it reserved its right to challenge any motion for leave to adduce fresh evidence.

[20] Although Sagkeeng filed its amended memorandum of fact and law on February 10, 2020 and, due to the Covid pandemic, the judicial review was not heard until more than a year later, on April 7, 2021, Sagkeeng took no steps to pursue a motion to file a supplementary affidavit until March 29, 2021.

[21] On that date, counsel for Sagkeeng sent a notice of motion in writing, pursuant to Rule 369, to the Registry seeking leave to file an Affidavit of Chief Derrick Henderson, affirmed on March 17, 2021 [Henderson Affidavit], pursuant to Rule 312. In the alternative, Sagkeeng sought an order permitting the filing of the affidavit subject to a determination of its admissibility at the April 6, 2021 hearing. By letter of April 1, 2021 counsel for the Respondent wrote to the

Registry indicating that the Respondent's understanding was that Sagkeeng did not intend to file a motion record, as required by Rule 364. The Respondent also set out its view that the test for the admission of new affidavit evidence, as found in *Forest Ethics Advocacy Assn v National Energy Board*, 2014 FCA 88 at para 4 [*Forest Ethics*], did not appear to have been met. Moreover, that a Rule 312 order is discretionary and the factors to be considered by the Court in exercising that discretion did not support Sagkeeng's request.

[22] By oversight, the Registry did not inform me of the request to file the Henderson Affidavit or of the Respondent's letter until immediately before the hearing. The motion had not been filed by the Registry or referred for direction by the Court. It also does not appear that Sagkeeng sought confirmation of the status of its request prior to the hearing.

[23] At the hearing before me, Sagkeeng confirmed that it had not filed written representations in support of its motion as required by Rule 364(2). Counsel for Sagkeeng stated that they had determined that it was not expedient to do so. However, as counsel began to make their submissions as to the admissibility of the Henderson Affidavit, it became apparent that detailed submissions had been prepared which counsel was referencing in their oral submissions. Counsel for Sagkeeng also provided the Respondent with a Second Supplemental Book of Authorities in support of the motion on the holiday Monday before the Tuesday hearing.

[24] Rule 312 permits a party, with leave of the Court, to file additional affidavits. The Federal Court of Appeal in *Forest Ethics* (at paras 4–6; also see *Connolly v Canada (Attorney*

General), 2014 FCA 294 at para 6) set out the requirements that must be met to obtain an order under Rule 312. First, an applicant must satisfy two preliminary requirements:

> (1) The evidence must be admissible on the application for judicial review. Generally the record before the reviewing court consists of the material that was before the decision-maker, although there are exceptions to this; and
>
> (2) The evidence must be relevant to an issue that is properly before the reviewing court.

[25] If these two preliminary requirements are met, the applicant must then convince the Court that it should exercise its discretion in favour of granting the order under Rule 312. Three questions have been identified to guide the Court in determining whether the granting of an order under Rule 312 is in the interests of justice:

> (a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
>
> (b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
>
> (c) Will the evidence cause substantial or serious prejudice to theother party?

(see also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 from paras 10 – 16).

[26] As a general rule, the evidentiary record before a Court on judicial review is restricted to the evidentiary record that was before the decision maker. Evidence that was not before the decision maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible (*Association of Universities and Colleges of Canada v Canadian Copyrights*

Licensing Agency, 2012 FCA 22 ; *Bernard v. Canada Revenue Agency*, 2015 FCA 263 at para 35). The first exception is an affidavit that provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, but care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision maker. The second exception is evidence that brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision maker so that the Court can fulfill its role of reviewing for procedural unfairness. The third exception is evidence that highlights the complete absence of evidence before the administrative decision maker when it made a particular finding.

[27] Here, Sagkeeng seeks to admit the Henderson Affidavit. The Henderson Affidavit describes Sagkeeng's requests to Manitoba that Sagkeeng be included in the provincial environmental assessment process and that the Manitoba Crown fulfil its duty to consult. Attached to the Affidavit are seven exhibits. The first three exhibits are correspondence by Sagkeeng's counsel to the Environmental Approval's Branch of Manitoba Sustainable Development between February 12, 2019 and May 13, 2019: in response to a Notice of Environment Act Proposal pertaining to the Project; in response to subsequent correspondence from the Manitoba Sustainable Development Branch (not attached) seeking further comments and questions regarding the additional information provided by the Proponent regarding the Environment Act Proposal; and, asserting that the duty to consult had not been satisfied.

[28] Also attached as an exhibit is a May 16, 2019 letter to the Proponent referencing an enclosed Environment Act Licence No. 3285 dated May 16, 2019 [Licence] and advising that Manitoba Sustainable Development had determined that public concerns with the Project had been addressed through the additional information and/or through licence conditions. Accordingly, and pursuant s 27 of *The Environment Act*, a public hearing for the Project was not recommended to the Minister of Sustainable Development, that recommendation decision was open for appeal for a period of 30 days [Manitoba Letter to Proponent].

[29] Finally, attached to the Affidavit as exhibits are: a June 14, 2019 letter from Sagkeeng's counsel to the provincial Minister of Sustainable Development appealing the decision to issue the Licence without holding a public hearing; the Minister's response on February 14, 2020 dismissing the appeal; and, counsel's letter of March 11, 2020 to the Manitoba Minister of Conservation and Climate requesting that the appeal be referred to the Lieutenant Governor in Council for consideration pursuant to s 29 of *The Environment Act*.

[30] In my view, for a variety of reasons, the Henderson Affidavit fails to meet the requirements for admissibility under Rule 312. None of this evidence was before the Minister when she made her decision. The first three letters from counsel predate the Minister's decision. However, they are not copied to the Minister, they are not found in the CTR and there is no evidence to support Sagkeeng's position that the Minister had actual or constructive knowledge of these letters when she made her decision. This is also true of the Manitoba Letter to Proponent. Further, these documents were available to Sagkeeng and could with reasonable

diligence have been submitted when Sagkeeng originally filed its application for judicial review on June 14, 2019.

[31] As to the letters from counsel sent in June 2019 and later, they postdate the Minister's decision and take issue with a decision by Manitoba not to hold a public hearing.

[32] Finally, and most significantly in my view, the Respondent was seriously prejudiced by the failure to bring the motion in a timely manner and by Sagkeeng's failure to provide written submissions, as required by Rule 364, explaining how the Henderson Affidavit meets the Rule 312 requirements and why Sagkeeng sought its admission.

[33] Sagkeeng made no mention of the Licence or any documents pertaining to Manitoba's environmental assessment process in its original written submissions. When granted leave to address the *Vavilov* standard of review, Sagkeeng went further and added a new argument, without leave, asserting that the Minister's decision was unreasonable because the Minister failed to ensure proper consultation by Manitoba – but even then no mention was made of the existence of the Licence, the Manitoba Letter to the Proponent or other documentation. And while Sagkeeng suggested at that time that it would seek leave to file a supplemental affidavit, it was not until more than a year later, on March 26, 2021 and just four business days before the hearing that Sagkeeng sought to pursue a motion to file a supplementary affidavit. It then did so without providing written representations supporting its motion and explaining why the motion had not been brought earlier. In the result, the Respondent was prejudiced. The Respondent was denied the opportunity to assess the proposed new evidence, to conduct any cross-examination

on the affidavit or to seek leave to file its own responding supplemental affidavit. I also note that the Respondent also did not have a meaningful opportunity to consider and respond to the new arguments that Sagkeeng sought to make at the hearing concerning the Licence or Sagkeeng's assertion that the Minister was obliged, by the honour of the Crown, to ensure the adequacy of the Manitoba environmental assessment consultations.

[34] Ultimately, at the hearing counsel for Sagkeeng advised that it only sought admission of paragraph 8 of the Henderson Affidavit and Exhibit D, the Manitoba Letter to the Proponent. Counsel also noted that the Manitoba Letter to the Proponent and a copy of the Licence were found in Sagkeeng's Second Supplemental Book of Authorities. Counsel advised that the letter had been included in error but invited the Court to take judicial notice of the Licence.

[35] At the hearing I advised that I would reserve my determination as to the admissibility of the Henderson Affidavit. Given my reasons above, I find the Henderson Affidavit to be inadmissible in whole. As to the Licence, this should properly have been put in evidence by way of an affidavit and should have been addressed in Sagkeeng's written submissions. In any event, for the reasons I have set out in my analysis below, the existence and date of the Licence does not change the outcome of this application for judicial review.

Legislation

[36] The relevant provisions of CEAA 2012 and the CEAA Regulations are set out in Annex A of these reasons.

[37] I note in passing that in August 2019, subsequent to the Minister's decision, CEAA 2012 was repealed and replaced by the *Impact Assessment Act*, SC 2019, c 28. The parties agree that s 9 of the *Impact Assessment Act* is the equivalent of s 14(2) of CEAA 2012.

