Federal Court  Cour fédérale

Date: 20211213

Dockets: T-541-20
T-679-20

Citation: 2021 FC 1367

Ottawa, Ontario, December 13, 2021

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

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

Applicants

and

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

Respondent

and

LE CONSEIL DES INNU DE EKUANITSHIT

Intervener

JUDGMENT AND REASONS

I. Overview

[1] The governments of Canada and Newfoundland and Labrador are cognizant of both the economic benefits and the potential long-term impact on our ecosystem of off shore oil and gas exploration in Canadian waters to the east of the Province of Newfoundland and Labrador. To this end, the government of Canada implemented a regulatory scheme in an effort to avoid duplication of the management of that exploration and to ensure that the highest standards of environmental protection continue to be applied and maintained. The Sierra Club Canada Foundation, World Wildlife Fund Canada and Ecology Action Centre (the "Applicants") oppose the regulatory scheme and the means by which it was implemented by the government of Canada.

[2] The Applicants seek judicial review pursuant to sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 [*Federal Courts Act*], of the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador (the "Regional Assessment") which was made available to the public and to the Applicants on March 4, 2020. The Regional Assessment Committee (the "Committee") prepared the Regional Assessment, which constitutes part of the Committee's report ("Final Report") to the Minister of Environment and Climate Change Canada (the "Minister"). The Applicants additionally seek judicial review of the *Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)* (the "Regulation") made by the Minister pursuant to paragraph

112(1)(a.2) of the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 [*IAA*]. The *Regulation* came into force on June 4, 2020. Both judicial reviews have been consolidated.

[3] At the outset of these reasons it is important to set out what the Final Report is not. It is not a report related to the production of oil and gas reserves. It is a report related to exploration. Exploration has been ongoing in the area under study for many years. Prior to the commencement of the Regional Assessment, the then Minister of Natural Resources for the Province of Newfoundland and Labrador described "exploration", in part, as a "low impact" activity for which "potential impacts and standard mitigations are well known". The then Minister of Indigenous Services, Seamus O'Regan, in speaking about the Regional Assessment, opined that the government of Canada is "working with the Province to improve the efficiency of the environmental assessment process for offshore projects, while continuing to maintain the highest standards of environmental protection". Minister O'Regan's comments were directed at the issue of duplication of the management of off shore oil and gas exploration in the east coast of the Province of Newfoundland and Labrador, an issue that the regulatory scheme put in place by the government of Canada was meant to eliminate.

[4] A second important point to be made is that each of the three applicants were active participants, funded in part by Canadian taxpayers, in the Regional Assessment process. I can do no better than quote from the Applicants' Notice of Application, where they collectively say, in part:

> The Applicants were active participants in the Regional Assessment process leading to the Report. Each was named to the Technical Advisory Group ("TAG") assembled pursuant to the Agreement. The TAG was composed of government departments

> and agencies, indigenous groups, environmental and industry organizations with interests, information and expertise related to the Regional Assessment. Under the Agreement, the TAG was responsible for gathering information, conducting analysis, and providing advice to the Committee. **All were recipients of participant funding** within the Regional Assessment process and within other environmental review processes regarding offshore oil and gas development." [Emphasis added]

[5] Finally, I would note that in the course of its work, the Committee consulted broadly, including with indigenous communities. The list of those communities is found at page 46 of the Applicant's Application Record:

> The Innu Nation (Labrador Innu); Nunatsiavut Government (Labrador Inuit); NunatuKavut Community Council; Miawpukek First Nation; Qalipu First Nation; Kwilmu'kw Maw-klusuaqn Negotiation Office representing Acadia First Nation, Annapolis Valley First Nation, Bear River First Nation, Eskasoni First Nation, Glooscap First Nation, Membertou First Nation, Paqtnkek Mi'kmaw Nation, Pictou Landing First Nation, Potlotek First Nation, Wagmatcook First Nation, and We'koqma'q First Nation; Mi'gmawe'l Tplu'taqnn Inc representing Fort Folly First Nation, Eel Ground First Nation, Pabineau First Nation, Esgenoôpetitj First Nation, Buctouche First Nation, Indian Island First Nation, Eel River Bar First Nation, and Metepnagiag Mi'kmaq First Nation; Wolastoqey Nation of New Brunswick representing Kingsclear First Nation, Madawaska Maliseet First Nation, Oromocto First Nation, Saint Mary's First Nation, Tobique First Nation and Woodstock First Nation; Mi'kmaq Confederacy of PEI representing Abegweit First Nation and Lennox Island First Nation; Mi'gmawei Mawiomi Secretariat representing Micmacs of Gesgapegiag, La Nation Micmac de Gespeg, and Listuguj Mi'gmaq Government; Conseil des Innu de Ekuanitshit; Première Nation des Innus de Nutashkuan; Unama'ki Institute of Natural Resources; Mi'kmaq Conservation Group; and Atlantic Policy Congress.

[6] For the reasons set out below, I dismiss the Applications for judicial review.

II. Facts and Decisions under Review

A. *Legislative Context surrounding the IAA*

[7] The *IAA* came into force on August 28, 2019, its predecessor legislation being the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 [*CEAA, 2012*]. Impact assessments are conducted by the Impact Assessment Agency of Canada (the "Agency"), a federal body accountable to the Minister. The Agency, among other things, conducts or administers the impact assessment process for "designated projects" subject to the *IAA*. Designated projects are set out in the *Physical Activities Regulations*, SOR/2019-285 [*PAR*] or by ministerial order. Offshore exploratory drilling projects are one type of designated project subject to the requirements of the *IAA*.

[8] Regional assessments, while not defined in the *IAA*, permit the Government of Canada to study and examine issues beyond project-focused impact assessments for a specific designated project. They are intended to assist governmental decision-making by providing a more comprehensive analysis than a site-specific assessment. They are multi-faceted, covering vast areas and aimed broadly at understanding the effects of existing or future physical activities assessable under the *IAA*. Importantly, paragraph 112(1)(a.2) of the *IAA* empowers the Minister to make a regulation, after considering a regional assessment, that would exclude activities from the impact assessment process set out in the *IAA*. The exclusion occurs if the activity is proposed in an area for which a regional assessment has been carried out and the project meets the conditions set out in the relevant regulation.

[9] Sections 92-103 of the *IAA* set out various requirements related to the conduct of a regional assessment. Those requirements include, but are not limited to:

- The Agency has an obligation to offer to consult and cooperate with any jurisdiction that has powers, duties or functions in relation to the physical activities in respect of which the assessment is conducted (s. 94);
- The Minister must respond to any request that an assessment be conducted (s. 97(1));
- The Agency – or the committee if one has been established under ss 92 or 95 - must take into account any scientific information and Indigenous knowledge provided when conducting an assessment (s. 97(2));
- The Agency or the committee must ensure that information it uses when conducting an assessment is made available to the public, and must ensure that the public is afforded an opportunity to participate meaningfully in an assessment (ss. 98-99).

[10] Pursuant to subsections 93(2), 93(3) and section 96 of the *IAA*, the Minister has broad discretion to establish the terms of reference for a regional assessment, including the establishment of the assessment's purpose and objectives. On completion of the regional assessment, the relevant assessment committee must provide a report to the Minister pursuant to subsection 102(1) of the *IAA*. The Regional Assessment currently under attack is the first such assessment conducted under the *IAA*.

B. *Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador*

[11] The Regional Assessment applies to offshore exploratory drilling and associated activities in a defined "study area" off Eastern Newfoundland and Labrador. The Regional Assessment was undertaken as a collaborative effort among the Agency, the Canada-Newfoundland and Labrador Offshore Petroleum Board ("C-NLOPB"), Natural Resources Canada, and the Newfoundland and Labrador Department of Natural Resources pursuant to an agreement signed in March 2019 (the "Agreement"). The Agreement is attached hereto as Schedule A to these reasons. The Regional Assessment was commenced under the *CEAA, 2012* and completed under the *IAA*.

[12] The Agreement established a five-member Committee as well as a Task Team and a Technical Advisory Group ("TAG") who supported the Committee. The TAG included participants from relevant government departments and agencies, Indigenous groups, industry and stakeholder organizations and others. Appendix A of the Agreement sets out the factors to be considered by the Committee, and Appendix D sets out the Committee's Terms of Reference.

[13] Once the Agreement and Committee were in place, the Regional Assessment process began. The following is a brief timeline of the events and opportunities provided to the public to participate in the Regional Assessment:

A. May 2019 – the Committee conducted a series of initial planning and issues-scoping meetings with stakeholders and Indigenous groups, including the Applicants and the Intervener;

B. August 8, 2019 – the Committee wrote to the Minister advising that it may be necessary to have additional time to complete the Regional Assessment, beyond the Fall 2019 deadline;

C. September 24, 2019 – the Agency President responded to the Committee on behalf of the Minister, advising that the timeline was "aggressive and challenging" but there was a desire to complete the Regional Assessment in a timely manner. No extension was granted at that time;

D. September 2019 – the Committee held a number of TAG sessions on various themes. The Applicants' representatives attended these sessions and provided submissions. One of the TAG sessions focussed on the development of the Geographical Information System ("GIS") tool;

E. October 2019 – the Committee invited TAG participants, including the Applicants, to provide input into various literature reviews related to the potential environmental effects of offshore exploratory drilling;

F. November 13, 2019 – The Intervener participated in a TAG process entitled "Connaissances autochtones et double perspective";

G. December 4-6, 2019 – the Committee conducted workshops with stakeholders and Indigenous groups to discuss and seek input on its draft recommendations prior to the release of the draft Report and formal public review period. The public, including the Applicants, were first sent a draft of the Committee' recommendations on the eve of the workshops;

H. December 17, 2019 – the Applicants' wrote to the Minister communicating their concerns regarding the process, including the insufficient time afforded to the

Committee to complete the Regional Assessment. The Minister did not reply to the Applicants' concerns;

I. January 10, 2020 – the Minister approved an amendment to the Agreement, allowing for the delivery of the Committee's final report no later than the end of February 2020;

J. January 23, 2020 – the draft Report was released to the public, including the Applicants. They were provided with a 30-day period to review and comment on the report's draft recommendations;

K. February 23-29, 2020 – the Committee had five business days to review the submissions and finalize the Report;

L. March 4, 2020 – the Committee's Final Report was made public;

M. May 31, 2020 – the GIS tool was finalized. The GIS tool consisted of the description and evaluation of the technical and factual information upon which the Final Report and recommendation were said to be based. The Committee referred to the GIS tool as "an integral component of the Regional Assessment".

[14] The Applicants repeatedly expressed their concerns, principal among them being that the time allotted for the Regional Assessment was much too short to allow for a fulsome assessment.

[15] The Final Report, while much too lengthy to include in these reasons, contained a number of recommendations. Those recommendations are attached hereto as Schedule B.

C. *Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells) (the "Regulation")*

[16] On March 4, 2020, the same day the Final Report was made public, the Minister sought comments on a *Discussion Paper on a Ministerial Regulatory Proposal to Designate Offshore Exploratory Drilling East of Newfoundland and Labrador for Exclusion under the Impact Assessment Act* (the "Discussion Paper"). The Discussion Paper proposed creating a regulation exempting exploratory oil and gas drilling projects from assessment requirements under the *IAA*.

[17] On April 7, 2020, Ms. Gretchen Fitzgerald of the Sierra Club Canada Foundation wrote to the Minister's office requesting a meeting between the Minister and the Applicants to discuss concerns regarding the proposed regulation. Ms. Fitzgerald received no response to her request and no meeting took place.

[18] Due to interruptions caused by Covid-19, the Minister extended the deadline for providing comments regarding the Discussion Paper to April 30, 2020.

[19] Recall, the *Regulation* was declared in force on June 4, 2020. It provides, among others, that new offshore exploratory drilling projects that meet the conditions imposed by the *Regulation*, are excluded from the *PAR* and are not considered "designated projects" under the *IAA*.

[20] I would note that the *Regulation* is not listed in the Canada Gazette. Section 112(4) of the *IAA* provides that a regulation made under paragraph 112(1)(a.2), such as the *Regulation*, is exempt from the *Statutory Instruments Act*, R.S.C., 1985, c. S-22 ("SIA"). The *SIA* is the legislative instrument which provides, amongst other requirements, that regulations must be

published in the Canada Gazette (s. 11). For that reason, and for ease of reference, the *Regulation* is attached hereto as Schedule C.

III. Relevant Provisions

[21] The relevant provisions of the *IAA* are ss. 92, 93, 96, 97, 98, 99, 102(1), 112(1)(a.2) and 112(4). They are set out in Schedule D attached to these reasons.

IV. Issues

[22] The Court is called upon to consider the following issues in these consolidated applications for judicial review:

A. Is the Final Report, and hence the Regional Assessment, a justiciable decision?

B. If the Final Report is justiciable, was the Regional Assessment:

   i) Reasonable; and

   ii) Procedurally fair?

C. Does the Regulation meet the test of reasonableness as it has been defined in *Portnov v. The Attorney General of Canada* 2021 FCA 171 [*Portnov*]. That is to say, does it constitute, in the circumstances, reasonable subordinate legislation as contemplated by the *IAA*?

[23] Because I conclude the Final Report is not a justiciable decision, I need not address the second issue, other than as it relates to the reasonableness of the *Regulation*.

V. Is the Final Report a justiciable decision?

[24] The Applicants contend that the Final Report, including the Regional Assessment, is justiciable in its own right because of its legal and practical effects. They argue that the Final Report is distinguishable from the review panel reports under the *CEAA, 2012*, which, admittedly, were not justiciable. They say that the effects of the Final Report reach far beyond the regional assessment process and its influence will extend decades into the future.

[25] The Applicants submit that judicial review extends to "decisions or orders that determine a party's right, even if the decision at issue is not the ultimate decision" (*Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750, [2003] 1 FC 541 at para 18).

[26] Moreover, the Applicants submit that regardless of what this Court decides on the justiciability of the Final Report, it must determine whether the Committee discharged its mandate and delivered a Regional Assessment capable of allowing the Minister to satisfy the statutory preconditions for making the *Regulation*. The question therefore becomes whether the Final Report is materially deficient. If the Final Report is determined to be materially deficient, the decision, or *Regulation* in the within matter, may be set aside on that basis (*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 FCR 3 at para 201 [*Trans Mountain*].

[27] The Respondent contends that the Final Report is not justiciable since it is not a "decision" subject to judicial review pursuant to the *Federal Courts Act*. It merely provides information and advice to the Minister. The Respondent cites recent jurisprudence from the Federal Court of Appeal in support of its contention. In *Gitxaala Nation v. Canada*, 2016 FCA

187, [2016] 4 FCR 418 [*Gitxaala*], the Court considered a report of a joint review panel under the *CEAA, 2012* and the *National Energy Board Act*, R.S.C., 1985, c. N-7. The panel conducted an environmental assessment under the *CEAA, 2012.* It prepared a report providing recommendations to the Governor in Council. The Court concluded that the only meaningful decision-maker is the Governor in Council. The Report was not subject to judicial review. (*Gitxaala* at para 125). In *Trans Mountain, supra*, the Federal Court of Appeal was invited to overturn *Gitxaala* as "manifestly wrong" on this issue. It declined to do so. Following a thorough analysis, the Court held, as it did in *Gitxaala,* that the report was not justiciable.

