REVIEW PANEL
ROBERTS BANK TERMINAL 2 PROJECT

IN THE MATTER OF the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 37 and the regulations made thereunder;

AND IN THE MATTER OF the environmental assessment of the Roberts Bank Terminal 2 Project.

To:

Review Panel, Roberts Bank Terminal 2 Project

c/o Cindy Parker, Project Manager, Roberts Bank Terminal 2 Project

Canadian Environmental Assessment Agency

22nd Floor, Place Bell, 160 Elgin Street

Ottawa, ON K1A 0H3

BOOK OF AUTHORITIES FOR THE WRITTEN SUBMISSIONS OF T'SOU-KE NATION

April 15, 2019

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65302 British Columbia Limited, Appellant v. Her Majesty The Queen, Respondent

L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Heard: April 20, 1999
Judgment: November 25, 1999 *
Docket: 26352

Proceedings: reversing [1998] 1 C.T.C. 131 (Fed. C.A.); reversing [1995] 2 C.T.C. 2294 (T.C.C.)

Counsel: *S. Kim Hansen*, for Appellant.
Gordon Bourgard and *Brent Paris*, for Respondent.

***Bastarache J.* (*L'Heureux-Dubé J.* concurring):**

I. Introduction

1 This appeal raises the narrow question of whether a levy imposed pursuant to a provincial egg marketing scheme can be deducted as a business expense for the purposes of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the "Act"). The broader question posed by my colleague Justice Iacobucci is whether fines or other types of payments may be deductible from a taxpayer's income. While I agree with his answer to the narrow question, as well as with his characterization of the payment as a current expense rather than a capital outlay, and adopt his statement of the facts and judgments of the lower courts, I respectfully cannot agree that all types of fines and penalties are deductible as a matter of course.

II. Analysis

1. The Concept of Profit and the Scheme of the Income Tax Act

2 The Act sets out the mechanism for deducting expenses for the purpose of determining taxable income in broad language. Section 9 provides that "a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year." The Act provides no definition of the term "profit". In *Symes v. R.*, [1993] 4 S.C.R. 695 (S.C.C.), this Court examined the calculation of profit in detail and determined that the correct approach is to begin by asking whether a particular expense would be deductible according to well accepted principles of business practice. However, even if the deduction is otherwise consistent with the principles of commercial trading, it may still be disallowed through the express limitations in s. 18(1). In particular, s. 18(1)(*a*) prohibits deductions in respect of:

> ... an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property; ...

3 *Symes*, *supra*, explains that the calculation of profit is a question of law that does not necessarily coincide with generally accepted accounting principles. As Iacobucci J. instructs, at p. 724, "the s. 9(1) test is a *legal test* rather than

an accountancy test" (emphasis added). While the definition of profit for balance sheet purposes and for income tax purposes may coincide, they are not necessarily identical.

4 Accordingly, the question of statutory interpretation raised in the present case is whether levies, fines and other payments should, *in the legal sense*, be considered to be "made or incurred by the taxpayer for the purpose of gaining income from the business."

2. Legislative Intention and Statutory Interpretation

5 It is well established that the correct approach to statutory interpretation is the modern contextual approach, set out by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:

> ... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The modern rule is again described in *Driedger on the Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at p. 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning.

See also P.-A. Côté, *Interprétation des lois* (3rd ed. 1999), at pp. 364-73. Recent decisions have applied the modern approach in both tax and non-tax cases: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.*, [1996] 1 S.C.R. 963 (S.C.C.), at paras. 14-15; *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.), at para. 110; *Symes*, *supra*, at p. 744; *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536 (S.C.C.), at p. 578.

6 When considering the operation of ss. 9 and 18 in their entire context, I am persuaded that it was not the intention of Parliament to allow all fines to be deductible. I principally reach this conclusion for the simple reason that to so allow would operate to frustrate the legislative purpose of other statutes.

7 The statute book as a whole forms part of the legal context in which an act of Parliament is passed. As Driedger notes in the second edition, at p. 159, "one statute may influence the meaning of the other, so as to produce harmony within the body of the law as a whole"; see also Côté, *supra*, at pp. 433-40. Sullivan in *Driedger on the Construction of Statutes* is even more explicit in this regard, at p. 288:

> The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature. The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation.
>
> ... It is presumed that the legislature does not intend to contradict itself or to create inconsistent schemes. Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred. [Footnotes omitted.]

She explains, at footnote 14, that the Act as a whole combined with the statute book as a whole "constitutes the complete text of a legislative provision". Similarly, Côté, *supra*, explains, at p. 433, that:

> [TRANSLATION] Different enactments of the same legislature are supposedly as consistent as the provisions of a single enactment. All legislation of one Parliament is deemed to make up a coherent system. Thus interpretations

favouring harmony between statutes should prevail over discordant ones, because the former are presumed to better represent the thought of the legislator.

8 To allow all fines to be deductible as a matter of course would therefore be inconsistent with the modern contextual approach to statutory interpretation, which requires that weight be given to the total context of the Act, including its relationship to other statutes. As N. Brooks argues in "The Principles Underlying the Deduction of Business Expenses", in B. Hansen, V. Krishna and J. Rendall, eds., *Essays on Canadian Taxation* (1978), 249, at p. 297:

> If the legislative bodies and the courts are perceived as engaged in a cooperative venture of law-making, then the courts must assume the task of ensuring, as much as possible, that the matrix of statutory instruments do not operate at cross purposes.

9 This is similar to the approach adopted by the United States Supreme Court in *Tank Truck Rentals, Inc. v. C.I.R.* (1958), 356 U.S. 30 (U.S. Sup. Ct.). At issue there was whether fines imposed for violations of state maximum weight laws were deductible. The court unanimously held they were not, explaining, at p. 35:

> We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a state. To allow the deduction sought here would but encourage continued violations of state law by increasing the odds in favor of non-compliance. This could only tend to destroy the effectiveness of the State's maximum weight laws.

The court recognized, however, that this presumption against congressional intention to encourage violations of other laws had to be balanced against the intention to tax only the profits of a business.

10 I observe the same complexity in the Canadian context. Nevertheless, it would clearly frustrate the purposes of the penalizing statute if an offender was allowed to deduct fines imposed for violations of the *Criminal Code*, R.S.C., 1985, c. C-46, or related statutes as business expenses. The deduction of a fine imposed for a *Criminal Code* violation would suggest that the decision to commit a criminal offence may be a legitimate business decision. Moreover, such a deduction would have the unsavoury effect of reducing the penal and deterrent effect of the penalizing statute.

11 The Act has since been amended to prohibit the deduction of illegal bribery expenses (s. 67.5, added by 1994, c. 7, Sch. II (1991, c. 49), s. 46) and fines imposed pursuant to the Act itself (s. 18(1)(*t*), added by 1990, c. 30, s. 8). It is argued that this indicates that Parliament did not intend to prohibit the deduction of other fines and penalties. In my view, this observation does not address the general consistency issue or require that the principles sustaining the coherence of our statutory framework be set aside when deciding whether an expense is incurred for the purpose of producing income under s. 18(1)(a). Côté, *supra*, explains the frailties of the type of *a contrario* argument proposed by the appellant, at p. 426:

> [TRANSLATION] *A contrario*, especially in the form *expressio unius est exclusio alterius*, is widely used. But of all the interpretative arguments, it is among those which must be used with the utmost caution. The courts have often declared it an unreliable tool, and, as we shall see, it is frequently rejected.

He concludes, at p. 429:

> [TRANSLATION] Since it is only a guide to the legislature's intent, *a contrario* reasoning should certainly be set aside if other indications reveal that its consequences go against the statute's purpose, are manifestly absurd, or lead to incoherence and injustice that could not have been the desire of Parliament. [Footnotes omitted.]

12 In this case, it is possible to interpret the Act in a manner that is consistent with the object of other legislative enactments. To adopt the position that fines are always or generally deductible, without reference to the Act under which the fine was imposed, ignores the obligation to consider the intention of Parliament and to determine whether

the deduction would defeat or impair the effectiveness of other legislative enactments. Absent express provision to the contrary, the presumption that Parliament would not intend to encourage the violation of other laws must be considered.

13 In my view, it is important not to overlook the importance of the characterization of the expenditure. When considering other types of payments, such as fees levied under regulatory regimes with compensatory aims, it might be wholly consistent with the scheme to allow the charges to be deductible. Such charges, like user fees generally, are costs of engaging in a particular type of business and are levied to compensate for different types of regulated activities or to claw back profits earned in violation of the regulations. Allowing such charges to be deducted does not undermine their function, as the money still goes to the compensatory scheme. Thus, it would not undermine the charging statute for these levies to be deducted from a taxpayer's income.

14 The nature of the expenditure and the specific policy of the rule under which it became payable have also been recognized as the fundamental criteria for determining non-deductibility in a unanimous decision of the House of Lords in the very recent case of *McKnight (Inspector of Taxes) v. Sheppard*, [1999] 3 All E.R. 491 (U.K. H.L.), at p. 496. In that case, Lord Hoffmann reviewed prior case law in which expenditures resulting from a taxpayer's own misconduct had been disallowed because it constituted "behaviour outside the proper scope of his trade" or because they constituted "incidents which followed after the profits had been earned" (p. 495). He agreed with those decisions but found the explanations given too uncertain. As noted above, he concluded that the divergent answers given by the courts in cases on fines, penalties, damages and costs could be explained by looking to the nature of the expenditure and the policy of the rule providing for its payment. These criteria would permit the court to "easily conclude that the legislative policy would be diluted if the taxpayer were allowed to share the burden with the rest of the community by a deduction for the purposes of tax" (p. 496).

15 The distinction between deductible and non-deductible payment must therefore be determined on a case-by-case basis. The main factor in such a determination is whether the primary purpose of the statutory provision under which the payment is demanded would be frustrated or undermined. Statutory provisions imposing payments either as punishment for past wrongdoing or as general or specific deterrence against future law-breaking would be undermined if the fine could then be deducted as a business expense.

16 In contrast, if the legislative purpose behind a provision is primarily compensatory, its operation would not generally be undermined by the deduction of the expense. Where the purpose is mixed and the charging provisions have both a penal and a compensatory aim, a court should look for the primary purpose of the payment. In approaching this task, the court should consider, in particular, the nature of the mischief that the provision was designed to address.

17 I agree with my colleague, Iacobucci J., that public policy determinations are best left to Parliament. However, I am not suggesting that the deduction of penal fines be disallowed for public policy reasons, but instead because their deduction, not specifically authorized by the Act, would frustrate the expressed intentions of Parliament in other statutes if they were held to come under s. 18(1)(*a*) of the Act. In my view, penal fines are not expenditures incurred for the purpose of gaining or producing income in the legal sense. This concern is not so much one of public policy, morality or legitimacy, but one consistent with a realistic understanding of the accretion of wealth concept and the court's duty to uphold the integrity of the legal system in interpreting the *Income Tax Act*. As explained by McLachlin J. in *Hall v. Hebert*, [1993] 2 S.C.R. 159 (S.C.C.), at p. 169, in finding that a court could bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct:

> The basis of this power, as I see it, lies in the duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand. [Emphasis added.]

3. Application to the Facts

18 The impugned levy in the case at bar was imposed under s. 6 of the *British Columbia Egg Marketing Board Standing Order* (Rev. Jan. 1989), which derives its authority from s. 13(1)(k) of the *Natural Products Marketing (BC) Act*, R.S.B.C. 1979, c. 296, (the "*Marketing Act*") permitting the Lieutenant Governor in Council to vest in a marketing board or commission the power to:

> ... fix and collect levies or charges from designated persons engaged in the production or marketing of the whole or part of a regulated product and for that purpose to classify those persons into groups and fix the levies or charges payable by the members of the different groups in different amounts, and to use those levies or charges and other money and licence fees received by the commission
>
> (i) to carry out the purposes of the scheme;
>
> (ii) to pay the expenses of the marketing board or commission;
>
> (iii) to pay costs and losses incurred in marketing a regulated product;
>
> (iv) to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine; and
>
> (v) to set aside reserves for the purposes referred to in this paragraph;

19 In contrast, penalties are authorized by s. 20 of the *Marketing Act* which contemplates both fines and imprisonment as punishment for failing to comply with the Act or subordinate legislation:

> (1) Every person who fails to comply with this Act or the regulations or an order, rule, regulation, determination or decision made by the Provincial board or a marketing board or commission or made by virtue of a power exercisable under the federal Act, is liable on conviction, to a fine of not less than $100 and not more than $500 or to imprisonment not exceeding 6 months or to both a fine and imprisonment.

20 The comparison of these two provisions confirms that the over-quota levy assessed by the board pursuant to s. 13 of the *Marketing Act* was primarily compensatory and not penal. I would thus accept the trial judge's determination that this type of levy was akin to a "fee for service" incurred for the purpose of producing income:

> ... I do not view the levy imposed by the Board under the authority of paragraph 6(e) of the Standing Order, as a penalty. Indeed, there is a specific section in the B.C. Act dealing with penalties (section 20), and I do not see that these levies are assessed as a punishment imposed by statute as a consequence of the commission of an offense, but rather as an additional cost to the producer in the carrying out of his business.
>
> ([1995] 2 C.T.C. 2294, at p. 2304.)

The deduction of such a levy does not operate to frustrate or undermine the purposes of the *Marketing Act* or of the *British Columbia Egg Marketing Board Standing Order* because such levies are not primarily geared towards punishment or deterrence, but instead to the efficient operation of the regulatory scheme.

21 Thus, as the over-quota levy was a compensatory fee charged primarily to defray the costs of over-production and incurred for the purpose of gaining or producing income, I would allow its deduction for the purposes of the computation of profit.

III. Disposition

22 I would accordingly allow the appeal with costs in this Court and the court below.

***Iacobucci J.* (*Gonthier, McLachlin, Major, Binnie JJ.* concurring):**

I. Introduction

23 At issue in the present appeal is whether levies, fines and penalties may be deducted as business expenses from a taxpayer's income. The resolution of this issue involves questions of statutory interpretation and the extent to which public policy considerations may enter into this interpretation. It is my opinion that as a general principle, it is Parliament, and not the courts, who should decide which expenses incurred for the purpose of earning business income should not be deductible. Parliament has made such decisions on many occasions; this is simply not one of them. As such, levies, fines and penalties which are incurred for the purpose of earning income are deductible business expenses.

II. Facts

24 The appellant, 65302 British Columbia Ltd. (formerly Veekens Poultry Farms Ltd.), carries on a poultry farm business near Prince George, British Columbia. The farm produces both meat production chickens and egg-laying chickens that produce eggs for the table market. At the relevant times, the appellant was a registered producer under British Columbia Regulation 173/67, otherwise known as the *British Columbia Egg Marketing Scheme, 1967* (the "Scheme"). The Scheme was enacted under the *Natural Products Marketing (BC) Act*, R.S.B.C. 1979, c. 296, previously R.S.B.C. 1960, s. 263, (the "B.C. Act") and established the British Columbia Egg Marketing Board (the "Board") to administer the Scheme.

25 Pursuant to its authority under the Scheme, the Board established a quota system whereby egg producers in the province are assigned quotas for egg production. The quota determines the number of layer hens that may be kept by each producer. Because of local market conditions, the appellant made a decision to operate over his allocated quota for the years 1984 to 1988. The appellant was concerned that if it did not produce over quota, it would lose its major customer, Overwaitea Foods, which was expanding in the area. Additional quota was not available for purchase in the Prince George area during these years, but quota was available in the Lower Mainland. However, the price was $50 per bird compared to $30 per bird in the Prince George area.

26 The appellant did not inform the Board of its over-quota production. In 1988 an inspector from the Board, acting under a new policy requiring him to check all the barns on the appellant's property, discovered an estimated 6,700 more layers than permitted under the appellant's quota. The Board imposed an over-quota levy on the appellant pursuant to its authority under s. 6(e) of the *British Columbia Egg Marketing Board Standing Order*. After negotiations with the Board, the appellant agreed to pay an over-quota levy of $269,629.69 and to dispose of its excess layers. In 1989 the appellant purchased additional quota.

27 When filing its returns under the *Income Tax Act*, R.S.C., 1985, c.1 (5th supp.) (the "Act"), the appellant included in its income the profit from its over-quota production. In 1988, the appellant deducted the over-quota levy as a business expense pursuant to ss. 9(1) and 18(1)(*a*) of the Act. This deduction resulted in a non-capital loss of $61,879 that was carried back, pursuant to s. 111 of the Act, to its 1985 taxation year. Subsequently, in its 1989 taxation year, the appellant deducted $9,704.50 for interest paid on the unpaid balance of the levy and legal expenses of $3,766 incurred for representation in respect of the over-quota levy.

28 The appellant was reassessed in respect of its 1985, 1988, and 1989 taxation years by Notices of Reassessment, dated November 14, 1991, which disallowed the deduction of the over-quota levy, loss carry back, interest and legal expenses. The appellant appealed to the Tax Court of Canada, where the parties agreed that the deductibility of the loss carry back, interest, and legal expenses depended upon the deductibility of the over-quota levy. The Tax Court held that the over-quota levy was deductible as a business expense and that this deduction was not prohibited by s. 18(1)(*b*) of the Act, which prevents taxpayers from deducting payments made on account of capital. The Minister of National Revenue (the "Minister") appealed this decision to the Federal Court of Appeal, which allowed the appeal and held that the over-quota levy was not deductible. The appellant now appeals from that decision to this Court.

III. Relevant Statutory Provisions

29 *Natural Products Marketing (BC) Act*, R.S.B.C. 1979, c. 296

12. (1) The Lieutenant Governor in Council may, in accordance with section 2, provide for the establishment of a marketing board to administer, under the supervision of the Provincial board, regulations for the marketing of a regulated product.

13. (1) Without limiting the generality of the other provisions of this Act, the Lieutenant Governor in Council may vest in a marketing board or commission any or all of the following powers:

...(k) to fix and collect levies or charges from designated persons engaged in the production or marketing of the whole or part of a regulated product and for that purpose to classify those persons into groups and to fix the levies or charges payable by the members of the different groups in different amounts, and to use those levies or charges and other money and licence fees received by the commission.

(i) to carry out the purposes of the scheme;

(ii) to pay the expenses of the marketing board or commission;

(iii) to pay costs and losses incurred in marketing a regulated product;

(iv) to equalize or adjust returns received by producers of regulated products during the periods the marketing board or commission may determine; and

(v) to set aside reserves for the purposes referred to in this paragraph;

. . . . .

20. (1) Every person who fails to comply with this Act or the regulations or an order, rule, regulation, determination or decision made by the Provincial board or a marketing board or commission or made by virtue of a power exercisable under the federal Act, is liable on conviction, to a fine of not less than $100 and not more than $500 or to imprisonment not exceeding 6 months or to both a fine and imprisonment.

British Columbia Egg Marketing Scheme, 1967 (B.C. Reg. 173/67)

37 The board shall have authority within the Province to promote, regulate and control the production, transportation, packing, storing and marketing, or any of them, of the regulated product, including the prohibition of such production, transportation, packing, storing and marketing, or any of them, in whole or in part, and without limiting the generality of the foregoing shall have the following authority:

(v) to make orders fixing, imposing and collecting levies or charges from registered producers engaged in the marketing of any category of the regulated product, and for such purposes to classify registered producers into groups and to fix the levies or charges payable by the members of the different groups in different amounts, and to use such levies or charges for the board's purposes, including the creation of reserves and the payment of expenses and losses resulting from the sale or disposal of regulated product and the equalization or adjustment among registered producers of moneys realized from the sale thereof during such period or periods of time as the board may determine.

British Columbia Egg Marketing Board Standing Order (Rev: Jan. 1989)

Section 6 Levies and fees

(a) Levy - A levy (the provincial levy) is hereby imposed on each Registered Producer of an amount per dozen from time to time fixed by the Board, on the number of dozens of eggs marketed by him excluding any eggs, if any, marketed by him in interprovincial or export trade.

(b) Levy-Layers - A levy is hereby imposed on each Registered Producer of an amount from time to time fixed by the Board for each layer which may be kept or maintained by the Registered Producer for a period less:

(i) The aggregate amount for that period fixed by the Board as the levy payable per dozen in respect of eggs marketed by him in intraprovincial trade, and:

(ii) If applicable, the amount for that period fixed by the Canadian Egg Marketing Agency as the federal levy payable per dozen in respect of eggs marketed by him in interprovincial and export trade.

. . . . .

(e) Over-Quota Levy - A levy is hereby imposed in the amount of $0.08 (eight cents) per day in respect of each layer kept or maintained by a Registered Producer or Commercial Hatching Egg Producer at any time in excess of the number of layers which may be kept or maintained by that Registered Producer or Commercial Hatching egg Producer for the period in question. The levy shall be calculated and payable for the entire period for which excess layers are kept or maintained until such date as it is established to the Board's satisfaction that the excess layers have been disposed of by the Registered Producer or Commercial Hatching Egg Producer.

Income Tax Act, R.S.C. 1985, c. 1 (5th supp.)

9. (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for that year.

18. (1) In computing the income of a taxpayer from a business or property no deduction shall be made in respect of

(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property;

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part;

. . . . .

67. In computing income, no deduction shall be made in respect of an outlay or expense in respect of which any amount is otherwise deductible under this Act, except to the extent that the outlay or expense was reasonable in the circumstances.

IV. Judicial History

A. Tax Court of Canada, [1995] 2 C.T.C. 2294 (T.C.C.)

30 Lamarre J.T.C.C. noted that the B.C. Act drew a distinction between the Board's powers to fix and collect levies and charges (s. 13) and the power to impose a penalty (s. 20). Further, when dealing with similar legislation in *Reference re Agricultural Products Marketing Act (Canada)*, [1978] 2 S.C.R. 1198 (S.C.C.), the Supreme Court of Canada mentioned that the purpose of the levies was to fund the boards and to provide for surplus removal of over-quota production. Laskin C.J. said the levies could be regarded as a "fee for services". In light of these considerations, Lamarre J.T.C.C. concluded that the levy imposed by the Board under s. 6(e) of the Standing Order was not a penalty. Such levies are not assessed as a punishment imposed by statute as a consequence of the commission of an offence, but are instead an additional cost to a producer of carrying on his or her business. In Lamarre J.T.C.C.'s view, both the regular and the over-quota levies can be characterized as "fees for services". Simply because the levy resulted in a loss to the appellant in 1988 is not proof that the Standing Order was penalizing in the legal sense.

31 Even if the levy could be described as a penalty, Lamarre J.T.C.C. concluded that it could still be deductible as a business expense pursuant to s. 18(1)(*a*) of the Act. In *Imperial Oil Ltd. v. Minister of National Revenue* (1947), 3 D.T.C. 1090 (Can. Ex. Ct.), a payment of damages and legal costs by the taxpayer company to the owners of a vessel sunk

in a collision with one of the taxpayer company's vessels was held to be deductible on the grounds that collisions were "an ordinary risk of the marine operations part of the appellant's business and really incidental to it." Likewise, in *TNT Canada Inc. v. R.*, [1988] 2 C.T.C. 91 (Fed. T.D.), and *Day & Ross Ltd. v. R.* (1976), [1977] 1 F.C. 780 (Fed. T.D.), fines relating to trucking regulations were held to be deductible according to a two-part test. The first part of the test asks whether the payment of the fines was an outlay for the purpose of producing income, pursuant to s. 18(1)(*a*). The second part of the test asks whether public policy considerations preclude deductibility.

32 Lamarre J.T.C.C. concluded that the over-quota levy at issue "resulted from the day-to-day operation of egg production business and was incurred as a risky but necessary expense" (at p. 2306). In her view, over-quota egg production was no more an outrageous violation of public policy than the statutory infractions at issue in *Day & Ross, supra*, and *TNT, supra*. The fact that the outlay did not result in income but rather caused a loss in the year it was assessed did not prevent it from being deductible, as it is the purpose of the expenditure that must be assessed: *Royal Trust Co. v. Minister of National Revenue* (1957), 57 D.T.C. 1055 (Can. Ex. Ct.).

33 Lamarre J.T.C.C. also dismissed the argument that the over-quota levy was in fact an outlay on account of capital, the deduction of which would be prohibited by s. 18(1)(*b*) of the Act. It did not bring into existence an advantage of enduring benefit or provide an enduring advantage for the trade. It was a recurrent expense likely to happen occasionally in the egg production business. Nor was the over-quota levy an expenditure to preserve a capital asset, i.e., the quota. There is only a possibility that a registered producer might lose its licence if the levy was not paid and in fact only once in the past was a producer's quota suspended by the Board.

34 Lamarre J.T.C.C. allowed the appeal with costs.

B. Federal Court of Appeal (1997), [1998] 1 C.T.C. 131 (Fed. C.A.)

35 Desjardins J.A., for the court, held that regardless of whether the levy is characterized as a penalty or not, it is imposed in order to carry out the purpose of the scheme, which is the orderly production of eggs in British Columbia. Further, Desjardins J.A. noted that the Federal Court of Appeal had previously held that business is to be carried on without any infraction of the law: *Amway of Canada Ltd. v. R.* (1996), 193 N.R. 381 (Fed. C.A.). In the instant case, the appellant could have carried on his business in such a way as to avoid the over-quota production it intentionally pursued.

36 Desjardins J.A. also held that there is a strong public policy argument precluding the appellant from claiming the levy as a business expense. She stated, at p. 132:

> It is clearly inconsistent with the purpose of such a marketing scheme if producers are able to take action similar to that of the respondent and successfully claim as business expenses levies encountered in excess of permissible allotments.

37 Desjardins J.A. allowed the appeal with costs, set aside the Tax Court's decision, and dismissed the appellant's appeal of the Minister's assessments for the taxation years 1985, 1988 and 1989.

V. Issues

38

1. What is the proper approach to the deduction of fines, penalties and statutory levies from income under the Act?

2. If statutory levies are deductible under s. 18(1)(*a*) of the Act, is the levy here more properly characterized as a capital outlay or loss, the deduction of which is prohibited by s. 18(1)(*b*) of the Act?

VI. Analysis

A. Section 18(1)(a) of the Income Tax Act

(1) The Concept of Profit in s. 18(1)(a)

39 The central question in this appeal is whether an over-quota levy may be deducted as a business expense from a taxpayer's business income. It has been argued that the levy was non-deductible because it was an "avoidable" fine or penalty. For the reasons I give below, the characterization of the levy as a "fine or penalty" is of no consequence, because in my view, the income tax system does not distinguish among levies, fines and penalties. If the expense is incurred for the purpose of earning business income, it is deductible. Section 9(1) of the Act provides that a taxpayer's business income for the tax year is the profit from that business. It is well established that the concept of profit found in s. 9(1) authorizes the deduction of business expenses, as profit is inherently a net concept, and such deductions are allowed under s. 9(1) to the extent that they are consistent with "well accepted principles of business (or accounting) practice" or "well accepted principles of commercial trading": *Symes v. R.*, [1993] 4 S.C.R. 695 (S.C.C.), at pp. 722-23. These expenses may nonetheless be prohibited by the limiting provisions found in s. 18(1), although many of these provisions are also consistent with well accepted principles of business practice. The present appeal concerns the language of s. 18(1)(*a*), which provides that, in computing taxable business income, no deduction may be made in respect of

> an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business or property.

The majority of this Court in *Symes*, *supra*, at p. 736, stated:

> ... no test has been proposed which improves upon or which substantially modifies a test derived directly from the language of s. 18(1)(*a*). The analytical trail leads back to its source, and I simply ask the following: did the appellant incur [the impugned] expenses for the purpose of gaining or producing income from a business?

To rephrase this language in the context of the present appeal, the question to ask is: did the appellant incur the over-quota levy for the purpose of gaining or producing income from its business?

40 On its face, I would answer this question in the affirmative. I agree with Lamarre J.T.C.C., in the Tax Court, that the levy was incurred as part of the appellant's day to day operations. The decision to produce over- quota was a business decision made in order to realize income. The appellant deliberately produced over-quota in order to maintain its major customer, who was then expanding in the area, until it could purchase additional quota at what it thought was an affordable price.

41 However, the respondent urges this Court to follow Lord Sterndale's distinction between "a loss connected with the business" and "a fine imposed upon the company personally": *Commissioners of Inland Revenue v. Von Glehn*, [1920] 2 K.B. 553 (Eng. C.A.). The argument is that the nature of the sanction is such that it is more properly viewed as attaching to the business entity itself rather than to the business of the entity. *Alexander von Glehn* has been followed in other common law jurisdictions: see *Robinson v. Commissioner of Inland Revenue*, [1965] N.Z.L.R. 246 (New Zealand S.C.); *Herald & Weekly Times v. Federal Commissioner of Taxation* (1932), 2 A.T.D. 169 (Australia H.C.); *Mayne Nickless Ltd. v. Federal Commissioner of Taxation* (1984), 71 F.L.R. 168 (Australia Vic. Sup. Ct.).

42 I do not find these cases helpful to the present appeal given the differences in the applicable taxation statues. According to Lord Sterndale in *Alexander von Glehn, supra*, three rules of the *Income Tax Act*, 1842, governed the deductibility of the fine at issue in that case. The third rule that he cited provided (at p. 563):

> In estimating the balance of the profits or gains to be charged ... no sum shall be set against or deducted from ... such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation. [Emphasis added.]

All three members of the Court of Appeal agreed that the penalty at issue was not wholly and exclusively laid out or expended for the purposes of trade or, what amounts to the same thing, that the penalties were not expenditures *necessary* to earn the profits (at pp. 565-66, 569, and 573).

43 I note that the New Zealand and Australian cases cited by the respondent dealt with similarly worded taxation statutes to that at issue in *Alexander von Glehn*. Canada's *Income War Tax Act*, R.S.C. 1927, c. 97, also prohibited the deduction of expenses not "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". However, in 1948 this section was replaced with the precursor to our current s. 18(1)(*a*) of the Act, dropping the language of "wholly, exclusively and necessarily laid out or expended". As this Court affirmed in *Symes* at p. 732:

> the current wording of s. 18(1)(*a*) is sufficient justification for the view that Parliament acted to amend its predecessor section in such a way as to broaden the scope for business expense deductibility.

In my view, following case law interpreting statutes that employed similarly restrictive language as our *Income War Tax Act* would be to ignore the clear intention exhibited by Parliament since 1948 to broaden the scope of deductible business expenses. Indeed, in *Mayne Nickless, supra*, the Supreme Court of Victoria declined to consider Canadian case law, stating at page 183 that it was not of any great assistance given the different legislation involved.

44 The respondent also asks this Court to follow the Federal Court of Appeal's decision in *Amway, supra*. The central issue in *Amway* was also the deductibility of fines and penalties pursuant to s. 18(1)(*a*) of the Act. Strayer J.A. held, for the court, that "one legitimate test of whether fines should be deductible as a business expense is that of avoidability of the offences" (p. 389). In support of this proposition, Strayer J.A. cited *Alexander von Glehn, supra, Imperial Oil, supra, Day & Ross, supra*, and *TNT supra*.

45 I have already mentioned why I do not find *Alexander von Glehn*, helpful in the context of our current Act. For similar reasons, I would decline to follow *Imperial Oil*. In that case, Thorson P. held that the damages and costs associated with a negligence action against the taxpayer were properly deducted as business expenses where "the nature of the operations is such that the risk of negligence on the part of the taxpayer's servants in the course of their duties or employment is really *incidental* to such operations" (p. 1100, emphasis added). However, *Imperial Oil* concerned the application of the *Income War Tax Act* which, as I have already outlined, required that an expense be "wholly, exclusively and necessarily" made for the purpose of earning income. Thorson P.'s statement, at p. 1100, must therefore be understood in context:

> Where income is earned from certain operations, as it was by the appellant from its marine operations, all the expenses wholly, exclusively and necessarily incidental to such operations must be deducted as the total cost thereof in order that the amount of the profits or gains from such operations that are to be assessed may be computed. Such cost includes not only all the ordinary operations costs but also all moneys paid in discharge of the liabilities normally incurred in the operations. When the nature of the operations is such that the risk of negligence on the part of the taxpayer's servants in the course of their duties or employment is really incidental to such operations, as was the fact in the present case, with its consequential liability to pay damages and costs, then the amount of such damages and costs is properly included as one of the items of the total cost of such operations. It may, therefore, properly be described as a disbursement or expense that is wholly, exclusively and necessarily laid out as part of the process of earning the income from such operations. [Emphasis added.]

In the absence of similar language in the current Act, I find it difficult to endorse the requirement that expenses need be incidental, in the sense that they were unavoidable, in order to be deductible under s. 18(1)(*a*).

46 *Day & Ross, supra*, is a more recent case, but at best I find it ambiguous on the issue. While Dubé J. held that the fines at issue, levied for violations of provincial highway weight restriction laws, were in fact "necessary expenses" and "inevitable", it is not clear whether these considerations went to establish that the fines fell within the wording of s. 12(1)(*a*) (now s. 18(1)(*a*)) of the Act or that the fines were not "outrageous transgressions of public policy".

47 Indeed, in *TNT, supra*, Cullen J. purports to follow *Day & Ross* and yet appears not to follow the avoidability test. At issue in *TNT* were two types of fines. The first type was held to fall clearly within the *ratio* of *Day & Ross*, as they were unavoidable. With respect to the second type of fine, levied because a "foreign carrier [was] used in Canada and made more than one stop which conduct is prohibited by law" (at p. 100), the Minister argued that the fines were avoidable and that the taxpayer was deliberately flouting the law. In response, Cullen J. stated, at p. 100:

> Counsel also made this comment: "*it may have been good economics and more expeditious* but it was against public policy". That comment buttresses my own view that these actions were taken to earn income and therefore were a legitimate expense under paragraph 18(1)(a) of the Act. The taxpayer has certainly met the "purpose test" *vis-à-vis* this penalty. [Emphasis added by Cullen J.]

48 With respect, I differ from Strayer J.A.'s interpretation of *TNT* in *Amway, supra*, as I do not read Cullen J.'s statement as a finding that the second type of fine was an unavoidable expense. Rather, I interpret his statement to mean that so long as the fines were incurred in order to earn income, they fell within the meaning of s. 18(1)(*a*) of the Act. Cullen J. then held that the deduction of the fines should not be disallowed on the basis of public policy, since the amount of the second type of fine at issue was lumped together with the first type and could not easily be separated, and since the underlying offences were small in number (at p. 101).

49 Even if these cases clearly established a test of avoidability, I would decline to endorse it. As Strayer J.A. indicated in *Amway, supra*, this test would only apply to fines and penalties and not the deductibility of other types of expenses (at p. 390). With respect, I do not see how the language of s. 18(1)(*a*) can support a requirement of avoidability, let alone one that only attaches to fines and penalties.

(2) Statutory Interpretation and Public Policy

50 This Court has on many occasions endorsed Driedger's statement of the modern principle of statutory construction: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21. This rule is no different for tax statutes: *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536 (S.C.C.), at p. 578.

51 However, this Court has also often been cautious in utilizing tools of statutory interpretation in order to stray from clear and unambiguous statutory language. In *Antosko v. Minister of National Revenue*, [1994] 2 S.C.R. 312 (S.C.C.), at p. 326-27, this Court held:

> While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed.

In discussing this case, P.W. Hogg and J.E. Magee, while correctly acknowledging that the context and purpose of a statutory provision must always be considered, comment that "[i]t would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision": *Principles of Canadian Income Tax Law* 2nd ed., 1997 at pp. 475-76. This is not an endorsement of a literalist approach to statutory interpretation, but a recognition that in applying the principles of interpretation to the Act, attention must be paid to the fact that the Act is one of the most detailed, complex, and comprehensive statutes in our legislative inventory and courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation.

52 The most compelling argument put to this Court in the present appeal is that Parliament could not have intended s. 18(1)(*a*) to permit the deduction of fines and penalties as such a result violates public policy. Therefore, even if fines

and penalties are allowable expenses within the ordinary meaning of s. 18(1)(*a*), this meaning must be modified in order to conform to a broader appreciation of Parliament's intent, and thereby avoid a repugnant disharmony or absurdity. In *Amway, supra*, the Federal Court of Appeal also took this approach, holding, at para. 31, that even if the fine or penalty in question is unavoidable, its deduction should be disallowed where "that fine or penalty is imposed by law for the purpose of punishing or deterring those who through intention or a lack of reasonable care violate the laws." Similarly, Professor Neil Brooks argues that this consideration is legitimate for courts to invoke even in the absence of statutory language to that effect, because of "the broad interpretative principle that in discharging their function they [courts] should not construe one statute in such a way that the objectives of another statute are frustrated": "The Principles Underlying the Deduction of Business Expenses" in B. Hansen, v. Krishna and J. Rendall, eds., *Canadian Taxation* 1981), 189, at p. 242.

53 The United States Supreme Court took this position in *Tank Truck Rentals, Inc. v. C.I.R.* (1958), 356 U.S. 30 (U.S. Sup. Ct.). At issue was whether fines imposed for the operation of trucks in violation of state maximum weight laws were "ordinary and necessary" business expenses under § 23 (a)(1)(A) of the *Internal Revenue Code* of 1939. The court held at pp. 33-35 that:

> A finding of "necessity" cannot be made ... if the allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof. ...
>
> ... It is clear that assessment of the fines was punitive action and not a mere toll for use of the highways: the fines occurred only in the exceptional instance when the overweight run was detected by the police. Petitioner's failure to comply with the state laws obviously was based on a balancing of the cost of compliance against the chance of detection. Such a course cannot be sanctioned, for judicial deference to state action requires, whenever possible, that a State not be thwarted in its policy. We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State. To allow the deduction sought here would but encourage continued violations of state law by increasing the odds in favor of noncompliance. This could only tend to destroy the effectiveness of the State's maximum weight laws.

However, the court recognized that this presumption against congressional intent to encourage the violation of declared public policy had to be balanced against the congressional intent to tax only net income. The test for non-deductibility therefore turns on "the severity and immediacy of the frustration resulting from allowance of the deduction" (at p. 35). I note that in 1969 Congress amended § 162 of the *Internal Revenue Code* to disallow, *inter alia*, the deduction of "any fine or similar penalty paid to a government for the violation of any law."

54 Invoking public policy concerns raises the question, as put by Richard Krever, of *whose* public policy should be furthered by courts in disallowing the deduction of fines and penalties ("The Deductibility of Fines: Considerations From Law and Policy Perspectives" (1984), 13 *Austl. Tax Rev.* 168, at p. 185). As he notes, "[a] taxpayer may incur a fine in one jurisdiction as a result of activities producing assessable income that are undertaken on a nation-wide basis and allowed in all other States" (p. 185). Further, Krever points out on the same page:

> A more difficult problem arises with fines incurred in foreign jurisdiction where the illegal activity was carried out to earn assessable income that is taxed in Australia. Does comity require our courts to give effect to the public policy of other jurisdictions? If so, would this policy extend to situations where the fine was levied for actions not considered illegal in Australia or considered to be contrary to our public policy?

55 To my mind, this difficulty, is highlighted by the United States Supreme Court's decision in *C.I.R. v. Sullivan* (1958), 356 U.S. 27 (U.S. Sup. Ct.), decided at the same time as *Tank Truck, supra*. The issue in that case was the amount paid for wages and rent in the course of operating illegal bookmaking establishments. Under Illinois law, the payment of rent and wages under such circumstances was illegal and so the case would appear to be similar in principle to *Tank Truck*. However, the court allowed the deduction of rent and wages, stating, *inter alia* at pp. 28-29:

> At times the policy to disallow expenses in connection with certain condemned activities is clear. ... Any inference of disapproval of these expenses as deductions is absent here. The Regulations, indeed, point the other way, for they make the federal excise tax on wagers deductible as an ordinary and necessary business expense. This seems to us to be recognition of a gambling enterprise as a business for federal tax purposes. The policy that allows as a deduction the tax paid to conduct the business seems sufficiently hospitable to allow the normal deductions of the rent and wages necessary to operate it.

Therefore, federal policy was held to be sufficiently amenable to the deduction despite the possible frustration of state policy.

56 In this connection, I note that in calculating income, it is well established that the deduction of expenses incurred to earn income generated from *illegal* acts is allowed. For example, not only is the income of a person living from the avails of prostitution liable to tax, but the *expenses* incurred to earn this income are also deductible: *Minister of National Revenue v. Eldridge*, [1964] C.T.C. 545 (Can. Ex. Ct.). See also *Espie Printing Co. v. Minister of National Revenue*, [1960] Ex. C.R. 422 (Can. Ex. Ct.). Allowing a taxpayer to deduct expenses for a crime would appear to frustrate the *Criminal Code*; however, tax authorities are not concerned with the legal nature of an activity. Thus, in my opinion, the same principles should apply to the deduction of fines incurred for the purpose of gaining income because prohibiting the deductibility of fines and penalties is inconsistent with the practice of allowing the deduction of expenses incurred to earn illegal income.

57 This brings us to the crux of the issue. While fully alive to the need in general to harmonize the interpretation of different statutes, the question here arises in the specific context of a tax collection system based on self-assessment. Parliament designed the system and it is open to Parliament, as part of that design, to choose for itself to resolve any apparent conflicts between policies underlying tax provisions and other enactments. Parliament has indicated its intention to perform this role, not only in the design of the self-assessment system, which requires individuals without legal training to work through a complex series of provisions to calculate net income, for which maximum explicit guidance is necessary, but more specifically in its identification in the Act itself of certain outlays which the taxpayer is not permitted to deduct, as discussed below. Having recognized the problem of potentially conflicting legislative policies, Parliament has provided the solution, which is that in the absence of Parliamentary direction in the *Income Tax Act* itself, outlays and expenses are deductible if made for the purpose of gaining or producing income.

58 The argument is also put to this Court that Parliament did not intend to dilute the deterrent effect of a fine or penalty. If this Court is to accept this argument, then it would have to determine whether any particular fine or penalty was in fact meant to be deterrent in nature. If a fine was instead meant to be compensatory then there is no public policy frustrated by allowing its deduction: see Brooks, *supra*, at p. 244-45. Furthermore, this argument requires a court to establish that the deduction of the fine or penalty would decrease its intended effect. As Professor Vern Krishna has noted, although concluding that certain fines and penalties should not be deductible, the dilution argument may be

> turned around to ask whether the denial of a deduction may have the ultimate effect of increasing a civil or criminal penalty, which may or may not have been intended by the legislative policy behind the statute violated. Thus, it is conceivable that indiscriminate judicial application of a public policy limitation to all situations may cause the legislative policy behind an enactment to be varied in an unintended manner.
>
> ("Public Policy Limitations on the Deductibility of Fines and Penalties: Judicial Inertia" (1978), 16 *Osgoode Hall L. J.* 19, at pp. 32-33.)

59 These difficulties outlined above demonstrate that the public policy arguments ask courts to make difficult determinations with questionable authority. Moreover, they place a high burden on the taxpayer who is to engage in this analysis in filling out his or her income tax return and would appear to undermine the objective of self-assessment

underlying our tax system: see Hogg and Magee, *supra*, at p. 243. In addition, it is my opinion that the fundamental principles and provisions of the Act in the final analysis dictate that the rule be deductibility.

60 Tax neutrality and equity are key objectives of our tax system. Tax neutrality is violated by tax concessions, since the purpose of such concessions is to influence people's behaviour through the tax system by providing incentives for engaging in certain types of behaviour. For example, a deduction for an RRSP or a charitable contribution is a tax concession. This is to be distinguished from deductions allowed for the purpose of gaining an accurate picture of a taxpayer's *net* income. One of the underlying premises of our tax system is that the state taxes only net, rather than gross, income because it is net income that measures a taxpayer's ability to pay. As has been pointed out, this results in business-related fines being deductible: see Hogg and Magee, *supra*, at p. 243. Moreover, Hogg and Magee, *supra*, note, at p. 40, "in a system that is generally related to ability to pay, the provisions that violate neutrality (tax concessions) tend also to violate equity by abandoning the criterion of ability to pay in favour of other policy objectives."

61 Business expenses allowed under s. 18(1)(*a*) are deductible because of the concern to tax only net income, not in order to provide tax concessions to businesses. Such deductions are therefore consistent with the principles of tax neutrality and equity The argument to disallow fines and penalties is thus an argument that the court should violate these principles in the name of public policy.

62 While various policy objectives are pursued through our tax system, and do violate the principles of neutrality and equity, it is my view that such public policy determinations are better left to Parliament. Particularly apposite is this Court's statement in *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), at para. 112, that "a legislative mandate is apt to be clearer than a rule whose precise bounds will become fixed only as a result of expensive and lengthy litigation." This statement was approved of by the Court in *Canderel Ltd. v. R.*, [1998] 1 S.C.R. 147 (S.C.C.), at para. 41, adding that "[t]he law of income tax is sufficiently complicated without unhelpful judicial incursions into the realm of lawmaking. As a matter of policy, and out of respect for the proper role of the legislature, it is trite to say that the promulgation of new rules of tax law must be left to Parliament".

63 This approach and conclusion are supported by the fact that Parliament has expressly disallowed the deduction of certain expenses on what appear to be public policy grounds. For example, s. 67.5, added by R.S. 1994, c.7, Sch. II (1991, c.40), s. 46, prohibits the deduction of any outlay or expense made

> for the purpose of doing anything that is an offence under any of sections 119 to 121, 123 to 125, 393 and 426 of the Criminal Code or an offence under section 465 of that Act as it relates to an offence described in any of those sections.

In the absence of s. 67.5, bribes to public officials would be deductible (and taxable in the hands of the "bribee"). This is a situation where Parliament, specifically chose to *prohibit* a deduction which would otherwise have been allowed. In addition, taxpayers are prohibited from deducting payments of interest and penalties levied under the Act itself (s. 18(1)(*t*) added by R.S. 1990, c. 39, s. 8), statutory royalties (s. 18(1)(*m*)), and payments required under the *Petroleum and Gas Revenue Act* (s. 18(1)(*l*.1)).

64 These provisions in the Act also reduce the force of the argument that allowing the deduction of fines and penalties permits the taxpayer to profit from his or her own wrongdoing. This line of reasoning is often traced to the statement of Lord Atkin in *Beresford v. Royal Insurance Co.*, [1938] 2 All E.R. 602 (U.K. H.L.), at p. 607: "the absolute rule is that the Courts will not recognize a benefit accruing to a criminal from his crime." However, as several commentators note, *Beresford* involved a payment under an insurance policy where the insured had committed suicide, at a time when suicide was characterized as a heinous crime. See E. Krasa, "The Deductibility of Fines, Penalties, Damages, and Contract Termination Payments" (1990) 38 *Can. Tax J.* 1399, at p. 1417 and Krishna, *supra*, at pp. 31-32. There is therefore little authority to extend Lord Atkin's statement more generally, especially when one considers the clear authority, as mentioned above, to the effect that expenses incurred in the pursuit of illegal activities are deductible expenses.

65 Moreover, given that Parliament has expressly turned its mind to the deduction of expenses associated with certain activities that are offences under the *Criminal Code*, outlined in s. 67.5 of the Act, I do not find a legitimate role for judicial amendment on the general question of deductibility of fines and penalties. Since the Act is not silent on the issue of restricting the deduction of some expenses incurred for the purpose of gaining income, this is a strong indication that Parliament did direct its attention to the question and that where it wished to limit the deduction of expenses or payments of fines and penalties, it did so expressly. I am also sceptical that the deduction of fines and penalties provides the taxpayer with a "benefit" or "profit" — indeed, their purpose is to calculate the taxpayer's profit, which is then taxed.

(3) Conclusion Regarding s. 18(1)(a)

66 I therefore cannot agree with the argument that the deduction of fines and penalties should be disallowed as being contrary to public policy. First and foremost, on its face, fines and penalties are capable of falling within the broad and clear language of s. 18(1)(*a*). For courts to intervene in the name of public policy would only introduce uncertainty, as it would be unclear what public policy was to be followed, whether a particular fine or penalty was to be characterized as deterrent in nature, and whether the body imposing the fine intended it to be deductible. Moreover, allowing the deduction of fines and penalties is consistent with the tax policy goals of neutrality and equity. Although it may be said that the deduction of such fines and penalties "dilutes" the impact of the sanction, I do not view this effect as introducing a sufficient degree of disharmony so as to lead this Court to disregard the ordinary meaning of s. 18(1)(*a*) when that ordinary meaning is harmonious with the scheme and object of the Act. When Parliament has chosen to prohibit the deduction of otherwise allowable expenses on the grounds of public policy, then it has done so explicitly.

67 Although there are many points in my colleague Bastarache J.'s reasons with which I agree, there are others on which I would like to comment.

68 My colleague proposes a test in which the distinction between deductible and non-deductible levies must be determined on a case-by-case basis. In my view, such an approach would be quite onerous for the taxpayer who would be forced to undertake the difficult task of determining the object or purpose of the statute under which the payment was demanded whenever he or she filled out a tax return. Indeed, he or she would have to ascertain whether the specific purpose of the section was meant to be deterrence, punishment or compensation. Moreover, difficulties and uncertainties would undoubtedly arise where the purpose of the statutory provision is mixed. While a taxpayer must inevitably make various determinations in filing a return in order to report all relevant income and expenses and estimate the amount of tax payable, the statutory interpretation inquiry into the purpose of a statute is one which even courts often find particularly challenging. Consequently, it is inevitable that disputes will often require courts to determine whether a particular levy can be deducted from his or her income. Undoubtedly, this would introduce a significant element of uncertainty into our self-reporting tax system. On the other hand, Parliament could expressly prohibit the deduction of fines and penalties in a way compatible with the objectives of self-assessment and ease of administration.

69 Finally, at para. 17, my colleague states that penal fines are not, in the legal sense, incurred for the purpose of gaining income. It is true that ss. 18(1)(*a*) expressly authorizes the deduction of expenses incurred for the purpose of gaining or producing income from that business. But it is equally true that if the taxpayer cannot establish that the fine was in fact incurred for the purpose of gaining or producing income, then the fine or penalty cannot be deducted and the analysis stops here. It is conceivable that a breach could be so egregious or repulsive that the fine subsequently imposed could not be justified as being incurred for the purpose of producing income. However, such a situation would likely be rare and requires no further consideration in the context of this case, especially given that Parliament itself may choose to delineate such fines and penalties, as it has with fines imposed by the *Income Tax Act*. To repeat, Parliament may well be motivated to respond promptly and comprehensively to prohibit clearly and directly the deduction of all such fines and penalties, if Parliament so chooses.

B. Section 18(1)(b) of the Income Tax Act

70 The respondent also submits that the over-quota levy was in fact an outlay of capital prohibited by s. 18(1)(*b*) of the Act because its payment allowed the taxpayer to retain its quota. With respect, I do not find much merit to this argument. Under s. 17(g) of the *British Columbia Egg Marketing Board Standing Order*, the Board has the discretion to cancel or suspend a producer's license and quota when *any* provision of a standing order has been violated. Therefore the taxpayer would face the same threat of the loss of its quota if it failed to pay the *within*-quota levy imposed for each layer kept by a producer. At trial the respondent conceded that this within-quota levy is deductible as a current expense. Given this, I do not see how the characterization of the *over*-quota levy as a capital outlay can rely upon the consequences of not paying the levy.

71 Even without the respondent's concession regarding the within-quota levy, I would not characterize the over-quota levy as a capital outlay. As this Court stated in *Canderel, supra*, at para. 45:

> Rather than trying to discern into which pigeonhole a particular income expenditure falls, the taxpayer's focus should be on attempting to portray his or her income in the manner which best reflects his or her true financial position for the year, that is, which gives an "accurate picture" of profit.

The fine at issue in the present appeal is assessed on a per-day basis and is meant to remove the profit of over-quota production from the producer. These considerations all point to characterizing the levy as a current expense. The fact that there was a risk that the quota could be revoked upon failure to pay the fine is no more relevant to this analysis than the fact that if a factory's electricity bill is not paid, there is a risk that the utility company will eventually cut off the power to the factory, thereby putting the existence of the business in jeopardy. To declare the cost of electricity as a capital outlay on this basis would not provide an accurate picture of the taxpayer's income for the year.

72 For these reasons, the appellant's expenditures for the over-quota levy are best characterized as a current expense, the deduction of which is permitted by ss. 9(1) and 18(1)(*a*) of the Act.

VII. Disposition

73 The over-quota levy is an allowable deduction pursuant to s. 18(1)(*a*) of the Act. I would therefore allow the appeal, with costs in this Court and the court below, set aside the judgment of the Federal Court of Appeal, and restore the order of Lamarre J.T.C.C.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* Corrigenda issued by the court on December 22, 1999 and December 23, 1999 have been incorporated herein.

TAB A2

2015 SCC 60, 2015 CSC 60
Supreme Court of Canada

Canadian Imperial Bank of Commerce v. Green

2015 CarswellOnt 18335, 2015 CarswellOnt 18336, 2015 SCC 60, 2015 CSC 60, [2015] 3 S.C.R. 801, [2015] S.C.J. No. 60, 135 O.R. (3d) 334 (note), 260 A.C.W.S. (3d) 25, 346 O.A.C. 204, 391 D.L.R. (4th) 567, 44 B.L.R. (5th) 1, 478 N.R. 202, 77 C.P.C. (7th) 1, J.E. 2015-1921

Canadian Imperial Bank of Commerce, Appellant and Howard Green and Anne Bell, Respondents

Gerald McCaughey, Tom Woods, Brian G. Shaw and Ken Kilgour, Appellants and Howard Green and Anne Bell, Respondents and Canadian Foundation for Advancement of Investor Rights, Shareholder Association for Research and Education, Ontario Securities Commission and Insurance Bureau of Canada, Interveners

IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler, Francis T. Joyce, Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble, Appellants and Marvin Neil Silver and Cliff Cohen, Respondents and Canadian Foundation for Advancement of Investor Rights and Ontario Securities Commission, Interveners

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi, Appellants and Trustees of the Millwright Regional Council of Ontario Pension Trust Fund, Respondent

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi, Appellants and Nabil Berzi, Respondent

Celestica Inc., Stephen W. Delaney and Anthony P. Puppi, Appellants and Huacheng Xing, Respondent and Canadian Foundation for Advancement of Investor Rights and Ontario Securities Commission, Interveners

McLachlin C.J.C., Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon, Côté JJ.

Heard: February 9, 2015
Judgment: December 4, 2015
Docket: 35807, 35811, 35813

Proceedings: affirming *Green v. Canadian Imperial Bank of Commerce* (2014), 370 D.L.R. (4th) 402, 314 O.A.C. 315, (sub nom. *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*) 118 O.R. (3d) 641, [2014] O.J. No. 419, 50 C.P.C. (7th) 113, 2014 ONCA 90, 2014 CarswellOnt 1143, Doherty J.A., E.A. Cronk J.A., K. Feldman J.A., R. Juriansz J.A., R.A. Blair J.A. (Ont. C.A.); additional reasons at *Green v. Canadian Imperial Bank of Commerce* (2014), 68 C.P.C. (7th) 99, 2014 ONCA 344, 2014 CarswellOnt 5625, Doherty J.A., E.A. Cronk J.A., Kathryn Feldman J.A., R.A. Blair J.A., R.G. Juriansz J.A. (Ont. C.A.); reversing *Green v. Canadian Imperial Bank of Commerce* (2012), 29 C.P.C. (7th) 225, [2012] O.J. No. 3072, 2012 CarswellOnt 8382, 2012 ONSC 3637 (Ont. S.C.J.); and affirming *Silver v. Imax Corp.* (2012), [2012] O.J. No. 4002, 2012 ONSC 4881, 2012 CarswellOnt 10391, K. van Rensburg J. (Ont. S.C.J.); additional reasons at *Silver v. Imax Corp.* (2012), 2012 CarswellOnt 15182, 2012 ONSC 6020, K. van Rensburg J. (Ont. S.C.J.); and affirming *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* (2012), [2012] O.J. No. 5083, 113 O.R. (3d) 264, 2012 CarswellOnt 13292, 2012 ONSC 6083, Perell J. (Ont. S.C.J.)

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Anna Perschy, Amanda Heydon, for Intervener, Ontario Securities Commission
Alan L. W. D'Silva, Daniel S. Murdoch, Sinziana R. Hennig, for Intervener, Insurance Bureau of Canada

***Côté J.* on Celestica (dissenting in part with Karakatsanis J. on CIBC and IMAX) (McLachlin C.J.C. and Rothstein J. concurring):**

I. Introduction

1 These appeals are the result of competing interpretations of the interaction between two pieces of Ontario legislation: Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 ("*OSA*"), and s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

2 Part XXIII.1 *OSA* provides, at s. 138.3, for a claim for secondary market misrepresentation. An action with respect to this statutory claim may be commenced only with leave of the court as prescribed by s. 138.8 and within the limitation period specified in s. 138.14, that is, three years after the date of the alleged misrepresentations in the instant cases.

3 As for s. 28 *CPA*, it operates to suspend the limitation period for "a cause of action asserted in a class proceeding" in favour of the members of a class "on the commencement of the class proceeding".

4 At issue in the court below was the meaning of the word "asserted" in s. 28 *CPA*. Initially, a panel of three judges of the Court of Appeal ruled unanimously in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569 (Ont. C.A.), that the statutory claim for secondary market misrepresentation cannot be "asserted" until a court has granted leave to do so. As a result, the court held that the *CPA* could not operate to suspend the limitation period for class members (including for the representative plaintiff) until leave was obtained.

5 The ruling in *Timminco Ltd.* was handed down in the midst of three class action suits for secondary market misrepresentations in Ontario: *Canadian Imperial Bank of Commerce et al. v. Green and Bell* ("*CIBC*"); *IMAX Corp. et al. v. Silver and Cohen* ("*IMAX*"); and *Celestica Inc. et al. v. Trustees of the Millwright Regional Council of Ontario Pension Trust Fund et al.* ("*Celestica*").

6 In each of those cases, the plaintiffs [1] had pleaded a common law cause of action together with an intention to seek leave to assert a statutory claim under s. 138.3 *OSA* within the statutory limitation period, but leave was not granted before the limitation period expired. It should be noted however that in *CIBC*, a motion for leave was filed before the expiry of the limitation period, and that in *IMAX*, a motion for leave was both filed and argued before the limitation period expired. It is fair to say that *Timminco* came as a surprise to the litigants.

7 In the Superior Court, the motion judges considering the issue of leave to commence the statutory action found that they were bound by *Timminco Ltd.*, although relief was granted in the form of a *nunc pro tunc* order in *IMAX*, and by applying the doctrine of special circumstances in *Celestica*. No relief was granted to the plaintiffs in *CIBC*. The appeals in the three cases were subsequently heard together by a five-judge panel of the Court of Appeal, which unanimously overruled the interpretation of *Timminco Ltd.*: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402 (Ont. C.A.). The Court of Appeal found that a representative plaintiff who pleads an intention to seek leave in respect of a s. 138.3 claim within the limitation period has "asserted" a cause of action within the meaning of s.

28 *CPA* even before the filing of a motion seeking leave. As a result, the court held that in all three cases, the plaintiffs' statutory claims for secondary market misrepresentation were not statute-barred.

8 In my opinion, pleading an intention to seek leave in respect of a s. 138.3 *OSA* claim in a class proceeding together with a common law cause of action amounts to neither the assertion of the statutory cause of action nor the commencement of a class proceeding for that statutory cause of action under s. 28 *CPA*. Not only is this interpretation consistent with the fundamental principles and structure of class proceedings in Canada, but it is also the only one that is consistent with the wording of the provisions and the ordinary and grammatical meaning of the words used as well as with the rigorous and exhaustive legislative balancing that produced Part XXIII.1 *OSA*.

9 Moreover, I am of the view that neither the doctrine of *nunc pro tunc* nor that of special circumstances can be of any avail to the plaintiffs in *CIBC* and *Celestica*. With regard to *IMAX*, relief should be granted to the plaintiffs in the form of a *nunc pro tunc* order, but only in relation to the defendants who were parties to the original statement of claim: IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.

10 Accordingly, I would allow the appeals in *CIBC* except in respect of the Court of Appeal's conclusion that five of the seven issues proposed by the plaintiffs should be certified. I would allow the appeal and issue a partial *nunc pro tunc* order in *IMAX*, and I would allow the appeal in *Celestica*.

II. Legislation

A. Ontario Securities Act

11 Part XXIII.1 *OSA* sets out a scheme of civil liability for secondary securities market misrepresentation in Ontario. Section 138.3 creates a statutory cause of action for a misrepresentation made in a document or a public oral statement, or a failure to make timely disclosure, against a range of parties potentially implicated in the misrepresentation. This statutory cause of action accrues to those who acquired or disposed of the issuer's security between the time of the misrepresentation and that of its correction. Explicitly not required for a finding of liability is proof of a plaintiff's reliance on the misrepresentation, which is essential to a common law cause of action based on misrepresentation. Furthermore, as s. 138.13 makes plain, this statutory right of action is in addition to any other rights of action the plaintiff may have.

12 Two components of this scheme are of particular relevance to these appeals.

13 First, s. 138.8 imposes a requirement that leave be granted before the statutory action based on a secondary market misrepresentation may be commenced:

> **138.8** (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

14 Second, s. 138.14 imposes a limitation period for statutory actions based on s. 138.3:

> **138.14** No action shall be commenced under section 138.3,
>
> (a) in the case of misrepresentation in a document, later than the earlier of,
>
> (i) three years after the date on which the document containing the misrepresentation was first released, and
>
> (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

15 Section 138.14 thus requires that the statutory action be commenced within the earlier of three years after the date of the misrepresentation and six months after a news release discloses that leave has been granted to commence a statutory action in Ontario, or under parallel legislation elsewhere in Canada. It should be noted that the scheme contains no internal mechanism for suspending the limitation period before or pending the granting of leave.

B. Class Proceedings Act

16 Section 28 of the *CPA* provides for the suspension of any limitation period in a class proceeding as follows:

> 28. (1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,
>
> (a) the member opts out of the class proceeding;
>
> (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
>
> (c) a decertification order is made under section 10;
>
> (d) the class proceeding is dismissed without an adjudication on the merits;
>
> (e) the class proceeding is abandoned or discontinued with the approval of the court; or
>
> (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.
>
> (2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

C. Interaction Between Part XXIII.1 OSA and Section 28 CPA

17 The primary issue in these appeals is the interaction of the leave requirement in Part XXIII.1 *OSA* with the suspension of the limitation period for a class proceeding under s. 28 *CPA*. Typically, where leave is not required, the operation of s. 28 *CPA* is straightforward: the commencement of a class proceeding would coincide with a statement of claim asserting a cause of action to be certified as a class action (*Logan v. Canada (Minister of Health)* (2004), 71 O.R. (3d) 451 (Ont. C.A.), at para. 21).

18 Where leave is required, however, a statutory action cannot be commenced until leave is granted by the court. The issue in the cases at bar is whether s. 28 *CPA* operates to suspend the limitation period applicable to a statutory cause of action under s. 138.3 *OSA* at the time when an intention to seek leave under s. 138.8 *OSA* is pleaded in a class proceeding for a common law misrepresentation claim. This question has plagued the Ontario courts.

III. Judicial History and Facts

A. Timminco

19 These appeals trace back to the Court of Appeal's ruling in *Timminco Ltd.* . The appeal in that case concerned misrepresentations that had allegedly occurred between March and November 2008. The plaintiff had initiated a class proceeding in the Ontario Superior Court in which he asserted a common law cause of action for secondary market misrepresentation. An intention to seek leave for a statutory claim under s. 138.3 *OSA* was also stated in the pleadings, but leave had not been sought as of February 2011. With the statutory claim in jeopardy because of the looming limitation

period, the plaintiff moved, in March 2011, for an order declaring that the limitation period was suspended by reason of s. 28 *CPA*. The motion judge granted the order (2011 ONSC 8024 (Ont. S.C.J.)), which was then appealed.

20 This table illustrates the timeline of the events in *Timminco Ltd.*:

Alleged misrepresentations	March 17 to November 11, 2008
Statement of claim filed pursuant to the *CPA*, pleading common law cause of action and an intent to seek leave for s. 138.3 statutory action	May 14, 2009
Plaintiff requests case conference re limitation period	End of February, 2011
Case conference	March 10, 2011
Notice of motion filed seeking declaration that s. 138.14 limitation period is suspended and "conditional leave" to commence s. 138.3 action	March 14, 2011
Limitation period expires for statutory action	*March 17 to November 11, 2011*
Leave motion heard	March 25, 2011
Declaration of suspension granted by motion judge	March 31, 2011

21 On February 16, 2012, Goudge J.A. held that under s. 28 *CPA*, a cause of action cannot be "asserted" until it can be enforced, and that in the case of a cause of action under Part XXIII.1 *OSA*, this is only possible after leave of the court is obtained. Goudge J.A. stressed that this interpretation of the provisions was the only one to produce textual coherence while also being consistent with the purposes of both the *OSA* and the *CPA*. To interpret "asserted" such that it includes a mere mention of an intention to seek leave, he concluded, would not be consistent with the ordinary meaning of the word and would produce results that the legislature could not have intended. For example, the limitation period would be suspended for the representative plaintiff in a class proceeding, but not for the same plaintiff in an individual proceeding. As a result, Goudge J.A. ruled that leave must be granted before the Part XXIII.1 *OSA* statutory cause of action can be asserted within the meaning of s. 28 *CPA*, and that it is only then that the limitation period is suspended in favour of the representative plaintiff and the other class members.

B. Post-Timminco Decisions of the Ontario Superior Court

22 The decision in *Timminco* seems to have taken the Ontario Bar by surprise, throwing a wrench in the works of three proceedings that were then pending before the Superior Court and are now being appealed to this Court. In each of these cases, the motion judge found that he or she was bound by *Timminco*, but the three judges then diverged entirely on whether relief was available to the plaintiffs either by way of an order made *nunc pro tunc* (a Latin expression meaning "now for then" that is used to indicate that an act has retroactive legal effect) or by application of the doctrine of special circumstances.

(1) Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225 (Ont. S.C.J.)*

(a) Facts and Procedural Timeline

23 The plaintiffs allege that, between May 31 and December 6, 2007, the defendants failed to amply record and disclose the extent of CIBC's exposure to and position in the United States residential mortgage market as the subprime mortgage crisis unfolded. On July 22, 2008, the plaintiffs filed a statement of claim which contained a claim for a common law cause of action for misrepresentations and indicated that they intended to seek leave to proceed with the statutory action. After a series of case conferences and amendments to the statement of claim, the plaintiffs filed a motion seeking leave for the statutory claim on January 21, 2010 in which they stated that leave would be sought *nunc pro tunc* if the limitation period were to expire. Discussions between counsel to schedule the leave and certification motions continued until it was settled after a case conference in March 2010 that the motions would be heard a year later. On January 15, 2011, after the plaintiffs had completed their record in support of their motions, it was agreed that the original hearing dates were impractical, and the hearing was accordingly rescheduled for February 2012.

24 The ruling in *Timminco Ltd.* was released on the penultimate day of the original hearing of the motions for leave and for certification in *CIBC*. As the defendants put it, the ruling was a "thunderbolt" in a case in which the limitation period had never been at issue (*CIBC*, at para. 475). Following *Timminco Ltd.*, counsel made additional representations on the limitation period issue, and another hearing was held on April 5, 2012.

25 This table illustrates the timeline of the events in *CIBC*:

Alleged misrepresentations	May 31 to December 6, 2007
Statement of claim filed pursuant to the *CPA*, pleading common law cause of action and intent to seek leave for s. 138.3 statutory action	July 22, 2008
Notice of motion seeking leave under s. 138.8	January 21, 2010
Case conference	March 17, 2010
Limitation period expires for statutory action	*May 31 to December 6, 2010*
Plaintiffs' record completed	January 15, 2011
Leave and certification motions heard	February 9, 10, 13-17; April 5, 2012
Timminco released	February 16, 2012
Hearing on limitation period issue	April 5, 2012

(b) Disposition

26 In his exhaustive ruling, Strathy J. (as he then was) considered the requirements for granting leave under s. 138.8 *OSA*: (1) that the action is being brought in good faith; and (2) that there is a reasonable possibility of success. Good faith, he held, requires an honest and reasonable belief that the claim has merit, and a genuine intent and capacity to pursue it. He found that the plaintiffs had met this requirement and that this had not been seriously challenged by the defendants. As to the reasonable possibility of success requirement, Strathy J. stated that it is a "relatively low threshold" (para. 373) and that the question to ask is "whether, having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success" (para. 374). Had he applied this standard, Strathy J. would have granted the leave motion, but he found that he was bound by *Timminco Ltd.*, as he saw no way to distinguish it from the case before him.

27 Strathy J. went on to rule that he did not have jurisdiction to extend the limitation period either by issuing an order *nunc pro tunc* or by applying the doctrine of special circumstances. On the issue of *nunc pro tunc*, Strathy J. stated that the court has inherent jurisdiction to correct a slip or an oversight in the name of justice, but added that this case does not "strictly speaking" involve a slip, since the plaintiffs had recognized the possibility of the limitation period expiring and had assumed that their motion for leave would result in a *nunc pro tunc* order (para. 511). As regards both *nunc pro tunc* and the doctrine of special circumstances, Strathy J. found that he did not have jurisdiction, because (1) Part XXIII.1 *OSA* is designed to be a comprehensive code under which a limitation period begins to run upon the occurrence of objective events; (2) nothing in the legislation or in the judicial interpretation thereof suggests that the court has jurisdiction to make such an order; and (3) the general philosophy underlying the law of limitations in Ontario is one of clearly defined periods that are not subject to judge-made exceptions. As a result, he held that the limitation period for the plaintiffs' statutory action had expired and that no relief was available to them.

(2) Silver v. Imax Corp.*, 2012 ONSC 4881 (Ont. S.C.J.)*

(a) Facts and Procedural Timeline

28 The plaintiffs allege that, between February 17 and March 9, 2006, the defendants made misrepresentations overstating IMAX Corp.'s revenue and net income for 2005. In their statement of claim, issued on September 20, 2006, the plaintiffs asserted a common law cause of action for misrepresentations and an intention to seek leave for a claim

under s. 138.3 *OSA*. They served their motion for leave on November 28, 2006, and the motion record in February 2007. A hearing was originally scheduled for December 2007. However, delays ensued as the record became, in the motion judge's words, "complex and voluminous" (para. 9 (CanLII)). The parties requested that the leave motion be heard at the same time as the motion for certification and a motion under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike certain common law causes of action from the statement of claim. Ultimately, the hearing on the three motions was concluded on December 19, 2008, though an additional attendance and further written submissions followed on the certification and Rule 21 motions. It should be noted that as at December 19, 2008, 79 days remained of the three-year limitation period under s. 138.14.

29 The judgment remained under reserve for nearly a year before van Rensburg J. (as she then was) granted leave in respect of the statutory cause of action on December 14, 2009. During that period, the motion judge had held a telephone conference in the course of which she raised the maxim *actus curiae neminem gravabit* — an act of the court will prejudice no one — in relation to the limitation period, and requested submissions from the parties, who agreed that the limitation period should be suspended while the decision was under reserve.

30 After the granting of leave, it took another two years, until December 12, 2011, before the plaintiffs filed a fresh statement of claim in which they pleaded the statutory cause of action and added the following individuals as defendants: Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble. The defendants filed a statement of defence on February 6, 2012. This statement was amended on February 16, 2012, the day of *Timminco Ltd.* 's release, to assert that the limitation period applicable to the plaintiffs' statutory right of action had expired.

31 This table illustrates the timeline of the events in *IMAX*:

Alleged misrepresentations	February 17 to March 9, 2006
Statement of claim filed pursuant to the *CPA*, pleading common law cause of action and intent to seek leave for s. 138.3 statutory action	September 20, 2006
Notice of motion seeking leave under s. 138.8	November 28, 2006
Leave and certification motions heard	December 15-19, 2008
Limitation period expires for statutory action	*February 17 to March 9, 2009*
Leave granted and class action certified	December 14, 2009 (the order was backdated to December 19, 2008 on August 27, 2012)
Fresh statement of claim pleading statutory cause of action and adding new defendants filed	December 12, 2011
Timminco released	February 16, 2012
Leave order amended *nunc pro tunc*: leave effective December 19, 2008	August 27, 2012

(b) Disposition

32 In her decision to amend the leave order, van Rensburg J., too, found that she was bound by *Timminco*, but she parted company with Strathy J. by finding that she had an inherent jurisdiction to grant the motion for leave *nunc pro tunc*. She wrote that absent an explicit prohibition of a *nunc pro tunc* order, a statute must be understood to contemplate the possibility of such an order. Furthermore, she drew attention to the inclusion of s. 138.14 in Sch. B to the *Limitations Act, 2002*, S.O. 2002, c. 24, which according to her lists provisions in respect of which common law doctrines such as *nunc pro tunc* continue to apply. On her reading of the jurisprudence on *nunc pro tunc* orders, the case before her was clearly one in which the court has the ability to ensure that a plaintiff's rights will not be arbitrarily affected by matters outside his or her control, such as the court's schedule. Van Rensburg J. added that limitation periods are not meant to foreclose causes of action that have been "actively and vigorously pursued" (para. 85). She granted the plaintiffs leave *nunc pro tunc* effective December 19, 2008, the date argument was concluded on the leave motion, and authorized the plaintiffs to amend their statement of claim to assert the statutory claim, except against two of the proposed defendants,

Mr. Utay and Mr. Fuchs. Van Rensburg J. excluded them from the *nunc pro tunc* order as a result of her finding in *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.J.), at para. 24, that the plaintiffs had no reasonable possibility of success against them.

33 Additionally, van Rensburg J. held that the doctrine of special circumstances was not applicable in this case. In her estimation, the doctrine is meant to allow amendments to an existing statement of claim which add new causes of action where the limitation period has been suspended by the commencement of the action, whereas the plaintiffs in the case before her were seeking to amend their statement of claim to add a claim which stemmed from the same facts but required leave. She found that the doctrine was "analytically irrelevant", since it did not "fit within the framework of a limitation period such as that provided for in s. 138.14" (para. 77).

(3) Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2012 ONSC 6083, 113 O.R. (3d) 264 (Ont. S.C.J.)*

(a) Facts and Procedural Timeline

34 The defendant Celestica Inc. is an electronics manufacturer incorporated in Ontario that trades shares on both the Toronto Stock Exchange ("TSX") and the New York Stock Exchange. The plaintiffs Trustees of the Millwright Regional Council of Ontario Pension Trust Fund ("Millwright Trustees") purchased Celestica shares on both exchanges, whereas the plaintiffs Nabil Berzi and Huacheng Xing purchased Celestica shares only on the TSX. The alleged misrepresentations relate to the progress and success of a $225 to $275 million restructuring of the company that took place between January 27, 2005 and January 30, 2007.

35 The Millwright Trustees launched a class action in the United States on March 2, 2007. On August 20, 2007, Mr. Xing filed a statement of claim in Ontario for a class proceeding concerning a common law cause of action for misrepresentation in which he pleaded an intention to seek leave in respect of a statutory claim under s. 138.3 *OSA*; Mr. Berzi did the same on August 27, 2008. The Millwright Trustees' U.S. class action was dismissed in District Court on October 14, 2010 after a pivotal ruling in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (U.S. Sup. Ct. 2010) (2010), to the effect that "foreign plaintiffs who purchased securities on foreign exchanges where there was no trading of those securities on any domestic U.S. exchange could no longer pursue actions under the U.S. *Securities and Exchange Act of 1934*, 15 U.S.C. § 78a" (*Celestica*, at para. 33). In response, the Millwright Trustees filed a statement of claim for a class proceeding concerning a common law cause of action for misrepresentation in Ontario on April 8, 2011, alleging the same misrepresentations in Celestica's public disclosure documents as in their U.S. case. On December 29, 2011, the U.S. Second Circuit Court of Appeals unanimously reversed the dismissal of the Millwright Trustees' action and remanded that action for further proceedings. At that time, the pending actions of Mr. Xing and Mr. Berzi in Ontario remained inactive.

36 The release of *Timminco Ltd.* on February 16, 2012 spurred the plaintiffs into action on the Canadian front. The Millwright Trustees filed a motion for leave under s. 138.8 *OSA* on February 24, 2012. Perell J. then ordered the consolidation of the Millwright Trustees, Xing and Berzi cases on April 13, 2012. A motion to strike all claims as statute-barred was heard in October of that year.

37 This table illustrates the timeline of the events in *Celestica*:

Alleged misrepresentations	January 27, 2005 to January 30, 2007
Millwright Trustees file class action in U.S.	March 2, 2007
Xing files pursuant to the *CPA* a statement of claim for common law cause of action and pleading intent to seek leave for s. 138.3 statutory action	August 20, 2007
Defendants in U.S. class action bring motion to strike	March 17, 2008
Berzi files statement of claim for common law cause of action and pleading intent to seek leave for s. 138.3 action	August 27, 2008
Limitation period expires for statutory action	*January 27, 2008 to January 30, 2010*

U.S. Supreme Court decision in *Morrison*	June 24, 2010
District Court dismisses Millwright Trustees' U.S. class proceeding	October 14, 2010
Millwright Trustees file statement of claim for common law cause of action	April 8, 2011
U.S. Court of Appeals reverses dismissal of U.S. class action	December 29, 2011
Timminco released	February 16, 2012
Notice of motion seeking leave under s. 138.8 *OSA* filed by Millwright Trustees	February 24, 2012
Xing, Berzi and Millwright Trustees actions consolidated	April 13, 2012

(b) Disposition

38 Perell J. ruled that as a result of *Timminco Ltd.*, the statutory claim was time-barred, but he found that the doctrine of special circumstances could be applied so as to grant leave *nunc pro tunc* were it necessary to do so. Broadly, in his view, the doctrine is not limited to the addition of new causes of action, as van Rensburg J. had suggested, but is, rather, a discretionary doctrine that can be adapted to the factual circumstances of a particular case. In addition, he wrote, the doctrine of special circumstances is a common law doctrine which is applicable to the s. 138.14 *OSA* limitation period as a result of that provision's inclusion in Sch. B to the *Limitations Act, 2002*. Perell J. then held that the following special circumstances existed in the case before him:

> ... (1) the defendants have known of the factual allegations against them since 2007, including the Part XXIII.1 claims; (2) the defendants have had a full opportunity to investigate the claims against them; (3) there is no prejudice to the defendants; (4) the law has changed unexpectedly — twice — each time to the plaintiffs' and class' detriment; (5) the plaintiffs' Part XXIII.1 claims do not raise new factual allegations; and (6) the defendants did not raise limitation periods in any of the class proceedings until now. [para. 145]

39 Perell J. therefore ruled that these special circumstances would justify granting leave for the statutory action *nunc pro tunc* were it to be granted at a later date. Leave was eventually granted to the plaintiffs with respect to some of the alleged misrepresentations a year and a half later: 2014 ONSC 1057, 49 C.P.C. (7th) 12 (Ont. S.C.J.).

C. Ontario Court of Appeal Decision (2014 ONCA 90 (Ont. C.A.))

40 The Ontario Court of Appeal convened a panel of five judges to consider the appeals from the decisions on the motions in the three cases and to determine whether *Timminco Ltd.* should be overturned.

41 Feldman J.A., writing for a unanimous court, held that for the purposes of s. 28 *CPA*, asserting a claim should be understood to mean "to invoke a legal right" rather than solely to "enforce" one, particularly considering that any ambiguity in interpreting a limitation provision must be resolved in favour of the plaintiff (paras. 45-47). The court found that this interpretation would not produce an indefinite suspension, which was a concern Goudge J.A. had raised in *Timminco Ltd.*, because the diligence of the defendants and the class action case management judge would ensure that stalled proceedings are dismissed. Feldman J.A. reasoned that although this reading of s. 28 *CPA* produces the "unusual, if not anomalous effect" (para. 51) that the limitation period will be suspended if a s. 138.3 statutory claim is asserted in a class proceeding, but not if it is asserted in an individual action, this effect followed from a statutory scheme that was optimized for class proceedings. Feldman J.A. also expressed concern for judicial economy, worrying that all members of a class would be required to start their own actions while waiting to see if leave would be granted in the class proceeding. Overall, the Court of Appeal ruled that its new interpretation was consistent with the purposes of the *CPA* and the *OSA*, and of limitation periods generally.

42 As a result of the Court of Appeal's conclusion that *Timminco Ltd.* had been wrongly decided, the statutory actions in *CIBC*, *IMAX* and *Celestica* were each held not to be statute-barred. Feldman J.A. also upheld the interpretation of the "reasonable possibility" threshold for granting leave under s. 138.8 *OSA* given by Strathy J. in *CIBC*.

D. Legislative Amendment

43 Following the Court of Appeal's decision in the cases at bar, the Ontario legislature amended s. 138.14 *OSA* to include the following subs. (2):

> (2) A limitation period established by subsection (1) in respect of an action is suspended on the date a notice of motion for leave under section 138.8 is filed with the court and resumes running on the date,
>
> (a) the court grants leave or dismisses the motion and,
>
> (i) all appeals have been exhausted, or
>
> (ii) the time for an appeal has expired without an appeal being filed; or
>
> (b) the motion is abandoned or discontinued.

IV. Issues

44 There are two issues common to each of these appeals:

1. Does s. 28 *CPA* operate to suspend the limitation period applicable to a statutory claim under s. 138.3 *OSA* at the time when an intention to seek leave under s. 138.8 *OSA* is pleaded in a proposed class proceeding alleging a common law misrepresentation claim?

2. If not, can the plaintiffs obtain relief in the form of an order granting leave *nunc pro tunc* or pursuant to the doctrine of special circumstances?

45 In addition, there are two issues raised only by the defendants in *CIBC* which I will discuss at the end of these reasons:

1. Was the threshold test for leave under s. 138.8 *OSA* properly interpreted and applied?

2. Can a class proceeding based on a common law cause of action be the preferable procedure for resolving a secondary market misrepresentation claim?

V. Analysis

A. Interpretation of the Legislation

46 In *Timminco Ltd.* and the cases at bar, the Ontario Court of Appeal advanced two different interpretations of s. 28 *CPA*. According to its decision in the cases at bar, pleading the relevant facts and an intention to seek leave for a statutory cause of action under s. 138.3 *OSA* is sufficient to trigger s. 28 *CPA* and suspend the limitation period for all class members, including the representative plaintiff. According to *Timminco Ltd.*, leave must be granted under s. 138.8 *OSA* before the limitation period can be suspended under s. 28 *CPA*. Neither of these interpretations matches the subsequent amendment to s. 138.14 *OSA*, which provides that the limitation period for a claimant is suspended upon the filing of a notice of motion seeking leave under s. 138.8.

(1) Ordinary and Grammatical Meaning of the Words

47 In my opinion, there is no ambiguity in the interaction of s. 28 *CPA* with Part XXIII.1 *OSA*. The ordinary and grammatical meaning of the words clearly confirms the ruling in *Timminco* regarding the aforementioned provisions. Furthermore, an analysis of the legislative context does not support the Court of Appeal's decision in the cases at bar. Feldman J.A.'s interpretation of s. 28 *CPA* goes against the very purpose of s. 138.14 *OSA*, namely to impose an additional mechanism designed to screen out strike suits as early as possible in the litigation process.

48 Section 28 *CPA* requires "a cause of action asserted" in order for the limitation period to be suspended in favour of the class members "on the commencement of the class proceeding". Section 138.8(1) *OSA* is clear, however: "No action may be commenced under s. 138.3 without leave of the court ...". On its face, the timing is clear. Unless leave is granted, a statutory action may not be commenced under Part XXIII.1 *OSA*, and it is not until the action commences that a limitation period can be suspended under s. 28 *CPA*. In short, I am of the view that, under s. 138.8(1) *OSA*, a statutory action commenced without having first obtained leave is a nullity and a statutory claim under Part XXIII.1 *OSA* cannot be validly commenced without leave of the court. Therefore, the limitation period cannot be suspended in favour of the class members under s. 28 *CPA* before leave is granted.

49 The Court of Appeal's ruling in the instant cases, if accepted, would create unnecessary inconsistencies between the two pieces of legislation and within the *OSA* itself. The result of Feldman J.A.'s interpretation is that a plaintiff proceeding by way of a class action would have more rights than a plaintiff suing in his or her individual capacity. Yet class actions are merely procedural vehicles, designed to extend the substantive rights of the representative plaintiff to the entire class, not to create substantive rights for the class which an individual plaintiff would not otherwise enjoy since they do not exist.

50 It is also quite troubling that the effect of the Court of Appeal's ruling in the instant cases is that a class proceeding asserting a statutory cause of action can commence before a judge has granted the initial leave to allow the statutory action itself to commence. This is plainly putting the cart before the horse: a class proceeding cannot commence before the action itself commences.

51 I also agree with the interpretation of the meaning of the word "assert" in s. 28 *CPA* proposed by Goudge J.A. in *Timminco Ltd.* . The plaintiffs argue that to trigger the application of s. 28 *CPA*, it is sufficient to merely plead the material facts of the claim which are common to the statutory and common law causes of action together with an intention to seek leave under s. 138.8 *OSA*. Although it is true that the definition of "cause of action" is the set of facts that give rise to a legal right of action, I am of the view that the *assertion* of a cause of action must be premised on the existence of a "right of action". In this sense, the meaning of the word "assert", plucked and isolated from the context of the provision, is a red herring. In *Méthot c. Commission de transport de Montréal* (1971), [1972] S.C.R. 387 (S.C.C.), the relevant limitation provision required that a written notice be provided before an action was commenced. This Court held that "the notice which is required is not simply a procedural step. It is part of the very formation of the right of action" (p. 396). The same reasoning applies here with respect to the leave requirement, and I do not share Karakatsanis J.'s view that that case dealt with a different issue. Given the clear wording of s. 138.3 *OSA*, pleading a factual matrix and an intention to seek leave under s. 138.8 *OSA* cannot amount to the assertion of the statutory cause of action.

52 Furthermore, as can be seen from the legislative history, the original draft of what is now s. 28 *CPA* read "a cause of action advanced in a proceeding" before it was later changed to "a cause of action asserted in a class proceeding" in the final piece of legislation: *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), at p. 47. In my opinion, this change is evidence that the legislature intended "assert" to represent a more forceful concept than a mere mention or advancement of a cause of action, since the change would otherwise have been unnecessary.

53 Viewing these provisions together, there is no ambiguity to speak of in their interaction. Section 28 of the *CPA* does not operate to suspend the limitation period applicable to a cause of action until the commencement of a class proceeding in which the cause of action is asserted. This commencement cannot occur under Part XXIII.1 *OSA* until leave is granted. In this sense, the leave requirement of s. 138.8 *OSA* is a hurdle which must be cleared before s. 28

CPA can operate to suspend the limitation period. The necessity of the leave requirement is equally applicable for an individual plaintiff and for a representative plaintiff in a class proceeding. However, in the latter case, once leave has been granted to one plaintiff, the members of the group benefit from it and the limitation period is suspended for all.

54 Finally, considering the entire context, I am also of the view that pleading an intention to seek leave under s. 138.8 *OSA* cannot have the effect of suspending the limitation period prior to the time when leave is granted by the court. At that time, and only at that time, the representative plaintiff will have the benefit of suspension of the limitation period, and a class proceeding in respect of the statutory claim may be commenced.

(2) Legislative Purpose and Structure

55 Even if we were to assume that there is an ambiguity in the wording of the relevant provisions — which there is not — the legislative purpose and structure of those provisions would nonetheless support my conclusion. In other words, "the scheme of the Act, the object of the Act, and the intention of Parliament" are consistent with the ordinary and grammatical meaning of the words, which is another reason not to depart from that meaning: E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21. To hold that s. 28 *CPA* operates to suspend a limitation period for a statutory claim under s. 138.3 *OSA* before leave is obtained would be to circumvent the carefully calibrated purposive balance struck by the limits to the statutory action provided for in Part XXIII.1 *OSA*. Such an interpretation would render s. 138.8 *OSA* ineffective, since the suspension of the limitation period, although not permanent, could nevertheless delay the decision on the merits of leave for several months or even for years, as the cases at bar demonstrate.

56 In these appeals, the legislative context has three components that must be interwoven as seamlessly as possible: the purposes attributed to limitation periods generally; the *CPA*, which gives structure and form to class action proceedings; and Part XXIII.1 *OSA*, enacted subsequently to the *CPA*, which lays out the scheme for the statutory claim for secondary market misrepresentation. The goal of interpretation is to maximize the coherence of these three components to the extent possible within the range of ordinary and grammatical meaning of the text.

(a) Limitation Periods

57 This Court has generally recognized that limitation periods have three purposes known as the certainty, evidentiary and diligence rationales: *Novak v. Bond*, [1999] 1 S.C.R. 808 (S.C.C.), at paras. 64-67, per McLachlin J.; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), at pp. 29-31, per La Forest J. Limitation periods serve "(1) to promote accuracy and certainty in the adjudication of claims; (2) to provide fairness to persons who might be required to defend against claims based on stale evidence; and (3) to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion": P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at p. 123.

58 Clearly, it is desirable that litigation be accurate and certain, given that the passage of time dims memories and erodes evidence, and also that the risk of error grows as an adjudicator is further removed from the cause of action. Furthermore, after a certain time, possible defendants may be unaware of the need to preserve potentially enlightening or even exonerating pieces of evidence. Finally, it is appropriate to expect plaintiffs to assert their claims diligently and to be cognizant of their circumstances and of the extent of their control over them. Modern limitations legislation is therefore based on a recognition that limitation periods, in order to be effective, need to be final. This is the other side of the coin, the practical consequence of limitation periods that can make the application of a limitations statute seem harsh: *Novak*, at para. 8, per Iacobucci and Major JJ, dissenting.

(b) Class Proceedings Act

59 The Ontario Law Reform Commission identified three benefits of the class action procedure: judicial economy, increased access to the courts and modification of the behaviour of potential wrongdoers (*Report on Class Actions* (1982), vol. I, at pp. 117-46). Where there are multiple claims, the number of actions can be reduced via the consolidating

mechanism of class proceedings. The aggregation of the class helps overcome social, psychological and economic barriers to redress. The possibility of a class action discourages unjust enrichment and encourages an internalization of costs. Finally, class proceedings extend the substantive rights of a representative plaintiff to the class in order to make the legal system more efficient, more accessible and more effective.

60 The purpose of s. 28 *CPA* is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights: *Coulson v. Citigroup Global Markets Canada Inc.*, 2010 ONSC 1596, 92 C.P.C. (6th) 301 (Ont. S.C.J.), at para. 49, quoted with approval by the Court of Appeal, 2012 ONCA 108, 288 O.A.C. 355 (Ont. C.A.), at para. 11. Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter.

61 In *Logan v. Canada (Minister of Health)* [2003 CarswellOnt 425 (Ont. S.C.J.)], 2003 CanLII 20308, it was these goals which were held to justify a reading of s. 28 *CPA* to the effect that the commencement of a class proceeding is not delayed until the time of certification: paras. 14-24, aff'd *Logan v. Canada (Minister of Health)* [2004 CarswellOnt 2662 (Ont. C.A.)], at paras. 21 and 24. *Logan* therefore confirms that the time of commencement precedes that of certification.

62 Most importantly, as this Court has repeatedly ruled, a class action provision cannot operate to create or modify substantive legal rights: *Bou Malhab c. Diffusion Métromédia CMR inc.*, 2011 SCC 9, [2011] 1 S.C.R. 214 (S.C.C.), at para. 52; *Barrette c. Ciment du St-Laurent inc.*, 2008 SCC 64, [2008] 3 S.C.R. 392 (S.C.C.), at para. 111; *Union des consommateurs c. Dell Computer Corp.*, 2007 SCC 34, [2007] 2 S.C.R. 801 (S.C.C.), at paras. 105-8. This principle forms a vital foundation for all class proceedings in Canada. Limitation periods and rights of action are such substantive legal rights.

(c) Part XXIII.1 OSA

63 Part XXIII.1 *OSA* represents a carefully calibrated statutory head of liability for secondary market misrepresentation. Section 1.1 *OSA* provides that the *OSA*'s overall purposes are twofold: to protect investors "from unfair, improper or fraudulent practices", but also to guarantee fairness, efficiency and confidence in capital markets. Part XXIII.1 was developed progressively through a series of reports and other documents which ultimately culminated in the adoption of the statutory liability scheme in 2002. Three of the documents are vital to this appeal: (i) Toronto Stock Exchange Committee on Corporate Disclosure (the "Allen Committee"), *Final Report — Responsible Corporate Disclosure: A Search for Balance* (1997) (the "*Allen Committee Report*"); (ii) Ontario Securities Commission, "Proposal for a Statutory Civil Remedy for Investors in Secondary Market — Notice and Request for Comment" (1998), 21 OSCB 3335 and 3367 (the "1998 Draft Legislation"); and (iii) Canadian Securities Administrators ("CSA"), "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'", CSA Notice 53-302, reproduced in (2000), 23 OSCB 7383.

64 In its report, the Allen Committee identified the failure by public corporations to comply with continuous disclosure requirements as a problem from the perspective both of actual incidents and of public perception. It concluded that the regulatory sanctions available at the time were an "inadequate deterrent" (conclusion (ii)) and that the common law remedies available to aggrieved investors for misleading disclosure in secondary trading markets were so onerous that they were "as a practical matter largely academic" (conclusion (iii)): p. vii.

65 As a solution, the Allen Committee proposed a statutory scheme for secondary market misrepresentation liability in which it would not be necessary to prove reliance on the misrepresentation. Its recommendations were informed by two goals — deterrence of corporate non-disclosure and compensation for wronged investors — related to the identified problem, but it is important to recognize that the Committee knowingly struck a precise balance between these goals. Its report concluded as follows at p. vii:

(v) Faced with the task of designing recommendations from the perspective of strengthening deterrence (conclusion (ii)) or creating a route to meaningful compensation of injured investors (conclusion (iii)), the Committee has adopted improved deterrence as its goal in the belief that effective deterrence will logically reduce the need for investor compensation.

This understanding would later be reiterated in CSA Notice 53-302, which includes the following comment: "The CSA accept that deterrence should outweigh compensation but, at the same time, any deterrent effect requires a plausible element of compensation": p. 7391, fn. 23. In order to achieve this balance, the Committee proposed the establishment of a series of limits on damages and liability, as well as the creation of express statutory defences. To give priority to compensation would have led to a different set of recommendations and limits, as can be seen from the dissenting statement of Philip Anisman in the *Allen Committee Report*: pp. 85-124.

66 The limitation period in s. 138.14 *OSA*, which was added by the CSA in 2000 through proposed amendments to legislation in response to the 1998 Draft Legislation (see App. C of the CSA Notice 53-302 (the "2000 Draft Legislation"), at p. 7429), was originally modeled upon the limitation period for general civil liability in s. 138 *OSA*. It was expressly designed to run without regard for the "plaintiff's knowledge of the facts giving rise to the cause of action": 1998 Draft Legislation, at p. 3384.

67 The leave requirement for actions under Part XXIII.1 *OSA* was developed by the CSA and reported in CSA Notice 53-302. This requirement arose out of a concern for the potential of U.S.-style "strike suits" in Canada. Strike suits are meritless actions launched in order to coerce targeted defendants into unjust settlements. The Allen Committee had concluded that the legal environment in Canada was sufficiently different from the United States to prevent a flood of unmeritorious claims: pp. 26-27.

68 The CSA nonetheless concluded that the depth of public concern and some examples of "entrepreneurial litigation" in Canada justified further measures to prevent strike suits: CSA Notice 53-302, at p. 7389. It proposed a screening mechanism that would require plaintiffs to obtain leave in order to assert a statutory cause of action under the *OSA* by satisfying the court that the action was being brought in good faith and had a reasonable possibility of success. The overriding policy concern was for long-term shareholders, who are unfairly affected by the volatility of share prices that results from spurious claims. In setting out the nature and the components of this mechanism, the CSA stressed the importance of screening out unmeritorious actions *as early as possible* in the litigation process:

> The CSA have also introduced in the 2000 Draft Legislation a new provision designed to screen out, as early as possible in the litigation process, unmeritorious actions (section 7 of the 2000 Draft Legislation). This screening mechanism is designed not only to minimize the prospects of an adverse court award in the absence of a meritorious claim but, more importantly, to try to ensure that unmeritorious litigation, and the time and expense it imposes on defendants, is avoided or brought to an end early in the litigation process. By offering defendants the reasonable expectation that an unmeritorious action will be denied the requisite leave to be commenced, the 2000 Draft Legislation should better enable defendants to fend off coercive efforts by plaintiffs to negotiate the cash settlement that is often the real objective behind a strike suit.
>
> The new screening provision would require a plaintiff to obtain leave of the court in order to bring an action. Before granting leave, the court must be satisfied that the action (i) is being brought in good faith and (ii) has a reasonable prospect of success at trial.
>
> This screening mechanism, coupled with the new provision described earlier that would require court approval of a settlement agreement are procedural protections that supplement the "loser pays" cost and proportionate liability provisions retained from the 1998 Draft Legislation. Taken together, these elements of the 2000 Draft Legislation should ensure that any exercise of the statutory right of action occurs in a litigation environment different from that in the United States and less conducive to coercive strike suits. [Emphasis added; footnotes omitted; p. 7390.]

69 In sum, Part XXIII.1 *OSA* strikes a delicate balance between various market participants. The interests of potential plaintiffs and defendants and of affected long-term shareholders have been weighed conscientiously and deliberately in light of a desired precise balance between deterrence and compensation. The legislative history reveals a long, meticulous development of this balance, one that found expression in all the limits built into the scheme.

(d) Analysis

70 In my opinion, a careful consideration of the context of limitation periods, the *CPA* and Part XXIII.1 *OSA* reveals that the Court of Appeal's decision in the instant cases is not only at odds with the ordinary and grammatical meaning of the words of the provisions at issue but also broadly undermines the legislative structures and the purposes at stake in these appeals.

71 It is particularly troubling to see the anomalous result produced by the decision of the Court of Appeal in these cases, namely that a plaintiff could improve his or her position by filing a class proceeding asserting the Part XXIII.1 *OSA* cause of action, thereby causing the limitation period to be suspended by s. 28 *CPA* where it would not otherwise have been possible to do so had the same plaintiff filed an individual lawsuit. The Court of Appeal justified this result on the basis that Part XXIII.1 *OSA* is optimized for class proceedings, but did so in quoting a passage from the Allen Committee's report which merely states that combining class actions with the statutory scheme would provide ample protection against extortionate actions. I accept that Part XXIII.1 *OSA* is optimized for class proceedings in the sense that the statutory action that Part creates does not require proof that the plaintiff relied on the misrepresentation. However, this should not be used to undermine the strict limitation period provided for in s. 138.14 *OSA*, which is not supposed to be suspended until leave is granted.

72 The Court of Appeal wrote in the cases at bar that it was concerned about judicial economy and access to justice; it noted that the ruling in *Timminco* would force potential class members to initiate their own individual actions in order to protect their rights before leave is obtained in the class proceeding. Although I accept the importance of judicial economy as articulated by the Court of Appeal in *Logan* and *Coulson*, the rationale for those decisions cannot extend beyond the fundamental limits of class proceedings.

73 As I mentioned above, class actions are procedural mechanisms which can only *extend* the substantive rights of the representative plaintiff to the other class members. The only way s. 28 *CPA* can protect the other members is by affording them the substantive protection already enjoyed by the representative plaintiff. Before there is a right of action or a suspension of the limitation period flowing from the operation of the statutory scheme itself, the *CPA* cannot be interpreted in such a way as to create either one.

74 Karakatsanis J. states that "[w]ithout s. 28, the commencement of a proceeding by a representative plaintiff would only suspend the limitation period with respect to that plaintiff; the limitation period governing other potential class members would continue to run during the certification proceedings" (para. 175). I agree, but in the case of class actions alleging secondary market misrepresentations, the representative plaintiff, acting on his or her own, must first obtain leave in order for the limitation period to be suspended. My reading of s. 28 *CPA* simply maintains this requirement for s. 138.3 *OSA* statutory claims, while extending the suspension to all other potential class members once leave is granted. In this sense, s. 28 *CPA* still "shelters the rights of potential class plaintiffs under the umbrella of the representative plaintiff's action" (para. 176), but it forces the representative plaintiff to proceed expeditiously to obtain leave. This interpretation promotes the purposes of the *CPA*, is compatible with the purpose and operation of Part XXIII.1 *OSA* and allows the class proceeding to remain an effective vehicle for secondary market liability claims.

75 The interpretation proposed by my colleague and by the Court of Appeal in the cases at bar gives priority to the objectives of the *CPA* at the price of contradicting the ordinary and grammatical meaning of the words of the provisions and upsetting the specific balance struck in Part XXIII.1 *OSA* even though those objectives had already been taken into account in enacting the legislation providing for the statutory claim. Part XXIII.1 *OSA* is the more recent legislation; it

creates a scheme that is intended to be comprehensive, and was crafted with the *CPA* in mind. The purposes associated with the *CPA* — judicial economy, access to the courts and behaviour modification — were each explicitly considered in developing the structure of Part XXIII.1 *OSA*. Policy concerns, as compelling as they are, do not override the plain meaning of the text and the intent of the Ontario legislature. This is not altered by the fact that both the *CPA* and Part XXIII.1 of the *OSA* are remedial in nature, and should thus be interpreted broadly and purposively. The end result of the legislature's consideration was that the scheme includes a leave requirement that serves as a precondition to the commencement of an action, a limitation period and no requirement to prove reliance on the misrepresentation. The combined effect of these features is to promote efficiency and fairness for both parties.

76 The interpretation proposed by the Court of Appeal in these cases significantly affects the protection provided against strike suits. As I noted above, the preliminary leave requirement was added because the CSA believed that the usual measures under the *CPA* did not provide appropriate safeguards. To supplement the *CPA*'s protection against unmeritorious actions, the CSA proposed a screening mechanism in which the granting of leave *as early as possible* in the litigation process was an essential component.

77 Requiring merely that a statutory cause of action be mentioned in an existing class proceeding for the limitation period to be suspended can hardly be said to achieve that purpose. It might even hypothetically force some defendants to enter in an unjust settlement when the leave application is pending — potentially during many years — and thus negatively affect the corporate defendant's share value.

78 In my view, the Court of Appeal's interpretation of s. 28 *CPA* not only contradicts the ordinary and grammatical meaning of the words used, but also displaces the balance struck by the legislature as reflected in Part XXIII.1 *OSA*. Thus, the Court of Appeal not only upset the carefully considered design of Part XXIII.1 *OSA*, but also inverted the statutory interpretation process, using an older provision of general application to alter a more recent, comprehensive scheme.

79 The Court of Appeal wrote that the effect of *Timminco Ltd.*, namely that a plaintiff does not unilaterally control whether his or her claim is brought within the limitation period (because of the starting point of the limitation period or because of delays caused by the defendant or the court), was "foreign to the concept of a limitation provision" (para. 27). In my view, the Court of Appeal failed to appreciate not only that modern limitation periods flow from an exercise in balancing the rights of plaintiffs and defendants, but also that the legislature undertook that balancing exercise in designing the limitation period in question. Section 138.14 *OSA* does not have an internal suspension mechanism, and the limitation period begins to run regardless of knowledge on the plaintiff's part, be it on when a document containing a misrepresentation is released, when an oral statement containing a misrepresentation is made, or when there is a failure to make timely disclosure. The scheme is exacting and even harsh, but it is structured in this manner to balance the interests of plaintiffs, defendants and long-term shareholders.

80 The plaintiffs argue that the effect of *Timminco Ltd.* is that leave is practically impossible to obtain. I disagree. The facts in *IMAX* suggest the opposite, given that the leave and certification motions were heard some three months before the limitation period expired. More importantly, even assuming that the plaintiffs are correct, *Timminco Ltd.* does not cause this difficulty, but merely fails to relieve a specific group of litigants from the consequences of the *OSA* scheme. In other words, any adverse consequence flows naturally from the text of Part XXIII.1, which is not ambiguous.

81 Like Goudge J.A in *Timminco Ltd.*, I am unwilling to rely upon an isolated purpose of limitation periods, taken out of context, in order to give priority to one stakeholder over others, particularly where the legislature was so clearly alive to these considerations in making the choices it made generally for Part XXIII.1 *OSA*, and more specifically for s. 138.14.