Reasonableness of the decision

Sagkeeng's position

[38] In its written submissions Sagkeeng acknowledges that the Minister is entitled to deference, however that her decision was unreasonable in the totality of the circumstances.

[39] Specifically, that the Minister's decision is unreasonable because she did not adequately consider all relevant considerations raised by Sagkeeng and other interested parties, including the potential adverse effects of the depletion of groundwater that may result if the Project proceeds, and the environmental impact of the Project, including cumulative effects.

[40] Further, the Minister unreasonably exercised her discretion by relying on unspecified or hypothetical mitigation processes that were not provided by the Proponent. Sagkeeng submitted that the Minister disregarded this lack of evidence regarding mitigation, including with respect to adverse effects related to fish and fish habitat and the adverse effects on the health of Indigenous people. And, with respect to admitted deficiencies in the Proponent's Environment Act Proposal, the Minister unreasonably relied on Manitoba's regulatory scheme to address significant issues that could affect First Nations, and specifically Sagkeeng. This reliance is particularly problematic in light of concerns raised by relevant federal agencies including Environment and

Climate Change Canada and Health Canada about the Project. Nor does Manitoba's scheme consider cumulative effects that would be unregulated in the absence of a federal environmental impact assessment.

[41] As noted above, Sagkeeng's amended memorandum of fact and law also adds a new argument, being that the Minister abdicated her responsibility to ensure proper consultation with Sagkeeng. Sagkeeng submits that a duty to consult was triggered because the Minister was informed by the Agency that the Project may cause limited adverse environmental effect to Indigenous communities. However, the Minster instead unreasonably relied on her understanding that the Manitoba Mineral Resources (Department of Growth, Enterprise and Trade) was leading consultation with Indigenous groups as part of the environmental assessment and regulatory approval process. The record contains no evidence of meaningful consultation or that Indigenous Services Canada provided any comment on Manitoba's alleged consultation. Sagkeeng was given only one opportunity to respond to the request for designation and there was no follow up between Canada and Sagkeeng. Nor is there any evidence in the record of how the Minister concluded that consultation could properly be carried out by Manitoba, other than Manitoba stating that their consultation process would address the issues raised. Sagkeeng submits that the Minister's failure to ensure that Sagkeeng is adequately consulted is a fundamental gap in her analysis. Her reliance on an alleged understanding that Manitoba would carry out a proper consultation was an unreasonable chain of analysis rendering her decision unreasonable.

[42] When appearing before me, counsel for Sagkeeng further revised or perhaps refined this argument. Counsel for Sagkeeng advised that this is not a duty to consult case. Rather, that in

making her decision the Minister relied on an unfounded presumption that Manitoba would conduct the required consultation. As I understood the argument, because Sagkeeng's treaty rights in its traditional territory would be affected by the Project, even if the Minister was not under a duty to consult with respect to her s 14(2) designation decision, the honour of the Crown was engaged. Thus, given her reliance on the Manitoba environmental assessment, and that the Minister's duty to act honourably was engaged, the Minister was required to ensure that the Manitoba consultation would be or was adequate. However, she made fundamental errors of fact and failed to inform herself of relevant and necessary facts, in particular with respect to the existence of the Licence, rendering her decision unreasonable.

Respondent's position

[43] The Respondent submits that the Minister's decision was reasonable in all of the circumstances, having regard to the statutory regime, relevant considerations and the evidence. Further, the Minister's decision made under s 14(2) of CEAA 2012 is discretionary. Even if the Minister is satisfied that the subject physical activity may cause adverse environmental effects or that public concerns related to those effects may warrant designation of the project, it is still open to the Minister to decide not to make the designation.

[44] The Respondent submits that the decision is also intelligible, transparent and justified. It directly refers to the contents of the record before the Minister and concurs with the evidence presented to the Agency and with the Memorandum. The Minister is presumed to have considered the entire record and her reasons need not explain every factor that led to her decision. The Respondent submits that the Minister adequately considered all relevant

considerations raised by Sagkeeng, including with respect to groundwater depletion and environmental impact and cumulative effects of the project, and points to places in the record that demonstrate that the Minister considered those concerns. Further, the Minister appropriately took into account the environmental effects listed in s 5(1)(a) to (c) of CEAA 2012. The Respondent's submissions address the Minister's consideration of each of these effects. The Respondent concludes that the Minister's reasons demonstrate that she did not misapprehend or ignore relevant considerations.

[45] Further, the Minister did not conclude that the Project would not cause any adverse environmental effects within the federal jurisdiction as defined by s 5 of CEAA 2012. Rather, she recognized and concluded that the Project may cause limited adverse environmental effects but was satisfied that these could be adequately managed by various mechanisms. These mechanisms include the Proponent's proposed mitigation measures; the provincial environmental assessment and licencing process; the provincial regulatory mechanisms (such as provincial permits under *The Crown Lands Act*, *The Wildlife Act*, and a provincial water rights licence for the use of groundwater); and, federal regulatory mechanisms (such as the prohibition against the deposit of deleterious substances in fish-bearing waters under the *Fisheries Act*). The Respondent acknowledges that in some cases there was a lack of evidence before the Minister on specific mitigation measures. However, the Respondent submits that the Minister was satisfied that other mitigation measures would address the potential environmental effects and concerns or that the risk was otherwise acceptable given the limited adverse environmental effects.

[46] Nor did the Minister place undue reliance on the Manitoba regulatory scheme. The Minister reasonably took that scheme into account as a factor to be considered in making her decision, particularly because no federal permits or authorizations were required for the Project.

[47] As to the issue of consultation, the Respondent submits that the Court's Order permitting revised submissions speaking to the impact of *Vavilov* did not open the door to an examination of the adequacy of consultation, an issue that was not previously raised. Further, the Project is located on provincial Crown land and is subject to a provincial environmental assessment and associated licensing. The Minister considered the submissions of the Agency, which included those received from Sagkeeng, and the Agency's conclusion that Manitoba's consultation process would provide Indigenous groups with the opportunity to express concerns and seek resolutions. At the time the Minister made her decision, Manitoba Mineral Resources was leading the provincial Crown consultation process with Indigenous groups as part of the environmental assessment and licensing process. That process was in its early stages. The issue now raised by Sagkeeng concerns the conduct of the Manitoba authorities with respect to Manitoba's separate duty to consult. If Project approval may adversely effect Sagkeeng's rights, it is for Manitoba to ensure that it has met its own independent duty to consult.

[48] The Respondent submits that this matter does not concern an abdication of responsibility by the Minister to ensure Manitoba's consultation with Sagkeeng was adequate, as Sagkeeng submits. Rather, it concerns a threshold question of whether a federal assessment should be required at all. It was not unreasonable, illogical or irrational for the Minister, in declining to designate this otherwise ineligible project for federal assessment, to let the provincial

consultation process, which was in its early stages, run its course. The Minister's decision must not be reviewed with the benefit of hindsight. Should Sagkeeng consider Manitoba's assessment processes to be inadequate in general, or in the specific context of ensuring that the province has met its separate duty to consult, Sagkeeng's remedy lies in challenging those processes.

[49] When appearing before me the Respondent pointed out that the Licence is not found in the CTR and the Respondent had not had an opportunity to address it or the related arguments raised by Sagkeeng at the hearing.

Analysis

January Letter

[50] In my view, the starting point for this analysis is the January Letter from Sagkeeng to the Agency in response to the Agency's letter of December 24, 2018 inviting Sagkeeng to provide views and comments on whether the Project should be designated under CEAA 2012. In the January Letter, Sagkeeng described its concerns about the Project.

[51] Sagkeeng states that it has not been consulted regarding the Project, which is located within it traditional territory where its members exercise their Aboriginal Treaty rights to hunt, fish and harvest. And, upon review of the Environment Act Proposal submitted by the Proponent, it was apparent to Sagkeeng that there would be adverse environmental impacts because of the Project. Sagkeeng disagreed with the Proponent's view that it was not anticipated that Project related activities would interact with fish of fish habitat. Sagkeeng submitted that

due to the close proximity of quarry leases to Lake Winnipeg, further environmental assessment and independent expert study was necessary to determine the possibility of adverse effects to fish and fish habitat due to project runoff and groundwater contamination.

[52] Sagkeeng submitted that the Project would have adverse effects on aquatic and terrestrial wildlife and migratory birds in the region due to vegetation clearing activities, noise and light pollution from equipment during construction and operation, truck traffic and dust from mining. This effect would be magnified by the 24 hour per day, 7 days per week, year round operation of the Project for up to 54 years.

[53] Sagkeeng also asserted that although the Project did not appear to meet the "arbitrary threshold" of 3.5 million tonnes per year so as to be a designated project, further studies and a review panel were essential to a new and novel project of this nature. Sagkeeng noted that similar projects in the United States have been linked to adverse health impacts to individuals working in the mine, transporting cargo and living near this type of project and its transportation routes. Further, that mining activities of this type may create a pathway for chemicals and/or bacteria to more easily reach groundwater and that a Closure Plan and not been developed and submitted to the Manitoba Sustainable Development at that time.