[28] *Taseko Mines Ltd. v. Canada (Environment)*, 2019 FCA 319 [*Taseko Mines*], concerned an application for judicial review of the final report of a federal review panel under the *CEAA, 2012*. The three-member panel had been appointed under the former *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, and continued under the *CEAA, 2012*. *Taseko Mines* involved an appeal from a decision of the Federal Court in which the trial judge had dismissed Taseko Mines' application for judicial review. The trial judge concluded the panel had not breached any procedural fairness principles and it made reasonable findings of fact (*Taseko Mines* at para 33). On appeal, both the appellant and the governmental respondents distinguished *Gitxaala* and *Trans Mountain* on the basis that the legislative scheme in place in each of those cases provided an effective internal remedy (at para 42). The Federal Court of Appeal rejected that assertion. It held that that distinction did not change the fact that the final report, in itself, affects no legal rights and carries no legal consequences. It held that the final report only serves to assist the Minister (or the GIC) in making their decision (at para 43).

[29] In each of the decisions rendered by the Federal Court of Appeal in *Gitxaala*, *Trans Mountain and Taseko Mines*, a party sought judicial review of a report prepared by a committee or panel under the *CEEA, 2012* or jointly under another statute. Those committees or panels produced a number of recommendations to assist the Governor in Council when making decisions. In all three appeals, the Federal Court of Appeal arrived at the same conclusion, that the reports affect no legal rights and carry no legal consequences. If follows they were not amenable to judicial review. At paragraph 43 of *Taseko Mines*, the Court states:

> [43] Having duly considered that argument, I feel bound to reject it essentially for the reasons articulated in *Trans Mountain*. **The distinction between the two schemes highlighted by the parties does not change the fact that the Final Report, in itself, affects no legal rights and carries no legal consequences** (*Trans Mountain*, at paras. 179-180*; Gitxaala*, at paras. 121-123, 125). **Whether or not the Panel can be requested to review its conclusions and recommendations, the Final Report only serves to assist the Minister (or the GIC) in making their decisions**. In light of the above-noted precedents and of this Court's holding in *Jada Fishing Co. Ltd. v. Canada*, 2002 FCA 103, 41 Admin L.R. (3d) 281, at paragraph 12, **I find that the Final Report is not amenable to judicial review.**
>
> [Emphasis Added]

[30] Section 92 of the *IAA*, states that the Minister may establish a committee to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is entirely on federal lands. Subsection 102(1) of the *IAA* provides that, on completion of a regional assessment, a report be prepared by the Committee and delivered to the Minister. The Final Report is not a 'decision'. It is an advisory report to the Minister that informs potential future decisions. It is not justiciable.

[31] The Respondent agrees that the Final Report's contents are relevant in considering the validity of the *Regulation*. I agree with the parties on this issue. See, *Trans Mountain* at para 201:

> [201] […] As this Court noted in *Gitxaala* at paragraph 125, the Governor in Council is required to consider any deficiency in the report submitted to it. The decision of the Governor in Council is then subject to review by this Court under section 55 of the *National Energy Board Act*. The Court must be satisfied that the decision of the Governor in Council is lawful, reasonable and constitutionally valid. **If the decision of the Governor in Council is based upon a materially flawed report the decision may be set aside on that basis.** Put another way, under the legislation the Governor in Council can act only if it has a "report" before it; a materially deficient report, such as one that falls short of legislative standards, is not such a report. In this context the Board's report may be reviewed to ensure that it was a "report" that the Governor in Council could rely upon. The report is not immune from review by this Court and the Supreme Court.
>
> [Emphasis Added]

[32] Given my conclusion that the report is not justiciable, I need not consider its reasonableness independently of the question on the validity of the *Regulation*. I now turn to the challenge to the *Regulation*.

VI. What is the standard of review for determining the validity of the *Regulation*

[33] The Applicants contend that the validity of the *Regulation* must be reviewed on the standard of reasonableness. Gone, they say, is the *vires* test and anything akin to the correctness standard of review. They contend that this Court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision"

(*Canada (Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 [*Vavilov*] at para 99).

[34] The Applicants also rely upon the recently released decision in *Portnov*. In *Portnov* the Court was called upon to consider the validity or *vires* of a regulation made pursuant to the *Freezing Assets of Corrupt Foreign Officials Act,* S.C. 2011, c.10 (*Freezing of Assets Act*). Under s. 4 of the *Freezing of Assets Act* the Governor in Council may, upon a request from a foreign state, issue an order or regulation restricting or prohibiting any dealings with certain property held by designated individuals. In 2014, following a request by Ukraine, the Governor in Council enacted a regulation titled *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, S.O.R./2014-44 (the *2014 Regulations*).

[35] The *2014 Regulations* designated eighteen individuals. It restricted and prohibited their dealings with certain property for up to five years. Mr. Portnov was one of the eighteen. Under s. 6 of the *Freezing of Assets Act*, the Governor in Council may make a regulation extending the previous regulation. The Governor in Council did just that in 2019 in relation to 16 of the 18 individuals previously identified. Mr. Portnov was one of those 16. Mr. Portnov applied to the Federal Court for an order quashing the Extending Order and the *Regulations Amending the Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2019-68. In a decision reported at 2019 FC 1648, a judge of the Federal Court dismissed Mr. Portnov's application. On appeal, Mr. Portnov contested the Federal Court's choice of reasonableness as set out in *Vavilov* as the standard of review applicable to a judicial review of a Governor in Council regulation. He contended that a special rule existed for attacking a regulation. That rule is, according to him,

found in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, 2013 3 S.C.R. 810 (*Katz* Rule). I can do no better than describe the *Katz* Rule in the language employed by Justice Stratas in *Portnov*:

> [19] There are three parts to the *Katz* rule: (1) when a party challenges the validity of regulations, the party bears the burden of proof; (2) to the extent possible, regulations must be interpreted so that they accord with the statutory provision that authorizes them; and (3) the party must overcome a presumption that the regulations are valid. On the third part, *Katz* suggests (at paras. 24 and 28) that the presumption is overcome only where the regulations are "irrelevant", "extraneous" or "completely unrelated" to the objectives of the governing statute. A leading commentator on Canadian administrative law calls this "hyperdeferential": Paul Daly, "Regulations and Reasonableness Review" in *Administrative Law Matters*, (29 January 2021), <www.administrativelawmatters.com/blog/2021/01/29/regulations-and-reasonableness-review/>. I agree.

[36] In the course of abandoning the *Katz* Rule, the Federal Court of Appeal made four principal observations: 1. that *Vavilov* now instructs that true questions of jurisdiction will necessarily have less precedential force (*Portnov* at para 26); 2. that *Vavilov* acknowledges there are cases where the legislature has delegated broad authority to administrative decision-makers that allow them to make regulations in pursuit of the objects of the enabling statute but does not "carve out a special rule for regulations" (*Portnov* at para 26); 3. that *Vavilov* instructs us to conduct reasonableness review of all administrative decision-making unless one of three exceptions leading to correctness review applies (*Portnov* at para 27); and, 4. "the Katz rule applies across the board to all regulations regardless of their content or context. This sits uneasily with Vavilov which adopts a contextual approach to reasonableness review" (*Portnov* at para 27).

[37] I am of the view there is a huge distinction between orders or regulations enacted by, for example, one of hundreds of administrative tribunals such as the various agricultural marketing boards in the provinces and subordinate legislation enacted by the Governor in Council. I also ask rhetorically, why, if the Supreme Court of Canada wished to abandon the *Katz* Rule, it did not clearly do so, as it has done in other situations? For example, in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board),* [1987] 2 SCR 59, 44 DLR (4th) 663 [*Rio Hotel*], the Supreme Court specifically concluded that, to the extent decisions of the Ontario Court of Appeal in *Re Koumoudouros et al. and Municipality of Metropolitan Toronto*, 52 OR (2d) 442, 24 DLR (4th) 638; *Re Nordee Investments Ltd. and City of Burlington,* 48 OR (2d) 123, 13 DLR (4th) 37; and *Re Sherwood Park Restaurant Inc. et al. and Town of Markham,* 48 OR (2d) 449, 14 DLR (4th) 287, were incompatible with their reasons in *Rio Hotel*, those cases were wrongly decided (at para 38). The Supreme Court took a similar approach in *Vavilov* at paragraph 37 when it concluded that the standard of review for appeals from statutory decision makers would be the appellate standard and not reasonableness. Finally, when the Federal Court of Appeal notes that *Vavilov* did not carve out any special rule for regulations, it could be that the Supreme Court justices were acknowledging there already existed a special rule, that being the *Katz* Rule. Regardless, I am duty bound to follow the opinion of the Federal Court of Appeal. *Stare decisis* demands nothing less.

[38] The Regulation will be reviewed based upon the standard of reasonableness as set out in the *Vavilov/Portnov* framework.

VII. Have the Applicants met the onus upon them of establishing that the *Regulation* is unreasonable?

A. *Was the Regulation based upon a valid Final Report?*

[39] The Applicants contend the Committee, in preparing the Final Report, was constrained by the requirements of the *IAA* and its Terms of Reference. Moreover, the Applicants contend that a factor is only "properly considered", if the review panel or committee has applied a "high standard of care". While the Court is not expected to "reweigh the methodology and conclusions of an expert panel", the Applicants contend that the Court plays a critical role in ensuring that each factor the panel is required to consider is indeed considered (*Ontario Power Generation Inc. v. Greenpeace Canada*, 2015 FCA 186, 388 DLR (4th) 685 [Ontario Power Generation] at paras. 129-130).

[40] The Applicants raise numerous issues challenging the reasonableness of the Final Report and hence the reasonableness of the *Regulation*. In essence, they claim the Final Report is not a report as required by the *IAA*. There is therefore nothing upon which to base the *Regulation*. Included among their many complaints about the Final Report are the following:

i. the Final Report does not identify and consider changes to the environment, effects of malfunctions or accidents and cumulative effects, contrary to the Committee's Terms of Reference;
ii. the Committee chose to report on "enhanced mitigation and follow-up measures";
iii. the cumulative effects set out in the Final Report are superficial, as it reviewed only the potential sources of effects rather than the effects themselves;

iv. the Committee did not consider the evidence of "risk", since the only means by which they could arrive at their conclusions was by ignoring the Applicants' contentions;

v. the Committee suppressed submissions and recommendations from the Canadian Science Advisory Secretariat ("CSAS") report that did not align with the Minister's predetermined objective. The Applicants say that the Supreme Court in *Vavilov* was clear that failure to account for evidence, much less, the suppression of evidence, is fatal (*Vavilov* at para. 126);

vi. the Committee ignored the relevant policy guidance on cumulative effects; specifically a policy guidance document entitled *Assessing Cumulative Environmental Effects under the [CEEA, 2012]*;

vii. the Committee improperly applied its mandate on cumulative effects by adopting a planning or remediation approach rather than identifying the cumulative effects from offshore exploratory drilling in combination with other physical activities that have been or will be carried out;

viii. the Committee reverse-engineered a desired outcome by adopting an unreasonable interpretation of its mandate by excluding assessment of risk and cumulative effects;

ix. the Committee failed to follow the process sequence set out in the Agreement and "secretly changed its recommendations at the behest of officials who feared the recommendations would interfere with the pre-determined Regulation";

x. s. 4.22 of the Agreement sets out the four phases of the process as: Engagement, Analysis, Report writing and Providing for comments. Moreover, the Terms of Reference require the Final Report to be the last step. The Applicants' contend that

Committee began the process by drafting recommendations in violation of the process set out in the Agreement and the Terms of Reference;

xi. the Committee changed at least one of its recommendations at the direction of Natural Resources Canada to support prior "political commitments to the provinces". Recommendation 20 of the *Potential Recommendations of the Regional Assessment Committee* suggested that certain portions of the Study Area be excluded from future exploratory drilling activities. Faced with NRC's serious concerns, the Committee changed this recommendation. The Committee's Draft and Final Report do not recommend that certain portions of the Study Area be excluded from future exploratory drilling activities.

xii. In summary, all of the above demonstrate a failure on the part of the Committee to give impartial consideration to any views that contradicted a pre-determined result. The Committee did not exercise its discretion independently.

[41] The Respondent contends that the Applicants are simply inviting this Court to re-weigh the Final Report and the information and expertise that went into the Regional Assessment. The Respondent contends the Applicants invite this Court to become the arbiter of science and policy. The Respondent says that this Court is not a referee on such policy matters. The Federal Court of Appeal has expressed the view that the court "must ensure that steps in the Act are followed, but it must defer to the responsible authorities in their substantive determinations" (*Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage*), [2001] 2 FC 461, 27 Admin LR (3d) 229 at para 78). The Respondent submits that the function of the reviewing court is to ensure that the *Regulation* accords with the governing legislation and that it is a

reasonable decision in light of the evidence and information available. As for the adequacy of the decision-maker's consideration of scientific evidence, the Federal Court of Appeal has stated the Court's role is to assess, in a formal rather than substantive sense, whether there has been some consideration of the factors which the statute requires the study to address (*Ontario Power Generation*, at para. 126).

[42] The Respondent submits that the Regional Assessment was conducted pursuant to the *IAA*, the Agreement and the Terms of Reference. The Agreement defines the Regional Assessment as a "study or assessment of the effects of existing or future physical activities carried out in a region" and lays out various requirements related to its conduct, including its objectives, geographic boundaries and factors for the Committee to consider. The Respondent submits that the Committee fully addressed those requirements in the conduct of the Regional Assessment, as evidenced in the Final Report.

[43] Moreover, given the complexities inherent in the study, as described in the Final Report, the "decision" must be afforded significant deference.

[44] The Respondent contests the assertion that the Committee's findings and recommendations were pre-determined or "reverse-engineered" or that the Committee was pressured into changing its draft recommendations by external parties. The Respondent notes that the Committee's draft recommendations were first presented in early December 2019, when the Committee held a series of public workshops. The Respondent notes that this occurred nearly nine months after the Committee was first appointed. The Respondent submits that it is

inconceivable that the Committee developed its recommendations as an initial step of the Regional Assessment.

[45] Moreover, given that the draft recommendations were publicly available in early December 2019, the Respondent submits that it was appropriate for Agency staff to consider those draft recommendations in developing draft regulations. The Respondent says that the Agreement is perfectly clear that the enactment of regulations governing exploratory drilling, and the mitigation of its impact on the environment, was always a possibility.

[46] The Respondent submits that the Committee fully complied with its mandate and made 41 recommendations respecting future projects, mitigation and follow-up measures. The Respondent submits that the Applicants' concerns regarding the precautionary principle, cumulative effects, risks and scientific expertise are appropriately and reasonably canvassed in the Final Report. The Committee considered the precautionary principle. It dedicated an entire section on the topic. As for cumulative effects, the Respondent acknowledges the concerns raised by the Applicants but notes that the Committee gave them considerable attention in its analysis. The Respondent says the Applicants misplace their argument regarding policy guides related to cumulative effects since those policies relate principally to project-specific environmental assessments, as opposed to regional assessments. Those policy guides are therefore largely irrelevant to the analysis being undertaken by the Court.