82 Ultimately, in light of the underlying principle and the structure of class proceedings in Canada, the operation of s. 28 *CPA* must follow the granting of leave under s. 138.8 *OSA*. I should add that this interpretation is also compatible with the legislative choices embodied in Ontario's statutory scheme for secondary market misrepresentation. Above all, it is consistent with the ordinary and grammatical meaning of the words of the provisions.

(2) Conclusion

83 After considering the ordinary and grammatical meaning of the words of the provisions as well as the entire legislative context, I am of the view that s. 28 *CPA* cannot operate to suspend the limitation period for a statutory claim for secondary market misrepresentation before leave for that claim has been granted under 138.8 *OSA*. Given my conclusion, which accords with the result in *Timminco*, there is no need to address the question whether the Court of Appeal erred in overturning its own precedent. I will now turn to the second issue of these appeals.

B. Jurisdiction for Relief

84 The interposition of *Timminco Ltd.* in the proceedings below upset the presumption on which the plaintiffs were operating. A presumption, I should add, that was based on an erroneous reading of the provisions at issue. Before the motion judges and in this Court, the plaintiffs therefore asked that equity be used to save their statutory claims. In this Court, the argument centred on whether the courts below could and should have relied upon the doctrine of *nunc pro tunc* or the doctrine of special circumstances. Although there is some confusion on this point in the motion judges' reasons, *nunc pro tunc* and special circumstances are two separate doctrines. As a result, they need to be addressed separately.

(1) Doctrine of Nunc Pro Tunc

85 The courts have inherent jurisdiction to issue orders *nunc pro tunc*. In common parlance, it would simply be said that a court has the power to backdate its orders. This power is implied by rule 59.01 of the *Rules of Civil Procedure*: "An order is effective from the date on which it is made, *unless it provides otherwise*".

86 The history of the courts' inherent jurisdiction to issue orders *nunc pro tunc* is intimately tied to the maxim *actus curiae neminem gravabit* (an act of the court shall prejudice no one). Originally, the need for this type of equitable relief arose when a party died after a court had heard his or her case but before judgment had been rendered. In civil suits, this situation caused problems because of the well-known common law rule that a personal cause of action is extinguished with the death of the claimant.

87 One of the oldest and most often cited cases, *Turner v. London & South Western Railway* (1874), L.R. 17 Eq. 561 (Eng. Ex. Ch.), dealt with this very circumstance: the plaintiff had died after the hearing but before the court rendered its judgment. The court ordered that its judgment be entered *nunc pro tunc*, as of the day when the argument terminated, noting that this would not cause an injustice to the other party and that such a result was appropriate in a case in which the delay had resulted from an act of the court. A long line of Canadian cases has followed *Turner*, as courts have granted *nunc pro tunc* orders where parties have died after hearings: *Gunn v. Harper* (1902), 3 O.L.R. 693 (Ont. C.A.); *Young v. Gravenhurst (Town)* (1911), 24 O.L.R. 467 (Ont. C.A.); *Hubert v. DeCamillis* (1963), 41 D.L.R. (2d) 495 (B.C. S.C.); *Monahan v. Nelson*, 2000 BCCA 297, 76 B.C.L.R. (3d) 109 (B.C. C.A.); *Medina v. Bravo*, 2008 BCSC 1307, 87 B.C.L.R. (4th) 369 (B.C. S.C.).

88 LeBel and Rothstein JJ. drew upon this line of cases in *Hislop v. Canada (Attorney General)*, 2007 SCC 10, [2007] 1 S.C.R. 429 (S.C.C.), affirming "the correctness of this approach" and concluding that the estate of any class member in a class proceeding who was alive on the date that argument concluded was entitled to the benefit of the judgment: para. 77.

89 In *CIBC*, Strathy J. suggested that a court has inherent jurisdiction to issue an order *nunc pro tunc*, but only in the case of a slip or oversight. In my opinion, the occurrence of a slip or oversight is not the only circumstance in which a court may exercise its inherent jurisdiction, but is instead one example of a situation in which it may do so. To hold otherwise would run counter to the historical basis for the development of the doctrine.

90 In fact, beyond cases involving the death of a party or a slip, the courts have identified the following non-exhaustive factors in determining whether to exercise their inherent jurisdiction to grant such an order: (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such

that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice (*New Alger Mines Ltd., Re* (1986), 54 O.R. (2d) 562 (Ont. C.A.), at pp. 570-71; *Gallo v. Beber* (1998), 116 O.A.C. 340 (Ont. C.A.), at paras. 7 and 10; *Krueger v. Raccah* (1981), 12 Sask. R. 130 (Sask. Q.B.), at paras. 11-15; *Parker v. Atkinson* (1993), 104 D.L.R. (4th) 279 (Ont. U.F.C.), at p. 286; *Hogarth v. Hogarth*, [1945] 3 D.L.R. 78 (Ont. H.C.), at pp. 78-79; *DeGroote v. Canadian Imperial Bank of Commerce* (1998), 37 O.R. (3d) 651 (Ont. C.A.), at p. 654; *Couture v. Bouchard* (1892), 21 S.C.R. 281 (S.C.C.), at p. 285; *Westman v. Gyselinck*, 2014 MBQB 174, 308 Man. R. (2d) 306 (Man. Q.B.), at para. 40, citing *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.), at para. 28; *McKenna Estate v. Marshall* (2005), 37 R.P.R. (4th) 222 (Ont. S.C.J.), at paras. 23-24). None of these factors is determinative.

91 Returning to the issue in the cases at bar, there are two schools of thought in the jurisprudence on whether a failure to obtain leave within a specified limitation period results in the nullity of the action or is merely a procedural irregularity. According to one view, a failure to do so results in the nullity of the action, which cannot be remedied by a *nunc pro tunc* order, and is therefore an "insurmountable obstacle": *Holst v. Grenier* (1987), 65 Sask. R. 257 (Sask. Q.B.), at para. 10. According to the second view, such a failure is merely a procedural irregularity that can be corrected by a *nunc pro tunc* order: see e.g., *Canadian Imperial Bank of Commerce Mortgage Corp. v. Manson* (1984), 32 Sask. R. 303 (Sask. C.A.), at paras. 8-11 and 33; *McKenna*, at para. 22.

92 In my opinion, van Rensburg J. correctly stated the law on this point in *IMAX*. She noted that the courts have been willing to grant *nunc pro tunc* orders where leave is sought within the limitation period but not obtained until after the period expires (as in *Montego Forest Products Ltd.*). She also noted that, in the cases suggesting that an action commenced without leave was a nullity, the applicable limitation periods had expired before the application for leave was brought. A *nunc pro tunc* order in such cases would be of no use to the plaintiff, as it would be retroactive to a date after the expiry of the limitation period.

93 Thus, subject to the equitable factors mentioned above, an order granting leave to proceed with an action can theoretically be made *nunc pro tunc* where leave is sought prior to the expiry of the limitation period. One very important caveat, identified by Strathy J., is that a court should not exercise its inherent jurisdiction where this would undermine the purpose of the limitation period or the legislation at issue.

94 This is because, as with all common law doctrines and rules, the inherent jurisdiction to grant *nunc pro tunc* orders is circumscribed by legislative intent. Given the long pedigree of the doctrine and of rule 59.01, to which I have referred, it has been held that the legislature is presumed to have contemplated the possibility of a *nunc pro tunc* order: *McKenna*, at para. 27; *Parker*, at pp. 286-87; *New Alger Mines*, at pp. 570-71. However, *nunc pro tunc* orders will not be available if they are precluded by either the language or the purpose of a statute. None of the other equitable factors listed above, including the delay being caused by an act of the court, can be relied on to effectively circumvent or defeat the express will of the legislature.

(2) Application of Nunc Pro Tunc

95 I must now decide whether the doctrine applies to the cases at bar. Before doing so, I should briefly outline the applicable standard of review. The standard that ordinarily applies to a judge's discretionary decision on whether to grant an order *nunc pro tunc* is that of deference: if the judge has given sufficient weight to all the relevant considerations, an appellate court must defer to his or her exercise of discretion (*Reza v. Canada*, [1994] 2 S.C.R. 394 (S.C.C.), at p. 404). However, if the judge's discretion is exercised on the basis of an erroneous principle, an appellate court is entitled to intervene: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 54. In *CIBC*, Strathy J. found that he did not have jurisdiction to make the order *nunc pro tunc*. It follows that he did not actually exercise any discretion, and there is therefore no decision to defer to. But, even if he had done so, his reasoning on whether the order should be granted *nunc pro tunc* was based on an erroneous principle in that he conflated the doctrine of *nunc pro tunc* with that of special

circumstances and erroneously concluded that an order can be made *nunc pro tunc* only in the event of a slip or oversight. His decision is therefore not entitled to deference on appeal.

96 Having reached this conclusion, I must now consider whether the discretion to grant leave *nunc pro tunc* should be exercised. As I mentioned above, a court's exercise of its inherent jurisdiction to grant such an order has the potential to undermine the strict limitation period set out in s. 138.14 *OSA*. In particular, one of the clear objectives of Part XXIII.1 is to ensure that leave will be sought and obtained quickly. The requests of the plaintiffs in *CIBC* and *Celestica* for a *nunc pro tunc* order sit uneasily with this objective. As for *IMAX*, a *nunc pro tunc* order, if appropriate, can only be applicable in respect of the defendants who were parties to the original statement of claim, as I will discuss later.

97 In *CIBC*, Strathy J. wrote that he had no jurisdiction to relieve the plaintiffs from the application of s. 138.14 *OSA*. However, a close reading of his reasons suggests that he was of the opinion that he had inherent jurisdiction, but that he could not exercise his discretion, because this case did not involve a slip or oversight. As I mentioned above, however, the occurrence of a slip or oversight is not the only circumstance in which a court may exercise its inherent jurisdiction to grant an order *nunc pro tunc*, but is instead one example of a situation in which it may do so. Strathy J. therefore erred in limiting the exercise of his inherent jurisdiction to a case involving a slip or oversight.

98 Had he reached a different conclusion, Strathy J. would have exercised his discretion to issue the order for "several reasons": para. 540. One of the reasons he gave was that "the plaintiffs have been diligently pursuing the motion for leave on their own behalf and on behalf of the Class", although it is clear from his comments that this finding of fact is inextricably linked to the idea that "[t]his is not a case in which the suspension of the limitation period would have left the parties, Class Members and the court without any guarantee that the action would be prosecuted": para. 541. Yet lack of prejudice to the defendants and diligence are two different things. Strathy J. also stated that, had he concluded that he could exercise his inherent jurisdiction, the fact that the plaintiffs were surprised by *Timminco Ltd.* would have played an important role in his decision on whether to grant the order.

99 With all due respect, what I find particularly problematic is that the plaintiffs' request for a *nunc pro tunc* order shows that they were aware of the requirement of obtaining leave, yet they made the choice to bring a motion for leave at the same time as their certification motion rather than expediting the leave motion. Their failure to obtain leave within the limitation period is therefore a result of their own decision. The fact that the plaintiffs were surprised by the decision in *Timminco Ltd.* is of no help to them, since, as Strathy J. noted, not only were they mistaken in their interpretation of the law, but they also proceeded on the assumption "that the court had jurisdiction to extend the limitation period and that the discretion would be exercised in their favour by granting leave *nunc pro tunc*": para. 511.

100 My colleague Cromwell J. says that "[t]he plaintiffs reasonably thought that they could be granted leave after the expiry of the limitation period" (para. 139). Although the plaintiffs' belief that they *could be* granted leave might be considered reasonable, it was not reasonable for them to assume that they *would be* granted leave. A plaintiff cannot simply assume that he or she will be granted relief, doing nothing although knowing that the limitation period is going to expire. In the instant cases, the plaintiffs could have requested an expedited hearing, but they did not even raise the issue, ultimately presenting the judge with a *fait accompli*. As Strathy J. wrote, "Had the issue been raised, the parties might have considered a tolling agreement. Had the parties not reached an agreement, I would have considered whether the hearing could be scheduled at an early date or whether some other order could be made to prevent potential injustice": para. 539. Strathy J. went further, adding that "[t]he lack of prejudice to the defendants and the irreparable prejudice to Class Members as a result of the loss of their cause of action would have militated strongly in favour of some action": para. 539. In *CIBC*, more than a year and a half passed between the filing of the first statement of claim and the filing of the notice of motion seeking leave under s. 138.8. Granting an extension of the limitation period, in the form of a *nunc pro tunc* leave order, in this context would defeat the very purpose of s. 138.14 *OSA* and would amount to an unreasonable exercise of discretion.

101 While the courts do have inherent jurisdiction to issue *nunc pro tunc* orders in relation to leave to commence claims under s. 138.3 *OSA*, that jurisdiction is not unlimited. It should be exercised bearing in mind that the leave

requirement, and its interaction with the limitation period, are central to the delicate balance struck in Part XXIII.1 *OSA*. Strathy J. wrote that "extending the limitation period in this particular case would not do violence to the purposes of limitation periods, including the need of parties to order their affairs after reasonable periods of repose and to avoid evidence becoming stale or lost": para. 543. This comment, which focuses on limitation periods in general, disregards the delicate balance achieved in Part XXIII.1 of the *OSA* in particular. Strathy J. correctly observed that he should refrain from undermining the strict limitation period set out in s. 138.14 *OSA*, but, with respect, he did not act accordingly in concluding that he would have issued the *nunc pro tunc* order.

102 Cromwell J. also refers to Strathy J.'s view that there is a duty to protect the rights of unrepresented putative class members and that that could justify the issuance of a *nunc pro tunc* order. I cannot subscribe to this argument, since class members do not have more rights than the representative plaintiff.

103 I would also add that the last of the reasons Strathy J. gave in support of his conclusion that he would have granted such an order was premised on an erroneous interpretation of the law: he found that the plaintiffs' statutory claim had a reasonable possibility of success, but as I will explain below, this finding was based on the wrong threshold.

104 In my opinion, Strathy J., although in a very good position to assess and weigh all the relevant considerations, failed to proceed with the necessary caution in considering whether he would have exercised the court's discretion in the plaintiffs' favour. If a *nunc pro tunc* order could be made where a limitation period has expired even though the plaintiffs did absolutely nothing to prevent its expiry, the effect would be that it is very easy to override the legislature's intent.

105 Similar considerations apply in *IMAX*. The plaintiffs waited nearly two years after leave was granted before filing a statement of claim pleading the statutory cause of action and adding defendants, even though 79 days had remained in the limitation period after leave was granted, in view of the parties' agreement that the limitation period be suspended while the leave motion was under reserve. As a result, in my opinion, the plaintiffs' delay in filing their action far outweighed any delays caused by acts of the court in respect of which a *nunc pro tunc* order might be justified. In this sense, the irregularity in their case is also tied to their own deliberate and informed acts.

106 Nevertheless, I am inclined to grant the *nunc pro tunc* order in relation to the defendants — IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce — who were parties to the original statement of claim. I am of the view that with respect to those defendants, van Rensburg J. exercised her discretion correctly. However, as regards the other defendants (Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble), who were not defendants in any proceeding at the time when argument on the leave application was concluded, the plaintiffs, who waited more than two years after leave was granted before issuing a first statement of claim against them as defendants and provided no valid explanation for this delay, certainly cannot be said to have acted diligently. Granting relief to the plaintiffs against those defendants in this context would undermine the strict limitation period set out in s. 138.14 *OSA* and the balance struck in the legislation.

107 Indeed, here, the plaintiffs had two things to do: obtain leave and issue a fresh statement of claim (to include the statutory cause of action and to add new defendants). The leave application was under reserve when the limitation period technically expired. However, as mentioned before, the parties had agreed to suspend that period while the application remained under reserve. Therefore, a period of 79 days was still available, when leave was granted, to issue the fresh statement of claim. Yet, the amendment to include the statutory cause of action — even made outside the 79 days period — , by nature, would have operated retroactively to the date of the initial statement of claim. In any event, as van Rensburg J. correctly noted: "An order for the effective date of an amendment is within the scope of rule 26.01, which provides that a court shall grant leave to amend a pleading 'on such terms as are just' at any stage of an action ..." (para. 99). However, I am of the view that the situation is different regarding the addition of the new defendants. Since, strictly speaking, there was no statement of claim pending against these defendants, the amendment cannot operate retroactively. It can only apply for the future. In my opinion, adding a statutory cause of action based on the same facts as the common law claim through a technical amendment, and adding new defendants, are two different things and should be treated accordingly. In exercising her discretion, van Rensburg J. failed to address or distinguish the situation of these additional

defendants. She simply concluded that a *nunc pro tunc* order was enough to relieve the plaintiffs from the expiry of the limitation period. I am of the view that this question should have been addressed.

108 Moreover, van Rensburg J. found that the facts of the case before her did not allow for the doctrine of special circumstances to be applied. She wrote the following, at para. 68: "... I do not believe that the doctrine of special circumstances has any actual or potential application to the operation of the limitation period under s. 138.14 of the *OSA* or is relevant to the relief sought by the plaintiffs in this case". It is worth noting that s. 21(1) of the *Limitations Act, 2002* provides that, "[i]f a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding." Some judges have said that s. 21(1) has abolished the doctrine of special circumstances for limitation periods to which the *Limitations Act, 2002* applies. See *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401 (Ont. C.A.). If that is true, it would be another reason why the *nunc pro tunc* order should not be granted in respect of the defendants who were added after the expiry of the limitation period. I note, however, that the case law is contradictory as regards the scope of s. 21(1) of the *Limitations Act, 2002*. See, e.g., *Bikur Cholim Jewish Volunteer Services v. Penna Estate*, 2009 ONCA 196, 94 O.R. (3d) 401 (Ont. C.A.); *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764 (Ont. S.C.J.).

109 My colleague, Cromwell J., writes that "the wiser course for us... is not to address this issue in disposing of the *IMAX* appeal" (para. 154). I agree with him on this point. However, one may conclude that his reasons necessarily imply that s. 21 does not apply to the case at bar since he comes to the conclusion that relief *can* be granted to add defendants despite the expiry of the limitation period. Since the parties have not made complete submissions on this point and since I conclude that relief regarding the addition of new defendants should not be granted for other reasons, it is not necessary for me to address the issue of s. 21(1). I would nevertheless highlight that, at the very least, s. 21 is an explicit recognition by the Ontario legislature that amendments aiming to add parties to an existing procedure are different in nature than other types of amendments and should be made promptly. At the risk of repeating myself, for a period of almost five years and three months, the only defendants to the existing statement of claim were IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.

110 To sum up, given the agreement between the parties to suspend the limitation period while the decision was under reserve, which had the effect of leaving a period of 79 days available in the limitation period when leave was granted, and given the existence of the original statement of claim, I am of the view that a *nunc pro tunc* order is justified in relation to the defendants who were parties to that statement of claim. As regards the defendants who were not parties to any statement of claim at the time when argument on the leave application was concluded, however, the discretion to grant leave *nunc pro tunc* should not be exercised, nor do the facts of this case justify the application of the doctrine of special circumstances — assuming that it has not been abolished by s. 21(1) of the *Limitations Act, 2002*. I would therefore not issue the order in relation to Neil S. Braun, Kenneth G. Copland, Garth M. Girvan, David W. Leebron and Kathryn A. Gamble, but would issue it in respect of IMAX Corp., Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.

111 As for *Celestica*, because no motion for leave was filed before the expiry of the limitation period, a *nunc pro tunc* order, assuming one were available, could not remedy that expiry. This is sufficient to deny a *nunc pro tunc* order. Moreover, for reasons which I will explain below, I am of the opinion, with all due respect, that it was not open to Perell J. to apply the doctrine of special circumstances to salvage the plaintiffs' claim.

(3) Doctrine of Special Circumstances

112 Although pinpointing the origin of an equitable doctrine is generally an exercise fraught with peril, it can be said with a limited degree of certainty that the doctrine of special circumstances originated in Lord Esher M.R.'s ruling in *Weldon v. Neal* (1887), 19 Q.B.D. 394 (Eng. C.A.). In that case, Lord Esher stated that an amendment adding a cause of action to a statement of claim after the expiry of the limitation period for that cause of action will generally be unfair and prejudice a defendant. He therefore held that a court should allow such an amendment only in "very peculiar circumstances": p. 395. It is this narrow exception which has evolved into what is now known as the doctrine of special circumstances.

113 In essence, the doctrine allows a court to temper the potentially harsh and unfair effects of limitation periods by allowing a plaintiff to add a cause of action or a party to the statement of claim after the expiry of the relevant limitation period. I hasten to add that, as the Court recognized in *Basarsky v. Quinlan* (1971), [1972] S.C.R. 380 (S.C.C.), and as the word "special" — or "peculiar" — suggests, the circumstances warranting such an amendment will not often occur.

114 As an offspring of equity, the doctrine of special circumstances is naturally concerned with fairness to the parties. Indeed, this concern was at the forefront of Lord Esher's mind in *Weldon* . Unsurprisingly, no exhaustive list of the circumstances that qualify as "special" has been proposed by the courts, and I believe it would be risky and unwise to do so. I note however that, concerned with not prejudicing a defendant, this Court has paid particular attention to whether the facts relevant to the extinguished action were pleaded in the original statement of claim and whether the defendant was aware of them during discovery: *Basarsky*; see also *Dugal*, at paras. 60-68. The factors enumerated by the Ontario Court of Appeal in *Frohlick v. Pinkerton Canada Ltd.*, 2008 ONCA 3, 88 O.R. (3d) 401 (Ont. C.A.), at para. 23, which were reiterated by van Rensburg J. in *IMAX*, are also helpful guides:

> As such, "special circumstances" include factors such as: the relationship between the proposed claim and the existing action; the true nature of all of the claims; the progress of the action; and the knowledge of the parties ... [*IMAX*, at para. 71]

115 Here, the legislature specifically barred a plaintiff from commencing a statutory action under s. 138.3 *OSA* without first obtaining leave of the court. This leave requirement, and its interaction with the limitation period, is central to the delicate balance which Part XXIII.1 *OSA* strikes between the various participants in the market.

116 The doctrine of special circumstances is of no avail to any of the plaintiffs in the three cases before us. This is because neither the limitation period in s. 138.14 *OSA* nor the leave requirement in s. 138.8 *OSA* can be defeated by amending the pleadings to include a statutory claim under s. 138.3. In all three cases, this doctrine does not provide the plaintiffs with an effective remedy, since it cannot on its own overcome the leave requirement of s. 138.8 *OSA*.

117 In the case of *Celestica*, in which the limitation period expired before a motion for leave was even brought, applying the special circumstances doctrine to grant relief to the plaintiffs would necessarily provide judges with general authority to extend limitation periods, which would frustrate the purpose of s. 138.14 *OSA*. It is also striking that Perell J., in discussing the "special circumstances" justifying this discretionary remedy, did not conclude that the plaintiffs had been diligent, but focused instead on the absence of prejudice to the defendants.

C. Threshold of Reasonable Possibility of Success

118 In *CIBC*, the defendants challenged the threshold that must be met by a plaintiff applying for leave under s. 138.8 *OSA*. One of the conditions that must be met to obtain leave is that the court must be satisfied that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff": s. 138.8(1)(b) *OSA*. Strathy J. interpreted this statutory language as establishing a relatively low threshold according to which leave will be denied only if, "having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success": para. 374. The Court of Appeal upheld this interpretation of s. 138.8(1)(b).

119 The defendants in *CIBC* argued in this Court that the threshold articulated by Strathy J. is too low.

120 I will address the point briefly, given the Court's recent decision in *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106 (S.C.C.) .

121 In *Theratechnologies inc.*, the Court was asked to interpret s. 225.4 of the *Securities Act*, CQLR, c. V-1.1 (the "*QSA*"), the Quebec counterpart to s. 138.8 *OSA*. That section, which introduces a leave requirement for a statutory claim based on a secondary market misrepresentation in Quebec, provides that there must be a "reasonable possibility

that [the action] will be resolved in favour of the plaintiff" for leave to be granted. The Court stated that for an action to have a "reasonable possibility" of success under s. 225.4, there must be a "reasonable or realistic chance that [it] will succeed": *Theratechnologies inc.*, at para. 38. Claimants must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim": *Theratechnologies inc.*, at para. 39.

122 There is no difference between the language of s. 138.8 *OSA* and that of s. 225.4 *QSA*. Moreover, both provisions relate to leave applications for statutory claims based on secondary market misrepresentation, albeit in different jurisdictions. Accordingly, the threshold test under s. 225.4 *QSA* articulated in *Theratechnologies inc.* applies in the context of s. 138.8 *OSA*.

123 Although there may be differences in the records that need to be produced in support of the leave applications in Quebec and Ontario (*121851 Canada inc. c. Theratechnologies inc.*, 2013 QCCA 1256 (C.A. Que.), at paras. 125-26 (CanLII)), this does not affect the threshold a plaintiff must meet.

D. Preferability

124 In *CIBC*, the plaintiffs sought certification for seven common issues relating to a common law misrepresentation claim. Strathy J. held that reliance, a necessary element of a common law misrepresentation claim, "is not an issue that is capable of resolution on a common basis": para. 600. He added that "a class proceeding would not be the preferable procedure for resolving a reliance-based claim, as it would give rise to individual issues of causation and reliance that would be unmanageable": para. 610. In the result, he refused to certify all seven issues relating to the common law negligent misrepresentation claim.

125 The Court of Appeal upheld the motion judge's decision not to certify the issues relating to reliance and damages. However, it held that five out of the seven issues proposed by the plaintiffs related to the intent and conduct of the defendant CIBC, and should be certified as against CIBC in order to advance the litigation against it. The Court of Appeal therefore allowed the appeal in part and certified those five issues.

126 In this Court, the defendants argued that none of the issues relating to the common law misrepresentation claim should be certified in this case. The defendants further argued that the common law misrepresentation claim fails the preferability analysis required under s. 5(1)(d) *CPA*, because the common law cause of action is not preferable to the statutory cause of action under Part XXIII.1 *OSA*. The defendants raised several arguments to the effect that the procedure created by Part XXIII.1 was specifically intended by the legislature to be the preferable procedure for class actions: CIBC factum, at paras. 89-111.

127 CIBC's argument is premised in part on *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, [2013] 3 S.C.R. 949 (S.C.C.), in which this Court stated that the preferability analysis focuses not just on the alternative procedure, but also on the effect that the procedure may have on the achievement of substantive results: para. 34.

128 I am unable to accept CIBC's arguments. First, they run counter to the language of s. 138.13 *OSA*, which provides that the statutory right of action under s. 138.3 *OSA* is meant to be "in addition to, and without derogation from, any other rights". Moreover, the preferability analysis under s. 5(1)(d) *CPA* requires a court to assess whether a class proceeding is the preferable *procedure*. The Court's dictum in *Fischer* does not stand for the proposition, essentially advanced by the defendants, that a cause of action must be the preferable one in order for a claim based on it to be certified as a class proceeding. It merely indicates that the effect of a procedure on substantive rights is relevant to its preferability for the pursuit of a given cause of action. In short, the defendants' argument confuses procedure with substantive causes of action.

VI. Conclusion

129 For the reasons stated above:

• In *CIBC*, I would allow the appeal except in respect of the Court of Appeal's conclusion that five of the seven issues proposed by the plaintiffs should be certified.

• In *IMAX*, I would allow the appeal and only issue a *nunc pro tunc* order granting leave to commence the statutory action in relation to the defendants who were parties to the original statement of claim, that is, IMAX Corporation, Richard L. Gelfond, Bradley J. Wechsler and Francis T. Joyce.

• In *Celestica*, I would also allow the appeal.

• Finally, in *CIBC* and *Celestica*, I would award costs to the appellants throughout. In *IMAX*, I would also award costs to the appellants throughout regardless of my decision to grant a *nunc pro tunc* order for some defendants.

***Cromwell J.* (concurring with Côté J. on Celestica) (concurring in the result with Karakatsanis J. on CIBC and IMAX):**

I. Introduction

130 I agree with my colleague Côté J.'s interpretation of the limitation and leave provisions which leads to the conclusion that the actions in these appeals were commenced after expiry of the limitation period. I also agree that the Ontario Superior Court of Justice has a discretionary power to grant leave, *nunc pro tunc*, after the expiry of that period, to commence a statutory claim for secondary market misrepresentation under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 ("*OSA*"). I part company with my colleague, however, on the question of whether the appeals in *Canadian Imperial Bank of Commerce et al. v. Green and Bell* ("*CIBC*") and *IMAX Corp. et al. v. Silver and Cohen* ("*IMAX*") are proper cases in which to exercise that discretion. In my view they are and I would dismiss the appeals. As for the appeal in *Celestica Inc. et al. v. Trustees of the Millwright Regional Council of Ontario Pension Trust Fund et al.* ("*Celestica*"), I agree with Côté J.'s reasons and disposition, including as to costs.

131 The possible limitation period problem was not on anyone's radar before the Ontario Court of Appeal's decision in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569 (Ont. C.A.), in February 2012. These proceedings had been underway for years before that, since 2006 in the case of the *IMAX* action and 2008 in the case of the *CIBC* action. In both matters, the motion judges found that the plaintiffs had prosecuted their claims with diligence, that the claims had a reasonable prospect of success, that the defendants had been well aware of the nature of the claims from the beginning and that there was no hint of prejudice to them resulting from the passage of time. The record suggests that the defendants were as surprised as the plaintiffs to learn that they might have a limitation defence when *Timminco* was released. Failing to exercise the *nunc pro tunc* discretion in these cases permits the defendants to avoid facing the merits of the plaintiffs' claims on purely technical grounds that even the defendants did not assert until after the fact.

II. CIBC

132 The motion judge in the *CIBC* appeals, Strathy J. (as he then was), found that the plaintiffs' secondary market misrepresentation claim brought under Part XXIII.1 of the *OSA* was time-barred because they had not obtained leave of the court to commence it within the three-year limitation period found at s. 138.14 of the *OSA*: *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225 (Ont. S.C.J.). I agree with this conclusion. Strathy J. also found, however, that he had no authority to grant the plaintiffs leave *nunc pro tunc* in order to avoid dismissing the plaintiffs' action as time-barred. I agree with Côté J. that this conclusion was wrong and that the motion judge in fact had a discretion to grant the order *nunc pro tunc*.

133 The question then becomes whether that discretion ought to be exercised in the plaintiffs' favour. The motion judge stated that if he had jurisdiction to extend the limitation period by granting leave *nunc pro tunc*, he would do so. Before turning to his reasons for reaching that conclusion, it is worth noting how well placed he was to assess the factors relevant to this question. Any legal errors that he made were irrelevant to his assessment of the equities in relation to whether or not to allow the claim to proceed.

134 The motion judge had been the case management judge assigned to this file since the fall of 2009. He had conducted the 8-day hearing which led to his decision. The record before him was voluminous. It consisted of some 25 affidavits, excerpts from thousands of documents, 29 days of cross-examination and the evidence of 18 witnesses. The reasons for decision demonstrate that the motion judge had an encyclopedic grasp of this material. He was, therefore, ideally placed to assess and weigh all of the many considerations that are relevant to the question of whether the court's discretion should be exercised in the plaintiffs' favour. His assessment of those considerations and the weight to be given to them should, in my view, be treated with deference on appeal.

135 The motion judge gave five reasons why he would exercise his discretion to grant leave *nunc pro tunc* in the plaintiffs' favour. I see no error in the principles that he applied, in the factors that he considered relevant or in his assessment of the evidence. In short, I see no basis to interfere with his conclusion that this is a proper case to exercise the *nunc pro tunc* discretion in the plaintiffs' favour.

136 The motion judge began by finding that the plaintiffs had been diligent in pursuing their action:

> First, unlike the situation in *Timminco Ltd.*, the plaintiffs have been diligently pursuing the motion for leave on their own behalf and on behalf of the Class. This is not a case in which the suspension of the limitation period would have left the parties, Class Members and the court without any guarantee that the action would be prosecuted. [para. 541]

He reviewed the history of the litigation in detail: para. 494. He found that while the action had moved slowly, there had never been any doubt about the plaintiffs' intention to seek leave and that a "great deal of time, effort and resources ha[d] been expended to develop a substantial record": para. 495. He noted that the plaintiffs had faced some challenges along the way and that "[t]heir conduct [could not] be described as dilatory": para. 495. He observed that the action had been under case management from the outset. I see no basis on which we could reach a different assessment of the plaintiffs' diligence than did the motion judge who had been immersed for several years in this file.

137 The motion judge then noted that the limitation issue came as a surprise to the bar when the *Timminco* decision was released in February 2012: Second, *Timminco Ltd.* was a case of first impression. It is fair to say that it came as a surprise to the bar. There are other decisions of this court, specifically those of Perell J. in *Timminco Ltd.*, of Rady J. in *Nor-Dor Developments Ltd.* and of van Rensburg J. in *Silver v. Imax Corp.*, that suggested that the course of action proposed by the plaintiffs was appropriate. [para. 542]

138 The motion judge elaborated on this point by noting that, until the *Timminco Ltd.* decision, the limitation period issue had not been the subject of discussion between the parties or counsel: "There is nothing in the communications between counsel, leading up to the certification and leave motions, to suggest that either party had considered the possibility that the limitation period ... might expire if the certification and leave hearing did not occur and leave was not granted before December 6, 2010" (para. 497). He observed that *Timminco Ltd.* was released on the second to last day of the original hearing of the motion (i.e. February 16, 2012) and that counsel for the individual *defendants* described it at the time as a "thunderbolt": para. 475. It was only then that counsel requested an opportunity to make further submissions on the issue of whether this action was time-barred and additional factums and authorities were delivered and further argument heard in April 2012: para. 476.

139 The plaintiffs reasonably thought that they could be granted leave after the expiry of the limitation period. The defendants did not suggest otherwise until after *Timminco Ltd.* was released. The "thunderbolt" remark suggests that the defendants were as surprised by the ruling — and the possibility that the claim was irremediably statute-barred — as everyone else. The point is not whether, with the benefit of hindsight, we think that these views were wrong. Neither is the point that the plaintiffs' decision to seek leave *nunc pro tunc* was an intentional strategic choice. The point, in my view, is that this strategic choice had a reasonable basis at the time it was made. No one apparently had ever thought otherwise. The motion judge concluded that this was a factor favouring exercising his discretion in favour of the plaintiffs. I see no reason to differ from that conclusion.

140 The motion judge next turned to the fact that exercising his discretion would not undermine the purposes of limitation periods:

> Third, extending the limitation period in this particular case would not do violence to the purposes of limitation periods, including the need of parties to order their affairs after reasonable periods of repose and to avoid evidence becoming stale or lost. The defendants have known of the action from an early stage and have mounted a full evidentiary response. The limitation period could have been extended without unfairness to the defendant and without impairing public confidence in the administration of justice. [para. 543]

141 This is a proper consideration and I see no error in the motion judge's reliance on it here. I would put the point more bluntly. Holding that the plaintiffs' claim is irremediably statute-barred is to defeat that claim by allowing the defendants to take advantage of an after-the-fact "gotcha" — a technical defence, the application of which in this case does not further either the purpose of the limitation defence or reinforce public confidence in the administration of justice.

142 The motion judge next considered the duty to protect unrepresented putative class action members:

> Fourth, this is a proposed class action and the court has a duty to the unrepresented putative Class Members to ensure that their rights are protected. At least up until the decision in *Timminco Ltd.*, it was reasonable for unrepresented Class Members to assume that their rights could shelter under the umbrella of this action. Their rights will now be lost as a result of the expiry of the limitation period. [para. 544]

143 I see no basis to object to the motion judge's reasoning on this point.

144 The final basis for exercising discretion in the plaintiffs' favour was that their claim has a reasonable prospect of success:

> Finally, I have found that the plaintiffs' statutory claim has a reasonable possibility of success. In the next section of these reasons, I will set out my conclusion that the statutory claim would be suitable for certification under the *C.P.A.* As a result of the expiry of the limitation period, this class action, which has a reasonable possibility of success, will not be resolved on its merits, an unfortunate conclusion, under the circumstances. [para. 545]

145 There is no basis to interfere with the motion judge's assessment of the potential merit of the plaintiffs' claim or with his conclusion that this factor supported exercising discretion in their favour. I note that my colleague Côté J. does not take issue with the motion judge's conclusion that this action had a reasonable prospect of success.

146 To conclude, the motion judge identified relevant considerations, weighed them carefully and decided that if he had jurisdiction to do so, he would exercise his discretion in the plaintiffs' favour. I see nothing wrong with his analysis, let alone anything that justifies second-guessing his conclusion on appeal.

147 Other issues were raised in the *CIBC* appeals. With respect to the threshold for leave under s. 138.8 *OSA*, I agree with my colleague Côté J.'s conclusion as to the applicable threshold and with my colleague Karakatsanis J. that the *CIBC* plaintiffs met it. I also agree with Côté J.'s analysis and disposition of the certification of common issues.

148 In *CIBC*, therefore, I would apply the *nunc pro tunc* doctrine to grant leave to commence the statutory action, and dismiss the appeals.

III. IMAX

149 Like my colleague Côté J., I agree that the motion judge in this matter, van Rensburg J. (as she then was), was correct to exercise her *nunc pro tunc* discretion. I part company with my colleague, however, in overturning the motion judge's decision to exercise her curative discretion in relation to the defendants whom she permitted to be added to the amended statement of claim.

150 Like my colleague, I do not think that this case is an appropriate one to finally decide whether the limitation defence in relation to the claims against additional defendants is beyond the reach of the court's discretion by virtue of s. 21(1) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The point is an important one in Ontario law, the Ontario jurisprudence is not settled and we received no argument on it in this appeal, and only brief submissions in the appeal in *Celestica Inc. et al. v Trustees of the Millwright Regional Council of Ontario Pension Trust Fund et al.* ("*Celestica*").

151 Section 21(1) of the *Limitations Act, 2002* prevents the addition of a party where a limitation period has expired with respect to the claim against that party. However, s. 20 provides that the *Limitations Act, 2002* (and therefore s. 21(1)) "does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act". The relevant limitation period here, of course, is found not in the *Limitations Act, 2002* but in the *OSA*. The limitation period is therefore "under another Act". The question that arises is whether the discretion which the motion judge exercised to make an amendment to add parties after expiry of a limitation period is an "extension, suspension or other variation of a limitation period ... by or under another Act" and therefore not ousted by s. 21(1).

152 The Ontario jurisprudence is not settled on this question. In *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469, 90 O.R. (3d) 401 (Ont. C.A.), the issue was whether the amendment powers under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, could be used so as to extend a limitation period under the *Limitations Act, 2002*. The court's conclusion in the negative does not precisely resolve the question in this case. Moreover, the Ontario Court of Appeal has held that the doctrine of special circumstances continues to be available with respect to limitation periods other than those set out in the *Limitations Act, 2002*: see, e.g., *Bikur Cholim Jewish Volunteer Services v. Penna Estate*, 2009 ONCA 196, 94 O.R. (3d) 401 (Ont. C.A.). In the Ontario Superior Court of Justice, there are conflicting decisions in relation to the impact of ss. 20 and 21 on the court's inherent jurisdiction: see, e.g., the three motion judges' decision in the present appeals and *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1764 (Ont. S.C.J.). Recent commentary takes the view that the discretionary jurisdiction may apply to other limitation periods contained in different legislation, such as the *OSA* in this case: C. Porretta and R. Punjani, "The Clock Strikes: A Review of the Limitations Act, 2002, A Decade Later" (2015), 44 *Adv. Q.* 346, at pp. 375.

153 The motion judge reviewed the Ontario jurisprudence and concluded that the Superior Court of Justice continues to have discretion in relation to amendments that have the effect of overcoming the limitation period set out in the *OSA*: 2012 ONSC 4881 (Ont. S.C.J.), at paras. 67-88 (CanLII). She found that s. 20 of the *Limitations Act, 2002* preserved that jusrisdiction: paras. 82-83. The Court of Appeal did not consider this aspect of the case, given its conclusion that the action was not statute-barred: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402 (Ont. C.A.). The appellants in this case did not rely on ss. 20 and 21 of the *Limitations Act, 2002*, although the appellants in the *Celestica* appeal did advance brief argument on this point: A.F., at paras. 76-78.

154 In my view, the wiser course for us in these circumstances is not to address this issue in disposing of the *IMAX* appeal. The issue is an important point of Ontario limitations law on which the Ontario Court of Appeal has not definitively ruled. The point is also far from straightforward, as evidenced by the conflicting views of the motion judges in these cases. We have nothing in the reasons of the Court of Appeal in this case to assist our consideration of the question and the parties to the *IMAX* appeal did not address it. I would therefore dispose of this appeal without deciding this point. To be clear, I am treating this as an issue not before us for decision in this appeal and my reasons should not be understood as implying anything else.

155 I focus, therefore, on the motion judge's exercise of the discretion, assuming that she had it to exercise. I find nothing to fault and no basis for reaching a different conclusion.

156 The application to dismiss the statutory claim on the basis of the limitation period was heard more than two years after leave to proceed and certification had been granted. The motion judge noted that the defendants had actual notice of the nature of all of the claims against them well within the limitation period. She observed that, in fact, this actual notice "far exceeded the detail of what would have been pleaded in a statement of claim" by virtue of the requirement

that the plaintiffs file affidavits in support of their leave motion: para. 89. The motion judge also found that the motion for leave was brought promptly and pursued vigorously without inappropriate delay.

157 The motion judge also dismissed the defendants' argument that time continued to run until the plaintiffs actually filed their amended statement of claim, a step which did not occur until some two and one-half years after the expiry of the limitation period. Giving effect to this argument, she found, would be "arbitrary and unfair": para. 95. In her view, the plaintiffs had "moved promptly to make the amendments as soon as they reasonably could have done so": para. 95. She explained:

> The defendants sought to appeal the leave decision, such that it was only on February 14, 2011, with the release of the decision refusing leave to appeal, that the order granting leave under s. 138.8 became final. Any attempt to amend the Statement of Claim in the interim would have been premature. Considering the issues, and the attempt to obtain the defendants' approval to the amendments, many of which were in relation to aspects of the claim other than the pleading of the statutory cause of action, the plaintiffs moved promptly to make the amendments as soon as they reasonably could have done so.
>
> [Emphasis added; para. 95.]

158 The motion judge was intimately familiar with the progress of this file with which she had been dealing over several years. I see no basis on which to interfere with her assessment of the equities of the situation or of the plaintiffs' diligence. In particular, there is nothing that permits us to second-guess on appeal her conclusion that the plaintiffs moved promptly to make the amendments to their statement of claim as soon as they reasonably could have done so.

IV. Disposition

159 I would dismiss the appeals in *CIBC* and *IMAX*. I agree with Karakatsanis J.'s disposition as to costs.

***Karakatsanis J.* on CIBC and IMAX (dissenting with Côté J. on Celestica) (Moldaver and Gascon JJ. concurring):**

160 These appeals concern class proceedings asserting both the statutory cause of action for secondary market misrepresentations and the common law tort of negligent misrepresentation. The question here is whether s. 28 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*CPA*), can suspend the limitation period for the statutory cause of action found in Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (*OSA*) where leave has not yet been granted under that Part. My colleague Côté J. concludes that it cannot. I disagree, and would hold that it can.

161 As long as the class proceeding is properly commenced, s. 28 of the *CPA* will suspend the limitation periods applicable to all of the causes of action asserted (that is, fully pleaded) within the proceeding. As leave under s. 138.8 of the *OSA* is not a constituent element of the statutory cause of action set out in s. 138.3, the "assertion" of that cause of action does not require the prior obtaining of leave. Thus, I conclude that s. 28 of the *CPA* will suspend the limitation period in s. 138.14 of the *OSA* once the representative plaintiff properly commences a class proceeding for a common law cause of action and pleads the statutory cause of action and its constituent elements in the statement of claim.

162 Neither the text nor the purpose of s. 28 supports my colleague Côté J.'s conclusion that this provision will not suspend the class members' limitation period until the representative plaintiff obtains leave under s. 138.8 of the *OSA*. Such an interpretation is not consistent with the purposes of the *CPA* as a whole, nor is it harmonious with the purposes or text of Part XXIII.1 of the *OSA*, a statutory framework intended to operate effectively with the class proceeding vehicle. Concretely, excluding the statutory cause of action from s. 28 protection until leave has been granted removes compliance with the limitation period from the plaintiff's control. It would also necessarily oblige potential class members to file a multitude of individual motions for leave to commence the statutory claim, thus unnecessarily adding procedural steps and increasing costs and delays for all parties involved. Such an obligation is not required by the text of s. 28, nor by the context or purposes of the *CPA*. Such a result serves neither judicial economy nor access to justice. Rather, it undermines the harmonious operation of class proceedings in the securities context.

163 In my view, the five-member panel of the Court of Appeal in this case (the *Green* panel) was correct to overturn that court's earlier interpretation of the application of s. 28 of the *CPA* to the s. 138.14 limitation period. For the reasons below, I would dismiss the appeals.

I. Facts and Judicial History

164 The appeals in these three cases stem from motions in class proceedings brought before different judges of the Ontario Superior Court of Justice: *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, 29 C.P.C. (7th) 225 (Ont. S.C.J.) (*CIBC*), per Strathy J.; *Silver v. Imax Corp.*, 2012 ONSC 4881 (Ont. S.C.J.) (*IMAX*), per van Rensburg J.; *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.*, 2012 ONSC 6083, 113 O.R. (3d) 264 (Ont. S.C.J.) (*Celestica*), per Perell J. In each case, the plaintiffs claimed damages under the common law tort of negligent misrepresentation and under the statutory cause of action in Part XXIII.1 of the *OSA* for alleged misrepresentations in respect of shares trading in the secondary market. None of the plaintiffs obtained leave to commence the statutory claim before commencing the class proceeding. In all of the cases, the limitation period, if not suspended, would have run out prior to leave being obtained: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 370 D.L.R. (4th) 402 (Ont. C.A.), at para. 2 (*Green ONCA*).

165 During the course of these class proceedings, the Ontario Court of Appeal released its decision in another matter, *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569 (Ont. C.A.), in which it interpreted the application of s. 28 of the *CPA* to the limitation period in s. 138.14 of the *OSA* for the first time. The panel (per Goudge J.A.) held that s. 28 did not suspend the s. 138.14 limitation period until leave was obtained: para. 20. Prior to this decision, the parties in the present appeals assumed that s. 28 suspended the limitation period whether or not leave had been granted. As Strathy J. noted, "[c]ounsel for the individual defendants aptly described [*Timminco*], at that time, as a 'thunderbolt'": *CIBC*, at para. 475.

166 The motion judges presiding over the present cases found that the panel's interpretation of s. 28 in *Timminco* governed the claims. Van Rensburg J. and Perell J. applied the common law doctrines of *nunc pro tunc* and special circumstances to save the *IMAX* and *Celestica* claims from being statute-barred. Strathy J. found that those doctrines were inapplicable, and that the statutory claim in *CIBC* could not be saved.

167 On appeal, all three cases were heard together by a five-member panel of the Ontario Court of Appeal: *Green ONCA*, at para. 5. The panel overturned *Timminco Ltd.*, holding that s. 28 of the *CPA* suspends the limitation period for all class members once the statutory cause of action is asserted in a class proceeding by a representative plaintiff, even if leave has not yet been granted, as long as the facts that found the action and the intent to seek leave to commence the action have been pleaded: *Green ONCA*, at paras. 6 and 78.

168 Following these decisions, the Ontario legislature amended Part XXIII.1 of the *OSA* so that the limitation period is suspended on the filing of a motion for leave under s. 138.8 (s. 138.14(2), am. S.O. 2014, c. 7, Sch. 28, s. 15). Despite this amendment, the question at issue in these appeals requires determination for the parties before us and for other class proceedings brought prior to the amendment of the *OSA*.

II. Analysis

A. The Issues

169 Section 28 of the *CPA* is engaged upon the "commencement of the class proceeding" and operates to suspend "any limitation period applicable to a cause of action asserted" in the class proceeding. Part XXIII.1 of the *OSA* provides, first, that an action under that Part cannot be commenced "without leave of the court granted upon motion with notice": s. 138.8(1). Second, it provides that "[n]o action shall be commenced" after the expiration of the applicable limitation period: s. 138.14.

170 The combined operation of these provisions in the context of these class proceedings raises the following questions in relation to s. 28 of the *CPA*:

1. Is leave required in order for the plaintiff to "assert" the Part XXIII.1 statutory cause of action?

2. Is leave a pre-condition for the commencement of a class proceeding asserting both the Part XXIII.1 statutory cause of action and the common law tort of negligent misrepresentation?

171 I agree with the five-member panel of the Ontario Court of Appeal and would therefore answer these questions as follows.

(a) The statutory cause of action can be asserted in a class proceeding statement of claim before leave is obtained under the *OSA*.

(b) Section 28 of the *CPA* applies once *the class proceeding* is commenced with respect to a *cause of action* asserted. Where the statutory cause of action is asserted in a class proceeding that has been properly commenced with respect to a common law tort, s. 28 will suspend the limitation period for all causes of action.

B. Section 28 of the Class Proceedings Act

172 The *CPA* creates and governs the procedural vehicle of class proceedings. It is a remedial statute designed to improve judicial economy, increase the access of plaintiffs to the court system for claims that would otherwise be too costly, and promote behavioural modification of wrongdoers: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.), at para. 15; Ontario Law Reform Commission, *Report on Class Actions* (1982) (*OLRC Report*), vol. I, at pp. 117 and 212. Section 28 is an integral part of this scheme:

28. (1) [Limitations] Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

(a) the member opts out of the class proceeding;

(b) an amendment that has the effect of excluding the member from the class is made to the certification order;

(c) a decertification order is made under section 10;

(d) the class proceeding is dismissed without an adjudication on the merits;

(e) the class proceeding is abandoned or discontinued with the approval of the court; or

(f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

173 The French version of s. 28(1) states that "*tout délai de prescription applicable à une cause d'action invoquée dans un recours collectif est suspendu en faveur d'un membre du groupe à l'introduction du recours collectif*".

174 Section 28 protects potential class members from the expiration of their individual limitation periods during the representative plaintiffs' pursuit of their rights through a class proceeding by suspending the limitation period for all potential class members for any "cause of action asserted in a class proceeding". In this way, s. 28 promotes two of the purposes guiding the *CPA* — judicial economy and access to justice: *OLRC Report*, vol. III, at p. 779.

175 Regardless of when the representative plaintiff commences proceedings within the limitation period, the length of the certification process is inherently uncertain: see *OLRC Report*, vol. III, at p. 779. Without s. 28, the commencement of a proceeding by a representative plaintiff would only suspend the limitation period with respect to that plaintiff; the

limitation period governing other potential class members would continue to run during the certification proceedings. Thus, potential class members would have to initiate parallel individual proceedings to protect their rights from becoming statute-barred. Neither outcome — the inundation of the courts by parallel individual proceedings or the expiration of plaintiffs' individual rights due to a delayed or failed certification process — is desirable: *ibid.*, at pp. 779-80.

176 Section 28 offers protection against both outcomes: *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), at p. 47. Section 28 shelters the rights of potential class plaintiffs under the umbrella of the representative plaintiff's action. As long as the representative plaintiff commences a class proceeding within the applicable limitation period, s. 28 will suspend the limitation periods of all potential class members during the certification process.

177 As the text of s. 28 indicates, the suspension applies to any "cause of action asserted in a class proceeding" — "*une cause d'action invoquée dans un recours collectif*". In these appeals, this Court must determine whether s. 28 shelters the rights of potential class members with respect to a Part XXIII.1 statutory cause of action that is fully pleaded (that is, asserted), but where leave has not yet been granted.

C. Part XXIII.1 of the Securities Act

178 Part XXIII.1 is remedial legislation intended to promote the twin purposes of facilitating and enhancing access to justice for investors and deterring corporate misconduct and negligence. It was introduced to the *OSA* following a series of "high profile and well publicized incidents of alleged misrepresentations and questionable disclosure" by Canadian public companies: Canadian Securities Administrators, "Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of 'Material Fact' and 'Material Change'", CSA Notice 53-502, reproduced in (2000), 23 OSCB 7383, at p. 7385. The Toronto Stock Exchange Committee on Corporate Disclosure (the Allen Committee) recommended the inclusion of a statutory civil liability regime in the *OSA* to remedy two gaps in the *OSA* enforcement measures: (1) the inability of regulators to effectively enforce compliance with disclosure in the secondary market; and (2) the inadequacy and inaccessibility of existing civil remedies for secondary market misrepresentations (*Final Report — Responsible Corporate Disclosure: A Search for Balance* (1997), at p. vi-vii (the *Allen Committee Report*)).

179 In response to this need, Part XXIII.1 seeks to deter misleading disclosure without unduly penalizing innocent market participants or unreasonably increasing the cost of disclosure: CSA Notice 53-302, at p. 7387. To do so, it provides investors who incurred losses as a result of a misrepresentation or lack of timely disclosure on the secondary market with a statutory cause of action: *OSA*, ss. 138.3 and 138.4. This statutory cause of action exists over and above any other causes of action the plaintiff may have: s. 138.13. The scheme balances provisions to facilitate recourse for plaintiff investors, such as deemed reliance on the misrepresentation, with protections for corporate defendants. Two such protections are the restrictive limitation period and the leave requirement.

180 First, the limitation period is restrictive in that it runs from the occurrence of the misrepresentation, or from a news release advising that leave has been granted to commence an action based on such misrepresentation, rather than from a prospective plaintiff's discovery or awareness of that event:

> **138.14** [Limitation period] No action shall be commenced under section 138.3,
>
> (a) in the case of misrepresentation in a document, later than the earlier of,
>
> (i) three years after the date on which the document containing the misrepresentation was first released, and
>
> (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;

Similar limitation periods are prescribed for a misrepresentation in a public oral statement (s. 138.14(b)) and for the failure to make timely disclosure (s. 138.14(c)). This legislative choice protects corporate defendants from untimely claims and forces plaintiffs to act promptly.

181 Similarly, the leave requirement acts as a screening mechanism, allowing courts to protect corporate defendants from unmeritorious claims:

> **138.8** (1) [Leave to proceed] No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,
>
> (a) the action is being brought in good faith; and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

D. Relationship Between Section 28 of the CPA and Part XXIII.1 of the OSA

182 It is not a coincidence that the balancing of interests under Part XXIII.1 of the *OSA* is most evident in the context of a class action — the most effective procedural vehicle for securities liability claims. In recommending an expansion of Ontario's class action regime, the Ontario Law Reform Commission highlighted the inadequacy of the then-available procedural vehicles to address claims in the securities context:

> Although losses stemming from wrongdoing in relation to the trading of securities may be large in the aggregate, individual losses may be comparatively small; when the small size of the claim is combined with the cost of litigating complex issues in securities cases, access to the courts to redress wrongdoing may not be economically feasible for the individual investor. Moreover, ... there is not, at present, an effective means of aggregating claims that arise in the securities context.
>
> (*OLRC Report*, vol. I, at p. 236)

The Allen Committee, tasked more than a decade later with recommending a statutory civil liability scheme in the securities context, concluded that

> the combination of class actions with statutory civil liability for a misrepresentation in continuous disclosure, properly designed, would provide the benefits of better disclosure without unduly facilitating meritless litigation.
>
> (*Allen Committee Report*, at para. 4.6)

183 The effectiveness and preferability of the class proceeding in pursuing Part XXIII.1 statutory claims depends on these balanced protections. By freeing plaintiffs from the obligation to prove their reliance on the misrepresentation, Part XXIII.1 ensures that class proceedings remain effective procedural vehicles for injured securities purchasers. However, by requiring plaintiffs to comply with the leave requirement and imposing a cap on recoverable damages, Part XXIII.1 also protects corporate defendants from meritless large-scale strike suits and extortionate liability in the class action context. This Part was intended to operate harmoniously with the *CPA*. The evidence to date indicates that this interrelationship is key: 26 of the 27 claims that have been the subject of decisions under Part XXIII.1 in Ontario thus far have been brought through the class proceedings vehicle.

E. Joint Operation of Section 28 of the CPA and Sections 138.8(1) and 138.14 of the OSA

184 As noted above, the question is whether, in a class proceeding claiming both the Part XXIII.1 statutory cause of action and the common law tort of negligent misrepresentation, s. 28 of the *CPA* can suspend the limitation period applicable to the statutory cause of action if leave has not yet been obtained under the *OSA*.

185 This requires determining how the two statutes operate together. The Court must determine whether the statutory cause of action can be "asserted" and whether the class proceedings can be "commenced" for the purposes of s. 28 of the *CPA* before leave has been granted under the *OSA*, such that the statutory limitation period is suspended pending certification under the *CPA*. Prior to the recent amendment, Part XXIIII.1 of *OSA* was silent regarding suspension of the limitation period. This Court must seek a harmonious interpretation that respects the ordinary meaning of the text of both statutes, and the context and the purpose of the *CPA*, recognizing its intended application in the securities context.

186 As both the *CPA* and Part XXIII.1 of the *OSA* are remedial in nature, the provisions from those statutes must be interpreted broadly and purposively: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed., 2014), at §§ 15.18, 15.22 and 15.59. Moreover, in analysing the interaction between the laws of one legislature, we must presume that the laws "are meant to work together, both logically and teleologically, as parts of a functioning whole": Sullivan, at §11.2; *Thibodeau c. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340 (S.C.C.), at para. 93; *Lévis (Ville) c. Côté*, 2007 SCC 14, [2007] 1 S.C.R. 591 (S.C.C.), at para. 47. Here, the relevant provisions in the *OSA* were enacted after the *CPA*, although the legislator clearly intended to facilitate class actions for securities litigation. However, to the extent that we must interpret provisions in Part XXIII.1 of the *OSA* to resolve this issue, it is clear that this Part was intended to operate in the context of class proceedings legislation: *Allen Committee Report*, at para. 4.6. If available, we should prefer an interpretation that does not frustrate the purposes of either law at issue.

(1) Is Leave Required to Assert the Part XXIII.1 Statutory Cause of Action for the Purposes of Section 28?

187 Section 28 of the *CPA* is engaged upon the "commencement of the class proceeding" with respect to "a cause of action asserted" in the class proceeding. Must a plaintiff first obtain leave under the *OSA* in order to properly "assert" the statutory cause of action for the purposes of s. 28?

188 A cause of action is "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person": *Letang v. Cooper* (1964), [1965] 1 Q.B. 232 (Eng. C.A.), at pp. 242-43, per Diplock L.J.; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94 (S.C.C.), at para. 27; *Dilollo, Re*, 2013 ONCA 550, 117 O.R. (3d) 81 (Ont. C.A.), at para. 43.

189 As the *Timminco Ltd.* and *Green* panels of the Court of Appeal noted, "assert" has multiple dictionary meanings. To "assert" is defined variously as "[t]o invoke or enforce a legal right" or "make or enforce a claim to": *Black's Law Dictionary* (10th ed., 2014), at p. 139; *Canadian Oxford Dictionary* (2nd ed., 2004), at p. 78. Applying these meanings to the s. 28 context, the *Timminco* panel endorsed the narrower definition "to enforce": paras. 17-18. The *Green* panel disagreed, instead adopting the broader definition "to invoke/to make": para. 46.

190 In my view, the *Green* panel's conclusion that "asserting" a cause of action in s. 28 refers to "invoking the legal right" or "making the claim" is more consistent with the English and French text of s. 28 and with the context of s. 28. It is difficult to see how a plaintiff could ever "enforce" a claim in a pleading, practically or theoretically. A statement of claim, by its nature, is a tool of invocation, as compared to a court judgment, which by its nature is a tool of enforcement. Section 28 is engaged at a very early stage in the litigation — the commencement of a class proceeding. At this stage, the representative plaintiff must plead the constituent elements of the cause of action founding the right or claim in order to then apply for certification: *CPA*, ss. 2(2) and 5.[2] It is in this sense that the plaintiff "makes the claim" or "invokes the legal right". This is the term used in the French version of s. 28: "*invoquée*".

191 In the context of "invoking the legal right" or "making the claim", what does it mean to "assert" the cause of action? To return to the definition of "cause of action", the claim must assert the "factual situation" that "entitl[es] one person to obtain from the court a remedy against another person": *Letang*, at pp. 242-43; see also P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed., 2014), at ¶¶ 4.409 and 4.412 to 4.414. Thus, in order to "make the claim" or "invoke the legal right", the representative plaintiff must plead the essential factual elements required to constitute the cause of action. Côté J. cites *Méthot c. Commission de transport de Montréal* (1971), [1972] S.C.R. 387 (S.C.C.), per

Hall J., in support of her conclusion that the "assertion" of the statutory cause of action requires the plaintiffs to first obtain leave: para. 51. However, the issue in *Méthot* was whether a notice requirement was a constituent element of the particular statutory cause of action. The Court decided that it was, and therefore that the right of action arose only once the notice requirement was fulfilled: p. 398. In contrast, as I shall explain, the leave requirement at issue in these appeals is not a constituent element of the Part XXIII.1 statutory cause of action.

192 Section 138.3 provides injured shareholders with four causes of action tied to misrepresentations in public documents, oral statements, or the failure to make timely disclosure of a material change: *OSA*, s. 138.3(1) to (4). Each cause of action will arise from the factual situation required to give the injured shareholder a "right of action for damages". For example, s. 138.3(1) sets out the multiple factual elements that constitute the right of action for damages for misrepresentations in a document. In order to "invoke the legal right" or "make the claim" based on this cause of action, a representative plaintiff must plead all of these elements. Notably, the obtaining of leave is not one of them. Leave is not part of the "factual situation" giving rise to this cause of action. Moreover, while not decisive, the structure of Part XXIII.1 sets out the s. 138.3 causes of action under the heading "Liability", whereas the s. 138.8 leave requirement is set out under the heading "Procedural Matters". In view of these considerations, I conclude that the presence or absence of leave does not impact the existence of the cause of action founding the statutory claim.

193 Furthermore, treating the leave requirement as an essential component of "asserting" a claim would be inconsistent with the substance of the leave requirement itself. In order to obtain leave, the plaintiff must convince the court of two things: that "the action is being brought in good faith" and that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff": *OSA*, s. 138.8(1); *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106 (S.C.C.), at paras. 31 and 38. To do so, the plaintiff must address the merits of the "factual situation" giving rise to the statutory cause of action by "setting forth the material facts" (*OSA*, s. 138.8(2)):

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

194 In this regime, the leave requirement relates directly to the merits of the action. If obtaining leave were also a constituent element of the statutory cause of action, the court would be required to assess whether leave could be granted as an underlying pre-condition of the ultimate decision on whether to grant leave. Such an outcome would represent a sort of "catch-22" — you cannot get leave without proving you can get leave. Certainly, this would not be consistent with the scheme of the *OSA*.

195 Effectively, obtaining leave under s. 138.8 of the *OSA* is a procedural requirement. A proceeding with respect to the statutory cause of action cannot be commenced without leave. Though the leave requirement impacts the plaintiff's ability to bring suit, it does not form part of, or affect, the factual elements comprising the statutory cause of action. Leave is necessary for the right arising from s. 138.3 to be ultimately exercised, adjudicated at trial and enforced (to obtain damages). However, "asserting" the statutory cause of action for the purposes of s. 28 of the *CPA* — that is, "invoking the legal right" or "making the claim" — does not require the representative plaintiff to first obtain leave.

(2) Is Leave a Pre-condition for the Commencement of a Class Proceeding Asserting the Part XXIII.1 Statutory Cause of Action?

196 As noted above, s. 28 only suspends the running of the limitation periods upon "the commencement of the class proceeding". Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, define a "proceeding" as "an action or application": r. 1.03(1). A proceeding is commenced by the issuance of an originating process, such as a statement of claim, a notice of action, or a notice of application: r. 1.03(1), "originating process". "Commencement" for the purposes of s. 28 refers to the commencement of an intended class proceeding under the *CPA* prior to certification: *Logan v. Canada (Minister of Health)* (2004), 71 O.R. (3d) 451 (Ont. C.A.), at paras. 21-23. To commence a class proceeding, the representative plaintiff must file a statement of claim: r. 1.03(1), "action".

197 With respect to an individual statutory cause of action under Part XXIII.1 of the *OSA*, s. 138.8(1) provides: "No action may be *commenced* under section 138.3 without leave of the court ...". It may well be that a plaintiff could not "commence" an individual statutory action without leave; however these appeals concern class actions, not individual actions. Further, we need not decide the issue of whether a class proceeding based solely on the statutory cause of action may be commenced without leave. The issue before us is whether *these class proceedings* have been properly commenced within the meaning of s. 28 of the *CPA*.

198 There is no question that a class proceeding asserting the common law cause of action based on the tort of misrepresentation may be properly commenced simply by issuing a statement of claim. However, the appellants say that a class proceeding must be capable of being commenced separately for each cause of action asserted. I disagree.

199 The text of s. 28 clearly recognizes the realistic prospect that multiple causes of action (with differing limitation periods and procedural requirements) could be asserted in a single statement of claim. The commencement of "the class proceeding" is sufficient to suspend "any limitation period applicable to *a cause of action asserted*" in the class proceeding. Section 28 does not condition the "commencement" of the class proceeding on the prior fulfilment of all procedural requirements in respect of every cause of action asserted in the proceeding. Nor does it contemplate separate class actions, or different commencement dates, for the different causes of action. Rather, on a plain reading of s. 28, the limitation periods applicable to all causes of action asserted in the proceeding are suspended upon the commencement of the class proceeding, regardless of whether some (such as the Part XXIII.1 statutory cause of action) would require leave to proceed individually.

200 In my view, this understanding of s. 28 best accords with the words, scheme and purpose of the *CPA*, as well as the language, purpose and operation of Part XXIII.1 of the *OSA*.

201 Unlike my colleague Côté J., I do not find it troubling that the intended class proceeding asserting the statutory cause of action (alongside the common law tort) "commences" under s. 28 prior to leave being obtained: para. 50. As stated above, the statutory cause of action arises prior to leave being obtained. It seems to me that a more troubling inconsistency flows from my colleague's interpretation of s. 28: the class proceeding could have different commencement dates for each cause of action. Her interpretation could also result in multiple class proceedings arising from the same facts. This result is neither required nor preferred by the language of s. 28.

202 My colleague and the appellants suggest that the purpose of s. 28 is merely to shelter potential class members under a cause of action that could otherwise be commenced as an individual action — and not to broaden the rights of the representative plaintiff by sheltering a statutory cause of action under a properly commenced class proceeding. They rely heavily on the fact that an individual plaintiff who brings an individual action (as opposed to a class action) does not benefit from a suspended limitation period simply by asserting the statutory claim in her statement of claim.

203 With respect, such a view misses the larger point. Section 28 will never apply to an individual plaintiff; it applies only in the context of class actions. It responds to the interrelated need to protect the interests of class members and to avoid the duplication of redundant individual proceedings by class members; such needs are simply not present in individual proceedings. The provision forms part of a larger scheme that seeks to make class actions an effective and accessible procedural vehicle. Moreover, the comparison my colleague draws between the rights of individual and class plaintiffs is somewhat theoretical, since, as noted earlier, 26 of the 27 claims that have been the subject of decisions under Part XXIII.1 in Ontario have been brought through the class proceedings vehicle. Indeed, this Part of the *OSA* was specifically designed to work effectively with class proceedings.

204 I recognize my colleague's point that the class action is a procedural vehicle, not intended to increase the parties' substantive rights. However, the class action nonetheless provides class members with tools and advantages that "mak[e] pursuing one's substantive rights feasible ... in a way that allows mass claims to be adjudicated efficiently": W. K. Winkler et al., *The Law of Class Actions in Canada* (2014), at p. 6. For example, where damages are certified as a common issue, ss.

23 and 24 of the *CPA* allow the court to admit otherwise inadmissible statistical information to determine issues relating to the quantum or distribution of a monetary award, and to undertake an aggregate assessment of the quantum of monetary damages owed to the class members: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 (Ont. C.A.), at paras. 40-58; *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401 (Ont. C.A.), at paras. 41-53; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346 (Ont. C.A.), at paras. 119-39; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477 (S.C.C.), at paras. 131-35; see also *Barrette c. Ciment du St-Laurent inc.*, 2008 SCC 64, [2008] 3 S.C.R. 392 (S.C.C.), paras. 107-118. These mechanisms, like the protection offered by s. 28 from the running of limitation periods, are not available to individual plaintiffs. These mechanisms make the pursuit of the substantive right of action "feasible" and "efficient" in the context of a collective suit. Far from being "anomalous" (see Côté J. reasons, para. 71), the benefits provided by these provisions are consistent with the intention to make the class proceeding an effective and feasible vehicle for the collective pursuit of substantive claims.

205 Moreover, an interpretation that suspends the limitation period where leave has not yet been granted (1) promotes the purposes of the *CPA*; (2) is harmonious with the language, purpose and operation of Part XXIII.1 of the *OSA*; and

(3) allows the class proceeding to remain an effective vehicle for the pursuit of Part XXIII.1 statutory claims while respecting the policy underpinnings of limitation periods.

206 First, such an interpretation of s. 28 furthers the *CPA*'s goals of judicial economy and access to justice. It guarantees the class members' access to the courts by maintaining one of the main benefits of the class action: the suspension of the limitation period for all class members. Section 28 protects potential class members, including the representative plaintiff, from the running of their individual limitation periods during the collective pursuit of their claims through the class proceeding vehicle. This protection ceases and the individual limitation periods resume running on the occurrence of any of the six events set out in s. 28(1) that end that collective pursuit. Effective protection of potential class members during the collective pursuit of their claims necessarily entails protecting the rights that those class members seek to pursue in a class proceeding as opposed to in individual actions. This interpretation of s. 28 protects class members' individual rights from becoming statute-barred during the pursuit of the class proceeding. This protection, in turn, obviates the need for class members to initiate duplicate individual proceedings to protect these rights, thus promoting judicial economy. My colleague's conclusion that s. 28 does not protect individual class members prior to the obtaining of leave "could go a long way toward eliminating the economic advantage of class proceedings for any class member with a small claim": *Logan v. Canada (Minister of Health)* [2003 CarswellOnt 425 (Ont. S.C.J.), 2003 CanLII 20308 (Ont. S.C.J), at para. 23, per Winkler J., aff'd *Logan v. Canada (Minister of Health)* [2004 CarswellOnt 2662 (Ont. C.A.)]. As Feldman J.A. noted in the present appeals, one of the effects of the decision in *Timminco* was that "[o]ne of the main benefits of the class action, the suspension of the limitation period for all members of the class, has been removed": *Green ONCA*, at para. 64.

207 Second, such an interpretation is harmonious with the balance struck by Part XXIII.1 of the *OSA*. Even if the limitation period is suspended, the leave requirement remains. The leave requirement still serves its screening function, because in order to obtain leave, the representative plaintiff must address the merits of the statutory cause of action: *OSA*, s. 138.8. Moreover, the service of the class action claim still satisfies the recognized policy rationales for the limitation period, and for limitation periods generally: protecting the defendant from liability for ancient obligations, putting the defendant on notice of the claims against her, guaranteeing the preservation of relevant evidence, and ensuring that plaintiffs act in a timely manner (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), at pp. 29-30; *Novak v. Bond*, [1999] 1 S.C.R. 808 (S.C.C.)). If the plaintiff does not commence a class proceeding and assert the statutory claim in the proceeding before the limitation period runs out, her claim will be statute-barred. As well, the inclusion of the statutory claim and the facts underlying it gives notice to the defendants of the particulars of the claim against them and ensures that the defendants will be able to preserve evidence relevant to the claim. Indeed, as class proceedings are actively managed both pre-trial and during the trial, the managing judge is empowered to take appropriate measures to ensure that the claims proceed expeditiously and that leave is sought in a timely manner: Perell and Morden, at ¶¶ 4.234 and 4.235; *CPA*, ss. 12 and 34. Far from "displacing" the balance struck by the legislature in Part XXIII.1, this interpretation of s. 28 maintains that balance and furthers the legislative intent that Part XXIII.1 operate harmoniously with class

proceedings legislation. Indeed, legislative reactions in Manitoba and Ontario to the release of the *Timminco* decision indicate that the interpretation endorsed by my colleague "interprets [Part XXIII.1 of the *OSA*] in an unintended way and limits the access to justice that the new remedy was intended to provide": *Green ONCA*, at para. 73.

208 Finally, such an approach ensures that the class proceeding remains the most effective and available vehicle through which to pursue Part XXIII.1 statutory claims. As the facts of the *IMAX* appeal illustrate, even a plaintiff who discovers the misrepresentation quickly and initiates her claim in a timely manner may be unable to obtain leave and "commence" the statutory action within the three-year limitation period: paras. 5, 22 and 90 (CanLII). Tying the running of the limitation period to the granting of leave removes compliance with the limitation period from the plaintiff's control. It gives defendants both the incentive and, potentially, the means to delay the proceedings on the leave motion until the expiry of the limitation period. As Feldman J.A. noted, it "undercuts the ability of investors to bring a class action within the limitation period because they do not have control of whether they can meet or toll the limitation period": *Green ONCA*, at para. 66. Such an approach also jeopardizes the adjudicative role of the court, as the cases under appeal illustrate. If unsuspended, the limitation period in the *IMAX* appeal would have expired while the leave and certification motions were under reserve, and the limitation period in the *CIBC* appeals would have expired between the filing of the notice of motion seeking leave and the hearing: *IMAX*, at para. 41; *CIBC*, at paras. 494 and 497. Such an interpretation risks the effect of forcing the court to decide whether to allow plaintiffs' rights to expire or to risk the rights of others by deferring other urgent matters to prioritize leave motions: see, for example, *CIBC*, at para. 539.

209 In contrast, tying the suspension of the limitation period to the assertion of the statutory cause of action in a class proceeding, rather than to the granting of leave by the court, avoids these undesirable consequences. Potential plaintiffs can effectively pursue Part XXIII.1 statutory claims through the class proceeding vehicle. Courts are not put in the difficult position of deferring other cases to avoid an injustice.

III. Conclusion

210 In my view, as long as the Part XXIII.1 statutory cause of action is asserted in a properly commenced class proceeding, s. 28 of the *CPA* will suspend the limitation periods applicable to all causes of action asserted — including the limitation period governing the statutory claim — regardless of whether leave has been obtained. This interpretation is consistent with the language of s. 28 and the purposes guiding the *CPA*, and is harmonious with the language and purposes driving Part XXIII.1 of the *OSA*. In the cases before us, the class proceedings were properly commenced with respect to the common law tort of negligent misrepresentation.

211 In contrast, the interpretation adopted by my colleague Côté J. seriously undermines the viability of the class action vehicle in the context of Part XXIII.1 statutory claims. As the *Green* panel noted, this obliges class members to "do what s. 28 was intended to obviate: commence their own action with leave in order to try to ensure that their action is brought within the limitation period": para. 65. By rendering the class action an ineffective vehicle to pursue Part XXIII.1 statutory claims, my colleague's interpretation effectively bars Part XXIII.1 from fulfilling either of its goals; it can neither facilitate access to justice for investors nor deter corporate misconduct.

212 The defendants in the *CIBC* appeals additionally challenge the articulation of the standard to obtain leave under s. 138.8 of the *OSA* adopted by Strathy J. and the *Green* panel. I agree with my colleague Côté J. that the reasonable possibility of success threshold test articulated by this Court in *Theratechnologies* applies to a motion for leave under s. 138.8 of the *OSA*. In my view, the *CIBC* plaintiffs have met this threshold. I also agree with my colleague's discussion and disposition of the *CIBC* defendants' appeals concerning the certification of common issues.

IV. Disposition

213 In each of the three cases appealed to this Court, the respondent plaintiffs commenced class proceedings and pleaded the constituent facts of the tort of negligent misrepresentation and of the Part XXIII.1 statutory cause of action in their statements of claim. In my view, this pleading constitutes an assertion of the statutory cause of action for the

purposes of s. 28 of the *CPA*. Thus, the limitation periods for the statutory claims at issue in these appeals are suspended as of the date of filing of their statements of claim. None of the claims are statute-barred. In light of this conclusion, it is not necessary to address the availability of *nunc pro tunc* or the special circumstances doctrine. However, I should not be taken to agree with either the analysis or conclusions of Côté J. on these issues.

214 I would dismiss the appeals with costs throughout.

Order accordingly.

Ordonnance en conséquence.

Footnotes

1 For the sake of clarity, I will consistently refer to the respondents in the instant cases as the "plaintiffs" and to the appellants in the instant cases as the "defendants".

2 The court may only certify a class proceeding in respect of the causes of action "disclose[d]" in the pleadings: *CPA*, s. 5(1)(a).

TAB A3

1999 CarswellNat 348
Federal Court of Canada — Trial Division

Citizens' Mining Council of Newfoundland & Labrador Inc. v. Canada (Minister of the Environment)

1999 CarswellNat 348, 1999 CarswellNat 4656, [1999] F.C.J. No. 273, 163 F.T.R. 36, 17 Admin. L.R. (3d) 287, 29 C.E.L.R. (N.S.) 117

The Citizens' Mining Council of Newfoundland and Labrador Inc., Applicant and The Minister of the Environment, the Minister of Public Works and Government Services, The Minister of Fisheries and Oceans, Voisey's Bay Nickel Company Ltd., and Her Majesty the Queen in Right of Newfoundland, Respondents

MacKay J.

Heard: February 10, 1998
Judgment: March 8, 1999
Docket: T-2015-97

Counsel: *Rodney Northey* and *Richard J. King*, for applicant.
Ian Dick and *Charleen Brenzall*, for respondent Ministers.
David Stratas, *Brett Ledger* and *Douglas Hamilton*, for respondent Voisey's Bay Nickel Company.
Don Burrage, for respondent HMQ of Newfoundland.

***MacKay J.*:**

Reasons for Order

1 This is an application concerning environmental assessments of the Voisey's Bay nickel project. Put simply, the applicant here challenges the environmental assessment process by two separate environmental impact assessments of developments proposed by the respondent corporation, one for its proposed mine/mill development at Voisey's Bay in Labrador, and the other for its proposed smelter/refinery development at Argentia in Newfoundland. The applicant submits that the two projects require assessment by a single process encompassing both developments.

2 The originating notice of motion, filed September 15, 1997, seeks various forms of relief, including declarations that the proposed project by Voisey's Bay Nickel Company Limited ("the Company") to construct and operate a mine and mill at Voisey's Bay, Labrador, and a smelter and refinery at Argentia, Newfoundland, is a single "project" within the meaning of the *Canadian Environmental Assessment Act*, S.C. 1992, c.37 (the "*Act*"), and that the *Act* requires a single assessment of this project. In the course of hearing this application, and again in subsequent written submissions, the Court was asked by the applicant to consider alternative relief, that is, a declaration that the respondent Ministers have unlawfully and invalidly failed to require a single environmental assessment of the proposed mine, mill, smelter and refinery, as required by s-s. 15(3) of the *Act*.

3 In addition to this primary form of relief, by its originating notice of motion the applicant also seeks an order of *mandamus* requiring the respondents to amend the terms of reference issued to a review panel in respect of the mine/mill development to encompass both the mine/mill and the smelter/refinery, and an order in the nature of prohibition to prevent the respondents from making any decision or taking any course of action which is inconsistent with the declarations here sought.

General Background

4 The applicant in this matter, the Citizens' Mining Council of Newfoundland and Labrador, is a coalition of over 465 persons and 12 socio-environmental organizations representing some hundreds of additional persons. The stated objectives of the applicant are: to monitor mining and related activities in Newfoundland and Labrador, to promote education and awareness of environmental issues arising from mining and related issues in Newfoundland and Labrador, and to ensure that appropriate authorities are aware of the general public's views and concerns about environmental issues arising from mining and related developments.

5 The respondents originally joined in this matter by the originating motion are the Canadian Government Ministers of the Environment, of Public Works and Government Services ("Public Works"), and of Fisheries and Oceans. Voisey's Bay Nickel Company Limited ("VBNC" or the "Company"), the proponent of the developments, and Her Majesty the Queen in Right of Newfoundland and Labrador ("Newfoundland") applied and were joined as respondents, on consent. All respondents were represented at hearings of this application, the three Canadian Ministers being represented by counsel on behalf of the Attorney General.

6 The factual background to this application is complex. Voisey's Bay, the place, is located on the northeast coast of Labrador, between Nain and Utshimasits (Davis Inlet). In November 1994, Diamond Field Resources announced a very substantial mineral find, of nickel, copper and cobalt, near the Bay. Subsequently, in June 1995, Diamond Fields transferred its interests in this discovery to the Voisey Bay Nickel Company, later renamed Voisey's Bay Nickel Company Limited. In August 1996, the Company became a wholly owned subsidiary of Inco Limited.

7 When this application was heard in the spring of 1998 VBNC's plans were to mine, and to process by a mill, in Labrador, the ore found in the mineral deposit, producing nickel-cobalt and copper concentrates to be shipped off-site for smelting and refining. The Company also planned to construct a smelter and refinery at Argentia. At that time the mining operation was expected to last roughly 20 years, and the proposed smelter/refinery, for dealing with some or all of the nickel-cobalt concentrates, but apparently not the copper, would be designed to operate for 40 years.

8 On September 27, 1996, the Company registered with the federal Department of Fisheries and Oceans, a Project Description Report for the proposed construction and operation of the mine and mill project at Voisey's Bay. On the basis of this report, that Department concluded that the proposed mine and mill would require authorization under the *Fisheries Act*, R.S.C. 1985, c. F-14 as amended, because of anticipated disruption of fish habitat, and also a permit under the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, as amended. These requirements trigger the environmental assessment requirements under the *Act*. Since the Department of Fisheries has the power to issue the authorizations, the Minister of Fisheries and Oceans is the responsible authority under the *Act* for the assessment of the proposed mine and mill development.

9 That development also requires an environmental assessment under the Newfoundland *Environmental Assessment Act*, R.S.N. 1990, c.E-14 (the "*NEAA*"). The assessment process for the mine and mill initiative is somewhat complicated by reason of aboriginal land claims of the Labrador Inuit Association and of the Innu Nation to lands in the Voisey's Bay region. In January 1996, the Newfoundland Minister of Environment and Labour wrote to the federal Minister of the Environment proposing a co-operative environmental assessment process for the mine and mill project that would ensure meaningful participation by the Inuit and Innu.

10 Negotiations during the summer and fall of that year between the aboriginal groups and the two governments resulted, on November 21, 1996, in a draft Memorandum of Understanding ("MOU") for the conduct of the environmental assessment of the mine and mill project at Voisey's Bay. Public comment on the draft MOU was invited. The applicant, then an unincorporated coalition of citizens and environmental groups, commented on December 15, 1996, on the proposed assessment process provided under the MOU. It did so without referring to the proposed smelter and refinery development that had been announced on November 29, 1996, by the Company, to be located at Argentia, on the west of the Avalon peninsula in the southeastern part of the island of Newfoundland, some 1200 kilometres southeast of Voisey's Bay. Apparently only one of 100 written comments received on the assessment process proposed

for the mine/mill development under the MOU, that from the Canadian Arctic Resources Committee, suggested that the smelter/refinery development and the mine/mill development be considered part of the same project for the purposes of an environmental assessment.

11 Subsequently, on January 31, 1997, a final version of the MOU was agreed to by the federal and provincial governments and the native groups concerned. Its stated purpose is the establishment of "a single effective and efficient process for assessing the Environmental Effects of the Undertaking, including provisions for comprehensive public involvement." The "undertaking" includes all activities related to the proposed construction, operation, demolition, decommission, and rehabilitation of the mine/mill project. The scope of that project was determined to include the mine and mill and all physical works in relation to the mine and mill, including an evaluation of the shipping corridors from the mine/mill to existing shipping lanes off the east coast of Labrador, though apparently not including shipping lanes all the way to Argentia.

12 The smelter/refinery initiative was not included in environmental assessment arrangements for the mine/mill project. The parties to the MOU considered possible inclusion of the smelter/refinery project at Argentia but concluded that the great distance between the two projects, the difference in environments and affected populations, along with the different natures of the proposed projects and of their potential impacts on the environment, warranted two separate assessments, one of the mine/mill project and one of the smelter/refinery project. Further, it was not anticipated that with the distance between the projects, there would be any cumulative enviromnental impact and it was also noted that the knowledge and experience required of potential assessment panel members would differ for the two developments.

13 On January 31, 1997, after consultation with the province and the aboriginal groups, five panel members were appointed by the federal Minister of the Environment to conduct the environmental assessment of the mine and mill, in keeping with the MOU. By March 1997, the panel had devised draft Guidelines for the Environmental Impact Statement ("EIS") for the mine/mill project and it made these available for public and governmental review and comment. On April 29, 1997, in submissions before this review panel, the applicant, still an unincorporated association, objected to the assessment of the project without including the proposed smelter/refinery project and it raised the spectre of litigation. Principals of the applicant met with the Newfoundland Minister of Environment and with representatives of Public Works Canada in May, 1997, to renew their objection. Final Guidelines for the EIS for the mine/mill project were issued on June 20, 1997. They did not include provision for environmental assessment of the smelter/refinery project at Argentia.

14 Under the issued Guidelines, the Company is to address in its EIS "all phases" of the mine/mill project. The EIS is to be made available to the public for comment for a review period, after which the panel would determine whether the EIS contains sufficient information to hold public hearings. Thereafter, following any hearings considered necessary by the panel, it submits a report to the signatories of the MOU describing the public review process, summarizing any comments and recommendations received from the public, and setting out the rationale, conclusions and recommendations of the panel itself. The panel is empowered under the MOU; by its own understanding it is not conducting an assessment directly under the *Act* or the *NEAA*. Once the panel's report is submitted to the Canadian Ministers of the Environment and of Fisheries and Oceans, the latter's Department will then, pursuant to s.37 of the *Act*, determine whether to grant the permits necessary for work on the project at Voisey's Bay to proceed.

15 It has been noted that VBNC announced the smelter/refinery site at the end of November 1996. On December 12, 1996, the Company registered the smelter/refinery project as required under the *Act*, proposing construction on a site owned by the Government of Canada and operated under the Department of Public Works and Government Services, at Argentia. As the project would involve the transfer of federal government land, Public Works is the responsible authority pursuant to the *Act*.

16 The smelter/refinery also requires environmental assessment under the provincial *NEAA*. When the Company registered the smelter/refinery project for environmental assessment under the *NEAA* on December 9, 1996, it was advised that the two levels of government were negotiating a harmonized environmental process to avoid duplication of effort. On March 18, 1997, the Company was supplied with *Guidelines for Preparation of Terms of Reference for the Argentia*

Nickel Smelter and Refinery Environmental Impact Statement and for the Comprehensive Study ("Guidelines"), to provide guidance on its completion of requirements under the *NEAA* and the *Act*. In accordance with the *Comprehensive Study List Regulations*, SOR/94-638, because of the proposed large marine terminal to be constructed with the smelter/refinery, Public Works, as the responsible authority, determined that a comprehensive environmental study, within the meaning of the *Act* and *Regulations*, was required. Under s.23 of the *Act*, should the comprehensive study identify significant environment effects or should public concern warrant, the project could still be referred to a mediator or a review panel, and there is opportunity for public participation by commenting on the review process at a later stage whatever the process.

17 On March 26, 1997, the Company returned to the governments its draft terms of reference for the Argentia Environmental Impact Statement. It was subsequently informed, on May 23, 1997, that this draft was generally acceptable, subject to certain changes. The Company then commenced preparation of its environmental assessment for the smelter/refinery project, the report of which would be used by the federal and provincial Ministers to assess the environmental viability of the project and the appropriate next steps, if any, in the assessment process.

18 In contemplating whether the assessment should be conducted in combination with the mine/mill analysis, Public Works determined that the large distance between the mine and mill in Voisey's Bay and the smelter/refinery at Argentia meant that environmental impacts of the project would affect different environments and populations, and that there would be no potential for cumulative effects. Further, it was determined that the mine/mill and the smelter/refinery would not be interdependent, for the concentrate from the mine may be processed at other smelters. Indeed, roughly 1/3 of the mineral concentrate produced by the mine/mill would not go to the refinery at Argentia. Thus the smelter may serve as a multi-client facility, smelting ore from other sources than Voisey's Bay. In these circumstances, the Department concluded that the two VBNC project initiatives were not so interlinked that the decision to proceed with one made inevitable the decision to proceed with the other. Other differences between the projects include the absence of aboriginal interests at the Argentia site, the industrial nature of the Argentia region compared with the Voisey's Bay region, and the difference in by-products produced by each facility.

19 On the facts by affidavit evidence, the projects are administered separately, each with its own separate management team, and its own manager of environmental assessment, within the Company. Further, the Company established, for each of the projects, separate consultants and environmental assessment teams to assess and manage the different environmental effects of each project. At the same time, when this matter was heard the smelter/refinery was still clearly viewed by the Company as part of its overall development from the Voisey's Bay mineral resource, and while the Court notes media reports suggest the two projects may now be considered more distinct in the view of VBNC, the smelter/refinery decisions are not likely to be made without some reference to relevant mine/mill developments, including the further exploration of ore reserves. It may be that without an approved mine/mill the Argentia smelter/refinery would probably not be constructed, and construction of the mine/mill may not necessitate construction of the smelter/refinery but there is also considerable pressure not to proceed with a mine/mill project unless the smelter/refinery project also proceeds.

The application for judicial review

20 Following its incorporation at the end of June 1997 the applicant wrote to the respondent ministers on July 17, 1997, urging that there be a single environmental assessment of the smelter/refinery project together with the mine/mill, all as one project, as some of the applicant's principals had earlier urged in representations concerning the MOU panel's draft Guidelines for the EIS for the mine/mill project. In a letter dated August 12, 1997, a representative of the Minister of Public Works, writing of behalf of the Minister, replied to the applicant's letter, indicating that Public Works is the lead Responsible Authority for the smelter/refinery proposal and that its responsibilities include determination of the scope of the project to be assessed. The letter further advised that Public Works considers the mine/mill proposal to be separate from the smelter/refinery proposal. That letter said in part:

In determining the scope of the project to be assessed according to Canadian Environmental Assessment Agency advice, PWGSC considers the mine/mill proposal to be separate from the smelter/refinery proposal. It was determined that the geographical distance between the two project sites was such that one assessment of the two undertakings would be highly impractical and, in fact, could work to the detriment of the overall quality of a given review because of the very different environments typifying the respective locations, particularly in terms of ecology, geology, culture and socioeconomics.

Similarly, PWGSC is awaiting the results of the provincial selection process prior to making a decision concerning whether the power generation proposal will be subject to the CEAA. Should the preferred option be situated on PWGSC lands, an assessment pursuant to the Act would be mandatory. Additional consideration will be given to including such a project into the ongoing Comprehensive Study once design information has been received.

With regard to the other area of PWGSC's responsibilities, the scope of the environmental assessment, the potential scope of a Comprehensive Study is for all practical purposes unlimited. In this regard, the decision by PWGSC to carry out a Comprehensive Study as opposed to a referral to a Mediator or Review Panel was predicated in large part on the fact that this department could determine the scope it believed was necessary to protect the environment. Added to this is PWGSC's authority to determine related investigative protocols, including public consultation.

In this latter regard, I would like to assure you that PWGSC will be holding public meetings on the Environmental Impact Study following its release by Voisey's Bay Nickel Company Limited. At that time, concerned members of the public, including your Council, will have an opportunity to provide any and all comments regarding the potential environmental impact of the project on the environment. Related input will subsequently be used to determine whether a Mediator or Review Panel will be required.

21 On September 15, 1997, the applicant brought this application for judicial review. The originating notice of motion does not identify a specific decision of the respondents, or of any of them, as the focus for the relief sought, but in referring to grounds for relief it does refer to written advice from the respondent Ministers in August 1997, which must mean the letter from Public Works, which denied the applicant's request that the panel's terms of reference (i.e. the panel for the mine/mill assessment) be amended to assess the entire project proposed by VBNC.

The statutory context

22 The *Canadian Environmental Assessment Act* establishes the legal context within which the environmental assessment process is here challenged. Section 5 of the *Act* specifies that an environmental assessment is required where, *inter alia*, a federal authority has the administration of federal lands and disposes of them or transfers administration and control of the lands to a province to enable the project to be carried out (paragraph 5(1)(c)), or where it must authorize a statutory or regulatory approval to enable the project to proceed (paragraph 5(1)(d)). A "project", under s. 2, in relation to a physical work, means "any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work".

23 By s.11, the federal authority involved under s.5 is the "responsible authority" charged with ensuring that the environmental assessment is conducted as early as is practicable in the planning stages of a project and before irrevocable decisions are made. In the case at bar, the requirement triggering an environmental assessment for the mine/mill project is a statutory trigger, the necessity for a permit or license, under paragraph 5(1)(d), and the "responsible authority" is the Minister of Fisheries and Oceans. In the case of the Argentia facility, the assessment is triggered under paragraph 5(1)(c), and the responsible authority is the Minister of Public Works and Government Services.

24 When an assessment is required s.14 provides that the environmental assessment may comprise a screening, or a comprehensive study, mediation or assessment by a review panel and, where applicable, the implementation of a follow up program. Section 15 of the *Act* concerns the scope of the project to be assessed and s. 16 deals with the factors to be

considered in every screening or comprehensive study of a project and every mediation or assessment by a review panel. It is s. 15 that is principally in issue in this application. It provides as follows:

> 15.(1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
>
> (a) the responsible authority; or
>
> (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority.
>
> (2) For the purposes of conducting an environmental assessment in respect of two or more projects,
>
> (a) the responsible authority, or
>
> (b) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,
>
> may determine that the projects are so closely related that they can be considered to form a single project.
>
> (3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of
>
> (a) the responsible authority, or
>
> (b) where the project is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority,
>
> likely to be carried out in relation to that physical work.
>
> 15.(1) L'autorité responsable ou, dans le cas où le projet est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, détermine la porté du projet à l'égard duquel l'évaluation environnementale doit être effectuée.
>
> (2) Dans le cadre d'une évaluation environnementale de deux ou plusieurs projets, l'autorité responsable ou, si au moins un des projets est renvoyé à la médiation ou à l'examen par une commission, le ministre, après consultation de l'autorité responsable, peut décider que deux projets sont liés assez étroitement pour être considérés comme un seul projet.
>
> (3) Est effectuée, dans l'un ou l'autre des cas suivants, l'évaluation environnementale de toute opération - construction, exploitation, modification, désaffectation, fermeture ou autre - constituant un projet lié à un ouvrage:
>
> a) l'opération est proposée par le promoteur,
>
> b) l'autorité responsable ou, dans le cadre d'une médiation ou de l'examen par une commission et après consultation de cette autorité, le ministre estime l'opération susceptible d'être réalisée en liaison avec l'ouvrage.

25 The *Act* itself does not set out the meaning of "scope" for the purposes of s.15. The Canadian Environmental Assessment Agency, charged with overseeing the implementation of the *Act*, has published a *Reponsible Authorities Guide* outlining, *inter alia*, factors that should be taken into consideration in determining the scope of a project, including the interdependence of physical works or activities, any linkage that ensures that a decision to proceed with one work or activity renders another inevitable, and the proximity of physical works.

26 Where there is overlap between the federal environmental review process and a provincial assessment, in those assessments where a panel is required or permitted by the *Act*, s.40 provides that the Minister of Environment may enter into an agreement with the province respecting the joint establishment of a review panel and the manner in which an assessment of the environmental effects of the project is to be conducted by the review panel. Section 42 indicates that where the Minister establishes a joint review panel, the assessment conducted by the panel is deemed to satisfy any requirements of the *Act* and the regulations concerning assessments by a review panel. It is under these provisions that the review panel was established to assess the mine/mill project under the MOU, an arrangement not followed in relation to the smelter/refinery project, for which a comprehensive study has been undertaken by Public Works, the responsible authority, in cooperation with provincial authorities.

Issues

27 There are a number of issues raised by the parties in this case, though not all have labelled the issues the same way and not all have offered submissions on each issue. I deal with their various submissions in regard to the issues as I identify them. There are three general preliminary procedural issues:

1. the applicant's standing to bring this application,

2. the focus and timeliness of this application, and

3. the evidence provided by the applicant's affidavit material.

After dealing with those issues I turn to the fourth, and principal issue, the substance of the application, considering whether the Responsible Authority erred in not combining in one assessment the mine/mill and the smelter/refinery projects.

28 I note that following the hearing of this matter decisions were filed by my colleagues Mr. Justice McKeown, in *Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans)* [1] and Mr. Justice Gibson, in *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* [2], upon which counsel for the parties made further written submissions. Those submissions are here taken into consideration.

Analysis

1. The applicant's standing to bring this application

29 The applicant, an incorporated non-profit body without financial stake in the projects being assessed, relies upon the three-part test for public interest standing invoked in *Friends of the Island Inc. v. Canada (Minister of Public Works)* [3], a test based on that established by the Supreme Court of Canada in *Canadian Council of Churches v. R.* [4]. Under this test, the applicant must show that a serious issue is raised regarding invalidity of legislation or administrative action, that it has a genuine interest in the issue, and that there is no other reasonable and effective manner to bring the issue before the Court.

30 The VBNC contends that the applicant has not raised a serious issue, that it does not have a genuine interest, in the sense of a real and continuing interest, in the legality of the federal administrative action at issue in this case. It is urged that more than a mere *bona fide* interest and concern about social and environmental issues is necessary to obtain public interest standing. Indeed, it is urged, an applicant to claim that standing must have a longstanding reputation and it must do significant work on the subject-matter of the challenge, and its interest must be greater than that possessed by a member of the general public.

31 In the case at bar, it is said by VBNC that the applicant cannot demonstrate a real and continuing commitment to environmental issues raised by the developments from the exploitation of the ore body, given that it was incorporated

only three months before these proceedings were commenced, and it had less than a $100 is assets in the month following the commencement of the proceedings. The applicant, it is urged, is merely a shell company formed for the purposes of this litigation. Further, it is said there is no evidence that the applicant, or its members, are subject to any direct impact from the proposed projects that is distinct from the impact on the public at large, and the applicant has not identified any individual members who reside near the site of the smelter/refinery, even though it is said many members live down wind from the proposed project site.

32 In my opinion, standing is to be accorded to the applicant in this case under the doctrine of public interest. In applying the test set by the *Canadian Council of Churches* case this Court has rejected argument that the words "directly affected" in s-s. 18.1(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7 as amended, should be given a relatively restricted meaning. In *Friends Of The Island Inc.* Madam Justice Reed, after canvassing the development of Supreme Court rulings on standing in constitutional matters, wrote: [5]

. . . . .

> I think the wording in subsection 18.1(1) allows the Court discretion to grant standing when it is convinced that the particular circumstances of the case and the type of interest which the applicant holds justify status being granted. (This assumes there is a justiciable issue and no other effective and practical means of getting the issue before the courts). ...

33 Subsequently, in *Sunshine Village Corp. v. Superintendent of Banff National Park* [6], the Federal Court of Appeal followed Reed J. in holding that s-s.18.1(1) could not be interpreted as narrowing the Supreme Court's test for public interest standing. In that case, the *Canadian Council of Churches* test was applied. Finding that the issue before it, whether an environmental assessment was required, was justiciable, the Court held that the applicant had a genuine interest in that its primary objective, and that of its members, was to preserve the integrity of the ecosystem in Canada's parks and wilderness areas.

34 In the case at bar, in my opinion the issue raised by the applicant is a serious one. It concerns the application of s. 15 of the *Act* at an initial stage of the environmental assessment process by the responsible authority. Also, the applicant's primary objective, environmental protection, particularly with regard to the Voisey's Bay and Argentia regions, coupled with the evident interest of its members in the assessment process, is sufficient, in my view, to meet the genuine interest requirement of the test for public interest standing. The applicant has been granted a modest sum of intervenor funding to participate in the mine/mill panel assessment process. This level of involvement with the Voisey's Bay development and its environmental assessment distinguishes this case from that of *Shiell v. Canada (Atomic Energy Control Board)* [7], relied upon by the respondent Company, where the applicant seeking standing lived geographically distant from the proposed project, had only a generalized concern with the environment, and no direct personal interest and no history of involvement with the particular project there in question.

35 While any member of the general public in Newfoundland and Labrador may have an interest in the matter, the applicant is the only one to demonstrate sufficient interest or the means to launch a court challenge. This is very different from the situation in *Canadian Council of Churches* where apart from the applicant, each refugee claimant, whose interests the applicant there sought to represent, clearly had a genuine interest to support a challenge to the impugned legislation. In the case at bar, a coalition has formed, and it is now incorporated, to express a communal concern and to challenge decisions that might otherwise be essentially beyond review. In my view, public interest standing may be accorded where the applicant has a genuine interest and there is no evidence of another or others with a genuine interest that could reasonably be expected to bring a challenge.

36 In this regard VBNC urges that there are other directly affected individuals who could bring litigation concerning this matter but have not done so, in particular, individual residents of Argentia who have not litigated and, it is said, do not share the concerns of the applicant. I am not persuaded that because others might share the applicant's concerns, but have not commenced legal action, the applicant should be denied standing. There is no evidence that others might

raise the important issue here raised by the applicant concerning the application of s. 15 of the *Act* in relation to what VBNC submits are two separate projects, which the applicant urges are required to be assessed as one under the *Act*.

37 Thus, in my view, standing of the applicant to bring this application, if it is to proceed, warrants recognition in the public interest.

2. The focus and timeliness of this application

38 Two further preliminary issues are raised in opposing this application. The first I describe as "the focus" of the application, i.e. what decision or action is here questioned and whether that is an appropriate matter for judicial review. The second issue concerns the timeliness of the application in light of the time set by s. 18.1 of the *Federal Court Act* for commencement of proceedings for judicial review.

39 Earlier I noted that no decision is specifically referred to in the originating notice of motion filed September 15, 1997 as being questioned by this application. That notice does seek, *inter alia*, declaratory relief, that is that the two projects proposed by VBNC constitute one project within the meaning of the *Act*, which requires a single assessment, and it also seeks *mandamus*, to require amendment of the terms of reference provided for the review panel for the mine/mill project to encompass the project, implicitly to include the smelter/refinery and its environment effects. Further, in the course of the hearing, the applicant requested a declaration that the respondent Ministers have unlawfully failed to require a single assessment of VBNC's mine, mill, smelter and refinery project as required under s-s. 15(3) of the *Act*.

40 Those forms of relief sought, and the process of discovery which apparently concentrated attention on the scope determined for the mine/mill project assessment, led VBNC and the federal Ministers to urge that the focus of the application is the decision, formally made in January 1997 when the terms of reference were settled for the review panel constituted under the MOU, and reaffirmed when the EIS guidelines for that review were finalized, after public consultation, in June 1997.

41 It is urged by VBNC and the federal Ministers that this application was brought too late, roughly eight months after the terms of reference limiting the panel review to the mine/mill project were finalized in the MOU, approximately seven months after one of the applicant's principals was told that the terms of reference for that assessment would not be revisited, and approximately five months after the applicant's principal organizers made submissions on the scope of the assessment to the MOU review panel urging inclusion of the smelter/refinery project in its assessment. On the other hand, the applicant notes this proceeding commenced within 30 days of receipt of the letter from the Minister of Public Works dated August 12, 1997.

42 Subsection 18.1(2) of the *Federal Court Act* requires that an application for judicial review be brought within 30 days after a decision or order is first communicated to the party directly affected. It is urged that the applicant commenced this proceeding long after it or its principals became aware of the decision concerning the terms of reference for assessment of the mine/mill project. The letter from the Minister of Public Works, it is urged, is not a decision or order for the purposes of calculating the time period under s-s. 18.1(2) for it merely explained the original decision, said to have been made in January 1997 when the terms of assessing the mine/mill project were set by agreement under the MOU. Thus, it is said the Minister's August letter cannot be regarded as more than a "courtesy response", as in *Dhaliwal v. Canada (Minister of Citizenship & Immigration)* [8], and in *Dumbrava v. Canada (Minister of Citizenship & Immigration)* [9], where a negative response to a request to reconsider an earlier decision was found not to be a decision subject to judicial review under s. 18.1.