Memorandum

[54] As noted above, having received responses from Sagkeeng and other interested persons and entities, the Agency prepared a Memorandum for the Minister. This included a description of the proposed Project. The Memorandum noted that the Project would be located within Treaty 5

territory and approximately 225 metres west of Hollow Water First Nation. The quarry would consist of a series of open pits, to be mined at a rate of one pit per year, over a period of 54 years. Further, that the Proponent holds a block of 2289 hectares of provincial quarry leases in the area, of which the total surface areas disturbed by the Project would be 353 hectares. A total of 83 hectares would be disturbed at any time due to the sequential nature of the open pit development. The Agency identified nine Indigenous groups, including Hollow Water First Nation and Sagkeeng, as potentially affected by the Project and invited them to provide input. The Agency also sought and received input from the Proponent, Manitoba Sustainable Development, the individual requestors, and federal authorities (Fisheries and Oceans Canada, Environment and Climate Change Canada, Health Canada, Parks Canada, Natural Resources Canada, Transport Canada and Indigenous Services Canada).

[55] There are three Annexes to the Memorandum. Annex I is a Project Map Location, Annex II is the Agency Analysis, and Annex III contains the requests for designation. The Memorandum notes that the annexed Agency Analysis provides a summary of the concerns raised by the requestors and the Agency's full analysis, including consideration of input from Indigenous groups, the Proponent, Manitoba Sustainable Development and the federal authorities. This is significant as it demonstrates that the information before the Minister when she made her decision included all of this information.

[56] The Memorandum outlines the decision making framework found in s 14(2) of CEAA 2012 and also notes that the Project is subject to a provincial environmental assessment under Manitoba's *The Environment Act*. Further, that the Proponent had submitted an Environment Act

Proposal to Manitoba Sustainable Development and that the Project would also require provincial permits under *The Crown Lands Act*, the *Wildfires Act*, and a provincial water rights licence for use of groundwater needed to support the processing facility. Should the Province allow the Project to proceed, it would issue an Environment Act Licence specifying the conditions with which the Proponent must comply. No federal permits or authorizations were required for the Project.

[57] The Memorandum then set out the considerations, being a summary of the views expressed by all of the relevant parties. The first of these was the views of Indigenous groups and the public. While Hollow Water First Nation had not responded to the Agency regarding the designation of the Project, the Agency had received a copy of a Hollow Water First Nation letter addressed to Manitoba Sustainable Development supporting the Project. This letter confirmed that Hollow Water First Nation was satisfied with how the Proponent addressed the environmental concerns. The Chief of Hollow Water First Nation had also publically supported the Project in the media, citing economic and social benefits for the community.

[58] The Memorandum notes that Sagkeeng and the Manitoba Metis Federation identified a number of concerns and requested that the Project be designated. Specifically, they identified potential adverse effects to fish and fish habitat, migratory birds, health, current use of lands and resources for traditional purposes, heritage resources, and to Aboriginal and Treaty rights as well as a lack of consultation. Concerns were also expressed regarding impacts beyond the environmental effects defined in s 5 of CEAA 2012, including traffic and transportation effects

on provincial highways, air quality and public health effects and impacts on Aboriginal and Treaty rights.

[59] Having identified and summarized all of the submissions, the Memorandum provided its analysis:

> **ANALYSIS**
>
> The Agency considered the matters set out in its reference guide *Designating a Project under CEAA* 2012, such as proposed mitigation and other existing legislative or regulatory mechanisms that might address the potential environmental effects and concerns expressed, in its analysis of whether the Project may cause adverse environmental effects and if concerns expressed warrant designation. In addition, the Agency considered advice from federal authorities and comments from Indigenous groups, the public and the proponent.
>
> The Project may cause limited adverse environmental effects to fish and fish habitat due to erosion and sedimentation, acid rock drainage and groundwater interactions. The Agency is of the view that the potential adverse environmental effects to fish and fish habitat would be limited in nature as there is no direct disturbance to fish habitat. In addition, the proponent has proposed mitigation measures including implementation of an erosion and sediment control plan, placing extracted shale in a clay-lined pit and capping with limestone to neutralize acidic drainage, and minimizing groundwater use through recycling of water. The provincial environmental assessment and licensing process will also consider effects to wildlife, including fish and fish habitat, and can address the potential effects. In addition, the prohibition against the deposit of deleterious substances into fish bearing waters under the *Fisheries Act* would apply to the Project.
>
> The Project may cause limited adverse environmental effects to migratory birds, including species at risk, due to surface area disturbance from vegetation clearing. The Agency is of the view that the potential adverse environmental effects to migratory birds would be limited in nature because of the small extent of surface disturbance and the proponent has proposed mitigation measures, including progressive reclamation, clearing vegetation outside of bird breeding seasons, and noise and light control. The provincial environmental assessment and licensing process will also consider

effects to wildlife, including migratory birds, and can address the potential effects. In addition, the requirements of *the Migratory Birds Convention Act,* 1994 would apply to the Project.

The Project may cause limited adverse environmental effects to federal lands, namely the Hollow Water First Nation reserve located 225 metres from the Project, due to changes to air quality and noise. The Agency is of the view that the potential adverse environmental effects would be limited considering the proponent has proposed mitigation measures, including progressive reclamation, enclosure of the processing facility to minimize noise and application of negative pressure to the processing facility enclosure to limit dust escaping into the environment. The provincial environmental assessment and licensing process will also consider potential effects to air quality and noise and can address the potential effects. Although the Agency sought input from the Hollow Water First Nation, no comments were received as part of the process. The Agency understands that Hollow Water First Nation and the proponent have signed an Economic Participation Agreement in relation to the Project that provides economic and social benefits, and that Hollow Water First Nation is in support of the Project.

The Project may cause limited adverse environmental transboundary effects related to greenhouse gas emissions from constriction equipment and mobile equipment. However, the Agency is of the view that the effects would be limited in extent because the Project's estimated emissions of 13 359 tonnes of carbon dioxide equivalents per year during operation, which represents 0.06 percent of Manitoba's total annual emissions and 0.002 percent of Canada's total annual emissions respectively. In addition, the proponent has proposed mitigation measures including electrification of key Project components. The provincial environmental assessment and licensing process will also consider effects from greenhouse gases and, under Manitoba's *The Environment Act*, the decision maker must take into account the amount of greenhouse gases to be generated by the project under consideration.

The Project may cause limited adverse environmental effects to Indigenous Peoples as described in paragraph 5(l)(c) of CEAA 2012, including effects to Indigenous health, current use of lands and resources for traditional purposes, and heritage resources, due to changes in air quality, noise, plant and wildlife availability, and access to traditional use areas. However, the Agency is of the view that the extent of effects would be limited in nature as the total surface disturbance would be 353 hectares with 83 hectares cleared

at any one time, the areas that would be cleared do not contain resources that are limited in the Project area (et. rare medicinal plants), and the Province of Manitoba has indicated that the regional area is relatively undeveloped. In addition, the proponent has proposed mitigation measures, including progressive reclamation and enclosing and applying negative pressure to the processing facility. These effects will also be considered as part of the provincial environmental assessment and licensing process and can be addressed therein.

The Agency is of the view that the Project may contribute cumulatively to adverse environmental effects and recognizes that the provincial environmental assessment does not consider these. However, the Agency reviewed the proponent's assessment of cumulative effects submitted to the Agency and accepts the assertion by both the Province of Manitoba and the proponent that cumulative effects are likely to be limited.

The Agency is of the view that the Project may impact Aboriginal and Treaty rights. The Agency understands that Manitoba Mineral Resources (Department of Growth, Enterprise, and Trade) is leading consultations with Indigenous groups as part of the environmental assessment and regulatory approval processes. The Agency is of the view that the Province's consultation process will provide the opportunity for Indigenous groups to express concerns and seek resolutions.

The Agency is of the view that many of the concerns expressed by the public, including effects to highway safety, air quality and public health, are outside the scope of section 5 of CEAA 2012 and fall within the jurisdiction of the Province of Manitoba. Manitoba Sustainable Development recently hosted a public comment period on the provincial Environment Act Proposal. The Agency notes that the issues of highway safety, air quality and public health were raised directly with Manitoba Sustainable Development, which posted them online to its project webpage. Manitoba Sustainable Development has verbally indicated that traffic along some roads, air quality and public health will be addressed in the provincial environmental assessment process.

Although the carrying out of the Project may cause limited adverse environmental effects as defined under section 5 of CEAA 2012, and there are public concerns related to those effects, the Agency is of the view that, after taking into account the limited nature of the potential environmental effects, proposed mitigation measures, expert advice from federal authorities and the ongoing provincial

> environmental assessment and licensing process, designation under subsection l4(2) of CEAA 2012 is not warranted.