[47] Furthermore, a reviewing court is entitled to presume that an administrative decision-maker considered the entire record before it. The burden rests on the challenging party to rebut

that presumption (*Sagkeeng First Nation v. Attorney General of Canada and Minister of Environment and Climate Change*, 2021 FC 344 at para. 65).

[48] Section 5.4 of the Agreement states that the Final Report will contain information as outlined in the Factors to be considered in the Regional Assessment (Appendix A of the Agreement) and the Committee's Terms of Reference (Appendix D of the Agreement). Concerning the adequacy of the decision-maker's consideration of scientific evidence, the Federal Court of Appeal, in *Ontario Power Generation*, *supra*, at para. 126, stated that its role is to assess, in a formal rather than substantive sense, whether there has been some consideration of the factors which the statute requires the study to address. The Factors to be considered in the Regional Assessment state that the Committee "will include a consideration" of the listed factors. Given the wording, I am of the opinion that the Applicants can only establish a failure to consider factors if the Committee failed to give them any consideration (*Ontario Power Generation*, at para. 130).

[49] Appendix 1.A of the Final Report is a Table of Concordance: Factors to be Considered and Other Requirements of the Agreement. The table outlines each factor and corresponding section in the Regional Assessment. Having reviewed the Final Report, I am of the opinion that the Committee gave some consideration to each of the factors listed in the Agreement.

[50] I agree with the Applicants that the Committee failed to strictly follow the process sequencing set out in the Agreement. The GIS Tool, which the Committee heavily relied upon, was submitted a few months after the Final Report. It is unclear to me why the GIS Tool was

only finalized on May 31, 2020, when the Final Report was finalized on March 4, 2020. However, that being said, there is nothing to indicate the delay in finalizing the GIS Report negatively impacted the Final Report. It appears the Committee incorporated the data used to prepare the GIS Report contemporaneously into the Final Report.

[51] Generally, with respect to sequencing, when I consider the number of departments, agencies, indigenous communities, environmental groups, industry spokespersons and others who played a role in this process, or were consulted by the Committee, it is evident the process could not unfold in a linear fashion and still respect deadlines.

[52] The Applicants also challenge the Final Report on the basis that they were denied participatory rights and that information was not made publicly available in a timely fashion as required by the Agreement. These allegations challenge the procedural fairness of the Committee's work.

[53] The Applicants say that the duty of fairness is presumed to apply in any administrative context that is not of a legislative nature and which affects the rights, privileges or interests of an individual (*Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 SCR 504 at para 38). The degree of fairness is determined on the factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 DLR (4th) 193. Even on the low end of the spectrum, the ultimate question is whether the party "knew the case they had to meet, had an opportunity to respond and had an impartial decision maker consider their case fully and fairly"

(*Canada Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 at para. 41).

[54] The Applicants further submit that the right of disclosure by the administrative decision maker is a requirement of procedural fairness (*Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, 112 DLR (4th) 129 at pages 181-182). They submit that the right to be informed of undisclosed adverse material facts being considered by a decision-maker and to make submissions about them is the minimum level of fairness owed to anyone whose rights, privileges or interests are being impacted (*Gladman v. Canada (Attorney General)*, 2017 FCA 109 at para. 40). This common law principle of *audi alteram partem* is codified in s. 98 of the *IAA*, and is reflected in the Committee's Terms of Reference.

[55] The Applicants contend that the Committee breached its disclosure obligations by supressing certain key documents. For example, the CSAS report was never disclosed. They say that failure undermined their ability to meaningfully participate in the Regional Assessment.

[56] The Applicants contend that the failure to post the direction from David McGovern, President of the Impact Assessment Agency, dated September 24, 2019 revising the Agreement to develop the GIS Tool and the amendment to the Agreement, dated January 10, 2020, are contrary to s. 114 of the *IAA*, which requires that all agreements be made available to the public. Furthermore, s. 97(2) of the *IAA* requires that the Committee take into account all scientific information provided in respect of the assessment. The Applicants submit that the Committee failed to do so, breaching their right to procedural fairness.

[57] The Respondent contends that s. 99 of the *IAA* specifies that the Committee must provide an opportunity for the public to participate meaningfully, in a manner that the Committee considers appropriate. The Respondent further submits that the Applicants are not "parties to a decision" and they are not parties to the Agreement between the governments that established the Committee's mandate. The Respondent submits that there is no credible basis for the Applicants' argument that they were denied meaningful participation as they had numerous meetings with the Committee. The Committee took their submissions into consideration and paid them to make those submissions. The Applicants acknowledged in their Notice of Application that they "participated significantly" in the Regional Assessment.

[58] With respect to the allegation that the Committee suppressed evidence, the Respondent says that the Record demonstrates that the Committee was independent and objective and did not alter its view to satisfy anyone. Concerning the consult with NRC, the Respondent notes that the department was a party to the Agreement and a member of the task team. There was nothing untoward about the parties to the Agreement expressing their views and interfacing directly with the Committee. Concerning the CSAS report, the Respondent submits that there was no obligation to make the report public because the Committee did not consider it. The Respondent submits that the version received by the Committee was an incomplete draft and the CSAS report was not finalized until after the Committee completed the Final Report. The Department of Fisheries and Oceans advice considered by the Committee was made public on the Registry. As for the Committee's posting omission, the Respondent contends this constituted an administrative error. However, given the thousands of postings, the error was clearly innocent and had no impact upon the Final Report. The Respondent contends that the standard for a

committee conducting a regional assessment cannot be perfection (*Vavilov* at para. 91). The Respondent says that the Final Report, the GIS Tool and the public registries housing comments on the Regional Assessment and Final Report collectively demonstrate the comprehensive, transparent and immense nature of the Committee's work.

[59] I agree with all of the Respondent's submissions. The Applicants had ample opportunity to participate. There was nothing untoward in the Committee consulting NRC, a party to the Agreement. To the extent material was not posted on the public registry, it was an oversight and nothing turned on that oversight. The jurisprudence of the Supreme Court is clear that a prejudicial effect on a party is essential to establish a breach of procedural fairness (*Taseko Mines* at para 62; *Toshiba Corp v. Anti-Dumping Tribunal* (1984), 8 Admin. C.R. 173 (FCA); *Schaaf v. Minister of Employment and Immigration*, [1984] 2 FC 334, 52 NR 54, at page 442; *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH & Co.*, 2006 FCA 398, [2007] 4 FCR 101 at paras 21-22). I am unable to conclude that the failure to make public the CSAS report resulted in a prejudice – or even entailed a possibility of prejudice – for the Applicants. The report was at the draft stage and, in any event, was not considered by the Committee in making the Final report. In any event, a determination of whether procedural fairness was met in any given case is context specific (*Taseko Mines* at para 30). Considering the minimal degree of procedural fairness that was owed to the Applicants and the large scope of the project, I am not able to conclude that the failure to post the CSAS report – or other material – on the public registry justifies the intervention of this Court. Although nothing turns on this, I would also state that I do not consider the Applicants to have been parties to anything.

[60] Overall, I am of the view the Applicants are asking this Court to conduct a line by line analysis of the Final Report in a hunt for a treasure trove of error, something against which the Supreme Court has cautioned: see *Vavilov* at para 102; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34, [2013] 2 SCR 458 at para 54; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708 at para 14.

[61] I conclude Governor in Council enacted a Regulation that was based upon a reasonable Final Report. There is nothing about that report, or the manner in which it was prepared, that would tend to militate against the reasonableness of the *Regulation*.

B. *Is the Regulation reasonable in that it meets the test set out in Vavilov and Portnov?*

[62] The Applicants submit that the *Regulation* is to be reviewed on the standard of reasonableness. To be reasonable, the Minister's decision to make the *Regulation* must be based on an internally coherent and rational chain of analysis, as revealed by the record as a whole, and be justified in relation to the facts and law that constrain the Minister (*Vavilov* at para 85). The Applicants submit that the Minister erred in law and acted without jurisdiction by failing to meet the mandatory condition precedent in section 112(2) of the *IAA*. They say the Minister must consider a complete assessment under s. 92 that fully complies with the *IAA* and the assessment's mandate. The Applicants contend that the Final Report and associated GIS tool do not constitute an assessment under s. 92 of the *IAA*. I have already indicated I do not accept that contention. The Minister was in possession of a report upon which she could act.

[63] The Applicants also contend the Committee failed to consider mandatory factors and failed to give the public an opportunity to participate meaningfully. Again, I disagree with that contention. The recommendations in the Final Report demonstrate that all of the factors in the Terms of Reference were addressed. That said, the authors of the Final Report did acknowledge they did not have access to certain scientific data and that timelines were very short. The short timelines obviously had a negative impact upon the quality of their work. However, the Applicants have not demonstrated that the Final Report was so materially deficient and incomplete that it could not be considered a report capable of being relied upon. The Final Report concerns a massive geographic area, covers large tracts of material, addresses all of the factors it was supposed to and, in addition, provides a very useful GIS tool, which was not part of its original mandate. The original mandate only required the Committee to, "provide its advice on the feasibility of developing and how best to develop and structure such a system".

[64] The Applicants further argue that the *Regulation* is inconsistent with the purpose of the *IAA*. The Applicants argue that the *Regulation* is an attempt by the Minister to circumvent the *IAA*'s public participation-driven impact assessment scheme for offshore exploratory drilling projects, by supplanting it with a closed-door process. They argue that the *Regulation* is in stark contrast to the *IAA*'s objectives. They contend that "improve[ing] the efficiency of the assessment processes" for offshore exploratory drilling projects is not an objective of the *IAA*. I disagree. Improving efficiencies must be an objective of all government actions. If conducting a regional assessment obviates the need for many site specific assessments, or reduces their cost, with the same benefits, then, of course, such a process constitutes parts of the objective of the statute.

[65] Moreover, the Applicants argue that the *Regulation* does not require that the general public receive any notice of projects that seek approval nor do they ensure any meaningful participation in the process leading to a decision. The Applicants argue that the *Regulation* is unreasonable since it purports to establish a process which is contrary to the *IAA*'s central purpose.

[66] The Intervener agrees with the Applicants that the results of the Final Report were predetermined, based on a "secret memorandum" dated December 10, 2018. It says that the Minister suggested that the regional assessment could be used to exempt projects within the study area form a project-specific impact assessment. The Intervener submits that this pre-determined outcome prevented the Committee from appropriately considering Indigenous knowledge on the impacts of exploratory offshore drilling. They contend this secret memorandum amounted to a breach of procedural fairness.

[67] The Intervener also contends the Respondent failed to consider Indigenous knowledge of cumulative effects and precautionary principles of salmon migration. It contends the text of the *Regulation* militates against collaboration and reconciliation and minimizes the role of Indigenous groups during consultations.

[68] The Respondent acknowledges that *Vavilov* dictates that the standard of review is reasonableness; however, *Katz* illustrates what constitutes reasonableness review in a challenge to the validity of regulations. In *Katz*, as noted earlier, the Supreme Court held that a successful challenge to regulations requires the applicant to show that the regulation is inconsistent with the

statutory grant of power or the purpose of the parent statute, including where the decision-maker failed to comply with any statutory condition precedent.

[69] Regulations are presumed to be valid (*Katz*, at para. 25). This presumption has two effects: first, it places the burden on the challenger to demonstrate the invalidity of the regulations and second, it favours an interpretative approach that reconciles the regulation with its enabling statute. Both the challenged regulation and the enabling statute should be interpreted using a broad and purposive approach, consistent with the approach to statutory interpretation generally (*Katz* at paras. 25-26)).

[70] It is not the role of the Court to assess the policy merits of the regulations, or to determine whether regulations are "necessary, wise or effective in practice" (*Jafari v. Canada (Minister of Employment & Immigration)*, [1995] 2 FC 595, 125 DLR (4th) 141 at p. 604; and *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, 211 D.L.R. (4th) 741, 158 OAC 255).

[71] To meet the test of reasonableness, a regulation must be consistent with the statutory purpose. A regulation will be inconsistent if it is "irrelevant, extraneous or completely unrelated to the statutory purpose" (*Wildland League v. Ontario (Lieutenant Governor in Council*, 2016 ONCA 741, 402 DLR (4th) 738 [*Wildland League*] at para. 46; *Katz Group* at para. 28; and *West Fraser Mills Ltd. v. British Columbia (Worker's Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 SCR 635 at paras. 10-12). I conclude the *Regulation* respects the statutory purpose.

[72] In assessing reasonableness of a regulation, one must also consider the regulation-making authority in the statute. This authority must then be considered in the context of the *IAA* as a whole (*Wildlands League* at para. 88). In the within matter, the *Regulation* was made pursuant to subsection 112(1)(a.2) of the *IAA*, which empowers the Minister to designate physical activities in an area for which a regional assessment has been carried out and establish the conditions that must be met for the purpose of the designation. If the prescribed conditions are met, such physical activities are excluded from the *PAR* and are no longer "designated projects" subject to the impact assessment scheme.

[73] Section 6 of the *IAA* outlines the purpose of the act, which lists a number of legislative goals. It is clear that the dominant purpose of the *IAA* is to protect against adverse effects within federal jurisdiction and adverse direct or incidental effects that may be caused by designated projects. Environmental protection is not the only goal of the *IAA.* It also is intended to create opportunities for sustainable economic development. The *Regulation* clearly meets the statutory purpose in this case.

[74] The *IAA* expressly empowers the Minister, at section 112.1, to make a regulation establishing conditions that must be met for a "designated project" proposed in an area for which a regional assessment has been carried out, to be excluded from the *PAR.* The *Regulation* was made pursuant to this grant of authority and meets the very objective envisioned by subsection 112(1)(a.2). Moreover, the *Regulation* is consistent with the overall purpose and scheme of the *IAA.*

[75] The *Regulation* does not allow designated projects to proceed without any type of oversight. The *Regulation* imposes upon proponents a set of conditions. It also establishes a process wherein a proponent seeking an exemption must provide information to the Agency demonstrating how it meets the conditions. All of the information provided is made public.

[76] A reasonableness challenge may also succeed if the decision-maker failed to comply with a statutory condition precedent. The relevant condition precedent is found in subsection 112(2) of the *IAA*, which provides that the Minister may make a regulation designating physical activities under paragraph 112(1)(a.2) only after considering a regional assessment. The condition precedent set out in subsection 112(2) of the *IAA* is worded in broad terms. The Minister need only consider a regional assessment prior to making a regulation for the regulation to be valid. The *IAA* does not provide criteria that must be met in the context of the condition precedent, nor does it set out requirements as to what the report following a regional assessment must contain. The relevant provision merely states that the Committee or Agency "must provide a report to the Minister". In my view, the Committee fully addressed all aspects of its Terms of Reference and the factors to be considered by the Committee in the Regional Assessment. The Ministerial Response to the Final Report shows that the Minister considered, responded to, and generally accepted all of the recommendations in the Final Report.