43 For the federal Ministers it is urged that the applicant's principals were informed of the decision regarding the scope of the mine/mill project in February 1997 and that the 30 day period prescribed by s-s.18.1(2) commenced at that time. They concur with VBNC that the August letter from the Minister of Public Works was merely a courtesy letter affirming the scoping decision made on January 31, 1997 in the final MOU. They also support submissions that this application should be dismissed for lack of timeliness and that the Court should not exercise its discretion to extend the time.

44 The applicant, in oral argument before me, urged that the application was brought within time but, in the alternative, that grounds exist for extending the time available for filing an application for judicial review. It is urged that the August letter from the Minister of Public Works, while referring to a decision on the scope of the project using the past tense, reflects a determination that until then was not communicated to the applicant. The applicant points to affidavit evidence suggesting that the determination of the precise scope of the smelter/refinery project was undertaken independently of and later than the decision concerning the scope of the mine/mill project. Comments by the Canadian Environmental Assessment Agency on the draft terms of reference for the smelter/refinery assessment belie the respondents' arguments that the final decisions on the scoping for both the mine/mill project and the smelter/refinery project were made at the time the MOU concerning the mine/mill project was settled in January 1997. These comments, dated April 22, 1997, read, *inter alia*,

> The RA [Responsible Authority] cannot determine the scope for the [smelter/refinery] project (s.15(1)) and the scope of the review (s.16(3)) until VBN takes a decision on the power plant. Lack of decision on the power plant poses the risk of significant delays for the environmental assessment of the project.

45 I conclude that the responsible authority for the smelter/refinery project assessment, Public Works, had not made a final scoping decision under s.15 of the *Act* by late April 1997. The August 12 letter to the applicant was the first clear indication of the scoping determination made by Public Works. As a consequence, insofar as the applicant here challenges the scoping decision related to the smelter/refinery, I find that the letter was not merely a courtesy response and that the application, insofar as it seeks to question the scoping decision of the Minister of Public Works, was made in a timely fashion, within the time specified to commence proceedings for judicial review pursuant to s-s. 18.1(2) of the *Federal Court Act*.

46 I am cognizant that the applicant here urges that, in fact, the mine/mill and the smelter/refinery are the same "project" within the meaning of the *Act*, and that, as a consequence, the original scoping decision made in January 1997, by the MOU terms of reference, should have included both initiatives. Thus, Public Works' determination of August 12 was made in circumstances where it could be urged that the Minister of Environment failed in January to meet obligations under the *Act*. Yet, in my view, the applicant cannot rely on the reality of this August 12 determination by Public Works to base its application for judicial review and then directly attack the January 1997 decision. In my opinion, the issue in this application can only be whether the Minister of Public Works, the responsible authority for the smelter/refinery development, acted within the *Act* in excluding the mine/mill project from the smelter/refinery assessment, treating the smelter/refinery as a separate project for purposes of environmental assessment under the *Act*.

47 Finally, having determined that the decision here at issue is that of Public Works, relating to the scope of the smelter/refinery project, there is argument that this is not a "decision" within the meaning of s-s.18.1(2) since it was only a preliminary decision in the process of environmental review. In my opinion, a scoping determination under s.15 of the *Act* is a decision within the meaning of s-s.18.1(2) of the *Federal Court Act*, and it is subject to judicial review.

48 VBNC urged that a scoping decision is an interlocutory decision, rather than a final determination affecting rights that is subject to judicial review. By submissions in writing after the hearing, in support of its position VBNC referred to in the decision of Mr. Justice McKeown in *Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans)* [10] in which he held that the report of a joint panel under *CEAA*, where a subsequent decision of the Minister concerned was not challenged, was not a matter subject to judicial review. That decision was subsequently reversed by the Court of Appeal.

49 With respect, I am not persuaded that judicial review is premature in regard to a decision, by the responsible authority, determining the scope of the project which will be assessed, and which assessment that authority will later approve or disapprove. That decision is not merely a recommendation; rather it meets a statutory requirement [11] and provides the basis for the process of the assessment from that point on and, as a consequence, in my opinion it is a decision subject to judicial review. I find support for this view in Wade's *Administrative Law* [12], which reads, in part:

. . . . .

> Certiorari and prohibition will issue in respect of any exercise of statutory power which involves a true legal decision or determination. ... They will lie where there is some preliminary decision, as opposed to a mere recommendation, which is a prescribed step in a statutory process which leads to a decision affecting rights, even though the preliminary decision does not immediately affect rights itself.

50 In any event, even if the s.15 determination is viewed as an interlocutory decision, it is my view that extraordinary circumstances, within the dicta of the Court of Appeal's decision in *Szczecka c. Canada (Ministre de l'emploi & de l'immigration)* [13], exist to warrant review in this case. The scoping decision is fundamental to the assessment that is to be undertaken. In my view, it is of sufficient significance in the assessment process that it is reviewable when made, and an applicant need not wait until the assessment is completed to commence judicial review of a determination under s. 15 of the *Act*, on the scope of a project.

51 I find support for this result, in the circumstances of this case, in a recent decision of the Court of Appeal in *Krause v. Canada* [14]. There, judicial review was commenced without reference in the application to a particular decision questioned, and an order in the nature of *mandamus* and declaratory relief were sought in circumstances where the applicant urged, as the applicants in this case urge, that statutory obligations were not fulfilled. The motions judge found the application was filed out of time. Speaking for the Court, Stone J.A. held that in the circumstances, in light of the relief sought, it was not essential to question a particular decision and thus the statutory 30-day time limit did not apply where the complaint concerns alleged failure to comply with statutory responsibilities.

3. The evidence provided by the applicant's affidavit material

52 A final preliminary matter in this case is the question of what account the Court may take of the applicant's affidavit material. VBNC urges that the applicant's affidavit evidence contains mainly statements and opinions that are not within the personal knowledge of the affiant. In discussing the environmental impact of the project, the affiants rely on others or express lay views. It is urged that an originating motion should be struck out when the affidavit in support is deficient in that it is not limited to matters personally known to the affiant as required by former Rule 332(1), as it applied as all material times [15]. For its part, the applicant, in oral argument before me, relied on the principled exception to the hearsay rule, established by *R. v. Smith* [16] and *R. v. Khan* [17], based upon principles of reliability and necessity.

53 In *Vancouver Island Peace Society v. Canada* [18], I had occasion to deal with this same issue in an application for judicial review questioning a decision on environmental issues under regulations then in effect. In that case, I declined to strike the whole or portions of the affidavit evidence in question since in the circumstances it was not necessary for my decision. Subsequently, in *Labatt Brewing Co. v. Molson Breweries, A Partnership* [19], Mr. Justice Heald commented on the admissibility of hearsay under Rule 332 as follows:

> An affidavit may now contain statements of the deponent that are based on information and belief, if this prima facie inadmissible hearsay evidence falls within the common law exceptions to the hearsay rule. The question to be asked is whether the evidence sought to be admitted meets the common law exceptions to hearsay, which are now governed by the criteria of necessity and reliability.

54 In the case at bar, I do not assess each piece of evidence in terms of its reliability and the necessity for its admission. The evidence was not addressed in that manner by counsel. Rather, it was urged for VBNC that the evidence should be excluded virtually *in toto*, and for the applicant that it should be admitted *in toto*. My conclusion on the merits of this application, even if the applicant's evidence were accepted, precludes the necessity of determining what elements of affidavit evidence objected to as hearsay should be admitted.

4. Was there error in failure to combine the projects in one assessment process?

55 I turn to the substance of this application. The applicant says that the *Act* by s-s. 15(3) requires a single environmental assessment of the two projects proposed by VBNC. It is urged that the words "in whole or in part", appearing in both paragraphs (c) and (d) of s-s. 5(1), which provide respectively for environmental assessments in regard to each of the VBNC projects, mean that in an environmental assessment of either of the projects proposed the other project may be included.

56 The applicant relies upon the Supreme Court decisions in *Friends of the Oldman River Society v. Canada (Minister of Transport)* [20], and *Quebec (Attorney General) v. Canada (National Energy Board)* [21], ("*Hydro-Quebec*"), as authorities supporting the proposition that a broad assessment relating to the entire project is triggered where the federal government has broad legislative power over activities to be encompassed in the entire project, including all effects, such as those "upstream" from one project. By analogy, it is urged, the federal authority to examine "upstream" facilities, including the mine/mill facility, is triggered by the use of federal lands for the proposed smelter/refinery initiative.

57 The applicant urges that, while s-s.15(1) provides the Minister or the responsible authority, as the case may be, with the discretion to "determine" the "scope of the project", s-s.15(3) imposes a limit on this discretion. The latter subsection provides "where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation ... or other undertaking in relation to the physical work". The word "every" is emphasized by the applicant, and it is urged that where a project is a physical work, the assessment of the project must extend to all its related undertakings, including here another physical work, with which the project is interrelated.

58 The applicant urges that its interpretation of s-s.15(3) is supported by the definition of "project" in s.2 of the *Act*, which uses the term "any" to tie "proposed construction, operation, modification, decommissioning, abandonment or other undertaking" to the definition of "project", where a physical work is involved. As I understand the applicant's argument, the use of the term "every" in s-s.15(3), rather than "any" as is found in s.2, broadens the scope of the term "project" in s-s. 15(3) to encompass, mandatorily, every construction, operation, undertaking, etc., and not just those that the decision-maker, in its wisdom, sees fit to include within the meaning of "project", something that use of the term "any" as in s.2 would otherwise permit. In oral argument, counsel for the applicant focused on the words "in relation to" within s-s. 15(3), urging that it is this phrase, to be defined very broadly, that curbs the decision-maker's discretion under s.15.

59 In sum, it is urged that, under s-s.15(3) the scope of a physical work or "project" must include every related construction, operation or other undertaking or activity that is proposed by the same proponent. Otherwise, the decision maker fails to exercise its jurisdiction and its decision is subject to be set aside on judicial review. It is urged, by the applicant, that s-s. 15(3) restricts the discretion of the decision-maker, and in this case the mine, mill, smelter and refinery are integrally related undertakings, in terms of management, economics, production, scheduling, approval and environmental effects. By s-s. 15(3), it is urged, the two projects are required to be considered as one project, subject to a single environmental assessment process.

60 All of the respondents argue against construction of s-s. 15(3) proposed by the applicant. I am persuaded that the subsection does require inclusion in a project involving a physical work every phase of the life-span of the work, "every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that work". I am not persuaded, however, that s-s. 15(3) requires a single environmental assessment when two projects, each relating to a physical work or works, are proposed by the same proponent, even if the two projects are somewhat interrelated. Those are circumstances included within s-s. 15(2), which authorizes one assessment in respect of two or more projects where the responsible authority or the Minister of Environment determines that the projects are so closely related that they can be considered a single project. That determination is clearly discretionary, not one bound by statute.

61 There is no project to be assessed until a decision or action within s. 5 is to be made. Here two projects were proposed by VBNC, which treats them as separate projects, and it sought necessary approvals at different times, by different responding authorities. In these circumstances, in my opinion if the two are to be combined within a single environmental assessment under the *Act*, a determination to do so must be made under s-s. 15(2). I am not persuaded

that the applicant is correct in construing s-s. 15(3) as requiring inclusion in one project for environmental assessment of every physical work proposed by one proponent. Rather in my view, that provision relates to inclusion of all phases of the life cycle of a physical work that are proposed by the proponent. If they are not so proposed s-s. 15(3) leaves final discretion to the responsible authority or the Minister to determine "construction, operation ... abandonment or other undertaking in relation to that physical work is likely to be carried out..." and is thus to be included in the assessment of that work. Where a proponent does not include such a phase in the project, discretion may be exercised to include it, but by a deliberate decision of the responsible authority or of the Minister.

62 The French version of s-s. 15(3), phrased differently than the English version, provides for "l'évaluation environmentale de toute opération - construction, exploitation, modification, désaffectation, fermeture ou autre - constituant un projet lié à un ouvrage". That indicates that the matters to be included by s-s. 15(3) for assessment are phases of a physical work or of its life cycle. That, in my opinion is consistent with the scheme of the *Act* which provides in s-s. 15(2) for a determination to be made, within vested discretion, that a single assessment is warranted for two projects proposed.

63 Thus, I am not persuaded that s-s. 15(3) imposes a duty on Public Works to include within the scope of the smelter/refinery project the mine/mill project proposed by VBNC. Public Works did not err in law when it did not include the mine/mill project within the scope of the smelter/refinery project for purposes of environmental assessment.

64 I noted earlier that the parties provided written submissions concerning the decision in *Friends of the West Country Assn.* [22]. In that case the applicants sought judicial review of two environmental screening reports, each dealing with a proposed physical work, a bridge, to be constructed over rivers. The bridges were joined by a new road to provide access to and transport of logs from an area with substantial logging prospects. In the two screening reports the environmental effects of the connecting road and of exploiting the logging area were not considered. While the interpretation of s. 15 raised in the case at bar does not appear to have been a major issue in that case, Gibson J. determined that in the circumstances it was open to the responsible authority to determine that the two bridges were not so closely related as to form a single project for purposes of an environmental assessment. Moreover, there was no error in defining the scope of the projects subject to environmental review, specifically in not including within the bridge projects, or either of them, the road and the proposed forestry operations.

65 His Lordship did find, however, that the responsible authority, in framing the scope of the environmental assessment had erred in failing to take account, under s-s. 16(1), of the cumulative effects of the road construction and the exploitation of the logging potential, activities that had been or would be carried out. That failure Gibson J. found to be an error in law, and by Order the approvals of the screening reports were set aside. In the case at bar, the issue concerns the application of s. 15 and no argument was raised about the application of s. 16 of the *Act*, the basis of the decision in *Friends of the West Country Assn.*. I do note that in the case at bar, Public Works, did consider that there was no potential for cumulative effects of the two projects in considering the scope of the project under s-s. 15(1).

66 When this matter was heard counsel for the respondents submitted that the standard of review to be applied in this matter was one requiring significant deference by the Court for the decision of the responsible authority. I accept that, as I have in other cases [23]. Where statutory discretion, as here exercised under s-s. 15(1) of the *Act*, has been exercised reasonably, in good faith, without reference to irrelevant considerations and has not been exercised illegally, a reviewing court will not intervene even if it might have exercised the discretion differently [24].

67 It is the applicant's view that the mine/mill and smelter/refinery projects are integrally related, i.e., in their ultimate development and operation by one proponent, VBNC; in that the size of both are dependant, at least in substantial part, on the underlying economics of exploiting the mineral reserves, so that production of minerals of both projects is substantially interrelated; in that approval for both, at least initially, was interrelated; and finally since some environmental effects are interdependent. On the other hand, VBNC points to separate management teams within VBNC

for each project's development, environmental assessment, and ultimately its operations, to the distance between the projects, and to the different populations and environments principally affected by each one.

68 In its August 1997 letter to the applicant, Public Works advised that its decision for separate assessment of the smelter/refinery was based on its conclusions that the two projects are separate, that the distance between the two made one assessment of the two projects highly impractical and indeed one assessment might be detrimental because of different environments affected with different factors to be assessed. By affidavit, Mr. Paul Bernier, Vice President of the Canadian Environmental Assessment Agency, avers that Public Works' determination to proceed with a separate assessment of the smelter/refinery project included the following considerations:

> (a) In light of the large distance between the Mine and the Smelter, it was considered that any effects would impact different environments and different populations, and accordingly, there was no potential for cumulative effects;
>
> (b) It was considered that the Mine and the Smelter would not be interdependent as it was understood that concentrate from the mine could be processed at other smelters; and that, because the projected life span of the Smelter was significantly longer than that of the Mine, it was expected that the Smelter could be a multi-client facility; and
>
> (c) The two projects were not linked to such an extent that the decision to proceed with one made inevitable the decision to proceed with the other.

69 In the circumstances, I am not persuaded that Public Works, in exercising its discretion, was unreasonable. Its determination was not based on irrelevant considerations, and the decision was open to it in light of the facts and factors known to it. There is no suggestion the department acted in bad faith. There is thus no basis on which the exercise of discretion by Public Works, the responsible authority, should here be set aside.

Conclusion

70 I summarize my conclusions. First, the applicant in this case has public interest standing to pursue the application since it meets the test set out by the *Canadian Council of Churches* case. Second, the application, insofar as it relates to the smelter/refinery project, is timely, and the decision on the scope of the project by Public Works was a decision within s-s. 18.1(2) of the *Federal Court Act*. Third, the propriety of the applicant's affidavit evidence need not be assessed in detail, or finally, where the Court's decision on the merits of the application is not dependant on assessing that evidence.

71 Fourth, on the main issue, the respondent Minister of Public Works did not err in law in the decision to undertake a comprehensive environmental assessment in relation to the smelter/refinery project without including the mine/mill project in that assessment, for s-s. 15(3) does not impose a duty, in the circumstances of this case, to include the two projects in one environmental assessment. Finally, the determination of the respondent Minister of Public Works, made in the exercise of statutory discretion under s-s. 15(1) of the *Act*, was not unreasonable and was supportable on the basis of the facts and factors relevant for consideration in that decision.

72 Thus, there is no basis on which the Court should intervene and there is no basis for any of the declarations sought, or for the extraordinary relief by *mandamus* or prohibition sought, by the applicant. An Order goes dismissing the application for judicial review.

Costs

73 The applicant, VBNC and Newfoundland all asked for costs in written submissions. The respondent federal ministers did not seek costs in written submissions but did so request when the matter was heard. At the hearing, the province, Newfoundland, withdrew its request for costs.

74 I acknowledge that for all parties costs of the application were increased because of interruption in the hearing as originally scheduled, when as presiding judge I was not able to continue, and the matter was concluded only after an adjournment, increasing travel costs and time committed by counsel.

75 At the time of preparations for the hearing and for its argument the Court's Rules provided that, aside from special reasons, costs were not awarded on judicial review applications (see Rule 1618, as it then applied). The Rules changed when the *Federal Court Rules, 1988* came into effect on April 25, 1998 and Rule 400 now leaves the matter of costs in an application such as this, as in other cases, entirely within the discretion of the Court.

76 Each of the applicants, VBNC and the federal ministers argued the claim for costs in light of then Rule 1618, urging there were special factors in the preparatory stages, or in the argument, of this application which unnecessarily increased the difficulties each faced in preparation or presentation of its case. The application deals with circumstances faced by the applicant in a continuing series of decisions by VBNC, two governments and more than one federal department. The circumstances created complexity for all parties. I am not persuaded that the special factors relied upon to warrant an order of costs were entirely within the capacity of any one party to control. Thus I am not persuaded that an award of costs would have been warranted under Rule 1618 as it applied when this matter was heard.

77 Under the Court's current Rules the Court ultimately has complete discretion in regard to an award of costs. In my opinion, in this case that discretion is not to be exercised by an award to any party. That was the normal circumstance when the application was prepared and heard, and no party is substantially responsible for the complexities each of the parties faced. The Order, now issued, specifies that each party shall bear its own costs.

Application dismissed.

Footnotes

1 Court file T-2354-97, June 12, 1998 (F.C.T.D.) [reported (1998), 152 F.T.R. 49 (Fed. T.D.)]; reversed on appeal, Court file A-430-98, Dec. 1 and Dec. 4, 1998 [reported (1998), [1999] 1 F.C. 483 (Fed. C.A.)]

2 [1998] 4 F.C. 340, 150 F.T.R. 161 (Fed. T.D.).

3 [1993] 2 F.C. 229 (Fed. T.D.).

4 [1992] 1 S.C.R. 236 (S.C.C.), at 253.

5 Supra note 3, at 283.

6 (1996), 202 N.R. 132, 44 Admin. L.R. (2d) 201 (Fed. C.A.).

7 (1995), 33 Admin. L.R. (2d) 122 (Fed. T.D.).

8 (June 6, 1995), Doc. IMM-7381-93 (Fed. T.D.).

9 (1995), 101 F.T.R. 230 (Fed. T.D.).

10 Supra, note 1.

11 See, *Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans)*; decision of the Court of Appeal, supra, note 1.

12 Wade, Sir William, *Administrative Law*, (6th ed.) Oxford, Clarendon Press, 1988, at 637-638.

13 (1993), 116 D.L.R. (4th) 333 (Fed. C.A.).

14 Unreported, Court file A-135-98, February 8, 1999 (F.C.A.) [reported (1999), 236 N.R. 317 (Fed. C.A.)].

15 Rule 332(1) of the Court's former Rules provided:
Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions...
A similar requirement is set out by Rule 81(1) of the *Federal Court Rules, 1998*, with the exception specified as being in relation to motions.

16 [1992] 2 S.C.R. 915 (S.C.C.).

17 [1990] 2 S.C.R. 531 (S.C.C.).

18 (1993), [1994] 1 F.C. 102 (Fed. T.D.).

19 (1996), 113 F.T.R. 39 (Fed. T.D.).

20 [1992] 1 S.C.R. 3 (S.C.C.).

21 [1994] 1 S.C.R. 159 (S.C.C.).

22 Supra, note 2.

23 See *Cantwell v. Canada (Minister of the Environment)* (1991), 41 F.T.R. 18 (Fed. T.D.); *Union of Nova Scotia Indians v. Canada (Attorney General)* (1996), 122 F.T.R. 81 (Fed. T.D.). See also, Strayer J. in *Vancouver Island Peace Society v. Canada* (1992), 53 F.T.R. 300 (Fed. T.D.).

24 *Maple Lodge Farms Ltd. v. Canada* (1982), 137 D.L.R. (3d) 558 (S.C.C.) at 562.

TAB A4

2017 FC 932, 2017 CF 932
Federal Court

Enge v. Canada (Indigenous and Northern Affairs)

2017 CarswellNat 5618, 2017 CarswellNat 5619, 2017 FC 932,
2017 CF 932, [2018] 2 C.N.L.R. 99, 284 A.C.W.S. (3d) 480

WILLIAM ENGE, ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE NORTH SLAVE MÉTIS ALLIANCE (Applicant) and THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, GOVERNMENT OF THE NORTHWEST TERRITORIES, FORT SMITH MÉTIS COUNCIL, HAY RIVER MÉTIS GOVERNMENT COUNCIL, FORT RESOLUTION MÉTIS COUNCIL AND NORTHWEST TERRITORY MÉTIS NATION (Respondents)

Anne L. Mactavish J.

Heard: June 6, 2017; June 7, 2017; June 8, 2017
Judgment: October 19, 2017
Docket: T-1427-15

Counsel: Christopher Devlin, Kate Gower, for Applicant
Andrew Fox, for Respondent, Minister of Indian Affairs and Northern Development
Christopher Buchanan, for Respondent, Government of the Northwest Territories
Darwin Hanna, for Respondents, Fort Smith Métis Council, Hay River Métis Government Council, Fort Resolution Métis Council and Northwest Territory Métis Nation

***Anne L. Mactavish J.*:**

I. Introduction

1 William Enge is a Métis person and a member of the Métis community of the Great Slave Lake area in the Northwest Territories. He is also the President of the North Slave Métis Alliance (NSMA).

2 Mr. Enge brings this application for judicial review on his own behalf and as the representative of the members of the NSMA. Mr. Enge says that he and the members of the NSMA have Aboriginal harvesting rights that have been judicially recognized and affirmed under subsection 35(1) of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

3 By this application, Mr. Enge challenges the adequacy of the consultation by the Minister of Indian Affairs and Northern Development with the members of the NSMA with respect to the "Northwest Territory Métis Nation Land and Resources Agreement-in-Principle" (NWTMN AiP) that was approved on July 31, 2015.

4 Mr. Enge asserts that the members of the NSMA are a Métis people whose Aboriginal harvesting rights in the area north of Great Slave Lake in the Northwest Territories will be adversely affected by a Final Agreement negotiated pursuant to the NWTMN AiP. He further asserts that Canada intends to extinguish the Aboriginal rights held by NSMA members to harvest in the area north of Great Slave Lake, notwithstanding the fact that the NSMA and its members have been largely excluded from the negotiations leading up to the conclusion of the NWTMN AiP.

5 According to Mr. Enge, Canada's decision to exclude the NSMA from consultations was based on several errors of law and was, moreover, unreasonable. The result of these errors is that the parties were unable to have meaningful

and fair discussions about how Canada should accommodate the Aboriginal rights held by NSMA members prior to it signing the NWTMN AiP.

6 As a consequence, Mr. Enge asserts that negotiations towards a final Northwest Territory Métis Nation land and resources agreement (Final Agreement) should be stayed until such time as meaningful consultation with the NSMA can occur. This consultation should consider accommodation measures to address the NSMA's concerns with respect to the extinguishment of their Aboriginal harvesting rights as Métis north of Great Slave Lake.

7 The respondent Minister of Indian Affairs and Northern Development (Canada) submits that this case is not fundamentally about the adequacy of Crown consultation, but is rather a challenge to the authority of the Northwest Territory Métis Nation (NWTMN) as the proper representative of the Métis people whose Aboriginal ancestors were indigenous to the south Slave region of the Northwest Territories. Canada further submits that the duty to consult does not arise in this case, as the members of the NSMA are part of the group with whom Canada has been negotiating. In the alternative, Canada submits that if the Crown's duty to consult does arise here, the duty has been adequately discharged.

8 Canada further disputes Mr. Enge's standing to bring this application as a representative of the NSMA. According to Canada, Mr. Enge did not obtain the authority of the members of the NSMA to bring this application, nor did he take effective steps to determine the prevailing views of the membership in relation to the NWTMN AiP. Consequently, Canada submits that Mr. Enge has not satisfied the requirements of Rule 114 (the provision of the *Federal Courts Rules* governing representative actions).

9 The Government of the Northwest Territories (GNWT), the Fort Smith Métis Council, the Hay River Métis Government Council, the Fort Resolution Métis Council and the NWTMN have also been named as respondents to this application.

10 The GNWT accepts that the NSMA was entitled to be consulted with respect to the NWTMN AiP. It submits, however, that, in coordination with Canada, it consulted with the NSMA regarding the potential adverse impact of the NWTMN AiP on the Aboriginal rights that are allegedly held by the members of the NSMA. The GNWT also states that deeper consultation and, if appropriate, accommodation will take place as the parties move closer to a final agreement. Given that consultation with the NSMA with respect to the final agreement is ongoing, the GNWT submits that this application is premature.

11 The NWTMN is a registered society under the *Societies Act*, R.S.N.W.T. 1988, c. S-11 of the Northwest Territories. It is a representative body whose mandate is to serve and protect the interests of the Indigenous Métis of the south Slave region who are members of the three respondent councils: the Fort Smith Métis Council, the Hay River Métis Government Council, and the Fort Resolution Métis Council. The NWTMN and the three respondent councils will be referred to collectively in these reasons as the NWTMN.

12 The NWTMN notes that it is not a party to the consultations between Canada, the GNWT and the NSMA, and that it does not owe a duty of consultation to the NSMA. The NWTMN further contends that it has no control over how Canada or the GNWT approached the consultation process with the NSMA.

13 The NWTMN submits, however, that while Mr. Enge's application for judicial review is framed in terms of the adequacy of consultation, it is, in reality, a challenge to the legal basis or authority of the NWTMN to enter into the Agreement in Principle on behalf of the Métis of the Northwest Territories. The NWTMN also denies that Mr. Enge has the requisite standing to bring this application as a representative proceeding because they say that he has failed to satisfy the requirements of Rule 114 of the *Federal Courts Rules*, SOR/98-106. Consequently, the NWTMN submits that this application should be dismissed on this basis alone.

14 For the reasons that follow, I have concluded that Mr. Enge has the necessary standing to bring this application on behalf of the members of the NSMA, and that his application for judicial review is not premature. I have further concluded that the NSMA was entitled to be consulted with respect to the potential adverse impact of the NWTMN AiP

on the Aboriginal rights held by its members. I am also satisfied that Canada erred by failing to share its preliminary assessment of the strength of the NSMA members' claim with the NSMA.

15 Canada also misapprehended the severity of the potential impact that a final land and resources agreement negotiated in accordance with the terms of the NWTMN AiP would have on the Aboriginal rights of the NSMA's members. Having misunderstood the extent of the potential impact that such an agreement would have on the Aboriginal harvesting rights of the members of the NSMA, Canada entered into its consultation with the NSMA based on a fundamental misconception of the nature and scope of its duty to consult. Moreover, without fully understanding the seriousness of the potential impact that a land and resources agreement would have on the section 35 rights of the members of the NSMA, Canada could not properly assess what, if any, accommodation measures would be appropriate.

16 Consequently, Mr. Enge's application for judicial review will be granted.

II. The Métis Parties

17 Mr. Enge has been the President of NSMA since 2004. The NSMA is a registered society under the provisions of the *Societies Act*. It represents those members of the contemporary ethnic Métis community of the Northwest Territories who assert their Aboriginal rights as Métis north of Great Slave Lake. The over-arching objective of the NSMA is to protect the Aboriginal rights of its members in the area north of Great Slave Lake.

18 The NSMA claims to have 283 members out of a community of approximately 500 people. I understand the parties to agree that many of these individuals have ancestral ties to the area south of Great Slave Lake. Membership in the NSMA is limited to "Indigenous Métis". Since 2011, individuals registered as "Indians" under the provisions of the *Indian Act*, R.S.C. 1985, c. I-5 have been expressly prohibited from membership in the NSMA by the organization's By-laws.

19 The NSMA's Bylaws define an "Indigenous Métis" as being "a person who is descendant of the Métis People of the Northwest Territories including the North Slave area and is recognized by the Community of Indigenous Métis of the North Slave area as a descendant of the Métis People who resided in, or used and occupied the Northwest Territories including the North Slave area prior to the federal Crown taking effective control of their traditional lands including the North Slave area".

20 The parties agree that there is only one Métis community in the Northwest Territories whose traditional territory encompassed the entirety of the Northwest Territories and the northern portion of the provinces that abut the Northwest Territories. However, as was noted earlier, the NSMA is not the only organization purporting to represent the interests of the Métis community. The NWTMN also claims to have a similar purpose, although its focus is predominantly on the area south of Great Slave Lake, whereas the members of the NSMA claim to have Aboriginal rights in the area north of Great Slave Lake.

21 According to its Constitution, the objectives of the NWTMN include promoting the unity of Métis in the south Slave region of the NWT, as well as developing and implementing Métis land claims, the inherent right of self-government and constitutional development. The mandate of the NWTMN is also to serve and protect the interests of Indigenous Métis who are members of the Fort Smith Métis Council, the Hay River Métis Government Council and the Fort Resolution Métis Council. This mandate includes the affirmation, protection and recognition of Métis aboriginal rights throughout the traditional territory of the NWTMN.

22 The NWTMN maintains that it represents the interests of all Indigenous Métis of the Northwest Territories regardless of their current residence. The By-laws of the NWTMN define an "Indigenous Métis" as being a person who has:

> a) resided in a designated community [i.e. Fort Smith, Fort Resolution, Hay River]; and
>
> b) used or occupied the South Slave on or before December 31, 1921; or

c) is a descendant of a person described in (a) and (b);

d) is a descendant of a person registered as an Indian under the *Indian Act* who:

(i) resided in a designated community; and

(ii) used and occupied the South Slave on or before December 31, 1921.

e) is not registered as an Indian under the *Indian Act*, and

f) is not enrolled as a beneficiary in another land claim agreement in Canada.

23 While the NWTMN claims that 2,169 Indigenous Métis people across Canada are eligible for membership in the organization, it has refused to provide any actual membership numbers. The NWTMN says that it is currently undertaking a questionnaire process to identify additional Indigenous Métis who are eligible for membership in one of its three member Councils. The NWTMN is verifying the information provided by applicants, including information regarding their genealogy, such as birth certificates, death certificates, baptismal certificates and historic records.

III. The History of the Negotiations Leading Up to the NWTMN AiP

24 In 1978, Canada accepted land claim submissions from the Indian Brotherhood of the Northwest Territories and the Métis Association of the Northwest Territories and agreed to undertake the negotiation of a single land claim with both groups with respect to an area covering the entire Mackenzie Valley. This became known as the "Dene/Métis Land and Resource Negotiation".

25 Because of the many familial and community connections between the Dene and the Métis of the Northwest Territories, Canada decided that the best approach was to negotiate a single land claim for all of the Aboriginal people indigenous to the Northwest Territories rather than to pursue a divisive approach, trying to distinguish between the Dene and the Métis for the purpose of the negotiations.

26 Negotiations toward a single Dene/Métis Agreement proceeded throughout the 1980s and resulted in a Comprehensive Land Claim Agreement dated April 4, 1990 between Canada, the Dene Nation and the Métis Association of the Northwest Territories. However, neither the Dene Nation nor the Métis Association of the Northwest Territories ratified this agreement, and negotiations then ceased for a period of time.

27 Following the failure of the Dene/Métis Comprehensive Land Claim Agreement, Canada subsequently entered into regional land claim negotiations at the request of the Métis, the Gwich'in and the Sahtu Dene. These negotiations proceeded on the basis of the Dene/Métis draft agreement and the regions that had been predetermined for land selection purposes: namely the Gwich'in, Sahtu, North Slave, South Slave and Dehcho regions of the Northwest Territories.

28 Land claims agreements were concluded with the Gwich'in and Sahtu Dene in 1992, and with the Métis in 1993. A land claim and self-government agreement was subsequently concluded with the Tlicho First Nation in 2005. This agreement largely covered the area known as the North Slave region.

29 In the South Slave region, the First Nations (as represented by the Akaitcho Dene Treaty 8 Tribal Corporation) pursued Treaty Land Entitlement under Canada's Specific Claims Policy. However, Specific Claims (including Treaty Land Entitlements) are based on unfulfilled treaty obligations, and are only available to First Nations who had been signatories to treaties. As the Métis of the South Slave region did not have a treaty with Canada, they were excluded from the Specific Claims negotiation process.

30 To address this situation, negotiations recommenced between the Métis (as represented by the South Slave Métis Tribal Council, a predecessor to the NWTMN), Canada and the GNWT. These negotiations led to the signing of the

South Slave Métis Framework Agreement in 1996. According to the evidence of Christie Morgan, a senior negotiator with the federal Department of Indian Affairs and Northern Development (now Indigenous Affairs and Northern Development), Canada is negotiating an agreement with the NWTMN that is based, to a large extent, on Canada's Comprehensive Land Claims Policy. This Policy has guided the negotiation of regional land claims in the Northwest Territories.

31 Ms. Morgan further deposes that the negotiation of a Final Agreement is intended to allow the indigenous Métis people of the South Slave region of the Northwest Territories who were eligible for enrollment under the failed Dene-Métis Agreement but were ineligible for Treaty Land Entitlement to participate in a modern land and resources agreement with Canada.

32 Since 1996, the NWTMN, Canada and the GNWT have been actively negotiating the terms of the NWTMN AiP, which, as was noted earlier, was signed on July 31, 2015. The NWTMN AiP will form the basis for the negotiation of a Final NWTMN Land and Resources Agreement.

IV. The Discussions with the NSMA

33 In addition to their negotiations with the NWTMN, Canada and the GNWT determined that it was also appropriate to consult with what Ms. Morgan described as "neighbouring Aboriginal groups" whose rights could potentially be affected by a final land and resources agreement. The purpose of this consultation would be to determine "if and how those concerns might be addressed in the AiP or in a Final Agreement".

34 In order to identify the relevant groups for the purpose of consultation, Canada first identified those Aboriginal groups whose asserted or established Aboriginal or Treaty rights might fall within the NWTMN AiP's proposed Agreement Area. The Agreement Area covers a large area in the east of the Northwest Territories, largely to the south and east of Great Slave Lake. A copy of the map in the NWTMN AiP that identifies the Agreement Area is attached as an appendix to these reasons. Canada and the GNWT were aware that the NSMA asserted Aboriginal harvesting rights in the area north of Great Slave Lake. Consequently, the NSMA was identified as an appropriate Aboriginal group for Canada and the GNWT to consult with.

35 While Mr. Enge asserts that Canada and the GNWT failed to consult with the NSMA prior to entering into the NWTMN AiP, there were in fact discussions between the parties. Although there is a dispute as to the adequacy of the consultation that took place, the parties did exchange correspondence with respect to the terms of the NWTMN AiP. The NSMA was, moreover, provided with funding to assist them in advancing the claims of its members to Aboriginal harvesting rights in the area north of Great Slave Lake, and with an opportunity to provide the two governments with documentary evidence supporting these claims.

36 Amongst other things, the NSMA provided the two governments with five reports (at least one of which had been commissioned by Canada itself) that described the history, ethnogenesis, traditional knowledge and land use patterns of the members of the NSMA. There were also two face-to-face meetings at which Mr. Enge and other representatives of the NSMA were able to discuss the terms of the NWTMN AiP and possible accommodation measures with representatives of Canada and the GNWT.

37 While Canada had previously refused to consult with the NSMA, the two levels of government jointly wrote to the NSMA on October 10, 2012, advising that it would be consulted with respect to the NWTMN AiP, and asking for the name of a main contact person for the consultation process. The NSMA subsequently identified Mr. Enge as the contact person for the consultation process.

38 The October 10, 2012 letter further asked the NSMA "to identify potential adverse impacts that the proposed NWTMN AiP may have on your Aboriginal group's potential or established Aboriginal or Treaty rights". In response, the NSMA provided a substantial amount of information to Canada and the GNWT, including documentation regarding the NSMA's section 35 harvesting rights and its concerns with the terms of the NWTMN AiP.

39 On February 12, 2013, Canada wrote to Mr. Enge stating that it had reviewed the information submitted by the NSMA in support of its asserted section 35 rights and title and that it had "determined the NSMA has not provided sufficient evidence to establish the existence of an ancestrally-based, present-day Métis community in the North Slave area with links to a historic Métis community in that area". As a consequence, Canada stated that "the NSMA have not established a credible claim to s. 35 Métis rights which would support recognition of the NSMA as a distinct s. 35 Métis rights-holding community".

40 Despite having taken the position that the NSMA had not established that its members had a credible claim to section 35 Métis rights, Canada and the GNWT jointly wrote to NSMA on June 11, 2013 in an attempt to begin consultations with respect to the NWTMN AiP. They provided the NSMA with a copy of the draft NWTMN AiP, and set a deadline of July 26, 2013 for the NSMA to complete its review of the document. The two governments also offered funding to the NSMA to a maximum amount of $11,500 to support the consultation process.

41 The June 11, 2013 letter to the NSMA noted that Canada and the GNWT were aware that the NSMA was asserting Aboriginal rights to harvest in the area north of Great Slave Lake. They went on to note that "[t]he draft NWTMN AiP contemplates providing non-exclusive harvesting rights ... to Métis Members ... throughout the proposed Agreement Area", which, it will be recalled, is an area to the south and east of Great Slave Lake. The letter further stated that "[t]here may exist *a small area of overlap* between the northwest corner of the proposed Agreement Area and the area over which the NSMA asserts an Aboriginal right to harvest" [my emphasis].

42 Referring to the non-derogation clause in the draft NWTMN AiP, the June 11, 2013 letter went on to state that "[i]n the course of negotiations, Canada and the GNWT have been mindful to negotiate an agreement that would not affect the asserted Aboriginal or Treaty rights of groups that are not party to the NWTMN final agreement". That said, Canada and the GNWT asked the NSMA to identify any concerns that it may have in the event that any part of the draft NWTMN AiP would adversely affect the asserted Aboriginal right of the NSMA's members to harvest in areas that overlapped with the Agreement Area.

43 By letter dated June 25, 2013, Mr. Enge provided Canada and the GNWT with a copy of the decision of the Northwest Territories Supreme Court in *Enge v. Mandeville*, 2013 NWTSC 33, [2013] N.W.T.J. No. 38 (N.W.T. S.C.) [*Mandeville*], asking whether that decision affected Canada's assessment of the strength of the NSMA's section 35 claim.

A. The Mandeville Decision

44 *Mandeville* was another proceeding commenced by Mr. Enge, this one in the Northwest Territories Supreme Court. There, Mr. Enge sought judicial review of a decision by the Territorial Minister of the Environment and Natural Resources to deny a portion of the annual quota for the harvest of Bathurst caribou to members of the NSMA.

45 Based on evidence similar to that before this Court, the Court in *Mandeville* found that there was some evidence that established, on a *prima facie basis*, that there is a contemporary rights-bearing Métis community in the Great Slave Lake area of which Mr. Enge and the other members of the NSMA are members: at para. 207. In addition, the Court found that Mr. Enge had presented *prima facie* evidence that he is a Métis person through his long-term self-identification as a Métis, his ancestral connection to an historic Métis figure, and community acceptance by other Métis people: at para. 213.

46 The Court also found that Mr. Enge had established a good *prima facie* claim that he and the members of the NSMA had the right to hunt caribou, based upon their asserted rights as Métis people who have traditionally hunted in the Great Slave Lake area: *Mandeville* at para. 230. In addition, the Court found that the Minister's decision to deny Mr. Enge and the other members of the NSMA the opportunity to participate in the limited Aboriginal caribou harvest had a not insignificant adverse effect on their Aboriginal rights: at para. 236.

47 In addition, the Court found that the GNWT's consultation process with respect to the caribou harvest at issue in *Mandeville* was not reasonable: at para. 271. As a consequence, the Court concluded that the GNWT had erred in failing to conduct a preliminary assessment of the strength of the claims of Mr. Enge and the members of the NSMA, and the potential adverse effects of denying them a portion of the limited Aboriginal harvest of the Bathurst caribou herd. According to the Court, the GNWT had further erred in fulfilling its duty to consult by failing to conduct a reasonable consultation process: at para. 282.

48 After reviewing the decision in *Mandeville*, Canada advised Mr. Enge that it had revised its preliminary assessment of the strength of the NSMA's claim to rights under section 35. In a letter to Mr. Enge dated August 16, 2013, Canada acknowledged that the NSMA "has a good *prima facie* claim to the Aboriginal right to hunt caribou on their traditional lands, and are entitled to an appropriate measure of consultation when that asserted right may potentially be adversely impacted by the Crown's action".

49 However, Canada's letter further stated that its revised assessment "is not a determination by Canada that the North Slave Métis Alliance has any section 35 rights. The law relating to the duty to consult makes it clear that an assessment of the strength of the claim for the purposes of consultation is not a rights-determination process".

B. The NSMA's Submissions

50 In a letter dated August 15, 2013, Mr. Enge provided the NSMA's initial submissions with respect to the NWTMN AiP, identifying the portions of the agreement that raised concerns on the part of the NSMA. Mr. Enge also indicated that the NSMA was concerned that the definition of "Métis" in the NWTMN AiP was very broad. The NWTMN AiP defines the term "Métis" as meaning "an Aboriginal person of Cree, Slavey or Chipewyan [collectively the "Dene"] ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such person". Mr. Enge also questioned whether it was Canada's intention "that if a person fails to meet all three criteria, that that person would not be considered Métis for the purposes of the Final Agreement".

51 Mr. Enge's August 15, 2013 letter specifically raised the issue of how harvesting rights were being dealt with in the draft NWTMN AiP. He asked whether it was Canada's intention "to extinguish the common law Aboriginal rights to harvest wildlife, fish, plants and trees throughout the NWT held by Métis eligible to be enrolled under the Final Agreement and confer new rights by the Final Agreement to harvest wildlife, fish, plants and trees exercisable only in the Agreement Area ... to Métis eligible to be enrolled under the Final Agreement?" Or, in the alternative, Mr. Enge asked whether it was Canada's intention "that the certainty provided under subsection 2.3.1 will only apply to the common law Aboriginal rights of the current members of the NWTMN and its affiliate Métis Councils?"

52 The concerns of NSMA members were discussed during two face-to-face meetings between NSMA, Canada, and the GNWT. Present at those meetings were Mr. Enge and the NSMA's legal counsel, and representatives of Canada and the GNWT. The first such meeting occurred on August 29, 2013, and the second on October 24, 2013. The purpose of these meetings was to for Canada and the GNWT to discuss the draft NWTMN AiP with the NSMA.

53 At the August 29 meeting, the NSMA representatives requested additional funding to allow them to participate fully in the consultation process. Canada refused this request, but agreed to consider further requests for additional funding as the parties moved toward a Final Agreement.

54 The principle concern expressed by the representatives of the NSMA at this first meeting was that neither Canada nor the GNWT be permitted to unilaterally extinguish the Aboriginal harvesting rights of the members of the NSMA that had received judicial recognition in the *Mandeville* case. To this end, the NSMA proposed a modification to the provisions dealing with who was to be bound by a Final Agreement.

55 The draft NWTMN AiP provided that the agreement would provide certainty with respect to the use and ownership of lands in the Northwest Territories by individuals who were "eligible to be enrolled under the Final Agreement".

According to the "Eligibility" provision in Chapter 3.1.1 of the NWTMN AiP, "[a]n individual will be 'eligible to enrolled' under the Final Agreement if he or she is a Canadian citizen who a) is Métis; or b) was adopted as a Child, under Laws or under NWTMN custom, by a Métis or is a descendant of such person". The term "Métis" is defined in Chapter 1 of the NWTMN AiP as meaning "an Aboriginal person of Cree, Slavey or Chipewyan ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such people".

56 Chapter 2.4.1 of the NWTMN AiP states that "[t]he Final Agreement will provide that the NWTMN represents and warrants to Government that, with respect to the matters dealt with in the Final Agreement, it has the authority to enter into the Final Agreement on behalf of all individuals who are *eligible to be enrolled* under the Final Agreement in accordance with the Eligibility and Enrolment chapter." [my emphasis].

57 The NSMA does not accept that the NWTMN has the mandate or authority to enter into a Final Agreement on behalf of all of the individuals who are "eligible to be enrolled" under the agreement. According to the NSMA, this warranty would be a misrepresentation of the facts, as the NSMA is not a member society of the NWTMN and was not a party to the NWTMN AiP negotiations between Canada, the GNWT, and the NWTMN. The NSMA thus asked that the NWTMN AiP be amended so that the words "eligible to be enrolled" in the "Certainty" provision (Chapter 2.3.1) be replaced with the words "who are members of" so that the amended provision would read "[t]he Final Agreement will provide certainty with respect to the use and ownership of lands and resources within the Northwest Territories and the Wood Buffalo National Park by Métis *who are members of* the NWTMN and the Métis Councils" [my emphasis].

58 Also relevant is the "non-derogation" clause (Chapter 2.5.1) in the NWTMN AiP, which provides that "No provision in the Final Agreement will be construed to ... affect ...any Aboriginal Rights of any Aboriginal people other than individuals *eligible to be enrolled* under the Final Agreement" [my emphasis].

59 In asking that the words "eligible to be enrolled" be deleted from the "Certainty" provision and the "non-derogation" clause in the NWTMN AiP, the NSMA's concern was that if the language was not altered, these provisions would operate to extinguish at least some NSMA members' rights as Métis north of Great Slave Lake based solely on the fact that the Dene ancestry of these members would make them "eligible to be enrolled" under the Final Agreement. This extinguishment would, moreover, occur without the NSMA members' elected representatives having participated in the negotiations.

60 Canada's position was that if an individual held Aboriginal rights in the area north of Great Slave Lake as a member of another Aboriginal people (independent of his or her other ancestral ties to the south Slave region of the Northwest Territories), the ability of these individuals to exercise their Aboriginal rights should not be affected by a Final Agreement by virtue of the agreement's "non-derogation" clause. If, however, the individual's ancestral ties were just to the south Slave area, and they met the eligibility criteria of the Final Agreement, then that individual would be bound by the decision of the collective to ratify the agreement. This would be the case whether or not the individual had chosen to align him-or herself with another organization such as the NSMA.

61 Mr. Enge's counsel stated that its proposed changes to the wording of the NWTMN AiP would address two fundamental interests on the part of the NSMA. First, they would ensure that the Aboriginal rights of the NSMA members, including their right to harvest in the area north of Great Slave Lake, could only be extinguished where those NSMA members had applied for, and been accepted for enrollment under the Final Agreement. This would mean that there could be no extinguishment by operation of law, as there would have to be a clear choice made by individuals who elected to sign on to the agreement.

62 Mr. Enge further noted that this accommodation measure would also allow for the South Slave Métis people to proceed with their Final Agreement.

63 Canada and the GNWT rejected the NSMA's proposed modification to the language of the NWTMN AiP at the October 24, 2013 meeting on the basis that it was inconsistent with Canada's approach to negotiations of agreements of

this nature, which was that agreements were intended to deal with the rights of *all* of those who are eligible for enrollment under the agreement in question.

64 The NSMA then proposed that it be included as a party to post-NWTMN AiP negotiations towards a Final Agreement, so as to ensure that NSMA members had meaningful participation in negotiations that were intended to extinguish their Aboriginal hunting rights in the North Slave region. This proposal was also rejected by Canada and the GNWT.

C. The End of the Discussions

65 Following a further exchange of correspondence, Canada and the GNWT advised the NSMA by letter dated April 7, 2014 that there would be no further consultation with respect to the NWTMN AiP. This letter stated that Canada and the GNWT were negotiating with the NWTMN "by virtue of its members' Aboriginal ancestry, and not on the basis of the NWTMN representing a rights-bearing *Powley* community" [referring to the criteria for determining who qualifies as a Métis established by the Supreme Court in *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 (S.C.C.).

66 Canada and the GNWT took the position that "*if* the NSMA is a rights-bearing collective as contemplated by the Supreme Court of Canada in *Powley*, then the NSMA would be an Aboriginal group distinct from the NWTMN" and the rights of its members would thus be protected by virtue of the non-derogation clause contained in the Agreement. Canada and the GNWT further suggested that the NSMA discuss the situation with the NWTMN to see if the two organizations could come to some form of understanding.

67 During the process leading up to the signing of the NWTMN AiP, Mr. Enge was in communication with the President of the NWTMN with respect to the Agreement in Principle. A meeting between representatives of the two organizations took place on December 5, 2014. However, the two sides were unable to reach an agreement on the issues that divided them.

68 By letter dated August 18, 2015, Canada and the GNWT officially notified NSMA that the NWTMN AiP had been concluded on July 31, 2015. This followed the ratification of the Agreement at a meeting of the NWTMN at which 43 unidentified members of the organization were present.

V. The Decision under Review

69 The decision at issue in this proceeding is Canada's decision to enter into the NWTMN AiP with the NWTMN and the GNWT.

70 The NWTMN AiP confirms the right of "Métis members" to harvest all species of wildlife year-round in the "Agreement Area", which, as was mentioned earlier, is defined as that portion of the Northwest Territories that is to the south and east of Great Slave Lake. If the terms of the NWTMN AiP are ultimately incorporated into a Final Agreement between Canada, the NWTMN and the GNWT, Mr. Enge states that the effect of this Agreement would be to extinguish the judicially-recognized section 35 right of the members of the NSMA to hunt caribou in the area to the north of Great Slave Lake. Indeed, Canada has confirmed that its intent is that a final land and resources agreement with the Métis of the Northwest Territories would extinguish the section 35 harvesting rights outside of the Agreement Area for Métis whose ancestors lived in the South Slave area.

71 As noted earlier, the NWTMN AiP defines the term "Métis" as meaning "an Aboriginal person of Cree, Slavey or Chipewyan ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such people".

72 The applicants say that Canada and the GNWT are negotiating an agreement with the NWTMN that is blind to the constitutional distinction between "Métis" and "Indian" peoples. Eligibility under the NWTMN AiP is based on the Dene ancestry of the members of the NWTMN and their ancestral ties to the area south of Great Slave Lake. Mr. Enge notes

that Aboriginal ancestry is just one of the *indicia* of being a Métis, and that as it is used in section 35 of the *Constitution Act*, *1982*, the term "Métis" "does not encompass all individuals with mixed Indian and European heritage". It instead refers to "distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears": both quotes from *Powley*, above at para. 10.

73 Ms. Morgan, who, it will be recalled, was Canada's senior negotiator in the negotiations with respect to the Northwest Territories land and resources agreement, acknowledged that the definition of "Métis" in the NWTMN AiP does not incorporate the elements of the *Powley* test.

74 In contrast, Mr. Enge asserts that the members of the NSMA are ethnically "Métis", as contemplated by subsection 35(2) of the *Constitution Act*, *1982*, as they satisfy the criteria established by the Supreme Court in the *Powley* case. They are, moreover, a distinct section 35 rights-bearing Métis collective whose traditional harvesting activities were carried out north of Great Slave Lake — an area that is largely outside the area that was being dealt with in the NWTMN negotiations.

75 In accordance with the non-derogation clause in the NWTMN AiP, no provision in any Final Agreement between Canada, the NWTMN and the GNWT will be construed to affect any Aboriginal or treaty rights of any Aboriginal People other than individuals who are "eligible to be enrolled under the Final Agreement".

76 Mr. Enge acknowledges that those members of the NSMA who share ancestral ties to the Dene of the South Slave region would be "eligible to be enrolled" under the Final Agreement, and that that the non-derogation clause would only protect the rights of Aboriginal groups who are distinct from those with ancestral ties to the Dene of the south Slave region. Mr. Enge submits, however, that it should be open to such individuals to choose to assert *Powley*-type Métis rights through the NSMA, rather than participate in the NWTMN negotiation process by virtue of their Dene ancestry.

77 Before addressing the merits of Mr. Enge's application for judicial review, however, there is a preliminary matter that must be addressed. That is, as was mentioned earlier, Canada and the NWTMN assert that Mr. Enge has failed to satisfy the requirements of Rule 114 of the *Federal Courts Rules*, as he has not been properly authorized to act on behalf of the members of the NSMA, and he has failed to demonstrate that he can fairly and adequately represent their interests. As the issue of Mr. Enge's standing to bring this application could potentially be determinative of this application, it will be addressed first.

VI. Does Mr. Enge have Standing to Bring this Application on Behalf of the Members of the NSMA?

78 Mr. Enge brings this application for judicial review on his own behalf and on behalf of the members of the NSMA. He acknowledges that as such, the application is governed by the provisions of Rule 114(1) of the *Federal Courts Rules*, which provides that:

> 114 (1) Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that
>
> (a) the issues asserted by or against the representative and the represented persons
>
> (i) are common issues of law and fact and there are no issues affecting only some of those persons, or
>
> (ii) relate to a collective interest shared by those persons;
>
> (b) the representative is authorized to act on behalf of the represented persons;
>
> (c) the representative can fairly and adequately represent the interests of the represented persons; and
>
> (d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding

114 (1) Malgré la règle 302, une instance — autre qu'une instance visée aux articles 27 ou 28 de la Loi — peut être introduite par ou contre une personne agissant à titre de représentant d'une ou plusieurs autres personnes, si les conditions suivantes sont réunies:

a) les points de droit et de fait soulevés, selon le cas:

(i) sont communs au représentant et aux personnes représentées, sans viser de façon particulière seulement certaines de celles-ci,

(ii) visent l'intérêt collectif de ces personnes;

b) le représentant est autorisé à agir au nom des personnes représentées;

c) il peut représenter leurs intérêts de façon équitable et adéquate;

d) l'instance par représentation constitue la façon juste de procéder, la plus efficace et la moins onéreuse.

79 Canada and the NWTMN submit that Mr. Enge has not satisfied the requirements of Rule 114(1)(b) and Rule 114(1)(c). That is, they argue that he has not been duly authorized to act on behalf of the members of the NSMA, and he has not demonstrated that he can fairly and adequately represent their interests. The GNWT does not dispute Mr. Enge's standing to bring this application on behalf of the members of the NSMA, perhaps because they conceded as much in *Mandeville*.

80 While accepting that Mr. Enge is a member of a rights-bearing group, Canada and the NWTMN submit that this does not give him standing to bring this application.

81 Citing the Supreme Court of Canada's decisions in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 (S.C.C.) at para. 30, [2013] 2 S.C.R. 227 (S.C.C.), and *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (S.C.C.) at para. 35, [2010] 3 S.C.R. 103 (S.C.C.), these respondents observe that Aboriginal rights are collective rights, and the Crown does not owe a duty to consult individual members of an Aboriginal group. Consequently, Canada and the NWTMN submit that if Mr. Enge has not been duly authorized to bring this application for judicial review on behalf of the members of the NSMA, it follows that the application should be summarily dismissed.

A. Was Mr. Enge Authorized to Act on Behalf of the Members of the NSMA?

82 Rule 184(1) of the *Federal Courts Rules* provides that allegations of fact asserted in a pleading that have not been admitted by the opposing party or parties will be deemed to have been denied. Rule 184(2)(a) further provides that is it not necessary for a party to prove his or her right to bring a claim in a representative capacity, unless that right has been denied by an adverse party. That is the case here.

83 In support of its contention that Mr. Enge has not been duly authorized to act on behalf of the members of the NSMA in this case, Canada notes that no specific authority was given to Mr. Enge by the members of the NSMA prior to the filing of his application for judicial review on August 26, 2015. No resolution of the Board of Directors of the NSMA was ever passed authorizing this application, and because minutes of Board meetings are not kept, it is not clear whether the bringing of this application was ever discussed or approved by the Board of the NSMA.

84 According to Canada, the only authorization given for Mr. Enge to bring this application for judicial review is the *ex post facto* resolution passed at an Annual General Meeting of the NSMA that was held on April 9, 2016. This resolution ratified the filing of this application some seven months earlier. While acknowledging that such after-the-fact approval might by sufficient to comply with the requirements of Rule 114(1)(b) in some cases, Canada contends that it is not sufficient in this case because of the inadequacies of the notice that was given to members of the NSMA with respect to the Annual General Meeting of the organization.

85 One advertisement informing the public of the upcoming Annual General Meeting of the members of the NSMA was placed in "*The Yellowknifer*", a local Yellowknife newspaper. Canada acknowledges that this notice complied with the requirements of Article 8.2 of the NSMA's By-laws, which require that notice of an Annual General Meeting be given by way of "public advertisement" not less than 30 days prior to the date of the meeting. However, Canada says that there is good reason to believe that many of the members of the NSMA were unaware of the meeting.

86 In support of this contention, Canada points out that many of the NSMA's members do not live in Yellowknife and would thus not have seen the advertisement. Moreover, the NSMA holds Annual General Meetings only sporadically, with the last such meeting having taken place in 2013. Consequently, the members of the NSMA would have had no reason to expect an Annual General Meeting to take place in April of 2016. Canada further notes that there were any number of ways that the NSMA could have given notice of its upcoming Annual General Meeting to its members, including, for example, by posting a notice on the NSMA's website, sending notice to members of the NSMA by regular mail or email, or including a notice in a NSMA newsletter. For whatever reason, it chose not to avail itself of any of these methods of communication.

87 When he was asked in cross-examination why none of these other methods were used to provide NSMA members with notice of the upcoming Annual General Meeting, Mr. Enge stated that a single notice in the newspaper "was good enough for the Registrar of Societies so it is good enough for the NSMA". Mr. Enge further suggested that the onus was on members of the NSMA who lived outside of Yellowknife to keep themselves informed as to what was going on with the organization.

88 Canada notes that Mr. Enge's claim to having had a "clear mandate" to pursue this application stemmed not from the collectively expressed views of the members of the NSMA who had been informed of the contents of the NWTMN AiP, but rather from the objects of the organization, as set out in the NSMA's Constitution, and from the provision in NSMA membership application forms designating the NSMA as the representative of the members' interests. Canada says that such a mandate is "too general" to support the proposition that the members of the NSMA had specifically authorized Mr. Enge to commence legal proceedings on their behalf, the results of which would be binding on them.

89 The NWTMN notes that the position taken by the NSMA with respect to the NWTMN AiP was formulated by Mr. Enge, his brother, his cousin and his legal counsel, and that the members of the NSMA were not consulted regarding their views of the NWTMN AiP prior to the commencement of this application for judicial review. Mr. Enge made virtually no effort, moreover, to inform the members of the NSMA of the issues that he had raised during the consultation process with respect to the NWTMN AiP, and he made only minimal effort to seek the views of the NSMA's membership and their authority to commence this proceeding.

90 The NWTMN also argues that Mr. Enge seemed to accept that a specific mandate to commence this application for judicial review was required. That is, when he was asked why he had sought a resolution authorizing him to bring this application for judicial review after he had already done so, Mr. Enge explained that "[t]he North Slave Métis Alliance Board of Directors felt it was necessary to secure a general mandate and confirmation from its members that this judicial review was in the best interests of the North Slave Métis Alliance people".

91 The NWTMN notes that the NSMA's 2016 Annual General Meeting was attended by only 22 unnamed members of the NSMA, out of a total membership of 283. The NWTMN submits that the low turnout was explained by the inadequacy of the notice given with respect to the meeting, the result of which is that this retroactive authorization does not provide sufficient authority for Mr. Enge to bring this application as a representative proceeding. This is especially so, the NWTMN says, in light of the fact that the advertisement in "*The Yellowknifer*" did not specify that the membership would be asked to vote on a resolution authorizing Mr. Enge's actions in bringing this application on behalf of the NSMA's members. While no copy of the advertisement appears in the record, Mr. Enge stated in his cross-examination that the advertisement simply indicated that "the following business will be conducted: financial statements, resolutions, something like that".

92 Mr. Enge argues that independent of any resolution specifically authorizing the commencement of this application for judicial review, he had the requisite authority to commence this application by virtue of his office as President of the NSMA. He further submits that he can personally assert section 35 Aboriginal rights through this application on his own behalf and on behalf of others, as he is himself a member of the Métis of the north Slave area who has section 35 Aboriginal harvesting rights. Finally, Mr. Enge contends that there is no evidence before the Court of any other organization (including the NWTMN) that is authorized to represent Métis asserting harvesting rights in the area to the north of Great Slave Lake.

B. The History and Purpose of Rule 114

93 In determining whether Mr. Enge has the necessary standing to bring this application on behalf of the members of the NSMA, it is helpful to start by reviewing the history and purpose of Rule 114.

94 The *Federal Courts Rules* historically had a rule permitting representative proceedings which only applied to actions, and not to applications. The rule was, however, repealed in 2002 when the *Rules* were amended to allow for class actions. The view at the time was that proceedings that had previously been brought as representative actions would now be brought as class actions: Chief Justice Allan Lutfy and Emily McCarthy, "*Rule-Making in a Mixed Jurisdiction: the Federal Court (Canada)*" (2010) 49 S.C.L.R. (2d) 313 at para. 33.

95 Rule 114 was re-introduced into the *Federal Courts Rules* a few years later, however, at the request of members of the Aboriginal litigation bar who submitted that representative proceedings were more suitable than class actions for the group litigation of claims relating to Aboriginal and Treaty rights. Not only do representative actions not have the costly and complex certification requirements of class actions, there is, moreover, an important distinction between the two types of proceeding. Members of a class have the ability to opt out of a class action, something that is not appropriate when collective Aboriginal rights are being asserted. In contrast, in representative proceedings, all of the members of a group will be bound by the outcome of the proceeding: *Gill v. Canada*, 2005 FC 192 (F.C.) at para. 13, (2005), 271 F.T.R. 139 (F.C.); Lutfy and McCarthy, above at para. 38.

96 The re-enacted Rule 114 established a number of requirements that a representative party must meet in order to protect the individual members of Aboriginal groups: *Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 FC 517 (F.C.) at para. 84, (2012), 409 F.T.R. 82 (Eng.) (F.C.). One such requirement is that a representative applicant be duly authorized to act on behalf of the represented persons.

97 As the Supreme Court observed in *Behn*, "[t]he duty to consult exists to protect the collective rights of Aboriginal peoples": above at para. 30. Because of the collective nature of Aboriginal rights, the duty to consult is not owed to individuals, but rather to the Aboriginal group that holds the section 35 rights: *Beckman*, above at para. 35. Consequently, the fact that Mr. Enge may himself enjoy section 35 harvesting rights does not give him a personal right to be consulted with respect to the NWTMN AiP, nor is it enough to allow him to represent the other members of the NSMA in this application.

98 This is because self-appointed individuals will not be permitted to assert collective Aboriginal rights on behalf of an Aboriginal community: *Ross River Dena Council v. Canada (Attorney General)*, 2009 YKSC 38 (Y.T. S.C.) at para. 26, [2009] Y.J. No. 55 (Y.T. S.C.) citing *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517 (B.C. S.C.) at para. 35, (2006), [2007] 1 C.N.L.R. 286 (B.C. S.C.). An Aboriginal group can, however, authorize an individual or organization to represent it for the purpose of asserting its section 35 rights.

99 The question, then, is whether Mr. Enge has been properly authorized to assert collective Aboriginal rights on behalf of the members of the NSMA.

C. The Sufficiency of the Authority Given to Mr. Enge

100 Mr. Enge contends that independent of any resolution specifically authorizing the commencement of this application for judicial review, he had the authority to commence this application by virtue of his office as the duly-elected President of the NSMA, an office that he has held since 2004. As will be explained below, I agree with this submission.

101 According to its Constitution, the NSMA is an organization whose purpose is "to advance the interests of its members by whatever means as are appropriate", and to promote and support the recognition and advancement of the Aboriginal rights of the Métis community of the North Slave area of the Northwest Territories.

102 The objects of the NSMA include "undertak[ing] any activities related directly or indirectly that are of interest or concern to the Alliance", and "advanc[ing] and support[ing] the constitutional, legal, political, social and economic rights of the Indigenous Métis of the North Slave area of the Northwest Territories". The objects of the NSMA also include "negotiat[ing], ratify[ing] and implement[ing] agreements to advance and support the inherent right of self-government and self-determination of the community of Indigenous Métis of the North Slave area in the Northwest Territories for the benefit of the Alliance and its members between the federal Crown as represented by the Government of Canada and the territorial Crown as represented by the Government of the Northwest Territories".

103 Thus the assertion of Aboriginal harvesting rights in the area north of Great Slave Lake is part of the very *raison d'être* of the NSMA, and Mr. Enge's actions in bringing this application for judicial review are entirely consistent with the objects of the organization.

104 Furthermore, the NSMA's membership application includes a provision whereby applicants confirm that they have voluntarily chosen the NSMA as their sole representative for the purpose of pursuing any Aboriginal rights that they may have in the North Slave Region of the Northwest Territories. This further supports Mr. Enge's authority to bring this proceeding on behalf of the members of the NSMA.

105 As a registered society, the NSMA has all the rights and powers of a corporation: *Societies Act*, subsection 4(2). Corporations, in turn, have all the rights, powers and privileges of natural persons: *Business Corporations Act*, S.N.W.T. 1996, c.19, subsection 15(1). The *Business Corporations Act* further provides that "it is not necessary for a bylaw to be passed in order to confer any particular power on the corporation or its directors": subsection 16(1).

106 The By-laws of the NSMA do, however, provide that the Board of Directors of the NSMA is the governing body of the organization and is responsible for upholding its Constitution. The President of the NSMA has overall responsibility for the governance of the day-to-day business and activities of the organization.

107 Mr. Enge evidently developed the position taken by the NSMA with respect to the NWTMN AiP in conjunction with two members of the organization's Board of Directors. Mr. Enge has further stated that the rest of the Board members were kept apprised of the position that he and the other two Board members were taking in their discussions with Canada and the GNWT. This is consistent with the role of Mr. Enge as President and of the Board of Directors as the governing body of the NSMA.

108 As the Manitoba Court of Appeal noted in *Chartrand v. De la Ronde* (1996), 113 Man. R. (2d) 12 (Man. C.A.) at para 50, [1996] M.J. No. 433 (Man. C.A.), (citing *John Shaw & Sons (Salford) Ltd. v. Shaw*, [1935] 2 K.B. 113 (Eng. C.A.) at p. 134), "[a] company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting". Canada and the NWTMN have not identified any provision in either the NSMA's Constitution or its By-laws that require that the members of the NSMA approve any litigation brought on their behalf. I am thus not persuaded that it was necessary for Mr. Enge to obtain the specific approval of the membership of the NSMA before commencing this application for judicial review.

109 Moreover, the Court went on in *Shaw* to note that "[t]he only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove".

110 Mr. Enge was first elected President of the NSMA in 2004. According to Article 5 of the NSMA's By-laws, elections are to be held every four years. Consequently, it appears that Mr. Enge would likely have been re-elected President of the NSMA in 2016 — after this application was commenced, and after he had successfully asserted Aboriginal harvesting rights in the area north of Great Slave Lake on behalf of the members of the NSMA in the *Mandeville* case.

111 Mr. Enge's re-election to the Presidency of the NSMA in 2016 suggests that the members of the organization were satisfied with his actions in bringing both of these cases.

112 Indeed, it appears that the main impetus for the commencement of this application was to ensure that Canada and/or the GNWT could not extinguish the Aboriginal harvesting rights of the members of the NSMA in the area north of Great Slave Lake that received judicial recognition in *Mandeville*.

113 Moreover, without losing sight of the fact that the onus is on Mr. Enge to demonstrate that he has the requisite authority to bring this application for judicial review on behalf of the members of the NSMA, I note that neither Canada nor the NWTMN has identified a single member of the NSMA who does not support Mr. Enge's actions in bringing this application on his or her behalf.

114 Finally, even if the specific authorization of the members of the NSMA was required for Mr. Enge to commence this application, such authority was obtained (albeit it on an after-the-fact basis) through the resolution passed at the Annual General Meeting of the organization held on April 9, 2016 ratifying the filing of this application.

115 This resolution provides that:

> The members affirm that the President of the North Slave Métis Alliance, acting with the approval of the NSMA Board of Directors, has the authority to pursue all necessary legal and political actions to preserve NSMA members' Aboriginal rights as Métis of the Great Slave Lake area of the Northwest Territories from the effect of the Final Agreement as signified by NWTMN AiP including, but not limited to, the prosecution of the Application for Judicial Review, Federal Court File No. T-1427-15.

116 While better notice of the Annual General Meeting of the NSMA could perhaps have been provided, the fact is that the notice that was given complied with the provisions of both the *Societies* Act of the Northwest Territories and the By-laws of the NSMA.

117 For all of these reasons, I am satisfied that Mr. Enge has sufficient authority to bring this application on behalf of the members of the NSMA so as to satisfy the requirements of Rule 114(1)(b) of the *Federal Courts Rules*.

118 The next question is whether Mr. Enge can fairly and adequately represent the interests of the members of the NSMA.

D. Has Mr. Enge Demonstrated that He Can Fairly and Adequately Represent the Interests of the Members of the NSMA?

119 The respondents Canada and the NWTMN also claim that Mr. Enge has failed to demonstrate that he can fairly and adequately represent the interests of the members of the NSMA as he has failed to take reasonable steps to inform himself of their views. As a result, they say that he is unaware of the opinions of most of the members of the NSMA with respect to the NWTMN AiP.

120 In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 41, [2001] 2 S.C.R. 534 (S.C.C.), the Supreme Court of Canada addressed the type of considerations that a court should take into account

in assessing whether an individual litigant has the capacity to adequately represent a group. Amongst other things, the Supreme Court stated that regard may be given to "the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally)". The Court went on to state that "[t]he proposed representative need not be 'typical' of the class, nor the 'best' possible representative". The Court should, however, be satisfied that the proposed representative "will vigorously and capably prosecute the interests of the class", citing W. K. Branch, *Class Actions in Canada* (1998), at paras. 4.210-4.490; Friedenthal, Kane and Miller, Civil Procedure (2nd ed. 1993), at pp. 729-32.

121 While the Court's comments were made in the context of class actions, they are also relevant in the case of representative proceedings.

122 Inasmuch as Canada and the NWTMN's argument relates to the extent of Mr. Enge's consultation with the members of the NSMA before bringing this application for judicial review, I have already concluded that he had the necessary authority to bring this application for judicial review on behalf of the members of the NSMA, and that his action in doing so and the position taken in the application accords with the NSMA's Constitution. He has, moreover, demonstrated through his leadership role in the *Mandeville* case that he has the necessary knowledge of the facts and issues involved in this application, coupled with the ability to successfully assert section 35 Aboriginal harvesting rights on behalf of the members of the NSMA. Mr. Enge is, moreover, represented by experienced counsel who successfully prosecuted the *Mandeville* case on behalf of Mr. Enge and the members of the NSMA.

123 Consequently I am satisfied that Mr. Enge has satisfied the requirements of Rule 114(1)(c), and that he can fairly and adequately represent the interests of the members of the NSMA in this application.

124 This then takes us to the merits of the application for judicial review.

VII. The Issues

125 Mr. Enge asserts that Canada has failed in its duty to properly consult with the members of the NSMA prior to entering into the NWTMN AiP with the NWTMN. Consequently he asks, amongst other things, that negotiation of any Final Agreement be stayed until such time as meaningful consultation and accommodation has occurred between Canada and the NSMA with respect to the concerns that it has raised.

126 In particular, Mr. Enge asserts that Canada has erred in law by:

(1) Failing to conduct a preliminary assessment of the strength of the NSMA members' claim;

(2) Failing to correctly identify the parameters of the scope and content of its duty to consult;

(3) Failing to reassess the strength of the NSMA members' claims during the consultation process; and by

(4) Relying on the non-derogation clause in the NWTMN AiP as a mitigation measure.

127 Mr. Enge further asserts that the consultation process that was carried out by Canada was unreasonable because it:

(1) Took a rigid and inflexible position by relying on its regional claims negotiation policy and ignoring legal principles;

(2) Took an "ends justify the means" approach to consultation; and

(3) Refused to conduct deep consultation and to consider appropriate accommodation measures given the extreme nature of the potential adverse effects contemplated by the NWTMN AiP.

128 Before addressing Mr. Enge's issues, however, I will first address the GNWT's argument that this application for judicial review should be dismissed on the basis that it is premature. I will also address Canada's argument that no duty to consult with the NSMA was triggered in this case, as the members of the NSMA are part of the Métis community of the Northwest Territories — the group with whom Canada has been negotiating, as represented by the NWTMN.

129 In order to put the issues raised by this application into context, however, it is helpful to start by reviewing the law relating to the source and function of the duty to consult.

VIII. The Source and Function of the Duty to Consult

130 As the Supreme Court of Canada observed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), the management of the relationship between Canada's Aboriginal and non-Aboriginal peoples "takes place in the shadow of a long history of grievances and misunderstanding". The Court noted that the "multitude of smaller grievances created by the indifference of some government officials to Aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies": both quotes from para. 1.

131 It was in this context that the Supreme Court stated that "the fundamental objective of the modern law of Aboriginal and Treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions": *Mikisew*, above at para. 1; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (S.C.C.) at para. 19, [2017] S.C.J. No. 40 (S.C.C.). The duty to consult is grounded in the honour of the Crown, and seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown: *Clyde River*, above at para. 19, citing *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (S.C.C.) at para. 34, [2010] 2 S.C.R. 650 (S.C.C.).

132 In order to act honourably, the Crown cannot "cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.) at para. 27, [2004] 3 S.C.R. 511 (S.C.C.). Instead, the Crown must respect these potential, but as yet unproven, interests and must consult with the affected Aboriginal group or groups before any decision is made that may affect the Aboriginal or treaty rights of the group in question. As the Supreme Court noted in *Clyde River*, "'consultation' in its least technical definition is talking together for mutual understanding": above at para. 49, citing T. Isaac and A. Knox, "*The Crown's Duty to Consult Aboriginal People*" (2003), 41 Alta. L. Rev. 49, at p. 61.

133 The duty to consult has both a legal and a constitutional character: *Rio Tinto*, above at para. 34; *R. v. Kapp*, 2008 SCC 41 (S.C.C.) at para. 6, [2008] 2 S.C.R. 483 (S.C.C.). The constitutional dimension of the duty to consult is grounded in the honour of the Crown: *Kapp*, above at para. 6. It is enshrined in section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights: *Clyde River* at para. 19, citing *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (S.C.C.) at para. 24, [2004] 3 S.C.R. 550 (S.C.C.).

134 It is, moreover, "a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process": *Rio Tinto*, above at para. 32, citing *Haida Nation* at para. 20

135 The Supreme Court has explained that the duty to consult "derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right": *Rio Tinto*, above at para. 33. The duty to consult requires that the Crown take contested or established Aboriginal rights into account before making a decision that may have an adverse impact on them: *Rio Tinto*, above at para. 35.

136 The duty to consult is primarily a procedural right: *Mikisew*, above at para. 57. It is not based on the common law duty of fairness, however. Rather, it is a duty based on "a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution": *Haida Nation*, above at para. 32.

137 While primarily procedural in nature, the duty to consult also has a substantive dimension. The duty "is not fulfilled simply by providing a process within which to exchange and discuss information": *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 (B.C. S.C.) at para. 178, [2008] 4 C.N.L.R. 315 (B.C. S.C.). Consultation must instead be meaningful, and be conducted in good faith "with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue": *Clyde River*, above at para. 23; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 168, [1997] S.C.J. No. 108 (S.C.C.); see also Arthur Pape, "The Duty to Consult and Accommodate: A Judicial Innovation Intended to Promote Reconciliation" in *Aboriginal Law since Delgamuukw*, ed. Maria Morellato (Aurora, ON: Cartwright Group Ltd., 2009) at 317. In addition to being meaningful, consultation must also allow for accommodation where necessary. The representations of the Aboriginal group must be "seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action": *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 (B.C. C.A.) at para. 160, [1999] 4 C.N.L.R. 1 (B.C. C.A.).

138 Canada is required to consult with its Aboriginal peoples where it "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it": *Haida Nation*, above at para. 35. The knowledge threshold that must be met to trigger the duty to consult and accommodate is not high: see *Rio Tinto*, above at para. 40. Indeed, knowledge of a credible but unproven claim is sufficient to trigger the duty: *Haida Nation*, above at para. 37.

139 Although it is essential that the Aboriginal people establish the existence of a potential claim, proof that the claim will succeed is not required: see *Rio Tinto*, above at para. 40.

140 While the threshold for triggering a duty to consult is relatively low, once it is triggered, the degree of consultation that will be required in a specific case will depend on the strength of the Aboriginal claim, and the seriousness of the potential impact on the right: *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (S.C.C.) at para. 38 (*CTFN*), [2017] S.C.J. No. 41 (S.C.C.), citing *Haida Nation*, at paras. 39 and 43-45. Each case must be considered on its individual merits, and "flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light": *Clyde River*, above at para. 20, citing *Haida Nation*, at paras. 39 and 43-45.

141 A weak claim may only require the giving of notice, whereas a stronger claim may attract more onerous obligations on the part of the Crown: *Haida Nation*, above at para. 37. The content of the duty to consult in the circumstances of this case will be discussed in greater detail later in these reasons.

142 The duty to consult does not provide Aboriginal groups with a veto: *CTFN*, above at para. 59. As long as the consultation is meaningful, there is no obligation on the Crown to reach an agreement with the Aboriginal groups in issue. Rather, accommodation requires that "Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process": *Taku River*, above at para. 92.

143 Where, however, "there is a strong Aboriginal claim that may be significantly and adversely affected by the proposed Crown action, meaningful consultation may require the Crown to modify its proposed course to avoid or minimize infringement of Aboriginal interests pending their final resolution": *Wii'litswx*, above at para. 178. See also *Haida Nation*, above at paras. 41-42, 45-50. Consultation must be meaningful, and cannot simply be an opportunity for the Aboriginal group in issue to "blow off steam": *Mikisew*, above at para. 54.

144 The Crown has discretion as to how it structures the consultation process and how the duty to consult is met: *Gitxaala Nation v. Canada*, 2016 FCA 187 (F.C.A.) at para. 203, [2016] 4 F.C.R. 418 (F.C.A.), leave to appeal refused, [*R. v. Raincoast Conservation Foundation*] (2017), [2016] S.C.C.A. No. 386 (S.C.C.), SCC 37201, *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)*, 2013 ABCA 443 (Alta. C.A.) at para. 39, (2013), 566 A.R. 259 (Alta. C.A.).

145 Perfect satisfaction of the duty to consult is not required. As long as the Crown "makes reasonable efforts to inform and consult the First Nations which might be affected by the Minister's intended course of action, this will normally suffice to discharge the duty": *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2008 FCA 212 (F.C.A.), at para. 54, [2008] F.C.J. No. 946 (F.C.A.).

146 In all cases, the fundamental question is what is necessary to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake: *Haida Nation*, above at para. 45. The honour of the Crown also mandates that it balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims: *Haida Nation*, above at para. 45. Consequently, any decision affecting Aboriginal or treaty rights that is made without proper consultation will not be in compliance with the duty to consult, and should be quashed on judicial review: *Clyde River*, above at para. 24.

147 With this understanding of the source and function of the duty to consult and accommodate, I turn next to consider the GNWT's prematurity argument.

IX. The GNWT's Prematurity Argument

148 The GNWT notes that the focus of Mr. Enge and NSMA in this application is on the actions of Canada, and that only Canada's actions are identified in the grounds for review in the applicants' Notice of Application. The GNWT further submits that Canada was "in the driver's seat" in the discussions with the NSMA, and that it merely followed Canada's lead in this regard.

149 The GNWT concedes that it had a duty to consult with, and, if appropriate, accommodate the NSMA with respect to its members' asserted Aboriginal harvesting rights in the area to the north of Great Slave Lake. It further concedes that this duty was triggered by the negotiation of the draft NWTMN AiP, and that the GNWT will, moreover, continue to have a duty to consult with the NSMA through to the conclusion of any Final Agreement. The GNWT submits, however, that because there will be further consultation with the NSMA prior to the conclusion of a Final Agreement, this application for judicial review is therefore premature. I do not agree.

150 The duty to consult is not limited to decisions that have an immediate impact on lands and resources: *Clyde River*, above at para. 25. As I observed in *Sambaa K'e Dene Band v. Canada (Minister of Indian Affairs & Northern Development)*, 2012 FC 204, 405 F.T.R. 182 (F.C.), "the duty to consult extends to strategic, higher level decisions that may have an impact on Aboriginal claims and rights, even if that impact on the disputed lands or resources may not be immediate": at para. 164, citing *Rio Tinto*, above at para. 44.

151 Consultation must, moreover, be timely: *Halfway River*, above at para. 160. As I said in *Sambaa K'e*, "[i]f it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions". This is because "[o]nce important preliminary decisions have been made there may well be 'a clear momentum' to move forward with a particular course of action": at para. 165, citing *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 (B.C. S.C.) at para. 75, (2004), 34 B.C.L.R. (4th) 280 (B.C. S.C.). Such momentum, may, moreover, develop even if the preliminary decisions are not legally binding on the parties: both quotes from *Sambaa K'e*, above at para. 165.

152 The duty to consult has been found to have been engaged by a Crown decision to enter into an agreement in principle with respect to lands and resources: *Sambaa K'e*, above at paras. 164-168; *Huron-Wendat Nation of Wendake c. Canada (Minister of Indian Affairs and Northern Development)*, 2014 FC 1154 (F.C.), at para. 102-105. (2014), [2015] 3 C.N.L.R. 53 (F.C.).

153 Indeed, the case law shows that the non-binding nature of preliminary decisions does not necessarily mean that there can be no duty to consult. For example, in *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC

1354, 303 F.T.R. 106 (Eng.) (F.C.), negotiations leading to a non-binding Cooperation Plan nonetheless triggered a duty to consult that fell at the high end of the consultation spectrum.

154 While there is still much to be resolved with respect to the terms of a final land and resources agreement, as the GNWT itself acknowledged, the NWTMN AiP provides "a general framework" for those discussions.

155 As a consequence, this application for judicial review is not premature. It is open to Mr. Enge and the NSMA to challenge the adequacy of the consultation that has taken place with it to this point with respect to the NWTMN AiP.

156 The next question, then, is whether the duty to consult with the NSMA has been triggered in this case.

X. Has the Duty to Consult with the Members of the NSMA been Triggered in this Case?

157 While the GNWT concedes that it had a duty to consult with the NSMA that was triggered by its decision to negotiate the NWTMN AiP, Canada does not agree that it owed a duty to consult with the NSMA, or that any such duty was triggered in this case. Canada says that this is because the members of the NSMA are part of the group with whom it has been negotiating, namely the NWTMN.

158 According to Canada, the Métis rights that will potentially be affected by a Final Agreement are the rights held by Métis people who are eligible for enrollment in accordance with the terms of the NWTMN AiP. It will be recalled that the NWTMN AiP defines "Métis" as meaning "an Aboriginal person of Cree, Slavey or Chipewyan ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such person". This is essentially the Métis community that Canada says that is has been negotiating with for many years, as represented by the NWTMN.

159 While it had been negotiating with the NWTMN for a long time, Canada says that it started consulting with the NSMA in 2012 based on its understanding that the NSMA represented a distinct Aboriginal group that was asserting section 35 Aboriginal rights in the North Slave area. However, in the course of its consultations with the NSMA, Canada says that it learned that many members of the NSMA were in fact eligible for enrollment under the terms of the NWTMN AiP, and would thus be eligible to participate in the Final Agreement contemplated by the NWTMN AiP.

160 Canada further notes that a binding final agreement will not be imposed on the Métis of the Northwest Territories. A final agreement will only come into existence if it is ratified by a majority of the people who are eligible for membership under its terms.

161 According to Canada, this case is thus not fundamentally about the adequacy of Crown consultation; it is, rather, a challenge to the NWTMN as the proper representative of the Métis people whose Aboriginal ancestors were indigenous to the South Slave region of the Northwest Territories.

162 Canada accepts that it had an obligation to consult with the Métis community of the Northwest Territories prior to entering into the NWTMN AiP. Canada further accepts that the Métis of the Great Slave Lake area have a good *prima facie* claim to a right to harvest caribou in their traditional asserted territory, which includes the area north of Great Slave Lake. What Canada disputes is whether it had any duty to consult with the members of the NSMA, independent of its obligation to consult with the Métis community of the Northwest Territories as represented by the NWTMN.

163 The question for determination is thus whether Canada owed a duty to consult with the members of the Métis community of the Northwest Territories who are represented by the NSMA, in addition to the duty that it owed to consult with the members of the NWTMN. Before addressing this question, however, I will first examine the appropriate standard of review to be applied to Canada's choice of negotiating partner.

A. The Standard of Review

164 The Supreme Court of Canada discussed the standards of review to be applied to Crown decisions relating to the duty to consult in *Haida Nation*, above at paras. 61-63. The Supreme Court held that on questions of law, the decision-maker must generally be correct, whereas a reviewing Court may owe a degree of deference to the decision-maker on questions of fact or mixed fact and law: above at para. 61.

165 *Haida Nation* was decided before the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.). However, in *Ahousaht*, above at para. 34, the Federal Court of Appeal confirmed that *Dunsmuir* did not change the standards of review to be applied in reviewing decisions relating to the duty to consult.

166 The question of whether a duty on the part of the Crown to consult with a particular Aboriginal group has been triggered is a question of law, inasmuch as it defines a legal duty. As such, it is reviewable on the standard of correctness. That said, it also involves an assessment of the facts such as the composition of the Métis community in the Northwest Territories, and the nature of the two organizations that purport to represent that community. Consequently, a degree of deference is owed to Canada's assessment of the facts underlying its choice of negotiating partner in this case: *Haida Nation*, above at para. 61.

B. The Duty to Consult in the Métis Context

167 To a large extent, the disagreement between the parties with respect to whether a duty to consult is owed to the NSMA stems from the fact that the Aboriginal people whose rights are at stake in this proceeding are Métis, rather than "Indians", as that term is used in the *Indian Act*.

168 The governance structures and legal status of groups of "Indians" are largely governed by the provisions of the federal *Indian Act*. Because of this, it will usually be clear which entity represents which Aboriginal group, and which entity must thus be consulted with respect to Crown actions that may have an impact on the Aboriginal rights held by members of the group in question. There is no comparable legislation at the federal or territorial level that creates legal identities and governance structures for identifiable Métis collectives, although some provinces have legislated in this area. As a result, it may be unclear who the Crown must consult prior to taking action that may affect the Métis' Aboriginal rights.

169 As was noted earlier in these reasons, Canada has been engaged in negotiations with the Métis community of the Northwest Territories since the 1980s. After the failure of the Dene/Métis Land and Resource Negotiation, Canada entered into regional land claim negotiations in each of the five regions of the Northwest Territories, including the North and South Slave regions. It appears that it was initially understood that the Métis of the North Slave region would be pursuing their interests separately from the Métis of the South Slave Region, in conjunction with the Dogrib Treaty 11 Tribal Council.

170 In 1996, Canada negotiated a framework agreement called the "South Slave Métis Framework Agreement" with the GNWT, the Métis of Fort Smith Métis Nation Local #50, the Hay River and Area Métis Nation Local #51, and the Fort Resolution Métis Nation Local #53, as represented by the South Slave Métis Tribal Council (SSMTC). The SSMTC was an umbrella organization representing the Métis of the South Slave region of the Northwest Territories, and was the predecessor to the NWTMN. According to Canada, this Framework Agreement continues to govern its negotiations with the Métis community of the Northwest Territories.

171 At the same time, the NSMA was asking that it be recognized as the party to be consulted with respect to Métis claims relating to the area north of Great Slave Lake. This request appears to have been rejected on the basis that at least some of the members of the NSMA were eligible for membership in the NWTMN.

172 Although it appears to have had limited information regarding the NWTMN (perhaps because it never asked the NWTMN for information regarding the Aboriginal group that it purported to represent), Canada says that after the

failure of the Dene/Métis negotiations, it was an "easy decision" to continue negotiating the terms of a land and resources agreement with the NWTMN as the representative of the Métis people of the Northwest Territories.

173 Canada has, moreover, taken the position that any concern with respect to the make-up of the NWTMN can be addressed through the ratification process. That is, Canada says that the successful ratification of a Final Agreement would signify that the NWTMN had been granted the necessary authority to enter into the agreement. The applicants call this an "ends justify the means" approach.

174 While the successful ratification of a Final Agreement would signify that the majority of the members of the NWTMN approve of the agreement, it would not address the question of who had to be consulted with respect to the terms of that agreement. Nor would it address any shortcomings in the consultation process leading up to the ratification vote.

C. Comparing the NSMA and the NWTMN

175 The NSMA and the NWTMN were both established in the mid-1990s and both are registered societies under the *Societies Act* of the Northwest Territories. Although they have different criteria for membership, both organizations purport to represent the Métis people of the Northwest Territories who have section 35 rights to harvest in the area surrounding Great Slave Lake.

176 While both the NWTMN and the NSMA assert section 35 harvesting rights in and around Great Slave Lake, the NSMA clearly represents a different constituency within the Métis community than does the NWTMN. The focus of the NWTMN appears to be on preserving the rights of its members in the area south of Great Slave Lake, whereas the focus of the NSMA is to preserve the rights of its members in the area to the north of Great Slave Lake.

177 Although both organizations accept that there is a single Métis community in the Northwest Territories whose traditional territory encompasses the whole of the Territories, the two organizations have different objectives, different priorities and different criteria for membership.

178 One of the objects of the NWTMN is promoting the unity of the Métis in the region to the south of Great Slave Lake in the Northwest Territories. Other goals include protecting, promoting and enhancing the Aboriginal rights of the Métis of the South Slave Region. According to the affidavit of Gary Bailey, the President of the NWTMN, the mandate of the NWTMN is, in general terms, "to serve and protect the interests of Indigenous Métis who are members of the Fort Smith Métis Council, the Hay River Métis Council, and the Fort Resolution Métis Council". Mr. Bailey further asserts that this mandate includes "the affirmation, protection and recognition of Métis aboriginal rights throughout the traditional territory of the NWTMN", which, it says, includes the entirety of the Northwest Territories.

179 In contrast, the aims of the NSMA include promoting the unity of the Métis in the North Slave Region of the Northwest Territories, and promoting and supporting the recognition of the Aboriginal rights and title and treaty rights of the community of indigenous Métis of the North Slave Region.

180 The two organizations also appear to have different priorities, and to represent different constituencies within the Métis community of the Northwest Territories. While the focus of the NSMA is on protecting the Aboriginal harvesting rights of the community of indigenous Métis in the north Slave area of the Northwest Territories, Canada acknowledges that the NWTMN AiP contemplates the *extinguishment* of Aboriginal harvesting rights in the area to the north of Great Slave Lake.

181 The NWTMN does not agree that the NWTMN AiP contemplates the extinguishment of Aboriginal wildlife harvesting rights in the area north of Great Slave Lake, stating that the extinguishment of its members' Aboriginal rights outside of the agreement area is a matter that is "not under negotiation". However, although the terms of the Final Agreement remain to be negotiated, the extinguishment of Aboriginal harvesting rights in the area north of Great Slave

Lake does seem to be exactly what is contemplated by the NWTMN AiP. Indeed, Canada made clear that this was its intention throughout the consultation process.

182 Indeed, during the October 24, 2013 meeting, Canada advised Mr. Enge and the NSMA of its intent that a final land and resources agreement with the Métis would extinguish the Aboriginal harvesting rights north of Great Slave Lake of those individuals eligible to be enrolled under the Final Agreement. Canada further conceded at the hearing of this application that Mr. Enge was "probably correct" in his understanding of the impact of the eligibility provisions in the NWTMN AiP on the rights of the members of the NSMA in the area north of Great Slave Lake.

183 The NWTMN and the NSMA also appear to have different views as to who should be considered to be Métis for the purposes of a Final Agreement with the Crown. Both the By-laws of the NWTMN and the NWTMN AiP define "Métis" solely by reference to Aboriginal ancestry. However, as was noted by Mr. Enge and the NSMA, while all Métis have Aboriginal ancestry, not everyone with Aboriginal ancestry qualifies as "Métis", as that term has been understood by the Supreme Court of Canada in cases such as *Powley* and *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 (S.C.C.). Indeed, in *Powley*, the Supreme Court specifically rejected the idea that the term "Métis" includes everyone with mixed Indian and European heritage.

184 Section 35 of the *Constitution Act, 1982* affirms Métis rights, but is silent as to the definition of what it means to be "Métis". The Supreme Court attempted to provide guidance on this point in *Powley*, setting out *indicia* of Métis identity for the purpose of claiming Métis rights under section 35. In addition to ancestral connection, these include self-identification and community acceptance: at paras. 31-33. In *Daniels*, the Supreme Court affirmed that that the criteria in *Powley* were developed specifically for purposes of applying section 35 of the *Constitution Act*, *1982*, which, it said, "is about protecting historic community-held rights": at para 49, citing *Powley*, above, at para 13.

185 The Supreme Court further emphasized the case-by-case nature of the *Powley* analysis, noting that although determining who will be considered to be a member of a Métis community "might not be as simple as verifying membership in, for example, an Indian band". That does not, however, "detract from the status of Métis people as full-fledged rights-bearers". The Supreme Court further observed that "[a]s Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is imperative that membership requirements become more standardized so that legitimate rights-holders can be identified". In the interim, the Court stated that "courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis": all quotes from para. 29.

186 Although Canada says that the NSMA has essentially the same membership criteria as NWTMN, the eligibility criteria for membership in the NWTMN focus largely on Aboriginal ancestry, whereas the eligibility criteria for membership in the NSMA includes other *Powley*-type considerations such as community recognition.

187 The NSMA currently has 283 members, whose names have been provided to the two governments in the course of the consultation process. While the Bylaws of the NSMA prohibit the membership of those individuals with status under the *Indian Act*, Canada has noted that 33 of the individuals on the NSMA's membership list have the same name as individuals registered as "Indians" under the *Indian Act*. It has not, however, established that they are in fact the same individuals.

188 The NWTMN claims that there are 2,169 Métis people in Canada who are *eligibl*e for membership in the organization, and it says that it is currently undertaking a questionnaire process to identify additional Indigenous Métis who are eligible for membership in one of its the three member Councils. The NWTMN has, however, refused to provide any actual membership numbers nor has it provided the names of its members. We thus have no way of knowing how the size of the membership of the NWTMN compares to that of the NSMA.

D. Conclusion as to Whether a Duty on the Part of Canada to Consult with the NSMA was Triggered in this Case

189 While the entitlement of an Aboriginal organization to be consulted is not strictly a numbers game, I am prepared to draw an adverse inference from the fact that the NWTMN has refused to disclose its current membership numbers. I

find that this information would likely have not assisted the NWTMN in demonstrating that it was the only organization that was entitled to be consulted with respect to a land and resources agreement between the Métis of the Northwest Territories and the federal and territorial Crown.

190 There is no suggestion that the two government respondents ever asked the NWTMN to establish the strength of its members' claims to Aboriginal rights. Nor have the respondents established that the NWTMN has any greater right to represent the interests of the Métis people of the Northwest Territories than does the NSMA. The respondents have also not established that the NWTMN has any greater right than the NSMA to be consulted with respect to the terms of a land and resources agreement between the Métis of the Northwest Territories and the federal and territorial Crown.

191 The Supreme Court has, moreover, affirmed that Métis communities have a significant role to play in the identification of membership requirements and the development of organizational and governance structures: *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37 (S.C.C.) at para. 81, [2011] 2 S.C.R. 670 (S.C.C.), citing *Powley*, above at para. 29. It is thus not for Canada to decide which organization is better suited to represent the interests of the Métis community of the Northwest Territories, nor is it for Canada to decide which organization has the more appealing agenda.

192 Furthermore, the law is clear that "[t]he Crown cannot run roughshod over one group's potential and claimed Aboriginal rights in favour of reaching a treaty with another": *Haida Nation*, above at para. 27.

193 It is not appropriate to try to set out a set of guiding principles that should be taken into account in determining whether a specific organization purporting to represent a Métis collective is entitled to be consulted in a particular case. This is a fact-driven question that must instead be addressed on a case-by-case basis.

194 In this case, it appears that Canada and the GNWT were negotiating with the NWTMN for historical reasons, based on its members' Aboriginal ancestry, and not because the members of the NWTMN necessarily represented a section 35 rights-bearing *Powley* Métis community.

195 As the Supreme Court observed in *Haida Nation*, above at paragraph 37, knowledge of a credible but unproven claim is sufficient to trigger a duty to consult and accommodate. Canada was clearly aware that the members of the NSMA asserted a section 35 Aboriginal right to hunt caribou in the area north of Great Slave Lake. Not only was it provided with copious evidence supporting that claim, as of June, 2013, it was also aware that the Supreme Court of the Northwest Territories had found in *Mandeville* that Mr. Enge had established a good *prima facie* claim that he and the members of the NSMA had a right to hunt caribou, based upon their asserted rights as Métis people who had traditionally hunted in the area north of Great Slave Lake.

196 Once it determined that some members of the NSMA were eligible for membership in the NWTMN and were eligible to be enrolled under the NWTMN AiP, Canada appears to have concluded that it had no obligation to consult with the NSMA. It never considered the differences in the objects, priorities and criteria for membership between the two organizations. Nor did it consider the credibility of the organizations as representatives of the Métis community of the Northwest Territories, or whether the organizations represented different constituencies within that community. Canada's conclusion that no duty to consult was owed to the NSMA therefore lacks the justification, transparency and intelligibility required of a reasonable decision. It is thus both unreasonable and incorrect.

197 Indeed, I am satisfied that, in this case, the NSMA is a credible organization that has existed for many years, advocating for the rights of the Métis of the north Slave region. The NSMA further represents a sizeable and identifiable constituency within the Métis community of the Northwest Territories, one with concerns and priorities that differ from those of the NWTMN. As such, it was, and is, entitled to be consulted with respect to any actions of the Crown that may have an adverse impact on the Aboriginal rights of its members.

198 As was noted earlier, the duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct. The

knowledge threshold that must be met to trigger the duty to consult and accommodate is not high: see *Mikisew*, above at para. 55. Knowledge of a credible but unproven claim is sufficient to trigger that duty: *Haida Nation*, above at para. 37.

199 Canada was aware that the members of the NSMA were asserting section 35 Aboriginal rights to harvest in the area north of Great Slave Lake, and that, as of June, 2013, the Supreme Court of the Northwest Territories had found that Mr. Enge had established a good *prima facie* claim that he and the members of the NSMA had the Aboriginal right to hunt caribou in the area north of Great Slave Lake, based upon their asserted section 35 rights as Métis people who have traditionally hunted in that area: *Mandeville* at paras. 230 and 233.

200 The negotiation of the NWTMN AiP was, moreover, an action on the part of the Crown that could have an adverse impact on the Aboriginal rights of the members of the NSMA. While the NWTMN does not agree, Canada itself acknowledges its intention to extinguish the Aboriginal harvesting rights of the Métis community of the Northwest Territories in the area north of Great Slave Lake in exchange for a codified set of rights in the Agreement Area. This is clearly contemplated conduct that may adversely affect an Aboriginal claim or right: *Haida Nation*, above at para. 35.

201 In these circumstances, I am satisfied that a duty on the part of Canada to consult with the NSMA was triggered in this case.

202 This then takes us to a consideration of what actually happened in this case, how Canada approached the discussions with Mr. Enge and the NSMA, and whether those discussions were sufficient to fulfill Canada's duty to consult with the NSMA with respect to the terms of a proposed land and resources agreement between Canada and the Métis of the Northwest Territories.

XI. Did the Crown Properly Assess the Extent of its Duty to Consult the NSMA?

203 As previously noted, Canada's primary position appears to be that it does not owe any duty to consult with the NSMA as the members of the NSMA are part of the group with whom it has already been negotiating. Canada argues, in the alternative, that if such a duty does arise, it was adequately discharged by the consultations that have already taken place with the NSMA. As I have concluded that Canada did indeed have a duty to consult with the NSMA, I will now consider whether the interaction between the NSMA and the two levels of government was sufficient to discharge that duty.

204 Amongst other things, Mr. Enge and the NSMA argue that Canada erred in law by failing to conduct a preliminary assessment of the strength of the NSMA members' claims to Aboriginal harvesting rights, by failing to correctly identify the parameters of the scope and content of its duty to consult and by failing to reassess the strength of the NSMA's members' claims during the consultation process.

205 Before examining what occurred in this case, however, it is helpful to start by reviewing the law with respect to the need for a preliminary assessment of the strength of an Aboriginal claim.

A. The Law Relating to the Need for a Preliminary Assessment of the Strength of a Claim

206 Once triggered, the content of the duty to consult will vary from case to case depending upon what is required by the honour of the Crown in a given set of circumstances: *Haida Nation, above at para. 43. See also Rio Tinto*, above at para. 36; *Taku River*, above at para. 32; *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137 (Alta. C.A.) at para. 71, [2010] A.J. No. 479 (Alta. C.A.); *Ahousaht*, above at para. 39.

207 Where, for example, the claims are weak, the Aboriginal right is limited, or the potential for infringement is minor, the only duty on the Crown may be to give notice, to disclose information, and to discuss any issues raised in response to the notice: *Haida Nation*, above at para. 43.

208 In contrast, where a strong *prima facie* case has been established for the Aboriginal right or title in question, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable

damage is high, "deep consultation" aimed at finding a satisfactory interim solution may be required: *Haida Nation*, above at para. 44.

209 The scope of the duty to consult is thus proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and of the seriousness of the potentially adverse effect upon the right or title claimed: *Haida Nation*, above at para. 39. That is, the degree of impact on the rights asserted will dictate the degree of consultation that is required in a specific case: *Mikisew*, above at paras. 34, 55 and 62-3. The more serious the potential impact on asserted Aboriginal or Treaty rights, the deeper the level of consultation that will be required.

210 The failure of the Crown to conduct a preliminary assessment of the strength of an Aboriginal claim, to determine the scope of the consultation required, and to discuss its preliminary assessment with the Aboriginal group in question can itself be a breach of the duty to consult: *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (B.C. C.A.) at para. 113, [2011] 3 C.N.L.R. 343 (B.C. C.A.).

B. The Applicable Standard of Review

211 I understand the parties to agree that the standard of review to be applied to the Crown's assessment of the extent of its duty to consult, including its assessment of the strength of the Aboriginal claim in issue, and the potential impact on the right in question is that of correctness: *West Moberly*, above at para. 174. However, as was noted in *Haida Nation*, some deference should be shown to the Crown's assessment of the facts: at para. 61.

212 With this understanding of the applicable legal principles, I turn now to consider the sufficiency of Canada's preliminary assessment of the strength of the NSMA members' claim.