[60] Against this backdrop, I will address the concerns raised by Sagkeeng in its application for judicial review both in its written submissions and when appearing before me.

i. Depletion of groundwater

[61] The Minister's decision acknowledged Sagkeeng's concerns as identified in its January Letter. However, Sagkeeng submits that the Minister failed to adequately consider the potential adverse effects of the depletion of groundwater that the Project could cause.

[62] I would first note that Sagkeeng's January Letter addresses groundwater only in the context of fish and fish habitat. Specifically, that due to the close proximity of the quarry leases to Lake Winnipeg an environment assessment was needed to determine the possibility of adverse effects to fish and fish habitat due to project run off and groundwater contamination. The letter does not raise groundwater depletion as a concern.

[63] However, the Agency Analysis, in its summary of the Proponent's views under "Indigenous Health", notes that the Proponent recognized that groundwater quality and quantity could be affected and listed mitigation measures, being mining only above the groundwater table and, pending the outcome of hydrogeological investigation, potentially using trucked in water instead of groundwater for the sand processing facility. Natural Resources Canada's view was that the Proponent would be implementing appropriate mitigation measures related to groundwater quantity. In its analysis of fish and fish habitat, discussed below, the Agency noted

that concerns had been raised regarding filter cake use in site reclamation and associated effects to groundwater quality but that the Agency understood from the Proponent that the polymers used in the thickening plant are typical of other facilities and have no known adverse environmental effects.

[64] The Minister's reasons state that she considered scientific knowledge and information provided by federal expert departments. She was satisfied that any potential effects to fish and fish habitat, migratory birds, health, and traditional use of lands and resources will be addressed through the Proponent's mitigation measures, provincial assessment under Manitoba's *The Environment Act* and federal regulatory requirements pursuant to the *Fisheries Act* and the *Migratory Birds Convention Act*.

[65] Thus, while the Minister did not specifically address groundwater depletion in her letter, the record that was before the Minister indicates that it was considered by Natural Resources Canada. Further, groundwater quality was considered by the Agency and the Agency determined that the risk to groundwater would be adequately mitigated. A reviewing Court is entitled to presume that the administrative decision maker considered the entire record before it and the burden is on the challenging party to rebut that presumption (*Andrade v Canada (Citizenship and Immigration)* 2012 FC 1490 at para 11 [*Andrade*]). The decision maker is not required to make an explicit finding on each constituent element leading to its final conclusion. Reasons are not required to be perfect. A reviewing Court is also entitled to look to the record for the purpose of assessing the reasonableness of the outcome (*Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-18; *Vavilov* at para 91,

128; *Peguis First Nation v Minister of Climate Change and Manitoba Infrastructure*, 2019 FC 1067 at paras 26-27, 53-55, 59 [*Peguis*]). The reviewing Court should also afford significant deference to the decision maker's findings of fact, particularly where the impugned determination falls within the core of the decision maker's expertise (*Andrade* at para 11). Further, the review of an administrative decision also cannot be divorced the institutional context within which it was made (*Vavilov* at para 91).

[66] Viewed in light of these principles and in the context of the information that was before the Minister when she made her decision, I am not persuaded that the Minister failed to consider the potential adverse effects of the depletion of groundwater should the Project proceed. And, as to the adequacy of her consideration of the issue, as stated by the Federal Court of Appeal in *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 86 [*Ontario Power*]:

> [126] We also endorse the finding of Justice Pelletier at paragraph 71 of *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, 191 F.T.R. 20, [2000] F.C.J. No. 682 (QL) [*Inverhuron*], as follows:
>
> > 71 It is worth noting again that the function of the Court in judicial review is not to act as an "academy of science" or a "legislative upper chamber". In dealing with any of the statutory criteria, the range of factual possibilities is practically unlimited. No matter how many scenarios are considered, it is possible to conceive of one which has not been. The nature of science is such that reasonable people can disagree about relevance and significance. In disposing of these issues, the Court's function is not to assure comprehensiveness but to assess, in a formal rather than substantive sense, whether there has been some consideration of those factors in which the Act requires the comprehensive study to address. If there has been some consideration, it is irrelevant that there could have been further and better consideration. [Emphasis added]

[67] On judicial review, the Court is to determine whether the decision is justifiable on the facts and the law (*Vavilov* at paras 84-87) and deference is to be afforded to the administrative decision maker's findings. Here the record confirms that the issue of groundwater depletion was considered by Natural Resources Canada and groundwater quality was considered by the Agency. Based on the expert advice of those agencies, the Minister was satisfied that the risk was adequately mitigated. To go beyond this is asking the Court to reweigh the evidence or, in this case, as Sagkeeng made no submissions on groundwater depletion, to second guess Natural Resources Canada and the Agency's analysis. This is not the role of the Court on judicial review.

[68] I also do not agree with Sagkeeng's suggestion that *Inverhuron* is no longer good law in light of *Vavilov*. Both *Inverhuron* and *Ontario Power* speak to how a reviewing court is to address an administrative decision maker's consideration of comprehensive scientific studies. The reviewing court must assess whether the administrative decision maker gave some consideration to the factors which the prevailing statute requires the scientific studies to address. This reflects the applicable statutory constraints and the fact that scientific opinion may reasonably differ. It is the administrative decision maker's role to assess and weigh the scientific evidence before them, it is not the role of the reviewing court to reweigh that evidence. This is also reflected in *Vavilov* where the Supreme Court stated that "[i]t is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from 'reweighing and reassessing the evidence considered by the decision maker'" (at para 125).

ii. Consideration of environmental impact

[69] Sagkeeng also asserts that the Minister failed to adequately consider the environmental impact of the Project, including cumulative effects, which in its view requires specific independent study. However, the Minister acknowledged the potential environmental impacts identified by Sagkeeng, all of which are addressed in more detail in the Memorandum and the Agency Analysis and are not seriously challenged by Sagkeeng.

[70] As to cumulative impact, as indicated in the Memorandum, the Agency was of the view that the Project may contribute cumulatively to adverse environmental effects. It also recognized that the provincial environmental assessment does not consider cumulative effects. However, the Agency had reviewed the Proponent's assessment of cumulative effects and accepted the assertion by both the Proponent and the province that the cumulative effects are likely to be limited. Mitigating cumulative effects is also addressed in the Agency Analysis. That report acknowledged that members of the public expressed concern about cumulative effects and the lack of consideration of cumulative effects in the provincial environmental assessment. Further, that Manitoba Sustainable Development expressed the view that the Project should not be designated under CEAA 2012 and that all of the concerns raised will be dealt with under the provincial environmental assessment and licensing process, with the exception of cumulative effects, which Manitoba Sustainable Development noted are anticipated to be negligible. The Agency Analysis states that:

> 5.1 Cumulative Effects
>
> The Agency recognizes that an assessment of cumulative effects would not be addressed as part of the Manitoba Sustainable Development environmental assessment process and that Manitoba

> Sustainable Development indicated that there is a very low density of development in the area as well as planned for the foreseeable future. The proponent completed a cumulative effects assessment focused on areas of federal jurisdiction. Based on a review of this information, and consideration of Manitoba Sustainable Development, public, and Indigenous comments, the Agency is of the view that cumulative effects would be limited and that the proponent has proposed reasonable measures to manage cumulative effects.

[71] As discussed above, the Minister was not required to specifically address cumulative effects in her decision letter. The finding of the Agency, which she accepted, falls within her general conclusion that when making her determination on whether to designate the Project, she considered whether it may cause adverse environmental effects on areas of federal jurisdiction or whether concerns regarding those effects warrant designation. Having done so, as well as considering existing provincial assessment and federal and provincial regulatory mechanisms to mitigate any potential impacts associated with the Project, she decided not to designate the project under CEAA 2012. Accordingly, I am not persuaded that the Minister failed to consider the environmental impact of cumulative effects.

[72] When appearing before me Sagkeeng asserted that the Minister's treatment of cumulative effects was a fundamental error and that she failed to inform herself of relevant and necessary facts. Sagkeeng submitted that the Minister should not have relied on the advice of Manitoba Sustainable Development that there is a very low density of development in the area as well as planned for the foreseeable future. Nor should the Minister have relied on the Proponent's cumulative effects assessment. Further, that this reliance means that Sagkeeng's concerns were not meaningfully considered. In my view, Sagkeeng conflates reliance on submissions made to the Agency by interested parties with the Minister's prerogative to weigh the information before

her when deciding whether to designate the Project for environmental assessment. Sagkeeng points to no relevant or necessary facts as to cumulative effects that were before the Minister and that were not considered. It was open to the Minister to accept the Proponent's and the province's submissions that the cumulative effects are likely to be limited. This does not mean that Sagkeeng's views were not considered.

iii. Reliance on unspecified mitigation processes

[73] Sagkeeng submits that the Minister unreasonably exercised her discretion by relying on unspecified or hypothetical mitigation processes that have not been provided by the Proponent, and by unreasonably disregarding this lack of evidence regarding mitigation.