[77] Where a condition precedent requires a decision-maker consider certain factors before making a decision, and the evidence shows that the decision-maker considered those factors in good faith, the condition precedent will generally be satisfied (*Canadian Council for Refugees v.*

Canada, 2008 FCA 229, [2009] 3 FCR 136 at para 78). The condition precedent was met in this case.

[78] Where a statute requires a decision-maker to consider a report prepared by another body as a condition precedent to its decision, deficiencies in the report may render the decision unreasonable. The deficiencies must be material, such that the report falls short of legislative standards (*Trans Mountain* at para. 201). The relevant report was considered in this case. I have already concluded the Final Report does not contain material deficiencies.

[79] Section 98 of the *IAA* states that the Agency or Committee must ensure that the information it uses when conducting the assessment is made available to the public. The Respondent correctly asserts that the CSAS report was not used or considered by the Committee as it was incomplete. Consequently, I am of the opinion that there was no obligation to disclose the document. As for any posting omission by the Committee, given the thousands of comments received, I am of the opinion that the standard is not perfection. Although it is a legislative obligation, I believe that omissions can sometimes occur due to administrative errors. Unless such errors are material, they should not result in a declaration that a regulation is unreasonable.

[80] Section 99 of the *IAA* specifies that the Committee must provide an opportunity for the public to participate meaningfully, in a manner that the Committee considers appropriate. I am of the opinion that the Regional Assessment process included meaningful opportunities for the Applicants and Intervener to participate and engage with the Committee. They were also given the opportunity to provide feedback and participate in person.

[81] As the Terms of Reference indicate, there is an important distinction between the Committee's obligation with respect to consultations with Indigenous peoples for its purposes and the constitutional duty of the Crown to consult. The former is at issue in this application.

[82] Subsection 97(2) of the *IAA* states that the Committee, when conducting an assessment, must take into account any scientific information and Indigenous knowledge, including the knowledge of Indigenous women, provided with respect to the assessment. The Intervener submits that their Indigenous knowledge was not taken into consideration, specifically regarding salmon migration. However, a review of the Final Report shows that salmon migration was considered. There is no evidence before this Court that the Committee failed to take into account scientific information or Indigenous knowledge.

[83] Subsection 114(4) of the *IAA* provides that "Any guidelines, codes of practice, agreements, arrangements or criteria must be made available to the public". The Respondent made no written submissions regarding the September 24, 2019 letter from Mr. McGovern, nor the January 10, 2020 amendment to the Agreement, which the applicants claim were never publicly posted. The Applicants claims these omissions were contrary to subsection 114(4) of the *IAA*.

[84] The January 10, 2020 amendment to the agreement was minor; the time limit to submit the Final Report was extended from the end of December 2019 to the end of February 2020.

[85] The September 24, 2019 letter from David McGovern can be qualified as a letter in support of the Committee's work. It does not provide any substantive information or directions, nor does it provide any scientific data that could have influenced the outcome of the regional assessment or the Final Report. What can be taken from this letter is that Mr. McGovern supports the activities that have been undertaken be the Committee (including the development of the GIS tool). Also, he encourages the Committee to bear in mind the realities of the timelines established.

[86] I fail see how the McGovern letter can be categorized as a "direction", as asserted by the Applicants.

[87] The record shows that the amendment to the agreement and the letter were made public; but, after the conclusion of the Regional Assessment. The *IAA* does not specify when the documents referred to in s. 114(4) must be made public. Regardless, presuming such material must be made public before the publication of the Final Report, as mentioned previously, the degree of procedural fairness owed to the Applicants was minimal. I fail to see how the failure to make public a minor amendment and a support letter prejudiced the Applicants.

[88] Two of the Applicants contend they were prevented from making separate submissions regarding the GIS Tool. However, they fail to show how this adversely affected their interests. With so many moving parts involved in this large-scale project, it would be wrong for this Court to impose a procedural standard of perfection on the Committee.

[89] Considering the above, I reject the assertion the Committee acted contrary to s. 114(4) of the *IAA* or committed a breach of procedural fairness.

VIII. Conclusion

[90] The Applicants have not met their burden. The *Regulation* does exactly what is anticipated by subsection 112(1)(a.2) of the *IAA* and is entirely consistent with the overall purpose and scheme of the *IAA*. When I consider the Terms of Reference, the factors to be considered, the Final Report, the GIS Tool, the Ministerial pronouncements, the participation by the various interest groups, the objectives of the *IAA*, the deference owed to decision-makers, the onus upon the Applicants to establish that the *Regulation* is unreasonable, the Minister's regulation making power and the language of the *Regulation*, I conclude the *Regulation* meets the test of reasonableness. It meets the hallmarks of transparency, justification and intelligibility as set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [2008] 1 SCR 190 at para 47 and is justified in light of the relevant factual and legal constraints, as required by *Vavilov* (at para 85).

[91] The application for judicial review is dismissed. The parties agreed that costs in the amount of $6 000, all-inclusive, would be payable to the successful party.

JUDGMENT in T-541-20 and T-679-20

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with costs of $6 000 payable jointly and severally by the Applicants to the Respondent.

"B. Richard Bell"

Justice

Schedule A

Agreement to Conduct a Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador

Between

Her Majesty the Queen in Right of Canada as represented by the federal Minister of the Environment and the federal Minister of Natural Resources

and

Her Majesty the Queen in Right of Newfoundland and Labrador, as represented by the provincial Minister of Natural Resources and the provincial Minister for Intergovernmental and Indigenous Affairs

PREAMBLE

WHEREAS the federal Minister of t he Environment has statutory responsibilities pursuant to the

Canadian Environmental Assessment Act, 2012;

WHEREAS the federal Minister of Natural Resources and the provincial Minister of Natural Resources have statutory responsibilities pursuant to the Canada- Newfoundland and Labrador Atlantic Accord Implementation Act, and the Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act (Accord Acts);

WHEREAS the Canada-Newfoundland and Labrador Offshore Petroleum Board is established by the

Accord Acts and their respective regulations, including in relation to health, safety and environmental matters respecting petroleum-related work or activities which may include the exploration, development, production, and transportation of petroleum in the Canada-Newfoundland and Labrador Offshore Area;

WHEREAS the federal Minister of the Environment may establish a Committee to conduct a study of

the effects of existing or future physical activities carried out in a region t hat is within the

exclusive economic zone of Canada or the continental shelf of Canada;

WHEREAS the area where the study would be conducted is the site of current and proposed multiple

oil and gas exploration and production activities;

WHEREAS the Government of Newfoundland and Labrador recently announced initiatives to

encourage a significant level of increased exploratory activity in the Canada-Newfoundland and

Labrador Offshore Area by the year 2030; and

WHEREAS the Governments of Canada and Newfoundland and Labrador are interested in improving

the efficiency of the environmental assessment process as it applies to oil and gas exploration

drilling while at the same time ensuring the highest standards of environmental protection

continue to be applied and maintained.

THEREFORE, the federal Minister of the Environment, the federal Minister of Natural Resources, the

provincial Minister of Natural Resources and the provincial Minister for Intergovernmental and

Indigenous Affairs together hereby establish a Committee to conduct a Regional Study, to be

referred to hereafter as a Regional Assessment in accordance with the provisions of this

Agreement and the Terms of Reference, attached as Appendices A and D to this Agreement.

Definitions

For the purpose of this Agreement and of the Appendices attached to it,

"Agency" means the Canadian Environmental Assessment Agency established by the Canadian

Environmental Assessment Act and continued under the Canadian Environmental Assessment

Act, 2012.

"CEAA 2012" means the Canadian Environmental Assessment Act, 2012.

"C-NLOPB" means the Canada-Newfoundland and Labrador Offshore Petroleum Board.

"Designated project" has the same meaning as in CEAA 2012.

"Federal authority'' has the same meaning as in CEAA 2012.

"Committee" means the Committee established to conduct the Regional Assessment.

"Ministers" means, collectively, the federal Minister of the Environment, the federal Minister of

Natural Resources, the provincial Minister of Natural Resources for Newfoundland and

Labrador and the provincial Minister for Intergovernmental and Indigenous Affairs.

"Mitigation measures" means measures to eliminate, reduce, control or offset the adverse effects

of a project or designated project, and include restitution for any damage caused by those

effects through replacement, restoration, compensation or any other means.

"Offshore area" has the same meaning as in the Accord Acts.

"Regional Assessment" means a Regional Study pursuant to CEAA 2012 and is a study or assessment

of the effects of existing or future physical activities carried out in a region.

"Report" means the report produced by the Committee pursuant to section 75 of CEAA 2012 .

1. Interpretation

1.1. For greater certainty, the provisions of this agreement shall not be interpreted as providing a

basis for any claim by or on behalf of Canada or Newfoundland and Labrador in respect of any

interest in or legislative jurisdiction over any offshore area or any living or non-living resources

of any offshore area.

1.2. The agreement has been designed to meet the requirements of CEAA 2012 as well as those of

the proposed Impact Assessment Act.

1.3. Should CEAA 2012 be repealed and replaced by new legislation, this agreement remains valid.

2. Establishment of the Committee

2.1. A process is hereby established to create a Committee, pursuant to CEAA 2012.

2.2. The Committee will be a joint committee between the Governments of Canada and

Newfoundland and Labrador.

3. Constitution of the Committee

3.1. The Committee will consist of five members. There will be two co-chairs appointed by the federal Minister of the Environment. One of the co-chairs will be jointly recommended by the federal Minister of Natural Resources and the provincial Minister of Natural Resources for Newfoundland and Labrador. The remaining three members will be appointed by the federal Minister of the Environment in consultation with the other Ministers.

3.2. The Committee will have all the powers and obligations set out under section 77 of CEAA 2012.

3.3. The Committee members will have knowledge or experience relevant to the Regional Assessment.

4. Conduct of the Regional Assessment

Task Team

4 .1. The Task Team will be the joint responsibility of the Ministers and will be co-chaired by the Agency and the C-NLOPB.

4.2. The Agency, the C-NLOPB, Natural Resources Canada and the Newfoundland and Labrador Department of Natural Resources will make available technical staff to be part of the Task Team as appropriate.

4.3. The Task Team will report to the Agency and the C-NLOPB until the Committee is established.

Once the Committee is established, the Task Team will then report to the Committee instead of the Agency and C·NLOPB. The Task Team will be structured so as to allow the Committee to conduct its review in an efficient and cost-effective manner.

4.4. The Task Team will prepare the Regional Assessment design, including objectives, work plan,

process steps, knowledge and information requirements, resource needs and measures for public and Indigenous engagement, consistent with the Factors to be considered in the Regional Assessment, outlined in Appendix A.

4.5. The Task Team will assemble the existing information and knowledge relating to offshore exploratory drilling, including the existing environmental conditions in the Regional

Assessment Area (proposed in Appendix B), the project works and activities associated with exploratory drilling, the environmental effects of such works and activities, the mitigation measures applied to those effects and monitoring and follow-up requirements and any other existing information to address the Factors to be considered in the Regional Assessment (Appendix A).

4.6. Existing information and knowledge includes, but is not limited to, any Strategic Environmental

Assessments conducted or ongoing by the C-NLOPB, past or ongoing environmental assessments under CEAA 2012, the former CEAA and/or the Accord Acts, information held by government, industry, academia, Indigenous groups or the public.

4.7. The Task Team will also be responsible for administrative, technical, and procedural support to

the Committee and/or the Agency and the C-NLOPB as well as duties related to public and Indigenous information and engagement sessions.

4.8. The Task Team will undertake its work in accordance with the budget established under article

7.1. Technical Advisory Group

4.9. The Task Team will establish the Technical Advisory Group and seek its input on the existing

information and knowledge related to offshore exploration drilling.

4.10. A Technical Advisory Group will support the Task Team and the Committee, once established,

to gather relevant data and information, conduct technical analysis, and provide expertise in relation to the Regional Assessment.

4.11. The Technical Advisory Group will carry out Its duties in a manner that discharges the requirements set out in the Terms of Reference attached as Appendix C to this Agreement and that were approved by the Ministers.

4.12. The Technical Advisory Group members may be from within or outside of government and are

to have knowledge or experience relevant to the Regional Assessment.

4.13. The Technical Advisory Group members may change, as appropriate, in relation to the work or

expertise required during the course of the Regional Assessment. Committee

4.14. The Committee will conduct a Regional Assessment of the effects of existing and anticipated

exploratory drilling in the eastern Newfoundland and Labrador offshore, generally outlined in

Appendices A and D.

4.15. The Committee will document the results of the Regional Assessment in a Report. The content

of which is described in article 5.4 of this Agreement.

4.16. The Committee will conduct the Regional Assessment in a manner that discharges the

requirements set out in CEAA 2012 and satisfies the requirements set out in the Factors to be

considered in the Regional Assessment and Terms of Reference attached as Appendices A and

D to this Agreement.

4.17. The Committee will engage with Indigenous groups and any others that have knowledge

relevant to the Regional Assessment or whose interests and uses may be affected by

exploratory drilling.

4.18. The Committee may receive information from Indigenous peoples of Canada on the nature and

scope of any rights protected by section 35 of the Constitution Act, 1982, in the area of the

Regional Assessment, as well as information on the potential adverse environmental effects

that exploratory drilling may have on these rights. Information provided to the Committee will

be used by the Crown for consultation purposes.

4.19. The Crown will consult with Indigenous peoples on the Committee's draft Report. The

foregoing does not preclude the federal or provincial Crown from conducting consultation

activities from the time the Committee is appointed until a draft report is prepared.

4.20. The Committee is not mandated or empowered by this Agreement to make any determination

as to the existence or validity of Aboriginal rights, the probability of adverse impacts upon any

such rights, the level of Aboriginal consultation required, or whether the duty to consult has

arisen and been discharged.

4.21. The Committee will provide opportunity for the public to participate in the Regional Assessment. This will include at a minimum, face-to-face meetings in the province of Newfoundland and Labrador to discuss Regional Assessment requirements, and a public comment period on the draft Report.

4.22. The Committee will be resp9nsible for planning its work in accordance with the following phases :

- Engagement
  - o Engaging on information gathered by the Task Team
  - o Conducting public and Indigenous engagement sessions
- Analysis
  - o Identifying and addressing knowledge gaps and, as appropriate, making recommendations to address gaps
- Report writing
  - o Including describing how the results of the Regional Assessment could be used to guide and inform future environmental assessment and regulatory decisions related to proposed offshore exploration drilling in the region.
- Providing for comments
  - o Including from the public and Indigenous groups on the draft Report prior to the submission of the Final Report to the Ministers .

4.23. The Committee may request clarification of its Terms of Reference or the Factors to be considered in the Regional Assessment by sending a letter signed by the co-chairpersons to the federal Minister of t he Environment, setting out the request. Upon receiving such a request, the federal Minister of the Environment, in collaboration with the federal Minister of Natural Resources and the provincial Ministers, will provide the Committee such clarification in a timely manner.