C. Canada's Assessment of the Extent of its Duty to Consult with the NSMA

213 According to the evidence of Ms. Morgan, the only preliminary assessment that was carried out by Canada with respect to the strength of the Aboriginal harvesting claims asserted by the members of the NSMA was that contained in an undated table that was provided to the NSMA in the course of this application for judicial review. The GNWT evidently prepared its own "Partial Preliminary Assessment of the Depth of the Duty to Consult", which does not assess either the strength of the claims of the NSMA's members nor the depth of consultation to which they were entitled. Ms. Morgan was, moreover, clear that Canada had minimal input into this document.

214 Although Ms. Morgan initially claimed in her cross-examination that Canada's assessment had likely been prepared in the summer of 2012, prior to it entering into discussions with the NSMA, she subsequently conceded that the document had to have been prepared sometime after June of 2013, as it contained references to the decision in *Mandeville*. That decision was rendered on June 20, 2013, and was provided to Canada by the NSMA shortly thereafter.

215 Ms. Morgan also stated that this was the *only* assessment of the strength of the claims of the members of the NSMA that had been carried out by Canada. However, it appears that Canada had in fact previously assessed the strength of the NSMA's claims in early 2013.

216 Over the years, the NSMA had provided Canada with copious amounts of information in support of the section 35 harvesting rights being asserted by its members in the area north of Great Slave Lake. In a letter to Mr. Enge dated February 12, 2013, the Acting Director of Aboriginal and Territorial Relations advised that Canada had conducted a "thorough review" of the information that had been provided to support the NSMA members' claim to section 35 Aboriginal rights, and had that it had determined that that the NSMA had "not provided sufficient evidence to establish the existence of an ancestrally-based present-day Métis community in the North Slave area with links to a historic Métis community in that area". Consequently, the letter stated that the NSMA had "not established a credible claim to s. 35 Métis rights which would support the recognition of the NSMA as a distinct s. 35 Métis rights-holding community". The letter nevertheless concluded by suggesting a meeting to discuss the issue.

217 As noted by the applicants, the law requires that a single preliminary assessment of the strength of a claim to an Aboriginal right may not be enough, and that the situation may have to be re-evaluated from time to time, as the level of consultation required may change as the process goes on and new information comes to light: *Haida Nation*, above at para. 45.

218 However, despite the applicants' assertion that Canada failed to reassess the strength of the NSMA's members' claims during the consultation process, it appears that Canada's initial assessment was indeed reviewed in light of the *Mandeville* decision. This second assessment is the one identified by Ms. Morgan.

219 The assessment in question identifies the right at issue as being the "Aboriginal right to hunt for food, according to traditional practices". The document further notes that the NSMA members' traditional harvesting and land use area was "almost identical to the land area affected by the GNWT's Bathurst caribou management zones", referencing *Mandeville* at para. 231. Ms. Morgan acknowledged in her cross-examination that Canada was in fact relying on the assessment of the nature and scope of the rights that were identified in *Mandeville*.

220 This revised preliminary assessment further states that the NWTMN AiP "contemplates providing harvesting rights to the Métis throughout the proposed Agreement Area", and that "[t]he provision of harvesting rights to the Métis in an area that overlaps with the asserted traditional territory could be perceived as potentially affecting North Slave Métis Alliance harvesting rights".

221 There are a number of problems with this revised assessment.

222 First, this second assessment was never shared with Mr. Enge and the NSMA, and was only produced to them in the context of this application for judicial review. However, the jurisprudence clearly requires that the Crown provide an affected Aboriginal group with an opportunity to comment on a preliminary assessment of the strength of a claim and the potential impact of the proposed decision on the asserted rights: *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2011 BCSC 266 (B.C. S.C.) at para. 131, [2011] B.C.J. No. 363 (B.C. S.C.), rev'd, but not on this issue, 2012 BCCA 333 (B.C. C.A.).

223 As the Court observed in *Adams Lake*, "[t]his is necessarily a key step in the consultation process because the scope of the duty to consult is 'proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed'": at para. 131, citing *Haida Nation* at para. 39. As the Supreme Court further observed in *Haida Nation*, the Crown is required to complete a preliminary assessment because "one cannot meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope": *Haida Nation*, above at para. 36, citing *R. v. Marshall*, [1999] 3 S.C.R. 456 (S.C.C.) at para 112.

224 Indeed, as the Federal Court of Appeal observed in *Gitxaala*, the preliminary assessment "defines the subjects over which dialogue must take place: a broad and strong claim to rights and title over an asserted territory means that broad subjects within that territory must be discussed and, perhaps, must be accommodated": at para. 290.

225 Once the Crown has completed its preliminary assessment of the claim to Aboriginal rights, the Crown must undertake a process that is tailored to the "spectrum of consultation": *Haida Nation* at para 44.

226 As noted above, the first assessment of the strength of the claims asserted by Mr. Enge and the members of the NSMA was that contained in Canada's February 12, 2013 letter to Mr. Enge. This letter simply states that the NSMA had not established the existence of a credible claim to section 35 Métis rights which would support the recognition of the NSMA as a distinct section 35 Métis rights-holding community.

227 Insofar as the preliminary assessment identified by Ms. Morgan is concerned, although Canada had by this point conceded that the members of the NSMA had a good *prima facie* claim to the Aboriginal right to hunt caribou on their

traditional lands, there is nothing in the document regarding Canada's assessment of the strength of the claims of the NSMA's members to section 35 harvesting rights as Métis in the area north of Great Slave Lake.

228 Nor is there any indication in the document identified by Ms. Morgan as Canada's preliminary assessment as to what assessment, if any, the Crown had made concerning the scope of its duty to consult with the NSMA. The law, however, requires that the Crown correctly identify the legal parameters of the content of the duty to consult in order for it to be able to properly determine what will constitute adequate consultation: *Mandeville*, above at para. 145; *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 (B.C. S.C.) at para. 18, (2008), [2009] 1 C.N.L.R. 110 (B.C. S.C.); *Wii'litswx*, above at para. 15. To proceed without having done so would be an error of law: *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981 (F.C.) at para. 91, [2015] F.C.J. No. 969 (F.C.); *Mandeville*, above at paras. 172-180.

229 Indeed, as the Federal Court of Appeal observed in *Gitxaala*, affected Aboriginal peoples are "entitled to know Canada's information and views concerning the content and strength of their claims so they would know and would be able to discuss with Canada what was in play in the consultations, the subjects on which Canada might have to accommodate, and the extent to which Canada might have to accommodate": at para. 309. That did not happen here.

230 Notwithstanding an invitation from the NSMA to do so, Canada refused to assess the strength of the claimed right of the members of the NSMA to hunt in the area north of Great Slave Lake as *Métis*.

231 As noted earlier, the NWTMN AiP defines "Métis" as meaning "an Aboriginal person of Cree, Slavey or Chipewyan ancestry who resided in, used and occupied any part of the Agreement Area on or before December 31, 1921, or a descendant of such person". The focus of the NWTMN AiP is thus on individuals of Indian ancestry, at least some of whom might not qualify as "Métis" under the criteria that were established by the Supreme Court in *Powley*. Indeed, Ms. Morgan acknowledged in her cross-examination that negotiations with the NWTMN with respect to a Northwest Territories land and resources agreement were being carried out on the basis of Dene ancestry, and not Métis identity.

232 This approach is the result of the fact that negotiations towards a land and resources agreement with the Métis of the Northwest Territories started, not just before the decision of the Supreme Court in *Powley*, but before the enactment of the *Constitution Act, 1982* with its section 35 protection for the rights of Canada's Indigenous people. The language in the NWTMN AiP was evidently based on language contained in the pre-*Powley* South Slave Métis Framework Agreement, and the governments did not reconsider their approach to the negotiations after the release of the *Powley* decision. Indeed, Canada candidly admitted during the consultation process that it did not much care which kind of Aboriginal rights were held by those who were "eligible to be enrolled" under a final agreement, as long as Canada achieved the certainty it was seeking with respect to the use of lands and resources.

233 The NSMA was clear in its discussions with Canada and the GNWT that its members were asserting section 35 rights *as Métis*. Canada's representatives were, however, indifferent to the distinction between the Métis and people with Cree, Slavey or Chipewyan ancestry. When representatives of the NSMA attempted to discuss the issue at the October 24, 2013 meeting, a representative of Canada stated "... you can call yourself whatever you want to call yourself, but what is being settled in the claim is 'what are your Aboriginal rights?' Not your Métis rights, not your Indian rights, your Aboriginal rights".

234 The more fundamental problem with Canada's revised preliminary assessment is that it missed the most significant potential adverse effect contemplated by the NWTMN AiP. This was the extinguishment of the Aboriginal harvesting rights in the area north of Great Slave Lake of those NSMA members who had Dene ancestors from the South Slave region, in exchange for codified harvesting rights in the area south of the Lake being provided to those individuals.

235 Ms. Morgan confirmed in her cross-examination that in assessing the scope of the consultation with the NSMA that was required, Canada focussed on the impact of the agreement on the small area of overlap between the proposed Agreement Area and the territory to the north of Great Slave Lake to which the Supreme Court of the Northwest

Territories had found that NSMA members had a good *prima facie* claim to Aboriginal harvesting rights. Ms. Morgan further confirmed that this was the *only* potential adverse impact that Canada identified in its preliminary assessment.

236 This is consistent with the June 11, 2013 letter to the NSMA, which noted that Canada and the GNWT were aware that the NSMA was asserting Aboriginal rights to harvest in the area north of Great Slave Lake. They went on to note, however, that "[t]he draft NWTMN AiP contemplates providing non-exclusive harvesting rights ... to Métis Members ... throughout the proposed Agreement Area", which, it will be recalled is an area to the south and east of Great Slave Lake. The letter further stated that "[t]here may exist a *small area of overlap* between the northwest corner of the proposed Agreement Area and the area over which the NSMA asserts an Aboriginal right to harvest" [my emphasis].

237 However, in his August 16, 2013 letter to Mr. Enge, the Minister of Aboriginal Affairs and Northern Development expressly acknowledged that members of the NSMA have "a good *prima facie* claim to the Aboriginal right to hunt caribou on their traditional lands" (which include the area to the north of Great Slave Lake, and not merely a small area bordering on the Agreement Area), and that they were entitled to "an appropriate measure of consultation when that asserted right may potentially be adversely impacted by the Crown's actions".

238 As was noted earlier, Canada acknowledged at the October 24, 2013 meeting with Mr. Enge and other members of the NSMA that it was its intent that a Final Agreement with the NWTMN would extinguish Métis harvesting rights in the area north of Great Slave Lake for those individuals with ancestral ties to the Dene of the south Slave region. The impact of such an agreement would thus be on the entirety of the traditional territory of the members of the NSMA, and not merely on a "small area of overlap" along the northeast corner of the proposed Agreement Area.

239 As the Supreme Court observed in *Haida Nation*, where Aboriginal claims are weak, the Aboriginal right is limited, or the potential for infringement is minor, the only duty on the Crown may be to give notice, to disclose information, and to discuss any issues raised in response to the notice. That is essentially what happened here.

240 In contrast, where a strong *prima facie* case for the claim has been established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, "deep consultation" aimed at finding a satisfactory interim solution may be required: *Haida Nation*, above at para. 44.

241 "Deep consultation" may require that the Aboriginal group in question be provided with an opportunity to make submissions, to participate in the decision-making process, and to receive written reasons that demonstrate that their concerns were considered, and which reveal the impact those concerns had on the decision: *Haida Nation*, above at para. 44; *Clyde River*, above at para. 47.

242 Consultation founded upon a fundamental misconception of the Aboriginal interests at stake does not discharge the Crown's obligation to consult in good faith: *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 (B.C. C.A.) at para. 66, 69, [2015] 4 C.N.L.R. 225 (B.C. C.A.).

243 Canada had already acknowledged in its August 16, 2013 letter to Mr. Enge that the members of the NSMA have a good *prima facie* claim to the Aboriginal right to hunt caribou on their traditional lands, and that they therefore were entitled to "an appropriate measure of consultation" when their asserted right may potentially be adversely impacted by Crown action. However, Canada appears to have completely misunderstood the extent of the impact that a final land and resources agreement could have on that right.

244 Although the NWTMN AiP states that the parties would enter into land selection negotiations to identify Métis land and Métis community land for inclusion in a Final Agreement, the Aboriginal right at issue in this case does not involve title to the lands in question. That said, the right to hunt is nevertheless an important Aboriginal right — one that has played a central role in the history and culture of the Métis of the Northwest Territories. Moreover, an agreement that has the effect of extinguishing an important Aboriginal right in a group's traditional territory is clearly a Crown action that would have a profound impact on an asserted Aboriginal right and a traditional way of life — damage that

would not be readily compensable. This would suggest that consultation towards the deeper end of the spectrum would be required in this case.

245 However, having misunderstood the extent of the potential impact that the NWTMN AiP and a final land and resources agreement would have on the Aboriginal harvesting rights of the members of the NSMA, Canada entered into its consultation with the NSMA based on a fundamental misconception of the nature and scope of its duty to consult. Moreover, without fully understanding the seriousness of the potential impact that a land and resources agreement would have on the section 35 rights of the members of the NSMA, Canada could not properly assess what, if any, accommodation measures would be appropriate.

246 While the applicants were able to provide oral and written submissions to the federal and territorial Crown, they were not included in the decision-making process that led up to the conclusion of the NWTMN AiP in July of 2015. Indeed, there was no attempt to consult with the NSMA until such time as Canada and the GNWT had already arrived at a draft NWTMN AiP. This was, in my view, too little, too late. It was a breach of the duty to consult that was owed to the NSMA and its members by the Crown.

247 Given that this finding is sufficient to dispose of this application, it is not necessary to address the other issues raised by the applicants.

XII. Remedy

248 As the Supreme Court observed in *Clyde River*, "judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms." The Court further noted that "[j]udicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process": both quotes at para. 24, emphasis in the original. That is certainly the case here.

249 That said, we are now at the litigation stage, and I must attempt to craft a remedy that would undo, to the extent possible, what I have found to be the breach of the NSMA members' right to be properly consulted with respect to the potential infringement of their section 35 Aboriginal harvesting rights in the area north of Great Slave Lake.

250 Although the GNWT and the NWTMN have been named as respondents in this application, the decision under review in this case is the decision of the federal Minister of Indian Affairs and Northern Development not to consult the applicants sufficiently with respect to the NWTMN AiP prior to signing the agreement. Consequently, the remedy provided by the Court should be addressed solely to Canada. This is consistent with the relief sought in the applicants' Notice of Application.

251 I have concluded that as the representative of those members of the Métis community of the Northwest Territories who assert section 35 harvesting rights in the area north of Great Slave Lake, the NSMA is entitled to be consulted and, if necessary, accommodated with respect to potential adverse effects of the NWTMN AiP and any Final Agreement to be negotiated with the Métis of the Northwest Territories on the Aboriginal rights of its members. I have also concluded that Canada failed to consult sufficiently deeply with the NSMA prior to entering into the NWTMN AiP on July 31, 2015. Consequently, a declaration to that effect will issue.

252 Having further concluded that the NSMA is entitled to be consulted at the mid to deep end of the spectrum with respect to a future land and resources agreement that would potentially adversely affect the Aboriginal harvesting rights of its members, a declaration to that effect will issue.

253 Canada must also consider whether accommodation measures are appropriate to address the concerns of the members of the NSMA who are eligible to be enrolled under the terms of a final land and resources agreement, as contemplated by the eligibility provisions of the NWTMN AiP. Measures for consideration by the parties shall include:

(i) whether the words "eligible to be" should be removed from subsections 2.3.1, 2.4.1 and 2.5.1(b) of any Final Agreement; and

(ii) whether the NSMA should be included as a party to the negotiations of the final land and resources agreement in order to ensure that its members have meaningful participation in the NWTMN land claim negotiations that are intended to extinguish their Aboriginal harvesting rights in the North Slave Region;

254 No final land and resources agreement between the federal and territorial governments and the Métis of the Northwest Territories contemplated by the NWTMN AiP shall be concluded until there has been meaningful consultation with the members of the NSMA at the mid to deep end of consultation spectrum and the appropriate accommodation measures have been considered with respect the concerns raised by NSMA.

255 Finally, this process is to be conducted with the aim of reconciling outstanding differences between the parties, in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court in *Haida Nation* and *Taku River*, above.

XIII. Costs

256 I have been advised that there is an outstanding offer to settle in this case that may have a bearing on the question of costs. Consequently, the applicants shall have 10 days in which to provide written submissions on the issue of costs, which are not to exceed five pages in length. The respondents shall then have 10 days in which to respond with written submissions that are not to exceed five pages in length. The applicants will then have a further five days in which to reply with written submissions that shall not exceed three pages in length.

JUDGMENT IN T-1427-15

THIS COURT DECLARES, ORDERS AND ADJUDGES that:

1. The respondent Minister of Indian Affairs and Northern Development has a constitutional duty to consult with, and, if necessary, to accommodate the members of the NSMA with respect to the potential adverse effects on their Aboriginal harvesting rights of the NWTMN AiP and any final land and resources agreement to be negotiated with the Métis of the Northwest Territories;

2. The respondent Minister of Indian Affairs and Northern Development breached his duty to consult with and, if necessary, accommodate the members of the NSMA by inadequately consulting with them and by failing to meaningfully address the accommodation measures put forward by the applicants with respect to the NWTMN AiP, prior to approving the agreement in principle on July 31, 2015;

3. The members of the NSMA are entitled to be consulted at the mid to deep end of the consultation spectrum with respect to a future land and resources agreement that would potentially adversely affect their Aboriginal harvesting rights in the area north of Great Slave Lake;

4. Canada must consider whether accommodation measures are appropriate to address the concerns of the members of the NSMA who are eligible to be enrolled under the terms of a final land and resources agreement, as contemplated by the eligibility provisions of the NWTMN AiP. Measures for consideration by the parties shall include:

(i) whether the words "eligible to be" should be removed from subsections 2.3.1, 2.4.1 and 2.5.1(b); and

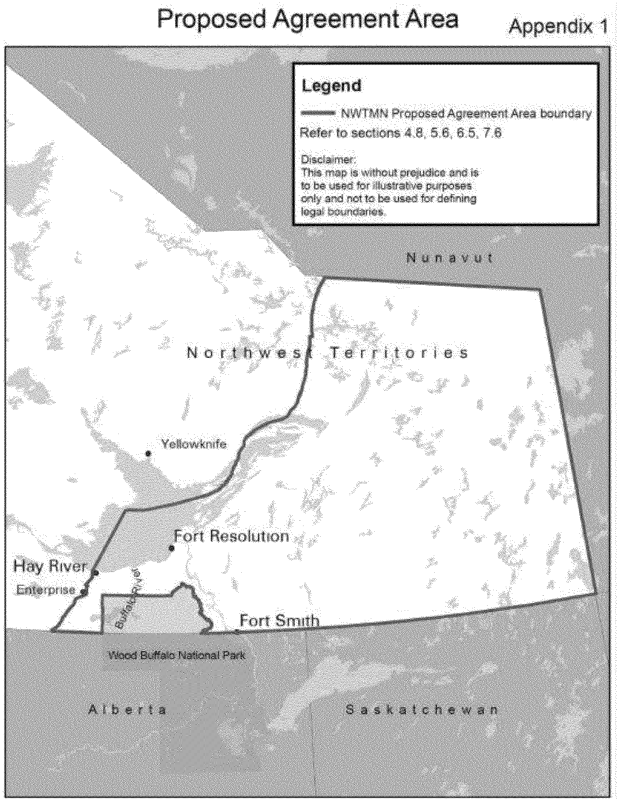
(ii) whether the NSMA should be included as a party to the negotiations of the final land and resources agreement in order to ensure that its members have meaningful participation in the NWTMN land claim negotiations that are intended to extinguish their Aboriginal harvesting rights in the North Slave Region;

5. No final land and resources agreement between the federal and territorial governments and the Métis of the Northwest Territories contemplated by the NWTMN AIP shall be concluded until such time as meaningful consultation between Canada and the NSMA has occurred at the mid to deep end of the spectrum, and appropriate accommodation measures have been considered with respect the concerns raised by NSMA; and

6. The Court retains jurisdiction to deal with the issue of costs. The applicants shall have 10 days in which to provide written submissions on the issue of costs, which are not to exceed five pages in length. The respondents shall then have 10 days in which to respond with written submissions that are not to exceed five pages in length. The applicants will then have a further five days in which to reply with written submissions that shall not exceed three pages in length.

Application granted.

Appendix 1



Graphic 1

TAB A5

1997 CarswellNfld 171
Newfoundland Court of Appeal

Labrador Inuit Assn. v. Newfoundland (Minister of Environment & Labour)

1997 CarswellNfld 171, [1997] N.J. No. 223, 152 D.L.R. (4th) 50, 155 Nfld. & P.E.I.R. 93, 25 C.E.L.R. (N.S.) 232, 481 A.P.R. 93, 74 A.C.W.S. (3d) 416

Labrador Inuit Association Appellant and Her Majesty The Queen in Right of the Province of Newfoundland, as Represented by the Minister of Environment and Labour, First Respondent and Voisey's Bay Nickel Company Limited, Second Respondent

Innu Nation, Appellant and Her Majesty The Queen In Right of Newfoundland, The Minister of Environment and Labour of Newfoundland, and Voisey's Bay Nickel Company Limited, Respondents

Marshall, Steele, Green JJ.A.

Heard: September 16-18, 1997
Judgment: September 22, 1997
Docket: 97/124

Proceedings: reversing (July 18, 1997), Doc. St. J. 1793/97, 1809/97 (Nfld. T.D.)

Counsel: *Thomas G. Heintzman, Q.C.*, *Chris Sullivan* and *Ann Bigue*, Counsel for the Appellant, Labrador Inuit Association.
Lloyd Hoffer and *Roger Townshend*, Counsel for the Appellant, Innu Nation.
Edward Roberts, Q.C. and *Donald Burrage*, Counsel for Her Majesty the Queen in Right of Newfoundland.
Ian Kelly, Q.C. and *Brett Ledger*, Counsel for Voisey's Bay Nickel Company Limited.

***Per curiam*:**

1 This appeal raises questions relating to the integrity of, and the role to be played by, environmental assessment processes in the context of a massive mining development proposed at Voisey's Bay in northern Labrador.

2 What is specifically at issue is the validity of certain decisions of the Minister of Environment and Labour for the Province of Newfoundland to accept for registration under provincial environmental assessment legislation a proposal by a mining developer for the construction of certain infrastructure, including a road and airstrip, at the proposed mine site, and, in so doing, to treat those Works as a separate undertaking from the overall mining development which is subject to a joint environmental assessment process to be conducted pursuant to an agreement among the governments of Canada and Newfoundland, the Labrador Inuit Association and the Innu Nation.

The Economic Imperative and the Environmental Challenge

3 In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.) at pp. 16-17, LaForest J. described the environment's protection "as one of the major challenges of our time". In this statement, the Supreme Court of Canada encapsulates the critical need of reconciling the use of the earth's natural resources with the protection of the environment.

4 The need to rationalize these imperatives is a phenomenon of relatively recent origin. This is because for most of the history of humankind the development and sustenance of life has been moulded and controlled by the environment.

As Rachel Carson has pointed out, it has only been in the last century that the relationship has been reversed to the extent that humans now possess the power to mould and change the environment in significant ways (*Silent Spring* Crest Paperback edition, 1962, p. 16). The web of life, which contains and controls the interdependence of living things and beings, both with respect to each other and to their physical surroundings, is not static. Change in one area may profoundly affect life and habitat in other areas and may even threaten its existence in ways that cannot be immediately foreseen.

5 The foreboding extent of the reality of, to use Carson's words, "the impetuous and heedless pace of man rather than the deliberate pace of nature" now brings a completely new dimension to the implications for change brought about by humankind's activities. As the harmful effects of amazonian deforestation; of damage to the ozone layer; and, of acid rain become increasingly apparent, the urgency of controlling the destruction of the earth's environment is brought home.

6 In this Province, as elsewhere, society has been left to grapple with the deleterious, and at times tragic, effects of unbridled development on the health and security of its residents and upon the environment. The recent experience of the devastation of the fishery through over-exploitation bears stark witness to the consequences of the impact which the pace of humankind's activities, especially those driven by economic forces, can have.

7 As important as are environmental considerations, sight cannot be lost of the economic and social benefits that flow from the production of these resources. Legitimate concerns of meaningful employment and security for families are at stake. This is a reality that must also be taken into account along with environmental considerations. The importance of development of resources to the lives of people should not be understated. It, and the investment that brings it about, are essential to the well-being and progress of society. In this regard, it is essential that the time-tables of those managing the investment be brought into the equation. Nevertheless, they cannot be allowed to control the agenda without regard to competing environmental interests.

8 The often competing concerns of economic development and environmental preservation ought not to be regarded as irreconcilable, however. Each comports its own vital imperative. No natural resource is a forbidden fruit. Indeed, discriminate harvesting from nature's storehouse is as essential to the maintenance and sustenance of life as the preservation of our environment. The challenge is to temper the refrain advocated by developers from time to time to "develop or perish" by assuring that it does not re-echo amongst future generations as "develop and perish". To this end, as *Oldman River* has observed, governments and international organizations have responded through "a wide variety of legislative schemes and administrative structures".

The Public Response

9 One of the primary initiatives taken by governments in rationalizing economic activity with environmental imperatives has been the enactment of statutes providing for environmental assessment. These measures have generally been aimed at moving away from correcting environmental problems *ex post facto*, towards preventing them from occurring *ab initio* or, at least, assuring that they are contained at tolerable levels. It is well to point out that this is not only environmentally sound but is economically desirable as well, inasmuch as the costs of rectifying long term effects often eclipse short term burdens. In any event, it appears just plain common sense to require development of resources to await the relatively short time that will be taken to allow adverse environment effects to be assessed and mitigated, if not eliminated.

10 Accordingly, it can be said that the process of environmental assessment is not a frill engrafted on the development process, nor should it be regarded as an administrative hurdle to be gotten over in the march towards economic development. It is, rather, an integral part *of* economic development.

11 Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation: *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (CEAA); *Environmental Assessment Act*, R.S.N. 1990, c. E-14 (NEAA). The regimes created by these statutes represent a public attempt to develop an appropriate

response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.

12 The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.

The Context

13 Voisey's Bay Nickel Company Limited is the holder of certain mineral licences in the general proximity of Voisey's Bay, Labrador. A major nickel-copper-cobalt mineral discovery was made in 1993. As a result of exploratory work already completed, the company has concluded that it has at least 30 million tons of proven reserves that are economically mineable. It has been estimated, subject to further exploration to delineate the size of the resource, that the site contains over 150 million tons of ore. The resource has been determined to lie in three separate structures known as the Ovoid, the Eastern Deeps, and the Western Extension. The company proposes to build a mine and mill in the vicinity of the discovery site. The Ovoid can be mined by open pit mining techniques. This is the area of the proven reserves. The other two areas will likely require underground mining methods. It is in these areas where, it is said, further work is necessary to delineate the actual extent of the resource. The information so gleaned will influence decisions of the company as to its mining methods and the extent of the mine.

14 Concern over the environmental repercussions of the proposed development initially triggered environmental assessments under the environmental statutes of both orders of government. The actual triggering events were the submission to Canada, on September 26, 1996 and the filing with Newfoundland, on October 25, 1996 of a document entitled "The Voisey's Bay Mine Mill Project, Project Description Report" which described in general terms a "proposed development of a ... mine and mill complex, including associated infrastructure". The report identified major elements of the development as including "permanent site roads", and a "permanent airstrip". It noted that the project was "described to the extent it can be defined at the current stage of development" and that exploration was ongoing to establish the extent of the reserves. It also noted the determination of the extent of those reserves "could affect the rate of production, the location of proposed mining infrastructure and the life of the operation". To that extent, therefore, further exploration was related to the scope and development of the mine itself.

15 In an effort to avoid duplication of effort resulting from the project's overlapping jurisdictional impact, Canada and Newfoundland sought a way of conducting a joint federal - provincial environmental assessment of the project. A Memorandum of Understanding (MOU), dated January 30, 1997, was signed. The agreement was made among both orders of government, the Labrador Inuit Association and the Innu Nation. The involvement of these two additional parties recognized their special interest and concern affecting the lands where the discovery was made and where the mine and mill are proposed to be developed.

16 In the MOU, the parties committed themselves to "the establishment of a single, effective and efficient process" with respect to the assessment of the environmental effects of the undertaking and included a provision for comprehensive public involvement. It provided for the constitution of a single Panel to conduct a joint public review of the undertaking in accordance with detailed terms of reference and with the normal wide-ranging statutory powers to conduct its proceedings, including public hearings, that would normally be applicable to a review panel constituted under the CEAA. Consistent with the statutory schemes, the report of the Panel containing its recommendations was to be submitted to the respective governments as well as the other parties for further action.

17 The scope of the MOU, in terms of just what activity should fall within the purview of the Panel's review, was the subject of much discussion between the four parties to the agreement. It is also clear that the company, although not named as a party in the agreement, was very much an active participant in many of those discussions and in fact provided information and even drafts of descriptions of the project to the parties.

18 In fact, issues as to whether roads and an airstrip ought to be part of the overall environmental assessment had surfaced long before the actual filing of the Project Description Report by the Company in the Fall of 1996. Much evidence was led at the original hearing as to these discussions and as to the perceptions of the parties as to the meanings to be ascribed to previous words and actions by others on this issue. In the end, each party at the original hearing took the position, as did the judge, that the MOU was sufficiently clear and unambiguous that it could be interpreted without resort to extrinsic evidence. Arguments based on such evidence were presented in the alternative. This Court is equally of the view that the questions at issue in this appeal can be resolved without resort to this evidence as an aid to interpretation of the parties' actual intent. Nevertheless, a reference to some of the key events leading up to the filing of the Project Description Report and the signing of the MOU will be useful in describing the factual matrix within which those documents came to be finalized.

19 A review of that material indicates that the LIA and the Innu Nation, although acknowledging that all exploratory activity engaged in or to be engaged in by the company would not necessarily be caught by the environmental assessment process, were very concerned about the status of construction of roads and the airstrip. In January of 1996, the company had filed under the NEAA, a registration document entitled "Advanced Exploration Infrastructure". The proposed activities included the construction of a two lane road twelve kilometres in length with a maximum grade of 8% that would generally follow the existing terrain, and a 1,250 metre airstrip. The document noted that "the advanced exploration infrastructure has been designed and located such that it can be incorporated into the development of a mine, should such a development prove to be technically, environmentally and economically feasible". It also noted that the Company had already determined that it has approximately 30 million tons of "economically mineable ore" and that continued exploration was required "to further define the resource".

20 The position of the LIA in response to this registration was that the undertaking therein described was "an integral part of and the commencement of a much larger development namely, the development of a mine and milling operation with supporting infrastructure" and that this infrastructure and the proposed mine were "inextricably intertwined". Eventually, the company withdrew this registration on the day it filed its Project Description Report in September of 1996. As indicated, the Project Description Report also included roads and an airstrip in the same locations as those identified in the Advanced Exploration Infrastructure registration but described them as "permanent" and, in the case of the road, as having a length of 13 kilometres and, in the case of the airstrip, a length of 1,525 metres. The road was to be a two lane structure, of less grade than the previous proposal in the Advanced Exploration Infrastructure and with major bridge work. The negotiations for the finalization of the MOU were well along by this point and the LIA and the Innu continued to have concern as to whether or not the road and the airstrip were to be covered by the assessment process for the project. Much of the discussion related to the definition of "Undertaking" in the MOU and the description of the project which was being supplied by the company. Eventually, the words "mine site roads" (a phrase suggested by the Innu Nation) and, "airstrip", without any qualifying phrases like "temporary" or "permanent", were included in that description when the final draft was agreed on.

21 On February 10, 1997, the Minister of the Environment, for the Province, acting under s. 37 of NEAA, exempted the Undertaking dealt with in the MOU from the application of the Newfoundland Act. The exemption order explicitly stated its rationale to be: "to enable the Province to participate in a joint environmental assessment of the Undertaking". It went on to state that the MOU "provides for a single, effective and efficient environmental assessment, including provision for comprehensive public involvement" and "eliminates the possibility of duplicative and costly environmental assessments potentially jeopardizing the Undertaking, which would clearly not be in the public interest". Hence, the purpose of the exemption was to clear the way for the environmental assessment of what was therein described as "the

Voisey's Bay Mining Development Undertaking" to be conducted by a joint panel in accordance with the Memorandum of Understanding.

22 In April 1997, the Company submitted to the Minister for registration under s. 6 of NEAA, a document entitled "Exploration Support Works" at the Voisey's Bay site. It included a proposal to construct a "temporary access road", in the same location as the one identified in the Project Description Report and MOU, but it was now a one-lane road and 11.5 km. in length. It also contemplated construction of a 1,250 metre long "temporary airstrip", again in the same location. It was stated that this infrastructure was to be used for "supporting exploration activities at Voisey's Bay". The LIA and the Innu objected to the submission, arguing that the proposed Works were an integral part of the first phase of the mine/mill which should be assessed as part of the MOU process and that it constituted an attempt to "fragment" the project. Subsequently, the April document was withdrawn and in its place the company submitted, on May 22, 1997, another document dated May 21, 1997, and also entitled "Exploration Support Works" which entailed the construction of essentially the same length of a one lane road but with a grade of 9%, and a smaller airstrip of 917 metres. They were again described as "temporary" and "supportive of exploration". The document stated that the exploration program in Voisey's Bay was "in the advanced stage" since proven reserves had already been established. Further exploration was required "to delineate and quantify the mineral inventory necessary to further support the proposed integrated mine/ smelter complex".

23 The Minister received the document as a proper registration under NEAA and advised the public accordingly; however, the parties to the MOU were formally advised that the Minister would be addressing whether the Exploration Support Works were part of the undertaking previously exempted from the Act's operation and, accordingly, subject to assessment by the joint panel constituted under the MOU.

24 Issue was taken with the Minister's right even to accept the Exploration Support Works document under the Act and it was also suggested that the Minister had no power unilaterally to determine whether the contemplated work was covered by the MOU. It was said that that decision had to be made by the four parties to the Memorandum.

25 It is also noted, not without interest, that the Chairperson of the Panel constituted under the MOU felt obliged to write the signatories to the MOU to express her concern, based on public input, that the approval of the Exploration Support Works under the Act "could jeopardize or delay the review process" defined by the MOU and that the "credibility of the review process would be called into question".

26 On July 2, 1997, the Minister decided the Works described in the May 21st registration were "a separate undertaking from the mine/mill development undertaking that was exempted from NEAA in favour of the MOU". This decision, if effective, would render the Exploration Support Works susceptible to assessment under the provincial statute, bringing it outside the ambit of the Memorandum.

27 The decisions to accept the May 21st registration document and to treat it as outside the purview of the MOU assessment process, precipitated applications to the Trial Division by both the Labrador Inuit Association and the Innu Nation seeking judicial review to quash those decisions. Both parties also sought, amongst other things, a declaration that the Exploration Support Works were part of the Undertaking committed to the joint environmental assessment under the MOU.

The Trial Division Decision

28 Both applications were heard jointly. The presiding judge stated the main issue to be "whether the Works are included in the definition of Undertaking which is defined in the Memorandum". He concluded they were not and that the Minister's decisions to receive the registration of the Exploration Support Works filed on May 22, 1997, and declaring, on July 2, 1997 that the Works were a separate Undertaking from that committed to assessment under the terms of the Memorandum, were correct. He also concluded that the Works were "necessary to support the ongoing exploration activity".

29 The essence of the judge's reasoning is represented by the following passages from his decision:

> Paragraph 3 of Schedule 2 states that during the "life cycle" of the mine/mill complex it will be necessary to construct "mine site roads" and "an airstrip". In order to determine whether the Works are included in the Undertaking it is necessary to interpret the meaning of these words. In considering their meaning, these words must be read in their ordinary sense and in the context of the Memorandum as a whole.
>
> The definition of Undertaking in the Memorandum describes the construction, operation, demolition, decommissioning and rehabilitation of a mine and mill complex including the "associated activities" which are described in Schedule 2. The definition of Undertaking does not include any reference to the exploratory activities that are required prior to the approval of the construction of the Undertaking.
>
> Schedule 2 describes the activities that are "associated" with the construction and operation of the mine/mill complex. Paragraph 1 of the Schedule again describes the mine/mill complex. The next ten paragraphs (including paragraph 3) describe how the Company will construct and operate the project. In other words, the whole definition of Undertaking must be read in the context of the construction and operation of the mine/mill complex.
>
> Accordingly, "mine site roads" and "an airstrip" relate specifically to the construction and operation of the mine/mill complex. These words mean permanent roads and a permanent airstrip which would support the construction and operation of the mine/mill complex. It would be a distortion of the clear meaning of these words to interpret them to include a temporary road or a temporary airstrip which are required for exploratory activities only.
>
> The temporary nature of the Works is recognized in the Registration which provides for the "rehabilitation" of the area in the event that the Panel determines that it is not environmentally appropriate for the Works to be situated in the area proposed in the Registration.

30 It is clear from the judge's reasons that

> 1. he focused on the words of Schedule 2 to the MOU as defining the scope of the undertaking without referring to the definitions in the legislation or the Exemption Order, or in the MOU itself, except to recite its language;
>
> 2. he drew a distinction between exploratory and mining activities and between temporary and permanent infrastructure; and concluded that anything that could be characterized as having an exploratory purpose or was "temporary" in nature was not covered by the MOU;
>
> 3. he concluded that the proposed temporary road and airstrip had to be placed in the exploratory category because they were necessary to support exploration;
>
> 4. he felt that Schedule 2 to the MOU should be construed in such a way that if there was no reference to exploratory activities as such in the Schedule, activities with an exploratory purpose were necessarily excluded, i.e. Schedule 2 was a defining document for the purpose of determining the scope of the undertaking;
>
> 5. he concluded that the words "permanent" should in effect be read into the document as qualifying the words "mine site roads" and "airstrip".

31 The Labrador Inuit Association and the Innu Nation are now appealing against the judge's determinations, whilst reasserting their claim to be rightfully entitled to the relief claimed in their applications.

Post-Decision Events

32 The judge's decision was delivered on July 18, 1997. On the same day the Minister, presumably relying on the result of the ruling that the road and airstrip described in the May 21, 1997 registration document were not included within the

MOU or Exemption Order, purported to make a determination under s. 7 of the NEAA that no further assessment of that road or airstrip was required. The effect of that ruling was that no environmental impact statement was required and no public hearings would be held with respect to those Works. This contrasts with the assessment approach to which they would have been subjected if they fell under the MOU. The degree of assessment they received was, instead, therefore limited to a detailed review of the proposal by the Minister's technical staff in light of requested public input.

33 The validity of this Ministerial decision is not directly before this Court because it was not the subject of the trial judge's decision. Nevertheless the acknowledgment, appropriately made by counsel for the Minister at the appeal hearing, that if the earlier decisions of the Minister, which are the subject of this appeal, are invalid, it necessarily follows that the July 18 decision also cannot stand, is noted.

Issues

34 The central question raised by this appeal is whether the judge at first instance erred in concluding that the Works described in the Company's May 21st registration document (essentially a road, airstrip and related borrow pits) do not come within the ambit of the MOU. If they are a part of the Undertaking committed to environmental assessment under the Memorandum, they have been exempted from the operation of NEAA so that the Minister's jurisdiction to subsequently receive and act upon the May 21st registration is open to question.

35 In light of our decision on this issue of interpretation and on the Minister's jurisdiction, other issues, including claims made by the Innu Nation to relief based on the administrative law doctrine of legitimate expectations and on the doctrine of promissory estoppel, will not need to be dealt with.

Applicable Legislation

Environmental Assessment Act (NEAA)

> s. 2(1)(f) environmental assessment means a process by which the environmental impact of an undertaking is predicted and evaluated before the undertaking has begun or occurred;
>
> (g) "environmental impact" means a change in the present or future environment that would result from an undertaking;
>
> (m) "undertaking" means an enterprise, activity, project, structure, work, policy, proposal, plan or program that may, in the opinion of the minister, have a significant environmental impact and includes a modification, an extension, an abandonment, a demolition and a rehabilitation of that enterprise, activity, project, structure, work, policy, proposal, plan or program;

3. The purpose of this Act is

> (a) to facilitate the wise management of the natural resources of the province; and
>
> (b) to protect the environment and quality of life of the people of the province,

through the institution of environmental assessment procedures prior to and after the commencement of an undertaking that may be potentially damaging to the environment.

6.(1) A proponent shall, before proceeding with the final design of an undertaking, notify the minister in writing, on a form prescribed by the regulations, concerning the proposed undertaking.

(2) The notification under subsection (1) shall be considered to be registration of an undertaking for the purpose of this Act.

7. The minister shall examine the information provided on the registration form under section 6, using criteria prescribed by the regulations to determine whether

(a) an environmental impact statement is required;

(b) an environmental impact statement may be required; or

(c) an environmental impact statement is not required.

37.(1) Where the minister is of the opinion that it is in the public interest, having regard to the purpose of this Act and weighing the purpose of this Act against the injury, damage or interference that might be caused a person or property by the application of this Act to an undertaking, the minister, with the approval of the Lieutenant-Governor in Council, may by order

(a) exempt an undertaking or a proponent of an undertaking from the application of this Act or the regulations or a matter provided for in this Act or the regulations, subject to those terms and conditions that the minister may impose;

Interpretation Act R.S.N. 1990, c. I-19

17. Where an Act confers power to make regulations or to grant, make, or issue an order in council, proclamation, order, writ, warrant, scheme, or letters patent, expressions used in them have the same respective meanings as in the Act conferring the power.

Voisey's Bay Mining Development Undertaking Exemption Order NF Reg. 21/97

2. The Voisey's Bay mining development undertaking for the development of a nickel-copper-cobalt mine and mill at Voisey's Bay in Labrador is exempted from the *Environmental Assessment Act*.

3. The exemption effected by this order is subject to the terms and conditions contained in the Appendix to this order.

Appendix

1. The environmental assessment of the Voisey's Bay mining Development Undertaking ("undertaking") will be performed in accordance with the duly executed Memorandum of Understanding on Environment Assessment of the Proposed Voisey's Bay Mining Development ("MOU").

. . . . .

Explanatory Note

The reason for this Exemption Order is to enable the province to participate in a joint environmental assessment of the undertaking. A Memorandum of Understanding on Environmental Assessment of the Proposed Voisey's Bay Mining Development ("MOU") will be executed by the relevant departments of the federal and provincial governments, the Labrador Inuit Association and the Innu Nation following the approval of this Exemption Order by the Lieutenant-Governor in Council. The MOU provides for a single, effective and efficient environmental assessment, including provision for comprehensive public involvement. The MOU eliminates the possibility of duplicative and costly environmental assessments potentially jeopardizing the undertaking which would clearly not be in the public interest.

[NOTE: Although included as an "explanatory note" to the published version of the Order, this material was in fact included within the body, and was apparently intended to be a part, of the original Exemption Order, as actually signed by the Clerk of the Executive Council.]

Analysis

(a) The Memorandum of Understanding

36 The "Undertaking" committed to the "single, effective and efficient environmental assessment" through the Exemption Order of February 10, 1977 is defined in the MOU as:

> The proposed construction, operation, demolition, decommissioning, rehabilitation and effective surrender of any leases by the Proponent of a mining development and associated activities as described in Schedule 2.

37 It will be observed that this is a prospective definition relating to the immediate and extended future construction and operation of the mining development at Voisey's Bay, and its eventual abandonment. Schedule 2 amplifies the definition, primarily giving a description of the Undertaking in its construction and operational stages. For the purposes of this appeal, the relevant portions of the Schedule amplifying on the foregoing general definition read:

> Voisey's Bay Nickel Company Ltd. (the "Proponent") is proposing to develop a nickel-copper-cobalt mine and mill in the vicinity of a place known to the Inuit of Labrador as Tasiujatsoak, to the Innu of Labrador as Kapukuanipant-kauashat, which is also known as Voisey's Bay. The indicated mineral resource is estimated to be 150 million tonnes. The deposit consists of three ore bodies known as the Ovoid, the Eastern Deeps, and the Western Extension. The Ovoid would be mined using open pit techniques. The Western Extension and Eastern Deeps would be mined by underground techniques. The ore would be processed to nickel-cobalt and copper concentrates using conventional milling processes. The concentrates would be shipped to a smelter off-site. This proposed development is hereinafter referred to as the "undertaking".
>
> The undertaking, through its life cycle, includes open pit and underground mining facilities and operations, the construction and operation of storage and deposition areas for waste rock and overburden, mine site roads, borrow pits and quarries and their road access, an airstrip .... The undertaking includes the activities associated with the above operations and infrastructure such as the transportation of personnel and supplies and the shipping of concentrates.
>
> [Emphasis added]

38 The issue whether the Exploratory Support Works referred to in the May 21st registration come within the MOU, therefore, hinges on whether the 11.5 km. single lane gravel road, airstrip and related borrow pits and quarries come within the definition of "Undertaking", and on the relevance of the references to "mine site roads, borrow pits and quarries and their road access, an airstrip ..." to that determination.

(b) A Question of Legal Interpretation

39 The trial judge found that "mine site roads" and "an airstrip" related to construction and operation of the mine/mill complex that entailed permanent roads and a permanent airstrip, and that it would be a "distortion of the clear meaning of these words to interpret them to include a temporary road or a temporary airstrip which are required for exploratory activities only". This finding clearly involved an interpretation of the Memorandum's definition of the Undertaking, as the judge's reference to a distortion of its words shows. As such he was engaged in the exercise of giving legal effect to the facts in light of the agreement that had been consummated in accordance with powers exercised to effect a statutory purpose. This must be considered, if not a question of law, at least of mixed law and fact amenable to appellate scrutiny.

40 Inasmuch as the question at issue essentially involves the construction of a written document, where credibility of witnesses and the weighing of evidence is not in question, this Court is in as good a position as the trial judge to examine the documentary evidence and to reach its own conclusion as to the proper interpretation of the MOU.

(c) Approach to Interpretation - The Nature of the MOU and the Question of Parol Evidence

41 The creation of the joint assessment process contemplated by the MOU resulted from the exercise of authority conferred, in the case of Canada, by Ss. 40-42 of the CEAA and, in the case of Newfoundland, by S. 37 of the NEAA. The MOU is therefore a specialized regime that is designed, not to derogate from the legislative environmental assessment process, but to facilitate its implementation. Whether one regards the MOU as a statutory instrument or as a contract, therefore, it must be interpreted and applied in furtherance of the underlying statutory intent that was its genesis. Concepts fundamental to the statutory assessment regime should equally apply to an understanding of the MOU.

42 One of the fundamental concepts of environmental assessment regimes is that they are concerned with the consequences of activities that involve physical incursions into an environment in a potentially harmful way. This is evident from the references to "environmental effects" in the CEAA and to the corresponding phrase, "environmental impact", in the Newfoundland legislation. Thus, it is the effect or impact of actual physical activity that is the focus of an assessment. As Gonthier, J. notes in *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.) at p. 1068, legislation in the field of environmental protection prefers "to take a broad and general approach" and to be expressed in terms "capable of responding to a wide variety of environmentally harmful scenarios, including one which might not have been foreseen by the drafters of the legislation". It follows that the scope of a required assessment is determined by the identified activities that are contemplated and is not to be defined along functional or purposive lines.

43 Of course, activity is not carried out for its own sake; it will have a purpose or goal. A comprehensive description of a bundle of activities is often given in terms of the contemplated purpose or objective. Thus, an examination of the environmental effects of, say, a hydro project, would, in the absence of any specific exclusions, be expected to include all of the actual physical activities associated with the "hydro project". If damming a river is necessary to facilitate that project and the construction of access roads to bring equipment to it is required, those activities would be inferentially included by virtue of being within the umbrella of the project's purpose. It is important to emphasize, however, that although activities may be identified and referred to in terms of an ultimate project purpose, the use of the terminology of "purpose" is merely as an aid to description of actual activities, "on the ground", so to speak. Once the activity is identified, it is irrelevant whether the particular activity can be said, in itself, to be in furtherance of that purpose.

44 This analysis is consistent with the legislative regimes involved. The key concept in the CEAA, which determines the activities on which the legislation bites, is "project" (s. 2(1)), and in the NEAA it is "undertaking" (s. 2(m)). Both of these definitions are structured in terms of types of activities, rather than purpose. Indeed, in the Newfoundland definition of "undertaking", the listed activities are linked directly to the concept of "significant environmental impact" as the trigger for the application of the Act. It cannot be an accident that the definition of "Undertaking" in the MOU, while not a rescript of either the CEAA or NEAA definition, has close affinities with both of them in terminology and in its emphasis on activities.

45 It is important to bear this distinction between the effect of activities and their purpose in mind when approaching analyses of environmental concerns, particularly when analyzing the arguments advanced by counsel in this appeal and the judgment that is under scrutiny.

46 The starting point in construing the MOU, then, is to bear in mind its statutory origin and the fact that it is designed to fulfil purposes and concepts embodied in the environmental legislation that spawned it. In negotiating and concluding the MOU, the parties must be taken to have recognized this fundamental reality. The search for the intentions of the parties, as embodied in the document, must therefore be approached with an appreciation of the statutory framework within which it was to operate.

47 It is worth reiterating, as well, that the construction of the MOU involves an exercise in discerning the intention of the parties, objectively determined, from the actual language employed. Specific language must be construed in the context of the document as a whole. Reference may also be had to surrounding facts and circumstances known to the parties at the time of entering into the agreement to better understand the context in which the agreement was reached as well as the "genesis and aim" (a phrase of Cardozo J. quoted by Lord Wilberforce in *Prenn v. Simmonds*, [1971] 1 W.L.R.

1381 (U.K. H.L.)) of the transaction. Here, knowledge that the MOU was to be a substitute for fulfilment of a general statutory purpose is a factor in informing as to the aims of the transaction.

48 As indicated, considerable parol evidence was presented to the trial judge dealing, amongst other things, with the negotiations leading up to the execution of the final draft of the MOU. There is considerable danger in having regard to positions taken, and statements of prior intention made by the parties, as well as to prior negotiating drafts as compared with the final document, for the purpose of interpreting particular language in an agreement. The addition or dropping of a particular word or phrase in a later draft may have many motivations, spoken and unspoken. One can never be sure whether a stated position leading to language change is truly reflective of a party's intent. The choice of final language may well be the result of a reconsideration of that party's understanding of the implication and importance of the use or non-use of a word that was regarded as crucial previously.

49 As an example of this problem, reference was made in this case to the fact that the phrase "including advanced exploration infrastructure", which had been in previous drafts of the definition of "Undertaking" in the MOU proposed by the appellants, was ultimately removed from later drafts. It was suggested that this indicated an acknowledgment that exploratory infrastructure was not to be covered by the agreement. While that is a possible inference, it is equally possible that the appellants withdrew it because they were satisfied, on reconsideration, that other remaining language accomplished their objectives in any event. The significance of the removal of the language would also depend on the reason for asking to have it included in the first place and the true understanding of the appellant as to what advanced exploration infrastructure encompassed, particularly, whether it encompassed a road and airstrip. Preceding expressions or indications of intent will therefore be treated as having been superseded by and merged in the final documents whose words are to be regarded as the basic signposts of the parties' intent. As emphasized in *Prenn v. Simmonds*, evidence of prior negotiations is usually excluded because it is irrelevant.

50 Here, widely differing inferences were sought to be drawn from the parties' negotiating history. This is reflective of the inconclusive nature of the evidence as a means of signifying the intent behind the final choice of language in the MOU, and is also indicative of the danger of having resort to it for the exercise of interpretation which this Court must engage in. Here, the language is sufficiently clear and unambiguous to allow the question of interpretation to be resolved without resort to this evidence in any event. Accordingly, while the prior actions and discussions of the parties may be referred to as part of the general factual matrix within which the MOU operated, it need not be utilized as integral elements of the process of interpretation of the language itself.

(d) The Role of the Exemption Order

51 The MOU was implemented, on the Newfoundland side, through the instrumentality of an exemption order made under S. 37 of the NEAA. The effect was to exempt the "undertaking" therein described from the operation of NEAA and, by virtue of the attachment of conditions to the exemption, to substitute, for the purposes of Newfoundland law, the regime provided for in the MOU. It seems logical to conclude that the agreement put in place was intended to completely fill the void created by the exemption. Thus, the scope of the "undertaking" exempted from the Act, as identified in the exemption order, should be coincident with the scope of the "undertaking" that was to be reviewed and assessed by the substitute procedure. It is appropriate, therefore, to examine the scope of the Exemption Order to see what light it can shed on the scope of the undertaking that was to be considered under the MOU.

52 The Exemption Order defines the undertaking as the Voisey's Bay "Mining Development Undertaking ... for the development of a nickel-copper-cobalt mine and mill at Voisey's Bay". Section 17 of the *Interpretation Act*, provides that expressions used in a statutory order have the same meanings as in the statute conferring the power to make the order in question. Prima facie, therefore, the use of the word "undertaking" in the Exemption Order imports within it the statutory notion of an activity-based description which focuses on environmental impact.

53 The Exemption Order itself does not purport to further define, narrow or alter the character of the concept of "undertaking". Although the conditions imposed by the Exemption Order require the assessment to be "performed

in accordance with" the MOU, and to that extent incorporate a reference to the MOU in the Order, it does not in any way purport to use the MOU as a means of defining the scope of the undertaking; it merely provides that the "undertaking" (whatever that may be) will be assessed using the MOU procedure. The MOU cannot therefore be said to cut down the scope of the undertaking referred to in the Exemption Order; to the contrary, the Exemption Order terminology may be looked at, on the assumption that the MOU was intended to be consistent with the Exemption Order, to assist in determining the subject-matter of the assessment under the MOU.

54 Neither does the other language of the Exemption Order derogate from the approach to describing an undertaking, as indicated by the NEAA, in favour of an identification process based on purpose. The Exemption Order describes its subject-matter as a "mining development" undertaking "for" the "development" of a "mine and mill". A fair and plain reading of these words does not lead to the conclusion that the concept is limited to the actual construction of a mine and mill. The emphasis on "development" shows that other activities that are associated with the lead up to the mine and mill itself could very well be included. The *Concise Oxford Dictionary* defines "development" as, inter alia, "gradual unfolding; fuller working out; growth; evolution".

55 In this context it is noted that the location of the road and airstrip have been chosen, at least in part, so that they can be incorporated as part of the infrastructure for the mine proper. In that sense, the construction of the road and airstrip, even though they may be used to support exploration, might well be said to be connected to the "development" of the mine.

(e) The Scope of the Memorandum of Understanding

56 The question next becomes: is the scope of the MOU, as reflected in its terminology, consistent with the activity-based, impact-focus approach to definition of the undertaking as contained in the NEAA and Exemption Order? The first recital in the MOU broadly describes the Company's proposal as "an undertaking in connection with ... deposits at a place known ... as Voisey's Bay." A later recital states that the parties wish to ensure that the "Environmental Effects of the Undertaking" are assessed "through the establishment of a single, effective and efficient process." To the extent that the recitals can be of assistance, they indicate that the undertaking is broader than the actual construction and operation of a mine and mill, since it is referred to as an undertaking "in connection with" Voisey's Bay mineral deposits.

57 The key word in the MOU which occupied much of the argument, both before the trial judge and on this appeal, was the definition of "Undertaking". For ease of reference, it is restated again:

> "Undertaking" means the proposed construction, operation, demolition, decommissioning, rehabilitation and effective surrender of any leases by the Proponent [The Company] of a mining development and associated activities as described in Schedule 2.

As already noted, the definition focuses on physical activities, such as construction and operation and, on its face is consistent with the definitional approach taken in both the CEAA and NEAA. As in the case of its statutory parents, it is broad and comprehensive in its capturing of generic activities. It seems logical that in tracking the scope of the federal and provincial legislation, the definition in the MOU likewise was intended to be accorded a wide construction and was focusing on activities that would have effects on the environment, more so than on the purpose of those activities.

58 The definition goes on to identify those activities by reference to three things:

(i) a "mining development";

(ii) "associated activities"; and

(iii) matters "described" in Schedule 2.

59 Any doubts as to whether the phrase "mining development" encompasses more than the work on the actual proposed mine are dispelled by the fact that the undertaking is expressed to include "associated activities". The nature of the mining

development and the associated activities are then further described in Schedule 2. It was argued by the respondents that Schedule 2 was in effect a control on the scope of the definition. This position cannot be maintained. The function of Schedule 2 is to provide descriptive material that amplifies the broad definition in the MOU. It is not part of the definition itself. This follows from the reference in the definition to the activities being "described" in Schedule 2 and from the express provision in section 1 of the MOU that the definitions apply to all parts of the agreement except Schedule 2. Accordingly, although Schedule 2, at the end of the first paragraph, purports to define "undertaking" by reference to the descriptive words that have gone before, that "definition", while relevant to its further usage in the Schedule, cannot control and limit the definition in the MOU itself. The trial judge's approach was different. He concluded that the whole of Schedule 2 "defines" "undertaking". In reaching that conclusion, he erred.

60 It also follows that, to the extent, as argued by the respondents, that Schedule 2 talks in terms of purposes, such as mining, milling and shipping, it does not limit the description of the activities contemplated by the environmentally assessable "undertaking" to only those activities that can be said to be in fulfilment of those purposes. True, the reference to purposes is of assistance in describing some of the types of activities that are included, but that is the only function of the reference to purposes - to assist in describing. To say that a particular activity is either covered by the assessment requirement or not based on its ultimate purpose would be inconsistent with the fundamental concepts of the legislation, the Exemption Order and the MOU itself, all of which focus on effects or impact rather than purpose. The environmental impact of a particular activity, such as an airstrip, is the same whether it is being built to support a housing development, a mine, or exploration activity. Accordingly, it matters not whether the construction of a particular piece of infrastructure, such as a road or an airstrip, is intended to exist for one year or 21 years; is labelled "permanent" or "temporary"; or, is described as being for "exploration" or for "mining". If the infrastructure is identified as being the type brought within the assessment umbrella and is to be constructed in the environmental area to which the assessment relates, it will, in the absence of a demonstrable exclusion, be caught by the assessment regime.

61 Here, it is not necessary to engage in speculation as to whether the infrastructure in question is of the type brought within the assessment umbrella or whether Schedule 2, even considered only as a descriptive document, might in some manner cut down on the expansiveness of the generality of the definition in the MOU itself. This is because roads and an airstrip are specifically identified as being part of the development. They are referred to in Schedule 2 and identified on the attached map. It is accepted that the proposed road and airstrip are in the same general locations as the ones identified as being part of the undertaking. It is a fair inference from previous comments of the company both in the January 1996 Advanced Exploration Infrastructure filing, and from counsel in court, that the choice of location was so made that the infrastructure could ultimately be incorporated as part of the infrastructure to be used in the development of the mine. They have the potential of having similar impacts. True, they are smaller in size and may not involve the same degree of excavation and environmental incursion; however, that is a question of degree, not of kind. The specific impact and the appropriate response thereto is the very thing that is within the purview of the environmental assessment process.

(f) Arguments of Counsel

62 Having engaged in the foregoing general analysis, the other specific arguments of counsel for the respondents can now be dealt with in short compass.

63 Counsel for both the Minister and the company differentiate between the Works described in the May 21st registration and the corresponding elements of the Undertaking in the MOU by insisting the former are exploratory and temporary, whilst the latter are operational and permanent. To this end, stress is laid on the first paragraph of Schedule 2 which describes the undertaking as a development involving mining, processing and shipping. In their view, the mine site roads and the airstrip subsequently mentioned as part of the Undertaking must be understood in the context of mining, processing and shipping. Styling Schedule 2 as providing an inclusive definition, counsel argues the failure to refer expressly to the notion of exploratory or temporary Works means such activity was not within the purview of the MOU and enabled the road and airstrip to be treated as a separate undertaking.

64 Counsel seek further support for the non-inclusive nature of the MOU definition by pointing to the definition of "cumulative environmental effects" in the MOU as meaning "additive and interactive effects of an Undertaking in combination with *other projects or activities* that have been or will be carried out" [emphasis added]. Counsel argues that the MOU therefore clearly contemplates other activities outside of the scope of the agreement that will take place at the mine site, notwithstanding the expression of the parties' wish for a single and comprehensive process. They posit that exploratory activity of the type represented by the construction of the road and airstrip, which will support such exploration, is one such extrinsic project.

65 These arguments are flawed on four grounds. First, they ignore the fact that the road and airstrip described in the May 21st registration and those referred to in the MOU are shown to be the same by the maps appended to the May 21st registration and the MOU. Even assuming *arguendo* that a distinction can be drawn between exploratory activities and mining/milling activities, it appears transparently artificial to maintain a road and an airstrip to be used for one purpose which lies on the same land when subsequently used for another, *albeit* improved and extended, are not also to be considered installations for proposed mining, processing and shipping. The defect in this oversight is traceable to concentration on immediate purpose rather than on its actual existence. This is the flaw, mentioned earlier, of emphasizing purpose rather than impact.

66 The second deficiency in the foregoing arguments is that they do not give full effect to the broad and expansive activity-based concept of undertaking embodied in the legislation and the impact that it has on the MOU. Concentration is centered on the particularization of the proposed development in Schedule 2. It must be remembered the governing definition states that the Undertaking means the proposed construction of a "mining development [not simply a "mine/mill complex" as stated by the trial judge] and associated activities" as described in Schedule 2. Counsel's attempts to ascribe a technical mining meaning to the term "mine site roads" must be rejected. The nature of this document requires it to be attributed a common meaning that would indubitably include roads at the site which has been proposed for the development of a mine.

67 Further, neither does reliance on the definition of "cumulative environmental effects" assist counsels' arguments. The fact that there may well be other activities outside the reach of the MOU does not in itself lead to the conclusion that the proposed road and airstrip are necessarily numbered amongst them. The court is not called to pass upon the general question of what other specific activities may be beyond the scope of the MOU and does not do so. One may note in passing, however, the obvious fact that there already has been activity on-going at the site for the past several years which, rightly or wrongly, has escaped environmental assessment. The fact that such activity existed in the past and other activity may also occur in the future, thereby requiring its effects to be considered by the MOU panel as part of cumulative environmental effects rather than as part of the undertaking itself, cannot, however, be regarded as excluding the road and airstrip which upon a proper construction of the provisions of the MOU are otherwise included, for reasons already given.

68 It was also argued that the MOU should be read as relating only to permanent roads and a permanent airstrip because the company's Project Description made such qualifications in enumerating them as such in the elements of the project and because the Report stated that the project does not include "ongoing" exploration activities. No such qualifications were, however, specified in Schedule 2.

69 In any event, the Project Description submitted by a proponent to the Minister cannot be determinative of the scope of the project to be reviewed. As the definition of "undertaking" in s. 2(m) of NEAA makes clear, it is the determination by the Minister that a particular project or proposal may have a "significant environmental impact" that triggers the further assessment process. Obviously, a proponent cannot shield parts of a proposed project from review by artificially labelling or limiting his or her description of the works. It would always be open to the Minister to determine that the proposal inevitably involves other activities as an integral part of those described and to consider the application of the Act to the consequences of what he or she views the project entails. Thus, although helpful in identifying the nature of the work that the proponent feels will have an environmental impact, the description contained in the project proposal

cannot be taken as defining the scope of review which the responsible governmental authorities deem, in the public interest, should be undertaken. Here, the government has indicated its view of the scope of the assessment that should be undertaken by executing the MOU.

70 In the result, these arguments advanced in support of the trial judge's decision are unsustainable. The trial judge must be considered to have erred in concluding that the road and airstrip do not come within the ambit of the review process contemplated by the Memorandum of Understanding. Properly interpreted as an instrument that is a creature of the environmental legislation from which it emanated and drew its force, the scope of the MOU is such as to encompass the road, airstrip and related borrow pits described in the May 21st registration document. As such they are subject to the environmental review process provided for under the MOU.

71 The essential source of the judge's error lies in his holding that the "mine site roads" and "an airstrip" described in the defined undertaking covered by the MOU "mean permanent roads and a permanent airstrip which would support the construction and operation of the mine/mill complex". Such a meaning is not sustainable on the face of the document. He erred in holding it was a "distortion of the clear meaning of these words" to construe them as including temporary installations required only for exploration activities. This was a product of erroneous approach of concentrating on purpose rather than consequences and impact.

(g) The False Dichotomy Between Exploration and Mining

72 In view of our conclusion that the road, airstrip and related borrow pits, whatever their immediate purpose and however labelled in the May 21st registration document, are within the MOU assessment process, it is not strictly necessary to consider the somewhat broader question of whether works "necessary for exploration", as such, may be within the MOU description of "Undertaking".

73 We would observe, however, that, clearly, some exploratory activity is regarded by all as outside the MOU and, indeed, on any objective analysis may not be such as to trigger the need for any environmental assessment or, at least, an assessment under the MOU process. On the other hand, it is error to say that just because works may have an exploratory purpose, that, in itself, excludes them from the purview of review pursuant to the assessment process governing the overall mining development project.

74 For the purpose of environmental assessment under the MOU, exploration and mining are not to be regarded as in separate, watertight compartments. Such a distinction is a false one. The question in each case is whether the identified *activity*, whether exploratory or not, is part of the broad definition of "Undertaking" in the MOU. Even though serving an exploratory purpose, it may also be related to, or serve a purpose in connection with, the mining development. It is for this reason that the trial judge erred in his assumption that if the Works in question were for exploration, they were automatically excluded. Instead of asking whether they were necessary for exploration, he should have asked whether the specific activity was within the umbrella of the development as contemplated by the broad activity-based concept of "undertaking" in the MOU, as infused with the corresponding meanings used in the governing legislation.

(h) The Jurisdiction of the Minister to make the Determinations he did

75 Had the trial judge viewed the 11.5 km gravel road and airstrip, that the Minister subsequently purported to deal with under the Newfoundland legislation as coming within the undertaking already committed to joint assessment under the Memorandum, he would inexorably have concluded that the Minister's decision on May 22nd to receive the registration, and his declaration on July 2nd that the Works were a separate undertaking, were both made without lawful authority and hence outside of his jurisdiction. By these dates the Works had been committed to the joint review process. Moreover, by these actions, the Minister was failing to comply with Newfoundland's obligations under the MOU.

76 The jurisdiction of the Minister to exercise his powers under NEAA is dependent on the existence of an "undertaking" that triggers the application of the Act. The definition of "undertaking" envisages that it is only after the Minister formulates the opinion that the proposal may have "a significant environmental impact" that the proposal will

be considered an "undertaking" under the Act. It is not necessary to determine, for the purposes of this appeal whether such a decision can be reviewed on an objective or subjective standard and what degree of deference ought to be accorded to such a determination. What is involved in this case does not involve that type of determination.

77 Here, the Minister received and acted on the Company's Project Description when filed in the fall of 1996. He obviously made the determination that the project would have significant environmental effects. He dealt with it under the Act by exempting the project under s. 37 and participating in the creation of the joint assessment process under the MOU. His authority to deal, under NEAA, with the undertaking encompassed by the project was therefore spent until such time as the MOU Panel reported with its recommendations.

78 Having exercised his jurisdiction under NEAA and having committed the project to the joint assessment process, he imported the federal legislation into the process and brought Canada, the Labrador Inuit Association and the Innu Nation, as partners, into the process, including the determination of its scope. It is now clearly beyond his jurisdiction unilaterally to withdraw elements from that process that had already been committed to it. He may only declare whether a given project is within or without the MOU process based on a correct interpretation of the scope of the Exemption Order and the MOU. That determination is reviewable by the court as a jurisdictional matter, and the standard of review is correctness.

79 It follows that the trial judge should have declared that the Minister exceeded his statutory authority in purporting to treat the road, airstrip and related borrow pits as not encompassed by the MOU.

(i) Relief

80 It now falls to this Court to address the relief sought. It follows from the foregoing that the Labrador Inuit Association and the Innu Nation are entitled to a declaration that:

> (a) the Exploration Support Works described in the May 21st, 1997 registration (consisting of a road, airstrip and related borrow pits) purportedly filed under Section 6 of the NEAA are part of the undertaking referred to in the Memorandum of Understanding and are to be environmentally assessed thereunder;
>
> (b) the Minister of Environment and Labour in his capacity as representative of Her Majesty the Queen in Right of Newfoundland, has failed to comply with the MOU by treating the said exploration support Works as a separate undertaking not subject to the assessment process under the MOU;
>
> (c) the Minister may not lawfully deal with the Exploration Support Works described in the May 21st, 1997 registration, under the NEAA, other than by referring its subject-matter to be environmentally assessed as part of the MOU.

81 Apart from the declaration, the Labrador Inuit Association and the Innu Nation are entitled to an order in the nature of certiorari quashing the Minister's decisions of May 22, 1997, and July 2, 1997. It is recognized that this court's order will operate against a decision of a Minister of the Crown and that there are peculiar limitations on the availability of such prerogative relief. However, as distinct from decisions of policy or matters of public convenience, those of law and jurisdiction lie within the purview of judicial review. This is clear from the following comment of Dickson, J. in *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106 (S.C.C.) where he states at p. 111 on behalf of the Court:

> The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: ...I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: ...Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order

in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.

82 As the impugned decisions are in the nature of purported discharge of a public duty, they must be considered subject to judicial review for want of jurisdiction on a standard of correctness. On this basis the order of certiorari quashing them will issue.

Disposition

83 This decision concludes where it began by underscoring that reconciling the use of the earth's resources with the protection and preservation of the environment is recognized as one of the major challenges of our time.

84 In this case the company is seeking to proceed towards development of significant nickel, copper and cobalt resources in the Voisey's Bay region. While the interests of investors must be respected, sight should not be lost of the fact that in pursuing them they are also furthering pressing social and economic concerns of substantial numbers of Newfoundlanders and Labradorians, and their families, who have legitimate expectations of badly needed meaningful employment.

85 Likewise, the Inuit and Innu may also be viewed as representing general vital interests. They are understandably pre-occupied with the protection from adverse environmental effects on the immediate area affected, to which their whole cultural, social and economic lives have been linked for generations. Nevertheless, in a very real sense they too are representing the interests of their fellow citizens in this Province inasmuch as the heritage of the environment is a legacy to be preserved for all Newfoundlanders and Labradorians, wherever their abode. Viewed from this perspective the general may be said to transcend the particular environmental concerns more immediately engaged. After all, indiscriminate development without regard to environmental impact translates eventually into agonizing problems for generations yet unborn from every corner of the Province, whether it be the depleted fishery; forestry harvesting in the absence of silvaculture; uncontrolled effluent and emissions from plants; or, the tragedies of flourospar or asbestos mines. We are sure that all parties involved would not want to have the mining development at Voisey's Bay to be placed in the same category.

86 The Government showed it was very alert to the need to reconcile environmental protection with this development. In its wisdom it addressed the challenge by committing the proposed undertaking at Voisey's Bay to a joint federal-provincial assessment.

87 In a nutshell, the Exploration Support Works were included in the undertaking committed to that process. For the foregoing reasons, the Minister has no jurisdiction to subsequently deal with the Works as he purported to do by treating them as outside of the Memorandum of Understanding.

88 The appeal is allowed with costs to the appellants on the original hearing and on this appeal.

89 The appellants are entitled to the declarations in the form set out in paragraph [80].

90 The Minister's decisions of May 22, 1997 and July 2, 1997 are hereby quashed and declared to be of no force and effect.

Appeal allowed.

TAB A6

1998 CarswellOnt 1
Supreme Court of Canada

Rizzo & Rizzo Shoes Ltd., Re

1998 CarswellOnt 1, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 221 N.R. 241, 33 C.C.E.L. (2d) 173, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 76 A.C.W.S. (3d) 894, 98 C.L.L.C. 210-006, J.E. 98-201

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997
Judgment: January 22, 1998
Docket: 24711

Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the court was delivered by *Iacobucci J.*:

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65% of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July, 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario (Employment Standards Branch) (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to

former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C. 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively:

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7.--

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40.-- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . . . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . . . .

40*a* ...

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C. 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . . . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.)

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C.), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice

required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (Ont. S.C.), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40*a*(1) begins with the words, "Where...fifty or more employees have their employment terminated by an employer...." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, (sub nom. *R. v. Hydro-Québec*) [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the

words of D.D. Carter in the course of an employment standards determination in *Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service....Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees 'fortunate' enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *Employment Standards Amendment Act, 1981*, ("*ESAA*") introduced s.40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> **2.** ...
>
> (3) Section 40*a* of the said Act does not apply to an employer who became bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a

bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows:

> ...any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *ESA*...it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . . . .
>
> ...the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached. [Ontario, Legislative Assembly, *Debates*, No. 36, at pp. 1236-37 (June 4, 1981)]

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this Act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions. [Ontario, Legislative Assembly, *Debates*, No. 48, at p. 1699 (June 16, 1981)]

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:

> ...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt

arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.), at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect." Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were amended by the *Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C. S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (Ont. C.A.), which cited the decision in *Malone Lynch*, *supra* with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 (S.C.C.)). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESSA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and

40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections 74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "the repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law." As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed.

Pourvoi accueilli.

TAB A7

2018 CAF 153, 2018 FCA 153
Federal Court of Appeal

Tsleil-Waututh Nation v. Canada (Attorney General)

2018 CarswellNat 4685, 2018 CarswellNat 4686, 2018 CAF 153, 2018 FCA 153, [2018] 3 C.N.L.R. 205, 21 C.E.L.R. (4th) 1, 295 A.C.W.S. (3d) 775, 45 Admin. L.R. (6th) 1, EYB 2018-301376

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝAM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY (Applicants) and ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC (Respondents) and ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF BRITISH COLUMBIA (Interveners)

Eleanor R. Dawson, Yves de Montigny, Judith Woods JJ.A.

Heard: October 2-5, 10, 12-13, 2017
Judgment: August 30, 2018
Docket: A-78-17, A-217-16, A-218-16, A-223-16, A-224-16, A-225-16, A-232-16, A-68-17, A-74-17, A-75-17, A-76-17, A-77-17, A-84-17, A-86-17

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Margot Venton, Dyna Tuytel, for Applicants, Raincoast Conservation Foundation and Living Oceans Society
Jan Brongers, Bruce Hughson, Dayna Anderson, Liliane Bantourakis, Sarah Bird, Jon Khan, Ashley Caron, for Respondent, Attorney General of Canada
Maureen Killoran, Q.C., Olivia Dixon, Sean Sutherland, for Respondent, Trans Mountain Pipeline ULC

Paul Johnston, Keith Bergner, Toby Kruger, for Respondent, National Energy Board
Marta Burns, Doreen Mueller, for Intervener, Attorney General of Alberta
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***Eleanor R. Dawson J.A.*:**

I. Introduction

1 On May 19, 2016, the National Energy Board issued its report concerning the proposed expansion of the Trans Mountain pipeline system. The Board's report recommended that the Governor in Council approve the expansion. The Board's recommendation was based on the Board's findings that the expansion is in Canada's public interest, and that if certain environmental protection procedures and mitigation measures are implemented, and if the conditions the Board recommended are implemented, the expansion is not likely to cause significant adverse environmental effects.

2 On November 29, 2016, the Governor in Council accepted the Board's recommendation and issued Order in Council P.C. 2016-1069. The Order in Council recited the Governor in Council's acceptance of the Board's recommendation, and directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the expansion project, subject to the conditions recommended by the Board.

3 A number of applications for judicial review of the Board's report and the Order in Council were filed in this Court. These applications were consolidated. These are the Court's reasons for judgment in respect of the consolidated proceeding. Pursuant to the order consolidating the applications, a copy of these reasons shall be placed in each file.

A. Summary of Conclusions

4 While a number of applicants challenge the report of the National Energy Board, as explained below, the Order in Council is legally the only decision under review. Its validity is challenged on two principal grounds: first, the Board's process and findings were so flawed that the Governor in Council could not reasonably rely on the Board's report; second, Canada failed to fulfil the duty to consult owed to Indigenous peoples.

5 Applying largely uncontested legal principles established by the Supreme Court of Canada to the factual record, a factual record that is also largely not contested, I conclude that most of the flaws asserted against the Board's process and findings are without merit. However, the Board made one critical error. The Board unjustifiably defined the scope of the Project under review not to include Project-related tanker traffic. The unjustified exclusion of marine shipping from the scope of the Project led to successive, unacceptable deficiencies in the Board's report and recommendations. As a result, the Governor in Council could not rely on the Board's report and recommendations when assessing the Project's environmental effects and the overall public interest.

6 Applying the largely uncontested legal principles that underpin the duty to consult Indigenous peoples and First Nations set out by the Supreme Court, I also conclude that Canada acted in good faith and selected an appropriate consultation framework. However, at the last stage of the consultation process prior to the decision of the Governor in Council, a stage called Phase III, Canada's efforts fell well short of the mark set by the Supreme Court of Canada. Canada failed in Phase III to engage, dialogue meaningfully and grapple with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns. The duty to consult was not adequately discharged.

7 Accordingly, for the following reasons, I would quash the Order in Council and remit the matter back to the Governor in Council for appropriate action, if it sees fit, to address these flaws and, later, proper redetermination.

8 These reasons begin by describing: (i) the expansion project; (ii) the applicants who challenge the Board's report and the Order in Council; (iii) the pending applications for judicial review; (iv) the legislative regime; (v) the report of the Board; and, (vi) the decision of the Governor in Council. The reasons then set out the factual background relevant to the challenges before the Court before turning to the issues raised in these applications and the consideration of those issues.

II. The Project

9 No company may operate an interprovincial or international pipeline in Canada unless the National Energy Board has issued a certificate of public convenience and necessity, and given leave to the company to open the pipeline (subsection 30(1) of the *National Energy Board Act*, R.S.C. 1985, c. N-7).

10 Trans Mountain Pipeline ULC is the general partner of Trans Mountain Pipeline L.P. (together referred to as Trans Mountain). Trans Mountain owns and holds operating certificates issued by the National Energy Board for the existing Trans Mountain pipeline system. This system includes a pipeline approximately 1,147 kilometres long that moves crude oil, and refined and semi-refined petroleum products from Edmonton, Alberta to marketing terminals and refineries in the central region and lower mainland area of British Columbia, as well as to the Puget Sound area in Washington State.

11 On December 16, 2013, Trans Mountain submitted an application to the National Energy Board for a certificate of public convenience and necessity (and certain amended certificates) for the Trans Mountain Expansion Project (Project).

12 The application described the Project to consist of a number of components, including: (i) twinning the existing pipeline system with approximately 987 kilometres of new pipeline segments, including new proposed pipeline corridors and rights-of-way, for the purpose of transporting diluted bitumen from Edmonton, Alberta to Burnaby, British Columbia; (ii) new and modified facilities, including pump stations and tanks (in particular, an expanded petroleum tank farm in Burnaby which would be expanded from 13 to 26 storage tanks); (iii) a new and expanded dock facility, including three new berths, at the Westridge Marine Terminal in Burnaby; and, (iv) two new pipelines running from the Burnaby storage facility to the Westridge Marine Terminal.

13 The Project would increase the number of tankers loaded at the Westridge Marine Terminal from approximately five Panamax and Aframax class tankers per month to approximately 34 Aframax class tankers per month. Aframax tankers are larger and carry more product than Panamax tankers. The Project would increase the overall capacity of Trans Mountain's existing pipeline system from 300,000 barrels per day to 890,000 barrels per day.

14 Trans Mountain's application stated that the primary purpose of the Project is to provide additional capacity to transport crude oil from Alberta to markets in the Pacific Rim, including Asia. If built, the system would continue to transport crude oil — primarily diluted bitumen.

III. The Applicants

15 A number of First Nations and two large cities are significantly concerned about the Project and its impact upon them, and challenge its approval. Two non-governmental agencies also challenge the Project. These applicants are described below.

A. Tsleil-Waututh Nation

16 The applicant Tsleil-Waututh Nation is a Coast Salish Nation. It is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 and its members are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

17 In the traditional dialect of Halkomelem, the name Tsleil-Waututh means "People of the Inlet". Tsleil-Waututh's asserted traditional territory extends approximately from the vicinity of Mount Garibaldi to the north to the 49th parallel and beyond to the south. The traditional territory extends west to Gibsons and east to Coquitlam Lake. The traditional territory includes areas across British Columbia's Lower Mainland, including sections of the Lower Fraser River, Howe Sound, Burrard Inlet and Indian Arm.

18 Tsleil-Waututh's traditional territory encompasses the proposed Westridge Marine Terminal and fuel storage facility expansion, and approximately 18 kilometres of pipeline right-of-way. Approximately 45 kilometres of marine shipping route will pass within Tsleil-Waututh's asserted traditional territory.

19 Much of Tsleil-Waututh's population of 500 people live in its primary community of Tsleil-Waututh, which is located on the north shore of Burrard Inlet, approximately 3 kilometres across the Inlet from the Westridge Marine Terminal.

20 Tsleil-Waututh asserts Aboriginal title to the land, water, air, marine foreshore and resources in Eastern Burrard Inlet. It also asserts freestanding stewardship, harvesting and cultural rights in this area. The Crown states that it assessed its duty to consult with Tsleil-Waututh on the deeper end of the consultation spectrum.

B. City of Vancouver

21 The City of Vancouver is the third most densely populated city in North America, after New York City and San Francisco. It has 69.8 kilometres of waterfront along Burrard Inlet, English Bay, False Creek and the Fraser River, with 18 kilometres of beaches and a 22-kilometre long seawall.

22 Approximately 25,000 residents of Vancouver live within 300 metres of the Burrard Inlet and English Bay shorelines.

C. City of Burnaby

23 The City of Burnaby is the third largest city in British Columbia, with a population of over 223,000 people.

24 A number of elements of the Project infrastructure will be located in Burnaby: (i) the new Westridge Marine Terminal; (ii) the Burnaby Terminal, including thirteen new storage tanks and one replacement storage tank; (iii) two new delivery lines following a new route connecting the Burnaby Terminal to the Westridge Marine Terminal through a new tunnel to be drilled under the Burnaby Mountain Conservation Area; and, (iv) a portion of the main pipeline along a new route to the Burnaby Terminal.

D. The Squamish Nation

25 The applicant Squamish Nation is a Coast Salish Nation. It is a band within the meaning of the *Indian Act* and its members are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. There are currently just over 4,000 registered members of the Squamish Nation.

26 The Squamish assert that since a time before contact with Europeans, Squamish have used and occupied lands and waters on the southwest coast of what is now British Columbia, extending from the Lower Mainland north to Whistler. This territory includes Burrard Inlet, English Bay, Howe Sound and the Squamish Valley. The boundaries of asserted Squamish territory thus encompass all of Burrard Inlet, English Bay and Howe Sound, as well as the rivers and creeks that flow into these bodies of water.

27 Squamish has three reserves located in and at the entrance to Burrard Inlet:

i. Seymour Creek Reserve No. 2 (ch'ích'elxwi7kw) on the North shore close to the Westridge Marine Terminal;

ii. Mission Reserve No. 1 (eslhá7an); and,

iii. Capilano Reserve No. 5 (xwmelchstn).

Also located in the area are Kitsilano Reserve No. 6 (senákw) near the entrance to False Creek, and three other waterfront reserves in Howe Sound.

28 Project infrastructure, including portions of the main pipeline, the Westridge Marine Terminal, the Burnaby Terminal, two new delivery lines connecting the terminals, and sections of the tanker routes for the Project will be located in Squamish's asserted traditional territory and close to its reserves across the Burrard Inlet. The shipping route for the Project will also travel past three Squamish reserves through to the Salish Sea.

29 Squamish asserts Aboriginal rights, including title and self-government, within its traditional territory. Squamish also asserts Aboriginal rights to fish in the Fraser River and its tributaries. The Crown assessed its duty to consult Squamish at the deeper end of the consultation spectrum.

E. Coldwater Indian Band

30 The applicant Coldwater is a band within the meaning of section 2 of the *Indian Act*. Its members are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. Coldwater, together with 14 other bands, comprise the Nlaka'pamux Nation.

31 The Nlaka'pamux Nation's asserted traditional territory encompasses part of south-central British Columbia extending from the northern United States to north of Kamloops. This territory includes the Lower Thompson River area, the Fraser Canyon, the Nicola and Coldwater Valleys and the Coquihalla area.

32 Coldwater's registered population is approximately 850 members. Approximately 330 members live on Coldwater's reserve lands. Coldwater holds three reserves: (i) Coldwater Indian Reserve No. 1 (Coldwater Reserve) approximately 10 kilometres southwest of Merritt, British Columbia; (ii) Paul's Basin Indian Reserve No. 2 located to the southwest of the Coldwater Reserve, upstream on the Coldwater River; and, (iii) Gwen Lake Indian Reserve No. 3 located on Gwen Lake.

33 Approximately 226 kilometres of the proposed pipeline right-of-way and four pipeline facilities (the Kamloops Terminal, the Stump Station, the Kingsvale Station and the Hope Station) will be located within the Nlaka'pamux Nation's asserted traditional territory. The Kingsvale Station is located in the Coldwater Valley. The approved pipeline right-of-way skirts the eastern edges of the Coldwater Reserve. The existing Trans Mountain pipeline system transects both the Coldwater Reserve and the Coldwater Valley.

34 Coldwater asserts Aboriginal rights and title in, and the ongoing use of, the Coldwater and Nicola Valleys and the Nlaka'pamux territory more generally. The Crown assessed its duty to consult Coldwater at the deeper end of the consultation spectrum.

F. The Stó:lo Collective

35 One translation of the term "Stó:lo" is "People of the River", referencing the Fraser River. The Stó:lo are a Halkomelem-speaking Coast Salish people. Traditionally, they have been tribally organized.

36 The "Stó:lo Collective" was formed for the sole purpose of coordinating and representing the interests of its membership before the National Energy Board and in Crown consultations about the Project. The Stó:lo Collective represents the following applicants:

(a) Aitchelitz, Skowkale, Tzeachten, Squiala First Nation, Yakweakwioose, Shxwa:y Village and Soowahlie, each of which are villages and also bands within the meaning of section 2 of the *Indian Act* (the Ts'elxweyeqw Villages). The Ts'elxweyeqw Villages collectively comprise the Ts'elxweyeqw Tribe. Members of the Ts'elxweyeqw Villages are Stó:lo people and Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*; and,

(b) Skwah and Kwaw-Kwaw-Apilt, each of whom are villages and also bands within the meaning of section 2 of the *Indian Act* (the Pil'Alt Villages). The Pil'Alt Villages are members of the Pil'Alt Tribe. Members of the Pil'Alt Villages are Stó:lo people and Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982*

and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. The Pil'Alt Villages are represented by the Ts'elxweyeqw Tribe in matters relating to the Project. (On March 6, 2018, Kwaw-Kwaw-Apilt filed a notice of discontinuance.)

37 The Stó:lo's asserted traditional territory, known as S'olh Temexw, includes the lower Fraser River watershed.

38 The Stó:lo live in many villages, all of which are located in the lower Fraser River watershed.

39 The existing Trans Mountain pipeline crosses, and the Project's proposed new pipeline route would cross, approximately 170 kilometres of the Stó:lo Collective applicants' asserted traditional territory, beginning from an eastern point of entry near the Coquihalla Highway and continuing to the Burrard Inlet.

40 The Stó:lo possess established Aboriginal fishing rights on the Fraser River (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 (S.C.C.)). The Crown assessed its duty to consult Stó:lo at the deeper end of the consultation spectrum.

G. Upper Nicola Band

41 The applicant Upper Nicola is a member community of the Syilx (Okanagan) Nation and a band within the meaning of section 2 of the *Indian Act*. Upper Nicola and Syilx are an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*.

42 The Syilx Nation's asserted traditional territory extends from the north past Revelstoke around Kinbasket to the south to the vicinity of Wilbur, Washington. It extends from the east near Kootenay Lake to the west to the Nicola Valley. Upper Nicola currently has eight Indian Reserves within Upper Nicola's/Syilx's asserted territory. The primary residential communities are Spaxomin, located on Upper Nicola Indian Reserve No. 3 on the western shore of Douglas Lake, and Quilchena, located on Upper Nicola Indian Reserve No. 1 on the eastern shore of Nicola Lake.

43 Approximately 130 kilometres of the Project's proposed new pipeline will cross through Upper Nicola's area of responsibility within Syilx territory. The Stump Station and the Kingsvale Station are also located within Syilx/Upper Nicola's asserted territory.

44 Upper Nicola asserts responsibility to protect and preserve the claimed Aboriginal title and harvesting and other rights held collectively by the Syilx, particularly within its area of responsibility in the asserted Syilx territory. The Crown assessed its duty to consult Upper Nicola at the deeper end of the consultation spectrum.

H. Stk'emlupsemc te Secwepemc of the Secwepemc Nation

45 The Secwepemc are an Aboriginal people living in the area around the confluence of the Fraser and Thompson Rivers. The Secwepemc Nation is comprised of seven large territorial groupings referred to as "Divisions". The Stk'emlupsemc te Secwepemc Division (SSN) is comprised of the Skeetchestn Indian Band and the Kamloops (or Tk'emlups) Indian Band. Both are bands within the meaning of section 2 of the *Indian Act*. SSN's members are also Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*.

46 The Skeetchestn Indian Band is located along the northern bank of the Thompson River, approximately 50 kilometres west of Kamloops and has four reserves. Its total registered population is 533. The Tk'emlups Indian Band is located in the Kamloops area and has six reserves. Its total registered population is 1,322. Secwepemc Territory is asserted to be a substantial landmass which encompasses many areas, including the area in the vicinity of Kamloops Lake.

47 The existing and proposed pipeline right-of-way crosses through SSN's asserted traditional territory for approximately 350 kilometres. Approximately 80 kilometres of the proposed pipeline right-of-way and two pipeline facilities, the Black Pines Station and the Kamloops Terminal, will be located within SSN's asserted traditional territory.

48 The SSN claim Aboriginal title over its traditional territory. The Crown assessed its duty to consult SSN at the deeper end of the consultation spectrum.

I. Raincoast Conservation Foundation and Living Oceans Society

49 These applicants are not-for-profit organizations. Their involvement in the National Energy Board review process focused primarily on the effects of Project-related marine shipping.

IV. The applications challenging the report of the National Energy Board and the Order in Council

50 As will be discussed in more detail below, two matters are challenged in this consolidated proceeding: first, the report of the National Energy Board which recommended that the Governor in Council approve the Project and direct the Board to issue the necessary certificate of public convenience and necessity; and, second, the decision of the Governor in Council to accept the recommendation of the Board and issue the Order in Council directing the Board to issue the certificate.

51 The following applicants applied for judicial review of the report of the National Energy Board:

- Tsleil-Waututh Nation (Court File A-232-16)
- City of Vancouver (Court File A-225-16)
- City of Burnaby (Court File A-224-16)
- The Squamish Nation and Xálek/Se*k*yú Siý am, Chief Ian Campbell on his own behalf and on behalf of all members of Squamish (Court File A-217-16)
- Coldwater Indian Band and Chief Lee Spahan in his capacity as Chief of Coldwater on behalf of all members of Coldwater (Court File A-223-16)
- Raincoast Conservation Foundation and Living Oceans Society (Court File A-218-16).

52 The following applicants applied, with leave, for judicial review of the decision of the Governor in Council:

- Tsleil-Waututh Nation (Court File A-78-17)
- City of Burnaby (Court File A-75-17)
- The Squamish Nation and Xálek/Se*k*yú Siý am, Chief Ian Campbell on his own behalf and on behalf of all members of Squamish (Court File A-77-17)
- Coldwater Indian Band and Chief Lee Spahan in his capacity as Chief of Coldwater on behalf of all members of Coldwater (Court File A-76-17)
- The Stó:lo Collective applicants (Court File A-86-17)
- Upper Nicola Band (Court File A-74-17)
- Chief Ron Ignace and Chief Fred Seymour, on their own behalf and on behalf of all other members of Stk'emlupsemc te Secwepemc of the Secwepemc Nation (Court File A-68-17)
- Raincoast Conservation Foundation and Living Oceans Society (Court File A-84-17).

V. The legislative regime

53 For ease of reference the legislative provisions referred to in this section of the reasons are set out in the Appendix to these reasons.

A. The requirements of the National Energy Board Act

54 As explained above, no company may operate an interprovincial or international pipeline in Canada unless the National Energy Board has issued a certificate of public convenience and necessity, and, after the pipeline is built, has given leave to the company to open the pipeline.

55 Trans Mountain's completed application for a certificate of public convenience and necessity for the Project triggered the National Energy Board's obligation to assess the Project pursuant to section 52 of the *National Energy Board Act*. Subsection 52(1) of that Act requires the Board to prepare and submit to the Minister of Natural Resources, for transmission to the Governor in Council, a report which sets out the Board's recommendation as to whether the certificate should be granted, together with all of the terms and conditions that the Board considers the certificate should be subject to if issued. The Board is to provide its reasons for its recommendation. When considering whether to recommend issuance of a certificate the Board is required to take into account "whether the pipeline is and will be required by the present and future public convenience and necessity".

56 The Board's recommendation is, pursuant to subsection 52(2) of the *National Energy Board Act*, to be based on "all considerations that appear to it to be directly related to the pipeline and to be relevant" and the Board may have regard to five specifically enumerated factors which include "any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application."

57 If an application relates to a "designated" project, as defined in section 2 of the *Canadian Environmental Assessment Act, 2012*, the Board's report must also set out the Board's environmental assessment of the project. This assessment is to be prepared under the *Canadian Environmental Assessment Act, 2012* (subsection 52(3) of the *National Energy Board Act*). A designated project is defined in section 2 of the *Canadian Environmental Assessment Act, 2012*:

> designated project means one or more physical activities that
>
> (a) are carried out in Canada or on federal lands;
>
> (b) are designated by regulations made under paragraph 84(*a*) or designated in an order made by the Minister under subsection 14(2); and
>
> (c) are linked to the same federal authority as specified in those regulations or that order.
>
> It includes any physical activity that is incidental to those physical activities.
>
> projet désigné Une ou plusieurs activités concrètes:
>
> a) exercées au Canada ou sur un territoire domanial;
>
> b) désignées soit par règlement pris en vertu de l'alinéa 84*a*), soit par arrêté pris par le ministre en vertu du paragraphe 14(2);
>
> c) liées à la même autorité fédérale selon ce qui est précisé dans ce règlement ou cet arrêté.
>
> Sont comprises les activités concrètes qui leur sont accessoires.

58 The remaining subsections in section 52 deal with the timeframe in which the Board must complete its report. Generally, a report must be submitted to the Minister within the time limit specified by the Chair of the Board. The specified time limit must not be longer than 15 months after the completed application has been submitted to the Board.

B. The requirements of the Canadian Environmental Assessment Act, 2012

59 Pursuant to subsection 4(3) of the *Regulations Designating Physical Activities*, SOR/2012-147, and section 46 of the Schedule thereto, because the Project includes a new onshore pipeline longer than 40 kilometres, the Project is a designated project as defined in part (b) of the definition of "designated project" set out in paragraph 57 above. In consequence, the Board was required to conduct an environmental assessment under the *Canadian Environmental Assessment Act, 2012*. For this purpose, subsection 15(*b*) of the *Canadian Environmental Assessment Act, 2012* designated the National Energy Board to be the sole responsible authority for the environmental assessment.

60 As the responsible authority, the Board was required to take into account the environmental effects enumerated in subsection 5(1) of the *Canadian Environmental Assessment Act, 2012*. These effects include changes caused to the land, water or air and to the life forms that inhabit these elements of the environment. The effects to be considered are to include the effects upon Aboriginal peoples' health and socio-economic conditions, their physical and cultural heritage, their current use of lands and resources for traditional purposes, and any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

61 Subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* required the Board to take into account a number of enumerated factors when conducting the environmental assessment, including:

- the environmental effects of the designated project (including the environmental effects of malfunctions or accidents that may occur in connection with the designated project) and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

- mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;

- alternative means of carrying out the designated project that are technically and economically feasible, and the environmental effects of any such alternative means; and

- any other matter relevant to the environmental assessment that the responsible authority, here the Board, requires to be taken into account.

62 The Board was also required under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* to make recommendations to the Governor in Council with respect to the decision to be made by the Governor in Council under paragraph 31(1)(*a*) of that Act — a decision about the existence of significant adverse environmental effects and whether those effects can be justified in the circumstances.

C. Consideration by the Governor in Council

63 Once in receipt of the report prepared in accordance with the requirements of the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*, the Governor in Council may make its decision concerning the proponent's application for a certificate.

64 Three decisions are available to the Governor in Council. It may, by order:

i. "direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report" (paragraph 54(1)(*a*) of the *National Energy Board Act*); or

ii. "direct the Board to dismiss the application for a certificate" (paragraph 54(1)(*b*) of the *National Energy Board Act*); or

iii. "refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration" and specify a time limit for the reconsideration (subsections 53(1) and (2) of the *National Energy Board Act*).

65 Subsection 54(2) of the *National Energy Board Act* requires that the Governor in Council's order "must set out the reasons for making the order."

66 Subsection 54(3) of the *National Energy Board Act* requires the Governor in Council to issue its order within three months after the Board's report is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, extend this time limit.

67 Additionally, once the National Energy Board as the responsible authority for the designated project has submitted its report with respect to the environmental assessment, pursuant to subsection 31(1) of the *Canadian Environmental Assessment Act, 2012*, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*, "decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment ... that the designated project":

> (i) is not likely to cause significant adverse environmental effects,
>
> (ii) is likely to cause significant adverse environmental effects that can be justified in the circumstances, or les circonstances,
>
> (iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances;
>
> (i) n'est pas susceptible d'entraîner des effets environnementaux négatifs et importants,
>
> (ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans
>
> (iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

VI. The report of the National Energy Board

68 On May 19, 2016, the Board issued its report which recommended approval of the Project. The recommendation was based on a number of findings, including:

- With the implementation of Trans Mountain's environmental protection procedures and mitigation measures, and the Board's recommended conditions, the Project is not likely to cause significant adverse environmental effects.

- However, effects from the operation of Project-related marine vessels would contribute to the total cumulative effects on the Southern resident killer whales, and would further impede the recovery of that species. Southern resident killer whales are an endangered species that reside in the Salish Sea. Project-related marine shipping follows a route through the Salish Sea to the open ocean that travels through the whales' critical habitat as identified in the Recovery Strategy for the Northern and Southern resident killer whales. The Board's finding was that "the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, and that it is likely to result in significant adverse effects on Aboriginal cultural uses associated with these marine mammals."

- The likelihood of a spill from the Project or from a Project-related tanker would be very low in light of the mitigation and safety measures to be implemented. However, the consequences of large spills could be high.

- The Board's recommendation and decisions with respect to the Project were consistent with subsection 35(1) of the *Constitution Act, 1982*.

• The Project would be in the Canadian public interest and would be required by the present and future public convenience and necessity.

• If approved, the Board would attach 157 conditions to the certificate of public convenience and necessity. The conditions dealt with a broad range of matters, including the safety and integrity of the pipeline, emergency preparedness and response and ongoing consultation with affected entities, including Indigenous communities.

VII. The decision of the Governor in Council

69 On November 29, 2016, the Governor in Council issued the Order in Council, accepting the Board's recommendation that the Project be approved and directing the Board to issue a certificate of public convenience and necessity to Trans Mountain.

70 The Order in Council contained a number of recitals, two of which are relevant to these applications. First, the Governor in Council stated its satisfaction "that the consultation process undertaken is consistent with the honour of the Crown and the [Aboriginal] concerns and interests have been appropriately accommodated". Second, the Governor in Council accepted the Board's recommendation that the Project is required by present and future public convenience and necessity and that it will not likely cause significant adverse environmental effects.

71 The Order in Council was followed by a 20-page explanatory note which was stated not to form part of the Order in Council. The Explanatory Note described the Project and its objectives and the review process before the National Energy Board, and summarized the issues raised before the Board. The Explanatory Note also dealt with matters that post-dated the Board's report and set out the government's "response to what was heard".

VIII. Factual background

A. Canada's consultation process

72 The first step in the consultation process was determining the Indigenous groups whose rights and interests might be adversely impacted by the Project. In order to do this, a number of federal departments and the National Energy Board coordinated research and analysis on the proximity of Indigenous groups' traditional territories to elements of the Project, including the proposed pipeline right-of-way, the marine terminal expansion, and the designated shipping lanes. Approximately 130 Indigenous groups were identified, including all of the Indigenous applicants.

73 On August 12, 2013, the National Energy Board wrote to the identified Indigenous groups to advise that Trans Mountain had filed a Project description on May 23, 2013, and to provide preliminary information about the upcoming review process. This letter also attached a letter from the Major Projects Management Office of Natural Resources Canada. The Major Projects Management Office's letter advised that Canada would rely on the National Energy Board's public hearing process:

> to the extent possible, to fulfil any Crown duty to consult Aboriginal groups for the proposed Project. Through the [National Energy Board] process, the [Board] will consider issues and concerns raised by Aboriginal groups. The Crown will utilise the [National Energy Board] process to identify, consider and address the potential adverse impacts of the proposed Project on established or potential Aboriginal and treaty rights.

74 In subsequent letters sent to Indigenous groups between August 2013 and February 19, 2016, the Major Projects Management Office directed Indigenous groups that could be impacted by the Project to participate in and communicate their concerns through the National Energy Board public hearings. Additionally, Indigenous groups were advised that Canada viewed the consultation process to be as follows:

> i. Canada would rely, to the extent possible, on the Board's process to fulfil its duty to consult Indigenous peoples about the Project;

ii. There would be four phases of Crown consultation:

a. "Phase I": early engagement, from the submission of the Project description to the start of the National Energy Board hearing;

b. "Phase II": the National Energy Board hearing, commencing with the start of the Board hearing and continuing until the close of the hearing record;

c. "Phase III": consideration by the Governor in Council, commencing with the close of the hearing record and continuing until the Governor in Council rendered its decision in relation to the Project; and

d. "Phase IV": regulatory authorization should the Project be approved, commencing with the decision of the Governor in Council and continuing until the issuance of department regulatory approvals, if required.

iii. Natural Resources Canada's Major Projects Management Office would serve as the Crown Consultation Coordinator for the Project.

iv. Following Phase III consultations, an adequacy of consultation assessment would be prepared by the Crown. The assessment would be based upon the depth of consultation owed to each Indigenous group. The depth of consultation owed would in turn be based upon the Project's potential impact on each group and the strength of the group's claim to potential or established Aboriginal or treaty rights.

75 On May 25, 2015, towards the end of Phase II, the Major Projects Management Office wrote to Indigenous groups, including the applicants, to provide additional information on the scope and timing of Phase III Crown consultation. Indigenous groups were advised that:

i. Canada intended to submit summaries of the concerns and issues Indigenous groups had brought forward to date and to seek feedback on the completeness and accuracy of the summaries. The summaries would be issued in the form of Information Requests, a Board hearing process explained below. Canada would also seek Indigenous groups' views on adverse impacts not yet addressed by Trans Mountain's mitigation measures. The Crown would use the information provided by Indigenous groups to "refine our current understanding of the potential impacts of the project on asserted or established Aboriginal or treaty rights."

ii. Phase III consultation would focus on two questions:

a. Are there outstanding concerns with respect to Project-related impacts to potential or established Aboriginal or treaty rights?

b. Are there incremental accommodation measures that should be considered by the Crown to address any outstanding concerns?

iii. Information made available to the Crown throughout each phase of the consultation process would be consolidated into a "Crown Consultation Report". "This report will summarize both the procedural aspects of consultations undertaken and substantive issues raised by Aboriginal groups, as well as how these issues may be addressed in the process". The section of the Crown Consultation Report dealing with each Indigenous group would be provided to the group for review and comment before the report was placed before the Governor in Council.

iv. If Indigenous groups identified outstanding concerns there were a number of options which might "be considered and potentially acted upon." The options were described to be:

The Governor in Council has the option of asking the [National Energy Board] to reconsider its recommendation and conditions. Federal and provincial governments could undertake additional

consultations prior to issuing additional permits and/or authorizations. Finally, federal and provincial governments can also use existing or new policy and program measures to address outstanding concerns.