[74] Specifically, with respect to adverse impacts of fish and fish habitat, Sagkeeng submits that the Minister failed to consider the Agency's findings: that an erosion and sediment plan was not provided for review; that the Environment Act Proposal did not consider potential acidic drainage associated with road construction; and, that the Environmental Act Proposal describes mitigation for spills, but not the effects associated with a spill if a spill were to occur.

[75] However, the record before me demonstrates that the Agency Analysis addresses all of these points, including acknowledging gaps in the Proponent's submissions, but for the reasons it set out the Agency concluded the effects to fish and fish habitat or public concerns related to those effects do not warrant designation under s 14(2) of CEAA 2012:

> 4.1 Fish and Fish Habitat
>
> The Agency understands that Fisheries and Oceans Canada agreed with the proponent that the Project is not likely to result in serious

harm to fish and fish habitat and that the Project would not require a *Fisheries Act* authorization. Environment and Climate Change Canada, the public, and Indigenous groups indicated there are potential effects to fish and fish habitat as a result of changes to surface water quality from erosion and sedimentation, acidic drainage, and interactions with contaminated groundwater. The Agency notes that the proponent identified standard mitigation measures for these effects, including implementing an erosion and sediment control plan, extracting and placing shale in a clay-lined pit, and minimizing groundwater use through the recycling of water. Manitoba Sustainable Development's environmental assessment processes considers effects to wildlife, including fish and fish habitat, and the Agency is of the view that the provincial environmental assessment can address effects to fish and fish habitat.

The Agency recognizes that Environment and Climate Change Canada identified gaps in the proponent's assessment of effects to water quality, and that public and Indigenous groups have raised concerns related to these gaps. Environment and Climate Change's comments are outlined below along with the Agency's considerations regarding those issues:

- The erosion and sediment control plan was not provided for review, however the effects from potential changes to water quality could be mitigated through appropriate mitigation measures. The Agency is of the view that the provincial environmental assessment is considering these potential effects and could include related conditions in associated regulatory documents, e.g. Environment Act Licence.

- The Environment Act Proposal did not consider potential acidic drainage associated with road construction. The Agency understands that road construction would be for 6 kilometres of a new paved main access road and upgrades to an existing 1.5 kilometre gravel access road. The Agency considers this to be a minor gap due to the relatively short distance of new roadway and that industry standards for road construction consider the potential for acidic drainage.

- Concerns regarding process water disposal from the sand processing facility. The Agency understands that there will be no discharge of water to the environment from the sand processing facility or other Project activities and therefore there would not be effects associated with disposal of process water.

> - Concerns regarding filter cake use in site reclamation and associated effects to groundwater quality. The Agency understands from the proponent that the polymers used in the thickening plant are typical of other facilities and have no known adverse environmental effects. The Manitoba Sustainable Development process and Mines Branch (Manitoba Department of Growth, Enterprise, and Trade) regulatory approvals process considers reclamation and closure planning. The Agency is therefore of the view that this can be addressed through the provincial environmental assessment and regulatory approval processes.
>
> - The Environment Act Proposal describes mitigation measures for spills, but not the effects associated with a spill if a spill were to occur. The Agency considers the proponent's mitigation measures to be appropriate to avoid and minimize effects to fish and fish habitat.
>
> Considering the above analysis, the Agency is of the view that the Project may cause limited adverse environmental effects to fish and fish habitat. However, those effects and public concerns related to fish and fish habitat can be appropriately addressed through the proposed mitigation measures, the provincial environmental assessment processes, and through the *Fisheries Act* prohibition against the deposit of deleterious substances into fish bearing waters. Therefore, the Agency is of the view that the effects to fish and fish habitat or public concerns related to those effects do not warrant designation under paragraph 14(2) of CEAA 2012.
>
> [Emphasis added]

[76] Sagkeeng similarly asserts the Minister unreasonably relied on the Proponent's prediction as to the adverse effects on the health of Indigenous peoples. However, in my view, in making this assertion Sagkeeng takes one sentence from the Agency Analysis in isolation. That analysis actually took various factors into consideration before concluding that the subject effects and concerns related to those effects do not warrant designation under paragraph 14(2) of CEAA 2012:

> **4.5 Effects to Indigenous Peoples**
>
> 4.5.1 Indigenous Health
>
> The Agency is of the view that the Project may cause a limited adverse environmental effect to human health resulting from changes to air quality and noise. In particular, the Agency recognizes that there may be small exceedances of the 24-hour Manitoba and Canadian Ambient Air Quality Criteria in the "reasonable worst-case" scenario for one hour during operations. The proponent's predictions considered the implementation of mitigation measures including enclosing and applying negative pressure to the sand processing facility, using waterproof seals to cover sand in transport trucks, and paving roads to minimize dust.
>
> The Agency recognizes that Health Canada noted that the proponent had identified exceedances of Manitoba Ambient Air Quality Criteria and Canadian Ambient Air Quality Criteria prior to the proponent updating the air quality model to provide greater accuracy. The revised predictions indicate that there would only be a small exceedance of the Manitoba and Canadian Ambient Air Quality Criteria. Further, the Agency notes that the modeled scenario is a "reasonable worst-case" one-hour scenario, while the guidelines are for a 24-hour exposure, so the predictions are conservative.
>
> The Agency also recognizes that Manitoba Sustainable Development's environmental assessment process includes an assessment of effects to human health and air quality, and is of the view that that Manitoba Sustainable Development's environmental assessment process would appropriately address concerns.
>
> Considering the above analysis, the Agency is of the view that the Project may cause limited adverse environmental effects to federal lands. However, those effects and concerns related to those effects can be appropriately addressed through mitigation and the provincial environmental assessment. Therefore the Agency is of the view that those effects and concerns related to those effects do not warrant designation under paragraph 14(2) of CEAA 2012.

[77] Given the above extracts from the Agency Analysis, I do not agree that the Minister disregarded the evidence in making her decision. The record demonstrates that all of the evidence was identified in the Agency Analysis which was before her. While Sagkeeng may

disagree with the Agency's Analysis, which the Minister accepted in making her decision, that does not make the decision unreasonable.

iv. Reliance on Manitoba's regulatory scheme

[78] I will first address the submissions that Sagkeeng made in its original written submissions. I will then address Sagkeeng's new written submissions and those made at the hearing concerning reliance by the Minister on Manitoba's environmental assessment process for consultation. In particular, that the Minister knew or ought to have known that Manitoba would not adequately consult with Sagkeeng and, therefore, that her reliance on the Manitoba environmental assessment process was unreasonable.

a) Sagkeeng's original written submissions – deficiencies

[79] Sagkeeng submits that in view of admitted deficiencies in the Proponent's Environment Act Proposal the Minister overly and unfairly relies upon Manitoba's provincial regulatory regime to address significant issues that could affect First Nations in the area, and specifically Sagkeeng. Such reliance is unreasonable and, in effect, the Minister has abdicated her responsibility and ignored blatant oversights.

[80] In support of their position, Sagkeeng points to the Agency's summary of Environment and Climate Change Canada's submission to the Agency. In their submissions, Environment and Climate Change had noted deficiencies in the Proponent's water quality assessment and other gaps in the Proponent's submissions. However, as indicated above, in its actual analysis the

Agency explained why the gaps identified by Environment and Climate Change Canada did not cause the Agency to conclude that the effects to fish and fish habitat or public concerns related to those effects warranted designation of the Project under s 14(2) of CEAA 2012. This included recognition by the Agency that Manitoba Sustainable Development's environmental assessment process includes an assessment of effects to human health and air quality, and the Agency's view that that Manitoba Sustainable Development's environmental assessment process would appropriately address concerns.

[81] And, as to greenhouse gasses, the Agency Analysis also addressed this, acknowledging that Environment and Climate Change Canada noted that information on emissions from the grader, passenger vehicles traveling to/from the site, and associated with electrical power consumption were not included in the Proponent's assessment. However, the Agency noted that under Manitoba's *The Environment* Act, the decision maker must take into account the amount of greenhouse gases to be generated. The Agency was therefore of the view that Manitoba Sustainable Development's environmental assessment process can appropriately address these concerns. In addition, the Agency stated that it was of the view that these gaps are minor for the reasons it set out including that the grader is one piece of mobile equipment and is likely to increase emissions only slightly. Based on its analysis, the Agency concluded that the Project may cause limited adverse transboundary environmental effects related to greenhouse gas emissions but that these, and public concerns related to transboundary effects, can be appropriately addressed through the Proponent's proposed mitigation measures, and through the provincial environmental assessment.