4.24. The Committee may seek an amendment to its Terms of Reference or the Factors to be considered in the Regional Assessment by sending a letter signed by the co-chairpersons to the

federal Minister of the Environment setting out the request. As appropriate, the federal Minister of the Environment, in collaboration with the federal Minister of Natural Resources and the provincial Ministers, will respond in writing to any request to amend the Terms of Reference in a timely manner.

4.25. Subject to articles 4.23 and 4.24 above, the Committee will continue with the Regional Assessment to the extent possible while waiting for a response in order to adhere to the timelines of this agreement and its Terms of Reference.

5. Record of Process and Report

5.1. A public registry will be maintained by the Task Team during the course of the Regional Assessment in a manner that provides for convenient public access.

5.2. The public registry will be hosted on the Agency's Internet Site.

5.3. The public registry will include information used to develop the Regional Assessment, including

submissions or reports as well as comments received by the Task Team or the Committee from the public or Indigenous groups during the Regional Assessment. It will also include information produced by the Task Team or Committee.

5 .4. The Report will contain information as outlined in the Factors to be considered in the Regional

Assessment (Appendix A) and in the Terms of Reference (Appendix D).

5.5. The Report will take into account and reflect the views of all Committee members.

5.6. After the Report is submitted, the information used during the Regional Assessment would remain publicly available on the Agency's Internet site.

5.7. The Committee will submit its Report to the Ministers no later than fall, 2019.

5.8. Upon receiving the Report, the federal Minister of the Environment will make the Report available to the public and will advise the public that the Report is available.

5.9. Recognizing the value of a digital, spatially-based system to house and make best use of the information generated during the Regional Assessment, the Committee will also provide its advice on the feasibility of and how best to develop and structure such a system.

5.10. The Committee will report to the Ministers within four months of being established concerning

the efficacy of developing such a system.

6. Other Government Departments and Agencies

6.1. The Task Team or the Committee may request federal authorities and provincial authorities having specialized information or knowledge with respect to the Regional Assessment to make that Information or knowledge available to the Task team or the Committee in an acceptable manner and within a specified period.

6.2. The Committee and Task Team in working with federal departments should aim to work collaboratively and optimize efforts currently underway that are relevant to the work required for the Regional Assessment.

6.3. Nothing in this Agreement will restrict the participation by way of submission to the Task Team

or t he Committee by other federal or provincial government departments or agencies.

7. Costs

7.1 The Agency, the C·NLOPB, and Natural Resources Canada will develop and agree upon a budget estimate of expenses.

7.2. The costs of the Regional Assessment will be apportioned between the Agency1 the C-NLOPB,

and Natural Resources Canada and reflected in a separate cost-sharing agreement between the Parties.

7.3. Costs incurred by the C-NLOPB may be recovered from industry.

7.4. The Committee will undertake its work in accordance with the budget established. The Committee may request a change to the budget by way of a written request to the Agency, the C-NLOPB, and Natural Resources Canada.

7.5. Funding will be administered by the Agency and made available for participating Indigenous communities, stakeholders and the public in the Regional Assessment process.

8. Amending the Agreement

8.1. The terms and provisions of the Agreement may be amended by written memorandum executed by the Ministers. The Agreement may be terminated at any time by an exchange of letters signed by the Ministers.

9. Signatures

9.1. This agreement may be signed by the parties in counterpart.

WHEREAS the Ministers hereto have put their signatures

Appendix A

Factors to be considered in the Regional Assessment

1. The Regional Assessment of offshore oil and gas exploratory drilling east of Newfoundland and Labrador will be conducted so that it satisfies the requirements of CEAA 2012, and will include a consideration of the following factors:

(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by offshore exploratory drilling, including

i. the effects of malfunctions or accidents that may occur in connection with exploratory drilling,

ii. any cumulative effects that are likely to result from offshore exploratory drilling in combination with other physical activities that have been or wilt be carried out, and

iii. the result of any interaction between those effects;

(b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of offshore exploratory drilling;

(c) the impact that exploratory drilling may have on any Indigenous group and any adverse impact that offshore exploratory drilling may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982;

(d) the purpose of and need for offshore exploratory drilling;

(e) alternative means of carrying out offshore exploratory drilling that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;

(f) Indigenous knowledge provided with respect to offshore exploratory drilling;

(g) the extent to which offshore exploratory drilling contributes to sustainability;

(h) the extent to which the effect s of offshore exploration drilling hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;

(i) any change to offshore exploratory drilling that may be caused by the environment;

(j) the requirements of the follow-up program in respect of offshore exploratory drilling;

(k) community knowledge provided with respect to offshore exploratory drilling;

(l) comments received from the public;

(m) comments from a jurisdiction that are received in the course of consultations;

(n) any assessment of the effects of offshore exploratory drilling that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to offshore exploratory drilling;

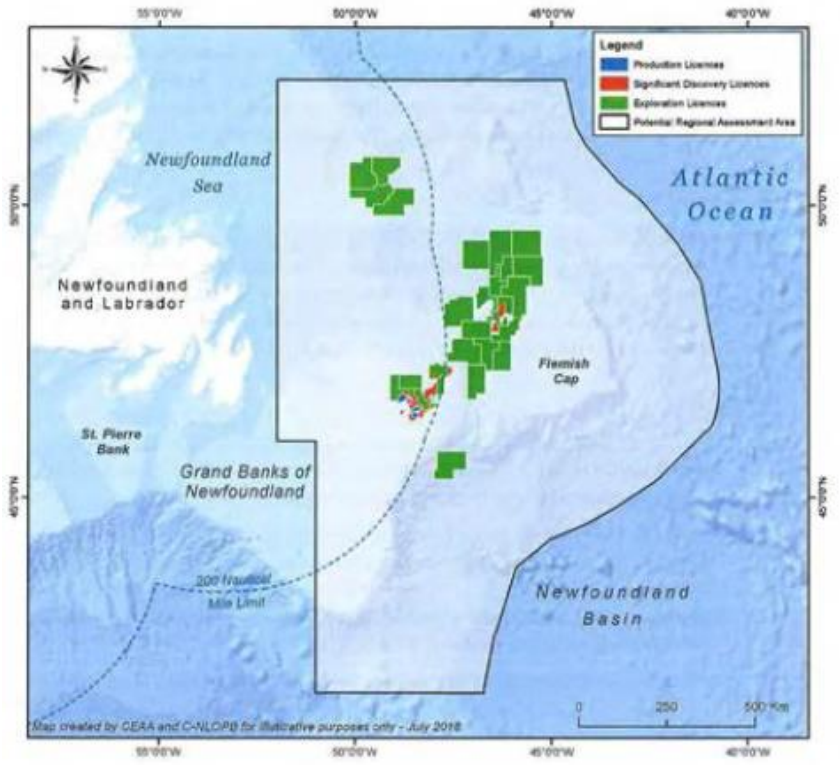
(o) any study or plan that is conducted or prepared by a jurisdiction - or an Indigenous governing body not referred to above - that is in respect of a region related to offshore exploratory drilling and that has been provided with respect to offshore exploratory drilling such as strategic environmental assessments conducted by the C-NLOPB;

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

(q) any other matter relevant to the Regional Assessment.

Appendix B

Proposed Regional Assessment Study Area



Appendix C

Terms of Reference – Technical Advisory Group

1. General

1.1 The Task Team will establish and provide direction to a Technical Advisory Group that will report to the Task Team and later to the Committee during the Regional Assessment. The Technical Advisory Group will be responsible for gathering information, conducting analysis, providing advice to t he Committee, and if required developing the digital, spatially-based system.

2. Membership

2.1 Members will be appointed by the Task Team and later, if necessary, by the Committee in cooperation with relevant agencies and organizations. Members may vary from time to time accordingly, in relation to the work or expertise required during the course of the Regional Assessment. Members may be from within or outside of government and are to have knowledge or experience relevant to the Regional Assessment.

3. Scope of Duties

3.1 The Technical Advisory Group members will be expected to provide information and expertise with respect to their respective agencies or organizations for the purpose of furthering the objectives of the Regional Assessment.

3.2 The Technical Advisory Group members will work in a collaborative manner and use peer-reviewed science, evidence and Indigenous knowledge in the development of the Regional Assessment. They will also be expected to make available and consider all known physical, biological, social and economic characteristics of the area in a digitized, interactive and plain-language accessible format to the extent possible.

3.3 The Technical Advisory Group will, when there remain areas with significant unknowns concerning the physical, biological attributes of an area, or unknowns concerning certain drilling technology or mitigating measures, recommend to the Committee steps to fill these knowledge gaps.

3.4 The Technical Advisory Group will also consider ongoing follow-up and effects monitoring requirements along with the need for periodic updates to meet the objectives of the Regional Assessment as an effective tool to aid decision-making.

Appendix D
Terms of Reference - Committee

Pursuant to the requirements of CEAA 2012, the Committee's Terms of Reference are as follows:

1. Mandate of the Committee

1.1 The Committee will conduct a Regional Assessment of offshore oil and gas exploratory drilling east of Newfoundland and Labrador in an area generally outlined in Appendix B. On completion of the Regional Assessment, the Committee will provide the Ministers with a Report

which includes the Committee's advice on how to best use the results in a systematic way to aid decision-making based on geographically-referenced knowledge and clear criteria. As such it will meet or exceed the rigour and performance of the current environmental assessment and regulatory review process used for the approval of exploratory drilling.

1.2 In conducting the Regional Assessment, the Committee will:

- Conduct its work generally in accordance with the following phases:
  - o Engaging on information and knowledge gathered by the Task Team
  - o Conducting public and Indigenous engagement sessions
  - o Analysis of existing information and comments received
  - o Identifying and addressing knowledge gaps and, as appropriate, making recommendations to address gaps
  - o Report writing, including describing how the results of the Regional Assessment could be used to guide and inform future environmental assessment and regulatory decisions related to proposed offshore exploration drilling in the region.
  - o Providing for comments from the public and Indigenous groups on the draft Report prior to the submission of the Final Report to the Ministers.

- Engage the public and Indigenous groups throughout the development of the Regional Assessment;

- Submit regular status reports to the Ministers outlining progress and any unresolved issues;

- Ensure that all relevant information used to support the Regional Assessment is publicly accessible;

- Carry out any required engagement With Indigenous groups and the public on the draft Report; and

- Finalize and submit the Report to the Ministers.

1.3 The Committee will be supported by a Task Team and a Technical Advisory Group.

2. Reporting

2.1 The Committee will consider the spatial boundary (area being assessed for potential exploration drilling) established by the Ministers in the Agreement (Appendix B). The Committee will also consider the periods and areas during and within which offshore exploratory drilling may potentially interact with, and have an effect on, components of the environment. The Committee will take into account the following:

- the natural variation of a population or ecological component,
- the timing of sensitive life cycle phases in relation to the scheduling of exploratory drilling;
- the time required for an impact to become evident;

- the time required for a population or ecological component to recover from an impact and return to a pre-impact condition, including the estimated degree of recovery;
- the area affected by offshore exploratory drilling; and
- the area within which a population or ecological component functions and within which the effects of offshore exploratory drilling may be felt.

2.2 The Committee should include in its Report the following:

- All information described in the Factors to be considered in the Regional Assessment (Appendix A).
- A description of the existing regulatory regime for oil and gas exploratory drilling and for the Regional Assessment;
- A description of the works and activities to which the Regional Assessment would apply;
- A description of the existing biophysical and socio-economic environment,
- A summary of the findings of follow-up and environmental effects monitoring programs that have been conducted in connection with offshore exploration and production drilling;
- A description of the public and Indigenous engagement activities undertaken during the Regional Assessment, including a summary of any comments received, and
- How the Committee, in determining the effects that are likely to be caused by offshore exploratory drilling, took into account and used any Indigenous knowledge provided with respect to offshore exploratory drilling. In doing so, the Committee must obtain permission to disclose any Indigenous knowledge.

2.3 The Committee will provide its advice on how the results of the Regional Assessment can be used to inform and guide future environmental assessments and regulatory decisions related to proposed offshore exploratory drilling projects within the region. This should include identifying any standard conditions that may be appropriate.

2.4 Recognizing the value of a digital, spatially-based system to house and make best use of the information generated during the Regional Assessment, the Committee will also provide its advice on the feasibility of and how best to develop, structure, maintain and keep up to date such a system, including how the system could include all pertinent spatially-derived information and knowledge on the Regional Assessment area including physical characteristics (geology, geomorphology, and oceanography), biophysical, chemical, and socioeconomic. information could be derived from existing databases, scientific information, local knowledge, and Indigenous knowledge. The Committee should consider how the use of such a system could be facilitated by the development of linked operational decision criteria for all aspects of offshore exploratory drilling including, drilling technology, mitigation measures, oil spill trajectory modelling and oil spill response,

2.5 Further to 2.4, in the interests of building the Regional Assessment on such a system, the Committee will examine and report to Ministers within four months of being established on the feasibility and efficacy of developing such a system

Schedule B

8.1 Recommendations Relevant to the Ministerial Regulation

8.1.1 Recommended Requirements for Future Projects
The Committee recommends that the following measures be incorporated within the planned regulation as specific requirements for all future exploratory drilling activities in the Study Area seeking exemption from federal IA requirements:

1) The various mitigation and follow-up measures that have been included as conditions of

environmental assessment (EA) approval for recent exploratory drilling projects in the Study Area under the Canadian Environmental Assessment Act, 2012 (CEAA 2012) (as summarized earlier in Section 4.5) should be requirements for all future exploratory drilling projects in the Study Area (Section 4.6.1).

2) Operators undertaking exploratory drilling activity in the Study Area should be required to assign trained (to Environment and Climate Change Canada – Canadian Wildlife Service (ECCC-CWS) standards, once finalized) and experienced seabird observers on drill rigs and supply vessels, whose primary responsibility is to make observations and collect seabird survey data during these activities (Section 4.6.1).

3) Operators be required to prepare and submit their Fisheries Communication Plan at the time of, and as part of, their application for an Operations Authorization (OA) from the Canada-Newfoundland and Labrador Offshore Petroleum Board (C-NLOPB), in order to ensure its timely development and implementation. The communication measures outlined in that Plan should be implemented throughout the OA review and approval process, as well as during the planning and conduct of the proposed exploratory drilling program in question (Section 4.6.1).

4) Operators commence the notification process at least two months prior to starting a well (as opposed to the two weeks notice that has previously been specified), and provide subsequent updates and information as these become available. Operators should also be required to demonstrate that (and how) they will provide more timely notifications to these parties regarding planned rig movements (Section 4.6.1).

5) Operators be required to demonstrate concrete, measurable steps to minimize light attraction effects on migratory birds (including the additional mitigation and monitoring requirements outlined previously in Section 4.6) (Section 4.6.1).

6) In addition to observer-based monitoring, operators should incorporate new technologies (e.g. radar, infrared imaging, high definition aerial surveys, telemetry studies, etc.) as they become available into their seabird monitoring programs to complement research on, and mitigation of, light attraction (Section 4.6.1).