(underlining added)

B. Prehearing matters and the Project application

76 To facilitate participation in the National Energy Board hearing process, the Board operates a participant funding program. On July 22, 2013, the Board announced that it was making funding available under this program to assist landowners, Indigenous groups and other interested parties to participate in the Board's consideration of the Project. To apply for funding, a party required standing as an intervener in the Board's process.

77 On July 29, 2013, the Board released its "list of issues" which identified the topics the Board would consider in its review of the Project. The following issues of relevance to these applications were included:

- the need for the proposed Project.
- the potential environmental and socio-economic effects of the proposed Project, including any cumulative environmental effects that were likely to result from the Project, including those the Board's Filing Manual required to be considered.
- the potential environmental and socio-economic effects of marine shipping activities that would result from the proposed Project, including the potential effects of accidents or malfunctions that might occur.
- the terms and conditions to be included in any recommendation to approve the Project that the Board might issue.
- the potential impacts of the Project on Indigenous interests.
- contingency plans for spills, accidents or malfunctions, during construction and operation of the Project.

78 On September 10, 2013, the Board issued "Filing Requirements Related to the Potential Environmental and Socio-Economic Effects of Increased Marine Shipping Activities." This was a guidance document intended to assist the proponent. The document described requirements that supplemented those set out in the Board's Filing Manual.

79 In particular, this guidance document required Trans Mountain's assessment of accidents and malfunctions to deal with a number of things, including measures to reduce the potential for accidents and malfunctions, credible worst case spill scenarios together with smaller spill scenarios and information on the fate and behaviour of any spilled hydrocarbons. For all mitigation measures Trans Mountain proposed, it was required to describe the roles, responsibilities and capabilities of each relevant organization in implementing mitigation measures, and the level of care and control Trans Mountain would have in overseeing or implementing the measures.

80 On December 16, 2013, Trans Mountain formally filed its application, seeking approval to construct and operate the Project.

C. The scoping decision and the hearing order

81 On April 2, 2014, the Board issued a number of decisions setting the parameters of the Project's environmental assessment and establishing the hearing process for the Project. Three of these decisions are of particular relevance to these applications.

82 First, the Board issued a hearing order which set out timelines and a process for the hearing. The hearing order did not allow any right of oral cross-examination. Instead, the hearing order provided a process whereby interveners and the Board could submit written interrogatories, referred to as Information Requests, to Trans Mountain. The hearing order also set out a process for interveners and the Board to compel adequate responses to their Information Requests,

an opportunity for Indigenous groups to provide oral traditional evidence, and allowed both written arguments in chief and summary oral arguments.

83 Next, in the decision referred to as the "scoping" decision, the Board defined the "designated project" to be assessed, and described the factors to be assessed under the *Canadian Environmental Assessment Act, 2012* (and the scope of each factor). In defining the "designated project", the Board did not include marine shipping activities as part of the "designated project". Rather, the Board stated that it would consider the effects of increased marine shipping under the *National Energy Board Act*. To the extent there was potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board would consider those effects under the cumulative effects portion of the *Canadian Environmental Assessment Act, 2012* environmental assessment.

84 Finally, the Board ruled on participation rights in the hearing. The Board granted participation status to 400 interveners and 1,250 commentators. All of the applicants before the Court applied for, and were granted, intervener status. Additionally, a number of government departments were granted intervener status; both Health Canada and the Pacific Pilotage Authority were granted commentator status.

D. Challenges to the hearing order and the scoping decision

85 Of relevance to issues raised in these applications are two challenges brought against the hearing order and the scoping decision.

86 The first challenge requested that all evidence filed in the hearing be subject to oral cross-examination. The Board dismissed this request in Ruling No. 14. In Ruling No. 51, the Board dismissed motions seeking reconsideration of Ruling No. 14.

87 The second challenge was brought by Tsleil-Waututh to aspects of both the hearing order and the scoping decision. Tsleil-Waututh asserted, among other things, that the Board erred in law by failing to include marine shipping activities in the Project description. This Court granted Tsleil-Waututh leave to appeal this and other issues. On September 6, 2016, this Court dismissed the appeal ([*Tsleil-Waututh Nation v. Canada (National Energy Board)*] 2016 FCA 219 (F.C.A.)). The dismissal of the appeal was expressly stated, at paragraph 21 of the Court's reasons, to be without prejudice to Tsleil-Waututh's right to raise the issue of the proper scope of the Project "in subsequent proceedings".

E. The TERMPOL review process

88 In view of the Project's impact on marine shipping, it is useful to describe this process.

89 Trans Mountain requested that the marine transportation components of the Project be assessed under the voluntary Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL). The review process was chaired by Transport Canada and the review committee was composed of representatives of other federal agencies and Port Metro Vancouver.

90 The purpose of the review process was to objectively appraise operational vessel safety, route safety and cargo transfer operations associated with the Project, with a focus on improving, where possible, elements of the Project.

91 The review committee did not identify regulatory concerns for the tankers, tanker operations, the proposed route, navigability, other waterway users or the marine terminal operations associated with tankers supporting the Project. It found that Trans Mountain's commitments to the existing marine safety regime would provide for a higher level of safety for tanker operations appropriate to the increase in traffic.

92 The review committee also proposed certain measures to provide for a high level of safety for tanker operations. Examples of such proposed measures were the extended use of tethered and untethered tug escorts and the extension of the pilot disembarkation zone. Trans Mountain agreed to adopt each of the recommended measures.

93 The TERMPOL report formed part of Transport Canada's written evidence before the National Energy Board.

F. The applicants' participation in the hearing before the Board

94 The applicants, as interveners before the Board, were entitled to:

- issue Information Requests to Trans Mountain and others;
- file motions, including motions to compel adequate responses to Information Requests;
- file written evidence;
- comment on draft conditions; and,
- present written and oral summary argument.

95 All of the applicants issued Information Requests, filed or supported motions and filed written evidence. Interveners who filed evidence were required to respond in writing to written questions about their evidence from the Board, Trans Mountain or other interveners.

96 All of the applicants filed written submissions commenting on draft conditions except for the City of Vancouver and SSN.

97 All of the applicants filed written arguments and all of the applicants except SSN delivered oral summary arguments.

98 Indigenous interveners could adduce traditional Indigenous evidence, either orally or in writing. Oral evidence could be questioned orally by other interveners, Trans Mountain or the Board. Tsleil-Waututh, Squamish, Coldwater, SSN, and Upper Nicola provided oral, Indigenous traditional evidence. The Stó:lo Collective formally objected to the Board's procedure for introducing Indigenous oral traditional evidence and did not provide such evidence.

G. Participant funding

99 As previously mentioned, the Board operated a participant funding program. Additional funding was available through the Major Projects Management Office and Trans Mountain.

100 It is fair to say that the participant funding provided to the applicants by the Board and the Major Projects Management Office was generally viewed to be inadequate by them (see for example the affidavit of Chief Ian Campbell of the Squamish Nation). Concerns were also expressed about delays in funding. Funds provided by the Board could only be applied to work conducted after the funding was approved and a funding agreement was executed.

101 The following funds were paid or offered.

1. Tsleil-Waututh Nation

102 Tsleil-Waututh requested $766,047 in participant funding. It was awarded $40,000, plus travel costs for two members to attend the hearing. Additionally, the Major Projects Management Office offered to pay $14,000 for consultation following the close of the hearing record and $12,000 following the release of the Board's report. These offers were not accepted.

2. The Squamish Nation

103 Squamish applied for $293,350 in participant funding. It was awarded $44,720, plus travel costs for one person to attend the hearing. The Major Projects Management Office offered $12,000 for consultations following the close of

the Board's hearing record, and $14,000 to support participation in consultations following the release of the Board's report. These funds were paid.

3. Coldwater Indian Band

104 Coldwater was awarded $48,490 in participant funding from the Board. Additionally, the Major Projects Management Office offered an additional $52,000 in participant funding.

4. The Stó:lo Collective

105 The Stó:lo Collective was awarded $42,307 per First Nation band in participant funding from the Board. Additionally, the Major Projects Management Office offered $4,615.38 per First Nation band for consultation following the close of the Board's hearing record, and $5,384.61 per First Nation band following the release of the Board's report.

5. Upper Nicola Band

106 Upper Nicola was awarded $40,000 plus travel costs for two members to attend the hearing and an additional $10,000 in special funding through the Board's participant funding program. Additionally, the Major Projects Management Office offered Upper Nicola Band and the Okanagan Nation Alliance $11,977 and $24,000 respectively in participant funding for consultations following the close of the Board's hearing record. The Okanagan Nation Alliance was offered an additional $26,000 following the release of the Board's report.

6. SSN

107 SSN applied for participant funding in excess of $300,000 in order to participate in the Board's hearing. It was awarded $36,920 plus travel costs for two members to attend the hearing. Additionally, the Major Projects Management Office offered $18,000 in participation funding for consultations following the close of the Board's hearing record and $21,000 for consultations following the release of the Board's report.

7. Raincoast Conservation Foundation and Living Oceans Society

108 Raincoast was awarded $111,100 plus travel costs for two people to attend the hearing from the Board's participant funding program. Living Oceans was awarded $89,100 plus travel costs for two persons to attend the hearing through the participant funding program.

H. Crown consultation efforts — a brief summary

1. Phase I (from 2013 to April 2014)

109 In this initial engagement phase some correspondence was exchanged between the Crown and some of the Indigenous applicants. Canada does not suggest that any of this correspondence contained any discussion about any substantive matter.

2. Phase II (from April 2014 to February 2016)

110 During the Board's hearing process and continuing until the close of its hearing record, Canada continued to exchange correspondence with some of the Indigenous applicants. Additionally, some informational meetings were held; however, these meetings did not allow for any substantive discussion about any group's title, rights or interests, or the impact of the Project on the group's title, rights or interests.

111 To illustrate, Crown representatives met with Squamish officials on September 11, 2015, and November 27, 2015. At these meetings Squamish raised a number of concerns, including its concerns that Squamish had not been involved in the design of the consultation process, that the consultation process was inadequate to assess impacts on Squamish rights

and title and that inadequate funding was provided for participation in the Board's hearing. Squamish also expressed confusion about the respective roles of the Board and Trans Mountain in consultations with Squamish.

112 Similarly, informational meetings were held with the Stó:lo Collective on July 18, 2014 and December 3, 2015. Again, no substantive discussion took place about Stó:lo's title, rights and interests or the impact of the Project thereon. The Stó:lo also expressed their concerns about the consultation process, including their concerns that the Board failed to compel Trans Mountain to respond adequately to Information Requests and the lack of specificity of the Board's draft terms and conditions.

113 Informational hearings of this nature were also held with Upper Nicola and SSN in 2014.

114 It is fair to say that in Phase II Canada continued to rely upon the National Energy Board process to fulfil the Crown's duty to consult. Canada's efforts in Phase II were largely directed to using the Information Request process to solicit concerns and potential mitigation measures from First Nations. Canada prepared tables to record potential Project impacts and concerns and to record and monitor whether those potential impacts and concerns were addressed in Trans Mountain's commitments, the Board's draft terms and conditions or other mitigation measures.

3. Phase III (February to November 2016)

115 Crown representatives met with all of the Indigenous applicants in Phase III. Generally, the Indigenous applicants expressed dissatisfaction with the National Energy Board process and the Crown's reliance on that process. Individual concerns raised by individual Indigenous applicants will be discussed in the context of consideration of the adequacy of Canada's consultation efforts.

116 Towards the latter part of Phase III, on August 16, 2016, the Major Projects Management Office and the British Columbia Environmental Assessment Office jointly sent a letter to Indigenous groups confirming that they were responsible for conducting consultation efforts for the Project, and that they were coordinating by participating in joint consultation meetings, sharing information and by preparing the draft "Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project" (Crown Consultation Report).

117 Canada summarized its consultation efforts in the Crown Consultation Report, which included appendices specific to individual Indigenous groups. Indigenous groups were generally provided with a first draft of the Crown Consultation Report, together with the appendix relevant to that group, in August of 2016. Comments and corrections were to be provided in September 2016. A second draft of the Crown Consultation Report, together with relevant appendices, was provided to Indigenous groups in November of 2016, with comments due by mid-November.

I. Post National Energy Board report events

1. The Interim Measures for Pipeline Reviews

118 On January 27, 2016, Canada introduced this initiative as part of a strategy to review Canada's environmental assessment processes. The Interim Measures set out five guiding principles to guide the approval of major pipeline projects:

i. No proponent would be required to return to the beginning of the approval process. That is, no proponent would be required to begin the approval process afresh.

ii. Decisions about pipeline approval would be based on science, traditional knowledge of Indigenous peoples and other relevant evidence.

iii. The views of the public and affected communities would be sought and considered.

iv. Indigenous peoples would be meaningfully consulted, and, where appropriate, accommodated.

v. The direct and upstream greenhouse gas emissions linked to a project under review would be assessed.

119 Canada advised that it planned to apply the Interim Measures to the Project and that in order to do so it would: undertake deeper consultations with Indigenous peoples and provide funding to support participation in these deeper consultations; assess the upstream gas emissions associated with the Project and make this information public; and, appoint a ministerial representative to engage local communities and Indigenous groups in order to obtain their views and report those views back to the responsible Minister.

120 The Minister of Natural Resources sought and obtained a four-month extension of time to permit implementation of the Interim Measures. The deadline for the Governor in Council to make its decision on Project approval was, therefore, on or before December 19, 2016.

2. The Ministerial Panel

121 On May 17, 2016, the Minister announced he was striking a three-member independent Ministerial Panel that would engage local communities and Indigenous groups as contemplated in Canada's implementation of the Interim Measures for the Project.

122 The Ministerial Panel held a series of public meetings in Alberta and British Columbia, received emails and received responses to an online questionnaire. The Ministerial Panel submitted its report to the Minister on November 1, 2016, in which it identified six "high-level questions" that "remain unanswered" that it commended to Canada for serious consideration.

123 The report of the Ministerial Panel expressly stated that the panel's work was "not intended as part of the federal government's concurrent commitment to direct consultation with First Nations" and that "full-scale consultation" was never the intent of the panel "especially in the case of First Nations, where the responsibility for consultation fell elsewhere". It follows that no further consideration of the Ministerial Panel is required in the context of consideration of the adequacy of Canada's consultation efforts.

3. Greenhouse gas assessment

124 For completeness, I note that in November 2016, Environment Canada did publish an assessment estimating the upstream greenhouse gas emissions from the Project.

IX. The issues to be determined

125 Broadly speaking, the applicants' submissions require the Court to address the following questions.

126 First, is there merit in any of the preliminary issues raised by the parties?

127 Second, under the applicable legislative scheme, can the report of the National Energy Board be judicially reviewed?

128 Finally, should the decision of the Governor in Council be set aside? This in turn requires the Court to consider:

i. What is the standard of review to be applied to the decision of the Governor in Council?

ii. Did the Governor in Council err in determining whether the Board's process of assembling, analyzing, assessing and studying the evidence before it was so deficient that the report submitted by it to the Governor in Council did not qualify as a "report" within the meaning of the *National Energy Board Act*? This will require the Court to consider:

a. was the process adopted by the Board procedurally fair?

b. did the Board err by failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*?

c. did the Board err in its treatment of the *Species at Risk Act*, S.C. 2002, c. 29?

d. did the Board impermissibly fail to decide certain issues before it recommended approval of the Project?

e. did the Board impermissibly fail to consider alternatives to the Westridge Marine Terminal?

iii. Did the Governor in Council fail to comply with the statutory requirement to give reasons?

iv. Did the Governor in Council err by concluding that the Indigenous applicants were adequately consulted and, if necessary, accommodated?

X. Consideration of the issues

A. The preliminary issues

129 Before turning to the substantive issues raised in this application it is necessary to deal with three preliminary issues raised by the parties. They may be broadly characterized as follows.

130 First, as described above, a number of the applicants commenced applications challenging the report of the National Energy Board. Trans Mountain moves to strike on a preliminary basis the six applications for judicial review commenced in respect of the report of the National Energy Board on the ground that the report is not amenable to judicial review.

131 Second, the applicants ask that the two affidavits sworn on behalf of Trans Mountain by Robert Love, or portions thereof, be struck or given no weight on a number of grounds, including that Mr. Love had no personal knowledge of the bulk of the matters sworn to in his affidavits.

132 Finally, the applicants object to the "Consultation Chronologies" found in Canada's compendium.

1. Trans Mountain's motion to strike

133 In *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 (F.C.A.), at paragraph 125, this Court concluded that applications for judicial review do not lie against reports made pursuant to section 52 of the *National Energy Board Act* recommending whether a certificate of public convenience and necessity should issue for all or any portion of a pipeline. Accordingly, Trans Mountain seeks orders striking the six notices of application (listed above at paragraph 51) that challenge the Board's report.

134 A comparison of the parties enumerated in paragraph 51 with those parties who challenge the decision of the Governor in Council (enumerated in paragraph 52) shows that all but one of the applicants who challenge the report of the National Energy Board also challenge the decision of the Governor in Council. For reasons not apparent on the record, the City of Vancouver elected to challenge only the report of the Board.

135 The City of Vancouver, supported by the City of Burnaby, Tsleil-Waututh, Raincoast and Living Oceans, responds to Trans Mountain by arguing that *Gitxaala* was wrongly decided on this point and that in any event, the applications should not be struck on a preliminary basis.

136 Those applicants who challenge both decisions are able to argue, and do argue, that in *Gitxaala* this Court determined that the decision of the Governor in Council cannot be considered in isolation from the Board's report; it is for the Governor in Council to determine whether the process followed by the Board in assembling, analyzing, assessing,

and studying the evidence before it was so deficient that its report does not qualify as a "report" within the meaning of the *National Energy Board Act*.

137 Put another way, a statutory pre-condition for a valid Order in Council is a report from the Board prepared in accordance with all legislative requirements. The Governor in Council is therefore required to be satisfied that the report was prepared in accordance with the governing legislation. This makes practical sense as well because the Board's report formed the factual basis for the decision of the Governor in Council.

138 It is in the context of these arguments that I turn to consider whether the applications should be struck on a preliminary basis.

139 The jurisprudence of this Court is uniformly to the effect that motions to strike applications for judicial review are to be resorted to sparingly: see, for example, *League for Human Rights of B'Nai Brith Canada v. R.*, 2009 FCA 82, 387 N.R. 376 (F.C.A.), at paragraph 5, citing *Pharmacia Inc. v. Canada (Minister of National Health & Welfare)* (1994), [1995] 1 F.C. 588, 176 N.R. 48 (Fed. C.A.).

140 The rationale for this approach is that judicial review proceedings are designed to proceed with celerity; motions to strike carry the potential to unduly and unnecessarily delay the expeditious determination of an application. Therefore justice is better served by allowing the Court to deal at one time with all of the issues raised by an application.

141 This rationale is particularly applicable in the present case where striking the applications would still leave intact the ability of all but one of the applicants to argue the asserted flaws in the Board's report in the context of the Court's review of the decision of the Governor in Council. Little utility would be achieved in deciding the motions when the arguments in support of them will be considered now, in the Court's determination of the merits of the applications.

142 For this reason, in the exercise of my discretion I would dismiss Trans Mountain's motion to strike the applications brought challenging the report of the National Energy Board. I deal with the merits of the argument that the report is not amenable to judicial review below at paragraph 170 and following.

2. The applicants' motion asking that the two affidavits of Robert Love, or portions thereof, be struck or given no weight

143 The applicants argue that the Love affidavits, or portions thereof, should be struck or given no weight on three grounds. First, the applicants argue that Mr. Love had no personal knowledge of the bulk of the matters sworn to in his affidavits so that his evidence should be disregarded as inadmissible hearsay. Second, the applicants argue that the affidavits contain irrelevant and impermissible evidence about Trans Mountain's engagement and consultations with the Indigenous applicants. Finally, the applicants argue that the second affidavit impermissibly augments the evidence that was before the Board and the Governor in Council.

(a) The hearsay objection

144 In both impugned affidavits Mr. Love swore that "I have personal knowledge of the matters in this Affidavit, except where stated to be based on information and belief, in which case I believe the same to be true." Notwithstanding this statement, on cross-examination, Mr. Love admitted that his first affidavit was based almost entirely on facts of which he had no personal knowledge and that his affidavit failed to disclose that he relied on information and belief to assert those facts. He largely relied on Trans Mountain's lawyers to prepare the paragraphs of his affidavit of which he had no direct knowledge. The basis of his belief that his affidavit was truthful and accurate was his "trust in other people". He frequently admitted that there were other Trans Mountain employees who had direct knowledge of the matters set out in his affidavit (cross-examination of Robert Love, June 19, 2017, by counsel for the City of Burnaby, page 14, line 17 to page 50, line 8).

145 Similarly, under cross-examination Mr. Love admitted that he had no personal knowledge of the contents of his second affidavit which dealt with Trans Mountain's consultation with Squamish (cross-examination Robert Love, June

22, 2017, by counsel for Squamish, page 2, line 7 to page 11, line 4). When cross-examined by counsel for Coldwater, Mr. Love admitted that he was "largely" not involved with Trans Mountain's engagement with Coldwater. Rather, "[i]t was the aboriginal engagement team who did the communications." (cross-examination of Robert Love, June 22, 2017, by counsel for Coldwater, page 2, line 9 to page 2, line 21).

146 Mr. Love is the Manager, Land and Rights-of-Way for Kinder Morgan Canada Inc., a company related to Trans Mountain. During his cross-examination by counsel for Squamish he described his role to be responsible for securing "all of the private land interest for the Trans Mountain Expansion Project and to obtain all utility crossings". He was also responsible "for undertaking the land rights necessary to go through about 10 reserves that we have agreements with." Later, on his cross-examination, he explained that prior to swearing his affidavit he "sat down with Regan Schlecker and went through most of the First Nation's engagement and high-level [government] engagements that were happening here" because he had no direct involvement in those engagements. Regan Schlecker was Trans Mountain's Aboriginal affairs manager.

147 On the basis of Mr. Love's many admissions the applicants argue that Mr. Love's evidence should be struck or given no weight.

148 Trans Mountain argues in response that the City of Burnaby failed to object to the Love affidavits on a timely basis. It also argues that on judicial review the parties can provide background explanations and summaries regarding the administrative proceeding below and that no applicant points to any important statements in the affidavits that were shown to be based on hearsay.

149 I begin by rejecting Trans Mountain's argument that the arguments raised by Burnaby were raised too late and so should not be considered. While Burnaby may well not have raised its hearsay objection on a timely basis (see the order of the case management Judge issued on July 25, 2017), both the City of Vancouver and Squamish did object to the Love affidavits on a timely basis. Squamish adopts Burnaby's objections (Squamish's memorandum of fact and law, paragraph 133) and the City of Vancouver relies upon the cross-examination of Mr. Love conducted by counsel for Burnaby (Vancouver's memorandum of fact and law, paragraph 109). On this basis, in my view, Burnaby's arguments are properly before the Court.

150 With respect to Trans Mountain's argument on the merits, I begin by noting that to the extent background statements and summaries are admissible on an application for judicial review, this admissibility is for the sole and limited purpose of orienting the reviewing Court. In any event and more importantly, affidavits must always fully and candidly disclose if an affiant is relying on information and belief and what portions of the affidavit are based on information and belief. In that event, the affiant must disclose both the sources of the information relied upon and the bases for the affiant's belief in the truth of the information sworn to. This was not done in the present case.

151 Notwithstanding this failure, I do not see the need to strike portions of the Love affidavits. The affidavits are relevant for the purpose of orienting the Court. However, it is unsafe to rely on the contents of the Love affidavits for the purpose of establishing the truth of their contents unless Mr. Love had personal knowledge of a particular fact or matter. Because Mr. Love did not demonstrate any material, personal knowledge of Trans Mountain's engagement with the Indigenous applicants, and because there is no explanation as to why an individual directly involved in that engagement could not have provided evidence, evidence of Trans Mountain's engagement must come from other sources — such as the consultation logs Trans Mountain placed in evidence before the Board.

152 As I have determined that it is unsafe except in limited circumstances to rely upon the contents of the Love affidavits to establish the truth of their contents, it is unnecessary for me to consider the applicants' objection to the second affidavit on the ground that it impermissibly supplemented the consultation logs in evidence before the Board.

(b) Relevance of evidence of Trans Mountain's engagement with the Indigenous applicants

153 In answer to an Information Request issued by Squamish inquiring whether Canada delegated any procedural aspects of consultation to Trans Mountain, Canada responded:

> The Crown has not delegated the procedural aspects of its duty to consult to Trans Mountain. The Crown does rely on the [National Energy Board] review process to the extent possible to fulfill this duty, a process that requires the proponent to work with and potentially accommodate Aboriginal groups impacted by the project. The [National Energy Board] filing manual provides information to the proponent on the requirement to engage potentially affected Aboriginal groups. This does not constitute delegation of the duty to consult.
>
> (underlining added)

154 Based on this response, the Indigenous applicants argue that evidence of Trans Mountain's engagement with them is irrelevant. It is necessary to consider this submission because it is an issue that transcends the Love affidavits — there is other evidence of Trans Mountain's engagement.

155 I accept Trans Mountain's submission that proper evidence of its engagement with the Indigenous applicants is relevant. I reach this conclusion for the following reasons.

156 First, the Indigenous applicants were informed by the Major Projects Management Office's letter of August 12, 2013, that Canada would rely on the Board's public hearing process "to the extent possible" to fulfil the Crown's duty to consult. As Canada noted in its response to the Information Request, the Board's hearing process required Trans Mountain to work with, and potentially accommodate, Indigenous groups impacted by the Project. Thus the Major Projects Management Office's August 12 letter encouraged Indigenous groups with Project-related concerns to discuss those concerns directly with Trans Mountain. Unresolved concerns were to be directed to the National Energy Board. It follows from this that the Indigenous applicants were informed before the commencement of the Board's hearing process that the Board and, in turn, Canada would rely in part on Trans Mountain's engagement with them.

157 Thereafter, the Board required Trans Mountain "to make all reasonable efforts to consult with potentially affected Aboriginal groups and to provide information about those consultations to the Board." The Board expressly required this information to include "evidence on the nature of the interests potentially affected, the concerns that were raised and the manner and degree to which those concerns have been addressed. Trans Mountain was expected to report to the Board on all Aboriginal concerns that were expressed to it, even if it was unable or unwilling to address those concerns". (Report of the National Energy Board, page 46).

158 Trans Mountain's consultation was guided by the Board's Filing Manual requirements and directions given by the Board during the Project Description phase.

159 This demonstrates that Trans Mountain's consultation was central to the decision of the Board. Therefore, evidence of Trans Mountain's efforts is relevant.

160 My second reason for finding proper evidence of Trans Mountain's engagement to be relevant is that, consistent with Canada's response to Squamish's Information Request, a review of the Crown Consultation Report shows that in Section 3 Canada summarized "the procedural elements and chronology of Aboriginal consultations and engagement activities undertaken by the proponent, the [Board] and the Crown." Elements of Trans Mountain's engagement were summarized in the Crown Consultation Report, and therefore put before the Governor in Council so it could assess the adequacy of consultation. Elements that were summarized include Trans Mountain's Aboriginal Engagement Program and the Mutual Benefit Agreements Trans Mountain entered into with Indigenous groups. Trans Mountain's Aboriginal Engagement Program was noted to have provided approximately $12 million in capacity funding to potentially affected groups. As well, Trans Mountain provided funding to conduct traditional land and resource use and traditional marine resource use studies. As for the Mutual Benefit Agreements, as of November 2016, Canada was aware that 33 potentially

affected Indigenous groups had signed such agreements with Trans Mountain. These included a letter of support for the Project.

161 Canada's reliance on Trans Mountain's engagement also makes evidence about that engagement relevant.

162 Finally on this point, some Indigenous applicants assert that Trans Mountain's engagement efforts were inadequate. Evidence of Trans Mountain's engagement, including its provision of capacity funding, is relevant to this allegation and to the issue of the adequacy of available funding.

3. Canada's compendium — The Consultation Chronologies

163 In its compendium, Canada included schedules in the form of charts (referred to as "Consultation Chronologies") which describe events said to have taken place. The Indigenous applicants assert that the schedules are interpretive, inaccurate, and incomplete and that they should not be received by the Court for two reasons.

164 First, the Indigenous applicants argue that the Consultation Chronologies summarize the facts as perceived by the Crown. As such, the material should have appeared in Canada's affidavit and in its memorandum of fact and law. It is argued that Canada should not be permitted to circumvent page length restrictions on the length of its memorandum by creating additional resources in its compendium.

165 Second, the Indigenous applicants argue that the Consultation Chronologies are not evidence. Instead, the summaries are newly created documents that were not before the Board or the Governor in Council. Their admission is also argued to be prejudicial to the Indigenous applicants.

166 Canada responds that, as the case management Judge noted in his direction of September 7, 2017, "parties often include material in their compendia as an aid to argument. As long as the aid to argument is brief and helpful and is not anything resembling a memorandum of fact and law and as long as the aid to argument presents or is based entirely upon facts and data from the evidentiary record without adding to it, hearing panels of this Court usually permit it. Of course, there is a limit to this."

167 I agree with the Indigenous applicants that the Consultation Chronologies must be approached with caution. For example, the Consultation Chronology in respect of the Coldwater Indian Band recites that on May 3, 2016, Canada emailed Coldwater a letter dated November 3, 2015 sent in response to Coldwater's letter of August 20, 2015. The Consultation Chronology also recites that the letter contained an offer to meet with Coldwater to discuss the consultation process and Project-related issues. However, Coldwater points to the sworn evidence of its Chief Councillor to the effect that the November 3, 2015 letter did not actually address the concerns detailed in Coldwater's letter of August 20, 2015, and that the meeting was never arranged because the November 3, 2015 letter was not provided to Coldwater until May 3, 2016.

168 Thus, I well understand the concern of the Indigenous applicants. This said, this Court's understanding of the evidence is not based upon a summary in chart form which briefly summarizes the consultation process. The Court will base its decision upon the evidentiary record properly before it, which includes the record before the Board and the Governor in Council, the affidavits sworn in this proceeding, the cross-examinations thereon, the statement of agreed facts, and the contents of the agreed book of documents. The sole permissible use of the Consultation Chronologies is as a form of table of contents or finding aid that directs a reader to a particular document in the record. On the basis of this explanation of the limited permissible use of the Consultation Chronologies there is no need to strike them, a point conceded by counsel for Coldwater and Squamish in oral argument.

169 For completeness, I note that Upper Nicola moved on a preliminary basis to strike portions of the second Love affidavit on the ground that the affidavit impermissibly recited confidential information. That motion is the subject of brief, confidential reasons issued contemporaneously with these reasons. After the parties to the motion have the opportunity to make submissions, a public version of the confidential reasons will issue.

B. Is the report of the National Energy Board amenable to judicial review?

170 While I would dismiss Trans Mountain's motion to strike the application on a preliminary basis, because some applicants do challenge the report of the National Energy Board it is necessary to decide whether judicial review lies, notwithstanding this Court's conclusion to the contrary in *Gitxaala*.

171 The applicants who argue that, contrary to *Gitxaala*, the Board's report is amenable to judicial review acknowledge the jurisprudence of this Court to the effect that the test applied for overruling a decision of another panel of this Court is whether the previous decision is "manifestly wrong" in the narrow sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed: see, for example, *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 (Fed. C.A.), at paragraph 10. The applicants argue that *Gitxaala* was manifestly wrong in deciding that the Board's report was not justiciable. The specific errors asserted are:

> a. *Gitxaala* was manifestly wrong in holding that only "decisions about legal or practical interests are judicially reviewable". The Court did not address case law that has interpreted subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 more broadly.
>
> b. The Court failed to deal with the prior decision of this Court in *Forestethics Advocacy v. Canada (Attorney General)*, 2014 FCA 71, 390 D.L.R. (4th) 376 (F.C.A.).
>
> c. The Court failed to deal with prior jurisprudence of the Federal Court and this Court which did review environmental assessment reports prepared by a joint review panel.
>
> d. The Court referred to provisions of the *Canadian Environmental Assessment Act, 2012* that were inapplicable.
>
> e. The *Gitxaala* decision impermissibly thwarts the right to seek judicial review of the decision of the National Energy Board.

172 I will deal with each argument in turn after first reviewing this Court's analysis in *Gitxaala*.

1. The decision of this Court in Gitxaala

173 The Court's consideration of the justiciability of the report of the Joint Review Panel began with its detailed analysis of the legislative scheme (reasons, paragraphs 99 to 118). The Court then turned to consider the proper characterization of the legislative scheme, which the Court described to be "a complete code for decision-making regarding certificate applications." The Court then reasoned:

> [120] The legislative scheme shows that for the purposes of review the only meaningful decision-maker is the Governor in Council.
>
> [121] Before the Governor in Council decides, others assemble information, analyze, assess and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon. In this scheme, no one but the Governor in Council decides anything.
>
> [122] In particular, the environmental assessment under the *Canadian Environmental Assessment Act, 2012* plays no role other than assisting in the development of recommendations submitted to the Governor in Council so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued.
>
> [123] This is a different role — a much attenuated role — from the role played by environmental assessments under other federal decision-making regimes. It is not for us to opine on the appropriateness of the policy expressed and implemented in this legislative scheme. Rather, we are to read legislation as it is written.

[124] Under this legislative scheme, the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation:

> • In the case of the report or portion of the report setting out the environmental assessment, subsection 29(3) of the *Canadian Environmental Assessment Act, 2012* provides that it is "final and conclusive," but this is "[s]ubject to sections 30 and 31." Sections 30 and 31 provide for review of the report by the Governor in Council and, if the Governor in Council so directs, reconsideration and submission of a reconsideration report by the Governor in Council.
>
> • In the case of the report under section 52 of the *National Energy Board Act*, subsection 52(11) of the *National Energy Board Act* provides that it too is "final and conclusive," but this is "[s]ubject to sections 53 and 54." These sections empower the Governor in Council to consider the report and decide what to do with it.

[125] In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, as set out above, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.

[126] Under this legislative scheme, the National Energy Board also does not really decide anything, except in a formal sense. After the Governor in Council decides that a proposed project should be approved, it directs the National Energy Board to issue a certificate, with or without a decision statement. The National Energy Board does not have an independent discretion to exercise or an independent decision to make after the Governor in Council has decided the matter. It simply does what the Governor in Council has directed in its Order in Council.

(underlining added)

174 Having reviewed *Gitxaala*, I now turn to the asserted errors.

2. Was Gitxaala wrongly decided on this point?

(a) Did the Court err by stating that only "decisions about legal or practical interests" are judicially reviewable?

175 Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by "anyone directly affected by *the matter* in respect of which relief is sought" (underlining added). In *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 (F.C.A.), this Court considered the scope of subsection 18.1(1) as follows:

> [24] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> . . .
>
> [28] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.

[29] One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, (2009), 86 Admin. L.R. (4th) 149.

(underlining added)

176 To similar effect, in *Democracy Watch v. Canada (Conflict of Interest & Ethics Commissioner)*, 2009 FCA 15, 387 N.R. 365 (F.C.A.), the Court wrote, at paragraph 10, that when "administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review".

177 On the basis of these authorities the City of Vancouver, supported by the City of Burnaby and Raincoast and Living Oceans, argues that this Court erred by writing in paragraph 125 in *Gitxaala* that only "decisions about legal or practical interests" are reviewable. The Court is said to have overlooked the established jurisprudence to the effect that "matter" as used in subsection 18.1(1) denotes a broader category than merely decisions.

178 In my view, when the Court's analysis in *Gitxaala* is read in its entirety no such statement was made and no such error was made.

179 In *Gitxaala*, the Court found that the only action to carry legal consequences was the decision of the Governor in Council. The environmental assessment conducted by the Joint Review Panel under the *Canadian Environmental Assessment Act, 2012* did not affect legal rights or carry legal consequences. Instead, the assessment played "no role other than assisting in the development of recommendations submitted to the Governor in Council" (reasons, paragraph 122). The same could be said of the balance of the report prepared pursuant to the requirements of the *National Energy Board Act*.

180 Put another way, on the basis of the legislative scheme enacted by Parliament, the report of the Joint Review Panel constituted a set of recommendations to the Governor in Council that lacked any independent legal or practical effect. It followed that judicial review did not lie from it.

181 Both the determination about the effect of the report of the Joint Review Panel and the conclusion that it was not justiciable were wholly consistent with *Air Canada* and *Democracy Watch*. It was therefore unnecessary for the Court to expressly deal with these decisions, or with subsection 18.1(1).

182 To complete this analysis, I note that the City of Vancouver also argues that it was prejudiced because the report of the National Energy Board did not comply with section 19 of the *Canadian Environmental Assessment Act, 2012* and because the Board's process was unfair. However, any detrimental effects upon the City of Vancouver could have been remedied through a challenge to the decision of the Governor in Council; the City has not asserted that it suffered any prejudice in the interval between the issuance of the Board's report and the issuance of the Order in Council by the Governor in Council.

(b) Forestethics Advocacy v. Canada (Attorney General)

183 In this decision, a single Judge of this Court decided whether this Court or the Federal Court had jurisdiction to entertain applications for judicial review brought in respect of the Report of the Joint Review Panel for the Enbridge Northern Gateway Project. Justice Sharlow found jurisdiction to lie in this Court. The City of Vancouver argues that implicit in this decision is the conclusion the reports prepared by joint review panels under the *Canadian Environmental Assessment Act, 2012* are judicially reviewable.

184 I respectfully disagree. At issue in *Forestethics* was the proper interpretation of section 28 of the *Federal Courts Act*. The Court made no finding about whether the report is amenable to judicial review — its only finding was that the

propriety of the report (which would include whether it was amenable to judicial review) was a matter for this Court, not the Federal Court.

(c) The jurisprudence which reviewed environmental assessment reports

185 The City of Vancouver also points to jurisprudence in which environmental assessment reports prepared by joint review panels were judicially reviewed, and argues that this Court erred by failing to deal with this jurisprudence. The authorities relied upon by Vancouver are: *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, 15 Admin. L.R. (3d) 25 (Fed. T.D.); *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* (1999), [2000] 2 F.C. 263, 169 F.T.R. 298 (note) (Fed. C.A.); *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, 80 Admin. L.R. (4th) 74 (F.C.); *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520, 422 F.T.R. 299 (Eng.) (F.C.); and, *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463, 455 F.T.R. 1 (F.C.), rev'd on appeal, [*Ontario Power Generation Inc. v. Greenpeace Canada*] 2015 FCA 186, 475 N.R. 247 (F.C.A.).

186 All of these authorities predate *Gitxaala*. They do not deal with the "complete code" of legislation that was before the Court in *Gitxaala*. But, more importantly, in none of these decisions was the availability of judicial review put in issue — this availability was assumed. In *Gitxaala* the Court reviewed the legislative scheme and explained why the report of the Joint Review Panel was not justiciable. The Court did not err by failing to refer to case law that had not considered this issue.

(d) The reference to inapplicable provisions of the Canadian Environmental Assessment Act, 2012

187 The City of Vancouver also argues that *Gitxaala* is distinguishable because it dealt with section 38 of the *Canadian Environmental Assessment Act, 2012*, a provision that has no application to the process at issue here. The City also notes that *Gitxaala*, at paragraph 124, referred to sections 30 and 31 of the *Canadian Environmental Assessment Act, 2012*. These sections are said not to apply to the Joint Review Panel at issue in *Gitxaala*.

188 I accept that pursuant to subsection 126(1) of the *Canadian Environmental Assessment Act, 2012* the environmental assessment of the Northern Gateway project (at issue in *Gitxaala*) was continued under the process established under the *Canadian Environmental Assessment Act, 2012*. Subsection 126(1) specified that such continuation was to be as if the assessment had been referred to a review panel under section 38 of the *Canadian Environmental Assessment Act, 2012*, and that the Joint Review Panel which continued the environmental assessment was considered to have been established under section 40 of the *Canadian Environmental Assessment Act, 2012*.

189 It followed that sections 29 through 31 of the *Canadian Environmental Assessment Act, 2012* did not apply to the Northern Gateway project, and ought not to have been referenced by the Court in *Gitxaala* in its analysis of the legislative scheme.

190 This said, the question that arises is whether these references were material to the Court's analysis. To assess the materiality, if any, of this error I begin by reviewing the content of the provisions said to be erroneously referred to in *Gitxaala*.

191 Section 29 of the *Canadian Environmental Assessment Act, 2012*, discussed above at paragraph 62, requires a responsible authority to ensure that its environmental assessment report sets out its recommendation to the Governor in Council concerning the decision the Governor in Council must make under paragraph 31(1)(*a*) of the *Canadian Environmental Assessment Act, 2012*. Section 30 allows the Governor in Council to refer any recommendation made by a responsible authority back to the responsible authority for reconsideration. Section 31 sets out the options available to the Governor in Council after it receives a report from a responsible authority. Paragraph 31(1)(*a*), discussed at paragraph 67 above, sets out the three choices available to the Governor in Council with respect to its assessment of the likelihood that a project will cause significant adverse environmental effects and, if so, whether such effects can be justified.

192 These provisions, without doubt, do apply to the Project at issue in these proceedings. Therefore, the Project is to be assessed under the legislative scheme analyzed in *Gitxaala*. It follows that *Gitxaala* cannot be meaningfully distinguished.

193 As to the effect, if any, of the erroneous references in *Gitxaala*, the statutory framework applicable to the Northern Gateway project originated in three sources: the *National Energy Board Act*; the *Canadian Environmental Assessment Act, 2012*; and, transitional provisions found in section 104 of the *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c.19 (Jobs Act).

194 Provisions relevant to the present analysis are:

- subsection 104(3) of the Jobs Act which required the Joint Review Panel to set out in its report an environmental assessment prepared under the *Canadian Environmental Assessment Act, 2012*;

- subsection 126(1) of the *Canadian Environmental Assessment Act, 2012* which continued the environmental assessment under the process established under that Act; and,

- paragraph 104(4)(*a*) of the Jobs Act which made the Governor in Council the decision-maker under section 52 of the *Canadian Environmental Assessment Act, 2012* (thus, it was for the Governor in Council to determine if the Project was likely to cause significant adverse environmental effects and, if so, whether such effects could be justified).

195 These provisions are to the same effect as sections 29 and 31 of the *Canadian Environmental Assessment Act, 2012*. I dismiss the relevance of section 30 to this analysis because it had no application to the environmental assessment under review in *Gitxaala*. Further, and more importantly, section 30 played no significant role in the Court's analysis.

196 It follows that the analysis in *Gitxaala* was based upon a proper understanding of the legislative scheme, notwithstanding the Court's reference to sections 29 and 31 of the *Canadian Environmental Assessment Act, 2012* instead of the applicable provisions.

197 Put another way, the error was in no way material to the Court's analysis of the respective roles of the Joint Review Panel, which prepared the report to the Governor in Council, and the Governor in Council, which received the panel's recommendations and made the decisions required under the legislative scheme.

198 Indeed, the technical nature of the erroneous references was acknowledged by Raincoast in its application for leave to appeal the *Gitxaala* decision to the Supreme Court of Canada. At paragraph 49 of its memorandum of argument it described the Court's error to be "technical in nature" (Trans Mountain's Compendium, volume 2, tab 35). To the same effect, Vancouver does not argue that the Court's error was material to its analysis. Vancouver simply notes the error in footnote 118 of its memorandum of fact and law.

199 Accordingly, I see no error in the *Gitxaala* decision that merits departing from its analysis.

(e) Gitxaala thwarts review of the decision of the National Energy Board

200 Finally, Vancouver argues that subsection 54(1) of the *National Energy Board Act* and 31(1) of the *Canadian Environmental Assessment Act, 2012* both make the Board's report a prerequisite to the decision of the Governor in Council. As the Governor in Council is not an adjudicative body, meaningful review must come in the form of judicial review of the report of the Board. The decision in *Gitxaala* thwarts such review.

201 I respectfully disagree. 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.

(f) Conclusion on whether the report of the National Energy Board is amenable to judicial review

202 For these reasons, I have concluded that the report of the National Energy Board is not justiciable. It follows that I would dismiss the six applications for judicial review which challenge that report. In the circumstance where the arguments about justiciability played a small part in the hearing I would not award costs in respect of these six applications.

203 As the City of Vancouver did not seek and obtain leave to challenge the Order in Council, it follows that the City is precluded from challenging the Order in Council.

C. Should the decision of the Governor in Council be set aside on administrative law grounds?

1. The standard of review to be applied to the decision of the Governor in Council

204 In *Gitxaala*, when considering the standard of review to be applied to the decision of the Governor in Council, the Court wrote that it was not legally permissible to adopt a "one-size-fits-all" approach to any particular administrative decision-maker. Rather, the standard of review must be assessed in light of the relevant legislative provisions, the structure of the legislation and the overall purpose of the legislation (*Gitxaala*, paragraph 137).

205 I agree. Particularly in the present case it is necessary to draw a distinction between the standard of review applied to what I will refer to as the administrative law components of the Governor in Council's decision and that applied to the constitutional component which required the Governor in Council to consider the adequacy of the process of consultation and, if necessary, accommodation. This is an approach accepted and urged by the parties.

(a) The administrative law components of the decision

206 In *Gitxaala*, the Court conducted a lengthy standard of review analysis (*Gitxaala*, paragraphs 128-155) and concluded that, because the Governor in Council's decision was a discretionary decision founded on the widest considerations of policy and public interest, the standard of review was reasonableness (*Gitxaala*, paragraph 145).

207 Canada, Trans Mountain and the Attorney General of Alberta submit that *Gitxaala* was correctly decided on this point.

208 Tsleil-Waututh, Raincoast and Living Oceans submit that the governing authority is not *Gitxaala*, but rather is the earlier decision of this Court in *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189, 376 D.L.R. (4th) 348 (F.C.A.). In this case the Court found the reasonableness standard of review applied to a decision of the Governor in Council approving the federal government's response to a report of a joint review panel prepared under the now repealed *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*Canadian Environmental Assessment Act, 1992*). The Court rejected the submission that the correctness standard applied to the question of whether the Governor in Council and the responsible authorities had respected the requirements of the *Canadian Environmental Assessment Act, 1992* before making their decisions under subsections 37(1) and 37(1.1) of that Act. Under these provisions the Governor in Council and the responsible authorities were required to review the report of the joint review panel and determine whether the project at issue was justified despite its adverse environmental effects.

209 This said, while deference was owed to decisions made pursuant to subsections 37(1) and 37(1.1), the Court wrote that "a reviewing court must ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme." (*Innu of Ekuanitshit*, paragraph 44).

210 To the submission that *Innu of Ekuanitshit* is the governing authority, Tsleil-Waututh adds two additional points: first and, in any event, the "margin of appreciation" approach followed in *Gitxaala* is no longer good law; and, second, issues of procedural fairness are to be reviewed on the standard of correctness. Tsleil-Waututh's additional submissions are adopted by the City of Burnaby.

211 I see no inconsistency between the *Innu of Ekuanitshit* and *Gitxaala* for the following reasons.

212 First, the Court in *Gitxaala* acknowledged that it was bound by *Innu of Ekuanitshit*. However, because of the very different legislative scheme at issue in *Gitxaala*, the earlier decision did not satisfactorily determine the standard of review to be applied to the decision of the Governor in Council at issue in *Gitxaala* (*Gitxaala*, paragraph 136). This Court did not doubt the correctness of *Innu of Ekuanitshit* or purport to overturn it.

213 Second, in each case the Court determined the standard of review to be applied to the decision of the Governor in Council was reasonableness. It was within the reasonableness standard that the Court found in *Innu of Ekuanitshit* that the Governor in Council's decision must still be made within the bounds of the statutory scheme.

214 Third, and finally, the conclusion in *Innu of Ekuanitshit* that a reviewing court must ensure that the Governor in Council's decision was exercised "within the bounds established by the statutory scheme" (*Innu of Ekuanitshit*, paragraph 44) is consistent with the requirement in *Gitxaala* that the Governor in Council must determine and be satisfied that the Board's process and assessment complied with the legislative requirements, so that the Board's report qualified as a proper prerequisite to the decision of the Governor in Council. Then, it is for this Court to be satisfied that the decision of the Governor in Council was lawful, reasonable and constitutionally valid. To be lawful and reasonable the Governor in Council must comply with the purview and rationale of the legislative scheme.

215 Reasonableness review requires a court to assess whether the decision under review falls within a range of possible, acceptable outcomes which are defensible on the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at paragraph 47).

216 Reasonableness review is a contextual inquiry. Reasonableness "takes its colour from the context" (*Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), at paragraph 59; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80 (S.C.C.), at paragraph 57); in every case the fundamental question "is the scope of decision-making power conferred on the decision-maker by the governing legislation." (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.), at paragraph 18).

217 Thus, when a court reviews a decision made in the exercise of a statutory power, reasonableness review requires the decision to have been made in accordance with the terms of the statute: see, for example, *Public Mobile Inc. v. Canada (Attorney General)*, 2011 FCA 194, [2011] 3 F.C.R. 344 (F.C.A.), at paragraphs 29-30. Put another way, an administrative decision-maker is constrained in the outcomes it may reach by the statutory wording (*Canada (Attorney General) v. Almon Equipment Ltd.*, 2010 FCA 193, [2011] 4 F.C.R. 203 (F.C.A.), at paragraph 21).

218 The Supreme Court recently considered this in the context of a review of a decision of the Specific Claims Tribunal. The Tribunal is required by its governing legislation to adjudicate specific claims "in accordance with law and in a just and timely manner." The majority of the Court observed that the Tribunal's mandate expressly tethered "the scope of its decision-making power to the applicable legal principles." and went on to note that the "range of reasonable outcomes available to the Tribunal is therefore constrained by these principles" (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, 417 D.L.R. (4th) 239 (S.C.C.), at paragraphs 33-34).

219 With respect to Tsleil-Waututh's two additional points, I believe the first point was addressed above. Reasonableness "takes its colour from the context." To illustrate, reasonableness review of a policy decision affecting many entities is of a different nature than reasonableness review of, say, a decision on the credibility of evidence before an adjudication tribunal.

220 The second point raises the question of the standard of review to be applied to questions of procedural fairness.

221 As this Court noted in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 474 N.R. 366 (F.C.A.), at paragraph 67, the standard of review for questions of procedural fairness is currently unsettled.

222 As Trans Mountain submits, in cases such as *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245, [2015] 4 F.C.R. 75 (F.C.A.), at paragraphs 70-72, this Court has applied the standard of correctness with some deference to the decision-maker's choice of procedure (see also *Khela v. Mission Institution*, 2014 SCC 24, [2014] 1 S.C.R. 502 (S.C.C.), at paragraphs 79 and 89).

223 This said, in my view it is not necessary to resolve any inconsistency in the jurisprudence because, as will be explained below, even on a correctness review I find there is no basis to set aside the Order in Council on the basis of procedural fairness concerns.

(b) The constitutional component

224 As explained above, a distinction exists between the standard of review applied to the administrative law components of the Governor in Council's decision and the standard applied to the component which required the Governor in Council to consider the adequacy of the process of consultation with Indigenous peoples, and if necessary, accommodation.

225 Citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at paragraphs 61-63, the parties agree that the existence and extent of the duty to consult are legal questions reviewable on the standard of correctness. The adequacy of the consultation is a question of mixed fact and law which is reviewable on the standard of reasonableness. I agree.

226 Reasonableness review does not require perfect satisfaction (*Gitxaala*, paragraphs 182-183 and the cases cited therein). The question to be answered is whether the government action "viewed as a whole, accommodates the collective aboriginal right in question". Thus, "[s]o long as every reasonable effort is made to inform and to consult, such efforts would suffice." (*Haida Nation*, paragraph 62, citing *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.) and *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.)). The focus of the analysis should not be on the outcome, but rather on the process of consultation and accommodation (*Haida Nation*, paragraph 63).

227 Having set out the governing standards of review, I next consider the various flaws that are said to vitiate the decision of the Governor in Council.

2. Did the Governor in Council err in determining that the Board's report qualified as a report so as to be a proper condition precedent to the Governor in Council's decision?

228 The Board's errors said to vitiate the decision of the Governor in Council were briefly summarized above at paragraph 128. For ease of reference I reorganize and repeat that the applicants variously assert that the Board erred by:

a. breaching the requirements of procedural fairness;

b. failing to decide certain issues before it recommended approval of the Project;

c. failing to consider alternatives to the Westridge Marine Terminal;

d. failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*; and,

e. erring in its treatment of the *Species at Risk Act*.

The effect of each of these errors is said to render the Board's report materially deficient such that it was not a "report" that the Governor in Council could rely upon. A decision made by the Governor in Council without a "report" before it must be unreasonable; the statute makes it clear that the Governor in Council can only reach a decision when informed by a "report" of the Board.

229 I now turn to consider each alleged deficiency.

(a) Was the Board's process procedurally fair?

(i) Applicable legal principles

230 The Board, as a public authority that makes administrative decisions that affect the rights, privileges or interests of individuals, owes a duty of procedural fairness to the parties before it. However, the existence of a duty of fairness does not determine what fairness requires in a particular circumstance.

231 It is said that the concept of procedural fairness is eminently variable, and that its content is to be decided in the context and circumstances of each case. The concept is animated by the desire to ensure fair play. The purpose of the participatory rights contained within the duty of fairness has been described to be:

> ... to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

(*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.), at paragraph 22).

232 In *Baker*, the Supreme Court articulated a non-exhaustive list of factors to be considered when determining what procedural fairness requires in a given set of circumstances: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme, including the existence of an appeal procedure; the importance of the decision to the lives of those affected; the legitimate expectations of the person challenging the decision; and, the choice of procedures made by the decision-maker.

233 Applying these factors, the City of Burnaby argues that the content of the procedural duty owed to it was significant.

234 Other applicants and the respondents did not make submissions on the content of the procedural duty of fairness.

235 Having regard to the adjudicative nature of the decision at issue, the court-like procedures prescribed by the *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208, the absence of an unrestricted statutory right of appeal (subsection 22(1) of the *National Energy Board Act* permits an appeal on a question of law or jurisdiction only with leave of this Court) and the importance of the Board's decision to the parties, I accept Burnaby's submission that the content of the duty of fairness owed by the Board to the parties was significant. The parties were entitled to a meaningful opportunity to present their cases fully and fairly. Included in the right to present a case fully is the right to effectively challenge evidence that contradicts that case. I will consider below more precisely the content of this duty.

236 Having briefly summarized the legal principles that apply to issues of procedural fairness, I next enumerate the assertions of procedural unfairness.

(ii) The asserted breaches of procedural fairness

237 The City of Burnaby asserts that the Board breached a duty of fairness owed to it by:

a. failing to hold an oral hearing;

b. failing to provide Burnaby with an opportunity to test Trans Mountain's evidence by cross-examination;

c. failing to require Trans Mountain to respond to Burnaby's written Information Requests and denying Burnaby's motions to compel further and better responses to the Information Requests;

d. delegating the assessment of critically important information until after the Board's report and the Governor in Council's decision;

e. failing to provide sufficient reasons concerning:

i. alternative means of carrying out the Project;

ii. the risks, including seismic risk, related to fire and spills;

iii. the suitability of the Burnaby Mountain Tunnel;

iv. the protection of municipal water sources; and,

v. whether, and on what basis, the Project is in the public interest.

238 Tsleil-Waututh submits that the Board breached the duty of fairness by restricting its ability to test Trans Mountain's evidence and by permitting Trans Mountain to file improper reply evidence.

239 The Stó:lo submit that it was procedurally unfair to subject their witnesses who gave oral traditional Indigenous evidence to cross-examination when Trans Mountain's witnesses were not cross-examined.

240 Squamish briefly raised the issue of inadequate response to their Information Request to Natural Resources Canada, and the Board's terse rejection of their requests for further and better responses from Natural Resources Canada, the Department of Fisheries and Oceans and Trans Mountain.

241 Each assertion will be considered.

(iii) The failure to hold a full oral hearing and to allow cross-examination of Trans Mountain's witnesses

242 It is convenient to deal with these two asserted errors together.

243 The applicants argue that the Board's decision precluding oral cross-examination was "a stark departure from the previous practice for a project of this scale." (Burnaby's memorandum of fact and law, paragraph 160) that deprived the Board of an important and established method for determining the truth. The applicants argue that this was particularly unfair because Trans Mountain failed to participate in good faith in the Information Request process with the result that the process did not provide an effective, alternative method to test Trans Mountain's evidence.

244 The respondents Canada and Trans Mountain answer that:

• The Board has discretion to determine whether a hearing proceeds as a written or oral hearing, and the Board is entitled to deference with respect to its choice of procedure.

• The process was tailored to take into account the number of participants, the volume of evidence and the technical nature of the information to be received by the Board.

• Many aspects of the hearing were conducted orally: the oral Indigenous traditional evidence, Trans Mountain's oral summary argument, the interveners' oral summary arguments and any reply arguments.

• Cross-examination is never an absolute right. A decision-maker may refuse or limit cross-examination so long as there is an effective means to challenge and test evidence.

245 I acknowledge the importance of cross-examination at common law. However, because the content of the duty of fairness varies according to context and circumstances, the duty of fairness does not always require the right of cross-examination. For example, in a multi-party public hearing related to the public interest, fairness was held not to require oral cross-examination (*Unicity Taxi Ltd. v. Taxicab Board* (1992), 80 Man. R. (2d) 241, [1992] 6 W.W.R. 35 (Man. Q.B.); aff'd (1992), 83 Man. R. (2d) 305, [1992] M.J. No. 608 (Man. C.A.)). The Court dismissed the allegation of unfairness because "in the conduct of multi-faceted and multi-party public hearings [cross-examination] tends to become an unwieldy and even dangerous weapon that may lead to disturbance, disruption and delay."

246 Similarly, in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099 (S.C.C.), the Supreme Court found that the Chippewas of the Thames were given an adequate opportunity to participate in the decision-making process of the Board (reasons, paragraph 51). This finding was supported by the Court's enumeration of the following facts: the Board held an oral hearing; provided early notice of the hearing process to affected Indigenous groups and sought their formal participation; granted intervener status to the Chippewas of the Thames; provided participant funding to allow the Chippewas of the Thames to tender evidence and pose formal Information Requests to the project proponent, to which they received written responses; and permitted the Chippewas of the Thames to make oral closing submissions. No right of oral cross-examination was granted (reasons, paragraph 52), yet the process provided an adequate right to participate.

247 These decisions are of course not determinative of the requirements of fairness in the present context.

248 The relevant context is discussed by the Board in its Ruling No. 14, which dealt with a motion requesting that the hearing order be amended to include a phase for oral cross-examination of witnesses. After quoting an administrative law text to the effect that procedural fairness is not a fixed concept, but rather is one that varies with the context and the interest at stake, the Board wrote:

> Here, the context is that the Board will be making a recommendation to the Governor in Council. The recommendation will take into account whether the pipeline is and will be required by the present and future public convenience and necessity. The Board's recommendation will be polycentric in nature as it involves a wide variety of considerations and interests. Persons directly affected by the Application include Aboriginal communities, land owners, governments, commercial interests, and other stakeholders. The motion and several of the comments in support of it appear to place significant reliance on the potential credibility of witnesses. The Board notes that this is not a criminal or civil trial. The Board's hearing also does not involve an issue of individual liberty. It is a process for gathering and testing evidence for the Board's preparation, as an expert tribunal, of its recommendation to the Governor in Council about whether to issue a certificate under section 52 of the NEB Act. The Board will also be conducting an environmental assessment and making a recommendation under CEAA 2012.
>
> Hearing processes are designed individually and independently by the Board based on the specific circumstances of the application. Each process is designed to provide for a fair hearing, but the processes are not necessarily the same. For this Application, the Hearing Order provides two opportunities to ask written information requests. There is also an opportunity to file written evidence, and to provide both written and oral final argument. For Aboriginal groups that also wish to present Aboriginal traditional evidence orally, there is an opportunity to do this.
>
> Regarding the nature of the statutory scheme, section 8 of the NEB Act authorizes the Board to make rules about the conduct of hearings before the Board. The Rules provide that public hearings may be oral or written, as determined by the Board. The Board has previously held fully written hearings for section 52 oil and gas pipeline applications. Hearings can also be oral, with significant written components, as is the case here. In addition to the hearing

procedures set out in the Rules, the Board makes rules about hearing procedures in its Hearing Order and associated rulings and bulletins.

. . .

Additional legislative requirements for the Board's public hearings are found in subsection 11(4) of the NEB Act, which requires that applications before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, and within the time limit provided. This subsection of the NEB Act was added in 2012. For this Application, the legislated time limit, which is 15 months after the completeness determination is made, is 2 July 2015.

As the legislative time limits are recent, there is no legitimate expectation as to the hearing procedures that will be used to test the evidence. In this case, the Board has provided notice about the procedures that will apply.

In the Board's view, the legislation makes it clear that the Board is master of its own procedure and can establish its own procedures for each public hearing with regard to the conduct of hearings. This includes the authority to determine for a particular public hearing the manner in which evidence will be received and tested. In the circumstances of this hearing, where there are 400 intervenors and much of the information is technical in nature, the Board has determined that it is appropriate to test the evidence through written processes. All written evidence submitted will be subject to written questioning by up to 400 parties, and the Board.

(underlining added, footnotes omitted)

249 Further aspects of the relevant context are discussed in the Board's final report at page 4:

For the Board's review of the Project application, the hearing had significant written processes as well as oral components. With the exception of oral traditional evidence described below, evidence was presented in writing, and testing of that evidence was carried out through written questions, known as Information Requests (IRs). Intervenors submitted over 15,000 questions to Trans Mountain over two major rounds of IRs. Hundreds of other questions were asked in six additional rounds of IRs on specific evidence. If an intervenor believed that Trans Mountain provided inadequate responses to its questions, it could ask the Board to compel Trans Mountain to provide a more complete response. Trans Mountain could do the same in respect of IRs it posed to intervenors on their evidence. There was also written questioning on various additional evidence, including supplemental, replacement, late and Trans Mountain's reply evidence.

The Board decided, in its discretion in determining its hearing procedure, to allow testing of evidence by IRs and determined that there would not be cross examination in this hearing. The Board decided that, in the circumstances of this hearing where there were 400 intervenors and legislated time limits, and taking into consideration the technical nature of the information to be examined, it was appropriate to test the evidence through written processes. In the final analysis, the written evidence submitted was subjected to extensive written questioning by up to 400 participants and the Board. The Board is satisfied that the evidence was appropriately tested in its written process and that its hearing was fair for all parties and met natural justice requirements. ...

(underlining added, footnote omitted)

250 Having set out the context relevant to determining the content of the duty of fairness, and the Board's discussion of the context, the next step is to apply the contextual factors enumerated in *Baker* to determine whether the absence of oral cross-examination was inconsistent with the participatory rights required by the duty of fairness. The heart of this inquiry is directed to whether the parties had a meaningful opportunity to present their case fully and fairly.

251 Applying the first *Baker* factor, the nature of the Board's decision is different from a judicial decision. The Board is required to apply its expertise to the record before it in order to make recommendations about whether the

Project is and will be required by public convenience and necessity, and whether the Project is likely to cause significant adverse environmental effects that can or cannot be justified in the circumstances. Each recommendation requires the Board to consider a broad spectrum of considerations and interests, many of which depend on the Board's discretion. For example, subsection 52(2) of the *National Energy Board Act* requires the Board's recommendation to be based on "all considerations that appear to it to be directly related to the pipeline and to be relevant". The Board's environmental assessment is to take into account "any other matter relevant to the environmental assessment that the [Board] requires to be taken into account" (paragraph 19(1)(*j*) of the *Canadian Environmental Assessment Act, 2012*). The nature of the decision points in favour of more relaxed requirements under the duty of fairness.

252 The statutory scheme also points to more relaxed requirements. The Board may determine that a pipeline application be dealt with wholly in writing (Rule 22(1), *National Energy Board Rules of Practice and Procedure, 1995*). The Board is required to deal with matters expeditiously, and within the legislated time limit. When the hearing order providing for Information Requests, not oral cross-examination, was issued on April 2, 2014, the Board was required to deliver its report by July 2, 2015. In legislating this time limit Parliament must be presumed to have contemplated that pipeline approval projects could garner significant public interest such that, as in this case, 400 parties successfully applied for leave to intervene. One aspect of the statutory scheme does point to a higher duty of fairness: the legislation does not provide for a right of appeal (save with leave on a question of law or jurisdiction). However, as discussed at length above, the Board's decision is subject to scrutiny in proceedings such as this.

253 The importance of the decision is a factor that points toward a heightened fairness requirement.

254 For the reasons given by the Board, I do not see any basis for a legitimate expectation that oral cross-examination would be permitted. To the Board's reasons I would add that such an expectation would be contrary to the Board's right to determine that an application be reviewed wholly in writing. While the Board did permit oral cross-examination in its review of the Northern Gateway Pipeline, in that case the Board's report discloses that intervener status was granted to 206 entities — roughly half the number of entities given intervener status in this case.

255 Finally, the Board's choice of procedure, while not determinative, must be given some respect, particularly where the legislation gives the Board broad leeway to choose its own procedure, and the Board has experience in deciding appropriate hearing procedures.

256 I note that when the Board rendered its decision on the request that it reconsider Ruling No. 14 so as to allow oral cross-examination, the applicants had received Trans Mountain's responses to their first round of Information Requests; many had brought motions seeking fuller and better answers. The Board ruled on the objections on September 26, 2014. Therefore, the Board was well familiar with the applicants' stated concerns, as is seen in Ruling No. 51 when it declined to reconsider its earlier ruling refusing to amend the hearing order to allow oral cross-examination.

257 Overall, while the importance of the decision and the lack of a statutory appeal point to stricter requirements under the duty of fairness, the other factors point to more relaxed requirements. Balancing these factors, I conclude that the duty of fairness was significant. Nevertheless, the duty of fairness was not breached by the Board's decisions not to allow oral cross-examination and not to allow a full oral hearing. The Board's procedure did allow the applicants a meaningful opportunity to present their cases fully and fairly.

258 Finally on this issue, the Board allowed oral traditional Indigenous evidence because "Aboriginal people have an oral tradition that cannot always be shared adequately in writing." (Ruling No. 14, page 5). With respect to Stó:lo's concerns about permitting oral questioning of oral traditional evidence, the Board permitted "Aboriginal groups [to] choose to answer any questions in writing or orally, whichever is practical or appropriate by their determination." (Ruling No. 14, page 5). This is a complete answer to the concerns of the Stó:lo.

259 I now turn to the next asserted breach of procedural fairness.

(iv) Trans Mountain's responses to the Information Requests

260 The City of Burnaby and Squamish argue that Trans Mountain provided generic, incomplete answers to the Information Requests and the Board failed in its duty to compel further and better responses.

261 During the oral hearing before this Court Burnaby reviewed in detail: Burnaby's first Information Request questioning Trans Mountain about its consideration of alternatives to expanding the pipeline, tank facilities and marine terminal in a major metropolitan area; Trans Mountain's response; the Board's denial of Burnaby's request for a fuller answer; Burnaby's second Information Request; Trans Mountain's response; the Board's denial of Burnaby's request for a fuller answer; the Board's first Information Request to Trans Mountain questioning alternative means of carrying out the Project; Trans Mountain's response; the Board's second Information Request; and, Trans Mountain's response to the Board's second Information Request. Burnaby argues that Trans Mountain provided significantly more information to the Board than it did to Burnaby, but the information Trans Mountain provided was still insufficient.

262 Squamish made brief reference in oral argument to the Board's failure to order fuller answers about the Crown's assessment of the strength of its claims to Aboriginal rights and title.

263 As can be seen from Burnaby's oral submission, it brought motions before the Board to compel better answers in respect of both of Trans Mountain's responses to Burnaby's Information Requests.

264 I begin consideration of this issue by acknowledging that most, but not all, of Burnaby's requests for fuller answers were denied by the Board. However, procedural fairness does not guarantee a completely successful outcome. The Board did order some further and better answers in respect of each motion. Burnaby must prove more than just that the Board did not uphold all of its objections.

265 The Board's reasons for declining to compel further answers are found in two of the Board's rulings: Ruling No. 33 (A4 C4 H7) in respect of the first round of Information Requests directed to Trans Mountain by the interveners, and Ruling No. 63 (A4 K8 G4) in respect of the second round of the interveners' Information Requests. Each ruling was set out in the form of a letter which attached an appendix. The appendix listed each question included in the motions to compel, organized by intervener, and provided "the primary reason" the motion to compel was granted or denied. Each ruling also provided in the body of the decision "overall comments about the motions and the Board's decision".

266 The Board set out the test it applied when considering motions to compel in the following terms:

> ...the Board looks at the relevance of the information sought, its significance, and the reasonableness of the request. The Board balances these factors so as to satisfy the purpose of the [Information Request] process, while preventing an intervenor from engaging in a 'fishing expedition' that could unfairly burden the applicant.

267 In its decision the Board also provided general information describing circumstances that led it to decline to compel further answers. Of relevance are the following two situations:

> • In some instances, Trans Mountain provided a full answer to the question asked, but the intervener disagreed with the answer. In these cases, rather than seeking to compel a further answer, the Board advised the interveners to file their own evidence in response or to provide their views during final argument.
>
> • In some cases, Trans Mountain may not have answered all parts of an intervener's Information Request. However, in those cases where the Board was of the view that the response provided sufficient information and detail for the Board to consider the application, the Board declined to compel a further response.

268 It is clear that the Board viewed Burnaby's requests for fuller answers about Trans Mountain's consideration and rejection of alternate locations for the marine terminal to fall within the second situation described above.

269 The Board's second Information Request to Trans Mountain on this point was answered by Trans Mountain on July 21, 2014, and its answer was served upon all of the interveners. Therefore, the Board was aware of this response when on September 26, 2014, it rejected Burnaby's motion in Ruling No. 33.

270 That the Board found Trans Mountain's answer to its second Information Request to be sufficient is reflected in the Board's report, where at pages 241 to 242 the Board relied on the content of Trans Mountain's response to its second Information Request to articulate Trans Mountain's consideration of the alternatives to the Westridge Marine Terminal. At page 244 of the report, the Board found Trans Mountain's "alternative means assessment" to be appropriate. The Board went on to acknowledge Burnaby's concern that Trans Mountain had not provided an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat or Roberts Bank. However, the Board disagreed, finding that "Trans Mountain has provided an adequate assessment, including consideration of the technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations."

271 Obviously, Burnaby disagrees with this assessment. However, it has not demonstrated how the Board's conduct concerning Burnaby's Information Requests breached the requirements of procedural fairness. For example, Burnaby has not pointed to evidence that contradicted Trans Mountain's stated reasons for rejecting alternative marine terminal locations. Trans Mountain stated that its assessment was based on feasibility of coincident marine and pipeline access, and technical, economic and environmental considerations of the screened alternative locations. Any demonstrated conflict in the evidence on these points may have supported a finding that meaningful participation required Trans Mountain to provide more detailed information.

272 In support of its submission concerning procedural fairness Squamish pointed to a question it directed to Natural Resources Canada. It asked whether that entity had "assessed the strength of Squamish's claim to aboriginal rights in the area of the proposed Project" and if so, to provide "that assessment and any material upon which that assessment is based."

273 The response Squamish received to its Information Request was:

> The Crown has conducted preliminary depth of consultation assessments for all Aboriginal groups, including Squamish Nation, whose traditional territory intersects with or is proximate to the proposed pipeline right of way, marine terminal expansion and designated marine shipping lanes. (Depth of consultation assessments consider both potential impacts to rights and the strength of claim to rights.) The Crown's depth of consultation assessment is iterative and is expected to evolve as the [Board] review process unfolds and as Aboriginal groups submit their evidence to the [Board] and engage in Phase III consultations with the Crown. The Crown has assessed depth of consultation for the Squamish Nation as "high." This preliminary conclusion was filed into evidence [by the Major Projects Management Office] on May 27, 2015.
>
> The starting point for these assessments is to work with information the Crown has in hand, but Squamish Nation is invited to provide information that they believe could assist the Crown in understanding the nature and scope of their rights.
>
> (underlining added)

274 Squamish objected to the Board that its request was only partly addressed, and requested that Natural Resources Canada provide the material on which its assessment was based.

275 In reply to Squamish's motion to compel a further answer, Natural Resources Canada responded:

> In the context of the current hearing process, it is the view of [the Major Projects Management Office] that the further information and records sought by Squamish Nation will not be of assistance to the Panel in fulfilling its mandate.

However, the Crown will communicate with the Squamish Nation in August 2015 to provide further information on Phase III Crown consultation and the Crown's approach to considering adverse impacts of the Project on potential or established Aboriginal and treaty rights. This forthcoming correspondence will summarize the Crown's understanding of the strength of Squamish Nation's claim for rights and title.

276 The Board denied Squamish's request for a fuller answer on the primary ground that the information Squamish sought "would not contribute to the record in any substantive way and, therefore, would not be material to the Board's assessment."

277 Given the mandate of the Board, the iterative nature of the consultation process and the fact that direct Crown consultation would take place in Phase III following the release of the Board's report, Squamish has not shown that it was a breach of procedural fairness for the Board not to compel a fuller answer to its question.

(v) The asserted deferral and delegation of the assessment of important information

278 The City of Burnaby next argues that the Board impermissibly deferred "the provision of critically important information to after the Report stage, and after the [Governor in Council's decision]" (memorandum of fact and law, paragraph 164). Burnaby says that by doing so, the Board acted contrary to the statutory regime and breached the principle of *delagatus non potest delgare*. At this point in its submissions, Burnaby did not suggest what specific aspect of the statutory regime was contravened, or how the Board or the Governor in Council improperly delegated their statutory responsibility. At this stage, Burnaby deals with this as an issue of procedural fairness. I deal with the statutory scheme argument commencing at paragraph 322.

279 Burnaby points to a number of issues where it alleges that the Board failed to weigh the evidence and expert opinions put before it. Burnaby says:

- It provided expert evidence that the Project presents serious and unacceptable safety risks to the neighbourhoods that are proximate to the Burnaby Terminal as a result of fire, explosion and boil-over, and that Trans Mountain had failed to assess these risks.

- It established gaps in Trans Mountain's geotechnical investigation of the tunnel option and a lack of analysis of the feasibility of the tunnel option.

- It identified significant information gaps with respect to the Westridge Marine Terminal, including gaps concerning: the final design; spill risk; fire risk; geotechnical risk; and, the ability to respond to these risks.

- It adduced evidence that the available fire response resources were inadequate.

- It demonstrated the risk to Simon Fraser University following an incident at the Burnaby Terminal because of the tunnel's proximity to the only evacuation route from the University.

280 Burnaby argues that the Board declined to compel further information from Trans Mountain on these points, and instead imposed conditions that required Trans Mountain to do certain specified things in the future. For example, the Board imposed conditions requiring Trans Mountain to file with the Board for approval a report to revise the terminal risk assessments, including the Burnaby Terminal risk assessment, to include consideration of the risks not assessed (Board Conditions 22 and 129). Board Condition 22 had to be met at least six months before Trans Mountain commenced construction; Condition 129 had to be met at least three months before Trans Mountain applied to open each terminal. Burnaby also notes that many conditions imposed by the Board were not subject to subsequent Board approval.

281 Burnaby argues that this process prevented meaningful testing of information filed after the Board issued its report recommending that the Project be approved. Further, the Governor in Council did not have access to the material to be filed in response to the Board's conditions when it made its determination of the public interest.

282 Underpinning these arguments is Burnaby's assertion that the "Board's rulings deprived Burnaby of the ability to review and assess the validity of the alternatives assessment (or to confirm that one was made)." (memorandum of fact and law, paragraph 41).

283 I can well understand Burnaby's concern — the consequence of a serious spill or explosion and fire in a densely populated metropolitan area might be catastrophic. However, in my respectful view, Burnaby's understandable desire to be able to independently review and assess the validity of the assessment of alternatives to the expansion of the Westridge Marine Terminal, or other matters that affect the City, is inconsistent with the regulatory scheme enacted by Parliament. Parliament has vested in the Board the authority and responsibility to consider and then make recommendations to the Governor in Council on matters of public interest; the essence of the Board's responsibility is to balance the Project-related benefits against the Project-related burdens and residual burdens, and to then make recommendations to the Governor in Council. In this legislative scheme, the Board is not required to facilitate an interested party's independent review and assessment of a project. It is not for this Court to opine on the appropriateness of the policy expressed and implemented in the *National Energy Board Act*. Rather, the Court's role is to apply the legislation as Parliament has enacted.

284 The Supreme Court has recognized the Board's "expertise in the supervision and approval of federally regulated pipeline projects" and described the Board to be "particularly well positioned to assess the risks posed by such projects". The Supreme Court went on to note the Board's "broad jurisdiction to impose conditions on proponents to mitigate those risks" and to acknowledge that it is the Board's "ongoing regulatory role in the enforcement of safety measures [which] permits it to oversee long-term compliance with such conditions" (*Chippewas of the Thames First Nation*, paragraph 48). While the Supreme Court was particularly focused on the Board's expertise in the context of its ability to assess risks posed to Indigenous groups, the Board's expertise extends to the full range of risks inherent in the operation of a pipeline, including the risks raised by Burnaby.

285 Burnaby's submission must be assessed in the light of the Board's approval process. I will set out the Board's approval process at some length because of the importance of this issue to the City of Burnaby and other applicants.

286 The Board described its approval process in Section 1.3 of its report:

> Trans Mountain's Application was filed while the Project was at an initial phase of the regulatory lifecycle, as is typical of applications under section 52 of the NEB Act. As set out in the Board's Filing Manual, the Board requires a broad range of information when a section 52 application is filed. At the end of the hearing, the level of information available to the Board must be sufficient to allow it to make a recommendation to the GIC that the Project is or is not in the public interest. There also must be sufficient information to allow the Board to draft conditions that would attach to any new and amended CPCNs, and other associated regulatory instruments (Instruments), should the Project be approved by the GIC.
>
> The Board does not require final information about every technical detail during the application stage of the regulatory process. For example, much of the information filed with respect to the engineering design would be at the conceptual or preliminary level. Site-specific engineering information would not be filed with the Board until after the detailed routing is confirmed, which would be one of the next steps in the regulatory process should the Project be approved. Completion of the detailed design of the project, as well as subsequent construction and operations, would have to comply with:
>
> • the NEB Act, regulations, including the National Energy Board Onshore Pipeline Regulations (OPR), referenced standards and applicable codes;
>
> • the company's conceptual design presented, and commitments made in the Application and hearing proceedings; and

• conditions which the Board considers necessary.

The Board may impose conditions requiring a company to submit detailed information for review (and in some cases, for approval) by the Board before the company is permitted to begin construction. Further information, such as pressure testing results, could be required in future leave to open applications before a company would be permitted to begin pipeline operations. In compliance with the OPR, a company is also required to fully develop an emergency response plan prior to beginning operations. In some cases, the Board has imposed conditions with specific requirements for the development, content and filing of the emergency response plan (see Table 1). This would be filed and fully assessed at a condition compliance stage once detailed routing is known. Because the detailed routing information is necessary to perform this assessment, it would be premature to require a fully detailed emergency response plan to be filed at the time of the project application.

While the project application stage is important, as set out in Chapter 3, there are further detailed plans, studies and specifications that are required before the project can proceed. Some of these are subject to future Board approval, and others are filed with the Board for information, disclosure, and/or future compliance enforcement purposes. The Board's recommendation on the project application is not a final determination of all issues. While some hearing participants requested the final detailed engineering or emergency response plans, the Board does not require further detailed information and final plans at this stage of the regulatory lifecycle.

To set the context for its reasons for recommendation, the Board finds it helpful to identify the fundamental consideration used in reaching any section 52 determination. The overarching consideration for the Board's public interest determination at the application stage is: can this pipeline be constructed, operated and maintained in a safe manner. The Board found this to be the case. While this initial consideration is fundamental, a finding that a pipeline could be constructed, operated and maintained in a safe manner does not mean a pipeline is necessarily in the public interest as there are other considerations that the Board must weigh, as discussed below. However, the analysis would go no further if the answer to this fundamental question were answered in the negative, as an unsafe pipeline can never be in the public interest.

(underlining added, footnote omitted)

287 The Board went on to describe how projects are regulated through their lifecycle in Chapter 3, particularly in Sections 3.1 to 3.5:

3.0 Regulating through the Project lifecycle

The approval of a project, through issuance of one or more Certificate of Public Convenience and Necessity (CPCN) and/or orders incorporating applicable conditions, forms just one phase in the Board's lifecycle regulation. The Board's public interest determination relies upon the subsequent execution of detailed design, construction, operation, maintenance and, ultimately, abandonment of a project in compliance with applicable codes, commitments and conditions, such as those discussed in Chapter 1. Throughout the lifecycle of an approved project, as illustrated in Figure 4, the Board holds the pipeline company accountable for meeting its regulatory requirements in order to keep its pipelines and facilities safe and secure, and protect people, property and the environment. To accomplish this, the Board reviews or assesses condition filings, tracks condition compliance, verifies compliance with regulatory requirements, and employs appropriate enforcement measures where necessary to quickly and effectively obtain compliance, prevent harm, and deter future non-compliance.

After a project application is assessed and the Board makes its section 52 recommendation (as described in Chapter 2, section 2.1), the project cannot proceed until and unless the Governor in Council approves the project and directs the Board to issue the necessary CPCN. If approved, the company would then prepare plans showing the proposed detailed route of the pipeline and notify landowners. A detailed route hearing may be required, subject to section 35 of the *National Energy Board Act* (NEB Act). The company would also proceed with the detailed design of the

project and could be required to undertake additional studies, prepare plans or meet other requirements pursuant to NEB conditions on any CPCN or related NEB order. The company would be required to comply with all conditions to move forward with its project, prior to and during construction, and before commencing operations. While NEB specialists would review all condition filings, those requiring approval of the Board would require this approval before the project could proceed.

Once construction is complete, the company would need to apply for the Board's permission (or "leave") to open the project and begin operations. While some conditions may apply for the life of a pipeline, typically the majority must be satisfied prior to beginning operations or within the first few months or years of operation. However, the company must continue to comply with the National Energy Board Onshore Pipeline Regulations (OPR) and other regulatory requirements to operate the pipeline safely and protect the environment.

. . .

If the Project is approved, the Board would employ its established lifecycle compliance verification and enforcement approach to hold Trans Mountain accountable for implementing the proposed conditions and other regulatory requirements during construction, and the subsequent operation and maintenance of the Project.

3.1 Condition compliance

If the Project is approved and Trans Mountain decides to proceed, it would be required to comply with all conditions that are included in the CPCNs and associated regulatory instruments (Instruments). The types of filings that would be required to fulfill the conditions imposed on the Project, if approved, are summarized in Table 4.

If the Project is approved, the Board would oversee condition compliance, make any necessary decisions respecting such conditions, and eventually determine, based on filed results of field testing, whether the Project could safely be granted leave to open.

Documents filed by Trans Mountain on condition compliance and related Board correspondence would be available to the public on the NEB website. All condition filings, whether or not they are for approval, would be reviewed and assessed to determine whether the company has complied with the condition, and whether the filed information is acceptable within the context of regulatory requirements and standards, best practices, professional judgement and the goals the condition sought to achieve. If a condition is "for approval," the company must receive formal approval, by way of a Board letter, for the condition to be fulfilled.

If a filing fails to fulfill the condition requirements or is determined to be inadequate, the Board would request further information or revisions from the company by a specified deadline, or may direct the company to undertake additional steps to meet the goals that the condition was set out to achieve.

3.2 Construction phase

During construction, the Board would require Trans Mountain to have qualified inspectors onsite to oversee construction activities. The Board would also conduct field inspections and other compliance verification activities (as described in section 3.5) to confirm that construction activities meet the conditions of the Project approval and other regulatory requirements, to observe whether the company is implementing its own commitments and to monitor the effectiveness of the measures taken to meet the condition goals, and ensure worker and public safety and protection of the environment.

3.3 Leave to open

If the Project is approved and constructed, the Board will require Trans Mountain to also apply, under section 47 of the NEB Act, for leave to open the pipelines and most related facilities. This is a further step that occurs after conditions applicable to date have been met and the company wishes to begin operating its pipeline and facilities.

> The Board reviews the company's submissions for leave to open, including the results of field pressure testing, and may seek additional information from the company. Before granting leave to open, the Board must be satisfied that the pipeline or facility has been constructed in compliance with requirements and that it can be operated safely. The Board can impose further terms and conditions on a leave to open order, if needed.
>
> (underlining added, figures and tables omitted)

288 In Section 3.5 the Board set out its compliance and enforcement programs noting that:

> While all companies are subject to regulatory oversight, some companies receive more than others. In other words, high consequence facilities, challenging projects and those companies who are not meeting the Board's regulatory expectations and goals can expect to see the Board more often than those companies and projects with routine operations.

289 No applicant challenged the accuracy of the Board's formulation of its approval process and subsequent compliance verification and enforcement approach. The City of Burnaby has not shown how the Board's multi-step approval process is either procedurally unfair or an improper delegation of authority. Implicit in the Board's imposition of a condition, such as a condition requiring a revised risk assessment, or a condition requiring information regarding tunnel location, construction methods, and the like, is the Board's expectation that the condition may realistically be complied with, and that compliance with the condition will allow the pipeline to be constructed, operated and maintained in a safe manner. Also implicit in the Board's imposition of a condition is its understanding of its ability to assess condition filings (whether or not the condition requires formal approval), and its ability to oversee compliance with its conditions.

290 Transparency with respect to Trans Mountain's compliance with conditions is provided by the Board publishing on its website all documents filed by Trans Mountain relating to condition compliance and all related, responsive Board correspondence.

291 As for the role of the Governor in Council in such a tiered approval process, the recitals to the Order in Council show that the Board's conditions were placed before the Governor in Council. Therefore, the Governor in Council must be seen to have been aware of the extent of the matters left for future review by the Board, and to have accepted the Board's assessment and recommendation about the public interest on that basis.

(vi) Failing to provide adequate reasons

292 The City of Burnaby next argues that the Board erred by failing to provide sufficient reasons on the following issues:

a. alternative means of carrying out the Project;

b. risks relating to fire and spills (including seismic risk);

c. the suitability of the Burnaby Mountain Tunnel;

d. the protection of municipal water sources; and,

e. whether, and on what basis, the Project is in the public interest.

293 I begin my analysis by noting that the adequacy of reasons is not a "stand-alone basis for quashing a decision". Rather, reasons are relevant to the overall assessment of reasonableness. Further, reasons "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at paragraph 14).

294 This is consistent with the Court's reasoning in *Dunsmuir* where the Supreme Court explained the notion of reasonableness review and spoke of the role reasons play in reasonableness review:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" *(Canada (Attorney General) v. Mossop*, 2008 SCC 9, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).
>
> (underlining added)

295 Reasons need not include all of the relevant arguments, statutory provisions or jurisprudence. A decision-maker need not make an explicit finding on each constituent element leading to the final conclusion. Reasons are adequate if they allow the reviewing court to understand why the decision-maker made its decision and permit the reviewing court to determine whether the conclusion is within the range of acceptable outcomes.

296 I now turn to consider Burnaby's submissions in the context of the Board's reasons.

Alternative means of carrying out the Project

297 Burnaby's concern about alternative means of carrying out the Project centers on the Board's treatment of alternative locations for the marine terminal. In Section 11.1.2 the Board dealt with the requirement imposed by paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012* that an environmental assessment of a designated project must take into account "alternative means of carrying out the designated project that are technically and economically feasible". The views of the Board are expressed in this section on pages 244 through 245.

298 Of particular relevance to Burnaby's concern are the first two paragraphs of the Board's reasons:

> The Board finds that Trans Mountain's route selection process, route selection criteria, and level of detail for its alternative means assessment are appropriate. The Board further finds that aligning the majority of the proposed pipeline route alongside, and contiguous to, existing linear disturbances is reasonable, as this would minimize the environmental and socio-economic impacts of the Project.

> The Board acknowledges the concern raised by the City of Burnaby that Trans Mountain did not provide an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat, B.C., or Roberts Bank in Delta, B.C. The Board finds that Trans Mountain has provided an adequate assessment, including consideration of technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations.

299 In my view, these reasons allowed the Governor in Council and allow this Court to know why the Board found Trans Mountain's assessment of alternative means to be adequate or appropriate — the Board accepted the facts conveyed by Trans Mountain and found that these facts provided an appropriately detailed consideration of the alternative means. In my further view, the reasons, when read with the record, also allow the Court to consider whether the Board's treatment of alternatives to the Westridge Marine Terminal were so materially flawed that the Board's report was not a "report" that the Governor in Council could rely upon. This is a substantive issue I deal with below commencing at paragraph 322.

Assessment of risks

300 Burnaby's concerns about the assessment of risks centre on the Burnaby Terminal risk assessment, the Westridge Marine Terminal risk assessment, the Emergency Fire Response plan and the evacuation of Simon Fraser University.

Burnaby Terminal

301 The Board's consideration of terminal expansions generally is found in Section 6.4 of its report. The Burnaby Terminal is discussed at pages 92 through 95 of the Board's report. After setting out the evidence, including Burnaby's evidence, at page 95 the Board expressed its reasons on the Burnaby Terminal as follows:

> The Burnaby Terminal is uphill of the neighborhood of Forest Grove. An issue of potential concern is the possibility, however remote, of a multiple-tank failure in a common impounding area exceeding the available secondary containment capacity under certain conditions. The Board would impose a condition requiring Trans Mountain to demonstrate that the secondary containment system would be capable of draining large spills away from Tank 96, 97 or 98 to the partial RI. Trans Mountain must also demonstrate that the secondary containment system has the capacity to contain a spill from a multiple-tank rupture scenario (Condition 24).
>
> The City of Burnaby and the City of Burnaby Fire Department raised concerns about fire and safety risks at the Burnaby Terminal following, in particular, those associated with boil-overs. Trans Mountain claimed that boil-over events are unlikely, yet did not quantify the risks through rigorous analysis. The Board is of the view that a complete assessment of risk requires consideration of the cumulative risk from all tanks at a terminal. The Board would impose conditions requiring Trans Mountain to revise the terminal risk assessments, including the Burnaby Terminal, to demonstrate how the mitigation measures will reduce the risks to levels that are As Low As Reasonably Practicable (ALARP) while complying with the Major Industrial Accidents Council of Canada (MIACC) criteria considering all tanks in each respective terminal (Conditions 22 and 129).

302 With respect to the geotechnical design, the Board wrote at page 97:

> The Board acknowledges the concerns of participants regarding the preliminary nature of the geotechnical design evidence provided. However, the Board is of the view that the design information and the level of detail provided by Trans Mountain with respect to the geotechnical design for the Edmonton Terminal West Tank Area and the Burnaby Terminal are sufficient for the Board at the application stage. The Board notes that more extensive geotechnical work will be completed for the detailed engineering and design phase of the Project.
>
> . . .

With regard to the selection of Seismic Use Group (SUG) for the design of the tanks, the Board notes that Trans Mountain has not made a final determination. Nevertheless, should the Project be approved, the Board will verify that Trans Mountain's tanks have secondary controls to prevent public exposure, in accordance with SUG I design criteria, by way of Conditions 22, 24 and 129.

303 In my view, these reasons adequately allow the Court to understand why the Board rejected Burnaby's evidence and why it imposed the conditions it did.

Westridge Marine Terminal

304 The Board dealt with the Westridge Marine Terminal expansion in Section 6.5 of its report.

305 The Board expressed its views at pages 100 through 102. With respect to the design approach the Board wrote:

Trans Mountain has committed to design, construct, and operate the Westridge Marine Terminal (WMT) in accordance with applicable regulations, standards, codes and industry best practices. The Board accepts Trans Mountain's design approach, including Trans Mountain's effort to eliminate two vapour recovery tanks in the expanded WMT by modifying the vapour recovery technology. The Board considers this to be a good approach for eliminating potential spills and fire hazards. The Board would impose Condition 21 requiring Trans Mountain to provide its decision as well as its rationale to either retain or eliminate the proposed relief tank.

306 With respect to the geotechnical design, the Board wrote:

The Board acknowledges the City of Burnaby's concern regarding the level of detail of the geotechnical information provided in the hearing for the Westridge Marine Terminal (WMT) offshore facilities. However, the Board is of the view that Trans Mountain has demonstrated its awareness of the requirements for the geotechnical design of the offshore facilities and accepts Trans Mountain's geotechnical design approach.

To confirm that soil conditions have been adequately assessed for input to the final design of the WMT offshore facilities, the Board would impose conditions requiring Trans Mountain to file a final preliminary geotechnical report for the design of the offshore facilities, and the final design basis for the offshore pile foundation layout once Trans Mountain has selected the pile design (Conditions 34 and 83).

To verify the geotechnical design approach for the WMT onshore facilities the Board would impose Condition 33 requiring Trans Mountain to file a preliminary geotechnical report for the onshore facilities prior to the commencement of construction.

The Board would examine the geotechnical reports upon receipt and advise Trans Mountain of any further requirements for the fulfilment of the above conditions prior to the commencement of construction.

307 I have previously dealt with Burnaby's concern with the Board's failure to compel further and better information from Trans Mountain at the hearing stage, and to instead impose conditions requiring Trans Mountain to do certain things in future. Burnaby's concerns relating to the assessment of risks centre on this approach taken by the Board. Burnaby has not demonstrated how the Board's reasons with respect to the Westridge Marine Terminal risk assessment are inadequate.

Emergency fire response

308 The Board responded to Burnaby's concerns about adequate resources to respond to a fire as follows at page 156:

The Board shares concerns raised by the City of Burnaby Fire Department and others about the need for adequate resources to respond in the case of a fire. The Board finds the 6-12 hour response time proposed by Trans Mountain

for industrial firefighting contractors to arrive on site as inadequate, should they be needed immediately for a response to a fire at the Burnaby Terminal. The Board would impose conditions requiring Trans Mountain to complete a needs assessment with respect to the development of appropriate firefighting capacity for a safe, timely, and effective response to a fire at the Westridge Marine Terminal (WMT) and at the Edmonton, Sumas, and Burnaby Terminals. The conditions would require Trans Mountain to assess and evaluate resources and equipment to address fires, and a summary of consultation with appropriate municipal authorities and first responders that will help inform a Firefighting Capacity Framework (Conditions 118 and 138).

309 Again, Burnaby's concern is not so much with respect to the adequacy of the Board's reasons, but rather with the Board's approach to dealing with Burnaby's concerns through the imposition of conditions — in this case conditions that do not require formal Board approval. On this last point, the Board's explanation of its process for the review of conditions supports the conclusion that an inadequate response to a condition, even a condition not requiring formal Board approval, would be detected by the Board's specialists. Further, the Board oversees compliance with the conditions it imposes.

310 In any event, I see no inadequacy in the Board's reasons.

Suitability of the Burnaby Mountain Tunnel

311 The Board deals with the Burnaby Mountain Tunnel in Sections 6.2.2 and 6.2.3. The Board's views, in part, are expressed as follows at pages 81 and 82:

> Regarding the City of Burnaby's concern with Trans Mountain's geotechnical investigation, the Board is of the view that the level of detail of the geotechnical investigation for the tunnel option is sufficient for the purpose of assessing the feasibility of constructing the tunnel. The Board notes that a second phase of drilling is planned for the development of construction plans at the tunnel portals, and that additional surface boreholes or probe holes could be drilled from the tunnel face during construction. The Board is of the view that both the tunnel and street options are technically feasible, and accepts Trans Mountain's proposal that the streets option be considered as an alternative to the tunnel option.
>
> The Board is not aware of the use of the concrete or grout-filled tunnel installation method for other hydrocarbon pipelines in Canada. The Board is concerned that damage to the pipe or coating may occur during installation of the pipelines or grouting, and that there will be limited accessibility for future maintenance and repairs. The Board is also concerned that there may be voids or that cracks could form in the grout. The Board would require Trans Mountain to address these and other matters, including excavation, pipe handing, backfilling, pressure testing, cathodic protection, and leak detection, through the fulfillment of Conditions 26, 27 and 28 on tunnel design, construction, and operation.
>
> The Board would impose Condition 29 regarding the quality and quantity of waste rock from the tunnel and Trans Mountain's plans for its disposal.
>
> The Board would also impose Condition 143 requiring Trans Mountain to conduct baseline inspections, including in-line inspection surveys, of the new delivery pipelines in accordance with the timelines and descriptions set out in the condition. The Board is of the view that these inspections would aid in mitigating any manufacturing and construction related defects, and in establishing re-inspection intervals.

312 Burnaby has not demonstrated how these reasons are inadequate.

Protection of municipal water sources

313 While Burnaby enumerated this as an issue on which the Board gave inadequate reasons, Burnaby made no submissions on this point and did not point to any particular section of the Board's reasons said to be deficient. In the absence of submissions on the point, Burnaby has not demonstrated the reasons to be inadequate.

Public interest

314 Again, while Burnaby enumerated this issue as an issue on which the Board gave inadequate reasons, Burnaby made no submissions on the point.

315 The Board's finding with respect to public interest is contained in Chapter 2 of the Board's report where, among other things, the Board described the respective benefits and burdens of the Project and then balanced the benefits and burdens in order to conclude that the Project "is in the present and future public convenience and necessity, and in the Canadian public interest". In the absence of submissions on the point, Burnaby has not demonstrated the reasons to be inadequate.

(vii) Trans Mountain's reply evidence

316 At paragraph 71 of its memorandum of fact and law, Tsleil-Waututh makes the bare assertion that the Board "permitted [Trans Mountain] to file improper reply evidence". While Tsleil-Waututh referenced in a footnote its motion record filed in response to Trans Mountain's reply evidence, it did not make any submissions on how the Board erred or how the reply evidence was improper. Nor did Tsleil-Waututh reference the Board's reasons issued in response to its motion.

317 Tsleil-Waututh argued before the Board that, rather than testing Tsleil-Waututh's evidence through Information Requests, Trans Mountain filed extensive new or supplementary evidence in reply. Tsleil-Waututh alleged that the reply evidence was substantially improper in nature. Tsleil-Waututh sought an order striking portions of Trans Mountain's reply evidence. In the alternative Tsleil-Waututh sought, among other relief, an order allowing it to issue Information Requests to Trans Mountain about its reply evidence and allowing it to file sur-reply evidence.

318 The Board, in Ruling No. 96, found that Trans Mountain's reply evidence was not improper. In response to the objections raised before it, the Board found that:

- Trans Mountain's reply evidence was not evidence that Trans Mountain ought to have brought forward as evidence-in-chief in order to meet its onus.
- Trans Mountain's reply evidence was filed in response to new evidence adduced by the interveners.
- Given the large volume of evidence filed by the interveners, the length of Trans Mountain's reply evidence was not a sufficient basis on which to find it to be improper.
- To the extent that portions of the reply evidence repeated evidence already presented, this caused no prejudice to the interveners who had already had an opportunity to test the evidence and respond to it.

319 The Board allowed Tsleil-Waututh to test the reply evidence through one round of Information Requests. The Board noted that the final argument stage was the appropriate stage for interveners and Trans Mountain to make submissions to the Board about the weight to be given to the evidence.

320 Tsleil-Waututh has not demonstrated any procedural unfairness arising from the Board's dismissal of its motion to strike portions of Trans Mountain's reply evidence.

(viii) Conclusion on procedural fairness

321 For all the above reasons the applicants have not demonstrated that the Board breached any duty of procedural fairness.

(b) Did the Board fail to decide certain issues before recommending approval of the Project?

322 Both Burnaby and Coldwater make submissions on this issue. Additionally, Coldwater, Squamish and Upper Nicola make submissions about the Board's failure to decide certain issues in the context of the Crown's duty to consult. The latter submissions will be considered in the analysis of the adequacy of the Crown's consultation process.

323 Burnaby's and Coldwater's submissions may be summarized as follows.

324 Burnaby raises two principal arguments: first, the Board failed to consider and assess the risks and impacts of the Project to Burnaby, instead deferring the collection of information relevant to the risks and impacts and consideration of that information until after the decision of the Governor in Council when Trans Mountain was required to comply with the Board's conditions; and, second, the Board failed to consider alternative means of carrying out the Project and their environmental effects. Instead, contrary to paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012*, the Board failed to require Trans Mountain to include with its application an assessment of the Project's alternatives and failed to require Trans Mountain to provide adequate answers in response to Burnaby's multiple Information Requests about alternatives to the Project.

325 With respect to the first error, Burnaby asserts that it is a "basic principle of law that a tribunal or a court must weigh and decide conflicting evidence. It cannot defer determinations post-judgment." (Burnaby's memorandum of fact and law, paragraph 142). In breach of this principle, the Board did not require Trans Mountain to provide further evidence, nor did the Board weigh or decide conflicting evidence. Instead, the Board deferred assessment of critical issues by imposing a series of conditions on Trans Mountain.

326 With respect to the second error, Burnaby states that Trans Mountain failed to provide evidence about alternative routes and locations for portions of the Project, including the Burnaby Terminal and the Westridge Marine Terminal. Thus, Burnaby says the Board "had no demonstrated basis on the record to decide" about preferred options or to decide that Trans Mountain used "criteria that justify and demonstrate how the proposed option was selected and why it is the preferred option." (Burnaby's memorandum of fact and law, paragraph 133).

327 Coldwater asserts that contrary to paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012*, the Board failed to look at the West Alternative as an alternative means of carrying out the Project. Briefly stated, the West Alternative is an alternative route for a segment of the new pipeline. The approved route for this segment of the new pipeline passes through the recharge zone of the aquifer that supplies the sole source of drinking water for 90% of the residents of the Coldwater Reserve and crosses two creeks which are the only known, consistent sources of water that feed the aquifer. The West Alternative is said by Coldwater to pose the least apparent danger to the aquifer.

328 Trans Mountain responds that the Board considered the risks and impacts of the Project to Burnaby and determined that there was sufficient evidence to conclude that the Project can be constructed, operated and maintained in a safe manner. Further, it was reasonable for the Board to implement conditions requiring Trans Mountain to submit additional information for Board review or approval throughout the life of the Project. This Court's role is not to reweigh evidence considered by the Board.

329 Trans Mountain notes that the proponent's application and the subsequent Board hearing represent the process by which the Board collects enough information to ensure that a project can be developed safely and that its impacts are mitigated. At the end of the hearing, the Board requires sufficient information to assess the Project's impacts, and whether the Project can be constructed, operated and maintained safely, and to draft terms and conditions to attach to a certificate of public convenience and necessity, should the Governor in Council approve the Project. It follows that the Board did not improperly defer its consideration of Project impacts to the conditions.

330 To the extent that some applicants suggest that the Board acted contrary to the "precautionary principle" Trans Mountain responds that the precautionary principle must be applied with the corollary principle of "adaptive management". Adaptive management responds to the difficulty, or impossibility, of predicting all of the environmental consequences of a project on the basis of existing knowledge. Adaptive management permits a project with uncertain, yet potentially adverse, environmental impacts to proceed based on mitigation measures and adaptive management techniques designed to identify and deal with unforeseen effects (*Canadian Parks & Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] 4 F.C. 672 (Fed. C.A.), at paragraph 24).

331 With respect to the assessment of alternative means, Trans Mountain notes that it presented evidence that it had conducted a feasibility analysis of alternative locations to the Westridge Marine Terminal and the Burnaby Terminal. Based on technical, economic and environmental considerations Trans Mountain had eliminated these options because of the significantly increased costs and larger environmental impacts associated with these alternatives.

332 Trans Mountain also argues that it presented evidence to confirm that its routing criteria followed the existing pipeline alignment and other linear facilities wherever possible. Additionally, it presented various routing alternatives to the Board. Trans Mountain's preferred corridor through Burnaby Mountain was developed in response to requests that it consider a trenchless option through Burnaby Mountain (as opposed to routing the new pipeline through residential streets). Further, while it had initially considered the West Alternative route around the Coldwater Reserve, Trans Mountain rejected this alternative because it necessitated two crossings of the Coldwater River and involved geo-technical challenges and greater environmental disturbances.