[82] In short, the information gaps that Sagkeeng identifies were acknowledged, were determined to be minor in nature and could be addressed by both the proposed mitigation measures and through the provincial environmental assessment.

[83] Sagkeeng also points to an extract from the Agency Analysis summary of the views submitted by Health Canada to support Sagkeeng's submission that the Minister unreasonably relied on the Manitoba environmental assessment process. Health Canada indicated that the Project has the potential to affect human health, based on its review of the proponent's December 2018 air quality predictions and that it would need to complete a full technical review in order to advise on the associated risk to human health. Subsequently, however, the Agency received updated air quality predictions from the Proponent, indicating that there will be only small exceedances at sensitive receptor locations. Further, the Agency's actual analysis addressed Health Canada's view, as indicated in s 4.5.1 Indigenous Health, set out above. In short, the exceedances were acknowledged by the Agency, which determined that they were small and could be appropriately dealt with by mitigation measures and Manitoba Sustainable Development's environmental assessment process.

[84] Sagkeeng also submits that because Manitoba Sustainable Development does not address cumulative effects, the Minister's decision not to designate the Project for a CEAA 2012 environmental assessment creates a situation where there will be no government oversight of the cumulative effects of the Project. However, as noted above, the Agency Analysis recognized that an assessment of cumulative effects would not be addressed as part of the Manitoba Sustainable Development environmental assessment process. Further, that Manitoba Sustainable

Development indicated that there is a very low density of development in the area as well as planned for the foreseeable future. And, the Proponent had completed a cumulative effects assessment focused on areas of federal jurisdiction. Based on a review of this information, and consideration of Manitoba Sustainable Development, public, and Indigenous comments, the Agency was of the view that cumulative effects would be limited and that the Proponent had proposed reasonable measures to manage cumulative effects.

[85] Given that the informational gaps identified by Sagkeeng were all acknowledged and addressed by the Agency, found to be minor in nature and adequately mitigated, this does not support Sagkeeng's assertion that, in view of the gaps, the Minister overly, unfairly and unreasonably relied on Manitoba's provincial regulatory regime. Given the Minister's reasons and the Agency Analysis, I am not persuaded that in this regard her reliance on the conduct of the Manitoba environmental assessment was unreasonable.

b) Sagkeeng's new written submissions and new submissions made at the hearing – reliance on Manitoba's environmental assessment process for consultation

[86] As indicated above, I granted Sagkeeng's request to amend its written submissions to address the Supreme Court's decision in *Vavilov*. However, Sagkeeng went further, revising its submissions and adding an entirely new argument asserting that the Minister's decision was unreasonable as it failed "to ensure proper consultation" with Sagkeeng.

[87] Those submissions were unclear as to whether Sagkeeng was asserting that Canada breached its duty to consult. However, when appearing before me, counsel for Sagkeeng advised

that this is not a duty to consult case. Rather, that because Sagkeeng's Aboriginal and Treaty rights would be effected by the Project, this meant that the Minister was under a different duty, arising from the honour of the Crown and in view of the need for reconciliation, to ensure that Manitoba's environmental assessment process would be adequate, specifically with respect to its consultations with Sagkeeng. According to Sagkeeng, the Minister should have investigated and made inquiries about Manitoba's consultation process but instead she chose to be willfully blind to its inadequacies.

[88] As a starting point I note that, in the context of the s 14(2) decision, the Minister considered the environmental impact on affected Indigenous communities, including Sagkeeng.

[89] The Agency Analysis acknowledges that the Project has the potential to have limited impact Aboriginal or Treaty rights, including its finding that:

> 4.5.2 Current Use of Lands and Resources for Traditional Purposes
>
> The Agency notes that the Project may cause limited adverse environmental effects to the current use of land and resources for traditional purposes as a result of changes to resource availability (plants and wildlife) and sensory disturbance to wildlife. For instance, community members may experience reduced trapping success using the Hollow Water First Nation community trapline located in the local study area. The proponent identified standard mitigation measures for vegetation and wildlife (e.g. progressive reclamation, undertaking an agricultural research project to investigate methods for transplanting berry plants), although it did not identify any mitigation measures specific to use.
>
> The Agency received concerns from local community members, some of whom identify as members of the Hollow Water First Nation, Sagkeeng First Nation, and Manitoba Metis Federation, expressing concerns about effects to trapping and other traditional use activities. For instance, Manitoba Metis Federation noted that neither the province nor proponent contacted Manitoba Metis Federation or responded to their letters. However, Manitoba

> Sustainable Development's environmental assessment and licensing approval processes considers impacts to land use and Aboriginal rights, including Treaty rights, and the Agency is of the view that that Manitoba Sustainable Development's environmental assessment and licensing process can address concerns related to current use of lands and resources for traditional purposes.
>
> Considering the above analysis, the Agency is of the view that the Project may cause adverse effects to the current use of lands and resources for traditional purposes. However, those effects and public and Indigenous group concerns related to those effects can be appropriately addressed through mitigation and through the provincial environmental assessment and licensing processes. Therefore the Agency is of the view that those effects and concerns related to those effects do not warrant designation under paragraph 14(2) of CEAA 2012.
>
> …..
>
> 5.2 Aboriginal and Treaty Rights
>
> The Agency is of the view that the Project has the potential to impact Aboriginal or Treaty rights. The Project is located within Treaty 5 territory and the Agency understands that by virtue of the Natural Resources Transfer Agreement (1930), all Manitoba treaty First Nations have access rights to unoccupied Crown lands within Treaty 5, including the Project area.
>
> In particular, the Agency accepts comments from Hollow Water First Nation members and members of the public that the Project could impact trapping success on the community trapline. In addition, the Agency accepts Manitoba Metis Federation's concern that Project would contribute to the incremental and cumulative loss of lands available to practice rights for the Manitoba Metis Federation and other Indigenous groups. The Agency is of the view that the surface area disturbance is relatively limited, and that impacts can be addressed through mitigation and the provincial environmental assessment and licensing process.

[90] This is also reflected in the Memorandum, for example:

> The Agency is of the view that the Project may impact Aboriginal and Treaty rights. The Agency understands that Manitoba Mineral Resources (Department of Growth, Enterprise, and Trade) is leading consultations with Indigenous groups as part of the

> environmental assessment and regulatory approval processes. The Agency is of the view that the Province's consultation process will provide the opportunity for Indigenous groups to express concerns and seek resolutions.

[91] What the Minister had to decide was the threshold question of whether to designate the Project under s 14(2). The applicable criteria for doing so is stated in s 14(2), being whether, in the Minister's opinion, either the carrying out of the physical activity may cause adverse environmental effects or public concerns related to those effects and may warrant the designation.

[92] Section 5(1)(a), (b) and (c) of CEAA 2012 lists, for the purposes of that Act, the environmental effects that are to be taken into account in relation to a physical activity or a designated project. Section 5(c) includes, with respect to Aboriginal people, an effect occurring in Canada of any change that might be caused to the environment on health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes or any structure, site or thing that is of historical, archeological, paleontological or architectural significance.

[93] The Agency requested input from nine Indigenous groups, including Sagkeeng, and others with respect to the proposed Project. The Agency Analysis specifically addresses each of the matters identified in s 5(1): fish and fish habitat; migratory birds; federal lands; effects to indigenous peoples (Indigenous health, current use of lands and resources for traditional purposes, sites of importance); other consideration being cumulative effects, Aboriginal and Treaty Rights, application of the CEAA Regulations and the adequacy of the provincial

environmental assessment process. Based on the Agency Analysis and Memorandum, the Minister decided not to designate the Project under CEAA 2012.

[94] The Agency Analysis also directly addresses the adequacy of the provincial environmental assessment process:

> 5.4 Adequacy of the Provincial Environmental Assessment Process
>
> The Agency recognizes the concern raised by members of the public and Indigenous groups about the adequacy of the provincial environmental assessment process led by Manitoba Sustainable Development. However, the Agency understands that the provincial environmental assessment process considers a broad range of environmental effects in areas of federal or shared jurisdiction including fish and fish habitat, migratory birds, air quality including greenhouse gas emissions, traditional land uses, human health, heritage resources, and Treaty rights. **Further, the Agency notes that the provincial environmental assessment process included opportunities for public participation and consultation with Indigenous groups.** The Agency is of the view that the provincial assessment can adequately address the potential environmental effects of this Project in areas of federal jurisdiction.
>
> (emphasis added)

[95] The Agency Analysis also states that the Project is subject to a provincial environmental assessment under Manitoba's *The Environment Act* and would also require permits and authorizations under the *Manitoba Crown Lands Act*, *The Wildfires Act* and a water rights licence for use of groundwater. Further, under its summary of the views expressed by Manitoba Sustainable Development, the Agency Analysis states that Manitoba Sustainable Development noted that concerns will be addressed by the provincial environmental assessment and licensing process, with the exception of cumulative effects.