7) Operators include general awareness regarding seabird strandings as part of their overall training / orientation programs for offshore workers (Section 4.6.1).

8) For any future exploratory drilling activities in the Study Area that are proposed to occur within a currently defined Marine Refuge (Fisheries and Oceans Canada, DFO) or a Northwest Atlantic Fisheries Organization (Northwest Atlantic Fisheries Organization, NAFO) Fisheries Closure Area, any exemption from the federal IA process be contingent on the operator demonstrating that any risks to intended biodiversity / conservation outcomes of that area will be avoided or mitigated.

Specifically, it is recommended that the operator be required to outline, in its project notification to the Impact Assessment Agency of Canada (IAAC) (see Section 8.1.2 below), its plans (to be developed in consultation with DFO) to address any effects of these activities on the various environmental characteristics and sensitivities present within the special area(s). In the case of a Marine Refuge, it is recommended that the operator be required to provide evidence in that submission that the Minister of DFO is satisfied that that risks to intended biodiversity outcomes are avoided or mitigated, and that this determination by DFO be made on clearly defined criteria which should be clearly referenced in the above (Section 4.6.2).

8.1.2 Procedural Recommendations: Improving Transparency

The recommendations provided below relate to the development and implementation of the Ministerial Regulation, and have not been provided in an earlier section of this report.

9) The Committee recommends that the IAAC consult with applicable government departments and agencies, Indigenous and stakeholder groups and the public in the development of the above referenced Ministerial Regulation.

Throughout the Regional Assessment process, the Committee has heard concerns from some Indigenous and stakeholder groups that the potential removal of IA requirements for future exploratory drilling projects in the Study Area will mean that there is no process for interested and potentially affected parties to be aware of, nor consulted on, future projects. There were therefore repeated calls to ensure that there remains an adequate public notification and input process for future such projects even in the absence of a detailed project-specific assessment.

10) It is therefore recommended that any such regulation, and the associated procedures for seeking and confirming such an exemption, include and address the following:

> a) The operator seeking such an exemption be required to provide a notification and description of its proposed exploratory drilling activities to the IAAC.
> b) In that submission, the operator provide details clearly demonstrating its planned compliance with the conditions for exemption as outlined in that regulation (or demonstrated equivalencies for any measures that are clearly shown to be not technically or economically feasible for that particular program). The operator must also demonstrate that it has undertaken engagement with Indigenous and stakeholder groups on the planned exploratory drilling program in question, including describing the nature and outcomes of that engagement.
> c) This submission by an operator be announced publicly and made available by the IAAC on its Registry for a 30 day public review period within which all interested parties

will have the opportunity to provide input to the IAAC in making the determination referenced below.
d) Once a determination has been made by the IAAC whether or not the proposed exploratory drilling program in question is in conformance with the regulation (and thus, whether it is or is not exempt from federal IA requirements), a notification of this outcome be announced publicly and made available by the IAAC on its Registry.

11) If, as described above, a determination is made that a proposed drilling program is in conformance with the regulation and thus is exempt from federal impact assessment requirements, it is recommended that such an exemption be linked to a defined time period, such as for the duration of the Exploration Licence in question. This will help allow the operator to plan and implement its drilling program with early and on-going clarity on its obligations, even in the event that there is a future change to the regulation.

12) For any proposed exploratory drilling activities in the Study Area that are not in conformance with the aforementioned regulation, and are thus considered to be a designated project that requires individual IA review, it is recommended that this project-specific IA be scoped to focus on the particular issue(s) that led to requiring this impact assessment (namely, the specific area of non-conformity with the conditions for exemption as outlined in the regulation). This scoping should be clearly reflected in and facilitated through the eventual project-specific guidelines developed and issued by the IAAC.

8.2 Updating and Implementing the Regional Assessment and the Ministerial Regulation

13) It is recommended that the Regional Assessment (including its associated Geographic Information System (GIS) decision-support tool) must be viewed and used as a "living" and "evergreen" product that is reviewed annually and updated as required, which should include identifying and incorporating new or updated information that is relevant to the assessment (Section 3.5.1).

14) It is recommended that the above referenced Ministerial Regulation be reviewed and updated as required based on the availability of new information or analysis obtained through an update to this Regional Assessment. The process for updating the regulation should include consultation with Indigenous and stakeholder groups and the public.

5) It is recommended that within four months of the submission of the Regional Assessment

Committee's Final Report, the Parties that were signatories to the Regional Assessment Agreement develop and publicly communicate their plans for the long-term housing, maintenance and use of the Regional Assessment and its associated GIS decision-support tool to Indigenous and stakeholder groups. This should include the development and implementation of clearly defined and documented procedures for future updates to the Regional Assessment, including: a) specifying the roles and responsibilities of other government departments and agencies in such updates through detailed and binding MOUs and associated annual workplans; b) associated data standards and protocols; and c) ensuring that adequate funding and resources are available and committed to by all responsible organizations.

16) The Committee also recommends that all parties with responsibility for one or more recommendations of this Regional Assessment provide regular (annual) updates on the status and implementation of these.

17) It is recommended that a "Regional Assessment Oversight Committee" be established to provide an on-going and consistent oversight and advisory function for the use and future updating of this Regional Assessment. The Committee should be established before the finalization and use of the Ministerial Regulation (see Section 8.1) and specifically, before future exploratory drilling projects are exempt from IA requirements as a result of such a regulation. This Committee should report to senior representatives of each of the Parties that were signatories to the Regional Assessment Agreement, and be supported by IAAC staff, and will provide advice on and help guide (Section 4.6.4):

a) The annual review and updating of the Regional Assessment, and the consideration and incorporation of these updates in the review and updating of the associated Ministerial regulation (as required);
b) Tracking and reporting annually on the progress of the implementation of the Regional Assessment recommendations;
c) The maintenance and further development of the GIS decision-support tool, including its associated datasets and analytical functionality; and
d) Reviewing, evaluating and providing advice on the IAAC's overall Regional Assessment procedures and policies, as informed by the experiences of and any associated lessons learned from this assessment, as well as the manner and effectiveness with which these assessments are being used to inform decision-making.

18) It is recommended that this Committee comprise a variety of interests and areas of expertise, including persons that bring expertise and perspectives from various related interests, including

Indigenous groups, the fishing and oil and gas industries and environmental organizations, selected through established, merit based, application processes. The Oversight Committee should be appropriately resourced, funded and supported, and should have established links with other IAAC advisory committees, including the Indigenous Advisory Committee and the Technical Advisory Committee on Science and Knowledge (Section 4.6.4).

8.3 Recommendations Directed to Other Parties

The Committee recommends that the following be implemented by other federal or provincial departments and agencies or other organizations as identified herein:

19) In the course of completing its work, the Committee has become aware of a number of on-going or planned studies or scientific reviews that should be incorporated into future updates of the Regional Assessment immediately upon their completion (see earlier list in Section 3.5) (Section 3.5.1).

20) It is recommended that DFO increase and accelerate its research on Atlantic salmon to help address this important issue. It is further recommended that DFO develop and implement its research plan in collaboration with Indigenous and stakeholder groups, and communicate its

research plan within 12 months, as well as sharing and discussing the eventual findings of that research with these groups.(Section 3.5.1).

21) It is recommended that ECCC, in partnership with Indigenous groups and relevant stakeholders including the oil and gas industry, increase its research into the seasonal presence of Leach's Storm-petrels and other relevant species in the Study Area and on the species' behaviour and susceptibility to lights from drilling platforms and vessels, including the potential role of offshore operations in recently observed population declines (Section 3.5.1).

22) It is recommended that the commercial fisheries data (landings statistics and geospatial information) be made available by DFO in a more timely, accessible, and useful manner. This includes making these data publicly available through a website or other such means as opposed to requiring users to make individual data requests to DFO (Section 3.5.2).

23) It is also recommended that DFO explore alternative means of packaging and providing these commercial fisheries data to help resolve or reduce the current issues around confidentiality and associated data redaction (Section 3.5.2).

24) It is recommended that representatives of the oil and gas industry, applicable regulatory and resource management agencies (including the C-NLOPB and DFO) the fishing industry and Indigenous groups work together to develop and implement a protocol for gathering, documenting and sharing this information and knowledge to better understand key fishing activities, areas and times on a regional scale. DFO may be best placed to coordinate such a process and house the resulting data (Section 3.5.2).

25) It is recommended that representatives of the oil and gas industry, applicable regulatory and resource management agencies (including the C-NLOPB, DFO and ECCC), Indigenous groups, the fishing industry and environmental organizations work together to develop and implement a protocol for gathering, documenting and sharing information and knowledge about key environmental components and sensitivities in the Study Area (through associated mapping at an appropriate and an acceptable scale of detail) for future use by interested parties. Again, DFO may be best placed to coordinate such a process and house the resulting data. This information should be incorporated into future updates of the Regional Assessment, and shared directly with interested parties (Section 3.5.2).

26) It is recommended that DFO-NL Region's marine mammals and sea turtles sightings dataset be made publicly accessible (along with a detailed description of the dataset and what it contains including any limitations) as opposed to requiring users to make individual requests to DFO for these data (Section 3.5.2).

27) It is recommended that DFO develop, communicate and implement standards / certifications for marine mammal observers that set out specific training and experience requirements for these personnel (Section 3.5.2).

28) It is recommended that ECCC-CWS develop, in consultation with industry, protocols for systematic surveys of stranded birds on offshore platforms and vessels, and work with operators to implement these protocols on offshore platforms and vessels (Section 4.6.1).

29) It is recommended that the C-NLOPB specifically consider overall information availability, data gaps and associated environmental risks in future decisions around whether and when to issue licences in data deficient areas as part of its scheduled land tenure process (Section 4.6.2).

30) For each of the various types of identified special areas found within the Study Area (Marine Refuges, Fisheries Closure Areas, Ecologically and Biologically Significant Areas (EBSAs), Sensitive Benthic Areas (SiBAs), Vulnerable Marine Ecosystems (VMEs)), it is recommended that the relevant authorities accelerate scientific review and analysis of these areas to determine if their various components and characteristics warrant additional protection, mitigation or follow-up measures for any future exploratory activity that may take place within them (Section 4.6.2).

31) For any proposed exploratory drilling projects in the Study Area that do not require project-specific IA review under the Impact Assessment Act as a result of this Regional Assessment, it is recommended that the C-NLOPB continue to ensure that adequate and appropriate modelling is completed or otherwise in place regarding: a) drill cuttings and their dispersion, and b) the predicted fate and behaviour of potential petroleum spills, and that these be included as part of its authorizations and approvals processes for the drilling program in question (Section 4.6.3).

32) As part of the notification of Indigenous and stakeholder groups in the event of an offshore spill, it is recommended that the C-NLOPB require that operators include any associated imagery around the nature and extent of the spill, and information on any affected marine biota (Section 4.6.3).

33) It is recommended that once DFO's forthcoming additional guidance on mitigating effects to corals and sponges has been developed and released, these measures be incorporated into a future update of this Regional Assessment (Section 4.6.3).

34) Should the Statement of Canadian Practice with respect to the Mitigation of Seismic Sound in the Marine Environment be revised as a result of DFO's on-going review of it, it is recommended that any new mitigations/standards be included in future update of this Regional Assessment (Section 4.6.3).

35) It is recommended that DFO, the C-NLOPB and the oil and gas industry work together to conduct a review of existing and available baseline data pertaining to contaminant levels (including polycyclic aromatic hydrocarbons (PAHs) and total petroleum hydrocarbons (TPHs)) in benthic organisms, fish and other harvested species in the Study Area, including an evaluation of the availability and adequacy of these data as baseline information for EEM purposes. In the event that the existing and available data are not suitable or adequate for this purpose, these parties should develop, communicate and implement a research plan to fill these gaps, in collaboration with Indigenous and stakeholder groups. The parties should also share and discuss the eventual results of that research with these groups once available (Section 4.6.3).

36) It is recommended that the information and analysis provided in this Regional Assessment, including the associated GIS decision-support tool, be considered by the C-NLOPB in its future decisions as part of the scheduled land tenure process. This should include consideration of potential cumulative effects and their management (as required) through associated planning

(licencing) decisions linked to the scheduled land tenure process, in consultation with relevant expert authorities (Section 5.4).

37) As there is a clear relationship between the information contained in this Regional Assessment (and especially, the associated GIS decision-support tool) and the C-NLOPB's Strategic Environmental Assessments (SEAs) for Eastern Newfoundland, it is also recommended that the Board seek to utilize this tool as part of any future SEA updates (and to inform its associated licencing processes) to avoid unnecessary duplication (Section 5.4).

38) It is recommended that as part of future updates to this Regional Assessment, the C-NLOPB undertake further development of the exploratory drilling scenarios described in the preceding sections, and generate periodic updates of those scenarios as new data become available (Section 5.4).

39) It is recommended that government assume responsibility for offshore-related cumulative effects assessment and management through a planning process directed by a dedicated agency. The DFO Marine Spatial Planning initiative might be considered as an appropriate vehicle through which to do this (Section 5.4).

40) It is recommended that the Benefits Plans developed by operators for proposed exploratory drilling programs in the Study Area and submitted to the C-NLOPB be made publicly available (with allowances for any commercially sensitive information to be redacted as appropriate prior to release) (Section 7.4).

41) It is recommended that Diversity Plans specific to exploratory drilling programs should be required by the C-NLOPB for future such programs in the Study Area, which should be made publicly available (Section 7.4).

Schedule C

Regulations Respecting Excluded Physical Activities (Newfoundland and Labrador Offshore Exploratory Wells)

Area of application

1 These Regulations apply only within the area described in Schedule 1.

Designation

2 The drilling, testing and abandonment of exploratory wells that are set out in section 34 of the schedule to the *Physical Activities Regulations*, take place in an area that is set out in one or more exploration licences issued in accordance with the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act* and satisfy the conditions set out in Schedule 2 are designated as physical activities under paragraph 112(1)(a.2) of the *Impact Assessment Act*.

Information to be provided

3 The person or entity that proposes the physical activity referred to in section 2 must provide the following information in respect of that physical activity to the Impact Assessment Agency of Canada at least 90 days before commencing the drilling program:

a. their name and contact information and the address of the Internet site on which the information referred to in section 40 of Schedule 2 will be published;

b. a description of the activity;

c. the licence number of any exploration licence respecting the area in which they propose to carry out the activity;

d. a summary of all engagement that the person or entity undertook with the Indigenous groups referred to in section 1 of Schedule 2, including issues raised and how views and issues raised have been considered and any future engagement that is planned;

e. the geographic coordinates of the area in which the activity would take place within the area described in Schedule 1 and the geographic coordinates identifying the area set out in any exploration licence;

f. the number of wells that are planned to be drilled and the planned depth of each well;

g. a list of all activities that are associated with the drilling, testing and abandonment and all infrastructure, structures and physical works that are necessary for those activities;

h. a site map that illustrates the location of the elements referred to in paragraph (g) and the distance between them;

i. a description of the processes that will be used to drill, test and abandon wells;

j. a list of any financial support received from federal authorities in relation to the activity and of any such support for which an application has been made;

k. a list of the permits, licences or other authorizations that may be required by jurisdictions that have powers, duties or functions in relation to an assessment of the activity's environmental effects; and

l. if the activity is proposed in an area that is closed in accordance with the *Conservation and Enforcement Measures* adopted by the Northwest Atlantic Fisheries Organization, a copy of any mitigation measures that were proposed to the Department of Fisheries and Oceans.