333 Based on the evidence before it the Board found that:

- Trans Mountain provided an adequate assessment of technically and economically feasible alternatives, including alternative locations;

- the Burnaby Mountain corridor minimized Project impacts and risks;

- Trans Mountain's route selection process and criteria, and the level of detail it provided for its alternative means assessment, were appropriate; and

- the Board imposed Condition 39 to deal with Coldwater's concerns regarding the aquifer. This condition required Trans Mountain to file with the Board, at least six months prior to commencing construction between two specified points, a hydrogeological report relating to Coldwater's aquifer. This report must describe, delineate and characterize a number of things. For example, based on the report's quantification of the risks posed to the groundwater supplies for the Coldwater Reserve, the report must "describe proposed measures to address identified risks, including but not limited to considerations related to routing, project design, operational measures, or monitoring".

334 Trans Mountain submits that while the applicants disagree with the Board's finding about the range of alternatives, the Board has discretion to determine the range of alternatives it must consider and it is not this Court's role to reweigh the Board's assessment of the facts.

(i) Did the Board fail to assess the risks and impacts posed by the Project to Burnaby?

335 At paragraphs 278 to 291 I dealt with Burnaby's argument that the Board breached the duty of procedural fairness by deferring and delegating the assessment of important information. This argument covers much of the same ground, except it is not couched in terms of procedural fairness.

336 The gist of Burnaby's concern is reflected in its argument that "[i]t is a basic principle of law that a tribunal or court must weigh and decide conflicting evidence. It cannot defer determinations post-judgment."

337 This submission is best considered in concrete terms. The risks the Board is said not to have assessed are the risks posed by the Burnaby Terminal, the tunnel route through Burnaby Mountain, the Westridge Marine Terminal, the lack of available emergency fire response resources to respond to a fire at the Westridge Marine and Burnaby terminals and, finally, the risk in relation to the evacuation of Simon Fraser University following an incident at the Burnaby Terminal. Illustrative of Burnaby's concerns is its specific and detailed argument with respect to the assessment of the risk associated with the Burnaby Terminal.

338 With respect to the assessment of the risks associated with the Burnaby Terminal, Burnaby points to the report of its expert, Dr. Ivan Vince, which identified deficiencies or information gaps in Trans Mountain's risk assessment for the Burnaby Terminal. A second report prepared by Burnaby's Deputy Fire Chief identified gaps in Trans Mountain's analysis of fire risks and fire response capability.

339 Burnaby acknowledges that the Board recognized these gaps and deficiencies. Thus, it found that while Trans Mountain claimed that boil-over events are unlikely, Trans Mountain "did not quantify the risks through a rigorous analysis" and that "a complete assessment of risk requires consideration of the cumulative risk from all tanks at a terminal". Burnaby argues, however, that despite recognizing this deficiency, the Board then failed to require Trans Mountain to provide further information and assessment prior to the issuance of the Board's report. Instead, the Board imposed conditions requiring Trans Mountain to file for the Board's approval a report revising the terminal risk assessments, including the Burnaby Terminal risk assessment, and including consideration of the risks not assessed (Conditions 22 and 129).

340 Condition 22 specifically required the revised risk assessment to quantify and/or include the following:

a. the effect of any revised spill burn rates;

b. the potential consequences of a boil-over;

c. the potential consequences of flash fires and vapour cloud explosions;

d. the cumulative risk based on the total number of tanks in the terminal, considering all potential events (pool fire, boil-over, flash fire, vapour cloud explosion);

e. the domino (knock-on) effect caused by a release of the contents of one tank on other tanks within the terminals and impoundment area(s), or other tanks in adjacent impoundment areas; and,

f. risk mitigation measures, including ignition source control methods.

341 The Board required that for those risks that could not be eliminated "Trans Mountain must demonstrate in each risk assessment that mitigation measures will reduce the risks to levels that are As Low As Reasonably Practicable (ALARP) while complying with the Major Industrial Accidents Council of Canada (MIACC) criteria for risk acceptability."

342 Burnaby concludes its argument on this point by stating that this demonstrates that when the Board completed its report and made its recommendation to the Governor in Council the Board did not have information on the risks enumerated in Condition 22, or information on whether these risks could be mitigated. It follows, Burnaby submits, that the Board failed in its duty to weigh and decide conflicting evidence.

343 Burnaby advances similar arguments in respect of the other risks described above.

344 In my view, Burnaby's argument illustrates that the Board did look critically at the competing expert evidence about risk assessment. After weighing the competing expert reports, the Board determined that Burnaby's evidence did reveal gaps and deficiencies in Trans Mountain's risk assessments. Burnaby's real complaint is not that the Board did not

consider and weigh conflicting evidence. Rather, its complaint is that the Board did not then require Trans Mountain to in effect re-do its risk assessment.

345 However this, in my respectful view, overlooks the Board's project approval process, a process described in detail at paragraphs 285 to 287 above.

346 This process does not require a proponent to file in its application information about every technical engineering detail. What is required is that by the end of the Board's hearing the Board have sufficient information before it to allow it to form its recommendation to the Governor in Council about whether the project is in the public interest and, if approved, what conditions should attach to the project. Included in the consideration of the public interest is whether the project can be constructed, operated and maintained safely.

347 This process reflects the technical complexity of projects put before the Board for approval. What was before the Board for consideration was Trans Mountain's study and application for approval of a 150 metre-wide pipeline corridor for the proposed pipeline route. At the hearing stage much of the information filed with the Board about the engineering design was at a conceptual or preliminary level.

348 Once a project is approved, one of the next steps in the regulatory process is a further hearing for the purpose of confirming the detailed routing of a project. Only after the detailed route is approved by the Board can site-specific engineering information be prepared and filed with the Board. Similarly, detailed routing information is necessary before things such as a fully detailed emergency response plan acceptable to the Board may be prepared and filed (report, page 7).

349 The Board describes the approval of a project to be "just one phase" in the Board's lifecycle regulation. Thereafter the Board's public interest determination "relies upon the subsequent execution of detailed design, construction, operation, maintenance and, ultimately, abandonment of a project in compliance with applicable codes, commitments and conditions" (report, page 19).

350 As stated above, implicit in the Board's imposition of a condition is the Board's expert view that the condition can realistically be complied with, and that compliance with the condition will allow the pipeline to be constructed, operated and maintained in a safe manner. After the Board imposes conditions, mechanisms exist for the Board to assess information filed in response to its conditions and to oversee compliance with its conditions.

351 Burnaby obviously disagrees with the Board's assessment of risk. However, Burnaby has not shown that the Board's approval process is in any way contrary to the legislative scheme. Nor has it demonstrated that the approval process impermissibly defers determinations post-judgment. Courts cannot determine issues after a final judgment is rendered because of the principle of *functus officio*. While this principle has some application to administrative decision-makers it has less application to the Board whose mandate is ongoing to regulate through a project's entire lifecycle.

(ii) Did the Board fail to consider alternative means of carrying out the Project?

352 As explained above, Burnaby's concern is that Trans Mountain did not provide sufficient information to allow the Board to conclude that Trans Mountain's assessment of alternatives was adequate. Burnaby says that the Board simply accepted Trans Mountain's unsupported assertion that the alternatives would result in "significantly greater cost, larger footprint and additional environmental effects, as compared to expanding existing facilities" without testing Trans Mountain's assertion. Burnaby argues that evidence is required to support that assertion "so that the evidence may be tested by intervenors and weighed by the Board in determining whether the preferred location is the best environmental alternative and in the public interest." (Burnaby's memorandum of fact and law, paragraph 136).

353 I begin consideration of Burnaby's submission with the observation that Burnaby's challenge is a challenge to the Board's assessment of the sufficiency of the evidence before it. The Board, as an expert Tribunal, is entitled to significant deference when making such a fact-based assessment.

354 Moreover, in my respectful view, Burnaby's submission fails to take into account that paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012* does not require the Board to have regard to any and all alternative means of carrying out a designated project. The Board is required to consider only those alternative means that are "technically and economically feasible".

355 While Burnaby relies upon guidance from the Canadian Environmental Assessment Agency as to the steps to be followed in the assessment of alternative means, and also relies upon the guidance set out in the Board's Filing Manual about the filing requirements for the consideration of alternatives, these criteria apply only to the treatment of true alternatives, that is alternatives that are technically and economically feasible.

356 I now turn to Burnaby's specific concern that the Board simply accepted Trans Mountain's assertion that Project alternatives would result in "significantly greater cost, larger footprint and additional environmental effects, as compared to expanding existing facilities" without testing this assertion. Burnaby argues that the Board was obliged to require that Trans Mountain provide evidence about alternative routes and locations for the Burnaby Terminal and the Westridge Marine Terminal so that the evidence could be tested by it and other interveners.

357 The impugned quotation comes from Trans Mountain's response to Burnaby's first Information Request (Exhibit H to the affidavit of Derek Corrigan). As previously referred to above at paragraph 269, in addition to Burnaby's Information Requests, the Board also served two Information Requests on Trans Mountain questioning it about alternative marine terminals.

358 The preamble to the Board's second Information Request referenced Trans Mountain's first response to the Board in which it stated that it had considered potential alternative marine terminal locations based on the feasibility of coincident marine and pipeline access, and screened them based on technical, economic, and environmental considerations. The preamble also referenced Trans Mountain's response that it had ultimately concluded that constructing and operating a new marine terminal and supporting infrastructure would result in significantly greater cost, a larger footprint and significantly greater environmental effects as compared to the existing facilities. Based on this conclusion Trans Mountain did not continue with a further assessment of alternative termini for the Project.

359 One of the specific inquiries directed to Trans Mountain by the Board in its second Information Request was:

> Please elaborate on Trans Mountain's rationale for the Westridge Marine Terminal as the preferred alternative, including details to justify Trans Mountain's statement in [Trans Mountain's response to the Board's first Information Request] that constructing and operating a new marine terminal and supporting infrastructure would result in significantly greater cost, a larger footprint, and additional environmental effects, as compared to expanding existing facilities.

360 In its response to the Board, Trans Mountain began by explaining the consideration it had given the option of a northern terminal. Trans Mountain's assessment ultimately "favoured expansion of the existing system south over a new northern lateral [pipeline] and terminal." This assessment was based on the following considerations. The northern option involved:

- A 250 kilometre longer pipeline with a concomitant 10% to 20% higher project capital cost.

- Greater technical challenges, including routing through high alpine areas of the Coast Mountains, or extensive tunneling to avoid these areas. These technical challenges, while not determined to be insurmountable, resulted in greater uncertainty for both cost and construction schedule.

- Fewer opportunities to benefit from existing operations, infrastructure and relationships. These benefits involved both using the existing Trans Mountain right-of-way, facilities, programs and personnel, and the synergies flowing

from other existing infrastructure such as road access, power, and marine infrastructure. The inability to benefit from existing operations would increase the footprint and the potential impact of the northern option.

361 Based on these considerations, Trans Mountain concluded that expansion along the existing Trans Mountain pipeline route was the more favourable option because of the higher costs and the greater uncertainty of both cost and schedule that accompanied the northern option.

362 Trans Mountain then turned to explain its consideration of the alternative southern terminals. Five southern alternative locations were considered: (i) Howe Sound, which was eliminated because there was no feasible pipeline access west of Hope, it would require a new lateral pipeline from the Kamloops area, it involved extreme terrain and there was limited land available in close proximity for storage facilities; (ii) Vancouver Harbour, which was eliminated because there were no locations with coincident feasible pipeline access and no land for storage facilities; (iii) Sturgeon Bank, which was eliminated because there was no feasible land available in close proximity for storage facilities; (iv) Washington State, which was eliminated because it involved a longer pipeline and complex regulatory issues (including additional permits required by both Washington State and federal authorities); and, (v) Boundary Bay, which was eliminated because of insufficient water depth.

363 This left for consideration Roberts Bank. Trans Mountain conducted a screening level assessment based on "desktop studies" of technical, economic and environmental considerations for marine access, storage facilities and pipeline routing for a terminal at that location.

364 After setting out the assumed technical configuration for the Roberts Bank dock, storage and pipeline, Trans Mountain reviewed the engineering and geotechnical considerations. While no unsurmountable engineering or geotechnical issues were identified, Trans Mountain's assessment showed that relative to the Westridge Marine Terminal, the Roberts Bank alternative "required a significantly larger dock structure, a large new footprint for the storage terminal, a longer right of way, and a greater diversion from the existing corridor. The extent and cost of ground improvement necessary for the dock and storage terminal also presented a significant source of uncertainty."

365 Trans Mountain then reviewed the relevant environmental considerations. Trans Mountain's assessment showed that while both Westridge and Roberts Bank:

> ... have unique and important environmental values, based on the setting the environmental conditions at Roberts Bank appeared to be more substantial and uncertain than at Westridge Terminal, particularly given the larger footprint required for the dock and storage terminal. Without effective mitigation accidents or malfunctions at Roberts Bank could result in greater and more immediate consequences for the natural [environment].

366 Trans Mountain then detailed the salient First Nations' considerations. For the purpose of the screening assessment, Trans Mountain assumed First Nation concerns and interests to be similar to those for the Westridge Terminal and likely to include concerns for impacts on traditional rights, environmental protection, and potential interest in economic opportunities.

367 Trans Mountain then reviewed the land use considerations, concluding that relative to the Westridge Terminal "the Roberts Bank alternative would result in a greater change in land use both for the storage terminal and the dock structure. As surrounding development is less than that for Westridge accidents or malfunctions at this location would be expected to affect fewer people."

368 Trans Mountain's assessment next looked to the estimated cost differences. While operating costs were not quantified for comparison purposes, "given the additional dock and storage terminal required these costs would be higher for the Roberts Bank alternative."

369 The assessment then looked at marine access considerations. While Roberts Bank offered a shorter and relatively less complex marine transit:

> [T]here is an existing well established marine safety system for vessels calling at Westridge. Although Roberts Bank would allow service to larger vessels which would result in potentially lower transport costs for shippers and lower probability of oil spill accidents larger cargos result in potentially larger spill volumes. While the overall effect on marine spill risk was not determined it is expected that larger cargos would require a greater investment in spill response.

370 Trans Mountain then set out the conclusions it drew from its assessment. While the Westridge and Roberts Bank terminal alternatives each had positive and negative attributes, especially when viewed from any one perspective, overall Trans Mountain's rationale for the Westridge Marine Terminal as a preferred alternative was based on the expectation that Roberts Bank would result in:

> • Significantly greater cost — Trans Mountain estimated a $1.2 billion higher capital cost and assumed higher operating costs for the Roberts Bank alternative.
>
> • A larger footprint and additional environmental effects — Roberts Bank would result in an additional storage terminal with an estimated 100 acres of land required, a larger dock structure with a 7 kilometre trestle, and a 14 kilometre longer pipeline that diverges further from the existing pipeline corridor.

371 I have set out Trans Mountain's response to the Board at some length because of the importance of this issue to Burnaby. In my view, two points arise from Trans Mountain's response to the Board.

372 First, its response was not as conclusory as Burnaby's submission might suggest. Second, Trans Mountain's explanation for eliminating a northern alternative and the six, southern alternatives on the ground they were not technically or economically feasible was based on factual and technical considerations well within the expertise of the Board. To illustrate, the Board would have an understanding of the technical challenges posed when routing through high alpine areas. It would also be familiar with considerations such as the expense and environmental impact that accompany the construction of a longer pipeline, away from an existing pipeline corridor, or a new storage facility. The Board would have an appreciation of the need for coincident pipeline access and land for storage facilities and of the efficiencies that flow from things such as the use of existing infrastructure and relationships.

373 In relevant part, the Board's conclusion on alternative means was:

> The Board finds that Trans Mountain's route selection process, route selection criteria, and level of detail for its alternative means assessment are appropriate. The Board further finds that aligning the majority of the proposed pipeline route alongside, and contiguous to, existing linear disturbances is reasonable, as this would minimize the environmental and socio-economic impacts of the Project.
>
> The Board acknowledges the concern raised by the City of Burnaby that Trans Mountain did not provide an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat, B.C., or Roberts Bank in Delta, B.C. The Board finds that Trans Mountain has provided an adequate assessment, including consideration of technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations.
>
> (underlining added)

374 Burnaby has not demonstrated that the Board's finding that Trans Mountain provided an appropriate level of detail in its alternative means assessment was flawed. This was a fact-based assessment well within the Board's area of expertise.

(iii) Did the Board fail to look at the West Alternative as an alternative route for the new pipeline?

375 In its project application, Trans Mountain initially proposed four alternative routes for the new pipeline through the Coldwater River Valley. These were referred to as the Modified Reserve Route, the East Alternative, the Modified East Alternative and the West Alternative. While initially its preferred route was identified to be the East Alternative, Trans Mountain later changed its preferred route to be the Modified East Alternative. Coldwater alleges that at some point early in the process Trans Mountain unilaterally withdrew the West Alternative from consideration without notice to Coldwater. Coldwater also alleges that the East and Modified East Alternatives pose the greatest risk of contaminating the aquifer that supplies drinking water to the Coldwater Reserve, and that the West Alternative is the only route to pose no apparent threat to the aquifer.

376 Before the Board, Coldwater argued that Trans Mountain did not adequately assess alternative locations for the new pipeline through the Coldwater River Valley. Coldwater requested that the Board require a re-examination of routing options for the Coldwater River Valley before any recommendation on the Project was made.

377 The Board, in its report, acknowledged Coldwater's concerns at pages 241, 285 and 289.

378 The Board noted, at page 245, that "the detailed route for the Project has not been finalized, and that this hearing assessed the general route for the Project, the potential environmental and socio-economic effects of the Project, as well as all evidence and commitments made by Trans Mountain regarding the design, construction and safe operation of the pipeline and associated facilities."

379 At page 290 the Board found that Trans Mountain had not sufficiently shown that there was no potential interaction between the aquifer underlying the Coldwater Reserve and the proposed Project route. Therefore, the Board imposed Condition 39 requiring Trans Mountain to file a hydrogeological study to more precisely determine the potential for interactions and impacts on the aquifer and to assess the need for any additional measures to protect the aquifer, including monitoring measures (Condition 39 was described in greater detail above at paragraph 333).

380 Coldwater argues that the Board breached its statutory obligation to consider alternative means of carrying out the designated project. Further, this breach cannot be cured at the detailed route hearing because at a detailed route hearing the Board can only consider limited routing options within the approved pipeline corridor. The West Alternative is well outside the approved corridor. Coldwater submits that the Board's only option at the detailed route hearing is to decline to approve the detailed routing and to reject Trans Mountain's Plan, Profile and Book of Reference (PPBoR); Coldwater says this is an option the Board would be unwilling to pursue given the Project's post-approval momentum.

381 I agree that at a detailed route hearing the Board may only approve, or refuse to approve, a proponent's PPBoR. However, this does not mean that at a detailed route hearing the Board is precluded from considering routes outside of the approved pipeline corridor.

382 Subsection 36(1) of the *National Energy Board Act* requires the Board "to determine the best possible detailed route of the pipeline and the most appropriate methods and timing of constructing the pipeline." This provision does not limit the Board to considering the best possible detailed route within the approved pipeline corridor. This was recognized by the Board in *Emera Brunswick Pipeline Company Ltd. (Re)*, 2008 LNCNEB 10, at page 30.

383 Additionally, section 21 of the *National Energy Board Act* permits the Board to review, vary or rescind any decision or order, and in *Emera* the Board recognized, at page 31, that where a proposed route is denied on the basis of evidence of a better route outside of the approved pipeline corridor an application may be made under section 21 to vary the corridor in that location.

384 It follows that the Board would be able to vary the route of the new pipeline should the hydrogeological study to be filed pursuant to Condition 39 require an alternative route, such as the West Alternative route, in order to avoid risk to the Coldwater aquifer.

385 As the pipeline route through the Coldwater River Valley remains a live issue, depending on the findings of the hydrogeological report, it follows that Coldwater has not demonstrated that the Board breached its statutory obligation to consider alternative means.

386 The next error said to vitiate the Board's report is its alleged failure to consider alternatives to the Westridge Marine Terminal.

(c) Did the Board fail to consider alternatives to the Westridge Marine Terminal?

387 In my view, this issue was fully canvassed in the course of considering Burnaby's argument that the Board impermissibly failed to decide certain issues for recommended approval of the Project.

(d) Did the Board err by failing to assess Project-related marine shipping under the Canadian Environmental Assessment Act, 2012?

388 Tsleil-Waututh argues that the Board breached the requirements of the *Canadian Environmental Assessment Act, 2012* by excluding Project-related marine shipping from the definition of the "designated project" which was to be assessed under that Act. In turn, the Governor in Council is said to have unreasonably exercised its discretion when it relied upon the Board's materially flawed report — in effect the Governor in Council did not have a "report" before it and, thus, could not proceed to its decision. Tsleil-Waututh adds that the Board failed to comply with the requirements of subsection 31(1) of the *Canadian Environmental Assessment Act, 2012* by:

> i. failing to determine whether the environmental effects of Project-related marine shipping are likely, adverse and significant;
>
> ii. concluding that the Project is not likely to cause significant adverse environmental effects; and,
>
> iii. failing to determine whether the significant adverse environmental effects likely to be caused by Project-related marine shipping can be justified under the circumstances.

389 The significant adverse effect of particular concern to Tsleil-Waututh are the Project's significant adverse effects upon the endangered Southern resident killer whales and their use by Indigenous peoples.

390 Tsleil-Waututh's submissions are adopted by Raincoast and Living Oceans. To these submissions they add that the Board's decision to exclude Project-related shipping from the definition of the "designated project" was not a discretionary scoping decision as Trans Mountain argues. Rather, the Board erroneously interpreted the statutory definition of "designated project".

391 The definition of "designated project" is found in section 2 of the *Canadian Environmental Assessment Act, 2012*: see paragraph 57 above. The parties agree that the issue of whether Project-related marine shipping ought to have been included as part of the defined designated project turns on whether Project-related marine shipping is a "physical activity that is incidental" to the pipeline component of the Project. This is not a pure issue of statutory interpretation. Rather, it is a mixed question of fact and law heavily suffused by evidence.

392 In response to the submissions of Tsleil-Waututh, Raincoast and Living Oceans, Canada and Trans Mountain make two submissions. First, they submit that the Board reasonably concluded that the increase in marine shipping was not part of the designated project. Second, and in any event, they argue that the Board conducted an extensive review of marine shipping. Therefore, the question for the Court becomes whether the Board's assessment was substantively adequate, such that the Governor in Council still had a "report" before it such that the Board's assessment could be relied upon. Canada and Trans Mountain answer that question in the affirmative.

393 Before commencing my analysis, it is important to situate the Board's scoping decision and the exclusion of Project-related shipping from the definition of the Project. The definition of the designated project truly frames the scope of the Board's analysis. Activities included as part of the designated project are assessed under the *Canadian Environmental Assessment Act, 2012* with its prescribed list of factors to be considered. Further, as the Board acknowledged in Chapter 10 of its report, the *Species at Risk Act* imposes additional obligations on the Board when a designated project is likely to affect a listed wildlife species. These obligations are discussed below, commencing at paragraph 442.

394 This assessment is to be contrasted with the assessment of activities not included in the definition of the designated project. These excluded activities are assessed under the *National Energy Board Act if* the Board is of the opinion that any public interest may be affected by the issuance of a certificate of public convenience and necessity, or by the dismissal of the proponent's application. On this assessment the Board is to have regard to all considerations that "appear to it to be directly related to the pipeline and to be relevant". Parenthetically, to the extent that there is potential for the effects of excluded activities to interact with the environmental effects of a project, these effects are generally assessed under the cumulative effects portion of the *Canadian Environmental Assessment Act, 2012* environmental assessment.

395 I begin my analysis with Trans Mountain's application to the Board for a certificate of public convenience and necessity for the Project. In Volume 1 of the application, at pages 1-4, Trans Mountain describes the primary purpose of the Project to be "to provide additional transportation capacity for crude oil from Alberta to markets in the Pacific Rim including BC, Washington State, California and Asia." In Volume 2 of the application, at pages 2-27, Trans Mountain describes the marine shipping activities associated with the Project. Trans Mountain notes that of the 890,000 barrels per day capacity of the expanded system, up to 630,000 barrels per day, or 71%, could be delivered to the Westridge Marine Terminal for shipment by tanker. To place this in perspective, currently in a typical month five tankers are loaded with diluted bitumen at the Westridge Marine Terminal, some of which are the smaller, Panamax tankers. The expanded system would be capable of serving up to 34 of the larger, Aframax tankers per month (with actual demand influenced by market conditions).

396 This evidence demonstrates that marine shipping is, at the least, an element that accompanies the Project. Canada argues that an element that accompanies a physical activity while not being a major part of the activity is not "incidental" to the physical activity. Canada says that this was what the Board implicitly found.

397 The difficulty with this submission is that it is difficult to infer that this was indeed the Board's finding, albeit an implicit finding. I say this because in its scoping decision the Board gave no reasons for its conclusion. In the second paragraph of the decision, under the introductory heading, the Board simply set out its conclusion:

> For the purposes of the environmental assessment under the CEAA 2012, the designated project includes the various components and physical activities as described by Trans Mountain in its 16 December 2013 application submitted to the NEB. The Board has determined that the potential environmental and socio-economic effects of increased marine shipping activities to and from the Westridge Marine Terminal that would result from the designated project, including the potential effects of accidents or malfunctions that may occur, will be considered under the NEB Act (see the NEB's Letter of 10 September 2013 for filing requirements specific to these marine shipping activities). To the extent that there is potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board will consider those effects under the cumulative effects portion of the CEAA 2012 environmental assessment.
>
> (underlining added)

398 Having defined the designated project not to include the increase in marine shipping, the Board dealt with the Project-related increase in marine shipping activities in Chapter 14 of its report. Consistent with the scoping decision, at the beginning of Chapter 14 the Board stated, at page 323:

As described in Section 14.2, marine vessel traffic is regulated by government agencies, such as Transport Canada, Port Metro Vancouver, Pacific Pilotage Authority and the Canadian Coast Guard, under a broad and detailed regulatory framework. The Board does not have regulatory oversight of marine vessel traffic, whether or not the vessel traffic relates to the Project. There is an existing regime that oversees marine vessel traffic. The Board's regulatory oversight of the Project, as well as the scope of its assessment of the Project under the *Canadian Environmental Assessment Act* (CEAA 2012), reaches from Edmonton to Burnaby, up to and including the Westridge Marine Terminal (WMT). However, the Board determined that potential environmental and socio-economic effects of Project-related tanker traffic, including the potential effects of accidents or malfunctions that may occur, are relevant to the Board's consideration of the public interest under the NEB Act. Having made this determination, the Board developed a set of Filing Requirements specific to the issue of the potential effects of Project-related marine shipping activities to complement the Filing Manual.

(underlining added, footnotes omitted)

399 Two points emerge from this passage. The first point is the closest the Board came to explaining its scoping decision was that the Board did not have regulatory oversight over marine vessel traffic. There is no indication that the Board grappled with this important issue.

400 The issue is important because the Project is intended to bring product to tidewater; 71% of this product could be delivered to the Westridge Marine Terminal for shipment by tanker. Further, as explained below, if Project-related shipping forms part of the designated project additional requirements apply under the *Species at Risk Act*. Finally, Project-related tankers carry the risk of significant, if not catastrophic, adverse environmental and socio-economic effects should a spill occur.

401 Neither Canada nor Trans Mountain point to any authority to the effect that a responsible authority conducting an environmental assessment under the *Canadian Environmental Assessment Act, 2012* must itself have regulatory oversight over a particular subject matter in order for the responsible authority to be able to define a designated project to include physical activities that are properly incidental to the Project. The effect of the respondents' submission is to impermissibly write the following italicized words into the definition of "designated project": "It includes any physical activity that is incidental to those physical activities *and that is regulated by the responsible authority*."

402 In addition to being impermissibly restrictive, the Board's view that it was required to have regulatory authority over shipping in order to include shipping as part of the Project is inconsistent with the purposes of the *Canadian Environmental Assessment Act, 2012* enumerated in subsection 4(1). These purposes include protecting the components of the environment that are *within the legislative authority of Parliament* and ensuring that designated projects are considered in a careful and precautionary manner to avoid significant adverse environmental effects.

403 The second point that arises is that the phrase "incidental to" is not defined in the *Canadian Environmental Assessment Act, 2012*. It is not clear that the Board expressly directed its mind to whether Project-related marine shipping was in fact an activity "incidental" to the Project. Had it done so, the Canadian Environmental Assessment Agency's "Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012" provides a set of criteria relevant to the question of whether certain activities should be considered "incidental" to a project. These criteria are:

i. the nature of the proposed activities and whether they are subordinate or complementary to the designated project;

ii. whether the activity is within the care and control of the proponent;

iii. if the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to "direct or influence" the carrying out of the activity;

iv. whether the activity is solely for the benefit of the proponent or is available for other proponents as well; and,

v. the federal and/or provincial regulatory requirements for the activity.

404 The Board does not advert to, or grapple with, these criteria in its report. Had the Board grappled with these criteria it would have particularly considered whether marine shipping is subordinate or complementary to the Project and whether Trans Mountain is able to "direct or influence" aspects of tanker operations.

405 In this regard, Trans Mountain stated in its application, on pages 8A-33 to 8A-34, that while it did not own or operate the vessels calling at the Westridge Marine Terminal, "it is an active member in the maritime community and works with BC maritime agencies to promote best practices and facilitate improvements to ensure the safety and efficiency of tanker traffic in the Salish Sea." Trans Mountain also referenced its Tanker Acceptance Standard whereby it can prevent any tanker not approved by it from loading at the Westridge Marine Terminal.

406 The Board recognized Trans Mountain's ability to give directions to tanker operators in Conditions 133, 134 and 144 where, among other things, the Board required Trans Mountain to:

- confirm that it had implemented its commitments to enhanced tug escort by prescribing minimum tug capabilities required to escort outbound, laden tankers and by including these minimum capabilities as part of its Tanker Acceptance Standard;

- file an updated Tanker Acceptance Standard and a summary of any revisions made to the Standard; and,

- file annually a report documenting the continued implementation of Trans Mountain's marine shipping-related commitments noted in Condition 133, any instances of non-compliance with Trans Mountain's requirements and the steps taken to correct instances of non-compliance.

407 To similar effect, as discussed below in more detail, Trans Mountain committed in the TERMPOL review process to require, through its tanker acceptance process, that tankers steer a certain course upon exiting the Juan de Fuca Strait.

408 Trans Mountain's ability to "direct or influence" tanker operations was a relevant factor for the Board to consider.

409 The Board's reasons do not well-explain its scoping decision, do not grapple with the relevant criteria and appear to be based on a rationale that is not supported by the statutory scheme. As explained in more detail below, it follows that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that permitted the Governor in Council to make its decision.

410 It follows that it is necessary to consider the respondents' alternate submission that the assessment the Board conducted was, nevertheless, substantially adequate such that the Governor in Council could rely upon it for the purpose of assessing the public interest and the environmental effects of the Project. To do this I will first consider the deficiencies said to arise from the assessment of Project-related shipping under the *National Energy Board Act*, as opposed to its assessment under the *Canadian Environmental Assessment Act, 2012*. I will then turn to the Board's findings, as set out in its report, in order to determine whether the Board's report was materially deficient or substantially adequate.

(i) The deficiencies said to arise from the Board's assessment of Project-related marine shipping under the National Energy Board Act

411 Had the Project been defined to include Project-related marine shipping, subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* would have required the Board to consider, and make findings, concerning the factors enumerated in section 19. In the present case, these include:

• the environmental effects of marine shipping, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project, and any cumulative effects likely to result from the designated project in combination with other physical activities that have or will be carried out;

• the significance of these effects;

• mitigation measures that are technically and economically feasible that would mitigate any significant adverse effects of marine shipping; and,

• alternative means of carrying out the designated project that are technically and economically feasible. This would include alternate shipping routes.

412 I now turn to address the Board's consideration of Project-related shipping.

(ii) The Board's consideration of Project-related marine shipping and its findings

413 I begin by going back to the Board's statement, quoted above at paragraph 398, that "potential environmental and socio-economic effects of Project-related tanker traffic, including the potential effects of accidents or malfunctions that may occur" were relevant to the Board's consideration of the public interest under the *National Energy Board Act*. In this context, in order to ensure that the Board had sufficient information about those effects, the Board developed the specific filing requirements referred to by the Board in the passage quoted above.

414 These filing requirements required Trans Mountain to provide a detailed description of the increase in marine shipping activities including: the frequency of passages, passage routing, speed, and passage transit time; and, the alternatives considered, such as passage routing, frequency of passages and tanker type utilized.

415 Trans Mountain's assessment of accidents and malfunctions related to the increase in marine shipping was required to include descriptions of matters such as:

• measures to reduce the potential for accidents and malfunctions to occur, including an overview of relevant regulatory regimes;

• credible worst case spill scenarios and smaller spill scenarios;

• the fate and behaviour of any hydrocarbons that may be spilled;

• the potential environmental and socio-economic effects of credible worst case spill scenarios and smaller spill scenarios, taking into account the season-specific behaviour, trajectory, and fate of the hydrocarbon(s) spilled, as well as the range of weather and marine conditions that could prevail during the spill event; and,

• Trans Mountain's preparedness and response planning, including an overview of the relevant regulatory regimes.

416 Trans Mountain was required to provide information on navigation and safety including:

• an overview of the relevant regulatory regimes and the role of the different organizations involved;

• any additional mitigation measures in compliance with, or exceeding regulatory requirements, proposed by Trans Mountain to further facilitate marine shipping safety; and,

• an explanation of how the regulatory regimes and any additional measures promote the safety of the increase in marine shipping activities.

417 The filing requirements also required specific information relating to all mitigation measures related to the increase in marine shipping activities.

418 I now turn to specifically consider Chapter 14 of the Board's report and its consideration of the Project-related increase in marine shipping activities. Because the applicants' primary concern centers on the Project's impact on the Southern resident killer whales and their use, I will focus on the Board's consideration of this endangered species, including spill prevention and the effects of spills. The Board did also consider and make findings about the impact of increased Project-related shipping on air emissions, greenhouse gases, marine and fish habitat, marine birds, socio-economic effects, heritage resources and human health effects.

419 The Board began by describing the extent of existing, future, and Project-related shipping activities. It then moved to a review of the regulatory framework and some federal improvement initiatives. The Board's report describes how marine shipping is regulated under the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 and administered by Transport Canada, the Canadian Coast Guard and other government departments.

420 The Board then moved, in Section 14.3, to the assessment of the effects of increased marine shipping, focusing on changes to the environmental and socio-economic setting caused by the routine operation of Project-related marine vessels. It noted that while it assessed the potential environmental and socio-economic factors of increased marine shipping as part of its public interest determination under the *National Energy Board Act*, the Board "followed an approach similar to the environmental assessment conducted under [the *Canadian Environmental Assessment Act, 2012*] ... to the extent it was appropriate, to inform the Board's public interest determination."

421 The Board went on to explain that in order to consider whether the effects of marine shipping were likely to cause significant environmental effects, it considered the existing regulatory scheme in the absence of any specific mitigation measures. This reflected the Board's view that since marine shipping was beyond its regulatory authority, it did not have the ability to impose specific mitigation conditions to address environmental effects of Project-related marine shipping. The Board also explained that it considered any cumulative effects that were likely to arise from Project-related shipping, in combination with environmental effects arising from other current or reasonably foreseeable marine vessel traffic in the area.

422 Finally, before turning to its assessment of the Project's effects, the Board stated that its assessment had considered:

- adverse impacts of Project-related marine shipping on *Species at Risk Act* (SARA)-listed wildlife species and their critical habitat;

- all reasonable alternatives to Project-related marine shipping that would reduce impact on SARA-listed species' critical habitat; and,

- measures to avoid or lessen any adverse impacts, consistent with applicable recovery strategies or action plans.

423 The Board then went on to make the following findings and statements with respect to marine mammals generally:

- Underwater noise from Project-related marine vessels would result in sensory disturbances to marine mammals. The disturbance is expected to be long-term as it is likely to occur for the duration of operations of Project-related vessel traffic.

- When assessing the impact of Project-related shipping on specific species, the Board's approach was to consider the temporal and spatial impact, and its reversibility.

- Project-related marine vessels have the potential to strike a marine mammal, which could result in lethal or non-lethal effects. Further, the increase in Project-related marine traffic would contribute to the cumulative risk of marine

mammal vessel strikes. The Board acknowledged Trans Mountain's commitment to provide explicit guidance for reporting both marine mammal vessel strikes and mammals in distress to appropriate authorities.

• The Board accepted the evidence of the Department of Fisheries and Oceans and Trans Mountain to the effect that there were no direct mitigation measures that Trans Mountain could apply to reduce or eliminate potential adverse effects from Project-related tankers. It recognized that altering vessel operations, for example by shifting shipping lanes away from marine mammal aggregation areas or reducing marine vessel speed, could be an effective mitigation measure. However, these specific measures were outside of the Board's regulatory authority, and out of Trans Mountain's control. The Board encouraged other regulatory authorities, such as Transport Canada or Fisheries and Oceans Canada to explore initiatives that would aim to reduce the potential effects of marine vessels on marine mammals.

• The Board recognized initiatives currently underway, or proposed, and noted Trans Mountain's commitment to participate in some of these initiatives. The Board imposed Condition 132 requiring Trans Mountain to develop a Marine Mammal Protection Program, and to undertake or support initiatives that focus on understanding and mitigating Project-related effects. Such Protection Program is to be filed prior to the commencement of Project operations.

• The Board explained that Condition 132 was meant to ensure that Trans Mountain fulfilled its commitments to participate in the development of industry-wide shipping practices in conjunction with the appropriate authorities. At the same time, the Board recognized that the Marine Mammal Protection Program offered no assurance that effective mitigation would be developed and implemented to address Project-related effects on marine mammals.

• The Board acknowledged the recommendation of the Department of Fisheries and Oceans that Trans Mountain explore the use of marine mammal on-board observers on Project-related marine vessels. The Board expressed its agreement and set out its expectation that it would see an initiative of this type incorporated as part of Trans Mountain's Marine Mammal Protection Program.

424 The Board also acknowledged Trans Mountain's commitment to require Project-related marine vessels to meet any future guidelines or standards for reducing underwater noise from commercial vessels as they come into force.

425 The Board went on to make the following findings with specific reference to the Southern resident killer whale:

• The Southern resident killer whale population has crossed a threshold where any additional adverse environmental effects would be considered significant. The current level of vessel traffic in the regional study area and the predicted future increase of vessel traffic in that area, even excluding Project-related marine vessels, "have and would increase the pressure on the Southern resident killer whale population."

• The Board expressed its expectation that Project-related marine vessels would represent a maximum of 13.9% of all vessel traffic in the regional study area, excluding the Burrard Inlet, and would decrease over time as the volume of marine vessel movements in the area is anticipated to grow. Therefore, while the effects from Project-related marine vessels would be a small fraction of the total cumulative effects, the Board acknowledged that this increase in marine vessels associated with the Project "would further contribute to cumulative effects that are already jeopardizing the recovery of the Southern resident killer whale. The effects associated with Project-related marine vessels will impact numerous individuals of the Southern resident killer whale population in a habitat identified as critical to the recovery". The Board classified these effects as "high magnitude". Consequently, the Board found that "the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale."

• The Board recognized that the "Recovery Strategy for the Northern and Southern Resident Killer Whale" prepared by the Department of Fisheries and Oceans identified vessel noise as "a threat to the acoustic integrity of Southern

resident killer whale critical habitat, and that physical and acoustic disturbance from human activities may be key factors causing depletion or preventing recovery of resident killer whale populations."

• The Board noted that the death of a Southern resident killer whale from a Project-related marine vessel collision, despite the low likelihood of such an event, would have population level consequences. The Board acknowledged that Project-related marine vessels would encounter a killer whale relatively often, however, "given the limited number of recorded killer whale marine vessel strikes and the potential avoidance behaviors of killer whales" the Board accepted the evidence of Trans Mountain and the Department of Fisheries and Oceans that the probability of a Project-related marine mammal vessel strike on a Southern resident killer whale was low.

• The Board expressed the view that the recovery of the Southern resident killer whale requires complex, multi-party initiatives, and that the Department of Fisheries and Oceans and other organizations are currently undertaking numerous initiatives to support the recovery of the species, including finalizing an action plan. The Board acknowledged Trans Mountain's commitment to support the objectives and recovery measures identified in the action plan. The draft action plan included a detailed prioritized list of initiatives. The Board expressed its expectation that Trans Mountain would support these initiatives within the Marine Mammal Protection Program. The Board encouraged initiatives, including initiatives of the federal government, to prioritize and implement specific measures to promote recovery of the species.

• Finally, the Board concluded that "the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale."

426 The Board then considered the impact of marine shipping on the traditional use of marine resources by Indigenous communities, finding that:

• There would be disruptions to Indigenous marine vessels and harvesters, and this may disrupt activities or access to specific sites. However, in the Board's view these disruptions would be temporary, occurring only during the period of time when Project-related tanker vessels are in transit. Thus, it was of the view that Indigenous marine vessel users would maintain the ability to continue to harvest marine resources and to access subsistence and cultural sites in the presence of these periodic and short-term disruptions.

• Therefore, the Board found that, with the exception of the effects on the Southern resident killer whale, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities and sites would be low.

• Given the low frequency, duration and magnitude of effects associated with potential disruptions, and Trans Mountain's commitments to provide regular updated information on Project-related marine vessel traffic to Indigenous communities, the Board found that adverse effects on traditional marine resource uses, activities and sites were not likely and that, overall, Project-related marine traffic's contribution to overall effects related to changes in traditional marine use patterns was not likely to be significant.

• Project-related marine traffic's contribution to cumulative effects was found to be of low to medium magnitude, and reversible in the long term. The Board therefore found significant adverse cumulative effects associated with Project-related marine vessel traffic on traditional marine resource use was not likely to be significant, with the exception of effects associated with the traditional use of the Southern resident killer whale, which were considered significant.

• Recognizing the cultural importance of the killer whale to certain Indigenous groups, the Board found that "the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale."

427 Finally, in Sections 14.4 to 14.6 the Board considered spill prevention. It made the following findings:

• The Board accepted the evidence filed by Trans Mountain regarding marine shipping navigation and safety, including the reports filed as part of the TERMPOL Review Process.

• Although a large spill from a tanker associated with the Project would result in significant adverse environmental and socio-economic effects, such an event is not likely.

• Even with response efforts, any large spill would result in significant adverse environmental and socio-economic effects.

• Trans Mountain, in conjunction with the Western Canada Marine Response Corporation, proposed appropriate measures to respond to potential oil spills from Project-related tankers. These proposed measures exceed regulatory requirements and would result in a response capacity that is double, and a delivery time that is half, that required by the existing planning standards. The Board gave substantial weight to the fact that the TERMPOL Review Committee and the Canadian Coast Guard did not identify any particular concerns with marine spill response planning associated with the Project.

• The environmental effects of a spill from a tanker would be highly dependent on the particular circumstances, such as the amount and the type of product(s) spilled, the location of the spill, the response time, the effectiveness of containment and cleanup, the valued components that were impacted, and the weather and time of year of the spill.

• A small spill, quickly contained, could have adverse effects of low magnitude, whereas a credible worst-case spill could have adverse effects of larger geographic extent and longer duration, and such effects would probably be significant. Moreover, spills could impact key marine habitats such as salt marshes, eelgrass beds and kelp forests, which could, in turn, affect the numerous species that rely upon them. Spills could also affect terrestrial species along the coastline, including SARA-listed terrestrial plant species.

• Although impacts from a credible worst-case spill would probably be adverse and significant, natural recovery of the impacted areas and species would likely return most biological conditions to a state generally similar to pre-spill conditions. Such recovery might be as quick as a year or two for some valued components, or might take as long as a decade or more for others. Valuable environmental values and uses could be lost or diminished in the interim. For some valued components, including certain SARA-species, recovery to pre-spill conditions might not occur.

• Mortality of individuals of SARA-listed species could result in population level impacts and could jeopardize recovery. For example, the impact on a Southern resident killer whale of exposure to an oil spill potentially would be catastrophic.

• There is a very low probability of a credible worst-case event.

• The effects of a credible worst-case spill on the current use of lands, waters and resources for traditional purposes by Indigenous people would likely be adverse and significant. However, the probability of such a worst-case event is very low.

428 With respect to the Board's reference to the report of the TERMPOL Review Committee, one of the topics dealt with in that report was Project routing. It was noted, in Section 3.2, that the "shipping route to and from Trans Mountain's terminal to the open sea is well-established and used by deep sea tankers as well as other vessel types such as cargo vessels, cruise ships and ferries." Later in the report it was noted that "Aframax class tankers currently use the proposed route, demonstrating that tanker manoeuvrability issues are not a concern."

429 Notwithstanding, the Review Committee did make one finding with respect to the shipping route. Finding 9 was to the effect that "Trans Mountain's commitment to require via its tanker acceptance process that Project tankers steer a course no more northerly than due West (270°) upon exiting the Juan de Fuca Strait will enhance safety and protection of the marine environment by providing the shortest route out of the Canadian" economic exclusion zone.

430 Returning to the Board's report, the end result of the Board's assessment of the Project was that, notwithstanding the impacts of the Project upon the Southern resident killer whales and Indigenous cultural uses associated with them, with the implementation of Trans Mountain's environmental protection procedures and mitigation, and the Board's recommended conditions, the Project is not likely to cause significant adverse environmental effects. This was the Board's recommendation under section 29 of the *Canadian Environmental Assessment Act, 2012*.

(iii) Was the Board's assessment of Project-related marine shipping substantially adequate?

431 I begin with the Board's description of its approach to the assessment of marine shipping. It "followed an approach similar to the environmental assessment conducted under" the *Canadian Environmental Assessment Act, 2012* "to the extent it was appropriate". Consistent with this approach, the Board's filing requirements in respect of marine shipping required Trans Mountain to provide information about mitigation measures and alternatives — factors which subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* require be considered in an environmental assessment.

432 Bearing in mind that the primary focus of the applicants' concern about the Board's assessment of Project-related marine shipping is the Board's assessment of the adverse effects of the Project on Southern resident killer whales, the previous review of the Board's findings demonstrates that the Board considered the Project's effects on the Southern resident killer whales, including the environmental effects of malfunctions or accidents that might occur, the significance of those effects and the cumulative effects of the Project on efforts to promote recovery of the species. The Board found the operation of the Project-related tankers was likely to result in significant, adverse effects to the Southern resident killer whale population.

433 Given the Board's finding that the Project was likely to result in significant adverse effects on the Southern resident killer whale, and its finding that Project-related marine vessel traffic would further contribute to the total cumulative effects (which were determined to be significant), the Board found that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Indigenous use associated with the Southern resident killer whale.

434 The Board then considered mitigation measures through the limited lens of its regulatory authority. It found there were no direct mitigation measures Trans Mountain could apply to reduce or eliminate potential adverse effects from Project-related tankers.

435 The Board stated that it considered all reasonable alternatives to Project-related marine shipping that would reduce the impact on SARA-listed species' critical habitat. This would include the critical habitat of the Southern resident killer whale. As part of this consideration, the Board directed Information Request No. 2 to Trans Mountain. In material part, Trans Mountain responded that the only known potential mitigation measures relevant to the Salish Sea to reduce the risk of marine mammal vessel strikes would be to alter the shipping lanes in order to avoid sensitive habitat (that is areas where whales aggregate), and to set speed restrictions. Trans Mountain advised that shipping lanes and speed restrictions are set at the discretion of Transport Canada.

436 Thereafter, the Board issued an Information Request to Transport Canada that, among other things, requested Transport Canada to summarize any initiatives it was currently supporting or undertaking that evaluated potential alternative shipping lanes or vessel speed reductions along the southern coast of British Columbia with the intent of reducing impacts on marine mammals from marine shipping. Transport Canada responded that it was "not currently contemplating alternative shipping lanes or vessel speed restrictions for the purpose of reducing impacts on marine mammals from marine shipping in British Columbia". However, Transport Canada noted it was participating in the Enhancing Cetacean Habitat and Observation Program led by Port Metro Vancouver.

437 Transport Canada's statement that it had no current intent to make alterations to shipping lanes or to impose vessel speed restrictions would seem to have pre-empted further consideration of routing alternatives by the Board.

438 This review of the Board's report has shown that the Board in its assessment of Project-related marine shipping considered:

- the effects of Project-related marine shipping on Southern resident killer whales;
- the significance of the effects;
- the cumulative effect of Project-related marine shipping on the recovery of the Southern resident killer whale population;
- the resulting significant, adverse effects on the traditional Indigenous use associated with the Southern resident killer whale;
- mitigation measures within its regulatory authority; and,
- reasonable alternatives to Project-related marine shipping.

439 Given the Board's approach to the assessment and its findings, the Board's report was adequate for the purpose of informing the Governor in Council about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups. The Board's report adequately informed the Governor in Council of the significance of these effects, the Board's view there were no direct mitigation measures Trans Mountain could apply to reduce potential adverse effects from Project-related tankers, and that there were potential mitigation measures beyond the Board's regulatory authority and so not the subject of proper consideration by the Board or conditions. Perhaps most importantly, the report put the Governor in Council on notice that the Board defined the Project not to include Project-related marine shipping. This decision excluded the effects of Project-related shipping from the definition of the Project as a designated project and allowed the Board to conclude that, as it defined the Project, the Project was not likely to cause significant adverse effects.

440 The Order in Council and its accompanying Explanatory Note demonstrate that the Governor in Council was fully aware of the manner in which the Board had assessed Project-related marine shipping under the *National Energy Board Act*. The Governor in Council was also fully aware of the effects of Project-related marine shipping identified by the Board and that the operation of Project-related vessels is likely to result in significant adverse effects upon both the Southern resident killer whale and Indigenous cultural uses of this endangered species.

441 Having found that the Governor in Council understood the Board's approach and resulting conclusions, it remains to consider the reasonableness of the Governor in Council's reliance on the Board's report to approve the Project. This is considered below, after considering the applicants' submissions with respect to the *Species at Risk Act*.

(e) Did the Board err in its treatment of the Species at Risk Act?

442 The purposes of the *Species at Risk Act* are: to prevent wildlife species from being extirpated or becoming extinct; to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity; and, to manage species of special concern to prevent them from becoming endangered or threatened (section 6).

443 Important protections are found in section 77 of the Act, which is intended to protect the critical habitat of listed wildlife species, and section 79, which is intended to protect listed wildlife species and their critical habitat from new projects. Listed wildlife species are those species listed in Schedule 1 of the Act, a list of wildlife species at risk. Sections 77 and 79 are set out in the Appendix to these reasons.

444 Raincoast and Living Oceans argue that as a result of unreasonably defining the designated project not to include Project-related marine shipping, the Board failed to meet the requirement of subsection 79(2) of the *Species at Risk Act*. As a result of this error they say it was unreasonable for the Governor in Council to rely upon the Board's report

without first ensuring that the Board had complied with subsection 79(2) of the Act with respect to Southern resident killer whales. They also argue that it was unreasonable for the Governor in Council not to comply with its additional, independent obligations under subsection 77(1) of the *Species at Risk Act*.

445 I will deal first with the applicability of section 79 of the Act.

(i) Did the Board err by concluding that section 79 of the Species at Risk Act did not apply to its consideration of the effects of Project-related marine shipping?

446 Section 79 obligates every person required "to ensure that an assessment of the environmental effects of a project is conducted" to:

i. promptly notify the competent minister or ministers if the project "is likely to affect a listed wildlife species or its critical habitat." (subsection 79(1));

ii. identify the adverse effects of the project on the listed wildlife species and its critical habitat (subsection 79(2)); and,

iii. if the project is carried out, ensure that measures are taken "to avoid or lessen those effects and to monitor them." The measures taken must be taken in a way that is consistent with any applicable recovery strategy and action plans (subsection 79(2)).

447 Subsection 79(3) defines a "project" to mean, among other things, a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*.

448 The Board acknowledged its obligations under section 79 of the *Species at Risk Act* in the course of its environmental assessment (Chapter 10, page 161). However, because it had not defined the designated project to include Project-related marine shipping, the Board rejected Living Oceans' submission that the Board's obligations under section 79 of the *Species at Risk Act* applied to its consideration of the effects of Project-related marine shipping on the Southern resident killer whale (Chapter 14, page 332). Notwithstanding this conclusion that section 79 did not apply, for reasons that are not explained in its report, the Board did comply with the obligation under subsection 79(1) to notify the responsible ministers that the Project might affect Southern resident killer whales and their habitat. The Board did this by letter dated April 23, 2014 (a letter sent approximately three weeks after the Board made its scoping decision).

449 I have found that the Board unjustifiably excluded Project-related marine shipping from the Project's description. It follows that the failure to apply section 79 of the *Species at Risk Act* to its consideration of the effects of Project-related marine shipping on the Southern resident killer whale was also unjustified.

450 Both Canada and Trans Mountain argue that, nonetheless, the Board substantially complied with its obligations under section 79 of the *Species at Risk Act*. Therefore, as with the issue of Project-related marine shipping, the next question is whether the Board substantially complied with its obligations under section 79.

(ii) Did the Board substantially comply with its obligations under section 79 of the Species at Risk Act?

451 The respondents argue that, in addition to complying with the notification requirement found in subsection 79(1), the Board considered:

- the adverse impacts of marine shipping on listed wildlife species and their critical habitat;
- all reasonable alternatives to marine shipping that would reduce impact on listed species' critical habitat; and
- measures, consistent with the applicable recovery strategies or action plans, to avoid or lessen any adverse impacts of the Project.

452 Canada and Trans Mountain submit that as a result the Board met its requirements "where possible." (Trans Mountain's memorandum of fact and law, paragraph 120). On this last point, Trans Mountain submits that the Board lacked authority to impose conditions or otherwise ensure that measures were taken to avoid or lessen the effects of marine shipping on species at risk. Thus, while the Board could identify potential mitigation measures, and encourage the appropriate regulatory authorities to take further action, it could not ensure compliance with subsection 79(2) of the *Species at Risk Act*.

453 Canada and Trans Mountain have accurately summarized the Board's findings that are relevant to its consideration of Project-related shipping in the context of the *Species at Risk Act*. However, I do not accept their submission that the Board's consideration of the Project's impact on the Southern resident killer whale substantially complied with its obligation under section 79 of the *Species at Risk Act*. I reach this conclusion for the following reason.

454 By defining the Project not to include Project-related marine shipping, the Board failed to consider its obligations under the *Species at Risk Act* when it considered the Project's impact on the Southern resident killer whale. Had it done so, in light of its recommendation that the Project be approved, subsection 79(2) of the *Species at Risk Act* required the Board to ensure, if the Project was carried out, that "measures are taken to avoid or lessen" the Project's effects on the Southern resident killer whale and to monitor those measures.

455 While I recognize the Board could not regulate shipping, it was nonetheless obliged to consider the consequences at law of its inability to "ensure" that measures were taken to ameliorate the Project's impact on the Southern resident killer whale. However, the Board gave no consideration in its report to the fact that it recommended approval of the Project without any measures being imposed to avoid or lessen the Project's significant adverse effects upon the Southern resident killer whale.

456 Because marine shipping was beyond the Board's regulatory authority, it assessed the effects of marine shipping in the absence of mitigation measures and did not recommend any specific mitigation measures. Instead it encouraged other regulatory authorities "to explore any such initiatives" (report, page 349). While the Board lacked authority to regulate marine shipping, the final decision-maker was not so limited. In my view, in order to substantially comply with section 79 of the *Species at Risk Act* the Governor in Council required the Board's exposition of all technically and economically feasible measures that are available to avoid or lessen the Project's effects on the Southern resident killer whale. Armed with this information the Governor in Council would be in a position to see that, if approved, the Project was not approved until all technically and economically feasible mitigation measures within the authority of the federal government were in place. Without this information the Governor in Council lacked the necessary information to make the decision required of it.

457 The reasonableness of the Governor in Council's reliance on the Board's report is considered below.

458 For completeness I now turn to the second argument advanced by Raincoast and Living Oceans: it was unreasonable for the Governor in Council to fail to comply with its additional, independent obligations under subsection 77(1) of the *Species at Risk Act*.

(iii) Was the Governor in Council obliged to comply with subsection 77(1) of the Species at Risk Act?

459 Subsection 77(1) applies when any person or body, other than a competent minister, issues or approves "a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species". The person or body may authorize such an activity only if they have consulted with the competent minister, considered the impact on the species' critical habitat and formed the opinion that: (a) all reasonable alternatives to the activity that would reduce the impact on the critical habitat have been considered and the best solution has been adopted; and (b) all feasible mitigation measures will be taken to minimize the impact on the critical habitat.

460 The Board accepted that:

> ... vessel noise is considered a threat to the acoustic integrity of Southern resident killer whale critical habitat, and that physical and acoustic disturbance from human activities may be key factors causing depletion or preventing recovery of resident killer whale populations.
>
> (report, page 350)

461 It also accepted that the impact of a Southern resident killer whale being exposed to an oil spill "is potentially catastrophic" (report, page 398).

462 Based on these findings, Raincoast and Living Oceans submit that Project-related shipping "may destroy" critical habitat so that subsection 77(1) was engaged.

463 I respectfully disagree. The Order in Council directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the expansion project. The Governor in Council did not issue or approve a licence, permit or other authorization that authorized marine shipping.

464 Further, subsection 77(1.1) of the *Species at Risk Act* provides that subsection 77(1) does not apply to the Board when, as in the present case, it issues a certificate pursuant to an order made by the Governor in Council under subsection 54(1) of the *National Energy Board Act*. I accept Canada's submission that Parliament would not have intended to exempt the Board from the application of subsection 77(1) while at the same time contemplating that the Governor in Council was not exempted and was obliged to comply with subsection 77(1). This is particularly so given the Board's superior expertise in assessing impacts on habitat and mitigation measures. If subsection 77(1) applied, the Board's ability to meet its obligations was superior to that of the Governor in Council.

(f) Conclusion: the Governor in Council erred by relying upon the Board's report as a proper condition precedent to the Governor in Council's decision

465 Trans Mountain's application was complex, raising challenging issues on matters as diverse as Indigenous rights and concerns, pipeline integrity, the fate and behaviours of spilled hydrocarbons in aquatic environments, emergency prevention, preparedness and response, the need for the Project and its economic feasibility and the effects of Project-related shipping activities.

466 The approval process was long and demanding for all participants; after the hearing the Board was left to review tens of thousands of pages of evidence.

467 Many aspects of the Board's report are not challenged in this proceeding.

468 This said, I have found that the Board erred by unjustifiably excluding Project-related marine shipping from the Project's definition. While the Board's assessment of Project-related shipping was adequate for the purpose of informing the Governor in Council about the effects of such shipping on the Southern resident killer whale, the Board's report was also sufficient to put the Governor in Council on notice that the Board had unjustifiably excluded Project-related shipping from the Project's definition.

469 It was this exclusion that permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related marine shipping. This exclusion then permitted the Board to conclude that, notwithstanding its conclusion that the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project (as defined by the Board) was not likely to cause significant adverse environmental effects. The Board could only reach this conclusion by defining the Project not to include Project-related shipping.

470 The unjustified exclusion of Project-related marine shipping from the definition of the Project thus resulted in successive deficiencies such that the Board's report was not the kind of "report" that would arm the Governor in

Council with the information and assessments it required to make its public interest determination and its decision about environmental effects and their justification. In the language of *Gitxaala* this resulted in a report so deficient that it could not qualify as a "report" within the meaning of the legislation and it was unreasonable for the Governor in Council to rely upon it. The Board's finding that the Project was not likely to cause significant adverse environmental effects was central to its report. The unjustified failure to assess the effects of marine shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed conclusion about the effects of the Project was so critical that the Governor in Council could not functionally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.

471 I have considered the reference in the Explanatory Note to the Order in Council to the government's commitment to the proposed Action Plan for the Southern resident killer whale and the then recently announced Oceans Protection Plan. These inchoate initiatives, while laudable and to be encouraged, are by themselves insufficient to overcome the material deficiencies in the Board's report because the "report" did not permit the Governor in Council to make an informed decision about the public interest and whether the Project is likely to cause significant adverse environmental effects as the legislation requires.

472 There remains to consider the issue of the remedy which ought to flow from the unreasonable reliance upon the Board's report. In my view, this is best dealt with following consideration of the adequacy of the Crown's consultation process.

473 My conclusion that the Board's report was so flawed that it was unreasonable for the Governor in Council to rely upon it arguably makes it unnecessary to deal with the argument advanced on behalf of the Attorney General of British Columbia. It is nonetheless important that it be briefly considered.

3. The challenge of the Attorney General of British Columbia

474 As explained above at paragraphs 64 and 65, after the Board submits a report to the Governor in Council setting out the Board's recommendation under section 52 of the *National Energy Board Act* about whether a certificate of public convenience and necessity should issue, the Governor in Council may, among other options, by order direct the Board to issue a certificate of public convenience and necessity. Irrespective of the option selected, the Governor in Council's order "must set out the reasons for making the order" (subsection 54(2) of the *National Energy Board Act*). The Attorney General of British Columbia intervened in this proceeding to argue that, in breach of this statutory obligation, the Governor in Council failed to give reasons explaining why the Project is not likely to cause significant adverse environmental effects and why the Project is in the public interest.

475 The Attorney General also argued in its written memorandum, but not orally, that the Governor in Council failed to consider the "disproportionate impact of Project-related marine shipping spill risks on the Province of British Columbia". This failure is said to render the Governor in Council's decision unreasonable.

476 In consequence, the Attorney General of British Columbia supports the request of the applicants that the Governor in Council's Order in Council be set aside.

(a) Did the Governor in Council fail to comply with the obligation to give reasons?

477 The lynchpin of the Attorney General's argument is his submission that the Governor in Council's reasons must be found "within the four corners of the Order in Council" and nowhere else. Thus, the Attorney General submits that it is impermissible to have regard to the accompanying Explanatory Note or to documents referred to in the Explanatory Note, including the Board's report and the Crown Consultation Report. Read in this fashion, the Order in Council does not explain why the Governor in Council found the Project is not likely to cause any significant adverse environmental effects or was in the public interest.

478 I respectfully reject the premise of this submission. Subsection 54(2) does not dictate the form the Governor in Council's reasons should take, requiring only that the "order must set out the reasons". Given the legislative nature and the standard format of an Order in Council (generally a series of recitals followed by an order) Orders in Council are not well-suited to the provision of lengthy reasons. In the present case, the two-page Order in Council was accompanied by the 20-page Explanatory Note. They were published together in the Canada Gazette. Given this joint publication, it would, in my view, be unduly formalistic to set aside the Order in Council on the ground that the reasons found in the attached Explanatory Note were placed in an attachment to the order, and not within the "four square corners" of the order.

479 Similarly, it would be unduly formalistic not to look to the content of the Board's report that informed the Governor in Council when rendering its decision. The Order in Council specifically referenced the Board's report and the terms and conditions set out in an appendix to the report, and expressly accepted the Board's public interest recommendation. This conclusion that the Order in Council may be read with the Board's report is consistent with this Court's decision in *Gitxaala*, where the Court accepted Canada's submission that the Order in Council should be read together with the findings and recommendations in the report of the joint review panel. This Court read the Order in Council together with the report and other documents in the record and found that the Governor in Council had met its statutory obligation to give reasons.

480 I therefore find that the Governor in Council also in this case complied with its statutory obligation to give reasons.

(b) Did the Governor in Council fail to consider the impact of Project-related shipping spill risks on the Province of British Columbia?

481 I disagree that the Governor in Council failed to consider the impact of shipping spill risks. The Explanatory Note shows the Governor in Council considered that:

- The Board found the risk of a major crude oil spill occurring was low (Explanatory Note, page 10).
- The Board imposed conditions relating to accidents and malfunctions (Explanatory Note, page 13).

482 Under the heading "Government response to what was heard" the Explanatory Note set out the following about the risk of spills:

> Communities are deeply concerned about the risk and impacts that oil spills pose to their land, air, water and communities. In addition to the terms and conditions related to spills identified by the NEB, land-based oil spills are subject to both federal and provincial jurisdiction. Federally regulated pipelines are subject to NEB regulation and oversight, which requires operators to develop comprehensive emergency management programs and collaborate with local responders in the development of these programs. B.C. also recently implemented regulations under the provincial *Environmental Management Act* to strengthen provincial oversight and require industry and government to collaborate in response to spills in B.C.
>
> The Government recently updated its world-leading pipeline safety regime through the *Pipeline Safety Act*, which came into force in June 2016. The Act implements $1 billion in "absolute liability" for companies operating major crude oil pipelines to clarify that operators will be responsible for all costs associated with spills irrespective of fault up to $1 billion; operators remain liable on an unlimited basis beyond this amount when they are negligent or at fault. The Act also requires proponents to carry cash on hand to ensure they are in a position to immediately respond to emergencies.
>
> With respect to ship source spills, the Government recently announced $1.5 billion in new investment in a national Oceans Protection Plan to enhance its world-leading marine safety regime. The Oceans Protection Plan has four main priority areas:

• creating a world-leading marine safety system that improves responsible shipping and protects Canada's waters, including new preventative and response measures;

• restoring and protecting the marine ecosystems and habitats, using new tools and research;

• strengthening partnerships and launching co-management practices with Indigenous communities, including building local emergency response capacity; and

• investing in oil spill cleanup research and methods to ensure that decisions taken in emergencies are evidence-based.

The Plan responds to concerns related to potential marine spills by strengthening the Coast Guard's ability to take command in marine emergencies, toughening requirements for industry response to incidents, and by enhancing Indigenous partnerships.

483 While the Attorney General of British Columbia disagrees with the Governor in Council's assessment of the risk of a major spill from Project-related shipping, there is no merit to the submission that the Governor in Council failed to consider the risk of spills posed by Project-related shipping.

484 I now turn to consider the adequacy of the consultation process.

D. Should the decision of the Governor in Council be set aside on the ground that Canada failed to consult adequately with the Indigenous applicants?

1. The applicable legal principles

485 Before commencing the analysis, it is helpful to discuss briefly the principles that have emerged from the jurisprudence which has considered the scope and content of the duty to consult. As explained in the opening paragraphs of these reasons, the applicable principles are not in dispute; what is in dispute is whether, on the facts of this case (which are largely agreed), Canada fulfilled its constitutional duty to consult.

486 The duty to consult is grounded in the honour of the Crown and the protection provided for "existing aboriginal and treaty rights" in subsection 35(1) of the *Constitution Act, 1982*. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing (*Haida Nation*, paragraph 32).

487 The duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title (*Haida Nation*, paragraph 35). The duty reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of a specific project.

488 The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Indigenous claim and the seriousness of the potentially adverse effect upon the claimed right or title (*Haida Nation*, paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), paragraph 36).

489 When the claim to title is weak, the Indigenous interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice (*Haida Nation*, paragraph 43). When a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to Indigenous peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making

process; and, the provision of written reasons to show that Indigenous concerns were considered and how those concerns were factored into the decision (*Haida Nation*, paragraph 44).

490 Parliament may choose to delegate procedural aspects of the duty to consult to a tribunal.

491 The Supreme Court has found the Board to possess both the procedural powers necessary to implement consultation and the remedial powers to accommodate, where necessary, affected Indigenous claims and Indigenous and treaty rights. The Board's process can, therefore, be relied on by the Crown to fulfil, in whole or in part, the Crown's duty to consult (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069 (S.C.C.), paragraph 34).

492 As referenced above at paragraph 284, the Supreme Court has described the Board as having considerable institutional expertise both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Indigenous or treaty rights substantially overlap with the project's potential environmental impact, the Board "is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available" (*Clyde River*, paragraph 33).

493 When the Crown relies on a regulatory or environmental assessment process to fulfil the duty to consult, such reliance is not delegation of the Crown's ultimate responsibility to ensure consultation is adequate. Rather, it is a means by which the Crown can be satisfied that Indigenous concerns have been heard and, where appropriate, accommodated (*Haida Nation*, paragraph 53).

494 The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Indigenous groups a veto over what can be done with land pending final proof of their claim. What is required is a process of balancing interests — a process of give and take. Nor does consultation equate to a duty to agree; rather, what is required is a commitment to a meaningful process of consultation (*Haida Nation*, paragraphs 42, 48 and 62).

495 Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement (*Haida Nation*, paragraph 47).

496 Good faith is required on both sides in the consultative process: "The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised [...] through a meaningful process of consultation" (*Haida Nation*, paragraph 42). The "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (*Haida Nation*, paragraph 45).

497 At the same time, Indigenous claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached (*Haida Nation*, paragraph 42).

498 In the present case, much turns on what constitutes a meaningful process of consultation.

499 Meaningful consultation is not intended simply to allow Indigenous peoples "to blow off steam" before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), paragraph 54).

500 The duty is not fulfilled by simply providing a process for exchanging and discussing information. There must be a substantive dimension to the duty. Consultation is talking together for mutual understanding (*Clyde River*, paragraph 49).

501 As the Supreme Court observed in *Haida Nation* at paragraph 46, meaningful consultation is not just a process of exchanging information. Meaningful consultation "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." Where deep consultation is required, a dialogue must ensue that leads to a demonstrably serious consideration of accommodation. This serious consideration may be demonstrated in the Crown's consultation-related duty to provide written reasons for the Crown's decision.

502 Where, as in this case, the Crown must balance multiple interests, a safeguard requiring the Crown to explain in written reasons the impacts of Indigenous concerns on decision-making becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of impacts on Indigenous rights (*Gitxaala*, paragraph 315).

503 Further, the Crown is obliged to inform itself of the impact the proposed project will have on an affected First Nation, and, if appropriate in the circumstances, communicate its findings to the First Nation and attempt to substantially address the concerns of the First Nation (*Mikisew Cree First Nation*, paragraph 55).

504 Consultation must focus on rights. In *Clyde River*, the Board had concluded that significant environmental effects to marine mammals were not likely and effects on traditional resource use could be addressed through mitigation measures. The Supreme Court held that the Board's inquiry was misdirected for the purpose of consultation. The Board was required to focus on the Inuit's treaty rights; the "consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*" (emphasis in original) (*Clyde River*, paragraph 45). Mitigation measures must provide a reasonable assurance that constitutionally protected rights were considered as rights in themselves — not just as an afterthought to the assessment of environmental concerns (*Clyde River*, paragraph 51).

505 When consulting on a project's potential impacts the Crown must consider existing limitations on Indigenous rights. Therefore, the cumulative effects and historical context may inform the scope of the duty to consult (*Chippewas of the Thames*, paragraph 42).

506 Two final points. First, where the Crown knows, or ought to know, that its conduct may adversely affect the Indigenous right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it (*Gitxaala*, paragraph 236).

507 Second, it is important to understand that the public interest and the duty to consult do not operate in conflict. As a constitutional imperative, the duty to consult gives rise to a special public interest that supersedes other concerns commonly considered by tribunals tasked with assessing the public interest. In the case of the Board, a project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*Clyde River*, paragraph 40).

2. The standard to which Canada is to be held in fulfilling the duty

508 As briefly explained above at paragraph 226, Canada is not to be held to a standard of perfection in fulfilling its duty to consult. The Supreme Court of Canada has expressed this concept as follows:

> Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> (*Haida Nation*, paragraph 62)
>
> (underlining added)

509 As in *Gitxaala*, in this case "the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ." (*Gitxaala*, paragraph 182).

510 Against this legal framework, I turn to the design and execution of Canada's four-phase consultation process. This process began in May 2013 with the filing of the Project description and ended in November 2016 with the decision of the Governor in Council to approve the Project and direct the issuance of a certificate of public convenience and necessity.

3. Application of the legal principles to the evidence

511 The Indigenous applicants express a myriad of concerns and asserted deficiencies with respect to the consultation process. Broadly speaking, they challenge both the design of the process and the execution of the process.

512 I will deal first with the asserted deficiencies in the design of the process selected and followed by Canada, and then consider the asserted deficiencies in the execution of the process.

(a) Was the consultation process deficient because of the design of the process selected and followed by Canada?

513 Generally speaking, the most salient concerns expressed with respect to the design of the consultation process are the assertions that:

i. The consultation framework was unilaterally imposed.

ii. The National Energy Board process is inadequate for fulfilling consultation obligations.

iii. Insufficient funding was provided.

iv. The process allowed the Project to be approved when essential information was lacking.

514 Each assertion will be considered in turn.

(i) The consultation framework was unilaterally imposed

515 There was no substantive consultation with the Indigenous applicants about the four-phase consultation process.

516 However, as Canada argues, the Crown possesses a discretion about how it structures a consultation process and how it meets its consultation obligations (*Gitxaala*, paragraph 203, citing *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)*, 2013 ABCA 443, 566 A.R. 259 (Alta. C.A.), at paragraph 39). What is required is a process that allows Canada to make reasonable efforts to inform and consult (*Haida Nation*, at paragraph 62).

517 Canada's four-phase consultation process is described above at paragraphs 72 through 75. While I deal below with the asserted frailties of the Board's hearing process in this particular case, the Supreme Court has recently re-affirmed that the Crown may rely on a regulatory agency to fulfil the Crown's duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Chippewas of the Thames*, paragraph 32). In the present case, no applicant asserts that the National Energy Board lacked any necessary statutory power so as to be able to fulfil in part the Crown's duty to consult. It follows that Canada could rely upon a consultation process which relied in part on the Board's hearing process, so long as Canada remained mindful of its constitutional obligation to ensure before approving the Project that consultation was adequate.

518 Canada implemented a five-phase consultation framework for the review of the Northern Gateway Project. In *Gitxaala*, this Court found that the framework was reasonable (*Gitxaala*, paragraph 8). When the two consultation

frameworks are compared there is little to distinguish them. An additional first phase was required in the Northern Gateway framework simply because the project was reviewed by a joint review panel, not the Board.

519 Given Canada's discretion as to how the consultation process is structured and the similarity of this consultation process to that previously found by this Court to be reasonable, I am satisfied that Canada did not act in breach of the duty to consult by selecting the four-phase consultation process it adopted.

(ii) The Board's process is said to be inadequate for fulfilling consultation obligations

520 A number of deficiencies are asserted with respect to the Board's process and its adequacy for fulfilling, to the extent possible, consultation obligations. The asserted deficiencies include:

- The Board's decision not to allow cross-examination of Trans Mountain's evidence.
- The Board's treatment of oral traditional evidence.
- The Board's timeframe which is said not to have provided sufficient time for affected Indigenous groups to inform themselves of the complexity of the Project and to participate with knowledge of the issues and impacts on them.
- The Board's failure to consult with affected Indigenous groups about any of the decisions the Board made prior to or during the hearing, including the list of issues for the hearing, the panel members who would hear the application, the design of the regulatory review and the environmental assessment, the decision-making process and the report and its recommendations.
- The failure of the Board's process to provide the required dialogue and consultation directly with Canada in circumstances where it is said that consultation in Phase III would be too little, too late.

521 It is convenient to deal with the first four deficiencies together as the Board's choice of procedures, its decision-making process and its ultimate decision flow from its powers as a regulator under the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*.

522 As explained above, the Supreme Court has found that meaningful Crown consultation can be carried out wholly or in part through a regulatory process (*Chippewas of the Thames*, paragraph 32). Prior to this decision, concern had been expressed about the tension said to result if a tribunal such as the Board were required both to carry out consultation on behalf of the Crown and then adjudicate on the adequacy of the consultation. The Supreme Court responded that such concern is addressed by observing that while it is the Crown that owes the constitutional duty to consult, agencies such as the Board are required to make legal decisions that comply with the Constitution. The Supreme Court went on to explain, at paragraph 34, that:

> When the [Board] is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution.
>
> (underlining added)

523 Applying these principles to the submissions before this Court, and bearing in mind that at this point I am only addressing submissions with respect to the adequacy of the design of the consultation process, the Board was required to provide a process that was impartial and fair and in accordance with its statutory framework and the Constitution.

524 As explained above, section 8 of the *National Energy Board Act* authorizes the Board to make rules about the conduct of hearings before it, and the Board's rules allow the Board to determine whether public hearings held before it are oral or written. Section 52 of the *National Energy Board Act* requires the Board to render its report to the Minister

within strict timelines. It follows that the Board could decide not to allow oral cross-examination, could determine how oral traditional evidence would be received and could schedule the hearing to comply with section 52 of the *National Energy Board Act* so long as, at the end of the hearing, it was satisfied that it had exercised its responsibilities in a manner that was fair and impartial and consistent with its governing legislation and section 35 of the *Constitution Act, 1982*.

525 Similarly, the Board was authorized as a neutral arbitrator to make the decisions required of it under the legislation, including decisions about which issues would be decided during the hearing, the composition of the hearing panel and the content of its ultimate report. So long as these decisions were made in a manner that was fair and impartial, and in accordance with the legislative scheme and subsection 35(1) of the *Constitution Act, 1982* they too were validly made. The Indigenous applicants have not shown that any additional dialogue or process was required between the Board and the Indigenous applicants in order for the Board's decision to be constitutionally sound.

526 Put another way, when the Board's process is relied on in whole or in part to fulfil the obligation to consult, the regulatory hearing process does not change and the Board's role as neutral arbitrator does not change. What changes is that the Board's process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not satisfied.

527 I now consider the last deficiency said to make the Board's process inadequate for fulfilling even in part the duty to consult: the failure of the Board's process to provide the required consultation directly with Canada.

528 The Indigenous applicants do not point to any jurisprudence to support their submission that Canada was required to dialogue directly with them during the Board's hearing process (that is, during Phase II) and I believe this submission may be dealt with briefly.

529 As stated above, meaningful Crown consultation can be carried out wholly through a regulatory process so long as where the regulatory process relied upon by the Crown does not achieve adequate consultation or accommodation, the Crown takes further steps to meet its duty to consult by, for example, filling any gaps in consultation on a case-by-case basis (*Clyde River*, paragraph 22).

530 In the present case, Phase III was designed in effect to fill the gaps left by the Phase II regulatory process — Phase III was to focus on outstanding concerns about the Project-related impacts upon potential or established Indigenous or treaty rights and on any incremental accommodation measures that Canada should address. Leaving aside the question of whether Phase III adequately addressed gaps in the consultation process, a point dealt with below, the Indigenous applicants have not shown that the consultation process required Canada's direct involvement in the regulatory process.

531 For all of these reasons, I am satisfied that the Board's process was adequate for fulfilling its consultation obligations.

532 The next concern with respect to the design of the consultation process is that it is said that insufficient participant funding was provided.

(iii) The funding provided is said to have been inadequate

533 Two Indigenous applicants raise the issue of inadequate funding: Squamish and SSN.

534 Squamish sought participant funding of $293,350 to participate in the Board process but was granted only $44,270, plus travel costs for one person to attend the hearing. Canada later provided $26,000 to Squamish to participate in consultation following the close of the Board hearing record. The Squamish appendix to the Crown Consultation Report notes that the British Columbia Environmental Assessment Office also offered Squamish $5,000 in capacity funding to participate in consultations.

535 Chief Campbell of the Squamish Nation provided evidence that the funding provided to Squamish was not adequate for Squamish to obtain experts to review and respond to the 8 volume, 15,000 page, highly technical Project

application. Nor, in his view, was the funding adequate for Squamish to undertake a comprehensive assessment of the impacts of the Project on Squamish rights and title. He notes that Squamish's limited budget is fully subscribed to meet the needs of its members and that the sole purpose of Squamish's involvement in the hearing and consultation process was "defensive: to protect our rights and title."

536 SSN requested in excess of $300,000 for legal fees, expert fees, travel costs, meeting attendance costs and information collecting costs. It received $36,920 in participant funding, plus travel for two representatives to attend the hearing. Canada later offered $39,000 to SSN to participate in consultation following the close of the Board hearing record. The British Columbia Environmental Assessment Office also offered some capacity funding.

537 SSN states that Canada knew that SSN requested funding in largest part to complete a traditional land and resource use study. It states that Canada knew that such studies had been completed for other Indigenous groups in relation to the Project, but that neither Canada nor the proponent had undertaken such a study for SSN.

538 I accept that the level of participant funding provided constrained participation in the process before the National Energy Board by the Squamish and the SSN. However, as Canada submits, it is difficult to see the level of participant funding as being problematic in a systematic fashion when only two applicants address this issue.

539 In *Gitxaala*, this Court rejected the submission that inadequate funding had been provided for participation before the joint review panel and in the consultation process. The Court noted, at paragraph 210, that the evidence filed in support of the submissions did:

> ... not explain how the amounts sought were calculated, or detail any financial resources available to the First Nations outside of that provided by Canada. As such, the evidence fails to demonstrate that the funding available was so inadequate as to render the consultation process unreasonable.

540 Much the same can be said of the evidence filed on this application. While SSN did append its request for participant funding as Exhibit D to the affidavit of its affiant Jeanette Jules, at the time this application was submitted SSN had not determined which expert or experts would be hired, it could not advise as to how many hours the expert(s) would likely bill or what the expert(s)' hourly rate(s) would be. The information provided was simply that it was expected that $80,000 was required to prepare a traditional land use study and that an additional $30,000 was required as the approximate cost of a wildlife study. No information was provided by either applicant about financial resources available to it.

541 The evidence has not demonstrated that the level of participant funding was so inadequate as to render the entire consultation process unreasonable.

(iv) The process allowed the Project to be approved when essential information was lacking

542 The final deficiency asserted with respect to the structure of the consultation process relates to the nature of the Board's process for approving projects. A number of Indigenous applicants argue that Canada's reliance upon the Board's hearing process was unreasonable in circumstances where potential impacts to title and rights remained unknown because studies of those potential impacts, and of the measures proposed in the Board's report to mitigate potential impacts, were left to a later date after the Governor in Council approved the Project. It is argued that without identification of all of the impacts of the Project Canada cannot rely on the Board's assessment of impacts to fulfil the duty to consult.

543 Commencing at paragraph 286 above, I describe in some detail the Board's approval process in the context of the submission of the City of Burnaby that the Board's approval process was procedurally unfair because of what Burnaby characterized to be the deferral and delegation of the assessment of important information.

544 Beginning at paragraph 322 above, I deal with the submissions of the City of Burnaby and Coldwater that the Governor in Council erred in determining that the Board's report qualified as a report because the Board did not decide

certain issues before recommending approval of the Project. Consideration of the concerns advanced by Coldwater with respect to the Board's failure to deal with the West Alternative begins at paragraph 375 above. At paragraphs 384 and 385, I conclude that the pipeline route through the Coldwater River Valley remains a live issue.

545 This places in context concerns raised by Coldwater and other applicants about the reasonableness of Canada's reliance on a process that left important issues unresolved at the time the Governor in Council approved the Project.

546 In my view, this concern is addressed by the Supreme Court's analysis in the companion cases of *Clyde River* and *Chippewas of the Thames* where the Supreme Court explained that the Board's approval process may itself trigger the duty to consult where that process may result in adverse impacts upon Indigenous and treaty rights (*Clyde River*, paragraphs 25 to 29; *Chippewas of the Thames*, paragraphs 29 to 31).

547 Examined in the context of Coldwater's concerns about the West Alternative and the protection of Coldwater's aquifer, this means that the Board's decision about the detailed pipeline routing in the vicinity of the Coldwater Reserve will trigger the duty to consult because Canada will have knowledge, real or constructive, of the potential impact of that decision upon Coldwater's aquifer located beneath the Coldwater Reserve. Once the duty is triggered, the Board may only make its decision if it informs itself of the impacts to the aquifer and takes the rights and interests of Coldwater into consideration before making its final decisions about pipeline routing and compliance with Condition 39 (*Chippewas of the Thames*, paragraph 48). Canada will remain responsible to ensure that the Board's decision upholds the honour of the Crown (*Clyde River*, paragraph 22). This is, I believe, a full answer to the concern that the consultation framework was deficient because certain decisions remain to be made after the Governor in Council approved the Project.

(v) Conclusion on the adequacy of the process selected and followed by Canada

548 In *Clyde River* and *Chippewas of the Thames* the Supreme Court provided helpful guidance about the indicia of a reasonable consultation process. Applying those indicia:

- The Indigenous applicants were given early notice of the Project, the Board's hearing process, the framework of the consultation process and Canada's intention to rely on the National Energy Board process, to the extent possible, to discharge Canada's duty to consult.

- Participant funding was provided to the Indigenous applicants both by the Board and Canada (and the provincial Crown as well).

- The Board's process permitted Indigenous applicants to provide written evidence and oral traditional evidence, to question both Trans Mountain and the federal government interveners through Information Requests and to make written and oral closing submissions.

- The regulatory framework permitted the Board to impose conditions upon Trans Mountain that were capable of mitigating risks posed by the Project to the rights and title of the Indigenous applicants.

- After the Board's hearing record closed and prior to the decision by the Governor in Council, Canada provided a further consultation phase, Phase III, designed to enable Canada to deal with concerns not addressed by the hearing, the Board's proposed conditions and Trans Mountain's commitments.

- Canada understood, and advised the Indigenous applicants, that if Indigenous groups identified outstanding concerns in Phase III there were a number of options available to Canada. These included asking the National Energy Board to reconsider its recommendations and conditions, undertaking further consultations prior to issuing additional permits or authorizations and the use of existing or new policy and program measures to address outstanding concerns.

549 I am satisfied that the consultation framework selected by Canada was reasonable. It was sufficient, if properly implemented, to enable Canada to make reasonable efforts to inform itself and consult. Put another way, this process,

if reasonably implemented, could have resulted in mutual understanding on the core issues and a demonstrably serious consideration of accommodation.

(b) Was the consultation process deficient because of Canada's execution of the process?

550 Canada argues that the consultation process allowed for deep consultation both in form and in substance. In particular it notes that:

- The Indigenous applicants were given early notice of the proposed Project, the Board hearing process and the consultation process, as well as Canada's intention to rely on the Board's process, to the extent possible, to discharge Canada's duty to consult.

- The Board required that Trans Mountain extensively consult before filing its application so as to attempt to address potential impacts by way of project modifications and design.

- Participant funding was provided to the Indigenous applicants by both Canada and the Board.

- The Indigenous applicants were afforded the opportunity before the Board to provide oral traditional and written evidence, to ask questions of Trans Mountain and the Federal interveners, and to make both written and oral submissions. The Board's report formulated conditions to mitigate, avoid or otherwise address impacts on Indigenous groups, and explained how Indigenous concerns were considered and addressed.

- Canada ordered an extension of the legislative timeframe for the Governor in Council's decision and met and corresponded with the Indigenous applicants to discuss concerns that may not have been adequately addressed by the Board and to work together to identify potential accommodation measures.

- Canada developed the Crown Consultation Report to inform government decision-makers and sought feedback from the Indigenous applicants on two draft versions of the Crown Consultation Report.

- Canada reviewed upstream greenhouse gas emission estimates for the Project, struck a Ministerial Panel to seek public input and held a workshop in Kamloops.

- Canada developed additional accommodation measures including an Indigenous Advisory and Monitoring Committee, the Oceans Protection Plan and the Action Plan for the Recovery of the Southern Resident Killer Whale.

- Canada gave written reasons for conditionally approving the Project that showed how Indigenous concerns were considered and addressed.

551 While in *Gitxaala* this Court found that the consultation process followed for the Northern Gateway project fell well short of the mark, Canada submits that the flaws identified by the Court in *Gitxaala* were remedied and not repeated. Specific measures were taken to remedy the flaws found in the earlier consultation. Thus:

i. Canada extended the consultation process by four months to allow deeper consultation with potentially affected Indigenous groups, greater public engagement and an assessment of the greenhouse gas emissions associated with the Project.

ii. The Order in Council expressly stated that the Governor in Council was "satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated". Reasons for this conclusion were given in the Explanatory Note.

iii. Canada shared its preliminary strength of claim assessments in August 2016 to allow Indigenous groups to comment on the assessments. Canada's ultimate assessments were set out in the Crown Consultation Report.

iv. Canada's officials met and dialogued with Indigenous groups. As well, several Ministers met with Indigenous groups. While the Governor in Council accepted the report of the National Energy Board, in addition to the Board's conditions the Crown Consultation Report contained a commitment to design, fund and implement an Indigenous Advisory and Monitoring Committee for the Project and the Explanatory Note referenced two new initiatives: the Economic Pathways Partnership and the Oceans Protection Plan.

v. In order to ensure that the Governor in Council received accurate information, two drafts of the Crown Consultation Report were distributed for comment and Indigenous groups were invited to provide their own submissions to the Governor in Council.

vi. The consultation was based on the unique facts and circumstances applicable to each Indigenous group. The Crown Consultation Report contained a detailed appendix for each potentially affected Indigenous group that dealt with: background information; a preliminary strength of claim assessment; a summary of the group's involvement in the Board and Crown Consultation process; a summary of the group's interests and concerns; accommodation proposals; the group's response to the Board's report; the potential impacts of the Project on the group's Indigenous interests; and the Crown's conclusions.

552 I acknowledge significant improvements in the consultation process. To illustrate, in *Gitxaala* this Court noted, among other matters, that:

- requests for extensions of time were ignored (reasons, paragraphs 247 and 250);

- inaccurate information was put before the Governor in Council (reasons, paragraphs 255-262);

- requests for information went unanswered (reasons, paragraphs 272, 275-278);

- Canada did not disclose its assessment of the strength of the Indigenous parties' claim to rights or title or its assessment of the Project's impacts (reasons, paragraphs 288-309); and,

- Canada acknowledged that the consultation on some issues fell well short of the mark (reasons, paragraph 254).

553 Without doubt, the consultation process for this project was generally well-organized, less rushed (except in the final stage of Phase III) and there is no reasonable complaint that information within Canada's possession was withheld or that requests for information went unanswered.

554 Ministers of the Crown were available and engaged in respectful conversations and correspondence with representatives of a number of the Indigenous applicants.

555 Additional participant funding was offered to each of the applicants to support participation in discussions with the Crown consultation team following the release of the Board's report and recommendations. The British Columbia Environmental Assessment Office also offered consultation funding.

556 The Crown Consultation Report provided detailed information about Canada's approach to consultation, Indigenous applicants' concerns and Canada's conclusions. An individualized appendix was prepared for each Indigenous group (as described above at paragraph 551(vi)).

557 However, for the reasons developed below, Canada's execution of Phase III of the consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court. As such, the consultation process fell short of the required mark for reasonable consultation.

558 To summarize my reasons for this conclusion, Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue.

Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.

559 On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants. While there are some examples of responsiveness to concerns, these limited examples are not sufficient to overcome the overall lack of response. The Supreme Court's jurisprudence repeatedly emphasizes that dialogue must take place and must be a two-way exchange. The Crown is required to do more than to receive and document concerns and complaints. As this Court wrote in *Gitxaala*, at paragraph 265, speaking of the limited mandate of Canada's representatives:

> When the role of Canada's representatives is seen in this light, it is of no surprise that a number of concerns raised by Aboriginal groups — in our view, concerns very central to their legitimate interests — were left unconsidered and undiscussed. This fell well short of the conduct necessary to meet the duty to consult.

560 Further, Phase III was to focus on two questions: outstanding concerns about Project-related impacts and any required incremental accommodation measures. Canada's ability to consult and dialogue on these issues was constrained by two further limitations: first, Canada's unwillingness to depart from the Board's findings and recommended conditions so as to genuinely understand the concerns of the Indigenous applicants and then consider and respond to those concerns in a genuine and adequate way; second, Canada's erroneous view that it was unable to impose additional conditions on Trans Mountain.

561 Together these three factors led to a consultation process that fell short of the mark and was, as a result, unreasonable. Canada then exacerbated the situation by its late disclosure of its view that the Project did not have a high level of impact on the established and asserted rights of the Indigenous applicants — a disclosure made two weeks before they were required to submit their final response to the consultation process and less than a month before the Governor in Council approved the Project.

562 I begin the analysis by underscoring the need for meaningful two-way dialogue in the context of this Project and then move to describe in more detail the three significant impediments to meaningful consultation: the Crown consultation team's implementation of their mandate essentially as note-takers, Canada's reluctance to consider any departure from the Board's findings and recommended conditions, and Canada's erroneous view that it lacked the ability to impose additional conditions on Trans Mountain. I then discuss Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants. Finally, I review instances that show that as a result of these impediments the opportunity for meaningful dialogue was frustrated.

563 The jurisprudence of the Supreme Court on the duty to consult is clear. The Indigenous applicants were entitled to a dialogue that demonstrated that Canada not only heard but also gave serious consideration to the specific and real concerns the Indigenous applicants put to Canada, gave serious consideration to proposed accommodation measures, and explained how the concerns of the Indigenous applicants impacted Canada's decision to approve the Project. The instances below show how Canada fell short of its obligations.

(i) The need for meaningful two-way dialogue

564 As a matter of well-established law, meaningful dialogue is a prerequisite for reasonable consultation. As explained above at paragraphs 499 to 501, meaningful consultation is not simply a process of exchanging information. Where, as in this case, deep consultation is required, a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.

565 The need for meaningful dialogue exists and operates in a factual context. Here, Phase III was a critically important part of the consultation framework. This was so for a number of reasons.

566 First, Phase III was the first opportunity for the Indigenous applicants to dialogue directly with Canada about matters of substance, not process.

567 Second, the Board's report did not deal with all of the subjects on which consultation was required. For example, the Board did not make any determinations about the nature and scope of asserted or established Indigenous rights, including title rights. Nor did the Board consider the scope of the Crown's duty to consult or whether the duty was fulfilled. Nor did Trans Mountain in its application, or the Board in its report, assess how the residual effects of the Project, or the Project itself, could adversely impact traditional governance systems and claims to Aboriginal title (Crown Consultation Report, sections 1.4, 4.3.4 and 4.3.5). Canada was obliged to consult on these issues.

568 Third, neither Trans Mountain nor the Board assessed the Project's impacts on a specific basis for each affected Indigenous group. Rather, Trans Mountain assessed the effects related to Project construction and operations (including potential accidents and malfunctions) that might impact biophysical resources and socio-economic components within the Project area, and the Indigenous uses, practices and activities associated with those resources. This approach was accepted by the Board (Board report, pages 51 to 52).

569 Finally, Phase III began in earnest with the release of the Board's report and finalized conditions. This report contained findings of great importance to the applicants because the Board's findings led Canada to conclude that the Project had only a minor-to-moderate impact on the Indigenous applicants. As a matter of law, this conclusion directly affected both the depth of consultation required and the need for accommodation measures. The following two examples illustrate the importance of the Board's findings to the Indigenous applicants.

570 The first example concerns the assessment of the Project's potential impact on freshwater fishing. The Board found that the proposed watercourse crossings designs, mitigation measures, reclamation activities and post-construction monitoring were appropriate and that they would effectively reduce the extent of effects on fish and fish habitat. Watercourse crossings would be required to comply with federal and provincial laws and regulations and would require permits under the British Columbia *Water Sustainability Act*, S.B.C. 2014, c. 15. The Board agreed with Trans Mountain's self-assessment of the potential for serious harm in that the majority of proposed watercourse crossings would not constitute serious harm to fish for the purposes of the *Fisheries Act*, R.S.C. 1985, c. F-14 (Board report, pages 183 and 185).

571 The Stó:lo have a constitutionally protected right to fish on the Fraser River, a right affirmed by the Supreme Court of Canada. In the Stó:lo appendix to the Crown Consultation Report, Canada concluded that Project construction and routine maintenance during operation would be expected to result in a minor-to-moderate impact on the Stó:lo's freshwater fishing and marine fishing and harvesting activities (Stó:lo appendix, pages 26 and 27). This assessment flowed directly from the Board's conclusion that Project-related activities could result in low-to-moderate magnitude effects on freshwater and marine fish and fish habitat and the Board's conclusion that its conditions, if the Project was approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Stó:lo appendix, pages 24 and 25).

572 The second example relates to the ability of Indigenous groups to use the lands, waters and resources for traditional purposes. The Board found that this ability would be temporarily impacted by construction and routine maintenance activities, and that some opportunities for certain activities, such as harvesting or accessing sites or areas of traditional land resource use, would be temporarily interrupted. The Board was of the view that these impacts would be short-term, as they would be limited to brief periods during construction and routine maintenance, and that these effects would be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the Westridge Marine Terminal site. The Board found these effects would be reversible in the short to long term, and low in magnitude (Board report, page 279). The Board also found that:

• Project-related pipeline, facility and Westridge Marine Terminal construction and operation, and marine shipping activities were likely to have low-to-moderate magnitude environmental effects on terrestrial, aquatic and marine species harvested by Indigenous groups as a whole (Board report, pages 204, 221 to 224 and 362);

• Construction of the Westridge Marine Terminal, the pipeline and associated facilities were likely to cause short-term temporary disruptions to Indigenous community members accessing traditional hunting, trapping and plant gathering sites (Board report, page 279); and,

• Project-related marine shipping activities were likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers were in transit (Board report, page 362).

573 Based on these findings, Canada concluded that the impact of Project construction and operation and Project-related marine shipping activities on Tsleil-Waututh's and Squamish's hunting, trapping and plant gathering activity would be negligible-to-minor. The Project's impact on these activities was assessed to be minor for the Stó:lo and SSN, and minor-to-moderate for Coldwater and Upper Nicola.

574 The critical importance of the Board's findings to the Indigenous applicants mandated meaningful dialogue about those findings. I now turn to consider Canada's execution of Phase III of the consultation process, commencing with the mandate of the Crown consultation team.

(ii) The implementation of the mandate of the Crown consultation team

575 While Canada submits that the members of the Crown consultation team were not mere note-takers, the preponderance of the evidence is to the effect that the members of the Crown consultation team acted on the basis that, for the most part, their role was that of note-takers who were to accurately report the concerns of the Indigenous applicants to the decision-makers.

576 My review of the evidence begins with the explanation of the team's mandate found in the Crown Consultation Report. I then move to the evidence of the interactions between the Crown consultation team and the Indigenous applicants during the consultation process.

577 First, a word of explanation about the source of the evidence cited below. Unless otherwise noted, the evidence comes from meeting notes prepared by Canada. It was Canada's practice to prepare meeting notes following each consultation meeting, to send the draft notes to the affected Indigenous group for comment, and then to revise the notes based on the comments received before distributing a final version. The parties did not take issue with the accuracy of meeting notes. As shown below, where there was any disagreement on what had been said, the minutes set out each party's view of what had been said.

a. The Crown Consultation Report

578 Section 3.3.4 of the Crown Consultation Report dealt with Phase III of the consultation process. Under the subheading "Post-NEB Hearing Phase Consultation" the report stated:

> ... The mandate of the Crown consultation team was to listen, understand, engage and report to senior officials, Aboriginal group perspectives. The Minister of Natural Resources and other Ministers were provided a summary of these meetings.

b. The experience of Tsleil-Waututh

579 At a meeting held on April 5, 2016, Erin O'Gorman of Natural Resources Canada "highlighted her mandate to listen and understand [Tsleil-Waututh's] perspective on how consultations should be structured, and move this information for decision. No mandate to defend the current approach."

580 In the course of the introductions and opening remarks at a meeting held September 15, 2016, "Canada stressed that the Crown's ultimate goal is to understand the position and concerns of the [Tsleil-Waututh] on the proposed Trans Mountain Expansion project."

581 At a meeting held on October 20, 2016, Canada's representatives advised that "[o]ur intention is to provide a report to cabinet and include all first Nations consulted, we are open to having [Tsleil-Waututh] input review and representation in that report, together with mitigation and accommodation measures." In response, a representative of Tsleil-Waututh "indicated he did not want consultations and a report of concerns to [Governor in Council]: that has occurred and does not work." The response of the federal representatives to this was that "it was sufficient to convey information to the [Governor in Council] depending on how it's done."

c. The experience of Squamish

582 On October 6, 2016, the Major Projects Management Office and the British Columbia Environmental Assessment Office jointly wrote to Squamish in response to a letter from Squamish setting out its views on the outstanding deficiencies in the Board review process and requesting a review of the consultation approach the Crown was taking to inform forthcoming federal and provincial decisions in respect of the Project. Under the heading "Procedural Concerns" Squamish was advised:

> The Crown Consultation Team's objective has always been to work with Squamish and other Aboriginal groups to put forward the best information possible to decision makers within the available regulatory timeframe, via this Consultation and Accommodation Report. Comments and input provided by Squamish will help the Crown Consultation Team to accurately convey Squamish's interests, concerns, and any specific proposals.
>
> The Crown is now focused on validating the key substantive concerns of Squamish, and has requested feedback on an initial draft report so that the Crown can include draft conclusions in a subsequent revision that will include the Crown's assessment of the seriousness of potential impacts from the Project on Aboriginal Interests, specific to each Aboriginal group.
>
> . . .
>
> At this stage in the process, following a four month extension of the federal legislated time limit, for a decision on the Project (required by December 19, 2016), we continue to want to ensure that Squamish's substantive concerns with respect to the Project, [Board] report (including recommended terms and conditions), and related proposals for mitigation or accommodation are accurately and comprehensively documented in the Consultation and Accommodation Report.
>
> (underlining added)

583 At the only consultation meeting held with Squamish, Canada's consultation lead referenced the ethics the team abided by during each meeting with Indigenous groups: "honesty, truth, pursuing the rightful path and ensuring that accurate and objective, representative information is put before decision-makers."

584 He later reiterated that "[i]t is the Crown's duty to ensure that accurate information on these outstanding issues is provided to decision-makers, including how Squamish perceives the project and any outstanding issues."

d. The experience of Coldwater

585 At a meeting held with Coldwater on March 31, 2016, prior to the start of Phase III, the head of the Crown consultation team explained that:

> ... the work of the Crown consultation team, to develop a draft report that helps document the potential impacts of the project on [Coldwater] rights and interests, will be the vehicle through which the Crown documents potentially outstanding issues and accommodation proposals. It may appear as though the Crown is relying solely on the [Board] process, however it is not. It is leading its own consultation activities and will be overlaying a separate analytical framework (i.e. the impacts-on-rights lens).

586 At a meeting on May 4, 2016, discussing, among other things, the effect of the Project on Coldwater's aquifer the Crown consultation team advised:

> For specifics such as detailed routing, it is the [Board] which decides those. The responsibility that the Crown consultation team has is to make sure these issues are reflected in the Crown consultation report, so they can be considered by decision makers.
>
> (underlining added)

After Coldwater expressed its strong preference for the West Alternative Canada's representatives responded that:

> [t]his issue is one which is very detailed, and will need to be recorded carefully and accurately in the Crown consultation Report. The Crown consultation report can highlight that project routing is a central issue for Coldwater.
>
> (underlining added)

587 At a consultation meeting held on October 7, 2016, again in the context of discussions about Coldwater's aquifer, one of Canada's representatives:

> ... acknowledged that the aquifer hasn't been fully explored, but explained that the [Board] process has analysed the Project and that the Crown will not be taking an independent analysis beyond that. This is because the [Board] is a quasi-judicial tribunal with significant technical expertise. The Crown (federally and provincially) will not undertake an independent analysis of potential corridor routes. That said, the Crown will take Coldwater's concerns back to decision makers.
>
> . . .
>
> Coldwater asked what the point of consultation was if all that was coming from the Crown was a summary report to the [Governor in Council].
>
> (underlining added)

588 In the later stages of the meeting during a discussion headed "Overview of Decision Making", Coldwater stated that based on the discussion with the Crown to date it did not seem likely that there would be a re-analysis of the West Alternative or any of the additional analysis Coldwater had asked for. Canada's representatives responded that:

> [The Crown's] position is that the detailed route hearing process and Condition 39 provide avenues to consider alternative routes, however the Crown is not currently considering alternative routes because the [Board] concluded that the applied for pipeline corridor is satisfactory. The Crown will ensure that Coldwater's concerns about the route are provided to the Cabinet, it will then be up to Cabinet to decide if those concerns warrant reconsideration of the current route.
>
> (underlining added)

e. The experience of Stó:lo

589 An email sent from the Major Projects Management Office following an April 13, 2016, consultation meeting advised that:

> The Crown consultation team for [the Trans Mountain expansion] and the forthcoming Ministerial Representative (or Panel) will hear views on the project and whether there are any outstanding issues not addressed in the [Board's] final report and conditions or [Environment Canada's] assessment of upstream greenhouse gas emissions. This will provide another avenue for participants to provide their views on the upstream [greenhouse gas] assessment for [Trans Mountain expansion]. Any comments will be received and given consideration by the Government of Canada.
>
> (underlining added)

590 On May 12, 2016, the Stó:lo wrote to the Minister of Natural Resources, the Honourable James Carr. It wrote about the Crown Consultation Report that:

> ... we understood [Canada's representative] Mr. Neil to say that the federal decision-maker will be the Governor-in-Council and that [Natural Resources Canada], further to this Crown consultation, will not make recommendations with respect to this project. Instead, its report to the Governor-in-Council will be a summary of what it heard during its consultations with aboriginal peoples with some commentary. We further understood Mr. Whiteside [another federal representative] to say that the Governor-in-Council cannot, based on Crown consultations, add or make changes to the Terms and Conditions of the project as set out by the [Board]. If we have misunderstood these representations, we would appreciate being informed in writing. If we have not misunderstood these representations, we believe that [Natural Resources Canada] is misinterpreting its constitutional obligations and the authority of federal decision-makers.
>
> (underlining added)

591 The Stó:lo went on to observe that "[a] high level of consultation means more than simply gathering information on aboriginal interests, cross checking those with the Terms and Conditions of the project and reporting those findings to the federal decision-maker." And that "[a] simple 'what we heard' report is inadequate to this task and the Governor-in-Council must be aware of its obligation to either reject or make changes to the project to protect and preserve the aboriginal rights, title and interests of the Stó:lo Collective."