[96] In her decision letter, the Minister states that she understood that Sagkeeng had raised its concerns with Manitoba Sustainable Development as part of a public comment period, that Manitoba Mineral Resources Division (Mines Branch) is leading the Crown consultations associated with the environmental assessment and licensing process and, the Minister understood that the Mines Branch had invited Sagkeeng to identify concerns in relation to the Project. I note that she makes no mention of the current status of Manitoba's consultations.

[97] Sagkeeng takes issue with the Minister's use of the term "understand" in her decision and submits that there is no evidence to support the Minister's presumption that Manitoba would conduct consultations. Further, that the presumption is rebutted by the fact that the Licence was issued on May 16, 2019, the day before the Minister issued her decision dated May 17, 2019.

[98] Sagkeeng also submits that the Minister made a fundamental error of fact in finding that the Manitoba environmental assessment process was in its early stages. In support of this submission, Sagkeeng references section 4.5.3 of the Agency Analysis, "sites of importance" which states, in part, that "[t]he Agency understands that Manitoba Mineral Resources (the provincial lead for consultation) indicated that it sent Manitoba Metis Federation an invite in early March 2019 to participate in the environmental assessment and regulatory approval process, and that Manitoba's consultation process was in its early stages". Sagkeeng submits that while the record indicates that the Minister believed consultation was in its early stages, the Licence demonstrates that Manitoba's assessment process ended the day before the Minister's decision. Therefore, the Minister knew or should have known that Manitoba's consultations were non-existent or inadequate and she therefore erred in relying on Manitoba's consultation process.

[99] However, there is no evidence before me that the Minister was aware of the issuance of the Licence when she issued her decision on May 17, 2019. The Licence is not contained in the CTR, where the Vice President, Operations, of the Agency certifies that the documents contained in the CTR are the materials in possession of the Minister relevant to the issues raised in the notice of application. Sagkeeng submits that because the Court is entitled to presume that the Minister, as an administrative decision maker, considered the entire record before her, it must also be presumed that she knew, or ought to have known, of related information, in this case the issuance of the Licence. Therefore, it can be inferred from this presumption that she knew that there would be no consultation by Manitoba when she issued her decision.

[100] Sagkeeng offers no authority in support of its assertion that the Court must presume that the Minster had knowledge of information not contained in the CTR and, in my view, this submission is of no merit. Were its so, administrative decision makers would be presumed to know, when making their decisions, of any information that any applicant deemed to be relevant to their application.

[101] Sagkeeng also submits that the Minster is responsible for her staff and that it was the responsibility of the Agency to bring the issuance of the Licence to her attention, which ought to have been in the record when she made her decision. In this regard, I note that the Agency Analysis upon which the decision is based is dated April 2019 and the Memorandum is dated April 25, 2019. Both documents predate the Licence. There is also no evidence before me that the Agency learned of the Licence issuance the day before the Minister made her decision. More significantly, even if when the Minister made her decision she understood that the Manitoba

environmental assessment process was ongoing, the fact that the Licence was issued on the day before she issued her decision does not establish that no consultation occurred under the Manitoba process. Although Sagkeeng submits that there is evidence that no consultation was conducted, in support of this it relies only on its statement in the January Letter responding to the Agency's invitation to provide views and comments on whether the Project should be designated. In that letter, Sagkeeng stated that there had been no consultation with Sagkeeng even though the Project was located within Sagkeeng's traditional territory where its members exercise their Aboriginal and Treaty right to hunt and fish and harvest. However, this does not establish that there was no subsequent consultation with Manitoba.

[102] The Minister's decision indicates that she understood that Sagkeeng's concerns had been raised with Manitoba Sustainable Development as part of a public comment period. That entity was leading the Crown consultations associated with the environmental assessment and licencing process and that it had invited Sagkeeng to identify Project related concerns.

[103] Sagkeeng does not suggest that Manitoba did not invite it to address its concerns nor does it suggest that it did not follow up with Manitoba to identify its concerns with the Project. Sagkeeng submits that the Manitoba process was concluded quickly and, for example, had the consultations taken a year to complete then the Minister's reliance on the Manitoba process may have been reasonable. In essence, Sagkeeng is of the view that any interactions with Manitoba were not as comprehensive as Sagkeeng believes they should have been.

[104] However, the onus is on Sakeeng to demonstrate that the Minister's decision is unreasonable. In that regard, it was open to Sagkeeng to challenge the sufficiency of the content of the CTR, to submit timely evidence as to what communications it had with Manitoba, and Manitoba's responses, or, any evidence that Manitoba refused to have any interaction with Sagkeeng prior to the Minister making her decision. Sagkeeng failed to do so and, therefore, has not met its onus in this regard.

[105] In my view, this is ultimately an issue of the adequacy of the consultations by Manitoba. In that regard, Sagkeeng may pursue any remedies open to it in challenging a breach by Manitoba of its duty to consult. Sagkeeng does not assert that Canada breached its duty to consult. And, while there is no question that the honour of the Crown is engaged when Canada is dealing with Indigenous peoples, Sagkeeng's submissions have not persuaded me that in these circumstances this means that the Minister had a new duty, based on the honour of the Crown, to "investigate", "make reasonable inquiries" or otherwise test the adequacy of Manitoba's consultations prior to making her decision. Further, Sagkeeng's logic would mean that the Minister would not be in a position to make her threshold s 14(2) CEAA 2012 project designation decision until Manitoba had completed its environmental assessment process – including consultation and determination of mitigating licence conditions – as the Minister would then be required to assess that process to determine if, in her view, it was adequate.

[106] Sagkeeng submits that it is not suggesting that the Minister was required to oversee Manitoba's environmental assessment process, including consultation, but that if the Minister was relying on that process she was required to ensure it was conducted reasonably. That is, as

the Minster was “handing over the keys”, she was required to take steps to ensure that her reliance on Manitoba’s process was reasonable. In my view, this is a distinction without a difference. Further, in the absence of any evidence concerning Manitoba’s consultation process, it cannot be established that the Minister unreasonably relied on that process.

[107] Indeed, even if the Minister had known of the issuance of the Licence, this does not establish that no consultation had previously occurred or that she would agree with Sagkeeng that Manitoba’s consultation was inadequate or that Sagkeeng’s concerns were not adequately addressed by the Proponent’s mitigation measures, the Licence conditions or the applicable regulatory requirements.

[108] In summary, Sagkeeng submits that the Minister made a fundamental error of fact in indicating that the Manitoba environmental assessment consultation process was in the early stages when, in fact, it was over by the time she made her decision. Therefore, Sagkeeng submits that the Minister unreasonably relied on the Manitoba environmental assessment process when she knew or should have known that there was and would be no consultation by Manitoba. I do not agree with the submission that if the Minister did not know of the Licence issuance then this alone is sufficient to render her decision unreasonable. Further, there is no evidence that the Minister was aware that the Licence had been issued. Nor is there any evidence that Sagkeeng’s concerns were not addressed in some manner by Manitoba prior to the issuance of the Licence. The adequacy of those consultations is a distinct issue. And, given that Sagkeeng does not assert that the Minster was under a duty to consult with respect to her threshold Project designation decision, nor am I persuaded that because one of the factors that she considered in making her

decision was environmental effects on Aboriginal treaty rights, that this engages the honour of the Crown such that the Minister was under a new duty requiring her to investigate Manitoba's consultation process.

[109] Before leaving this point I note that in its written submissions Sagkeeng refers to the policy and guidance document titled *Designating a Project under the Canada Environmental Assessment Act, 2012,* a guideline that the Agency states in the Memorandum that it considered. That document states, among other things, that when developing a recommendation for the Minister, the Agency will, as appropriate, take into account a number of matters including whether the potential adverse effects can be adequately managed through other existing legislative or regulatory mechanisms and whether an assessment of environmental effects could be carried out by another jurisdiction. This does not suggest that the Minister was not able to rely on the Manitoba environmental assessment process, particularly in circumstances such as this where the Project is located on provincial Crown land, is subject to environmental assessment and associated licencing under Manitoba's *The Environment Act* and other provincial regulatory approval process and no federal permits or authorizations are required. The Respondent also points out that one of the stated purposes of CEAA 2012 is to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments (CEAA 2012 at s 4(1)(c)).

[110] The parties did not refer the Court to any jurisprudence or provide any submissions that explain the interaction of federal and provincial agencies' roles in the context of potentially overlapping environmental assessments and the circumstances in which the federal Crown can

permit the provincial Crown to take the lead in an environmental assessment, as was the situation in this matter. Further, as Sagkeeng does not assert that Canada had or breached a duty to consult, nor is this a situation where the question of the interaction of the separate federal and provincial duties to consult with respect to the conduct of environmental assessment(s) arises.

[111] Sagkeeng also asserts that when the Minister became aware of the Licence she should have reconsidered her decision. However, there is no evidence that Sagkeeng requested her to do so or, as discussed above, that Manitoba failed to conduct any form of consultation.