Coming into force

4 These Regulations come into force on June 4, 2020.

Schedule 1

(Section 1)

Area of Application

The area of application is described as follows:

- Commencing at a point at latitude 52.0000000° north and longitude 52.0000000° west;
- Then along a rhumb line to the point of intersection of latitude 52.0000000° north and the edge of the continental shelf of Canada as defined in international law;
- Then following the edge of that shelf to the point of intersection of that edge and with latitude 41.3916667° north;
- Then along a rhumb line to a point at latitude 41.3916667° north and longitude 51.0000000° west;
- Then along a rhumb line to a point at latitude 46.0000000° north and longitude 51.0000000° west;
- Then along a rhumb line to a point at latitude 46.0000000° north and 52.0000000° west; and
- Then along a rhumb line to the point of commencement.

Schedule 2

Conditions

Definitions

1 The following definitions apply in this Schedule.

activity area means the area surrounding each well where drilling, testing or abandonment occurs.*(zone)*

Board means the Canada-Newfoundland and Labrador Offshore Petroleum Board referred to in section 9 of the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*. (*Office*)

competent authorities means all federal or provincial authorities that are in possession of specialist or expert information or knowledge, or that have a responsibility for the administration of a law or regulation, with respect to the subject matter of a condition set out in this Schedule. (*autorités compétentes*)

competent person means an individual who has the necessary education, experience and knowledge to conduct studies and provide advice in a particular field, and includes a person with community knowledge or Indigenous knowledge. (*personne compétente*)

Indigenous group includes Abegweit First Nation, Acadia First Nation, Annapolis Valley First Nation, Bear River First Nation, Buctouche First Nation, Eel Ground First Nation, Eel River Bar First Nation, Elispogtog First Nation, Esgenoopetitj First Nation, Eskasoni First Nation, Fort Folly First Nation, Glooscap First Nation, Indian Island First Nation, Innu de Ekuanitshit, Première Nation de Nutashkuan, Innu Nation, Kingsclear First Nation, La Nation Micmac de Gespeg, Lennox Island First Nation, Listuguj Mi'gmaq Government, Madawaska Maliseet First Nation, Membertou First Nation, Metepenagiag Mi'kmaq Nation, Miawpukek First Nation, Micmacs of Gespapegiag, Millbrook First Nation, Nunatsiavut Government, NunatuKavut Community Council, Oromocto First Nation, Pabineau First Nation, Paqtnkek (Afton) First Nation, Peskotomuhkati Nation at Skutik, Pictou Landing First Nation, Potlotek (Chapel Island) First Nation, Qalipu Mi'kmaq First Nation Band, Sipekne'katik First Nation, St. Mary's First Nation, Tobique First Nation, Wagmatcook First Nation, We'kmoqma'q (Waycobah) First Nation and Woodstock First Nation.(*groupe autochtone*)

spill means a spill or unplanned release of oil or any other substance that may cause adverse environmental effects. (*déversement*)

Competent persons and best technology

2 For greater certainty, studies referred to in this Schedule are to be done in collaboration with competent persons and the solutions adopted take into account the most current standards and knowledge, community knowledge, Indigenous knowledge and the best available technology.

Consultation

3 In this Schedule, consultation requires:

a. providing a written notice of the opportunity for the party or parties being consulted to present their views and information on the subject of the consultation;

b. providing information on the scope and the subject matter of the consultation in a period of time that allows the party being consulted to prepare their views and information;

c. undertaking a consideration of all views and information presented by the party being consulted on the subject matter of the consultation;

d. informing the party being consulted in a timely manner on how the views and information received have been considered; and

e. in the case of consultation with an Indigenous group, also consulting with the group with respect to the way in which paragraph (a) to (d) will be satisfied with respect to that group.

Fisheries communications plan

4 The activity is the subject of a fisheries communications plan that is developed before the beginning of the drilling program in consultation with the Board, Indigenous groups and commercial fishers respecting the way in which communications will take place during all phases of the activity. The plan includes the following elements with respect to the drilling of wells and communications in the event of unplanned events that may cause adverse environmental effects:

a. the measures by which, at least two months before the drilling of each well, Indigenous groups and commercial fishers will be informed of planned drilling activity and planned drilling installation movements;

b. the time at which updates respecting drilling and drilling installation movement will be provided;

c. procedures to determine when a Fisheries Liaison Officer or a fisheries guide vessel is necessary during movement of drilling installations and the conducting of geophysical operations;

d. the measures by which, in the event of a spill, Indigenous groups and commercial fishers will be informed of the spill and of the results of the monitoring of its potential adverse effects on the environment or human health;

e. the measures in place to ensure communication will be exchanged with Indigenous groups and commercial fishers during the course of any spill that requires a tier 2 or tier 3 response, as defined in the most recent version of the International Association of Oil & Gas Producers' document *Tiered Preparedness and Response*;

f. a list of the information that will be provided to Indigenous groups and commercial fishers and the time at which it will be provided, which list includes

    i. a description of the activities associated with the drilling, testing and abandonment,

    ii. the location of each safety exclusion zone,

    iii. the schedule of anticipated traffic from vessels and the shipping lanes whose use is anticipated, and

    iv. the locations of abandoned wellheads; and

g. the notices to be sent to Indigenous groups and commercial fishers with respect to the loss or damage of fishing gear attributed to the activity.

Follow-up program

5 Any follow-up program required in this Schedule is provided to the Board and includes the following:

a. the mitigation measures to be implemented and the methodology, location, frequency, timing and duration of monitoring to be used to assess the adverse effects of the activity and to determine the effectiveness of those mitigation measures;

b. the amount of change to the environment relative to the baseline conditions that existed before the activity began and to the adverse effects that were predicted that would require the implementation of modified or additional mitigation measures, including, if necessary, the stopping of the activity;

c. a description of the technologically and economically feasible measures to be implemented when modified or additional mitigation measures are required in accordance with paragraph(b); and

d. the scope, content, and frequency at which updates with respect to the results of the follow-up program are provided to the Board.

Follow-up program — fish and fish habitat

6 The activity is subject to a follow-up program with respect to fish and fish habitat and that measures the effectiveness of mitigation measures. The program is implemented throughout the drilling program and includes the following:

a. the measurement at every well of the concentration of drilling fluids retained on discharged drill cuttings as described in the most recent version of the *Offshore Waste Treatment Guidelines*, issued jointly by the National Energy Board, the Canada-Nova Scotia Offshore Petroleum Board and the Board, to verify that the discharge meets the performance targets set out in the Guidelines;

b. a study of the adverse effects of the discharge of drill cuttings on benthic habitat that is conducted, in consultation with the Department of Fisheries and Oceans and the Board, at the first well in each exploration licence, at any well where drilling is undertaken in an area determined by seabed investigation studies to be sensitive benthic habitat and at any well located within a special area designated as such due to the presence of sensitive coral and sponge species, or a location near such a special area where drill cuttings dispersion modelling predicts that the deposition of drill cuttings may have adverse effects, and includes:

    i. measuring the post-drilling extent and thickness of the deposition of sediment in order to verify the drill waste deposition modelling predictions,

ii. conducting benthic fauna studies to verify the effectiveness of mitigation measures, and

iii. comparing the modelling results to in situ results and providing those results no later than 60 days after the day on which the first well in each exploration licence is drilled; and

c. a study of the adverse effects of underwater sound levels that is conducted, in consultation with the Department of Fisheries and Oceans and the Board, at the first well in each exploration licence and includes the methods used to monitor those underwater sound levels.

Follow-up program — migratory birds

7 The activity is the subject of a follow-up program with respect to migratory birds that measures the effectiveness of mitigation measures and is developed in consultation with the Department of the Environment and the Board before the beginning of the drilling program. The follow-up program is implemented throughout the drilling program and includes:

a. monitoring for the presence of migratory seabirds throughout the day from the drilling installation and support vessels by a competent person whose primary responsibility is observing migratory seabirds and who follows the most recent version of Environment Canada's *Eastern Canada Seabirds at Sea Standardized Protocol for Pelagic Seabird Surveys from Moving and Stationary Platforms* and makes observations and collects migratory seabird study data during these activities; and

b. monitoring the drilling installation and support vessels throughout the day for the presence of stranded migratory birds and following the most recent version of Environment and Climate Change Canada's *Procedures for Handling and Documenting Stranded Birds Encountered on Infrastructure Offshore Atlantic Canada*.

Discharges, use of chemicals and disposal of drilling muds

8 The drilling complies with the following requirements:

a. chemicals that will be used and discharged into the marine environment are lower toxicity and selected in accordance with the most recent version of the *Offshore Chemical Selection Guidelines for Drilling & Production Activities on Frontier Lands*, issued jointly by the National Energy Board, the Canada-Nova Scotia Offshore Petroleum Board and the Board;

b. the treatment of discharges from drilling complies with the performance targets set out in the most recent version of the *Offshore Waste Treatment Guidelines*, issued jointly by the National Energy Board, the Canada-Nova Scotia Offshore Petroleum Board and the Board; and

c. spent or excess synthetic-based muds that are used in the activity and are not reused are disposed of in a facility on land in accordance with the applicable legislation.

Treatment of discharge from support vessels

9 During the activity, discharges from support vessels into the marine environment are treated in accordance with the *International Maritime Organization's International Convention for the Prevention of Pollution from Ships* and any applicable legislation.

Pre-drill study

10 The activity area is the subject of a pre-drill study at each proposed well site in order to determine whether there are seabed hazards, including unexploded ordnance.

Seabed hazards

11 If there is a seabed hazard in the activity area, safety measures are developed before the activity begins in consultation with the Board and the Canadian Coast Guard's Joint Rescue Coordination Centre in Halifax.

Seabed investigation study

12 The activity area is the subject of a seabed investigation study, that is developed and conducted in consultation with the Department of Fisheries and Oceans and the Board before the drilling of each well, to determine whether there are any aggregations of habitat-forming corals or sponges or any other environmentally sensitive features around each proposed well site. The study uses:

a. transects around each well site with a length and pattern that is based on applicable drill cutting dispersion model results; and

b. transects around each anchor site that extend at least 50 metres from each structure.

Coral, sponge and ecologically sensitive features

13 If a competent person concludes, on the basis of the seabed investigation study, that there are aggregations of habitat-forming corals or sponges or other environmentally sensitive features in the activity area, measures are taken to avoid affecting them, including moving the anchors or wells on the seafloor or redirecting the discharge of drill cuttings. If such movement or redirection is not technically feasible, other mitigation measures determined in consultation with the Department of Fisheries and Oceans and the Board are taken.

Other effective area-based conservation measure

14 If it is determined, after verifying with the Department of Fisheries and Oceans, that the activity area is one where there is an other effective area-based conservation measure in place in the marine environment, a plan is developed in consultation with that Department and the Board. The plan is provided to that Department and the Board at least 90 days before the beginning of the drilling program and includes a description of:

a. the potential effects of the activity with respect to the conservation objectives for the area;

b. the mitigation measures that are planned to limit the adverse effects of the activity on those objectives;

c. the monitoring activities that will be used to determine the effectiveness of those measures; and

d. the frequency at which updates with respect to the implementation of the mitigation measures and the results of monitoring activities will be provided to that Department and the Board.

Seismic sound

15 During the planning and the conduct of vertical seismic surveys associated with the activity, the most recent version of Fisheries and Oceans Canada's *Statement of Canadian Practice with Respect to the Mitigation of Seismic Sound in the Marine Environment* is applied, including the establishment of a safety zone of a minimum radius of 500 metres from the vertical seismic sound source.

Marine mammals and sea turtles

16 The activity area is the subject of a marine mammal and sea turtle monitoring plan that is developed in consultation with the Department of Fisheries and Oceans and the Board at least 30 days before the day on which there is a seismic survey.

The plan includes:

a. the use of passive acoustic monitoring, or equivalent technology, and of visual monitoring by marine mammal and sea turtle observers during vertical seismic surveys;

b. the shutting down of the seismic sound source if any marine mammal or sea turtle is observed within the safety zone referred to in section 15; and

c. the starting of the seismic sound source only once marine mammals and sea turtles have not been observed within the safety zone referred to in section 15 for 60 minutes.

Prevention of collision

17 Support vessels are subject to measures to reduce the risk of collision with marine mammals and sea turtles, including the requirements:

a. to use established shipping lanes where they already exist; and

b. to reduce their speed to a maximum of 7 knots when a marine mammal or sea turtle is observed or reported within 400 metres.

Reporting of collision

18 Any collision of a support vessel with a marine mammal or sea turtle is reported:

a. to the Department of Fisheries and Oceans' Canadian Coast Guard Regional Operations Centre, the Board and the competent authorities no more than 24 hours after the collision; and

b. to Indigenous groups no more than 3 days after the collision.

Salmon research

19 The carrying out of the activity includes contributing to a research program with respect to the presence of Atlantic salmon (*Salmo salar*) in the Eastern Canadian offshore area.

Provision of results

20 A summary of the activities of the research program with respect to salmon referred to in section 19 is provided yearly to Indigenous groups and to the Board.

Protection of migratory birds

21 The activity area is the subject of measures to avoid harming, killing or disturbing migratory birds that include:

a. using, when possible, a drill pipe conveyed test assembly or similar technology rather than by conducting a formation flow test with flaring;

b. limiting the duration of flaring to the length of time required to characterize the wells' hydrocarbon potential;

c. operating a water curtain barrier around the flare during flaring;

d. determining, in consultation with the Board and at least 30 days before any day on which flaring is planned, whether that flaring will occur during a period of migratory bird vulnerability and, if so, postponing the flaring or implementing additional measures to avoid adverse effects on those migratory birds;

e. controlling lighting required during the carrying out of the activity, including its direction, timing, intensity and glare;

f. measures that require support vessels to maintain a minimum lateral distance of 300 metres from Cape St. Francis and Witless Bay Islands Important Bird and Biodiversity Areas;

g. measures that require support helicopters to fly at altitudes greater than 300 metres above sea level where there are active migratory bird colonies and at a lateral distance of 1000 metres from Cape St. Francis and Witless Bay Islands Important Bird and Biodiversity Areas;

h. documenting any changes made to lighting regimes to allow for an evaluation of the effectiveness of the change in mitigating light attraction;

i. a research program to identify changes in light spectrum, type or intensity that may further reduce attraction for storm petrels and other migratory seabirds;

j. minimizing the number of flaring events during nighttime and poor weather conditions, as well as during seasonal periods of migratory bird vulnerability;

k. having a person described in paragraph 7 (a) monitor and document migratory bird behaviour around the flare while flaring occurs and assess the effectiveness of water curtains and flare shields in mitigating interactions between migratory birds and flares;

l. incorporating any technology that becomes available into migratory seabird monitoring to complement research on the mitigation of light attraction; and

m. training offshore workers with respect to migratory seabird strandings.