592 The Minister responded on July 15, 2016. The Minister agreed that addressing concerns required more than gathering and reporting information from consultation sessions and advised that if the Stó:lo Collective identified concerns that had not been fully addressed by the Board's terms and conditions consultation would "include efforts to preserve the Aboriginal rights in question." The Minister encouraged the Stó:lo Collective "*to work with the Crown consultation team so that the Stó:lo Collective's interests are fully understood and articulated in the Crown Consultation and Accommodation Report*" (underlining added). The Minister added that "[a]ny accommodation measures or proposals raised during Crown consultations will be included in this report and will inform the Government's decision on [the Project]."

f. The experience of Upper Nicola

593 At a meeting held on March 31, 2016, after Chief McLeod expressed his desire for Upper Nicola's "intentions to be heard by decision makers, and asked that all of the information shared today be relayed to Minister Carr", Canada's representatives responded that "senior decision makers are very involved in this project and the Crown consultation team would be relaying the outcomes and the meeting records from the meeting today up the line." Canada's Crown consultation lead noted that "wherever possible he would like to integrate some of the Indigenous words Chief McLeod spoke about into the Crown consultation report as a mechanism to relay the important messages which the Chief is talking about."

594 At a meeting on May 3, 2016, immediately prior to the release of the Board's report and recommendations, Canada's consultation lead "*reiterated the current mandate for the Crown consultation team, which is to listen, learn, understand, and to report up to senior decision makers*" (underlining added). Upper Nicola's legal counsel responded that "the old consultation paradigm, where the Crown's officials meets with Aboriginal groups to hear from them their perspectives and then to report this information to decision makers, is no longer valid."

595 Towards the end of the meeting, in response to a question about a recent media story which claimed that the Prime Minister had instructed his staff to develop a strategy for approving Trans Mountain, a senior advisor to Indigenous and Northern Affairs Canada advised that he had "received no instructions from his department that would change his obligation as a public servant to ensure that he does all he can to remain objective and impartial and *to ensure that the views of Aboriginal groups are appropriately and accurately relayed to decision makers*." The Crown consultation lead added that the "Crown consultation team has no view on the project. *Its job is to support decision makers with accurate information*" (underlining added).

g. The experience of SSN

596 In an email of July 7, 2015, sent prior to the release of the Board's draft conditions, SSN was advised by the Major Projects Management Office that the Federal "Crown's consultation will focus on an exchange of information and dialogue on two key documents", the Board's draft conditions and the draft Crown Consultation Report. With respect to the Crown Consultation Report, the email advised that the focus would be to determine "*whether the Crown has adequately described the Aboriginal group's participation in the process, the substantive issues they have raised and the status of those issues (including Aboriginal groups' views on any outstanding concerns and residual issues arising from Phase III)*" (underlining added).

597 In a later email of June 17, 2016, SSN were informed that:

> The objective of the Crown consultation team moving forward is to consult collaboratively in an effort to reach consensus on outstanding issues and related impacts on constitutionally protected Aboriginal and treaty rights, as well as options for accommodating any impacts on rights that may need to be considered as part of the decision-making process. The status of these discussions will be documented in a Consultation and Accommodation Report that will help inform future decisions on the proposed project and any accompanying rationale for the government's decisions.
>
> (underlining added)

h. Conclusion on the mandate of the Crown consultation team

598 As this review of the evidence shows, members of the Crown consultation team advised the Indigenous applicants on a number of occasions throughout the consultation process that they were there to listen and to understand the applicants' concerns, to record those concerns accurately in the Crown Consultation Report, and to pass the report to the Governor in Council. The meeting notes show the Crown consultation team acted in accordance with this role when discussing the Project, its impact on the Indigenous applicants and their concerns about the Project. The meeting notes show little or no meaningful responses from the Crown consultation team to the concerns of the Indigenous applicants. Instead, too often Canada's response was to acknowledge the concerns and to provide assurance the concerns would be communicated to the decision-makers.

599 As this Court explained in *Gitxaala* at paragraph 279, Canada was required to engage, dialogue and grapple with the concerns expressed to it in good faith by the Indigenous groups impacted by the Project. Meaningful dialogue required someone representing Canada empowered to do more than take notes — someone able to respond meaningfully to the applicants' concerns at some point in time.

600 The exchanges with the applicants demonstrate that this was missing from the consultation process. The exchanges show little to facilitate consultation and show how the Phase III consultation fell short of the mark.

601 The consultation process fell short of the required mark at least in part because the consultation team's implementation of its mandate precluded the meaningful, two-way dialogue which was both promised by Canada and required by the principles underpinning the duty to consult.

(iii) Canada's reluctance to depart from the Board's findings and recommended conditions and genuinely engage the concerns of the Indigenous applicants

602 During Phase III each Indigenous applicant expressed concerns about the suitability of the Board's regulatory review and environmental assessment. These concerns were summarized and reported in the appendix to the Crown Consultation Report maintained for each Indigenous applicant (Tsleil-Waututh appendix, pages 7-8; Squamish appendix, page 4; Coldwater appendix, pages 4-5; Stó:lo appendix, pages 12-14; Upper Nicola appendix, pages 5-6; SSN appendix, page 4). These concerns related to both the Board's hearing process and its findings and recommended conditions. The concerns expressed by the Indigenous applicants included:

- The exclusion of Project-related shipping from the definition of the "designated project" which was to be assessed under the *Canadian Environmental Assessment Act, 2012*.

- The inability to cross-examine Trans Mountain's witnesses, coupled with what were viewed to be inadequate responses by Trans Mountain to Information Requests.

- The Board's recommended terms and conditions were said to be deficient for a number of reasons, including their lack of specificity and their failure to impose additional conditions (for example, a condition that sacred sites be protected).

- The Board's findings were generic, thus negatively impacting Indigenous groups' ability to assess the potential impact of the Project on their title and rights.

- The Board's legislated timelines were extremely restrictive and afforded insufficient time to review the Project application and to participate meaningfully in the review process.

- The Board hearing process was an inappropriate forum for assessing impacts to Indigenous rights, and the Board's methods and conclusions regarding the significance and duration of the Project's impacts on Indigenous rights were flawed.

603 However, missing from both the Crown Consultation Report and the individual appendices is any substantive and meaningful response to these concerns. Nor does a review of the correspondence exchanged in Phase III disclose sufficient meaningful response to, or dialogue about, the various concerns raised by the Indigenous applicants. Indeed, a review of the record of the consultation process discloses that Canada displayed a closed-mindedness when concerns were expressed about the Board's report and was reluctant to depart from the findings and recommendations of the Board. With rare exceptions Canada did not dialogue meaningfully with the Indigenous applicants about their concerns about the Board's review. Instead, Canada's representatives were focused on transmitting concerns of the Indigenous applicants to the decision-makers, and nothing more. Canada was obliged to do more than passively hear and receive the real concerns of the Indigenous applicants.

604 The evidence on this point comes largely from Tsleil-Waututh and Coldwater.

605 I begin with the evidence of the Director of Tsleil-Waututh's Treaty, Lands and Resources Department, Ernie George. He affirmed that at a meeting held with representatives of Canada on October 21, 2016, to discuss Tsleil-

Waututh's view that the Board's process was flawed such that the Governor in Council could not rely on its report and recommendations:

> 81. Canada expressed that it was extremely reluctant to discuss the fundamental flaws that [Tsleil-Waututh] alleged were present in relation to the [Board] process, and even prior to the meeting suggested that we might simply need to "agree to disagree" on all of those issues. In our view Canada had already determined that it was not willing to take any steps to address the issues that [Tsleil-Waututh] identified and submitted constituted deficiencies in the [Board] process, despite having the power to do so under CEAA and NEBA and itself stating that this was a realistic option at its disposal.
>
> (underlining added)

606 Mr. George was not cross-examined on his affidavit.

607 Canada's reluctance was firmly expressed a few days later at a meeting held on October 27, 2016. Mr. George affirmed:

> 101. [Tsleil-Waututh] raised its concern that although the [Board] reached similar conclusions as [Tsleil-Waututh] that oil spills in Burrard Inlet would cause significant adverse environmental effects, it disagreed with Drs. Gunton and Broadbent's conclusions as to the likelihood of spills occurring. [Tsleil-Waututh] then asked Canada whether it agreed with those conclusions. Canada was unable to respond because it did not bring its risk experts to the meeting. [Tsleil-Waututh] rearticulated its view that such risks were far too high.
>
> 102. At this point, despite the critical importance of this issue, Canada advised [Tsleil-Waututh] that it was unwilling to revisit the [Board's] conclusions and would instead wholly rely on the [Board's] report on this issue. We stated that we did not accept Canada's position, that further engagement on this subject was required, and that we would be willing to bring our experts to a subsequent meeting to consider any new material or new technology that Canada might identify.
>
> (underlining added)

608 This evidence is consistent with the meeting notes prepared by Canada which reflect that Canada's representatives "indicated that government would rely on the [Board's] report". The notes then record that Tsleil-Waututh's representatives inquired "if the [Government of Canada] was going to rely on the [Board's] report, there was an openness to discuss matters related to gaps in the [Board's] report and what had been ignored." In response, "Canada acknowledged [Tsleil-Waututh's] views on the [Board] process, and indicated that it could neither agree or disagree: both [Tsleil-Waututh] and [Canada] had been intervenors and neither could know how the [Board] panel weighed information provided to it."

609 Coldwater provided similar evidence relating to its efforts to consult with Canada about the Project's impacts on its aquifer at meetings held on May 4, 2016 and October 7, 2016.

610 On May 4, 2016, representatives of Coldwater expressed their view that the West Alternative was a much better pipeline route that addressed issues the Board had not addressed adequately. As set out above, Canada's representatives responded that for "specifics such as detailed routing, it is the [Board] which decides those" and added that "[t]he responsibility that the Crown consultation team has is to make sure these issues are reflected in the Crown consultation report, so they can be considered by decision makers."

611 Canada again expressed the view that the Board's findings were not to be revisited in the Crown consultation process at the meeting of October 7, 2016. In response to a question about the West Alternative, Canada's representatives advised that in the Phase III consultation process it was not for Canada to consider the West Alternative as an alternate measure to mitigate or accommodate Coldwater's concerns. The meeting notes state:

> The Crown replied that the [Board] concluded that the current route is acceptable; however the Panel imposed a condition requiring the Proponent to further study the interaction between the proposed pipeline and the aquifer. Tim Gardiner acknowledged that the aquifer hasn't been fully explored, but explained that the [Board] process has analyzed the Project and that the Crown will not be taking an independent analysis beyond that. This is because the [Board] is a quasi-judicial tribunal with significant technical expertise, the Crown (federally and provincially) will not undertake an independent analysis of potential corridor routes. That said, the Crown will take Coldwater's concerns back to decision makers.
>
> (underlining added)

612 Canada went on to express its confidence in Board Condition 39 and the detailed route hearing process.

613 Later, in response to Coldwater's concern that the Board never considered the West Alternative, the meeting notes show that Canada's representatives:

> ... acknowledged Coldwater's concerns, and explained that when the West Alternative was no longer in the [Board's] consideration, the Crown was not able to question that. [Mr. Whiteside] acknowledged that from Coldwater's perspective this leaves a huge gap. Mr. Whiteside went on to explain that the Proponent's removal of the West Alternative "is not the Crown's responsibility. We are confined to the [Board] report."
>
> (underlining added)

614 Finally, in the course of an overview of decision-making held at the end of the October 7, 2016 meeting, Canada advised it was not considering alternative routes "because the [Board] concluded that the applied for pipeline corridor is satisfactory." Canada added that "[t]he Crown will ensure that Coldwater's concerns about the route are provided to the Cabinet, [and] it will then be up to Cabinet to decide if those concerns warrant reconsideration of the current route."

615 As this Court had already explained in *Gitxaala*, at paragraph 274, Canada's position that it was confined to the Board's findings is wrong. As in *Gitxaala*, Phase III presented an opportunity, among other things, to discuss and address errors, omissions and the adequacy of the recommendations in the Board's report on issues that vitally concerned the Indigenous applicants. The consequence of Canada's erroneous position was to seriously limit Canada's ability to consult meaningfully on issues such as the Project's impact on each applicant and possible accommodation measures.

616 Other meeting notes do not record that Canada expressed its reluctance to depart from the Board's findings in the same terms to other Indigenous applicants. However, there is nothing inconsistent with this position in the notes of the consultation with the other applicants.

617 For example, in a letter sent to Squamish by the Major Projects Management Office on July 14, 2015, it was explained that the intent of Phase III was:

> ... not to repeat or duplicate the [Board] review process, but to identify, consider and potentially address any outstanding concerns that have been raised by Aboriginal groups (i.e. concerns that, in the opinion of the Aboriginal group, have not been addressed through the [Board] review process).

618 Later, Squamish met with the Crown consultation team on September 11, 2015, to discuss the consultation process. At this meeting Squamish raised concerns about, among other things, the adequacy of Canada's consultation process. In a follow-up letter counsel for Squamish provided more detail about the "Squamish Process" — a proposed process to enable consideration of the Project's impact upon Squamish's interests. The process included having community concerns inform the scope of the assessment with the goal of having these concerns substantively addressed by conditions placed on the Project proponent.

619 Canada responded by letter dated November 26, 2015, in which it reiterated its position that:

> ... there are good reasons for the Crown to rely on the [Board's] review of the Project to inform the consultation process. This approach ensures rigour in the assessment of the potential adverse effects of the Project on a broad range of issues including the environment, health and socio-economic conditions, as well as Aboriginal interests.

620 The letter went on to advise that:

> Information from a formal community level or third-party review process can be integrated into and considered through the [Board] review process if submitted as evidence. For the Trans Mountain Expansion Project, the appropriate time to have done so would have been prior to the evidence filing deadline in May 2015.

621 Canada went on to express its confidence that the list of issues, scope of assessment and scope of factors examined by the Board would inform a meaningful dialogue between it and Squamish.

622 In other words, Canada was constrained by the Board's review of the Project. Canada required that evidence of any assessment or review process be first put before the Board, and any dialogue had to be informed by the Board's findings.

623 A similar example is found in the Crown's consultation with Upper Nicola. At the consultation meeting held on September 22, 2016, Upper Nicola expressed its concern with the Board's economic analysis. The Director General of the Major Projects Management Office responded that "as a rule, the [Governor in Council] is deferential to the [Board's] assessment, but they are at liberty to consider other information sources when making their decision and may reach a different conclusion than the [Board]." The Senior Advisor from Indigenous and Northern Affairs Canada added that "the preponderance of detail in the [Board] report weighs heavy on Ministers' minds."

624 No dialogue ensued about the legitimacy of Upper Nicola's concern about the Board's economic analysis, although Canada acknowledged "a strong view 'out there' that runs contrary to the [Board's] determination."

625 Matters were left that if Upper Nicola could provide more information about what it said was an incorrect characterization of the economic rationale and Indigenous interests, this information would be put before the Ministers.

626 Put another way, Canada was relying on the Board's findings. If Upper Nicola could produce information contradicting the Board that would be put before the Governor in Council; it would not be the subject of dialogue between Upper Nicola and Canada's representatives. Canada did not grapple with Upper Nicola's concerns, did not discuss with Upper Nicola whether the Board should be asked to reconsider its conclusion about the economics of the Project and did not explain why Upper Nicola's concern was found to lack sufficient merit to require Canada to address it meaningfully.

627 As explained above at paragraph 491, Canada can rely on the Board's process to fulfil, in whole or in part, the Crown's duty to consult. However, reliance on the Board's process does not allow Canada to rely unwaveringly upon the Board's findings and recommended conditions. When real concerns were raised about the hearing process or the Board's findings and recommended conditions, Canada was required to dialogue meaningfully about those concerns.

628 The Board is not immune from error and many of its recommendations were just that — proffered but not binding options for Canada to consider open-mindedly, assisted by its dialogue with the Indigenous applicants. Phase III of the consultation process afforded Canada the opportunity, and the responsibility, to dialogue about the asserted flaws in the Board's process and recommendations. This it failed to do.

(iv) Canada's erroneous view that the Governor in Council could not impose additional conditions on the proponent

629 Canada began and ended Phase III of the consultation process operating on the basis that it could not impose additional conditions on the proponent. This was wrong and limited the scope of necessary consultation.

630 Thus, on May 25, 2015, towards the end of Phase II, the Major Projects Management Office wrote to Indigenous groups to provide additional information on the scope and timing of Phase III consultation. If Indigenous groups identified outstanding concerns after the Board issued its report, the letter described the options available to Canada as follows:

> The Governor in Council has the option of asking the [National Energy Board] to reconsider its recommendation and conditions. Federal and provincial governments could undertake additional consultations prior to issuing additional permits and/or authorizations. Finally, federal and provincial governments can also use existing or new policy and program measures to address outstanding concerns.

631 Canada expressed the position that these were the available options throughout the consultation process (see, for example, the meeting notes of the consultation meeting held on March 31, 2016, with Coldwater).

632 Missing was the option of the Governor in Council imposing additional conditions on Trans Mountain.

633 At a meeting held on April 13, 2016, after Canada's representatives expressed the view that the Crown could not add additional conditions, the Stó:lo's then counsel expressed the contrary view. She asked that Canada's representatives verify with their Ministers whether Canada could attach additional conditions. By letter dated November 28, 2016 (the day before the Project was approved), Canada, joined by the British Columbia Environmental Assessment Office, advised that "the Governor in Council cannot impose its own conditions directly on the proponent as part of its decision" on the certificate of public convenience and necessity.

634 This was incorrect. In *Gitxaala*, at paragraphs 163 to 168, this Court explained that when considering whether Canada has fulfilled its duty to consult, the Governor in Council necessarily has the power to impose conditions on any certificate of public convenience and necessity it directs the National Energy Board to issue.

635 In the oral argument of these applications Canada acknowledged this power to exist, albeit characterizing it to be a power unknown to exist prior to this Court's judgment in *Gitxaala*.

636 Accepting that the power had not been explained by this Court prior to its judgment in *Gitxaala*, that judgment issued on June 23, 2016, five months before Canada wrote to the Stó:lo advising that the Governor in Council lacked such a power and five months before the Governor in Council approved the Project. The record does not contain any explanation as to why Canada did not correct its position after the *Gitxaala* decision.

637 The consequence of Canada's erroneous position that the Governor in Council lacked the ability to impose additional conditions on Trans Mountain seriously and inexplicably limited Canada's ability to consult meaningfully on accommodation measures.

(v) Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants

638 As explained above at paragraph 488, the depth of the required consultation increases with the seriousness of the potentially adverse effect upon the claimed title or right. Canada's assessment of the Project's effect on each Indigenous applicant was therefore a critical aspect of the consultation process.

639 Canada ultimately assessed the Project not to have a high level of impact on the exercise of the Indigenous applicants' "Aboriginal Interests" (a term defined in the Crown Consultation Report to include "asserted or established Aboriginal rights, including title and treaty rights."). The Project was assessed to have a minor impact on the exercise of the Aboriginal Interests of Squamish and SSN, a minor-to-moderate impact on the Aboriginal Interests of Coldwater and Stó:lo and a moderate impact on the Aboriginal Interests of Tsleil-Waututh and Upper Nicola.

640 This important assessment was not communicated to the Indigenous applicants until the first week of November 2016, when the second draft of the Crown Consultation Report was provided (the first draft contained placeholder

paragraphs in lieu of an assessment of the Project's impact). Coldwater, Upper Nicola and SSN received the second draft of the Crown Consultation Report on November 1, 2016, Squamish and Stó:lo on November 3, 2016 and Tsleil-Waututh on November 4, 2016. Each was given two weeks to respond to the draft Crown Consultation Report.

641 By this point in time Squamish, Coldwater, Stó:lo and SSN had concluded their consultation meetings with Canada and no further meetings were held.

642 Tsleil-Waututh did have further meetings with Canada, but these meetings were for the specific purposes of discussing greenhouse gases, the economic need for the Project and the Oceans Protection Plan.

643 Upper Nicola did have a consultation meeting with Canada on November 16, 2016, at which time it asked for an extension of time to respond to the second draft of the Crown Consultation Report. In response, Upper Nicola received a two-day extension until November 18, 2016, to provide its comments to Canada. Canada's representatives explained that "Cabinet typically requires material one month ahead of a decision deadline to enable time to receive and review the report, translate etc. and that we've already reduced this down to enable a second round of comments."

644 Importantly, Canada's Crown consultation lead acknowledged that other groups had asked for more time and the request had been "communicated to senior management and the Minister loud and clear." Canada's consultation lead went on to recognize that the time provided to review the second draft "may be too short for some to contribute detailed comments". There is no evidence that Canada considered granting the requested extension so that the Indigenous groups could provide detailed, thoughtful comments on the second draft of the Crown Consultation Report, particularly on Canada's assessment of the Project's impact. Nor does the record shed any light on why Canada did not consider granting the requested extension. The statutory deadline for Cabinet's decision was December 19, 2016, and the Indigenous applicants had been informed of this.

645 Ultimately, the Governor in Council approved the Project on November 29, 2016.

646 The consequence of Canada's late communication of its assessment of the Project's impact was mitigated to a degree by the fact that from the outset it had acknowledged, and continues to acknowledge, that it was obliged to consult with the Indigenous applicants at the deeper end of the consultation spectrum. Thus, the assessment of the required depth of consultation was not affected by Canada's late advice that the Project, in its view, did not have a high level of impact on the claimed rights and title of the Indigenous applicants.

647 This said, without doubt Canada's view of the Project's impact influenced its assessment of both the reasonableness of its consultation efforts and the extent that the Board's recommended conditions mitigated the Project's potential adverse effects and accommodated the Indigenous applicants' claimed rights and title. For this reason, the late delivery of Canada's assessment of the Project's impact until after all but one consultation meeting had been held contributed to the unreasonableness of the consultation process.

648 I now turn to review instances that illustrate Canada's failure to dialogue meaningfully with the Indigenous applicants.

(vi) Canada's failure to dialogue meaningfully

a. The experience of Tsleil-Waututh

649 Tsleil-Waututh had conducted its own assessment of the Project's impact on Burrard Inlet and on Tsleil-Waututh's title, rights and interests and traditional knowledge. This assessment, based on the findings of six independent experts and the traditional knowledge of Tsleil-Waututh members, concluded, among other things that:

- The likelihood of oil spills in Burrard Inlet would increase if the Project is implemented, and because spilled oil cannot be cleaned up completely, the consequences in such circumstances would be dire for sensitive sites,

habitat and species, and in turn for the Tsleil-Waututh's subsistence economy, cultural activities and contemporary economy.

• Any delay in spilled oil cleanup response would decrease significantly the total volume of oil which could be cleaned up, and in turn increase the negative effects and consequences of a spill.

• The direct effects of marine shipping are likely to add to the effects and consequences of spilled oil, which in turn will further amplify the negative effects of the Project on Tsleil-Waututh's title, rights and interests.

• Tsleil-Waututh could not accept the increased risks, effects and consequences of even another small incident like the 2007 spill at the Westridge Marine Terminal or the 2015 MV Marathassa oil spill, let alone a worst-case spill.

650 In the view of Tsleil-Waututh, the Board erred by excluding Project-related shipping from the Project's definition. Tsleil-Waututh was also of the view that the Board's conditions did not address their concerns about marine shipping. For example, Tsleil-Waututh noted that very few of the Board's conditions set out desired outcomes. Rather, they prescribed a means to secure an unspecified outcome.

651 At the consultation meeting of October 27, 2016, Canada's representatives repeatedly acknowledged Tsleil-Waututh's view that the Board's conditions were not sufficiently robust, that Project-related shipping ought to have been assessed under the *Canadian Environmental Assessment Act, 2012* and that the Board's failure to do so resulted in the further failure to impose conditions on marine shipping.

652 However, when the discussion turned to how to address Tsleil-Waututh's concerns, federal representatives noted that "proposals to strengthen marine shipping management, including nation to nation relationships, would take time to develop and strengthen." They went on to express optimism:

> ... that progress toward a higher standard of care could occur over the next few years with First Nations, at a nation to nation level, particularly on spill response and emergency preparedness capacities. As baseline capacities increased, risks would be reduced.

653 This generic and vague response that concerns could be addressed in the future, outside the scope of the Project and its approval, was Canada's only response. Canada did not suggest any concrete measures, such as additional conditions, to accommodate Tsleil-Waututh's concerns about marine shipping.

654 Nor did Canada propose any accommodation measures at the meeting of October 28, 2016. At this meeting, Tsleil-Waututh sought further discussion about the Project's definition because, in its view, this issue had to be resolved if the Project was to be sent back to the Board for reconsideration. Canada's representatives responded that this was a matter for consideration by the Governor in Council and "it was understood that the scope of the [Board's] review would be litigated."

655 Nor did Canada respond meaningfully to Tsleil-Waututh's concerns in the Crown Consultation Report or in the Tsleil-Waututh appendix.

656 The appendix, after detailing Tsleil-Waututh's concerns responded as follows:

> Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Tsleil-Waututh that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.
>
> (underlining added)

657 Section 4.2.6 of the Crown Consultation Report referred to the proposed Indigenous Advisory and Monitoring Committee and to recognition of the historical impacts of the existing Trans Mountain pipeline. The nascent nature of the Indigenous Advisory and Monitoring Committee is shown by the listing of possible roles the committee "could" play.

658 Section 5.2 of the Crown Consultation Report dealt with Canada's assessment of the adequacy of consultation. It contains no response to Tsleil-Waututh's specific concerns that the Board's conditions were not sufficiently robust, that Project-related shipping ought to have been assessed under the *Canadian Environmental Assessment Act, 2012*, and that the Board's failure to do this resulted in the further failure to impose conditions on marine shipping. Section 5.2 did provide Canada's limited response to concerns about the appropriateness of the Board's review process:

> With respect to perceived inadequacies in the [Board] review process, the Crown notes the Government's commitment to modernize the [Board] and to restore public trust in federal environmental assessment processes. The Crown further notes that consultations on these processes have been launched and will include the engagement of Indigenous groups. Overall, however, Government, through its Interim Strategy, indicated that no project proponent would be sent back to the beginning, which mean [*sic*] that project [*sic*] currently undergoing regulatory review would continue to do so within the current framework.

659 Canada has not pointed to any correspondence in which it meaningfully addressed Tsleil-Waututh's concern that the Board's conditions were not sufficiently robust and that Project-related shipping should not have been excluded from the Project's definition.

660 Tsleil-Waututh raised valid concerns that touched directly on its asserted title and rights. While Canada strove to understand those concerns accurately, it failed to respond to them in a meaningful way and did not appear to give any consideration to reasonable mitigation or accommodation measures, or to returning the issue of Project-related shipping to the Board for reconsideration.

661 While Canada moved to implement the Indigenous Advisory and Monitoring Committee and the Oceans Protection Plan, these laudable initiatives were ill-defined due to the fact that each was in its early planning stage. As such, these initiatives could not accommodate or mitigate any concerns at the time the Project was approved, and this record does not allow consideration of whether, as those initiatives evolved, they became something that could meaningfully address real concerns.

b. The experience of Squamish

662 At the one consultation meeting held in Phase III with Squamish on October 18, 2016, Squamish took the position throughout the meeting that it had insufficient information about the Project's impact on Squamish to make a decision on the Project or to discuss mitigation measures. Reference was made to a lack of information about the fate and behaviour of diluted bitumen if spilled in a marine environment. Squamish also expressed the view that the Governor in Council was equally unable to make a decision on the Project because of research and information gaps about diluted bitumen.

663 Canada responded:

> The Crown recognized that there are uncertainties and information gaps which factor into the project decision. Most decisions are not made with perfect certainty. For instance, fate and behaviour of diluted bitumen in the marine environment has been identified as an information gap. The Crown is happy to discuss the level of uncertainty but is unsure how the [Governor in Council] will weigh these issues, such as whether they will decide that uncertainties are acceptable for the project to move forward. It should be noted that the [Governor in Council] can send the [Board] recommendation and any terms and conditions back to the [Board] for reconsideration.
>
> (underlining added)

664 The meeting notes do not reflect that any discussion ensued about the fate and behaviour of diluted bitumen in water. This is not surprising because the Crown consultation team had effectively told Squamish that any discussion would not factor into the Governor in Council's deliberation and ultimate decision.

665 In a letter dated the day before the Project was approved, Canada and the British Columbia Environmental Assessment Office wrote jointly to Squamish responding to issues raised by Squamish. With respect to diluted bitumen the letter stated:

> Squamish Nation has identified concerns relating to potential spills as well as the fate and behaviour of diluted bitumen. The [Board's] Onshore Pipeline Regulations (OPR) requires a company to develop and implement management and protection programs in order to anticipate, prevent, mitigate and respond to conditions that may adversely affect the safety and security of the general public, the environment, property and, company's personnel and pipelines. A company must follow the legal requirements identified in the *National Energy Board Act* and its associated regulations, other relevant standards, and any conditions contained within the applicable Project certificates or orders.

666 This generic response is not a meaningful response to Squamish's concern that too little was known about how diluted bitumen would behave if spilled and that this uncertainty made it premature to approve the Project.

667 The letter went on to review Board conditions, planned government initiatives (such as the Area Response Planning Initiative, Transport Canada's commitment to engage with British Columbia First Nations on issues related to marine safety and the Oceans Protection Program). The letter also referenced research that the Government of Canada was conducting on the behaviour and potential impacts of a diluted bitumen spill in a marine environment. While laudable initiatives, they too did not respond meaningfully to Squamish's concern that more needed to be known before the Project was approved.

668 There is nothing in Canada's response to show that Squamish's concern about diluted bitumen was given real consideration or weight, and nothing to show any consideration was given to any meaningful and tangible accommodation or mitigation measures.

c. The experience of Coldwater

669 Coldwater's concerns about the Project's impact on its aquifer were described above at paragraphs 609-610 in the context of Canada's unwillingness to depart from the Board's findings and recommended conditions.

670 As explained at paragraph 610, when, during the consultation process, Coldwater suggested an alternate route for the pipeline that in its view posed less risk to its drinking water, Canada advised that it is the Board that decides pipeline routing, and the role of the Crown consultation team was to make sure the issue of an alternate route was reflected in the Crown Consultation Report so that it could be considered by the decision-makers.

671 Later during the May 4, 2016 meeting, in response to a question from Coldwater about a detailed route hearing, Brian Nesbitt, a contractor made available to answer questions about the Board, responded:

> Brian explained that the Governor in Council would approve the approved, detailed route, but that if someone doesn't agree with that route they can intervene, say a detailed route hearing is required, and propose an alternative route. He stated that the burden of proof is essentially flipped and the landowner has the onus to show that the best route is somewhere other than the approved route.
>
> Brian provided an overview of the Detailed Route Approval Process (DRAP). Alternative routes, even outside the approved ROW corridor, can be proposed. In those cases it falls to the intervening party to make the case for why that route is the best one. In Brian's experience, these arguments have been made in past hearings and sometimes they are successful. He provided the example of a pipeline going through a wooded area where inner city kids would

go. If an alternative route is identified in the detailed route hearing, the proponent has to apply for a variance. This might require Governor in Council decisions, depending on how the CPCN is worded. Brian emphasized that the burden of establishing a better route lies with the landowner.

(underlining added)

672 A senior advisor for Indigenous and Northern Affairs Canada then agreed that Coldwater would require a very significant variance, a departure of about 10 kilometres from the approved pipeline right-of-way.

673 Counsel for Coldwater, Melinda Skeels, then replied:

Melinda stated that it does not sound reasonable to expect Coldwater to mount the kind of evidence needed to make the case for that alternative. In her view, this issue needs to be addressed before a certificate is issued. It cannot wait until after.

Melinda stated that it did not seem like a detailed route hearing is a realistic option that would assist in addressing Coldwater's routing concerns.

Coldwater's recollection is that: Joseph, Tim and Ross were in general agreement, particularly given the significance of the variance and the fact that the onus would be shifted to Coldwater.

The Crown's position is that: The Crown officials would neither have agreed with or disagreed with the above statement.

674 The senior advisor for Indigenous and Northern Affairs Canada responded:

... reflecting this concern in the Crown Consultation Report is one way to have it before decision makers prior to a decision on the certificate. He said that the routing issue goes to the heart of the CPCN and that the Crown may need to send the Project back to the [Board] to address this.

675 As explained at paragraph 587 above, Coldwater's request for an analysis of the pipeline route was revisited at the October 7, 2016, consultation meeting. Canada acknowledged that the aquifer had not been fully explored, but expressed confidence in the Board's Condition 39.

676 In response:

Coldwater expressed its concern that, given the momentum behind the project following a [Governor in Council] approval, it will take a major adverse finding in the Condition 39 report for the West Alternative to become viable. They argued that their aquifer concerns would not be sufficiently mitigated by moving the pipeline within the 150m approved route corridor as part of a detailed route hearing, because the West Alternative was well outside that recommended corridor. Coldwater asked if an approved route corridor had ever been changed because of a report released following a GIC approval.

The [Board] asserted that detailed route hearings in the past had led to routes being changed for various reasons; however he (Brian Nesbitt) was personally unaware of a route being moved outside an approved corridor. However, it is possible if the situation warrants.

. . .

The Crown replied that Condition 39 was put in place because the Board felt that evidence did not provide enough certainty about the impact of the Project on Coldwater's aquifer. That knowledge gap will have to be addressed, to the [Board's] satisfaction, prior to construction commencing. The Crown appreciates that the Condition does not

provide certainty about the possibility of changing the pipeline corridor; however the presence of the Condition indicates that the [Board] is not satisfied with the information currently available.

(underlining added)

677 In the Crown Consultation Report Canada acknowledged that a pipeline spill associated with the Project could result in minor to serious impacts to Coldwater's Aboriginal Interests:

The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. The Crown acknowledges that Coldwater relies primarily on an aquifer crossed by the Project for their drinking water, as well as subsistence foods and natural resources, and are at greater risk for adverse effects from an oil spill. To address the concerns raised by Coldwater during the post-[Board] Crown consultation period, [Environmental Assessment Office] proposes a condition that would require, in addition to [Board] Condition 39, characterization of the aquifer recharge and discharge sources and aquifer confinement, and include an assessment of the vulnerability of the aquifer.

(underlining added, footnote omitted)

678 Throughout the consultation process, Canada worked to understand Coldwater's concerns, and the British Columbia Environmental Assessment Office imposed a condition requiring a second hydrogeological report for approval by it. However, missing from Canada's consultation was any attempt to explore how Coldwater's concerns could be addressed. Also missing was any demonstrably serious consideration of accommodation — a failure likely flowing from Canada's erroneous position that it was unable to impose additional conditions on the proponent.

679 Canada acknowledged that the Project would be located within an area of Coldwater's traditional territory where Coldwater was assessed to have a strong *prima facie* claim to Aboriginal title. In circumstances where Coldwater would bear the burden of establishing a better route for the pipeline, and where the advice given to Coldwater by the Board's technical expert was that he was personally unaware of a route being moved out of the approved pipeline corridor, Canada placed its reliance on Condition 39, and so advised Coldwater. However, as Canada acknowledged, this condition carried no certainty about the pipeline route. Nor did the condition provide any certainty as to how the Board would assess the risk to the aquifer.

680 At the end of the consultation process, and at the time the Project was approved, Canada failed to meaningfully engage with Coldwater, and to discuss and explore options to deal with the real concern about the sole source of drinking water for its Reserve.

d. The experience of Stó:lo

681 As part of the Stó:lo's effort to engage with the Crown on the Project, Stó:lo prepared a detailed technical submission referred to as the "Integrated Cultural Assessment for the Proposed Trans Mountain Expansion Project", also referred to as "ICA". A copy of the ICA was filed with the Board.

682 The ICA was based on surveys, interviews, meetings and workshops held with over 200 community members from approximately 11 Stó:lo bands. The ICA concluded that the Project posed a significant risk to the unique Indigenous way of life of the Stó:lo, threatening the cultural integrity and survival of core relationships at the heart of the Stó:lo worldview, identity, health and well-being. The ICA also contained 89 recommendations which, if implemented by Trans Mountain or the Crown, were believed by Stó:lo to mitigate the Project's adverse effects on Stó:lo.

683 To illustrate the nature of the recommendations, section 17.2 of the ICA deals with recommendations to mitigate the Project's impact on fisheries. Section 17.2.1 deals with Management and Planning in the context of fisheries mitigation. The recommended Management and Planning mitigation measures are:

17.2.1 Management and Planning

5. Stó:lo Fishing representatives will participate in the development and review of Fisheries Management Plans and water course crossing EPPs before construction and mitigation plans are finalized.

6. Stó:lo representatives will provide input on proposed locations for Hydrostatic test water withdrawal and release.

7. [The proponent] will consult with Stó:lo representatives to develop the Emergency Response Plans in the study area.

8. Stó:lo representatives will consult with community members to determine appropriate restoration plans for water crossings including bank armouring, seed mixes or replanting requirements.

9. Stó:lo fishing representatives must be notified if isolation methods will not work and [the proponent] is considering another crossing method.

10. Stó:lo representatives must be notified as soon as a spill or leak, of any size, is detected.

11. During water quality monitoring program, anything that fails to meet or exceed established guidelines will be reported to a Stó:lo Fisheries Representative within 12 hours.

684 These measures are specific, brief and generally measured and reasonable. If implemented they would provide more detail to the Board's generic conditions on consultation and require timely notification to the Stó:lo of events that may adversely impact their interests.

685 During the Board's Information Request process, the Stó:lo pressed Trans Mountain to respond to their 89 recommendations but Trans Mountain did not provide a substantive response. Instead, Trans Mountain provided a general commitment to work with Stó:lo to develop a mutually-acceptable plan for implementation.

686 The Board did not adopt any of the specific 89 recommendations made by the Stó:lo in its terms and conditions.

687 At a meeting held with the Crown consultation team on April 13, 2016, before the release of the Board's report, the Stó:lo provided an overview of the development of the ICA and expressed many concerns, including their dissatisfaction with their engagement with Trans Mountain.

688 The Stó:lo representative stated that, among other things, Trans Mountain was directed by the Board to include Indigenous knowledge in Project planning, but did not. By way of example, the Stó:lo explained that the Fraser River is a tidal (at least up to Harrison River), meandering river, with a wandering gravel bed that is hydrologically connected to many wetlands and waterways crossed by the Project. A map of historical waterways was provided in the ICA, along with a table listing local and traditional knowledge of waterways crossed by the Project. None of this information was considered in Trans Mountain's technical reports. In Stó:lo's view, Trans Mountain's assumptions and maps about the Fraser River were wrong and did not include their traditional knowledge. A year after the ICA was provided to Trans Mountain the Stó:lo met with Trans Mountain's fisheries manager who had never seen the ICA or any of the technical information contained in it.

689 Additionally, Stó:lo provided details about deficiencies identified in Trans Mountain's evidence filed with the Board about Stó:lo title, rights, interests and Project impacts. For example, Trans Mountain's evidence was to the effect that the Stó:lo had no traditional plant harvesting areas within the Project area. However, the ICA identified and mapped several plant gathering sites within the proposed pipeline corridor. Another example of a deficiency was Trans Mountain's evidence that there were no habitation sites in the Project area; however, the ICA mapped three habitation sites within the proposed pipeline corridor and two habitation sites located within 50 metres of the pipeline corridor.

690 At a later consultation meeting held September 23, 2016, the Stó:lo reiterated that a key concern was their view that the Board's process had failed to hold the proponent accountable for integrating Stó:lo's traditional use information into the assessment of the Project. The draft Crown Consultation Report overlooked evidence filed by Stó:lo about their traditional land use. Instead, the report repeated oversights in Trans Mountain's evidence presented to the Board. For example, Stó:lo noted the Crown was wrong to state that "[n]o plant gathering sites were identified within the proposed pipeline corridor". The Stó:lo had explained this at the April 13, 2016 meeting.

691 The Stó:lo Collective was not confident that Trans Mountain would follow through on commitments to include local Indigenous people or traditional knowledge in the development of the Project unless the Board's terms and conditions required Trans Mountain to regularly engage Stó:lo communities in a meaningful way.

692 Canada's representatives confirmed that the Stó:lo Collective was looking for stronger conditions, more community-specific commitments and more accountability placed on Trans Mountain so that conditions proposed by Stó:lo became regulatory requirements.

693 The Crown consultation team met with Stó:lo once after the release of the Board's report, on September 23, 2016.

694 During this meeting the "Collective noted with great concern that the [Board] report came out May 19th, that the [Governor in Council's] decision is due Dec. 19th, and that the Crown was just meeting now (Sept. 23) to consult on the [Board] report with so many potential gaps left to discuss and seek to resolve with tight timelines to do so".

695 At this meeting the Crown consultation team presented slides summarizing the Board's conclusions. The Stó:lo noted their disagreement with the following findings of the Board:

> • "Ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be ***temporarily impacted***" by construction and routine maintenance activities, and that some opportunities for certain activities such as harvesting or accessing sites or areas of [Traditional Land and Resource Use] will be ***temporary interrupted***.";
>
> • "Project's contribution to potential broader cultural impacts related to access and use of natural resources is ***not significant***."; and,
>
> • "Impacts would be ***short term, limited to brief periods*** during construction and routine maintenance, ***largely confined to the Project footprint*** for the pipeline... Effects would be ***reversible in the short to long term, and low in magnitude***."
>
> (emphasis in original)

696 The Stó:lo pointed to the potential permanent impact of the Project on sites of critical cultural importance to Stó:lo and the Project's impacts related to access and use of natural resources.

697 With respect to sites of critical cultural importance, the Stó:lo explained that none of the information contained in their ICA influenced the design of the Project or was included in the Project alignment sheets. The failure to include information about cultural sites on the Project alignment sheets meant that various geographic features known to Stó:lo and the proponent were not being factored into Project effects, or avoidance or mitigation efforts. In response to questions, Stó:lo confirmed that even though Trans Mountain was well aware of Stó:lo sites of importance, as detailed in the ICA, Trans Mountain had not recognized them on the right-of-way corridor maps. Stó:lo believed this afforded the sites no protection if the Project was approved.

698 With respect to Lightning Rock, a culturally significant spiritual and burial site, the Stó:lo noted that Trans Mountain planned to put a staging area in proximity to the site which, in the view of the Stó:lo, would obliterate the site. The Board had imposed Condition 77 relating to Lightning Rock. This condition required Trans Mountain to file

a report outlining the conclusions of a site assessment for Lightning Rock, including reporting on consultation with the Stó:lo Collective. However, Stó:lo Cultural Heritage experts had not been able to meet with Trans Mountain to participate in Lightning Rock management plans since September 2015. This was a source of great frustration.

699 The Stó:lo suggested that the Board's conditions should specifically list the Indigenous groups Trans Mountain was required to deal with instead of the generic "potentially affected Aboriginal groups" referenced in the Board's current conditions.

700 The Stó:lo also requested that they be involved in selecting the Aboriginal monitors working within their territory as contemplated by the Board's conditions. For example, Condition 98 required Trans Mountain to file a plan describing participation by "Aboriginal groups" in monitoring construction of the Project. Stó:lo wanted to ensure these monitors were sufficiently knowledgeable about issues of importance to the Stó:lo.

701 The September 23, 2016, meeting notes do not indicate any response or meaningful dialogue on the part of the Crown consultation team in response to any of Stó:lo's concerns and suggestions.

702 Interestingly, at the November 16, 2016, consultation meeting with Upper Nicola, the last of the consultation meetings and the only consultation meeting held after Canada provided the second draft of the Crown Consultation Report setting out Canada's assessment of the Project's impacts, the Crown consultation lead explained:

> ... "potentially affected Aboriginal groups" has been noted by many Aboriginal groups as too vague in the recommended conditions, and this phrase is repeated throughout the 157 conditions. Makes reference to how the Crown's consultation and accommodation report does address specific Aboriginal groups. Discussed another point on the [Board] condition for "Aboriginal monitors" — where communities would not [*sic*] want locally knowledgeable Aboriginal people to fulfil this role and not someone from farther afield.

703 Notwithstanding apparently widespread concern about the Board's generic use of the phrase "potentially affected Aboriginal groups" and the need for locally-selected Indigenous monitors, and despite Canada's ability to add new conditions that would impose the desired specificity, Canada failed to meaningfully consider such accommodation.

704 Canada and the British Columbia Environmental Assessment Office purported to respond to two of Stó:lo's concerns in their letter of November 28, 2016, to the Stó:lo: the concerns about Traditional Ecological Knowledge and sites of cultural importance.

705 The Crown "acknowledges the Stó:lo Collective's view that the [Board] and the proponent overlooked traditional knowledge within the development of the [Board] conditions and Project design." The Crown discusses these issues in Sections III and IV of the Stó:lo Collective appendix (pages 13, 29 and 30 respectively).

706 I deal with the Stó:lo appendix beginning at paragraph 712 below. As explained below, the Stó:lo appendix does not deal meaningfully with the concerns about Traditional Ecological Knowledge and sites of cultural importance.

707 The Crown made two more points independent of the Stó:lo Collective appendix. First, it expressed its understanding that the Stó:lo could trigger a detailed route hearing. Second, it encouraged the Stó:lo Collective to continue discussions with the proponent.

708 In connection with the detailed route hearing, the Crown advised that "[w]ithin the scope of such a hearing exists the potential for the right-of-way to move locations." There are three points to make about this response. First, as explained above at paragraphs 380 to 384, at a detailed route hearing the right of way may only move within the approved pipeline corridor, otherwise an application must be made to vary the pipeline corridor; second, the onus at a detailed route hearing is on the person requesting the alteration; and, third, Canada failed to consider its ability to impose additional conditions, likely because it was operating under the erroneous view it could not. The ability to trigger

a detailed route hearing provided no certainty about how potential adverse effects to areas of significant importance to the Stó:lo would be dealt with. This was not a meaningful response on Canada's part.

709 As to the Crown's suggestion that the Stó:lo Collective continue its discussions with the proponent, no explanation is given as to why this was believed to be an appropriate response to the concerns of the Stó:lo in light of the information they had provided as to the proponent's unwillingness to deal directly with them on a timely basis, or in some cases, at all.

710 The November 28, 2016, letter also referenced the four accommodation measures the Stó:lo requested in their two-page submission to the Governor in Council. The first asked for a condition to "outline and identify specifics regarding Trans Mountain's collaboration with and resourcing of the Stó:lo Collective to update construction alignment sheets and EPPs to reflect information provided in the Integrated Cultural Assessment" (March 2014). The Stó:lo were told "The recommendations included in the Stó:lo Collective's two-page submission of November 17, 2016 will be provided directly to federal and provincial decision makers."

711 Leaving aside the point that the letter was sent the day before the Project was approved, none of this is responsive, meaningful, two-way dialogue that the Supreme Court requires as part of the fulfillment of the duty to consult.

712 Nor is any meaningful response provided in the Stó:lo appendix to the Crown Consultation Report. This is illustrated by the following two examples. First, while the appendix recites that the Stó:lo Collective recommended 89 actions that would assist Trans Mountain to avoid or mitigate adverse effects on their Aboriginal Interests there is no discussion or indication that Canada seriously considered implementing any of the 89 recommended actions, and no explanation as to why Canada did not consider implementing any Stó:lo specific recommendation as an accommodation or mitigation measure. Second, while the appendix acknowledges that the Stó:lo provided examples of Traditional Ecological Knowledge which they felt the proponent and the Board ignored in the Project design, environmental assessment and mitigation planning, no analysis or response to the concern is given.

713 In the portion of the appendix that deals with Canada's assessment of the Project's impacts on the Stó:lo, the Crown relies on the conclusions of the Board to find that the impacts of the Project would be up to minor-to-moderate. Thus, for instance, the appendix repeats the Board's conclusion that if the Project is approved, the Board conditions would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping and gathering. In an attempt to deal with the specific concerns raised by the Stó:lo about the adequacy of the Board's report and its conditions, the appendix recites that:

> ... the proponent would implement several mitigation measures to reduce potential effects to species important for the Stó:lo Collective's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignment Sheets and environmental tables within the immediate vicinity of the [right-of-way] will be clearly marked before the start of clearing.

714 While the second draft of the Crown Consultation Report was revised to reference the plant gathering sites identified by Stó:lo in the ICA and in the April and October consultation meetings, Canada continued to rely upon the Board's findings without explaining, for example, how the Board's finding that "Trans Mountain adequately considered all the information provided on the record by Aboriginal groups regarding their traditional uses and activities." (report, page 278) was reliable in the face of the information contained in the ICA.

715 Nor does Canada explain the source of its confidence in the proponent's commitments in light of the concerns expressed by the Stó:lo that Trans Mountain had failed to follow through on its existing commitments and that without further conditions Stó:lo feared the proponent would not follow through with its commitments to the Board.

716 With respect to the Stó:lo's concerns about a Project staging area at Lightning Rock, the appendix noted that Lightning Rock was protected by Board Condition 77 which required the proponent to file with the Board an

archaeological and cultural heritage field investigation undertaken to assess the potential impacts of Project construction and operations on the Lightning Rock site. The appendix goes on to note that:

> However, given that this is a sacred site with burial mounds, Stó:lo Collective have noted that any Project routing through this area is inappropriate given the need to preserve the cultural integrity of the site and the surrounding area. For the Stó:lo Collective, the site surrounding Lightning Rock should be a "no go" area for the Project.

717 However, Stó:lo's position that Lightning Rock should be a "no go" area is left unresolved and uncommented upon by Canada.

718 Another Stó:lo concern detailed by Canada in the appendix, but unaddressed, is the concern of the Stó:lo Collective that the locations of various other culturally important sites do not appear on Trans Mountain's detailed alignment sheets. Examples of such sites include bathing sites within the 150 metre pipeline right-of-way alignment at Bridal Veil Falls, and an ancient pit house located within the pipeline right-of-way. None of these sites are the subject of any Board condition.

719 The appendix recites Canada's conclusion on these concerns of the Stó:lo as follows:

> With regards to specific risk concerns raised by the Stó:lo Collective, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for the Stó:lo Collective's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during [right-of-way] finalization, narrowing the [right-of-way] in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

720 This is not meaningful, two-way dialogue in response to Stó:lo's real and valid concerns about matters of vital importance to the Stó:lo.

721 Canada adopts a similar approach to its assessment of the Project's impact on freshwater fishing and marine fishing and harvesting at pages 24 to 27 of the Stó:lo appendix.

722 The section begins by acknowledging the Stó:lo's deeply established connection to fishing and marine harvesting "which are core to Stó:lo cultural activities and tradition, subsistence and economic purposes."

723 After summarizing each concern raised by the Stó:lo, Canada responds by adopting the Board's conclusions that the Project's impact will be low-to-moderate and that Board conditions will either directly or indirectly avoid or reduce potential environmental effects on fishing activities.

724 In the course of this review Canada acknowledges the Board's finding that "Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality." Appendix 12 to the Board report defines a moderate impact to be one that, among other things, noticeably affects the resource involved.

725 Canada also acknowledges that during the operational life of the Project fishing and harvesting activities directly affected by the construction and operation of the Westridge Marine Terminal would not occur within the expanded water lease boundaries.

726 Further, impacts on navigation, specifically in eastern Burrard Inlet, would exist for the lifetime of the Project, and would occur on a daily basis. Project-related marine vessels also would cause temporary disruption to the Stó:lo Collective's marine fishing and harvesting activities. These disruptions are said "likely to be temporary when accessing fishing sites in the Burrard Inlet that require crossing shipping lanes, as community members would be able to continue

their movements shortly after the tanker passes." This too would occur on a daily basis if the Westridge Marine Terminal were to serve 34 Aframax tankers per month.

727 Missing however from Canada's consultation analysis is any mention of the Stó:lo's constitutionally protected right to fish, and how that constitutionally protected right was taken into account by Canada. Also missing is any explanation as to how the consultation process affected the Crown's ultimate assessment of the impact of the Project on the Stó:lo. Meaningful consultation required something more than simply repeating the Board's findings and conditions without grappling with the specific concerns raised by the Stó:lo about those same findings.

e. The experience of Upper Nicola

728 Throughout the consultation process, Upper Nicola raised the issue of the Project's impact on Upper Nicola's asserted title and rights. The issue was raised at the consultation meetings of March 31, 2016, and May 3, 2016, but no meaningful dialogue took place. Canada's representatives advised at the March meeting that until the Board released its report Canada did not know how the Project could impact the environment and Upper Nicola's interests and so could not "yet extrapolate to how those changes could impact [Upper Nicola's] Aboriginal rights and title interests."

729 The issue was raised again, after the release of the Board's report, at the consultation meeting of September 22, 2016. Upper Nicola expressed its disagreement with Canada's assertion in the first draft of the Crown Consultation Report that potential impacts on its title claim for the pipeline right-of-way included temporary impacts related to construction, and longer-term impacts associated with Project operation. In Upper Nicola's view, construction did not have a temporary impact on its claim to title. Upper Nicola also stated that Canada had examined the Project's impact on title without considering impacts on governance and management, and concerns related to title, such as land and water issues. The meeting notes do not record any response to these concerns.

730 Nor did Canada respond meaningfully to Upper Nicola's position that the Project would render 16,000 hectares of land unusable or inaccessible for traditional activities. Upper Nicola viewed this to constitute a significant impact that required accommodation of their rights to stewardship, use and governance of the land and water. Canada's response was to acknowledge a letter sent to the Prime Minister in which numerous Indigenous groups had proposed a mitigation measure to ensure they would have a more active role in monitoring and stewardship of the Project. Canada stated that it saw merit in the proposal and that a response to the letter would be forthcoming.

731 On November 18, 2016, Upper Nicola wrote to the Crown consultation lead to highlight its key, ongoing concerns with the Project and the consultation process. With respect to title, Upper Nicola wrote:

> There were areas which the Crown has determined that we have a strong prima facie claim to Aboriginal title and rights. The Crown must therefore acknowledge the significant impacts and infringements of the Project to Upper Nicola/Syilx Title and Rights, including the incidents of Aboriginal title which include: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land and adequately accommodate these impacts, concerns and infringements. This has not yet been done.
>
> (underlining added)

732 Canada and the British Columbia Environmental Assessment Office wrote to Upper Nicola on November 28, 2016, the day before the Project was approved, to respond to the issues raised by Upper Nicola. The only reference to Upper Nicola's asserted title is this brief reference:

> *Impacts and Mitigation:* In response to comments received, the Crown has reviewed its analysis and discussion in the Consultation and Accommodation Report on the direct and indirect impacts of the Project on Syilx (Okanagan) Nation's rights and other interests. In addition, Upper Nicola identified that the study titled "Upper Nicola Band Traditional Use and Occupancy Study for the Kingsvale Transmission Line in Support of the Trans

Mountain Expansion Project" (Kingsvale TUOS) had not been specifically referenced in the Syilx (Okanagan) Nation appendix. Upper Nicola resent the Kingsvale TUOS to the Crown on Friday, November 18 and in response to this information, the Crown reviewed the Kingsvale TUOS, summarized the study's findings in Syilx (Okanagan) Nation's appendix, and considered how this information changes the expected impacts of the Project on Syilx (Okanagan) Nation's Aboriginal rights and title. As a result, conclusions were revised upward for Project impacts on Syilx (Okanagan) Nation's freshwater fishing activities, other traditional and cultural activities, as well as potential impacts on Aboriginal title.

(underlining added)

733 No response was made to the request to acknowledge the Project's impacts and infringement of Upper Nicola's asserted title and rights.

734 In the Upper Nicola appendix, Canada acknowledged that the Project would be located within an area of Syilx Nation's asserted traditional territory where Syilx Nation was assessed to have a strong *prima facie* claim to Aboriginal title and rights. Canada then asserted the Project to have "minor-to-moderate impact on Syilx Nation's asserted Aboriginal title to the proposed Project area." Canada did not address Upper Nicola's governance or title rights in any detail. Canada did refer to section 4.3.5 of the Crown Consultation Report but this section simply reiterates the Board's findings and conditions and the requirement that the proponent continue consultation "with potentially affected Aboriginal groups".

735 Missing is any explanation as to why moderate impacts to title required no accommodation beyond the environmental mitigation measures recommended by the Board — mitigation measures that were generic and not specific to Upper Nicola.

736 Throughout Phase III, Upper Nicola had proposed numerous potential mitigation measures and had requested accommodation related to stewardship, use and governance of the water. No response was given as to why Canada rejected this request. This was not meaningful, two-way dialogue or reasonable consultation.

f. The experience of SSN

737 Canada met with SSN twice during Phase III. At the first meeting, on August 3, 2016, SSN expressed the desire to have consultation go beyond the environmental assessment process which they felt was insufficient to tackle the issues that affected their territory. SSN sought to move forward on a nation to nation basis and wished to formalize a nation to nation consultation protocol using the Project as a starting point for further consultation.

738 In response, Canada and representatives of British Columbia asked that the SSN be prepared to review a draft memorandum of understanding for consultation about the Project (affidavit of Jeanette Jules, paragraph 70).

739 The meeting notes reflect that at the first meeting on August 3, 2016, SSN also raised as accommodation or mitigation measures that: the Project conditions be more specific with respect to safety and emergency preparedness response, warning notifications to communities and opportunities for training; and, that there be provision for both a spillage fee and a revenue tax imposed on the proponent for the benefit of SSN. The meeting notes do not reflect any dialogue or response from Canada to these proposals.

740 On September 9, 2016, the Crown consultation lead sent a two-page draft memorandum of understanding to the SSN (two pages not including the signature page).

741 At the second and last meeting on October 6, 2016, the SSN advised that they desired the proponent to submit to a review of the Project by the SSN, but that the proponent was unwilling to undergo another review. The SSN also repeated their desire for the federal and provincial Crowns to allow SSN to impose a resource development tax on proponents whose projects are located in the SSN's traditional territory. In response, the Crown raised the difficulty in

implementing the tax and having the Project undergo assessment by the SSN before the mandated decision deadline of December 19, 2016.

742 At this meeting Canada sought comments on the draft memorandum of understanding. Jeanette Jules, a counsellor with the Kamloops Indian Band swore in an affidavit filed in support of SSN's application for judicial review that:

> At [the October 6, 2016] meeting, the majority of the time was spent on discussing the content of the [memorandum of understanding], that is, what would engagement with the Crowns on the Project look like. We did not spend any time discussing the routing of the pipeline Project at Pipsell or SSN's concerns about the taking up of new land in the Lac du Bois Grasslands Protected area, although I did voice concerns about those issues again at that meeting. At the end of the meeting, the Crowns committed to revising the [memorandum of understanding] and to setting up another meeting to discuss it with us.
>
> (underlining added)

743 The meeting notes state that toward the end of the meeting SSN expressed the desire to have a terrestrial spill response centre stationed in their reserve. SSN contemplated that funding for the centre should be raised through a per-barrel spillage fee charged on product flowing through the pipeline.

744 Thereafter, no memorandum of understanding was finalized and no further meetings took place between Canada and the SSN. Ms. Jules swears that:

> I fully expected that between our last meeting with Canada and the Province of BC and the [Governor in Council] decision to approve the Project, we would come to an agreement on the terms of a [memorandum of understanding] and have had meaningful engagement with the Crowns about pipeline routing and SSN's other concerns raised in its final argument.

745 Ms. Jules was not cross-examined on her affidavit.

746 In the November 28, 2016, letter sent to the SSN by Canada and the British Columbia Environmental Assessment Office they wrote:

> We also would like to take this opportunity to provide you with additional information or responses to concerns that Stk'emlúps te Secwèpemc Nation has raised with the Crown.
>
> At the October 6, 2016 meeting with SSN, in addition to reiterating SSN's plan on undertaking its own assessment of the project, SSN outlined a proposal for an SSN resource development tax that they charge directly to proponents whose projects are in their traditional territory, and that SSN wants the federal and provincial Crown's to make the jurisdictional room necessary for the tax to be implemented. These proposals have been added to the SSN specific appendix for consideration by decision makers.

747 This is not a meaningful response to the proposals made by the SSN. The only response made to the resource development tax during the consultation meetings was the difficulty this would pose to meeting Canada's decision deadline (notwithstanding that SSN had sought consultation on a broader basis than the Project — the Project was contemplated by SSN to be a starting point).

748 The SSN appendix to the Crown Consultation Report faithfully records SSN's concerns about the review process, noting, in part, that:

> SSN stated that the [Board] hearing process is an inappropriate forum for assessing impacts to their Aboriginal rights. SSN also expressed concern about the [Board] process' legislated timelines and the way these timelines were unilaterally imposed on them. SSN considers this timeline extremely restrictive and does not believe it affords SSN sufficient time to review the application and participate meaningfully in the review process. SSN has stated

that their ability to participate in the process is further hampered by a lack of capacity funding from either the [Board] or the Crown. SSN has expressed a view that related regulatory (i.e. permitting) processes are not well-coordinated, which they believe results in an incomplete sharing of potential effects to SSN Interests. They refer to the perceived disconnected process between the proposed Project and proposed Ajax Mine application review. SSN are not satisfied with the current crown engagement model and the lack of addressing SSN's needs for a nation-to-nation dialogue about their concerns and interests, and have proposed that the Crown develop a [memorandum of understanding] to address these issues and provide a framework for the dialogue moving forward.

. . .

SSN have requested Nation-to-Nation engagement related to the broader issue of land management and decision making within their territory. SSN requested a consultation protocol agreement be developed, starting with a [memorandum of understanding] for Nation-to-Nation consultation, which would take the form of a trilateral agreement between SSN, BC and Canada. SSN recommended a framework of sustainable Crown funding to participate in the [memorandum of understanding] process, leading to a sustainable funding model to support ongoing land use management within SSN's territory.

At the October 6, 2016 meeting, SSN outlined a proposal for an SSN resource development tax that they charge directly to proponents whose projects are in their traditional territory. SSN wants the federal and provincial Crown's [*sic*] to make the jurisdictional room necessary for the tax to be implemented.

(underlining added)

749 Missing from the appendix is any advice to the Governor in Council that Canada committed to providing a draft memorandum of understanding to SSN and any advice about the status of the memorandum of understanding. Also missing is any indication of what, if any, impact this had on Canada's view of the consultation process.

750 In the SSN appendix Canada acknowledged that "the Project would be located within an area of Tk'emlúps te Secwe'pemc and Skeetchestn's traditional territory assessed as having a strong *prima facie* claim to Aboriginal title". Canada had also assessed its duty to consult SSN as being at the deeper end of the consultation spectrum.

751 Notwithstanding, Canada did not provide any meaningful response to SSN's proposed mitigation measures, and conducted no meaningful, two-way dialogue about SSN's concerns documented on pages 3 to 7 of the SSN appendix.

752 This was not reasonable consultation as required by the jurisprudence of the Supreme Court of Canada.

(vii) Conclusion on Canada's execution of the consultation process

753 As explained above at paragraphs 513 to 549, the consultation framework selected by Canada was reasonable and sufficient. If Canada properly executed it, Canada would have discharged its duty to consult.

754 However, based on the totality of the evidence I conclude that Canada failed in Phase III to engage, dialogue meaningfully and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodation of these concerns.

755 Certainly Canada's consultation team worked in good faith and assiduously to understand and document the concerns of the Indigenous applicants and to report those concerns to the Governor in Council in the Crown Consultation Report. That part of the Phase III consultation was reasonable.

756 However, as the above review shows, missing was a genuine and sustained effort to pursue meaningful, two-way dialogue. Very few responses were provided by Canada's representatives in the consultation meetings. When a response was provided it was brief, and did not further two-way dialogue. Too often the response was that the consultation team would put the concerns before the decision-makers for consideration.

757 Where responses were provided in writing, either in letters or in the Crown Consultation Report or its appendices, the responses were generic. There was no indication that serious consideration was given to whether any of the Board's findings were unreasonable or wrong. Nor was there any indication that serious consideration was given to amending or supplementing the Board's recommended conditions.

758 Canada acknowledged it owed a duty of deep consultation to each Indigenous applicant. More was required of Canada.

759 The inadequacies of the consultation process flowed from the limited execution of the mandate of the Crown consultation team. Missing was someone representing Canada who could engage interactively. Someone with the confidence of Cabinet who could discuss, at least in principle, required accommodation measures, possible flaws in the Board's process, findings and recommendations and how those flaws could be addressed.

760 The inadequacies of the consultation process also flowed from Canada's unwillingness to meaningfully discuss and consider possible flaws in the Board's findings and recommendations and its erroneous view that it could not supplement or impose additional conditions on Trans Mountain.

761 These three systemic limitations were then exacerbated by Canada's late disclosure of its assessment that the Project did not have a high level of impact on the exercise of the applicants' "Aboriginal Interests" and its related failure to provide more time to respond so that all Indigenous groups could contribute detailed comments on the second draft of the Crown Consultation Report.

762 Canada is not to be held to a standard of perfection in fulfilling its duty to consult. However, the flaws discussed above thwarted meaningful, two-way dialogue. The result was an unreasonable consultation process that fell well short of the required mark.

763 The Project is large and presented genuine challenges to Canada's effort to fulfil its duty to consult. The evaluation of Canada's fulfillment of its duty must take this into account. However, in largest part the concerns of the Indigenous applicants were quite specific and focussed and thus quite easy to discuss, grapple with and respond to. Had Canada's representatives met with each of the Indigenous applicants immediately following the release of the Board's report, and had Canada's representatives executed a mandate to engage and dialogue meaningfully, Canada could well have fulfilled the duty to consult by the mandated December 19, 2016 deadline.

E. Remedy

764 In these reasons I have concluded that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that permitted the Governor in Council to make its decision whether to approve the Project. The Board unjustifiably excluded Project-related shipping from the Project's definition.

765 This exclusion of Project-related shipping from the Project's definition permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related shipping. Having concluded that section 79 did not apply, the Board was then able to conclude that, notwithstanding its conclusion that the operation of Project-related vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project was not likely to cause significant adverse environmental effects.

766 This finding — that the Project was not likely to cause significant adverse environmental effects — was central to its report. The unjustified failure to assess the effects of Project-related shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed conclusion about the environmental effects of the Project was critical to the decision of the Governor in Council. With such a flawed report before it, the Governor in Council could not legally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.

767 I have also concluded that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants.

768 It follows that Order in Council P.C. 2016-1069 should be quashed, rendering the certificate of public convenience and necessity approving the construction and operation of the Project a nullity. The issue of Project approval should be remitted to the Governor in Council for prompt redetermination.

769 In that redetermination the Governor in Council must refer the Board's recommendations and its terms and conditions back to the Board, or its successor, for reconsideration. Pursuant to section 53 of the *National Energy Board Act*, the Governor in Council may direct the Board to conduct that reconsideration taking into account any factor specified by the Governor in Council. As well, the Governor in Council may specify a time limit within which the Board shall complete its reconsideration.

770 Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the *Species at Risk Act* to Project-related shipping, the Board's environmental assessment of the Project in the light of the Project's definition, the Board's recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* and any other matter the Governor in Council should consider appropriate.

771 Further, Canada must re-do its Phase III consultation. Only after that consultation is completed and any accommodation made can the Project be put before the Governor in Council for approval.

772 As mentioned above, the concerns of the Indigenous applicants, communicated to Canada, are specific and focussed. This means that the dialogue Canada must engage in can also be specific and focussed. This may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful. The end result may be a short delay, but, through possible accommodation the corrected consultation may further the objective of reconciliation with Indigenous peoples.

F. Proposed Disposition

773 For these reasons I would dismiss the applications for judicial review of the Board's report in Court Dockets A-232-16, A-225-16, A-224-16, A-217-16, A-223-16 and A-218-16.

774 I would allow the applications for judicial review of the Order in Council P.C. 2016-1069 in Court Dockets A-78-17, A-75-17, A-77-17, A-76-17, A-86-17, A-74-17, A-68-17 and A-84-17, quash the Order in Council and remit the matter to the Governor in Council for prompt redetermination.

775 The issue of costs is reserved. If the parties are unable to agree on costs they may make submissions in writing, such submissions not to exceed five pages.

776 Counsel are thanked for the assistance they have provided to the Court.

***Yves de Montigny J.A.*:**

I agree.

***Judith Woods J.A.*:**

I agree.

Applications allowed.

Appendix

National Energy Board Act, R.S.C. 1985, c. N-7

52 (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out

(a) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and

(b) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.

(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

(a) the availability of oil, gas or any other commodity to the pipeline;

(b) the existence of markets, actual or potential;

(c) the economic feasibility of the pipeline;

(d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

(e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

(3) If the application relates to a designated project within the meaning of section 2 of the *Canadian Environmental Assessment Act, 2012*, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.

(4) The report must be submitted to the Minister within the time limit specified by the Chairperson. The specified time limit must be no longer than 15 months after the day on which the applicant has, in the Board's opinion, provided a complete application. The Board shall make the time limit public.

(5) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit.

(6) The Board shall make public the dates of the beginning and ending of the period referred to in subsection (5) as soon as each of them is known.

(7) The Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of time.

(8) To ensure that the report is prepared and submitted in a timely manner, the Minister may, by order, issue a directive to the Chairperson that requires the Chairperson to

(a) specify under subsection (4) a time limit that is the same as the one specified by the Minister in the order;

(b) issue a directive under subsection 6(2.1), or take any measure under subsection 6(2.2), that is set out in the order; or

(c) issue a directive under subsection 6(2.1) that addresses a matter set out in the order.

(9) Orders made under subsection (7) are binding on the Board and those made under subsection (8) are binding on the Chairperson.

(10) A copy of each order made under subsection (8) must be published in the *Canada Gazette* within 15 days after it is made.

(11) Subject to sections 53 and 54, the Board's report is final and conclusive.

53 (1) After the Board has submitted its report under section 52, the Governor in Council may, by order, refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration.

(2) The order may direct the Board to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the Board shall complete its reconsideration.

. . .

54 (1) After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order,

(a) direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report; or

(b) direct the Board to dismiss the application for a certificate.

(2) The order must set out the reasons for making the order.

(3) The order must be made within three months after the Board's report under section 52 is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, by order, extend that time limit by any additional period or periods of time. If the Governor in Council makes an order under subsection 53(1) or (9), the period that is taken by the Board to complete its reconsideration and to report to the Minister is not to be included in the calculation of the time limit.

(4) Every order made under subsection (1) or (3) is final and conclusive and is binding on the Board.

(5) The Board shall comply with the order made under subsection (1) within seven days after the day on which it is made.

(6) A copy of the order made under subsection (1) must be published in the Canada Gazette within 15 days after it is made.

Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s.52

2(1) designated project means one or more physical activities that

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

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

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

It includes any physical activity that is incidental to those physical activities.

. . .

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

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

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

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

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

(iv) any other component of the environment that is set out in Schedule 2;

(b) a change that may be caused to the environment that would occur

(i) on federal lands,

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

(iii) outside Canada; and

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

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

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

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

. . .

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

(a) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

(c) comments from the public — or, with respect to a designated project that requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, any interested party — that are received in accordance with this Act;

(d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;

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

(f) the purpose of the designated project;

(g) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means;

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

(i) the results of any relevant study conducted by a committee established under section 73 or 74; and

(j) any other matter relevant to the environmental assessment that the responsible authority, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account.

. . .

29 (1) If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, the responsible authority with respect to the designated project must ensure that the report concerning the environmental assessment of the designated project sets out

(a) its recommendation with respect to the decision that may be made under paragraph 31(1)(a) in relation to the designated project, taking into account the implementation of any mitigation measures that it set out in the report; and

(b) its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.

. . .

31 (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment or its reconsideration report under section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*

(a) decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the reconsideration report, if there is one, that the designated project

(i) is not likely to cause significant adverse environmental effects,

(ii) is likely to cause significant adverse environmental effects that can be justified in the circumstances, or

(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and

(b) direct the responsible authority to issue a decision statement to the proponent of the designated project that

(i) informs the proponent of the decision made under paragraph (a) with respect to the designated project and,

(ii) if the decision is referred to in subparagraph (a)(i) or (ii), sets out conditions — which are the implementation of the mitigation measures and the follow-up program set out in the report with respect to the environmental assessment or the reconsideration report, if there is one — that must be complied with by the proponent in relation to the designated project.

Species at Risk Act, S.C. 2002, c. 29

77 (1) Despite any other Act of Parliament, any person or body, other than a competent minister, authorized under any Act of Parliament, other than this Act, to issue or approve a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species may enter into,

issue, approve or make the authorization only if the person or body has consulted with the competent minister, has considered the impact on the species' critical habitat and is of the opinion that

(a) all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat have been considered and the best solution has been adopted; and

(b) all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.

(1.1) Subsection (1) does not apply to the National Energy Board when it issues a certificate under an order made under subsection 54(1) of the *National Energy Board Act*.

(2) For greater certainty, section 58 applies even though a licence, a permit or any other authorization has been issued in accordance with subsection (1).

. . .

79 (1) Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the *Canadian Environmental Assessment Act, 2012* in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

(2) The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

(3) The following definitions apply in this section.

person includes an association, an organization, a federal authority as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*, and any body that is set out in Schedule 3 to that Act.

project means

(a) a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012* or a project as defined in section 66 of that Act;

(b) a project as defined in subsection 2(1) of the *Yukon Environmental and Socio-economic Assessment Act*; or

(c) a development as defined in subsection 111(1) of the *Mackenzie Valley Resource Management Act*.

TAB B:

REGULATORY DOCUMENTS

TAB B1

Canadian Environmental Assessment Agency | Agence canadienne d'évaluation environnementale

Reference Guide Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the *Canadian Environmental Assessment Act, 2012*

March 2015

Canada

Disclaimer

This reference guide is for information purposes only. It is not a substitute for the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) or its regulations. In the event of any inconsistency between this technical guidance and CEAA 2012 or its regulations, CEAA 2012 or its regulations would prevail.

For the most up-to-date versions of CEAA 2012 and regulations, please consult the Department of Justice website at: http://laws.justice.gc.ca/en/.

Updates

This document may be reviewed and updated periodically by the Canadian Environmental Assessment Agency (the Agency). For the most up-to-date version, please consult the Policy and Guidance page of the Agency website at: www.ceaa.gc.ca

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User Feedback

If you have used or consulted the Reference Guide: Considering Aboriginal Traditional Knowledge, we would like to hear from you.

Please submit your comments through the User Feedback webpage. Thank you for taking the time to contribute. Your feedback is appreciated.

Table of Contents

I. Introduction

There is recognition, both in Canada and abroad, that Aboriginal peoples have unique knowledge about the local environment, how it functions, and its characteristic ecological relationships. This Aboriginal traditional knowledge (ATK) is recognized as an important part of project planning, resource management, and environmental assessment (EA).

Aboriginal traditional knowledge under CEAA 2012

Subsection 19(3) of CEAA 2012 gives responsible authorities the discretion to consider Aboriginal traditional knowledge in any EA: "*The environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge*."

Purpose of these principles

These principles are intended to provide general guidance on the consideration of ATK.

This document has been written specifically for EA practitioners. The principles are not intended to replace any existing legislative process or requirements. They are intended to provide a framework for the consideration of ATK, where it has been determined that the provision of ATK is both desirable and appropriate.

What is Aboriginal traditional knowledge?

All cultures have traditional knowledge. In this broad context, ATK can be viewed as knowledge that is held by, and unique to, Aboriginal peoples. Although there are many different definitions of ATK in the literature, there is no one universally accepted definition. For this reason, no official definition of ATK has been provided in this document.

Generally, ATK is considered as a body of knowledge built up by a group of people through generations of living in close contact with nature. ATK is cumulative and dynamic. It builds upon the historic experiences of a people and adapts to social, economic, environmental, spiritual and political change.

While those involved in EA will likely be most interested in traditional knowledge about the environment (or, traditional ecological knowledge), it must be understood to form a part of a larger body of knowledge which encompasses knowledge about cultural, environmental, economic, political and spiritual inter-relationships.

Note: the term traditional ecological knowledge (TEK) is often used interchangeably with ATK. For the purposes of this document, TEK can be considered a subset of ATK that is primarily concerned with the environment.

Why consider Aboriginal traditional knowledge in an environmental assessment?

ATK is held by the Aboriginal people who live in the area of a proposed project, and who have a long relationship with the lands and resources likely to be affected. As such, the input of ATK into the EA process can assist in an EA in many ways. For instance, ATK can:

- provide relevant biophysical information, including historical information, that may otherwise have been unavailable;
- help identify potential environmental effects;
- lead to improved project design;
- strengthen mitigation measures;
- contribute to the building of enhanced long-term relationships between proponents, Aboriginal groups, and/or the responsible authority;
- lead to better decisions; and
- contribute to the building of EA and ATK capacity within Aboriginal communities and build an awareness of, and appreciation for, ATK in non-Aboriginal communities.

When can Aboriginal traditional knowledge be brought into environmental assessments?

ATK can be brought into an EA at any time.

ATK can be used throughout the EA process. For instance, in an EA, ATK can assist with:

- scoping of the assessment;
- the collection of baseline information;
- the identification or analysis of alternative means of carrying out a designated project;
- consideration of the environmental effects of a designated project;
- evaluation of environmental effects and the determination of their significance;
- evaluation of any cumulative environmental effects of the designated project;
- evaluation of the effects of the environment on the designated project;
- identification or modification of mitigation measures; and
- design and implementation of any follow-up programs.

II. General Principles

No two EAs are the same; therefore, a one-size-fits-all approach to considering ATK in EA is not possible. However, a number of general principles have been identified with respect to the use of ATK in EAs conducted under CEAA 2012. These are presented below.

Note: EA practitioners should be aware that while the Crown's duty to consult may include the consideration of ATK, the consideration of ATK, in and of itself, will not discharge any duties of consultation that may arise. Legal advice may be appropriate.

Work with the community

ATK research should be planned and conducted with communities, who are the holders of the traditional knowledge.

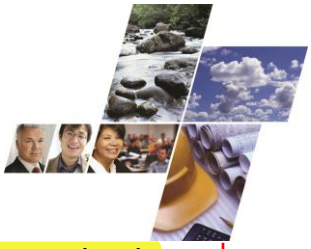
Since the ATK held by each Aboriginal group is unique to that group, consideration of ATK in a particular EA will need to be developed with the holders of the ATK. It is suggested that:

- communities be contacted early in the EA process and informed that their input is being sought;
- communities be provided with the opportunity to determine whether or not they wish to provide ATK to the EA;
- community members be provided with clear and accurate information about the designated project, the EA, the EA process, which kinds of ATK may be sought, and how any ATK provided may be incorporated into the EA process;
- practitioners be prepared for unforeseen delays and make extra efforts for ongoing and extensive communications with communities;
- practitioners place their ATK collection efforts in the context of broader long-term relationship-building, thus, the establishment of a relationship of trust with the community, its leaders, and ATK holders is crucial; and
- where language may be an issue, translation may be necessary.

Note: EA practitioners should be aware that different Aboriginal groups have different laws and customs regarding such things as who holds different aspects of a community's ATK, with whom and how ATK might be shared, and who has authority to pass on the ATK.

Seek prior informed consent

Only the community can decide if they are willing to provide access to their ATK.



In the context of ATK, prior informed consent refers to consent—usually written—that is given by a community to EA practitioners to access and use a community's ATK. In seeking consent, EA practitioners should work closely with the community to:

- clearly set out how the information will be collected and how it will be used;
- clearly set out who owns the knowledge;
- provide community members with clear and accurate information about any relevant access to information legislation;
- identify the proponent of the designated project and any other key contact persons;
- identify potential benefits and possible problems associated with the research; and
- ensure that the party or parties granting consent on behalf of the community truly represent the concerns and interests of the community.

Access Aboriginal traditional knowledge with the support of the community

Access to ATK is a privilege and must be respected.

Some communities may request that an ATK access agreement (also referred to as a protocol agreement, or memorandum of understanding) be negotiated, setting out how their ATK will be accessed and used in a given EA process. Access agreements are entered into voluntarily, and may set out:

- how and by whom the information will be collected;
- how and if specific community members will be paid for the provision of ATK-related services;
- who owns the ATK (intellectual property right issues may need to be addressed);
- how the community will be acknowledged and credited with any ATK that is provided to the process;
- how and when the community will be provided with any reports that incorporate their ATK so that they can review it; and
- if and how the confidentiality of specific ATK can be respected (see note below).

Note: Many Aboriginal groups have developed consultation and research protocols. Where these exist, EA practitioners are encouraged to follow the protocols that have been established, as appropriate.

Respect intellectual property rights

Intellectual property can also include inventions, literary and artistic works, symbols, names, images, and designs.

Certain kinds of creative endeavors are considered intellectual property, and a country's intellectual property right (IPR) laws grant protection to the creators of these endeavors. The main types of IPRs are trade secrets, patents, and copyrights.

Generally speaking, conventional IPR laws offer very limited protection of ATK. In general, this is because conventional IPR instruments tend to grant protection to an individual. ATK tends to be held collectively by a community, rather than by an individual. However, communities are likely to seek some kind of protection for their ATK when it is provided during an EA. This is especially true for sensitive information, such as information about sacred or spiritual sites.

Note: If an Aboriginal group requests confidentiality, EA practitioners will have to determine if the information can be protected, given the provisions of Canada's *Access to Information Act*, and the relevant legal requirements of other involved jurisdictions (e.g., provincial access to information legislation).

Collect Aboriginal traditional knowledge in collaboration with the community

All ATK research must respect the privacy, dignity, cultures, and traditions of Aboriginal people.

There are a number of methods and techniques in the literature for collecting and documenting ATK such as interviews, mapping and group discussions. The information could be collected during consultation efforts. However, a number of procedures can be identified, including:

- working closely with the community when developing methodologies for collecting ATK that respect the cultural identity of the community;
- preparing ATK research frameworks in collaboration with the holders of the ATK;
- ensuring that all research plans have met with the approval of the community;
- ensuring field data collection and analysis is done by or with members of the Aboriginal community;
- being aware that different types of ATK are held by different segments of the population depending on age, gender, and lifestyle;
- giving the community the opportunity to review and verify any ATK that is collected;
- giving the community the opportunity to review how ATK has been used in the EA, such as in the determination of environmental effects and any proposed mitigation, follow-up and monitoring that is proposed; and
- ensuring any ATK collected also stays in the community so that the community can also benefit from the ATK research.

Bring Aboriginal traditional knowledge and Western knowledge together

ATK and Western knowledge can complement one another.

How ATK is integrated into an EA depends almost entirely on the type of knowledge that is collected. For instance, environmental information (such as ATK dealing with wildlife migration patterns) can be readily integrated with other environmental knowledge. Knowledge about, or based on, values and norms, is not as readily integrated with scientific data sets. Thus, the main role of EA practitioners is to collect and organize any ATK that is provided, and bring to the attention of decision makers that ATK has been considered and how it has been considered.

Note: In many situations, Western and traditional knowledge systems will be complementary in the insights that they can provide to EA practitioners, and thus they can be reconciled with one another in the EA. Where they cannot be reconciled, EA practitioners should juxtapose what is suggested by each knowledge system in their EA report and demonstrate how each type of knowledge has been considered in the EA.

TAB B2

August 2011
CEAA Reference No. 07-05-26178
Department of Environment and Conservation Registration No.: 1305

Report of the Joint Review Panel

Lower Churchill Hydroelectric Generation Project
Nalcor Energy
Newfoundland and Labrador

Joint Review Panel established by Canada's Minister of the Environment,
the Minister of Environment and Conservation for Newfoundland and Labrador,
and the Minister for Intergovernmental Affairs for Newfoundland and Labrador

REPORT OF THE JOINT REVIEW PANEL

LOWER CHURCHILL HYDROELECTRIC GENERATION PROJECT
NALCOR ENERGY
NEWFOUNDLAND AND LABRADOR

August 2011

Report of the Joint Review Panel - Lower Churchill Hydroelectric Generation Project

Published under the authority of the Minister of Environment, Government of Canada

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critical habitat will be critical for government decision makers to be in a position to properly evaluate the potential risk the Project poses to the recovery of listed species. Without the recovery strategies and critical habitat, decision makers will not be in a position to fully appreciate the Project's impact on the most vulnerable species.

To illustrate, the Panel learned during the course of the environmental assessment of the Project about the primary Red Wine Mountain caribou herd habitat that would be flooded. The Panel notes that the area to be flooded is significant, however, the percentage of primary habitat is modest. The Panel was provided with a recovery strategy for the Red Wine Mountain caribou herd; however, the strategy fails to identify critical habitat for its recovery. Without knowing whether the primary habitat to be flooded is critical habitat for the recovery of the Red Wine Mountain herd, it is more difficult for the Panel to assess the impact of the Project on the prospect for recovery of the herd.

It clearly would have been desirable for all recovery strategies and critical habitat identification to have been completed before the start of the hearing, regardless of when they are required under federal or provincial legislation. Unfortunately, this did not happen. Only the recovery strategies for the harlequin duck and the Red Wine Mountain caribou herd were provided to the Panel. A number of the strategies, including those for the common nighthawk, olive sided flycatcher and rusty blackbird, are not required to be completed until after the conclusion of this environmental assessment. The absence of these recovery strategies makes it more difficult for the Panel to assess the impact of the Project on the recovery of these listed species.

What is particularly troubling to the Panel is that in some cases, recovery strategies and critical habitat identification appear to have been required to be completed under legislation before the hearings but were not available to the Panel. The recovery strategy for boreal woodland caribou, according to Environment Canada, was legally required by 2007, but was not expected until June 2011. The completion of recovery strategies and the identification of critical habitat are government responsibilities. They are not the responsibility of Nalcor.

The Panel concludes that based on the information available the Project is not expected to have a significant impact on listed species other than the Red Wine Mountain caribou herd; however the lack of recovery strategies and identification of critical habitat for some of these species make a final significance determination premature.

RECOMMENDATION 7.3 Recovery strategies for endangered species
The Panel recommends that, if the Project is approved, federal and provincial governments make all reasonable efforts to ensure that recovery strategies are in place and critical habitat is identified for each listed species found in the assessment area before a final decision is made about the effects of the Project on those species. Compliance with federal and provincial species protection legislation should be seen as a minimum standard. In fairness to Nalcor, this work should be given the priority needed to ensure that the Project decision is not unduly delayed. A final Project decision should only be made once government decisionmakers are satisfied that the recovery of listed species would not be compromised by the Project. Where Environment Canada is relying on provincial efforts to fulfill its obligations under the safety net provisions of the federal *Species at Risk Act*, before a federal decision is made about the Project it should satisfy itself that the provincial efforts for any species at risk are sufficient for its recovery and will not be compromised by the Project.

RECOMMENDATION 7.4 Compliance with species at risk legislation
The Panel recommends that, if the Project is approved, Nalcor should work with federal and provincial departments responsible for species at risk legislation to ensure all Project-related activities comply with restrictions and prohibitions against harassment, disturbance, injuring or killing of listed species or destroying and disturbing their residence.

Should it not be possible to complete recovery strategies and identify critical habitat not required by law before making a project decision, decision-makers should take a precautionary approach. This means decision-makers should err on the side of overestimating the Project's impact on listed species and should assume, unless there is clear evidence to the contrary, that the assessment area includes critical habitat and is otherwise essential to the recovery of the species.

7.5 CARIBOU

7.5.1 Nalcor's Views

The EIS also assessed effects of the Project on habitat, health, and mortality for the Red Wine Mountain caribou herd and the George River caribou herd. The Red Wine Mountain caribou herd is considered threatened under the provincial *Endangered Species Act* and the Canadian *Species at Risk Act*. The George River caribou herd is in decline but not considered threatened and hunting is legal within permitted seasons. The Lac Joseph caribou herd was also known to occur in the Project area; however, Nalcor did not include this herd in its assessment.

The Red Wine Mountain caribou herd was selected as a key indicator due to its small size, sedentary nature and limited range, factors which made it particularly vulnerable to Project effects. The George River herd was noted as having seasonal overlap with the Project area during the winter months. Nalcor considered the possibility of Project effects on the Lac Joseph caribou herd in response to an information request from the Panel but stated that it had limited spatial overlap at the northern extent of its range and therefore was not expected to be affected by the Project. The respective ranges of the caribou herds in relation to the Project area are provided in Figure 10.

In its assessment, Nalcor used the Red Wine Mountain caribou herd range as the caribou assessment area, which is approximately 57,000 square kilometres. Nalcor acknowledged that the range of the migratory George River caribou herd covers most of the Ungava Peninsula, but that a portion of its annual movements overlaps with the Project and would be captured within the caribou assessment area (Figure 11).

To carry out the habitat modelling for the Red Wine Mountain caribou herd, Nalcor used Forest Management District 19 as its study area. This area represents approximately 30 percent of the recent range of the Red Wine Mountain caribou herd. Nalcor explained its choice of study area noting that detailed habitat data were not available for the rest of the herd's range. Nalcor stated that the absence of sufficient habitat data for the remainder of the range would not affect its modelling predictions as the effects of the Project did not extend beyond the forest inventory area. After habitat types were determined, Nalcor used telemetry data to understand caribou use of the assessment area.

TAB C:

SECONDARY SOURCES

TAB C1

2019 - 04 - 15

Native Law

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NATIVE LAW

JACK WOODWARD, Q.C.

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(a) — Early consultation

5§1860 Ensuring that the momentum of a project does not render consultation meaningless. The Crown must initiate the consultation procèss early in its decision-making process, before that process has moved too far along.[218] This makes sense, particularly for projects proposed by third parties, which will gain momentum as the proponent begins to interact with government officials, develops the details of the project, and secures financing and preliminary approvals. This fact was recognized by the British Columbia Supreme Court in *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*:

> The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions. Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project.[219]

5§1870 Ensuring that the process allows for meaningful input. The requirement for early consultation may include the duty to consult about the decision-making process that will be used to decide whether to approve a project. This was held to be the case in *Dene Tha' First Nation v. Canada (Minister of Environment),* where Canada and Alberta had developed a unique regulatory and environmental review process for the proposed Mackenzie Gas Pipeline, a project of a significant size.[220] Thus, at least in the case of major projects with customized review processes, aboriginal groups who stand to see their s. 35 rights affected by the proposed activity are entitled to help design those processes.

5§1880 Ensuring that higher-level decisions do not render later consultation meaningless. The need for "early consultation" also means that the Crown must consult about higher-level strategic decisions. *Haida*[221] and *Gitxan*[222] confirm that strategic decisions include the transfer of ownership of forestry licences; *Wii'litswx*[223] confirms the need to consult about the replacement of forestry licences; *Klahoose*[224] confirms the Crown's duty to consult prior to approving forest stewardship plans (which are currently the longer-term, higher-level forestry planning instrument in British Columbia); *Tsuu T'ina* confirms the Crown's duty to consult in developing a large-scale water management plan.[224.1] On this logic, other strategic decisions that should attract consultation include mineral tenure grants,[225] oil and gas tenure grants, land use plans, or decisions to lift a moratorium on a particular resource extraction activity, because even if these decisions have no immediate impact on the landscape, they set the stage for further decisions that will have a direct impact on land and resources.[226]

5§1885 Cases of urgency. It has been suggested by the Alberta Court of Appeal that a factor affecting the extent of the Crown's consultation duty may be the urgency of a decision;[226.1] that is to say, in a case of emergency, the Crown may not need to consult or may be permitted to abridge the consultation period. This proposition is consistent with statements by the Supreme Court of Canada regarding the application of the *Sparrow* justification framework. The Court has stated that in deciding whether an infringement of an aboriginal right can be justified, courts must consider all of the relevant circumstances, including whether the Crown needed to respond swiftly to an emergency, such as a conservation emergency.[226.2] However, it does not appear as

though the issue of an "emergency" has been a live factor in any consultation or accommodation case so far.

FOOTNOTES

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218 *Musqueam Indian Band v. British Columbia*, 2005 CarswellBC 472, 2005 BCCA 128 (B.C. C.A.) at para. 95 (per Justice Hall).

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219 *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 CarswellBC 2379, 2004 BCSC 1320 (B.C. S.C.) at para. 74; affirmed in *Sambaa K'e Dene Band v. Canada (Minister of Indian Affairs & Northern Development)*, 2012 FC 204, 2012 CarswellNat 570 (F.C.) at para. 165 [applicants included Nahanni Butte Dene Band; respondents included Acho Dene Koe First Nation].

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220 *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 CarswellNat 3642, 2006 FC 1354 (F.C.) at paras. 107-110.

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221 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 CarswellBC 2656, 2004 SCC 73 (S.C.C.) [interveners included Squamish Indian Band, Lax-kw'alaams Indian Band, Haisla Nation, Dene Tha' First Nation].

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222 *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2002 CarswellBC 2928, 2002 BCSC 1701 (B.C. S.C.)[respondents included the Lax Kw'alaams Indian Band, and the Metlakatla Indian Band].

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223 *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 CarswellBC 1764, 2008 BCSC 1139 (B.C. S.C.) [petitioners included Gitanyow].

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224 *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 CarswellBC 2587, 2008 BCSC 1642 (B.C. S.C.) [petitioners included Klahoose First Nation].

224.1 *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 CarswellAlta 804, 2010 ABCA 137 (Alta. C.A).

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225 In the decision of *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 CarswellOnt 3877, 2008 ONCA 534 (Ont. C.A.), the Ontario Court of Appeal suggests, in passing, that the staking of mineral claims is an activity which should trigger the Crown's duty to consult and accommodate with aboriginal groups whose s. 35 rights may be affected by eventual mining activity (at paras. 61-62).

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226 Indeed, British Columbia Supreme Court has recognized land use planning as an infringement of aboriginal title in *Xeni Gwet'in First Nation v. British Columbia*, 2007 CarswellBC 2741, 2007 BCSC 1700 (B.C. S.C.) (see paras. 1068, 1096), affirmed in 2012 BCCA 285, 2012 CarswellBC 1860 (B.C. C.A.) at para. 315.

226.1 *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2008 CarswellAlta 1182, 2008 ABQB 547 (Alta. Q.B.) at para. 132, affirmed 2010 ABCA 137, 2010 CarswellAlta 804 (Alta. C.A.). This was an *obiter* remark and the principle was not applied in that particular case. In *R. v. Lefthand*, 2007 CarswellAlta 850, 2007 ABCA 206 (Alta. C.A.) [defendant was a member of Bearspaw Band], Justice Slatter stated in passing that the Crown was excused from having to consult about a fishery closure due to the urgent need for the restriction to be imposed (para. 35). However, this was an infringement case rather than a consultation case, and the infringement/justification analysis did not turn on the lack of consultation as Justice Slatter (and the other judges) agreed that there was no infringement (and therefore there was no justification analysis requiring the Court to consider the adequacy of consultation).

226.2 *R. v. Nikal*, 1996 CarswellBC 950, [1996] 1 S.C.R. 1013 (S.C.C.) at para. 110 [intervenors included Sheshaht Band]; *R. v. Marshall*, 1999 CarswellNS 349, [1999] 3 S.C.R. 533 (S.C.C.) at para. 43 [defendant was a member of Membertou Band]. In *Marshall*, the Supreme Court of Canada suggested that urgency would be a reason for abridging the consultation period rather than not consulting at all.

TAB D:

LEGISLATION

TAB D1

CANADA

CONSOLIDATION

CODIFICATION

Canadian Environmental Assessment Act, 2012

Loi canadienne sur l'évaluation environnementale (2012)

S.C. 2012, c. 19, s. 52

L.C. 2012, ch. 19, art. 52

NOTE

[Enacted by section 52 of chapter 19 of the Statutes of Canada, 2012, in force July 6, 2012, *see* SI/2012-56.]

NOTE

[Édictée par l'article 52 du chapitre 19 des Lois du Canada (2012), en vigueur le 6 juillet 2012, *voir* TR/2012-56.]

Current to December 12, 2018

Last amended on June 22, 2017

À jour au 12 décembre 2018

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to December 12, 2018. The last amendments came into force on June 22, 2017. Any amendments that were not in force as of December 12, 2018 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 12 décembre 2018. Les dernières modifications sont entrées en vigueur le 22 juin 2017. Toutes modifications qui n'étaient pas en vigueur au 12 décembre 2018 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act respecting the environmental assessment of certain activities and the prevention of significant adverse environmental effects

TABLE ANALYTIQUE

Loi concernant l'évaluation environnementale de certaines activités et visant à prévenir les effets environnementaux négatifs importants

S.C. 2012, c. 19, s. 52

L.C. 2012, ch. 19, art. 52

An Act respecting the environmental assessment of certain activities and the prevention of significant adverse environmental effects

[*Assented to 29th June 2012*]

Loi concernant l'évaluation environnementale de certaines activités et visant à prévenir les effets environnementaux négatifs importants

[*Sanctionnée le 29 juin 2012*]

Short Title

Short title

1 This Act may be cited as the *Canadian Environmental Assessment Act, 2012*.

Titre abrégé

Titre abrégé

1 *Loi canadienne sur l'évaluation environnementale (2012)*.

Interpretation

Definitions

2 (1) The following definitions apply in this Act.

Agency means the Canadian Environmental Assessment Agency continued under section 103. (*Agence*)

assessment by a review panel means an environmental assessment that is conducted by a review panel. (*examen par une commission*)

Canadian Nuclear Safety Commission means the Canadian Nuclear Safety Commission established by section 8 of the *Nuclear Safety and Control Act*. (*Commission canadienne de sûreté nucléaire*)

designated project means one or more physical activities that

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

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

Définitions

Définitions

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

Agence L'Agence canadienne d'évaluation environnementale maintenue en vertu de l'article 103. (*Agency*)

autorité fédérale

a) Ministre fédéral;

b) agence fédérale, société d'État mère au sens du paragraphe 83(1) de la *Loi sur la gestion des finances publiques* ou autre organisme constitué sous le régime d'une loi fédérale et tenu de rendre compte au Parlement de ses activités par l'intermédiaire d'un ministre fédéral;

c) ministère ou établissement public mentionnés aux annexes I et II de la *Loi sur la gestion des finances publiques*;

d) tout autre organisme mentionné à l'annexe 1.

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

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

environment means the components of the Earth, and includes

(a) land, water and air, including all layers of the atmosphere;

(b) all organic and inorganic matter and living organisms; and

(c) the interacting natural systems that include components referred to in paragraphs (a) and (b). (*environnement*)

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

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

federal authority means

(a) a Minister of the Crown in right of Canada;

(b) an agency of the Government of Canada or a parent Crown corporation, as defined in subsection 83(1) of the *Financial Administration Act*, or any other body established by or under an Act of Parliament that is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs;

(c) any department or departmental corporation that is set out in Schedule I or II to the *Financial Administration Act*; and

(d) any other body that is set out in Schedule 1.

It does not include the Executive Council of — or a minister, department, agency or body of the government of — Yukon, the Northwest Territories or Nunavut, a council of the band within the meaning of the *Indian Act*, Export Development Canada or the Canada Pension Plan Investment Board. It also does not include a Crown corporation that is a wholly-owned subsidiary, as defined in subsection 83(1) of the *Financial Administration Act*, a harbour commission established under the *Harbour Commissions Act* or a not-for-profit corporation that enters into

Sont exclus le conseil exécutif et les ministres du Yukon, des Territoires du Nord-Ouest et du Nunavut, ainsi que les ministères et les organismes de l'administration publique de ces territoires, tout conseil de bande au sens donné à « conseil de la bande » dans la *Loi sur les Indiens*, Exportation et développement Canada et l'Office d'investissement du régime de pensions du Canada. Est également exclue toute société d'État qui est une filiale à cent pour cent au sens du paragraphe 83(1) de la *Loi sur la gestion des finances publiques*, commission portuaire constituée par la *Loi sur les commissions portuaires* ou société sans but lucratif qui a conclu une entente en vertu du paragraphe 80(5) de la *Loi maritime du Canada*, à moins qu'elle ne soit mentionnée à l'annexe 1. (*federal authority*)

autorité responsable L'autorité visée à l'article 15, relativement à un projet désigné devant faire l'objet d'une évaluation environnementale. (*responsible authority*)

commission Toute commission constituée aux termes du paragraphe 42(1) ou au titre d'un accord conclu aux termes des paragraphes 40(1) ou (2) ou au titre du document visé au paragraphe 41(2). (*review panel*)

Commission canadienne de sûreté nucléaire La Commission canadienne de sûreté nucléaire constituée par l'article 8 de la *Loi sur la sûreté et la réglementation nucléaires*. (*Canadian Nuclear Safety Commission*)

développement durable Développement qui permet de répondre aux besoins du présent sans compromettre la possibilité des générations futures de répondre aux leurs. (*sustainable development*)

document Tous éléments d'information, quels que soient leur forme et leur support, notamment correspondance, note, livre, plan, carte, dessin, diagramme, illustration ou graphique, photographie, film, microformule, enregistrement sonore, magnétoscopique ou informatisé, ou toute reproduction de ces éléments d'information. (*record*)

effets environnementaux Les effets environnementaux prévus à l'article 5. (*environmental effects*)

environnement Ensemble des conditions et des éléments naturels de la Terre, notamment :

a) le sol, l'eau et l'air, y compris toutes les couches de l'atmosphère;

b) toutes les matières organiques et inorganiques ainsi que les êtres vivants;

an agreement under subsection 80(5) of the *Canada Marine Act*, that is not set out in Schedule 1. (*autorité fédérale*)

federal lands means

(a) lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands, other than lands under the administration and control of the Commissioner of Yukon, the Northwest Territories or Nunavut;

(b) the following lands and areas:

(i) the internal waters of Canada, in any area of the sea not within a province,

(ii) the territorial sea of Canada, in any area of the sea not within a province,

(iii) the exclusive economic zone of Canada, and

(iv) the continental shelf of Canada; and

(c) reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the *Indian Act*, and all waters on and airspace above those reserves or lands. (*territoire domanial*)

follow-up program means a program for

(a) verifying the accuracy of the environmental assessment of a designated project; and

(b) determining the effectiveness of any mitigation measures. (*programme de suivi*)

interested party, with respect to a designated project, means any person who is determined, under subsection (2), to be an ***interested party***. (*partie intéressée*)

Internet site means the Internet site that is established under section 79. (*site Internet*)

jurisdiction means

(a) a federal authority;

(b) any agency or body that is established under an Act of Parliament and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

(c) the government of a province;

c) les systèmes naturels en interaction qui comprennent les éléments visés aux alinéas a) et b). (*environment*)

évaluation environnementale Évaluation des effets environnementaux d'un projet désigné effectuée conformément à la présente loi. (*environmental assessment*)

examen par une commission Évaluation environnementale effectuée par une commission. (*assessment by a review panel*)

instance

a) Autorité fédérale;

b) organisme établi sous le régime d'une loi fédérale et ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet désigné;

c) gouvernement d'une province;

d) organisme établi sous le régime d'une loi provinciale et ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet désigné;

e) organisme constitué aux termes d'un accord sur des revendications territoriales visé à l'article 35 de la *Loi constitutionnelle de 1982* et ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet désigné;

f) organisme dirigeant constitué par une loi relative à l'autonomie gouvernementale des Indiens et ayant des attributions relatives à l'évaluation des effets environnementaux d'un projet désigné;

g) gouvernement d'un État étranger ou d'une subdivision politique d'un État étranger ou un de leurs organismes;

h) organisation internationale d'États ou un de ses organismes. (*jurisdiction*)

mesures d'atténuation Mesures visant à éliminer, réduire ou limiter les effets environnementaux négatifs d'un projet désigné. Y sont assimilées les mesures de réparation de tout dommage causé par ces effets, notamment par remplacement, restauration ou indemnisation. (*mitigation measures*)

ministre Le ministre de l'Environnement. (*Minister*)

Office national de l'énergie L'Office national de l'énergie constitué par l'article 3 de la *Loi sur l'Office national de l'énergie*. (*National Energy Board*)

(d) any agency or body that is established under an Act of the legislature of a province and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

(e) any body that is established under a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

(f) a governing body that is established under legislation that relates to the self-government of Indians and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

(g) a government of a foreign state or of a subdivision of a foreign state, or any institution of such a government; and

(h) an international organization of states or any institution of such an organization. (*instance*)

Minister means the Minister of the Environment. (*ministre*)

mitigation measures means measures for the elimination, reduction or control of the adverse environmental effects of a designated project, and includes restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means. (*mesures d'atténuation*)

National Energy Board means the National Energy Board established by section 3 of the *National Energy Board Act*. (*Office national de l'énergie*)

prescribed means prescribed by the regulations. (*Version anglaise seulement*)

proponent means the person, body, federal authority or government that proposes the carrying out of a designated project. (*promoteur*)

record includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape and machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy of it. (*document*)

Registry means the Canadian Environmental Assessment Registry established under section 78. (*registre*)

partie intéressée S'entend, relativement à un projet désigné, de toute personne pour laquelle il est décidé au titre du paragraphe (2) qu'elle est une partie intéressée. (*interested party*)

programme de suivi Programme visant à permettre :

a) de vérifier la justesse de l'évaluation environnementale d'un projet désigné;

b) de juger de l'efficacité des mesures d'atténuation des effets environnementaux négatifs. (*follow-up program*)

projet désigné Une ou plusieurs activités concrètes :

a) exercées au Canada ou sur un territoire domanial;

b) désignées soit par règlement pris en vertu de l'alinéa 84a), soit par arrêté pris par le ministre en vertu du paragraphe 14(2);

c) liées à la même autorité fédérale selon ce qui est précisé dans ce règlement ou cet arrêté.