[112] When appearing before me Sagkeeng also submitted that the Minister made a fundamental error of fact in accepting the Proponent's erroneous view that the Project site did not fall within Sagkeeng's traditional territory. However, this is not supported by the record before me. The Agency Analysis states that the Project is located within Treaty 5 territory and that by virtue of the Manitoba *Natural Resources Transfer Agreement*, other treaty groups also have access rights to unoccupied Crown lands within Treaty 5, including the Project area. The Agency stated that it had identified the listed nine Indigenous groups as having Aboriginal rights or uses within the Project area, Sagkeeng (Treaty 1) was included in this list. The agency sought Sagkeeng's view on the designation of the Project.

Minister's discretion

[113] As to the Ministers discretion in deciding whether or not to designate a project under s 14(2) of CEAA 2012, Sagkeeng submits that while the language of the provision is discretionary,

the Minister's exercise of discretion must be informed, and potentially limited by, s 35 of the Constitution. The Minister's discretion is not completely unfettered.

[114] The factors the Minister must consider when exercising her discretion under section 14(2) of CEAA 2012 are whether, in the Minister's opinion, either carrying out that physical activity may cause adverse environmental effects, or if public concerns related to those effects may warrant the designation. Section 5(1)(c) lists the environmental effects that are to be taken into account in relation to a physical activity, with respect to Aboriginal peoples. The effects are those that occur in Canada of any change that may be caused to the environment on: health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. As discussed above, the Agency Analysis dealt with each of these considerations, as well as the s 5(1)(a) and(b) considerations.

[115] It is true that the Minister's discretion is not unfettered. However, the Minister considered all of the s 5 factors, and impact on treaty rights more broadly, and she did have the discretion to weigh these factors in reaching her decision. Section 14(2) does not require the Minister to designate a project in the event that environmental effects are identified. Sagkeeng did not further develop its general statement that the Minister's exercise of discretion must be informed, and potentially limited by, s 35 of the Constitution in the context of this matter.

[116] When exercising her discretion under s 14(2), the Minister was satisfied that the factual context, the mitigation measures proposed by the Proponent, the federal and provincial

regulatory mechanisms – including the Manitoba's environmental assessment – were sufficient to mitigate any adverse environmental effects on federal lands. Moreover, the statutory scheme informs the acceptable approaches to decision making, including the exercise of discretion (*Vavilov* at para 108). In my view, the Minister reasonably exercised her discretion.

[117] Sagkeeng also asserts that reconciliation with First Nations requires that the Minister do more that simply assume that Manitoba will take care of consultation. However, it is clear the Minister put her mind to this issue. She was satisfied that Manitoba's environmental assessment process was broad enough to address all of Sagkeeng's concerns and with Manitoba's confirmation that it would address those concerns. Even if, in Sagkeeng's view, that process was not adequate its remedy is with the province.

[118] While Sagkeeng submits that the Minister's alleged failure to ensure that Sagkeeng was adequately consulted in the Manitoba environmental assessment process, or the asserted fundamental errors addressed above, comprise a "fundamental gap" in the Minister's s 14(2) analysis, I do not agree. As set out above, the Minister considered all of the factors required by s 5(1)(a),(b) and (c) of CEAA 2012 when making her decision.

Conclusion

[119] Upon review of the Minister's decision and the record that was before her when she made that decision I am satisfied that her decision was justified, transparent and intelligible and, therefore, reasonable. The decision was based on an internally coherent and rational chain of analysis and is justified in relation to he facts and law that constrained the Minister (*Vavilov* at

para 85, 105). The Minister did not fundamentally misapprehend or fail to account for the evidence before her (*Vavilov* at para 126).

[120] Based on her expertise and the factors that she considered in arriving at her threshold discretionary decision that the Project would not be designated for an environmental assessment under CEAA 2012, it was reasonable for her to rely, in part, on the fact that Manitoba would be conducting an environmental assessment of the Project pursuant to Manitoba's *The Environment Act*, including consultations. There is no evidence that the Minister was informed of the issuance of the Licence prior to the issuance of her decision or that, prior to the Minister's decision, Manitoba had failed to undertake any form of consultation with Sagkeeng. To the extent that Sagkeeng is of the view that the consultation were inadequate and that Manitoba breached its duty to consult with Sagkeeng as a part of that process, its remedy is to challenge Manitoba's process.

Costs

[121] The Respondent's written submissions seek an Order that the application for judicial review be dismissed, with costs. The Respondent submits that, in the interest of efficiency, and recognizing there have not been any extraordinary steps taken in this matter, that if costs are awarded they be fixed in the lump sum amount of $1,800, inclusive of disbursements, based on the lower-range of Column III of Tariff B. Sagkeeng made no submissions as to the quantum of costs. In my view the Respondent's submission is reasonable and I will exercise my discretion under Rule 400 and order costs in the requested amount.

JUDGMENT IN T-980-19

THIS COURT'S JUDGMENT is that

1. Sagkeeng is denied leave, pursuant to Rule 312, to serve and file a supplemental affidavit, being the affidavit of Chief Derrick Henderson, affirmed on March 17, 2012;

2. The application for judicial review is dismissed; and

3. The Respondent shall have its costs in the lump sum, all inclusive amount of $1800.00.

"Cecily Y. Strickland"
Judge

Schedule A

***Canadian Environmental Assessment Act*, 2012**

2 (1) 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;

(b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and

(c) are linked to the same federal authority as specified in those regulations or that order.

It includes any physical activity that is incidental to those physical activities. (*projet désigné*)

environmental assessment means an assessment of the environmental effects of a designated project that is conducted in accordance with this Act. (*évaluation environnementale*)

environmental effects means the environmental effects described in section 5. (*effets environnementaux*)

4 (1) The purposes of this Act are

(a) to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project;

(b) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;

(c) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments;

(d) to promote communication and cooperation with aboriginal peoples with respect to environmental assessments;

(e) to ensure that opportunities are provided for meaningful public participation during an environmental assessment;

(f) to ensure that an environmental assessment is completed in a timely manner;

(g) to ensure that projects, as defined in section 66, that are to be carried out on federal lands, or those that are outside Canada and that are to be carried out or financially supported by a federal authority, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;

(h) to encourage federal authorities to take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy; and

(i) to encourage the study of the cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments.

(2) The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the administration of this Act, must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are

(a) a change that may be caused 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 2;

(b) a change that may be caused 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 where the physical activity, the designated project or the project is being carried out, or

(iii) outside Canada; and

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

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

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

14 (1) A designated project that includes a physical activity designated under subsection (2) is subject to an environmental assessment.

(2) The Minister may, by order, designate a physical activity that is not prescribed by regulations made under paragraph 84(a) if, in the Minister's opinion, either the carrying out of that physical activity may cause adverse environmental effects or public concerns related to those effects may warrant the designation.

(3) The Minister may require any person to provide information with respect to any physical activity that can be designated under subsection (2).

(4) …

18 The responsible authority with respect to a designated project — or the Minister if the environmental assessment of the designated project has been referred to a review panel under section 38 — must offer to consult and cooperate with respect to the environmental assessment of the designated project with any

jurisdiction referred to in paragraphs (c) to (h) of the definition ***jurisdiction*** in subsection 2(1) if that jurisdiction has powers, duties or functions in relation to an assessment of the environmental effects of the designated project.

84 The Minister may make regulations

> **(a)** for the purpose of the definition ***designated project*** in subsection 2(1), designating a physical activity or class of physical activities and specifying for each designated physical activity or class of physical activities one of the following federal authorities to which the physical activity is linked:
>
> > **(i)** the Canadian Nuclear Safety Commission,
> >
> > **(ii)** the National Energy Board,
> >
> > **(iii)** any federal authority that performs regulatory functions, that may hold public hearings and that is prescribed in regulations made under paragraph 83(b), or
> >
> > **(iv)** the Agency;

Regulations Designating Physical Activities

2 The physical activities that are set out in the schedule are designated for the purposes of paragraph (b) of the definition ***designated project*** in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*.

3 The physical activities that are set out in the schedule or that are designated by the Minister under subsection 14(2) of the *Canadian Environmental Assessment Act, 2012* are designated for the purposes of paragraph 58(1)(a) of that Act.

SCHEDULE

(Sections 2 to 4)

Physical Activities

16 The construction, operation, decommissioning and abandonment of a new

> **(g)** stone quarry or sand or gravel pit, with a production capacity of 3 500 000 t/year or more.

17 The expansion of an existing

> **(g)** stone quarry or sand or gravel pit that would result in an increase in the area of mine operations of 50% or more and a total production capacity of 3 500 000 t/year or more.

I note in passing that CEAA 2012 was repealed on August 28, 2019 concurrently with the coming into force of the *Impact Assessment Act*, SC 2019, c 28.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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