Drill pipe conveyed test assembly

22 The Board is informed of the means by which paragraph 21(a) is satisfied.

Well control strategies

23 The activity is subject to well control strategies that include:

a. measures for well capping and containment of fluids released from the well and the drilling of a relief well and options to reduce the overall time it takes to respond to the release; and

b. measures to quickly disconnect the marine riser from the well in the event of an emergency or extreme weather conditions.

Provision of strategies to Board

24 The well control strategies referred to in section 23 are provided to the Board before the beginning of the drilling program.

Measures to prevent accidents

25 The activity is the subject of measures to prevent accidents and malfunctions that may result in adverse environmental effects and measures to mitigate such effects, including:

a. the development and implementation, in consultation with the Board, of operating procedures with respect to meteorological and oceanographic conditions that reflect the facility's design limits and the limits at which any work or activity may be conducted safely and without causing adverse environmental effects, including thresholds at which the activity will stop; and

b. the implementation of emergency response procedures and contingency plans in the event of an accident or malfunction.

Physical environment monitoring

26 The activity is the subject of a physical environment monitoring program that complies with the most recent version of the *Offshore Physical Environmental Guidelines*, issued jointly by the National Energy Board, the Canada-Nova Scotia Offshore Petroleum Board and the Board, and is developed in consultation with the Board and the Department of the Environment and is implemented throughout the drilling program.

Capping stacks

27 The activity is the subject, before and during the drilling of each well, of procedures to maintain information with respect to the current availability of capping stacks, vessels capable of deploying the capping stacks and installations capable of drilling relief wells in the activity area.

Provision of updates to Board

28 The updates with respect to the equipment referred to in section 27 are provided to the Board.

Spill impact mitigation assessment

29 The activity is the subject of a spill impact mitigation assessment to determine the options that could be implemented in the case of a spill in order to reduce adverse environmental effects as much as possible.

Provision of assessment to Board

30 The spill impact mitigation assessment referred to in section 29 is provided to the Board before the beginning of the drilling program.

Spill response plan

31 The activity is the subject of a plan to respond to a spill, which plan takes into account comments from Indigenous groups with respect to the draft plan that was provided to those groups.

Content of spill response plan

32 The spill response plan referred to in section 31 includes the following and is provided to the Board before the beginning of the drilling program:

a. modelling of potential spills;

b. measures for responding to a spill, including those for containing and recovering the spilled substance and measures for mitigating the spill's adverse effects on the environment;

c. measures for protecting and rehabilitating wildlife affected by a spill, including measures for collecting and cleaning marine mammals, sea turtles, migratory birds and species at risk and measures for shoreline protection and clean-up;

d. the list of authorities to notify of a spill, including when they will be notified and the means to notify them; and

e. a list of the persons responsible for managing the spill at sea and on land.

Exercise of spill response plan

33 The spill response plan that is provided to the Board is the subject of an exercise as described in the most recent version of the *Drilling and Production Guidelines*, issued jointly by the Canada-Nova Scotia Offshore Petroleum Board and the Board, in order to determine its deficiencies. The results are sent to the Board and, if applicable, an update is provided to the Board.

Updating of spill response plan

34 Before a new well is drilled, the spill response plan is updated, if necessary, and any such update is provided to the Board.

Provision of plan to Indigenous groups

35 A copy of any communication with respect to the development of the spill response plan, the plan itself and the results of the exercise referred to in section 33 are provided to Indigenous groups before the beginning of the drilling program. Subsequent updates referred to in section 33 or 34 are also provided to those groups.

Implementation of spill response plan

36 In the event of a spill, the competent authorities, Indigenous groups and commercial fishers are notified without delay and the plan referred to in section 31 is implemented. In the case of an uncontrolled subsea release, subsea containment and capping equipment and a relief well drilling installation are immediately mobilized to the site of the release.

Monitoring of spill

37 After a spill referred to in section 36, a program to monitor its adverse environmental effects that is developed in consultation with the Board is implemented. The program may include:

a. sensory testing of seafood for taint and chemical analysis for oil concentrations and any other contaminants, as applicable;

b. measuring the levels of contamination in recreational, commercial and traditionally harvested fish species, using those measurements to assess the risk to human health from the contamination and providing that assessment to the competent authorities, including those responsible for fishing area closures;

c. monitoring marine mammals, sea turtles and birds for signs of oiling or contamination and reporting the results of the monitoring to the Board, the Department of Fisheries and Oceans and the Department of the Environment; and

d. monitoring benthic organisms and habitats.

Well and wellhead abandonment plan

38 The activity is the subject of a well and wellhead abandonment plan that is developed at least 30 days before the day on which a well is planned to be abandoned. If the abandonment of a wellhead on the seafloor may interfere with Indigenous or commercial fisheries, the plan is developed in consultation with the Indigenous groups and commercial fishers with fishing licences that, in the opinion of the Department of Fisheries and Oceans, overlap with the activity area.

Notice

39 The Marine Communications and Traffic Services, the Northwest Atlantic Fisheries Organization Secretariat and the Canadian Hydrographic Services are given notice of the drilling and testing, the safety exclusion zones associated with that drilling and testing and the location where wellheads are abandoned and left on the seafloor.

Internet publication

40 An up-to-date version of the following information is published on the Internet and Indigenous groups are notified of the publication:

a. the communication plan referred to in section 4;

b. the results obtained from the implementation of the follow-up programs referred to in sections 6 and 7;

c. the results of the seabed investigation study referred to in sections 12 and 13;

d. the results of the marine mammal and sea turtle monitoring plan referred to in section 16;

e. the well control strategies referred to in section 23;

f. the spill impact mitigation assessment referred to in section 29;

g. the spill response plan referred to in section 31;

h. the well and wellhead abandonment plan referred to in section 38; and

i. the documents referred to in subparagraph 41(i)(i).

Board

41 Compliance with the following obligations under the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act* is a condition for the purpose of the Regulations:

a. the submission to the Board of a well and wellhead abandonment plan;

b. the submission to the Board of a marine mammal and sea turtles monitoring plan;

c. the submission to the Board of information with respect to known lost or damaged fishing gear attributed to the activity;

d. the submission to the Board of an ice management plan;

e. the submission to the Board of a plan for the avoidance of collisions between drilling installations and vessels or other foreseeable hazards;

f. the submission to the Board of a spill response plan and the submission of updates to such a plan;

g. the submission to the Board of an analysis of capping stack technology if drilling is anticipated in water depths in excess of 2 500 m or less than 500 m in order to confirm that the technology can be deployed and operated safely at the proposed depth;

h. the requirements that apply in the event of a spill, accident or malfunction, including those set out in the *Canada–Newfoundland and Labrador Offshore Petroleum Financial Requirements Regulations*, and the most recent version of the *Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity* issued jointly by the Canada-Nova Scotia Offshore Petroleum Board and the Board; and

i. the submission to the Board of any other plan, report or schedule with respect to measures for the protection of the environment, including:

    i. annual or final reports with respect to the drilling program, and

    ii. the execution plan and schedule for undertaking the activity.

Schedule D

***Impact Assessment Act* (S.C. 2019, c. 28, s. 1)**	***Loi sur l'évaluation d'impact*** **(L.C. 2019, ch. 28, art. 1)**
Regional assessments — region entirely on federal lands	**Évaluations régionales — territoire domanial**
92 The Minister may establish a committee — or authorize the Agency — to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is entirely on federal lands.	92 Le ministre peut constituer un comité chargé de procéder à l'évaluation des effets d'activités concrètes existantes ou futures exercées dans une région d'un territoire domanial ou autoriser l'Agence à y procéder.
93 (1) If the Minister is of the opinion that it is appropriate to conduct a regional assessment of the effects of existing or future physical activities carried out in a region that is composed in part of federal lands or in a region that is entirely outside federal lands,	93 (1) Si le ministre estime indiqué de faire procéder à l'évaluation des effets d'activités concrètes existantes ou futures exercées dans une région qui est soit composée de tout ou partie d'un territoire domanial et d'un territoire autre qu'un territoire domanial, soit située à l'extérieur d'un territoire domanial :
(a) the Minister may	a) le ministre peut :
(i) enter into an agreement or arrangement with any jurisdiction referred to in paragraphs (a) to (g) of the definition jurisdiction in section 2 respecting the joint establishment of a committee to conduct the assessment and the manner in which the assessment is to be conducted, or	(i) conclure avec toute instance visée à l'un des alinéas a) à g) de la définition de instance à l'article 2 un accord relatif à la constitution conjointe d'un comité chargé de procéder à l'évaluation et relatif aux modalités de l'évaluation,

(ii) authorize the Agency to conduct the assessment; and

(ii) autoriser l'Agence à procéder à l'évaluation;

(b) the Minister and the Minister of Foreign Affairs may enter into an agreement or arrangement with any jurisdiction referred to in paragraph (h) or (i) of that definition respecting the joint establishment of a committee to conduct the assessment and the manner in which the assessment is to be conducted.

b) le ministre et le ministre des Affaires étrangères peuvent conclure un tel accord avec toute instance visée aux alinéas h) ou i) de cette définition.

Committee — foreign state or international organization of states

(2) If an agreement or arrangement referred to in paragraph (1)(b) is entered into, the Minister must establish — or approve — the committee's terms of reference and appoint as a member of the committee one or more persons, or approve their appointment.

Comité — État étranger ou organisation internationale d'États

(2) En cas de conclusion d'un accord visé à l'alinéa (1)b), le ministre nomme le ou les membres du comité, ou en approuve la nomination, et fixe ou approuve le mandat de celui-ci.

Committee — federal authority, etc.

(3) In respect of an agreement or arrangement entered into under subparagraph (1)(a)(i), the Minister must

Comité – autorité fédérale, etc.

(3) Dans le cas d'un accord conclu en vertu du sous-alinéa (1)a)(i), le ministre :

(a) establish or approve the committee's terms of reference, including a specified time limit within which the assessment must be completed; and

a) fixe ou approuve le mandat du comité, y compris le délai pour terminer l'évaluation;

(b) appoint or approve the appointment of the members of the committee, of which at least one person must have been recommended by the jurisdiction with which the agreement or arrangement was entered into.

b) nomme les membres du comité ou en approuve la nomination, et au moins un des membres doit avoir été recommandé par l'instance avec laquelle l'accord a été conclu.

Agency's obligation to offer to consult

94 If the Agency conducts an assessment referred to in subsection 92 or 93, it must offer to consult and cooperate with any jurisdiction referred to in paragraphs (a) to (g) of the definition jurisdiction in section 2 that has powers, duties or functions in relation to the physical activities in respect of which the assessment is conducted.

Obligation de l'Agence — offre de consulter

94 Si elle procède à l'évaluation visée aux articles 92 ou 93, l'Agence est tenue d'offrir de consulter toute instance visée à l'un des alinéas a) à g) de la définition de instance à l'article 2 qui a des attributions relatives aux activités concrètes faisant l'objet de l'évaluation et de coopérer avec elle.

Committee's mandate and appointment of members

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

Mandat et nomination des membres — comité

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

Agency's mandate

(2) If the Minister authorizes the Agency to conduct an assessment under section 92, subsection 93(1) or section 95, he or she must establish the Agency's terms of reference with respect to the assessment.

Mandat - Agence

(2) S'il autorise l'Agence a procéder à une évaluation au titre de l'article 92, du paragraphe 93(1) ou de l'article 95, le ministre fixe le mandat de l'Agence à l'égard de l'évaluation.

Minister's obligations – request for assessment

97 (1) The Minister must respond, with reasons and within the prescribed time limit, to any request that an assessment referred to in section 92, 93 or 95 be conducted. The Minister must ensure that his or her response is posted on the Internet site.

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

Information available to public

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

Public participation

99 The Agency, or the committee, must ensure that the public is provided with an opportunity to participate meaningfully, in a manner that the Agency or committee, as the case may be, considers

Obligation du ministre — demande d'évaluation

97 (1) Le ministre répond, motifs à l'appui et dans le délai réglementaire, à toute demande de procéder à une évaluation visée aux articles 92, 93 ou 95. Il veille à ce que cette réponse soit affichée sur le site Internet.

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

Accès aux renseignements

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

Participation au public

99 L'Agence ou le comité, selon le cas, veille à ce que le public ait la possibilité de participer de façon significative, selon les modalités que l'Agence ou le comité, selon le cas, estime

appropriate, in any assessment referred to in section 92, 93 or 95 that it conducts

indiquées, à l'évaluation visée aux articles 92, 93 ou 95 à laquelle il ou elle procède.

Report to Minister

102 (1) On completion of the assessment that it conducts, the committee established under section 92 or 95 or under an agreement or arrangement entered into under subparagraph 93(1)(a)(i) or paragraph 93(1)(b) or the Agency, as the case may be, must provide a report to the Minister.

Rapport au ministre

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

Regulations – Minister

112 (1) The Minister may make regulations

Règlement du ministre

112 (1) Le ministre peut, par règlement :

(a.2) designating, for the purposes of section 112.1, a physical activity or class of physical activities from among those specified by the Governor in Council under paragraph 109(b), establishing the conditions that must be met for the purposes of the designation and setting out the information that a person or entity — federal authority, government or body — that is referred to in subsection (3) must provide the Agency in respect of the physical activity that they propose to carry out;

a.2) désigner, pour l'application de l'article 112.1, une activité concrète ou une catégorie d'activités concrètes parmi celles précisées par le gouverneur en conseil en vertu de l'alinéa 109b), établir les conditions devant être remplies pour la désignation et prévoir quels renseignements la personne ou l'entité — autorité fédérale, gouvernement ou organisme — visée au paragraphe (3) doit fournir à l'Agence à l'égard de l'activité concrète dont elle propose la réalisation;

Statutory Instruments Act

Loi sur les textes réglementaires

(4) The *Statutory Instruments Act* does not apply to a regulation made under paragraph 112(1)(a.2).

(4) La *Loi sur les textes réglementaires* ne s’applique pas aux règlements pris en vertu de l’alinéa 112(1)a.2).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-541-20 T-679-20
STYLE OF CAUSE:	ECOLOGY ACTION CENTRE, SIERRA CLUB FOUNDATION AND WORLD WILDLIFE FUND CANADA and MINISTER OF ENVIRONMENT AND CLIMATE CHANGE REPRESENTED BY THE ATTORNEY GENERAL OF CANADA and LE CONSEIL DES INNU DE EKUANITSHIT
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	MAY 25, 2021
JUDGMENT AND REASON :	BELL J.
DATED:	DECEMBER 13, 2021

APPEARANCES:

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Melissa Grant Sarah Drodge	FOR THE RESPONDENT
Sarah-Maude Belleville-Chénard S. Andrade	FOR THE INTERVENER

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