Sont comprises les activités concrètes qui leur sont accessoires. (*designated project*)

promoteur Autorité fédérale, gouvernement, personne ou organisme qui propose la réalisation d'un projet désigné. (*proponent*)

registre Le registre canadien d'évaluation environnementale établi au titre de l'article 78. (*Registry*)

site Internet Le site Internet établi au titre de l'article 79. (*Internet site*)

territoire domanial

a) Les terres qui appartiennent à Sa Majesté du chef du Canada ou dont elle a le pouvoir de disposer, ainsi que leurs eaux et leur espace aérien, à l'exception des terres dont le commissaire du Yukon, celui des Territoires du Nord-Ouest ou celui du Nunavut a la gestion et la maîtrise;

b) les eaux intérieures et la mer territoriale du Canada qui se trouvent dans des espaces maritimes non compris dans le territoire d'une province, ainsi que la zone économique exclusive et le plateau continental du Canada;

c) les réserves, terres cédées ou autres terres qui ont été mises de côté à l'usage et au profit d'une bande et assujetties à la *Loi sur les Indiens*, ainsi que leurs eaux et leur espace aérien. (*federal lands*)

responsible authority means the authority that is referred to in section 15 with respect to a designated project that is subject to an environmental assessment. (*autorité responsable*)

review panel means a review panel established under subsection 42(1) or under an agreement or arrangement entered into under subsection 40(1) or (2) or by document referred to in subsection 41(2). (*commission*)

sustainable development means development that meets the needs of the present, without compromising the ability of future generations to meet their own needs. (*développement durable*)

Interested party

(2) One of the following entities determines, with respect to a designated project, that a person is an interested party if, in its opinion, the person is directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise:

(a) in the case of a designated project for which the responsible authority is referred to in paragraph 15(b), that responsible authority; or

(b) in the case of a designated project in relation to which the environmental assessment has been referred to a review panel under section 38, that review panel.

Partie intéressée

(2) L'entité ci-après décide, relativement à un projet désigné, qu'une personne est une partie intéressée si elle estime que la personne est directement touchée par la réalisation du projet ou qu'elle possède des renseignements pertinents ou une expertise appropriée :

a) s'agissant d'un projet pour lequel l'autorité responsable est visée à l'alinéa 15b), cette autorité responsable;

b) s'agissant d'un projet pour lequel l'évaluation environnementale a été renvoyée au titre de l'article 38 pour examen par une commission, cette commission.

Her Majesty

Binding on Her Majesty

3 This Act is binding on Her Majesty in right of Canada or a province.

Sa Majesté

Sa Majesté

3 La présente loi lie Sa Majesté du chef du Canada et des provinces.

Purposes

Purposes

4 (1) The purposes of this Act are

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

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

Objet

Objet

4 (1) La présente loi a pour objet :

a) de protéger les composantes de l'environnement qui relèvent de la compétence législative du Parlement contre tous effets environnementaux négatifs importants d'un projet désigné;

b) de veiller à ce que les projets désignés dont la réalisation exige l'exercice, par une autorité fédérale, d'attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi soient étudiés avec soin et prudence afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants;

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

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

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

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

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

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

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

c) de promouvoir la collaboration des gouvernements fédéral et provinciaux et la coordination de leurs activités en matière d'évaluation environnementale;

d) de promouvoir la communication et la collaboration avec les peuples autochtones en matière d'évaluation environnementale;

e) de veiller à ce que le public ait la possibilité de participer de façon significative à l'évaluation environnementale;

f) de veiller à ce que l'évaluation environnementale soit menée à terme en temps opportun;

g) de veiller à ce que soient étudiés avec soin et prudence, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants, les projets au sens de l'article 66 qui sont réalisés sur un territoire domanial, qu'une autorité fédérale réalise à l'étranger ou pour lesquels elle accorde une aide financière en vue de leur réalisation à l'étranger;

h) d'inciter les autorités fédérales à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;

i) d'encourager l'étude des effets cumulatifs d'activités concrètes dans une région et la prise en compte des résultats de cette étude dans le cadre des évaluations environnementales.

Mandate

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

Mission

(2) Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence, les autorités fédérales et les autorités responsables doivent exercer leurs pouvoirs de manière à protéger l'environnement et la santé humaine et à appliquer le principe de précaution.

Environmental Effects

Environmental effects

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

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

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

Effets environnementaux

Effets environnementaux

5 (1) Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un projet désigné ou d'un projet sont les suivants :

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

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

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

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

(iv) any other component of the environment that is set out in Schedule 2;

(b) a change that may be caused to the environment that would occur

(i) on federal lands,

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

(iii) outside Canada; and

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

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

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

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

Exercise of power or performance of duty or function by federal authority

(2) However, if the carrying out of the physical activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:

(a) a change, other than those referred to in paragraphs (1)(a) and (b), that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and

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

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

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

(iv) toute autre composante de l'environnement mentionnée à l'annexe 2;

b) les changements qui risquent d'être causés à l'environnement, selon le cas :

(i) sur le territoire domanial,

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

(iii) à l'étranger;

c) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas :

(i) en matière sanitaire et socio-économique,

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

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

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

Exercice d'attributions par une autorité fédérale

(2) Toutefois, si l'exercice de l'activité ou la réalisation du projet désigné ou du projet exige l'exercice, par une autorité fédérale, d'attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi, les effets environnementaux comprennent en outre :

a) les changements — autres que ceux visés aux alinéas (1)a) et b) — qui risquent d'être causés à l'environnement et qui sont directement liés ou nécessairement accessoires aux attributions que l'autorité fédérale doit exercer pour permettre l'exercice en tout ou en partie de l'activité ou la réalisation en tout ou en partie du projet désigné ou du projet;

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

(i) health and socio-economic conditions,

(ii) physical and cultural heritage, or

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

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

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

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

Schedule 2

(3) The Governor in Council may, by order, amend Schedule 2 to add or remove a component of the environment.

2012, c. 19, ss. 52 "5", 64, c. 31, s. 425(F).

Annexe 2

(3) Le gouverneur en conseil peut, par décret, modifier l'annexe 2 pour y ajouter ou en retrancher toute composante de l'environnement.

2012, ch. 19, art. 52 « 5 » et 64, ch. 31, art. 425(F).

Prohibitions

Proponent

6 The proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause an environmental effect referred to in subsection 5(1) unless

(a) the Agency makes a decision under paragraph 10(b) that no environmental assessment of the designated project is required and posts that decision on the Internet site; or

(b) the proponent complies with the conditions included in the decision statement that is issued under subsection 31(3) or section 54 to the proponent with respect to that designated project.

Federal authority

7 A federal authority must not exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit a designated project to be carried out in whole or in part unless

(a) the Agency makes a decision under paragraph 10(b) that no environmental assessment of the designated project is required and posts that decision on the Internet site; or

(b) the decision statement with respect to the designated project that is issued under subsection 31(3) or section 54 to the proponent of the designated project indicates that the designated project is not likely to cause significant adverse environmental effects or that the significant adverse environmental effects that it is likely to cause are justified in the circumstances.

2012, c. 19, s. 52 "7", c. 31, s. 426(E).

Interdictions

Promoteur

6 Le promoteur d'un projet désigné ne peut prendre une mesure se rapportant à la réalisation de tout ou partie du projet et pouvant entraîner des effets environnementaux visés au paragraphe 5(1) que si, selon le cas :

a) l'Agence décide, au titre de l'alinéa 10b), qu'aucune évaluation environnementale du projet n'est requise et affiche sa décision sur le site Internet;

b) le promoteur prend la mesure en conformité avec les conditions qui sont énoncées dans la déclaration qui lui est remise au titre du paragraphe 31(3) ou de l'article 54 relativement au projet.

Autorité fédérale

7 L'autorité fédérale ne peut exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi et qui pourraient permettre la réalisation en tout ou en partie d'un projet désigné que si, selon le cas :

a) l'Agence décide, au titre de l'alinéa 10b), qu'aucune évaluation environnementale du projet n'est requise et affiche sa décision sur le site Internet;

b) la déclaration remise au promoteur du projet au titre du paragraphe 31(3) ou de l'article 54 relativement au projet donne avis d'une décision portant que la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou que les effets environnementaux négatifs importants que la réalisation du projet est susceptible d'entraîner sont justifiables dans les circonstances.

2012, ch. 19, art. 52 « 7 », ch. 31, art. 426(A).

Screening

Proponent's obligation — description of designated project

8 (1) The proponent of a designated project — other than one that is subject to an environmental assessment under section 13 or subsection 14(1) — must provide the Agency with a description of the designated project that includes the information prescribed by regulations made under paragraph 84(b).

Additional information

(2) If the Agency is of the opinion, after receiving the description of the designated project from the proponent, that a decision cannot be made under paragraph 10(b) because the description is incomplete or does not contain sufficient details, the Agency may, within 10 days after receiving it, require the proponent to provide an amended description that includes the information and details that the Agency specifies.

Posting of description of designated project and public notice on Internet site

9 When the Agency is satisfied that the description of the designated project includes all of the required information, it must post the following on the Internet site:

(a) a summary of the description;

(b) an indication of how a copy of the description may be obtained; and

(c) a notice that indicates that the designated project is the subject of a screening, invites the public to provide comments respecting the designated project within 20 days after the posting of the notice and indicates the address for filing those comments.

Screening decision

10 Within 45 days after the posting of the notice on the Internet site, the Agency must

(a) conduct the screening, which must include a consideration of the following factors:

(i) the description of the designated project provided by the proponent,

(ii) the possibility that the carrying out of the designated project may cause adverse environmental effects,

(iii) any comments received from the public within 20 days after the posting of the notice, and

Examen préalable

Obligation des promoteurs — description du projet désigné

8 (1) Le promoteur d'un projet désigné — autre que le projet désigné devant faire l'objet d'une évaluation environnementale au titre de l'article 13 ou du paragraphe 14(1) — fournit à l'Agence une description du projet qui comprend les renseignements prévus par règlement pris en vertu de l'alinéa 84b).

Renseignements supplémentaires

(2) Si elle estime qu'une décision ne peut être prise au titre de l'alinéa 10b) du fait que la description fournie est incomplète ou qu'elle n'est pas suffisamment précise, l'Agence peut, dans les dix jours suivant sa réception, exiger du promoteur qu'il lui en fournisse une version modifiée dans laquelle il ajoute les renseignements et précisions qu'elle demande.

Description et avis affichés sur le site Internet

9 Lorsqu'elle estime que la description du projet désigné comprend tous les renseignements requis, l'Agence affiche sur le site Internet :

a) un sommaire de la description;

b) une indication de la façon d'obtenir copie de celle-ci;

c) un avis indiquant que le projet fait l'objet d'un examen préalable, invitant le public à lui faire des observations à son égard dans les vingt jours suivant l'affichage de l'avis et indiquant l'adresse pour la réception par elle des observations.

Examen préalable et décision

10 Dans les quarante-cinq jours suivant l'affichage de l'avis sur le site Internet, l'Agence :

a) effectue l'examen préalable du projet désigné en tenant compte notamment des éléments suivants :

(i) la description du projet fournie par le promoteur,

(ii) la possibilité que la réalisation du projet entraîne des effets environnementaux négatifs,

(iii) les observations reçues du public dans les vingt jours suivant l'affichage de l'avis sur le site Internet,

(iv) the results of any relevant study conducted by a committee established under section 73 or 74; and

(b) on completion of the screening, decide if an environmental assessment of the designated project is required.

(iv) les résultats de toute étude pertinente effectuée par un comité constitué au titre des articles 73 ou 74;

b) décide, au terme de cet examen, si une évaluation environnementale du projet désigné est requise ou non.

Federal authority's obligation

11 Every federal authority that is in possession of specialist or expert information or knowledge with respect to a designated project that is subject to a screening must, on request, make that information or knowledge available to the Agency within the specified period.

Obligation des autorités fédérales

11 Il incombe à toute autorité fédérale possédant l'expertise ou les connaissances voulues en ce qui touche un projet désigné devant faire l'objet d'un examen préalable de fournir à l'Agence, sur demande et dans le délai précisé, les renseignements utiles.

Posting notice of decision on Internet site

12 The Agency must post a notice of its decision made under paragraph 10(b) on the Internet site.

Avis de décision affiché sur le site Internet

12 L'Agence affiche sur le site Internet un avis de la décision qu'elle prend au titre de l'alinéa 10b).

Environmental Assessment Required

Activities regulated by regulatory body

13 A designated project for which the responsible authority is referred to in any of paragraphs 15(a) to (c) is subject to an environmental assessment.

Designation of physical activity as designated project

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

Minister's power to designate

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

Minister's power to require that information be provided

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

Federal authority

(4) The Minister must specify in the order made under subsection (2) for each designated physical activity one of

Évaluation environnementale obligatoire

Activités régies par un organisme exerçant des fonctions de réglementation

13 Tout projet désigné dont l'autorité responsable est visée à l'un des alinéas 15a) à c) doit faire l'objet d'une évaluation environnementale.

Activités désignées comme projet désigné

14 (1) Tout projet désigné qui comprend une activité désignée en vertu du paragraphe (2) doit faire l'objet d'une évaluation environnementale.

Pouvoir du ministre de désigner

(2) Le ministre peut, par arrêté, désigner toute activité concrète qui n'est pas désignée par règlement pris en vertu de l'alinéa 84a), s'il est d'avis que l'exercice de l'activité peut entraîner des effets environnementaux négatifs ou que les préoccupations du public concernant les effets environnementaux négatifs que l'exercice de l'activité peut entraîner le justifient.

Pouvoir de demander la fourniture de renseignements

(3) Il peut demander à quiconque de lui fournir des renseignements relativement à toute activité concrète qui peut être désignée en vertu du paragraphe (2).

Autorité fédérale

(4) Il précise dans l'arrêté pris en vertu de ce paragraphe, relativement à toute activité concrète qui y est

the following federal authorities to which the physical activity is linked:

(a) the Canadian Nuclear Safety Commission;

(b) the National Energy Board;

(c) any federal authority that performs regulatory functions, that may hold public hearings and that is specified in regulations made under paragraph 83(b); or

(d) the Agency.

Limitation

(5) The Minister must not make the designation referred to in subsection (2) if

(a) the carrying out of the physical activity has begun and, as a result, the environment has been altered; or

(b) a federal authority has exercised a power or performed a duty or function conferred on it under any Act of Parliament other than this Act that could permit the physical activity to be carried out, in whole or in part.

Posting of notice of order on Internet site

(6) The Agency must post on the Internet site a notice of any order made under subsection (2).

2012, c. 19, s. 52 "14", c. 31, s. 427(E).

désignée, à laquelle des autorités fédérales ci-après elle est liée :

a) la Commission canadienne de sûreté nucléaire;

b) l'Office national de l'énergie;

c) toute autorité fédérale exerçant des fonctions de réglementation et pouvant tenir des audiences publiques, prévue par règlement pris en vertu de l'alinéa 83b);

d) l'Agence.

Restriction

(5) Il ne peut exercer le pouvoir prévu au paragraphe (2) si, selon le cas :

a) l'exercice de l'activité a commencé et, de ce fait, l'environnement est modifié;

b) une autorité fédérale a exercé des attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi et qui pourraient permettre l'exercice, en tout ou en partie, de l'activité.

Avis de l'arrêté affiché sur le site Internet

(6) L'Agence affiche sur le site Internet un avis de tout arrêté pris en vertu du paragraphe (2).

2012, ch. 19, art. 52 « 14 », ch. 31, art. 427(A).

Environmental Assessment of Designated Projects

Responsible Authority

Responsible authority

15 For the purposes of this Act, the responsible authority with respect to a designated project that is subject to an environmental assessment is

(a) the Canadian Nuclear Safety Commission, in the case of a designated project that includes activities that are regulated under the *Nuclear Safety and Control Act* and that are linked to the Canadian Nuclear Safety Commission as specified in the regulations made under paragraph 84(a) or the order made under subsection 14(2);

(b) the National Energy Board, in the case of a designated project that includes activities that are regulated under the *National Energy Board Act* or the *Canada Oil and Gas Operations Act* and that are linked to the

Évaluation environnementale des projets désignés

Autorité responsable

Autorité responsable

15 Pour l'application de la présente loi, l'autorité ci-après est l'autorité responsable à l'égard d'un projet désigné devant faire l'objet d'une évaluation environnementale :

a) la Commission canadienne de sûreté nucléaire, s'agissant d'un projet désigné qui comprend des activités régies par la *Loi sur la sûreté et la réglementation nucléaires* et liées à cette commission selon ce qui est précisé dans le règlement pris en vertu de l'alinéa 84a) ou l'arrêté pris en vertu du paragraphe 14(2);

b) l'Office national de l'énergie, s'agissant d'un projet désigné qui comprend des activités régies par la *Loi sur l'Office national de l'énergie* ou la *Loi sur les opérations pétrolières au Canada* et liées à cet office

National Energy Board as specified in the regulations made under paragraph 84(a) or the order made under subsection 14(2);

(c) the federal authority that performs regulatory functions, that may hold public hearings and that is prescribed by regulations made under paragraph 83(b), in the case of a designated project that includes activities that are linked to that federal authority as specified in the regulations made under paragraph 84(a) or the order made under subsection 14(2); or

(d) the Agency, in the case of a designated project that includes activities that are linked to the Agency as specified in the regulations made under paragraph 84(a) or the order made under subsection 14(2).

Cooperation

16 If two designated projects are closely related and the responsible authority with respect to each of them is different, each responsible authority must cooperate with the other with respect to the exercise of their respective powers and the performance of their respective duties and functions under this Act in relation to the projects.

Commencement of Environmental Assessment

Posting of notice on Internet site

17 The responsible authority with respect to a designated project must ensure that a notice of the commencement of the environmental assessment of a designated project is posted on the Internet site.

Consultation and Cooperation with Certain Jurisdictions

Responsible authority's or Minister's obligations

18 The responsible authority with respect to a designated project — or the Minister if the environmental assessment of the designated project has been referred to a review panel under section 38 — must offer to consult and cooperate with respect to the environmental assessment of the designated project with any jurisdiction referred to in paragraphs (c) to (h) of the definition ***jurisdiction*** in subsection 2(1) if that jurisdiction has powers, duties or functions in relation to an assessment of the environmental effects of the designated project.

selon ce qui est précisé dans le règlement pris en vertu de l'alinéa 84a) ou l'arrêté pris en vertu du paragraphe 14(2);

c) l'autorité fédérale exerçant des fonctions de réglementation et pouvant tenir des audiences publiques, prévue par règlement pris en vertu de l'alinéa 83b), s'agissant d'un projet désigné qui comprend des activités liées à cette autorité selon ce qui est précisé dans le règlement pris en vertu de l'alinéa 84a) ou l'arrêté pris en vertu du paragraphe 14(2);

d) l'Agence, s'agissant d'un projet désigné qui comprend des activités liées à celle-ci selon ce qui est précisé dans le règlement pris en vertu de l'alinéa 84a) ou l'arrêté pris en vertu du paragraphe 14(2).

Coopération

16 Si deux projets désignés dont les autorités responsables sont différentes sont liés étroitement, ces dernières sont tenues de coopérer entre elles dans l'exercice des attributions qui leur sont respectivement conférées sous le régime de la présente loi relativement à leur projet.

Début de l'évaluation environnementale

Avis

17 L'autorité responsable à l'égard d'un projet désigné veille à ce que soit affiché sur le site Internet un avis du début de l'évaluation environnementale du projet.

Consultation et coopération avec certaines instances

Obligation de l'autorité responsable ou du ministre

18 L'autorité responsable à l'égard d'un projet désigné ou, s'il a renvoyé, au titre de l'article 38, l'évaluation environnementale du projet désigné pour examen par une commission, le ministre est tenu d'offrir de consulter toute instance visée à l'un des alinéas c) à h) de la définition de ***instance*** au paragraphe 2(1) qui a des attributions relatives à l'évaluation des effets environnementaux du projet et de coopérer avec elle, à l'égard de l'évaluation environnementale du projet.

Factors To Be Considered

Factors

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

(a) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

(c comments from the public — or, with respect to a designated project that requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, any interested party — that are received in accordance with this Act;

(d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;

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

(f) the purpose of the designated project;

(g) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means;

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

(i) the results of any relevant study conducted by a committee established under section 73 or 74; and

(j) any other matter relevant to the environmental assessment that the responsible authority, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account.

Scope of factors

(2) The scope of the factors to be taken into account under paragraphs (1)(a), (b), (d), (e), (g), (h) and (j) is determined by

(a) the responsible authority; or

Éléments à examiner

Éléments

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

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

b) l'importance des effets visés à l'alinéa a);

c) les observations du public — ou, s'agissant d'un projet dont la réalisation requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*, des parties intéressées — reçues conformément à la présente loi;

d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux négatifs importants du projet;

e) les exigences du programme de suivi du projet;

f) les raisons d'être du projet;

g) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

h) les changements susceptibles d'être apportés au projet du fait de l'environnement;

i) les résultats de toute étude pertinente effectuée par un comité constitué au titre des articles 73 ou 74;

j) tout autre élément utile à l'évaluation environnementale dont l'autorité responsable ou, s'il renvoie l'évaluation environnementale pour examen par une commission, le ministre peut exiger la prise en compte.

Portée des éléments

(2) L'évaluation de la portée des éléments visés aux alinéas (1)a), b), d), e), g), h) et j) incombe :

a) à l'autorité responsable;

(b) the Minister, if the environmental assessment is referred to a review panel.

Community knowledge and Aboriginal traditional knowledge

(3) The environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge.

b) au ministre, s'il renvoie l'évaluation environnementale pour examen par une commission.

Connaissances des collectivités et connaissances traditionnelles autochtones

(3) Les connaissances des collectivités et les connaissances traditionnelles autochtones peuvent être prises en compte pour l'évaluation environnementale d'un projet désigné.

Federal Authority's Obligation

Specialist or expert information

20 Every federal authority that is in possession of specialist or expert information or knowledge with respect to a designated project that is subject to an environmental assessment must, on request, make that information or knowledge available, within the specified period, to

(a) the responsible authority;

(b) the review panel;

(c) a government, an agency or body, or a jurisdiction that conducts an assessment of the designated project under a substituted process authorized by section 32; and

(d) a jurisdiction that conducts an assessment, in the case of a designated project that is exempted under subsection 37(1).

Obligation des autorités fédérales

Fourniture des renseignements pertinents

20 Il incombe à toute autorité fédérale possédant l'expertise ou les connaissances voulues en ce qui touche un projet désigné devant faire l'objet d'une évaluation environnementale de fournir, sur demande et dans le délai précisé, les renseignements utiles :

a) à l'autorité responsable;

b) à la commission;

c) au gouvernement, à l'organisme ou à l'instance qui effectue une évaluation du projet qui découle d'un processus d'évaluation se substituant à l'évaluation environnementale au titre d'une autorisation donnée en vertu de l'article 32;

d) s'agissant d'un projet ayant fait l'objet d'une exception en vertu du paragraphe 37(1), à l'instance qui en effectue une évaluation.

Environmental Assessment by Responsible Authority

General Rules

Application only when no referral to review panel

21 Sections 22 to 27 cease to apply to a designated project if it is referred by the Minister to a review panel under section 38.

Responsible authority's obligations

22 The responsible authority with respect to a designated project must ensure that

(a) an environmental assessment of the designated project is conducted; and

Évaluation environnementale effectuée par l'autorité responsable

Règles générales

Application en l'absence de renvoi pour examen par une commission

21 Les articles 22 à 27 cessent de s'appliquer à un projet désigné si le ministre renvoie, au titre de l'article 38, l'évaluation environnementale du projet pour examen par une commission.

Obligations de l'autorité responsable

22 L'autorité responsable à l'égard d'un projet désigné veille :

a) à ce qu'il soit procédé à l'évaluation environnementale du projet;

(b) a report is prepared with respect to that environmental assessment.

(b) à ce que soit établi un rapport d'évaluation environnementale relatif au projet.

Information

23 (1) The responsible authority may, when conducting the environmental assessment of a designated project and preparing the report with respect to the environmental assessment of the designated project, use any information that is available to it.

Renseignements

23 (1) Dans le cadre de l'évaluation environnementale d'un projet désigné et de l'établissement du rapport d'évaluation environnementale relatif au projet, l'autorité responsable peut utiliser tous les renseignements disponibles.

Studies and collection of information

(2) However, if the responsible authority is of the opinion that there is not sufficient information available to it for the purpose of conducting the environmental assessment or preparing the report with respect to the environmental assessment of the designated project, it may require the collection of any information or the undertaking of any study that, in the opinion of the responsible authority, is necessary for that purpose, including requiring the proponent to collect that information or undertake that study.

Études et collecte de renseignements

(2) Toutefois, si elle est d'avis que les renseignements disponibles ne lui permettent pas de procéder à l'évaluation environnementale ou d'établir le rapport d'évaluation environnementale, elle peut faire procéder, notamment par le promoteur, aux études et à la collecte de renseignements qu'elle estime nécessaires à cette fin.

Public participation

24 Subject to section 28, the responsible authority must ensure that the public is provided with an opportunity to participate in the environmental assessment of a designated project.

Participation du public

24 Sous réserve de l'article 28, l'autorité responsable veille à ce que le public ait la possibilité de participer à l'évaluation environnementale d'un projet désigné.

Public notice in certain cases — draft report

25 (1) When the responsible authority is the Agency, it must ensure that a draft report with respect to the environmental assessment of a designated project is prepared, and must ensure that the following are posted on the Internet site:

(a) a copy of the draft report or an indication of how a copy may be obtained; and

(b) a notice that invites the public to provide comments on the draft report within the period specified and provides the address for filing those comments.

Avis public d'une ébauche du rapport dans certains cas

25 (1) Dans le cas où l'autorité responsable est l'Agence, elle veille à ce qu'une ébauche du rapport d'évaluation environnementale relatif au projet désigné soit établie et à ce que soient affichés sur le site Internet :

a) une copie de l'ébauche du rapport ou une indication de la façon de se la procurer;

b) un avis invitant le public à lui faire des observations sur l'ébauche du rapport dans le délai qui y est précisé et indiquant l'adresse pour la réception par elle des observations.

Final report submitted to Minister

(2) After taking into account any comments received from the public, the Agency must finalize the report with respect to the environmental assessment of the designated project and submit it to the Minister.

Rapport final remis au ministre

(2) Après avoir pris en compte les observations qui lui sont présentées en vertu du paragraphe (1), l'Agence finalise le rapport d'évaluation environnementale et le présente au ministre.

Delegation

26 (1) The responsible authority with respect to a designated project may delegate to any person, body or jurisdiction referred to in paragraphs (a) to (f) of the definition ***jurisdiction*** in subsection 2(1) the carrying out of

Délégation

26 (1) L'autorité responsable d'un projet désigné peut déléguer à un organisme, une personne ou une instance visée à l'un des alinéas a) à f) de la définition de ***instance*** au paragraphe 2(1) l'exécution de tout ou partie de

any part of the environmental assessment of the designated project and the preparation of the report with respect to the environmental assessment of the designated project, but must not delegate the duty to make decisions under subsection 27(1).

l'évaluation environnementale du projet ainsi que l'établissement du rapport d'évaluation environnementale relatif au projet, à l'exclusion de toute prise de décisions au titre du paragraphe 27(1).

For greater certainty

(2) For greater certainty, the responsible authority must not make decisions under subsection 27(1) unless it is satisfied that any delegated duty or function has been performed in accordance with this Act.

Précision

(2) Il est entendu que l'autorité responsable qui a délégué des attributions en vertu du paragraphe (1) ne peut prendre de décisions au titre du paragraphe 27(1) que si elle est convaincue que les attributions déléguées ont été exercées conformément à la présente loi.

Responsible authority's or Minister's decisions

27 (1) The responsible authority or, when the Agency is the responsible authority, the Minister, after taking into account the report with respect to the environmental assessment of the designated project, must make decisions under subsection 52(1).

Décisions de l'autorité responsable ou du ministre

27 (1) Après avoir pris en compte le rapport d'évaluation environnementale relatif au projet désigné, l'autorité responsable ou, si celle-ci est l'Agence, le ministre prend les décisions prévues au paragraphe 52(1).

Time limit for Minister's decisions

(2) The Minister's decisions must be made no later than 365 days after the day on which the notice of the commencement of the environmental assessment of the designated project is posted on the Internet site.

Délai pour la prise des décisions du ministre

(2) Le ministre est tenu de prendre les décisions dans les trois cent soixante-cinq jours suivant l'affichage sur le site Internet de l'avis du début de l'évaluation environnementale du projet.

Extension of time limit by Minister

(3) The Minister may extend that time limit by any further period — up to a maximum of three months — that is necessary to permit the Agency to cooperate with a jurisdiction referred to in section 18 with respect to the environmental assessment of the designated project or to take into account circumstances that are specific to the project.

Prolongation du délai par le ministre

(3) Il peut prolonger ce délai de la période nécessaire pour permettre à l'Agence de coopérer avec toute instance visée à l'article 18 à l'égard de l'évaluation environnementale du projet ou pour tenir compte des circonstances particulières du projet. Il ne peut toutefois prolonger le délai de plus de trois mois.

Extension of time limit by Governor in Council

(4) The Governor in Council may, on the recommendation of the Minister, extend the time limit extended under subsection (3).

Prolongation du délai par le gouverneur en conseil

(4) Le gouverneur en conseil peut, sur la recommandation du ministre, prolonger le délai prolongé en vertu du paragraphe (3).

Posting notice of extension on Internet site

(5) The Agency must post on the Internet site a notice of any extension granted under subsection (3) or (4).

Avis des prolongations affichés sur le site Internet

(5) L'Agence affiche sur le site Internet un avis de toute prolongation accordée en vertu des paragraphes (3) ou (4) relativement au projet.

Excluded period

(6) If, under subsection 23(2), the Agency requires the proponent of a designated project to collect information or undertake a study with respect to the designated project, then the period that is taken by the proponent, in the Agency's opinion, to comply with the requirement is not included in the calculation of the time limit within which the Minister's decisions must be made.

Période exclue du délai

(6) Dans le cas où l'Agence exige du promoteur du projet, au titre du paragraphe 23(2), qu'il procède à des études ou à la collecte de renseignements relativement au projet, la période prise, de l'avis de l'Agence, par le promoteur pour remplir l'exigence n'est pas comprise dans le calcul du délai dont dispose le ministre pour prendre les décisions.

Non application — section 54 of the *National Energy Board Act*

(7) Subsection (1) does not apply if the carrying out of the designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*.

Section 54 of the National Energy Board Act

Participation of interested party

28 If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, the responsible authority with respect to the designated project must ensure that any interested party is provided with an opportunity to participate in the environmental assessment of the designated project.

Recommendations in environmental assessment report

29 (1) If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, the responsible authority with respect to the designated project must ensure that the report concerning the environmental assessment of the designated project sets out

(a) its recommendation with respect to the decision that may be made under paragraph 31(1)(a) in relation to the designated project, taking into account the implementation of any mitigation measures that it set out in the report; and

(b) its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.

Submission of report to Minister

(2) The responsible authority submits its report to the Minister within the meaning of section 2 of the *National Energy Board Act* at the same time as it submits the report referred to in subsection 52(1) of that Act.

Report is final and conclusive

(3) Subject to sections 30 and 31, the report with respect to the environmental assessment is final and conclusive.

Order to reconsider

30 (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment under section 29, the

Non-application — article 54 de la *Loi sur l'Office national de l'énergie*

(7) Le paragraphe (1) ne s'applique pas au projet désigné dont la réalisation requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*.

Article 54 de la Loi sur l'Office national de l'énergie

Participation du public

28 Si la réalisation d'un projet désigné requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*, l'autorité responsable à l'égard du projet veille à ce que les parties intéressées aient la possibilité de participer à l'évaluation environnementale du projet.

Recommandations dans le rapport d'évaluation environnementale

29 (1) Si la réalisation d'un projet désigné requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*, l'autorité responsable à l'égard du projet veille à ce que figure dans le rapport d'évaluation environnementale relatif au projet :

a) sa recommandation quant à la décision pouvant être prise au titre de l'alinéa 31(1)a) relativement au projet, compte tenu de l'application des mesures d'atténuation qu'elle précise dans le rapport;

b) sa recommandation quant au programme de suivi devant être mis en œuvre relativement au projet.

Présentation du rapport au ministre

(2) Elle présente son rapport au ministre au sens de l'article 2 de la *Loi sur l'Office national de l'énergie* au même moment où elle lui présente le rapport visé au paragraphe 52(1) de cette loi.

Caractère définitif

(3) Sous réserve des articles 30 et 31, le rapport d'évaluation environnementale est définitif et sans appel.

Décret ordonnant un réexamen

30 (1) Une fois que l'autorité responsable à l'égard d'un projet désigné a présenté son rapport d'évaluation environnementale en vertu de l'article 29, le gouverneur en

Governor in Council may, by order made under section 53 of the *National Energy Board Act*, refer any of the responsible authority's recommendations set out in the report back to the responsible authority for reconsideration.

Factors and time limit

(2) The order may direct the responsible authority to conduct the reconsideration taking into account any factor specified in the order and it may specify a time limit within which the responsible authority must complete its reconsideration.

Responsible authority's obligation

(3) The responsible authority must, before the expiry of the time limit specified in the order, if one was specified, reconsider any recommendation specified in the order and prepare and submit to the Minister within the meaning of section 2 of the *National Energy Board Act* a report on its reconsideration.

Content of reconsideration report

(4) In the reconsideration report, the responsible authority must

(a) if the order refers to the recommendation referred to in paragraph 29(1)(a)

(i) confirm the recommendation or set out a different one with respect to the decision that may be made under paragraph 31(1)(a) in relation to the designated project, and

(ii) confirm, modify or replace the mitigation measures set out in the report with respect to the environmental assessment; and

(b) if the order refers to the recommendation referred to in paragraph 29(1)(b), confirm the recommendation or set out a different one with respect to the follow-up program that is to be implemented in respect of the designated project.

Report is final and conclusive

(5) Subject to section 31, the responsible authority reconsideration report is final and conclusive.

Reconsideration of report under this section

(6) After the responsible authority has submitted its report under subsection (3), the Governor in Council may, by order made under section 53 of the *National Energy Board Act*, refer any of the responsible authority's recommendations set out in the report back to the responsible authority for reconsideration. If it does so,

conseil peut, par décret pris en vertu de l'article 53 de la *Loi sur l'Office national de l'énergie*, renvoyer toute recommandation figurant au rapport à l'autorité responsable pour réexamen.

Décret de renvoi

(2) Le décret peut préciser tout facteur dont l'autorité responsable doit tenir compte dans le cadre du réexamen ainsi que le délai pour l'effectuer.

Réexamen

(3) L'autorité responsable, dans le délai précisé — le cas échéant — dans le décret, réexamine toute recommandation visée par le décret, établit un rapport de réexamen et le présente au ministre au sens de l'article 2 de la *Loi sur l'Office national de l'énergie*.

Rapport de réexamen

(4) Dans son rapport de réexamen, l'autorité responsable :

a) si le décret vise la recommandation prévue à l'alinéa 29(1)a) :

(i) d'une part, confirme celle-ci ou formule une autre recommandation quant à la décision pouvant être prise au titre de l'alinéa 31(1)a) relativement au projet,

(ii) d'autre part, confirme, modifie ou remplace les mesures d'atténuation précisées dans le rapport d'évaluation environnementale;

b) si le décret vise la recommandation prévue à l'alinéa 29(1)b), confirme celle-ci ou formule une autre recommandation quant au programme de suivi devant être mis en œuvre relativement au projet.

Caractère définitif

(5) Sous réserve de l'article 31, le rapport de réexamen est définitif et sans appel.

Réexamen du rapport présenté en application du présent article

(6) Une fois que l'autorité responsable a présenté son rapport de réexamen en vertu du paragraphe (3), le gouverneur en conseil peut, par décret pris en vertu de l'article 53 de la *Loi sur l'Office national de l'énergie*, renvoyer toute recommandation figurant au rapport à l'autorité responsable pour réexamen. Les paragraphes

subsections (2) to (5) apply. However, in subparagraph (4)(a)(ii), the reference to the mitigation measures set out in the report with respect to the environmental assessment is to be read as a reference to the mitigation measures set out in the reconsideration report.

Governor in Council's decision

31 (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment or its reconsideration report under section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*

(a) decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the reconsideration report, if there is one, that the designated project

(i) is not likely to cause significant adverse environmental effects,

(ii) is likely to cause significant adverse environmental effects that can be justified in the circumstances, or

(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and

(b) direct the responsible authority to issue a decision statement to the proponent of the designated project that

(i) informs the proponent of the decision made under paragraph (a) with respect to the designated project and,

(ii) if the decision is referred to in subparagraph (a)(i) or (ii), sets out conditions — which are the implementation of the mitigation measures and the follow-up program set out in the report with respect to the environmental assessment or the reconsideration report, if there is one — that must be complied with by the proponent in relation to the designated project.

Certain conditions subject to exercise of power or performance of duty or function

(2) The conditions that are included in the decision statement regarding the environmental effects referred to in subsection 5(2), that are directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority and that would permit the designated project to be carried out, in whole

(2) à (5) s'appliquent alors mais, au sous-alinéa (4)a)(ii), la mention des mesures d'atténuation précisées dans le rapport d'évaluation environnementale vaut mention des mesures d'atténuation précisées dans le rapport de réexamen.

Décisions du gouverneur en conseil

31 (1) Une fois que l'autorité responsable à l'égard d'un projet désigné a présenté son rapport d'évaluation environnementale ou son rapport de réexamen en application des articles 29 ou 30, le gouverneur en conseil peut, par décret pris en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie* :

a) décider, compte tenu de l'application des mesures d'atténuation précisées dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen, que la réalisation du projet, selon le cas :

(i) n'est pas susceptible d'entraîner des effets environnementaux négatifs et importants,

(ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans les circonstances,

(iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

b) donner à l'autorité responsable instruction de faire une déclaration qu'elle remet au promoteur du projet dans laquelle :

(i) elle donne avis de la décision prise par le gouverneur en conseil en vertu de l'alinéa a) relativement au projet,

(ii) si cette décision est celle visée aux sous-alinéas a)(i) ou (ii), elle énonce les conditions que le promoteur est tenu de respecter relativement au projet, à savoir la mise en œuvre des mesures d'atténuation et du programme de suivi précisés dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen.

Certaines conditions subordonnées à l'exercice d'attributions

(2) Les conditions énoncées dans la déclaration qui sont relatives aux effets environnementaux visés au paragraphe 5(2) et qui sont directement liées ou nécessairement accessoires aux attributions qu'une autorité fédérale doit exercer pour permettre la réalisation en tout ou

or in part, take effect only if the federal authority exercises the power or performs the duty or function.

Responsible authority's obligation

(3) The responsible authority must issue to the proponent of the designated project the decision statement that is required in accordance with the order relating to the designated project within seven days after the day on which that order is made.

Posting of decision statement on Internet site

(4) The responsible authority must ensure that the decision statement is posted on the Internet site.

Decision statement considered part of certificate

(5) The decision statement issued in relation to the designated project under subsection (3) is considered to be a part of the certificate issued in accordance with the order made under section 54 of the *National Energy Board Act* in relation to the designated project.

Substitution

Minister's obligation

32 (1) Subject to sections 33 and 34, if the Minister is of the opinion that a process for assessing the environmental effects of designated projects that is followed by the government of a province — or any agency or body that is established under an Act of the legislature of a province — that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project would be an appropriate substitute, the Minister must, on request of the province, approve the substitution of that process for an environmental assessment.

Minister's power

(2) Subject to sections 33 and 34, if the Minister is of the opinion that a process for assessing the environmental effects of designated projects that is followed by any jurisdiction referred to in paragraph (e) or (f) of the definition ***jurisdiction*** in subsection 2(1) that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project would be an appropriate substitute, the Minister may approve the substitution of that process for the environmental assessment.

Manner of approval

(3) An approval must be in writing and may be given in respect of a designated project or a class of designated projects.

en partie du projet désigné sont subordonnées à l'exercice par l'autorité fédérale des attributions en cause.

Obligation de l'autorité responsable

(3) Dans les sept jours suivant la prise du décret, l'autorité responsable fait la déclaration exigée aux termes de celui-ci relativement au projet désigné et la remet au promoteur du projet.

Déclaration affichée sur le site Internet

(4) Elle veille à ce que la déclaration soit affichée sur le site Internet.

Présomption

(5) La déclaration faite au titre du paragraphe (3) relativement au projet désigné est réputée faire partie du certificat délivré au titre du décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie* relativement au projet.

Substitution

Obligation du ministre

32 (1) Sous réserve des articles 33 et 34, s'il estime que le processus d'évaluation des effets environnementaux suivi par le gouvernement d'une province — ou un organisme établi sous le régime d'une loi provinciale — qui a des attributions relatives à l'évaluation des effets environnementaux d'un projet désigné serait indiqué, le ministre, sur demande du gouvernement de la province en cause, autorise la substitution de ce processus à l'évaluation environnementale.

Pouvoir du ministre

(2) Sous réserve des articles 33 et 34, s'il estime que le processus d'évaluation des effets environnementaux suivi par une instance visée aux alinéas e) ou f) de la définition de ***instance*** au paragraphe 2(1) qui a des attributions relatives à l'évaluation des effets environnementaux d'un projet désigné serait indiqué, le ministre peut autoriser la substitution de ce processus à l'évaluation environnementale.

Modalités

(3) L'autorisation du ministre est donnée par écrit et peut viser un projet désigné ou une catégorie de projets désignés.

Posting of notice of approval on Internet site

(4) The Agency must post a notice of the approval on the Internet site.

Exceptions

33 The Minister must not approve the substitution of a process in relation to a designated project

(a) for which the responsible authority is referred to in paragraph 15(a) or (b); or

(b) in relation to which the environmental assessment has been referred by the Minister to a review panel under section 38.

Conditions

34 (1) The Minister may only approve a substitution if he or she is satisfied that

(a) the process to be substituted will include a consideration of the factors set out in subsection 19(1);

(b) the public will be given an opportunity to participate in the assessment;

(c) the public will have access to records in relation to the assessment to enable their meaningful participation;

(d) at the end of the assessment, a report will be submitted to the responsible authority;

(e) the report will be made available to the public; and

(f) any other conditions that the Minister establishes are or will be met.

Approval

(2) The Minister may also approve the substitution of a process that has already been completed for an environmental assessment if he or she is satisfied that the conditions under subsection (1) have been met.

Availability

(3) The conditions referred to in paragraph (1)(f) must be made available to the public.

Assessment considered in conformity

35 If the Minister approves the substitution of a process under section 32, the assessment that results from the substitution is considered to be an environmental assessment under this Act and to satisfy any requirements of this Act and the regulations in respect of an environmental assessment.

Avis de l'autorisation affiché sur le site Internet

(4) L'Agence affiche sur le site Internet un avis de l'autorisation donnée.

Exception

33 Le ministre ne peut autoriser la substitution à l'égard d'un projet désigné pour lequel, selon le cas :

a) l'autorité responsable est visée aux alinéas 15a) ou b);

b) l'évaluation environnementale a été renvoyée au titre de l'article 38 pour examen par une commission.

Conditions

34 (1) Le ministre ne peut autoriser la substitution que s'il est convaincu que, à la fois :

a) l'évaluation à effectuer portera entre autres sur les éléments dont la prise en compte est exigée en vertu du paragraphe 19(1);

b) le public aura la possibilité de participer au processus d'évaluation;

c) le public aura accès aux documents sur l'évaluation, de manière à pouvoir participer de façon significative;

d) au terme de l'évaluation, un rapport sera présenté à l'autorité responsable;

e) le rapport sera mis à la disposition du public;

f) les autres conditions qu'il fixe sont ou seront remplies.

Autorisation

(2) Il peut également, s'il est convaincu que ces conditions ont été respectées, autoriser la substitution dans le cas d'un processus qui a déjà été mené à terme.

Accessibilité

(3) Les conditions visées à l'alinéa (1)f) sont accessibles au public.

Évaluation réputée conforme

35 L'évaluation autorisée en application de l'article 32 est réputée être une évaluation environnementale effectuée au titre de la présente loi et satisfaire aux exigences de celle-ci et des règlements à l'égard des évaluations environnementales.

Responsible authority's or Minister's decision

36 After taking into account the report with respect to the environmental assessment of the designated project that is received by the responsible authority at the end of the assessment under the process authorized by section 32, the responsible authority or, when the Agency is the responsible authority, the Minister must make decisions under subsection 52(1).

Décisions de l'autorité responsable ou du ministre

36 Après avoir pris en compte le rapport qui est présenté à l'autorité responsable au terme de l'évaluation autorisée en application de l'article 32, l'autorité responsable ou, si celle-ci est l'Agence, le ministre prend les décisions prévues au paragraphe 52(1).

Equivalent Assessment

Évaluations équivalentes

Exemption

37 (1) When the Minister must, under subsection 32(1), on request, approve the substitution of a process that is followed by the government of a province or any agency or body that is established under an Act of the legislature of a province for an environmental assessment of a designated project, the Governor in Council may, by order and on the Minister's recommendation, exempt the designated project from the application of this Act, if the Governor in Council is satisfied that

(a) after the completion of the assessment process, the government or the agency or body determines whether, taking into account the implementation of any mitigation measures that it considers appropriate, the designated project is likely to cause significant adverse environmental effects;

(b) the government or the agency or body ensures the implementation of the mitigation measures that are taken into account in making the determination and the implementation of a follow-up program; and

(c) any other conditions that the Minister establishes are or will be met.

Exceptions

37 (1) Dans le cas où le ministre est tenu, en vertu du paragraphe 32(1), sur demande, d'autoriser la substitution, à l'évaluation environnementale d'un projet désigné, d'un processus d'évaluation des effets environnementaux suivi par le gouvernement d'une province ou un organisme établi sous le régime d'une loi provinciale, le gouverneur en conseil peut, sur recommandation du ministre, soustraire par décret le projet à l'application de la présente loi s'il est convaincu que, à la fois :

a) au terme du processus d'évaluation, le gouvernement ou l'organisme décide si, compte tenu de l'application de mesures d'atténuation qu'il estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants;

b) le gouvernement ou l'organisme veille à l'application des mesures d'atténuation prises en compte dans le cadre de cette décision et à la mise en œuvre d'un programme de suivi;

c) les autres conditions que fixe le ministre sont ou seront remplies.

Availability

(2) The conditions referred to in paragraph (1)(c) must be made available to the public.

Accessibilité

(2) Les conditions visées à l'alinéa (1)c) sont accessibles au public.

Posting of notice of order on Internet site

(3) The Agency must post a notice of any order made under subsection (1) on the Internet site.

Avis du décret affiché sur le site Internet

(3) L'Agence affiche sur le site Internet un avis de tout décret pris en application du paragraphe (1).

Environmental Assessment by a Review Panel

General Rules

Referral to review panel

38 (1) Subject to subsection (6), within 60 days after the notice of the commencement of the environmental assessment of a designated project is posted on the Internet site, the Minister may, if he or she is of the opinion that it is in the public interest, refer the environmental assessment to a review panel.

Public interest

(2) The Minister's determination regarding whether the referral of the environmental assessment of the designated project to a review panel is in the public interest must include a consideration of the following factors:

(a) whether the designated project may cause significant adverse environmental effects;

(b) public concerns related to the significant adverse environmental effects that the designated project may cause; and

(c) opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it.

Time limits

(3) If the Minister refers the environmental assessment of the designated project to a review panel, the Minister must establish the following time limits — which combined are not to exceed 24 months — within which

(a) the review panel is to be established after the referral;

(b) the review panel must submit the report with respect to the environmental assessment of the designated project to the Minister; and

(c) the Minister must, after receiving the review panel's report, issue a decision statement under section 54 in relation to the designated project.

Modified time limits

(4) Subject to section 54, the Minister may, as required, modify those time limits.

Évaluation environnementale renvoyée pour examen par une commission

Règles générales

Renvoi pour examen par une commission

38 (1) Sous réserve du paragraphe (6), dans les soixante jours suivant l'affichage sur le site Internet de l'avis du début de l'évaluation environnementale d'un projet désigné, le ministre peut, s'il estime qu'il est dans l'intérêt public que celui-ci fasse l'objet d'un examen par une commission, renvoyer l'évaluation environnementale du projet pour examen par une commission.

Intérêt public

(2) Il tient notamment compte des éléments ci-après lorsqu'il détermine si, selon lui, il est dans l'intérêt public qu'un projet désigné fasse l'objet d'un examen par une commission :

a) la possibilité que le projet entraîne des effets environnementaux négatifs importants;

b) les préoccupations du public concernant les effets environnementaux négatifs importants que le projet peut entraîner;

c) la possibilité de coopérer avec toute instance qui exerce des attributions relatives à l'évaluation des effets environnementaux de tout ou partie du projet.

Délais

(3) S'il renvoie l'évaluation environnementale du projet pour examen par une commission, il fixe les délais ci-après dont la somme ne peut excéder vingt-quatre mois :

a) le délai imparti, après le renvoi, pour constituer la commission;

b) le délai imparti à la commission pour lui présenter son rapport d'évaluation environnementale;

c) le délai imparti, après réception du rapport, pour qu'il fasse une déclaration au titre de l'article 54 relativement au projet.

Modification des délais

(4) Il peut, sous réserve de l'article 54, modifier ces délais au besoin.

Posting of notices on Internet site

(5) The Agency must post on the Internet site a notice of any decision made by the Minister to refer the environmental assessment of the designated project to a review panel, and a notice of any time limits that the Minister establishes in relation to the designated project and any changes that he or she may make to those time limits.

Exception

(6) The Minister must not refer to a review panel the environmental assessment of a designated project for which the responsible authority is referred to in paragraph 15(a) or (b).

Studies and collection of information

39 When the Minister refers the environmental assessment of a designated project to a review panel under section 38, the Agency may, from the day on which the referral is made and until the day on which the panel is established, require the proponent of the designated project to collect any information or undertake any studies that, in the opinion of the Agency, are necessary for the environmental assessment by the review panel.

Agreement to jointly establish review panel

40 (1) When the Minister refers the environmental assessment of a designated project to a review panel under section 38, he or she may enter into an agreement or arrangement with any jurisdiction referred to in paragraphs (a) to (f) of the definition ***jurisdiction*** in subsection 2(1) that has powers, duties or functions in relation to the assessment of the environmental effects of the designated project, respecting the joint establishment of a review panel and the manner in which the environmental assessment of the designated project is to be conducted by that panel.

Other jurisdiction

(2) When the Minister refers the environmental assessment of a designated project to a review panel under section 38, the Minister and the Minister of Foreign Affairs may enter into an agreement or arrangement with any jurisdiction referred to in paragraph (g) or (h) of the definition ***jurisdiction*** in subsection 2(1) that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project respecting the joint establishment of a review panel and the manner in which the environmental assessment of the designated project is to be conducted by that panel.

Avis affichés sur le site Internet

(5) L'Agence affiche sur le site Internet un avis de toute décision que le ministre prend de renvoyer l'évaluation environnementale du projet pour examen par une commission et un avis des délais que celui-ci fixe relativement au projet ainsi que de toute modification qu'il apporte à ceux-ci.

Exception

(6) Le ministre ne peut renvoyer pour examen par une commission l'évaluation environnementale d'un projet désigné pour lequel l'autorité responsable est visée aux alinéas 15a) ou b).

Études et collecte de renseignements

39 Dans le cas où le ministre renvoie, au titre de l'article 38, l'évaluation environnementale d'un projet désigné pour examen par une commission, l'Agence peut, à partir de la date du renvoi et jusqu'à la date de la constitution de la commission, faire procéder par le promoteur du projet aux études et à la collecte de renseignements qu'elle estime nécessaires à l'examen.

Accord relatif à la constitution conjointe d'une commission

40 (1) Dans le cas où il renvoie, au titre de l'article 38, l'évaluation environnementale d'un projet désigné pour examen par une commission, le ministre peut conclure avec toute instance visée à l'un des alinéas a) à f) de la définition de ***instance*** au paragraphe 2(1) qui a des attributions relatives à l'évaluation des effets environnementaux du projet un accord relatif à la constitution conjointe d'une commission et aux modalités de l'évaluation environnementale du projet par celle-ci.

Autres instances

(2) Dans le cas où le ministre renvoie, au titre de l'article 38, l'évaluation environnementale d'un projet désigné pour examen par une commission, le ministre et le ministre des Affaires étrangères peuvent conclure avec toute instance visée aux alinéas g) ou h) de la définition de ***instance*** au paragraphe 2(1) qui a des attributions relatives à l'évaluation des effets environnementaux du projet un accord relatif à la constitution conjointe d'une commission et aux modalités de l'évaluation environnementale du projet par celle-ci.

Posting on Internet site

(3) Any agreement or arrangement referred to in subsection (1) or (2) must be posted on the Internet site before the commencement of the hearings conducted by the jointly established review panel.

Mackenzie Valley Resource Management Act

41 (1) When a proposal is referred to the Minister under paragraph 130(1)(c) of the *Mackenzie Valley Resource Management Act*, the Minister must refer the proposal to a review panel.

Document establishing review panel

(2) When the Minister is required to refer the proposal to a review panel, he or she and the Mackenzie Valley Environmental Impact Review Board must, in writing, jointly establish a review panel and prescribe the manner of its examination of the impact of the proposal on the environment.

If no agreement

(3) Despite subsection (2), if, in respect of a proposal referred to in subsection 138.1(1) of the *Mackenzie Valley Resource Management Act*, no agreement is entered into under that subsection within the period fixed by the regulations referred to in subsection 138.1(4) of that Act, an assessment by a review panel of the proposal must be conducted.

Coordination with environmental impact review

(4) The Minister must to the extent possible ensure that any assessment of the proposal required by subsection (3) is coordinated with any environmental impact review of the proposal under the *Mackenzie Valley Resource Management Act*.

Consultations

(5) Before making decisions under section 47 in relation to the proposal referred to in subsection (4), the Minister must take into account any report concerning the proposal that is issued under subsection 134(2) of the *Mackenzie Valley Resource Management Act* and must consult the persons and bodies to whom the report is submitted or distributed under subsection 134(3) of that Act.

Posting on Internet site

(6) Any document establishing a review panel under subsection (2) must be posted on the Internet site before the commencement of the hearings conducted by the jointly established review panel.

Accords affichés sur le site Internet

(3) Les accords visés aux paragraphes (1) ou (2) sont affichés sur le site Internet avant le début des audiences de la commission conjointe.

Loi sur la gestion des ressources de la vallée du Mackenzie

41 (1) Dans les cas où il est saisi d'une affaire en vertu de l'alinéa 130(1)c) de la *Loi sur la gestion des ressources de la vallée du Mackenzie*, le ministre est tenu de la soumettre à un examen par une commission.

Document constitutif d'une commission

(2) Dans les cas où il est tenu de soumettre l'affaire à un examen par une commission au titre du paragraphe (1), le ministre, de concert avec l'Office d'examen des répercussions environnementales de la vallée du Mackenzie, procède à la constitution conjointe d'une commission et fixe, dans le document constitutif, les modalités d'examen des effets environnementaux du projet par celle-ci.

Examen par une commission en l'absence d'un accord

(3) Malgré le paragraphe (2), faute de conclusion, dans le délai réglementaire visé au paragraphe 138.1(4) de la *Loi sur la gestion des ressources de la vallée du Mackenzie*, de l'accord prévu au paragraphe 138.1(1) de cette loi, le projet visé à ce paragraphe fait l'objet d'un examen par une commission.

Coordination de l'examen avec toute étude d'impact

(4) Le ministre veille, dans la mesure du possible, à ce que l'examen visé au paragraphe (3) soit coordonné avec toute étude d'impact du projet effectuée en vertu de la *Loi sur la gestion des ressources de la vallée du Mackenzie*.

Consultation

(5) Avant de prendre des décisions au titre de l'article 47 à l'égard du projet mentionné au paragraphe (4), le ministre tient compte de tout rapport établi en vertu du paragraphe 134(2) de la *Loi sur la gestion des ressources de la vallée du Mackenzie* à l'égard du projet et consulte les personnes et organismes qui doivent recevoir le rapport aux termes du paragraphe 134(3) de cette loi.

Document affiché sur le site Internet

(6) Le document visé au paragraphe (2) est affiché sur le site Internet avant le début des audiences de la commission conjointe.

Terms of reference and appointment of members

42 (1) Subject to subsection (2), if the environmental assessment of a designated project is referred to a review panel, the Minister must establish the panel's terms of reference and appoint as a member one or more persons who are unbiased and free from any conflict of interest relative to the designated project and who have knowledge or experience relevant to its anticipated environmental effects.

Provisions of agreement

(2) When there is an agreement or arrangement to jointly establish a review panel under subsection 40(1) or (2), or when there is a document jointly establishing a review panel under subsection 41(2), the agreement, arrangement or document must provide that the environmental assessment of the designated project includes a consideration of the factors set out in subsection 19(1) and is conducted in accordance with any additional requirements and procedures set out in it and provide that

(a) the Minister must establish — or approve — the review panel's terms of reference;

(b) subject to section 54, the Minister establishes or approves the period within which the panel must submit its report with respect to the environmental assessment of the designated project and may, at any time, modify the terms of reference in order to extend the period;

(c) the Minister must appoint — or approve the appointment of — the chairperson or appoint a co-chairperson and must appoint at least one other member of the review panel; and

(d) the members of the panel are to be unbiased and free from any conflict of interest relative to the designated project and are to have knowledge or experience relevant to its anticipated environmental effects.

Establishment of roster

(3) The Minister must establish a roster of persons who may be appointed as members of a review panel established under subsection (1) or under an agreement, arrangement or document referred to in subsection (2).

Review panel's duties

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

(a) conduct an environmental assessment of the designated project;

Mandat et nomination des membres

42 (1) Sous réserve du paragraphe (2), le ministre nomme le ou les membres de la commission d'évaluation environnementale et fixe le mandat de celle-ci. À cette fin, il choisit des personnes impartiales, non en conflit d'intérêts à l'égard du projet désigné et possédant les connaissances ou l'expérience voulues en ce qui touche les effets environnementaux prévisibles du projet.

Contenu des accords

(2) Dans le cas où la commission est constituée conjointement au titre d'un accord conclu aux termes des paragraphes 40(1) ou (2) ou au titre du document visé au paragraphe 41(2), l'accord ou le document contient une disposition selon laquelle l'évaluation environnementale du projet désigné prend en compte les éléments prévus au paragraphe 19(1) et est effectuée conformément aux exigences et modalités supplémentaires qui y sont contenues ainsi que les conditions suivantes :

a) le ministre fixe ou approuve le mandat de la commission;

b) sous réserve de l'article 54, il fixe ou approuve le délai imparti à celle-ci pour lui présenter son rapport d'évaluation environnementale et peut, à tout moment, modifier le mandat pour prolonger ce délai;

c) le ministre nomme le président, ou approuve sa nomination, ou nomme le co-président et nomme au moins un autre membre de la commission;

d) les membres de la commission sont impartiaux, non en conflit d'intérêts à l'égard du projet et possèdent les connaissances ou l'expérience voulues en ce qui touche les effets environnementaux prévisibles du projet.

Liste

(3) Le ministre établit une liste de personnes qui peuvent être nommées membres d'une commission aux termes du paragraphe (1) ou d'un accord ou document visés au paragraphe (2).

Devoirs de la commission

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

a) procède à l'évaluation environnementale du projet désigné;

b) veille à ce que le public ait accès aux renseignements qu'elle utilise dans le cadre de cette évaluation;

(b) ensure that the information that it uses when conducting the environmental assessment is made available to the public;

(c) hold hearings in a manner that offers any interested party an opportunity to participate in the environmental assessment;

(d) prepare a report with respect to the environmental assessment that sets out

(i) the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program, and

(ii) a summary of any comments received from the public, including interested parties;

(e) submit the report with respect to the environmental assessment to the Minister; and

(f) on the Minister's request, clarify any of the conclusions and recommendations set out in its report with respect to the environmental assessment.

c) tient des audiences de façon à donner aux parties intéressées la possibilité de participer à l'évaluation;

d) établit un rapport assorti de sa justification et de ses conclusions et recommandations relativement à l'évaluation, notamment aux mesures d'atténuation et au programme de suivi, et énonçant, sous la forme d'un résumé, les observations reçues du public, notamment des parties intéressées;

e) présente son rapport d'évaluation environnementale au ministre;

f) sur demande de celui-ci, précise l'une ou l'autre des conclusions et recommandations dont son rapport est assorti.

Time limit

(2) Subject to section 54, when a review panel is not jointly established under an agreement, arrangement or document referred to in subsection 42(2), the Minister must, in the terms of reference, set out the period within which the panel must submit the report with respect to the environmental assessment of the designated project to the Minister and may, at any time, modify the terms of reference in order to extend the period.

Délai

(2) Dans le cas où la commission n'est pas constituée conjointement au titre d'un accord ou document visés au paragraphe 42(2), sous réserve de l'article 54, le ministre précise, lorsqu'il fixe le mandat de celle-ci, le délai imparti pour lui présenter son rapport d'évaluation environnementale et peut, à tout moment, modifier le mandat pour prolonger ce délai.

Information

44 (1) A review panel may, when conducting the environmental assessment of a designated project and preparing the report with respect to the environmental assessment of the designated project, use any information that is available to it.

Renseignements

44 (1) Dans le cadre de l'évaluation environnementale du projet désigné et de l'établissement du rapport d'évaluation environnementale relatif au projet, la commission peut utiliser tous les renseignements disponibles.

Studies and collection of information

(2) However, if the review panel is of the opinion that there is not sufficient information available for the purpose of conducting the environmental assessment or preparing the report with respect to the environmental assessment of the designated project, it may require the collection of any information or the undertaking of any study that, in the opinion of the review panel, is necessary for that purpose, including requiring the proponent to collect that information or undertake that study.

Études et collecte de renseignements

(2) Toutefois, si elle est d'avis que les renseignements disponibles ne lui permettent pas de procéder à l'évaluation environnementale ou d'établir le rapport d'évaluation environnementale, elle peut faire procéder, notamment par le promoteur, aux études et à la collecte de renseignements qu'elle estime nécessaires à cette fin.

Power to summon witnesses

45 (1) A review panel has the power to summon any person to appear as a witness before it and to order the witness to

(a) give evidence, orally or in writing; and

(b) produce any records and things that the panel considers necessary for conducting its environmental assessment of the designated project.

Enforcement powers

(2) A review panel has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce records and other things as is vested in a court of record.

Hearings to be public

(3) A hearing by a review panel must be public unless the panel is satisfied after representations made by a witness that specific, direct and substantial harm would be caused to the witness or specific harm would be caused to the environment by the disclosure of the evidence, records or other things that the witness is ordered to give or produce under subsection (1).

Non-disclosure

(4) If a review panel is satisfied that the disclosure of evidence, records or other things would cause specific, direct and substantial harm to a witness, the evidence, records or things are privileged and must not, without the witness's authorization, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, records or other things under this Act.

Non-disclosure

(5) If a review panel is satisfied that the disclosure of evidence, records or other things would cause specific harm to the environment, the evidence, records or things are privileged and must not, without the review panel's authorization, knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, records or other things under this Act.

Enforcement of summonses and orders

(6) Any summons issued or order made by a review panel under subsection (1) must, for the purposes of enforcement, be made a summons or order of the Federal Court by following the usual practice and procedure.

Pouvoir d'assigner des témoins

45 (1) La commission a le pouvoir d'assigner devant elle des témoins et de leur ordonner :

a) de déposer oralement ou par écrit;

b) de produire les documents et autres pièces qu'elle juge nécessaires en vue de procéder à l'examen dont elle est chargée.

Pouvoirs de contrainte

(2) La commission a, pour contraindre les témoins à comparaître, à déposer et à produire des documents et autres pièces, les pouvoirs d'une cour d'archives.

Audiences publiques

(3) Les audiences de la commission sont publiques, sauf si elle décide, à la suite d'observations faites par le témoin, que la communication des éléments de preuve, documents ou pièces qu'il est tenu de présenter au titre du paragraphe (1) lui causerait directement un préjudice réel et sérieux ou causerait un préjudice réel à l'environnement.

Non-communication

(4) Si la commission conclut que la communication d'éléments de preuve, de documents ou de pièces causerait directement un préjudice réel et sérieux au témoin, ces éléments de preuve, documents ou pièces sont protégés; la personne qui les a obtenus en vertu de la présente loi ne peut sciemment les communiquer ou permettre qu'ils le soient sans l'autorisation du témoin.

Non-communication

(5) Si la commission conclut qu'un préjudice réel, pour l'environnement, résulterait de la communication d'éléments de preuve, de documents ou de pièces, ces éléments de preuve, documents ou pièces sont protégés; la personne qui les a obtenus en vertu de la présente loi ne peut sciemment les communiquer ou permettre qu'ils le soient sans l'autorisation de la commission.

Exécution des assignations et ordonnances

(6) Aux fins de leur exécution, les assignations faites et ordonnances rendues aux termes du paragraphe (1) sont, selon la procédure habituelle, assimilées aux assignations ou ordonnances de la Cour fédérale.

Immunity

(7) No action or other proceeding lies or is to be commenced against a member of a review panel for or in respect of anything done or omitted to be done during the course of and for the purposes of the assessment by the review panel.

Immunité

(7) Les membres d'une commission sont soustraits aux poursuites et autres procédures pour les faits — actes ou omissions — censés accomplis dans le cadre d'un examen par la commission.

Public notice

46 On receiving a report with respect to the environmental assessment of the designated project by a review panel, the Minister must make the report available to the public in any manner he or she considers appropriate to facilitate public access to the report, and must advise the public that it is available.

Avis public

46 Sur réception du rapport d'évaluation environnementale de la commission, le ministre en donne avis public et en favorise l'accès par le public de la manière qu'il estime indiquée.

Minister's decisions

47 (1) The Minister, after taking into account the review panel's report with respect to the environmental assessment, must make decisions under subsection 52(1).

Décisions du ministre

47 (1) Après avoir pris en compte le rapport d'évaluation environnementale de la commission, le ministre prend les décisions prévues au paragraphe 52(1).

Studies and collection of information

(2) The Minister may, before making decisions referred to in subsection 52(1), require the proponent of the designated project to collect any information or undertake any studies that, in the opinion of the Minister, are necessary for the Minister to make decisions.

Études et collectes de renseignements

(2) Il peut, avant de les prendre, faire procéder par le promoteur du projet désigné en cause aux études et à la collecte de renseignements qu'il estime nécessaires à la prise des décisions.

Excluded periods

48 If the Agency, the review panel or the Minister, under section 39 or subsection 44(2) or 47(2), respectively, requires the proponent of a designated project to collect information or undertake a study with respect to the designated project, then

(a) the period that is taken by the proponent, in the opinion of the Agency, to comply with the requirement under section 39 is not included in the calculation of the period referred to in paragraph 38(3)(a);

(b) the period that is taken by the proponent, in the opinion of the review panel, to comply with the requirement under subsection 44(2) is not included in the calculation of the period referred to in paragraph 38(3)(b) or 42(2)(b) or subsection 43(2); and

(c) the period that is taken by the proponent, in the opinion of the Minister, to comply with the requirement under subsection 47(2) is not included in the calculation of the period referred to in paragraph 38(3)(c).

Périodes exclues des délais

48 Dans le cas où l'Agence, la commission ou le ministre exigent du promoteur d'un projet désigné, au titre de l'article 39 ou des paragraphes 44(2) ou 47(2), selon le cas, qu'il procède à des études ou à la collecte de renseignements relativement au projet :

a) la période prise, de l'avis de l'Agence, par le promoteur pour remplir l'exigence au titre de l'article 39 n'est pas comprise dans le calcul du délai visé à l'alinéa 38(3)a);

b) la période prise, de l'avis de la commission, par le promoteur pour remplir l'exigence au titre du paragraphe 44(2) n'est pas comprise dans le calcul des délais visés aux alinéas 38(3)b) ou 42(2)b) ou au paragraphe 43(2);

c) la période prise, de l'avis du ministre, par le promoteur pour remplir l'exigence au titre du paragraphe 47(2) n'est pas comprise dans le calcul du délai visé à l'alinéa 38(3)c).

Rules in Case of Termination

Termination

49 (1) The Minister must terminate the assessment by a review panel of a designated project if the review panel fails to submit its report within the specified period including any extension of time limits.

Power to terminate

(2) The Minister may terminate the assessment by a review panel of a designated project if he or she is of the opinion that the review panel will not be able to submit its report within the specified period including any extension of time limits.

Preliminary consultations

(3) However, before the Minister exercises the power referred to in subsection (2) with respect to a review panel that is jointly established under one of the following agreements, arrangements or documents, he or she must

(a) in the case of an agreement or arrangement referred to in subsection 40(1), consult the jurisdiction with which the agreement or arrangement was entered into;

(b) in the case of an agreement or arrangement referred to in subsection 40(2), obtain the approval of the Minister of Foreign Affairs and consult the jurisdiction with which the agreement or arrangement was entered into; and

(c) in the case of a document referred to in subsection 41(2), consult the Mackenzie Valley Environmental Impact Review Board.

Completion of environmental assessment by Agency

50 When the assessment by a review panel of a designated project is terminated under section 49, the Agency must, in accordance with directives provided by the Minister, complete the environmental assessment of the designated project and prepare a report and submit it to the Minister.

Minister's decisions

51 The Minister, after taking into account the report with respect to the environmental assessment of the designated project that was submitted by the Agency, must make decisions under subsection 52(1).

Règles en cas d'arrêt de l'examen

Arrêt de l'examen

49 (1) Le ministre met fin à l'examen par une commission d'un projet désigné si celle-ci n'a pas présenté le rapport d'évaluation environnementale dans le délai qui lui est imparti, y compris par prolongation.

Pouvoir d'arrêter l'examen

(2) Il peut mettre fin à l'examen par une commission d'un projet désigné s'il estime que celle-ci ne sera pas en mesure de présenter le rapport d'évaluation environnementale dans le délai qui lui est imparti, y compris par prolongation.

Consultations préalables

(3) Toutefois, avant d'exercer le pouvoir visé au paragraphe (2) relativement à une commission constituée conjointement au titre des accords ou document ci-après, le ministre est tenu :

a) s'agissant de l'accord conclu aux termes du paragraphe 40(1), de consulter l'instance avec laquelle il a conclu l'accord;

b) s'agissant de l'accord conclu aux termes du paragraphe 40(2), d'obtenir l'approbation du ministre des Affaires étrangères et de consulter l'instance avec laquelle il a conclu l'accord;

c) s'agissant du document visé au paragraphe 41(2), de consulter l'Office d'examen des répercussions environnementales de la vallée du Mackenzie.

Évaluation environnementale complétée par l'Agence

50 Dans le cas où l'examen par une commission d'un projet désigné prend fin au titre de l'article 49, l'Agence est tenue, conformément aux directives que le ministre lui donne, de compléter l'évaluation environnementale du projet, d'établir le rapport d'évaluation environnementale relatif au projet et de présenter ce rapport au ministre.

Décisions du ministre

51 Après avoir pris en compte le rapport d'évaluation environnementale relatif au projet désigné que l'Agence lui présente, le ministre prend les décisions prévues au paragraphe 52(1).

Decision Making

Decisions of decision maker

52 (1) For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project

(a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and

(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).

Referral if significant adverse environmental effects

(2) If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

Referral through Minister

(3) If the decision maker is a responsible authority referred to in any of paragraphs 15(a) to (c), the referral to the Governor in Council is made through the Minister responsible before Parliament for the responsible authority.

Governor in Council's decision

(4) When a matter has been referred to the Governor in Council, the Governor in Council may decide

(a) that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or

(b) that the significant adverse environmental effects that the designated project is likely to cause are not justified in the circumstances.

Conditions — environmental effects referred to in subsection 5(1)

53 (1) If the decision maker decides under paragraph 52(1)(a) that the designated project is not likely to cause significant adverse environmental effects referred to in subsection 5(1), or the Governor in Council decides under paragraph 52(4)(a) that the significant adverse environmental effects referred to in that subsection that the designated project is likely to cause are justified in the circumstances, the decision maker must establish the

Prise de décisions

Décisions du décideur

52 (1) Pour l'application des articles 27, 36, 47 et 51, le décideur visé à ces articles décide si, compte tenu de l'application des mesures d'atténuation qu'il estime indiquées, la réalisation du projet désigné est susceptible :

a) d'une part, d'entraîner des effets environnementaux visés au paragraphe 5(1) qui sont négatifs et importants;

b) d'autre part, d'entraîner des effets environnementaux visés au paragraphe 5(2) qui sont négatifs et importants.

Renvoi en cas d'effets environnementaux négatifs importants

(2) S'il décide que la réalisation du projet est susceptible d'entraîner des effets environnementaux visés aux paragraphes 5(1) ou (2) qui sont négatifs et importants, le décideur renvoie au gouverneur en conseil la question de savoir si ces effets sont justifiables dans les circonstances.

Renvoi par l'entremise du ministre

(3) Si le décideur est une autorité responsable visée à l'un des alinéas 15a) à c), le renvoi se fait par l'entremise du ministre responsable de l'autorité devant le Parlement.

Décision du gouverneur en conseil

(4) Saisi d'une question au titre du paragraphe (2), le gouverneur en conseil peut décider :

a) soit que les effets environnementaux négatifs importants sont justifiables dans les circonstances;

b) soit que ceux-ci ne sont pas justifiables dans les circonstances.

Conditions — effets environnementaux visés au paragraphe 5(1)

53 (1) Dans le cas où il décide, au titre de l'alinéa 52(1)a), que la réalisation du projet désigné n'est pas susceptible d'entraîner des effets environnementaux visés au paragraphe 5(1) qui sont négatifs et importants ou dans le cas où le gouverneur en conseil décide, en vertu de l'alinéa 52(4)a), que les effets environnementaux visés à ce paragraphe négatifs et importants que la réalisation du projet est susceptible d'entraîner sont justifiables dans

conditions in relation to the environmental effects referred to in that subsection with which the proponent of the designated project must comply.

Conditions — environmental effects referred to in subsection 5(2)

(2) If the decision maker decides under paragraph 52(1)(b) that the designated project is not likely to cause significant adverse environmental effects referred to in subsection 5(2), or the Governor in Council decides under paragraph 52(4)(a) that the significant adverse environmental effects referred to in that subsection that the designated project is likely to cause are justified in the circumstances, the decision maker must establish the conditions — that are directly linked or necessarily incidental to the exercise of a power or performance of a duty or function by a federal authority that would permit a designated project to be carried out, in whole or in part — in relation to the environmental effects referred to in that subsection with which the proponent of the designated project must comply.

Conditions subject to exercise of power or performance of duty or function

(3) The conditions referred to in subsection (2) take effect only if the federal authority exercises the power or performs the duty or function.

Mitigation measures and follow-up program

(4) The conditions referred to in subsections (1) and (2) must include

(a) the implementation of the mitigation measures that were taken into account in making the decisions under subsection 52(1); and

(b) the implementation of a follow-up program.

2012, c. 19, s. 52 "53", c. 31, s. 428.

Decision Statement

Decision statement issued to proponent

54 (1) The decision maker must issue a decision statement to the proponent of a designated project that

(a) informs the proponent of the designated project of the decisions made under paragraphs 52(1)(a) and (b) in relation to the designated project and, if a matter was referred to the Governor in Council, of the decision made under subsection 52(4) in relation to the designated project; and

les circonstances, le décideur fixe les conditions que le promoteur du projet est tenu de respecter relativement aux effets environnementaux visés à ce paragraphe.

Conditions — effets environnementaux visés au paragraphe 5(2)

(2) Dans le cas où il décide, au titre de l'alinéa 52(1)b), que la réalisation du projet désigné n'est pas susceptible d'entraîner des effets environnementaux visés au paragraphe 5(2) qui sont négatifs et importants ou dans le cas où le gouverneur en conseil décide, en vertu de l'alinéa 52(4)a), que les effets environnementaux visés à ce paragraphe négatifs et importants que la réalisation du projet est susceptible d'entraîner sont justifiables dans les circonstances, le décideur fixe les conditions — directement liées ou nécessairement accessoires aux attributions que l'autorité fédérale doit exercer pour permettre la réalisation en tout ou en partie du projet — que le promoteur du projet est tenu de respecter relativement aux effets environnementaux visés à ce paragraphe.

Conditions subordonnées à l'exercice d'attributions

(3) Ces dernières conditions sont toutefois subordonnées à l'exercice par l'autorité fédérale des attributions en cause.

Mesures d'atténuation et programmes de suivi

(4) Les conditions visées aux paragraphes (1) et (2) sont notamment les suivantes :

a) la mise en œuvre des mesures d'atténuation dont il a été tenu compte dans le cadre des décisions prises au titre du paragraphe 52(1);

b) la mise en œuvre d'un programme de suivi.

2012, ch. 19, art. 52 « 53 », ch. 31, art. 428.

Déclaration

Déclaration remise au promoteur

54 (1) Le décideur fait une déclaration qu'il remet au promoteur du projet désigné dans laquelle :

a) il donne avis des décisions qu'il a prises relativement au projet au titre des alinéas 52(1)a) et b) et, le cas échéant, de la décision que le gouverneur en conseil a prise relativement au projet en vertu du paragraphe 52(4);

b) il énonce toute condition fixée en vertu de l'article 53 relativement au projet que le promoteur est tenu de respecter.

(b) includes any conditions that are established under section 53 in relation to the designated project and that must be complied with by the proponent.

Time limit of decision statement

(2) When the decision maker has made a decision under paragraphs 52(1)(a) and (b) in relation to the designated project for the purpose of section 47, the decision maker must issue the decision statement no later than 24 months after the day on which the environmental assessment of the designated project was referred to a review panel under section 38.

Extension of time limit by Minister

(3) The decision maker may extend that time limit by any further period – up to a maximum of three months – that is necessary to permit cooperation with any jurisdiction with respect to the environmental assessment of the designated project or to take into account circumstances that are specific to the project.

Extension of time limit by Governor in Council

(4) The Governor in Council may, on the recommendation of the Minister, extend the time limit extended under subsection (3).

Posting notice of extension on Internet site

(5) The Agency must post a notice of any extension granted under subsection (3) or (4) on the Internet site.

Excluded period

(6) If the Agency, the review panel or the Minister, under section 39 or subsection 44(2) or 47(2), respectively, requires the proponent of the designated project to collect information or undertake a study with respect to the designated project, the calculation of the time limit within which the decision maker must issue the decision statement does not include:

(a) the period that is taken by the proponent, in the opinion of the Agency, to comply with the requirement under section 39;

(b) the period that is taken by the proponent, in the opinion of the review panel, to comply with the requirement under subsection 44(2); and

(c) the period that is taken by the proponent, in the opinion of the Minister, to comply with the requirement under subsection 47(2).

Délai

(2) Dans le cas où il a pris les décisions au titre des alinéas 52(1)a) et b) pour l'application de l'article 47, le décideur est tenu de faire la déclaration dans les vingt-quatre mois suivant la date où il a renvoyé, au titre de l'article 38, l'évaluation environnementale du projet pour examen par une commission.

Prolongation du délai par le ministre

(3) Il peut prolonger ce délai de la période nécessaire pour permettre toute coopération avec une instance à l'égard de l'évaluation environnementale du projet ou pour tenir compte des circonstances particulières du projet. Il ne peut toutefois prolonger le délai de plus de trois mois.

Prolongation du délai par le gouverneur en conseil

(4) Le gouverneur en conseil peut, sur la recommandation du ministre, prolonger le délai prolongé en vertu du paragraphe (3).

Avis des prolongations affichés sur le site Internet

(5) L'Agence affiche sur le site Internet un avis de toute prolongation accordée en vertu des paragraphes (3) ou (4) relativement au projet.

Période exclue du délai

(6) Dans le cas où l'Agence, la commission ou le ministre exigent du promoteur, au titre de l'article 39 ou des paragraphes 44(2) ou 47(2), selon le cas, qu'il procède à des études ou à la collecte de renseignements relativement au projet, ne sont pas comprises dans le calcul du délai dont dispose le décideur pour faire la déclaration :

a) la période prise, de l'avis de l'Agence, par le promoteur pour remplir l'exigence au titre de l'article 39;

b) la période prise, de l'avis de la commission, par le promoteur pour remplir l'exigence au titre du paragraphe 44(2);

c) la période prise, de l'avis du ministre, par le promoteur pour remplir l'exigence au titre du paragraphe 47(2).

Posting of decision statement on Internet site

55 The responsible authority referred to in any of paragraphs 15(a) to (c) must ensure that any decision statement that it issues under section 54 is posted on the Internet site, and the Agency must post on the Internet site any decision statement that the Minister issues under that section.

Decision statement considered part of licence under *Nuclear Safety and Control Act*

56 (1) A decision statement issued in relation to a designated project by the responsible authority referred to in paragraph 15(a) is considered to be a part of the licence issued under section 24 of the *Nuclear Safety and Control Act* in relation to the designated project.

Decision statement considered part of certificate, etc., under *National Energy Board Act* and *Canada Oil and Gas Operations Act*

(2) A decision statement issued in relation to a designated project by the responsible authority referred to in paragraph 15(b) is considered to be a part of

(a) the certificate, order, permit or licence issued, the leave or exemption granted or the direction or approval given under the *National Energy Board Act* in relation to the designated project; or

(b) the authorization or licence issued, the approval granted or the leave given under the *Canada Oil and Gas Operations Act* in relation to the designated project.

Participant Funding Programs

Agency's obligation

57 The Agency must establish a participant funding program to facilitate the participation of the public in the environmental assessment of designated projects that have been referred to a review panel under section 38.

Responsible authority's obligation

58 (1) A responsible authority must establish a participant funding program to facilitate the participation of the public in the environmental assessment of any designated project, for which it is the responsible authority, that meets the following conditions:

(a) it includes physical activities that are designated by regulations made under paragraph 84(e) or that are part of a class of activities designated by those regulations; and

Déclarations affichées sur le site Internet

55 L'autorité responsable visée à l'un des alinéas 15a) à c) veille à ce que soient affichées sur le site Internet les déclarations qu'elle fait au titre de l'article 54 et l'Agence y affiche les déclarations que le ministre fait au titre de cet article.

Présomption — *Loi sur la sûreté et la réglementation nucléaires*

56 (1) Toute déclaration faite relativement à un projet désigné par l'autorité responsable visée à l'alinéa 15a) est réputée faire partie de toute licence ou permis délivrés en vertu de l'article 24 de la *Loi sur la sûreté et la réglementation nucléaires* relativement au projet.

Présomption — *Loi sur l'Office national de l'énergie* et *Loi sur les opérations pétrolières au Canada*

(2) Toute déclaration faite relativement à un projet désigné par l'autorité responsable visée à l'alinéa 15b) est réputée faire partie :

a) des certificats, permis ou licences délivrés, ordonnances rendues, autorisations accordées ou approbations ou dispenses données sous le régime de la *Loi sur l'Office national de l'énergie* relativement au projet;

b) des permis ou autorisations délivrés ou approbations accordées sous le régime de la *Loi sur les opérations pétrolières au Canada* relativement au projet.

Programmes d'aide financière

Obligation de l'Agence

57 L'Agence crée un programme d'aide financière pour faciliter la participation du public à l'évaluation environnementale des projets désignés dont l'évaluation environnementale est renvoyée au titre de l'article 38 pour examen par une commission.

Obligation des autorités responsables

58 (1) Toute autorité responsable crée un programme d'aide financière pour faciliter la participation du public à l'évaluation environnementale de tout projet désigné pour lequel elle est l'autorité responsable et qui remplit les conditions suivantes :

a) il comprend des activités concrètes qui sont désignées par règlement pris en vertu de l'alinéa 84e) ou qui font partie d'une catégorie d'activités ainsi désignée;

(b) the environmental assessment of the designated project was not referred to a review panel under section 38.

Exception

(2) The obligation does not apply with respect to any designated project for which the Minister has approved a substitution under section 32.

b) son évaluation environnementale n'a pas été renvoyée au titre de l'article 38 pour examen par une commission.

Exception

(2) Elle n'y est toutefois pas tenue en ce qui concerne tout projet désigné pour lequel le ministre a accordé une autorisation en vertu de l'article 32.

Cost Recovery

Proponent's obligation to pay costs

59 (1) For the Agency to recover its costs in relation to the environmental assessment of a designated project, the proponent of the designated project must pay to the Agency

(a) if the environmental assessment is conducted by the Agency, any costs that the Agency incurs for prescribed services provided by a third party in the course of the environmental assessment and any prescribed amounts that are related to the exercise of its responsibilities in relation to the environmental assessment; and

(b) if the environmental assessment is referred to a review panel under section 38, any costs that the review panel and the Agency incur for prescribed services provided by a third party in the course of the environmental assessment and any prescribed amounts that are related to the exercise of its responsibilities or to those of the members of the review panel, in relation to the environmental assessment.

Service Fees Act

(2) The *Service Fees Act* does not apply to the costs and amounts referred to in subsection (1) that are fixed at the time of the coming into force of this Act.

2012, c. 19, s. 52 "59"; 2017, c. 20, s. 454.

Services provided during given period

60 For the purposes of section 59, the services or responsibilities are limited to those provided or exercised during the period that begins when the notice of the commencement of the environmental assessment of the designated project is posted on the Internet site under section 17 and that ends when the decision statement is issued to the proponent under section 54.

Debt due to Her Majesty

61 The costs and amounts that the proponent must pay under section 59 constitute a debt due to Her Majesty in right of Canada and may be recovered as such in any court of competent jurisdiction.

Recouvrement des coûts

Obligation du promoteur

59 (1) Le promoteur d'un projet désigné est tenu de payer à l'Agence, afin de permettre à celle-ci de recouvrer les frais liés à l'évaluation environnementale du projet :

a) dans le cas où elle effectue l'évaluation, les frais qu'elle engage pour les services réglementaires fournis par un tiers dans le cadre de celle-ci et les sommes réglementaires afférentes à l'exercice de ses attributions relativement à l'évaluation;

b) dans le cas où l'évaluation a été renvoyée au titre de l'article 38 pour examen par une commission, les frais que celle-ci et l'Agence engagent pour les services réglementaires fournis par un tiers dans le cadre de l'évaluation et les sommes réglementaires afférentes à l'exercice des attributions de l'Agence, ou de celles des membres de la commission, relativement à l'évaluation.

Loi sur les frais de service

(2) La *Loi sur les frais de service* ne s'applique pas aux frais et sommes visés au paragraphe (1) qui sont établis à la date d'entrée en vigueur de la présente loi.

2012, ch. 19, art. 52 « 59 »; 2017, ch. 20, art. 454.

Services fournis pendant une période donnée

60 Pour l'application de l'article 59, les services ou les attributions en cause se limitent à ceux fournis ou exercés à partir du moment où l'avis du début de l'évaluation environnementale du projet désigné est affiché sur le site Internet au titre de l'article 17 jusqu'au moment où une déclaration est remise au promoteur du projet au titre de l'article 54 relativement au projet.

Créances de Sa Majesté

61 Les frais et sommes que le promoteur est tenu de payer au titre de l'article 59 constituent des créances de Sa Majesté du chef du Canada dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

Termination of Environmental Assessment

Termination by responsible authority or Minister

62 The responsible authority with respect to a designated project — or the Minister if the environmental assessment of the designated project has been referred to a review panel under section 38 — may terminate the environmental assessment if the proponent advises the responsible authority or the Minister in writing that the proponent does not intend to carry out the designated project.

Termination by responsible authority

63 The responsible authority referred to in any of paragraphs 15(a) to (c) may terminate the environmental assessment of a designated project for which it is the responsible authority if it decides not to exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit the designated project to be carried out in whole or in part and, if the responsible authority is referred to in paragraph 15(c), the environmental assessment of a designated project was not referred to a review panel under section 38.

2012, c. 19, s. 52 "63", c. 31, s. 429(E).

Termination by Minister

64 The Minister may terminate the environmental assessment by a review panel of a designated project for which the responsible authority is referred to in paragraph 15(c) if it decides not to exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit the designated project to be carried out in whole or in part.

2012, c. 19, s. 52 "64", c. 31, s. 429(E).

Confidential Information

No disclosure

65 Despite any other provision of this Act, no confidence of the Queen's Privy Council for Canada in respect of which subsection 39(1) of the *Canada Evidence Act* applies is to be disclosed or made available under this Act to any person.

Arrêt de l'évaluation environnementale

Pouvoir de l'autorité responsable ou du ministre

62 L'autorité responsable à l'égard d'un projet désigné ou, s'il a renvoyé, au titre de l'article 38, l'évaluation environnementale du projet pour examen par une commission, le ministre peut mettre fin à l'évaluation environnementale du projet si le promoteur l'avise par écrit qu'il n'entend plus réaliser le projet.

Pouvoir de l'autorité responsable visée à l'un des alinéas 15a) à c)

63 L'autorité responsable visée à l'un des alinéas 15a) à c) peut mettre fin à l'évaluation environnementale d'un projet désigné pour lequel elle est l'autorité responsable si elle décide de ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi et qui pourraient permettre la réalisation en tout ou en partie du projet et si, s'agissant de l'autorité visée à l'alinéa 15c), l'évaluation environnementale du projet n'a pas été renvoyée, au titre de l'article 38, pour examen par une commission.

2012, ch. 19, art. 52 « 63 », ch. 31, art. 429(A).

Pouvoir du ministre

64 Le ministre peut mettre fin à l'examen par une commission d'un projet désigné pour lequel l'autorité responsable est visée à l'alinéa 15c) si celle-ci décide de ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi et qui pourraient permettre la réalisation en tout ou en partie du projet.

2012, ch. 19, art. 52 « 64 », ch. 31, art. 429(A).

Renseignements confidentiels

Aucune divulgation

65 Malgré toute autre disposition de la présente loi, nul renseignement confidentiel du Conseil privé de la Reine pour le Canada visé au paragraphe 39(1) de la *Loi sur la preuve au Canada* ne peut être divulgué ni fourni à quiconque au titre de la présente loi.

Duties of Certain Authorities in Relation to Projects

Definitions

66 The following definitions apply in sections 5 and 67 to 72.

authority means

(a) a federal authority; and

(b) any other body that is set out in Schedule 3. (*autorité*)

project means a physical activity that is carried out on federal lands or outside Canada in relation to a physical work and is not a designated project. (*projet*)

2012, c. 19, s. 52 "66", c. 31, s. 430.

Project carried out on federal lands

67 An authority must not carry out a project on federal lands, or exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit a project to be carried out, in whole or in part, on federal lands, unless

(a) the authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or

(b) the authority determines that the carrying out of the project is likely to cause significant adverse environmental effects and the Governor in Council decides that those effects are justified in the circumstances under subsection 69(3).

2012, c. 19, s. 52 "67", c. 31, s. 431(E).

Project outside Canada

68 A federal authority must not carry out a project outside Canada, or provide financial assistance to any person for the purpose of enabling, in whole or in part, a project to be carried out outside Canada, unless

(a) the federal authority determines that the carrying out of the project is not likely to cause significant adverse environmental effects; or

(b) the federal authority determines that the carrying out of the project is likely to cause significant adverse environmental effects and the Governor in Council decides that those effects are justified in the circumstances under subsection 69(3).

Fonctions de certaines autorités relativement aux projets

Définitions

66 Les définitions qui suivent s'appliquent aux articles 5 et 67 à 72.

autorité

a) Autorité fédérale;

b) tout autre organisme mentionné à l'annexe 3. (*authority*)

projet Activité concrète qui est réalisée sur un territoire domanial ou à l'étranger, est liée à un ouvrage et n'est pas un projet désigné. (*project*)

2012, ch. 19, art. 52 « 66 », ch. 31, art. 430.

Projet réalisé sur un territoire domanial

67 L'autorité ne peut réaliser un projet sur un territoire domanial ou exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi et qui pourraient permettre la réalisation en tout ou en partie du projet sur un tel territoire que si, selon le cas :

a) elle décide que la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants;

b) elle décide que la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants et le gouverneur en conseil décide, au titre du paragraphe 69(3), que ces effets sont justifiables dans les circonstances.

2012, ch. 19, art. 52 « 67 », ch. 31, art. 431(A).

Projet réalisé à l'étranger

68 L'autorité fédérale ne peut réaliser un projet à l'étranger ou accorder à quiconque une aide financière en vue de l'aider à réaliser en tout ou en partie un projet à l'étranger que si, selon le cas :

a) elle décide que la réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants;

b) elle décide que la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants et le gouverneur en conseil décide, au titre du paragraphe 69(3), que ces effets sont justifiables dans les circonstances.

Referral to Governor in Council

69 (1) If the authority determines that the carrying out of a project on federal lands or outside Canada is likely to cause significant adverse environmental effects, the authority may refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

Referral through Minister

(2) When the determination is made by an authority other than a federal Minister, then the referral to the Governor in Council is made through the Minister responsible before Parliament for that authority.

Governor in Council's decision

(3) When a matter has been referred to the Governor in Council, the Governor in Council must decide whether the significant adverse environmental effects are justified in the circumstances and must inform the authority of its decision.

Non-application — national emergency or emergency

70 Sections 67 and 68 do not apply to an authority in respect of a project

(a) in relation to which there are matters of national security;

(b) that is to be carried out in response to a national emergency for which special temporary measures are being taken under the *Emergencies Act*; or

(c) that is to be carried out in response to an emergency, and carrying out of the project without delay is in the interest of preventing damage to property or the environment or is in the interest of public health or safety.

Federal authority's reporting duty

71 (1) The federal authority must, at the end of each fiscal year, report on its activities under sections 67 to 69 during the previous fiscal year.

Tabling in Parliament

(2) The information on its activities must be laid before each House of Parliament during the fiscal year after the fiscal year to which the information relates.

Authority's reporting duty

72 (1) The authority referred to in paragraph (b) of the definition ***authority*** in section 66 must, each year, report on its activities during the previous year under sections 67 and 69.

Renvoi d'une question au gouverneur en conseil

69 (1) L'autorité qui décide que la réalisation d'un projet sur un territoire domanial ou à l'étranger est susceptible d'entraîner des effets environnementaux négatifs importants peut renvoyer au gouverneur en conseil la question de savoir si ces effets sont justifiables dans les circonstances.

Renvoi par l'entremise du ministre

(2) Le cas échéant, s'agissant d'une autorité autre qu'un ministre fédéral, le renvoi se fait par l'entremise du ministre responsable de l'autorité devant le Parlement.

Décision du gouverneur en conseil

(3) Saisi d'une question au titre du paragraphe (1), le gouverneur en conseil décide si les effets environnementaux en cause sont justifiables dans les circonstances. Il informe l'autorité de sa décision.

Non-application — crise nationale ou urgence

70 Les articles 67 et 68 ne s'appliquent pas à une autorité à l'égard d'un projet dans l'un ou l'autre des cas suivants :

a) le projet soulève des questions de sécurité nationale;

b) le projet est réalisé en réaction à des situations de crise nationale pour lesquelles des mesures d'intervention sont prises aux termes de la *Loi sur les mesures d'urgence*;

c) le projet est réalisé en réaction à une situation d'urgence et il importe, soit pour la protection de biens ou de l'environnement, soit pour la santé ou la sécurité publiques, de le réaliser sans délai.

Rapport annuel des autorités fédérales

71 (1) À la fin de chaque exercice, l'autorité fédérale fait rapport des activités qu'elle a exercées au titre des articles 67 à 69 au cours de l'exercice précédent.

Dépôt au Parlement

(2) L'information sur ces activités est déposée avant la fin de l'exercice en cours devant chaque chambre du Parlement.

Rapport annuel des autorités

72 (1) L'autorité visée à l'alinéa b) de la définition de ***autorité***, à l'article 66, fait annuellement rapport des activités qu'elle a exercées au titre des articles 67 et 69 au cours de l'année précédente.

Availability

(2) The authority must make the information on its activities available to the public.

Regional Studies

Establishment of committee — region entirely on federal lands

73 (1) The Minister may establish a committee to conduct a study of the effects of existing or future physical activities carried out in a region that is entirely on federal lands.

Mandate and appointment of members

(2) If the Minister establishes a committee, he or she must establish its terms of reference and appoint as a member of the committee one or more persons.

Joint establishment of committee — other regions

74 (1) If the Minister is of the opinion that it is appropriate to conduct a study 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,

(a) the Minister may enter into an agreement or arrangement with any jurisdiction referred to in paragraphs (a) to (f) of the definition ***jurisdiction*** in subsection 2(1) respecting the joint establishment of a committee to conduct the study and the manner in which the study is to be conducted; and

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

Mandate and appointment of members

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

Report to Minister

75 On completion of the study that it conducts, the committee established under section 73 or under an agreement or arrangement entered into under paragraph 74(1)(a) or (b) must provide a report to the Minister.

Accessibilité

(2) Elle rend l'information sur ces activités accessible au public.

Études régionales

Constitution d'un comité — région d'un territoire domanial

73 (1) Le ministre peut constituer un comité chargé de procéder à l'étude des effets d'activités concrètes actuelles ou éventuelles exercées dans une région d'un territoire domanial.

Mandat et nomination des membres

(2) Le cas échéant, il nomme le ou les membres du comité et fixe le mandat de celui-ci.

Constitution conjointe d'un comité — autres régions

74 (1) Si le ministre estime indiqué de faire procéder à l'étude des effets d'activités concrètes actuelles ou éventuelles 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) le ministre peut conclure avec toute instance visée à l'un des alinéas a) à f) de la définition de ***instance*** au paragraphe 2(1) un accord relatif à la constitution conjointe d'un comité chargé de procéder à l'étude et relatif aux modalités de l'étude;

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

Mandat et nomination des membres

(2) Le cas échéant, le ministre nomme le ou les membres du comité, ou en approuve la nomination, et fixe ou approuve le mandat de celui-ci.

Rapport au ministre

75 Au terme de l'étude qu'il est tenu d'effectuer, tout comité constitué aux termes de l'article 73 ou au titre d'un accord conclu aux termes des alinéas 74(1)a) ou b) présente un rapport au ministre.

Public notice

76 On receiving the committee's report, the Minister must make the report available to the public in any manner he or she considers appropriate to facilitate public access to the report and must advise the public that it is available.

Application of section 45

77 Section 45 applies, with any necessary modifications, to a committee referred to in section 75 and, for the purpose of applying section 45 to a committee, a reference in that section to a review panel is a reference to a committee.

Canadian Environmental Assessment Registry

Establishment of Registry

Canadian Environmental Assessment Registry

78 (1) For the purpose of facilitating public access to records relating to environmental assessments and providing notice in a timely manner of those assessments, there is to be a registry called the Canadian Environmental Assessment Registry, consisting of an Internet site and project files.

Right of access

(2) The Registry must be operated in a manner that ensures convenient public access to it. That right of access to the Registry is in addition to any right of access provided under any other Act of Parliament.

Copy

(3) For the purpose of facilitating public access to records included in the Registry, the responsible authority must ensure that a copy of any of those records is provided in a timely manner on request.

Internet Site

Establishment and maintenance

79 (1) The Agency must establish and maintain an Internet site that is available to the public.

Contents — responsible authority

(2) The responsible authority with respect to a designated project must ensure that the following records and information, relating to the environmental assessment of the designated project that it conducts, are posted on the Internet site:

Avis public

76 Sur réception du rapport du comité, le ministre en donne avis public et en favorise l'accès par le public de la manière qu'il estime indiquée.

Application de l'article 45

77 L'article 45 s'applique, avec les adaptations nécessaires, à tout comité visé à l'article 75 et, à cette fin, la mention à l'article 45 de la commission vaut mention du comité.

Registre canadien d'évaluation environnementale

Établissement du registre

Registre canadien d'évaluation environnementale

78 (1) Afin de faciliter l'accès du public aux documents relatifs aux évaluations environnementales et de notifier celles-ci en temps opportun, est établi le registre canadien d'évaluation environnementale formé, d'une part, d'un site Internet et, d'autre part, des dossiers de projet.

Droit d'accès

(2) Le registre est maintenu de façon à en assurer l'accès facile au public. Ce droit d'accès existe indépendamment de tout droit d'accès prévu par toute autre loi fédérale.

Copie

(3) Afin de faciliter l'accès du public aux documents versés au registre, l'autorité responsable veille à ce que soit fournie, sur demande et en temps opportun, une copie de tel ou tel de ces documents.

Site Internet

Établissement et tenue du site Internet

79 (1) L'Agence établit et tient un site Internet accessible au public.

Contenu — autorité responsable

(2) L'autorité responsable à l'égard d'un projet désigné veille à ce que soient affichés sur le site Internet les documents et renseignements ci-après relativement à l'évaluation environnementale du projet qu'elle effectue :

(a) any public notice that is issued by the responsible authority to request participation of the public — or, with respect to a designated project that requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, of any interested party — in the environmental assessment;

(b) a description of the factors to be taken into account in the environmental assessment and of the scope of those factors or an indication of how such a description may be obtained;

(c) the report with respect to the environmental assessment that is taken into account by the responsible authority or the Minister for the purpose of making decisions under section 27 or 36, or a summary of the report and an indication of how a copy of the report may be obtained;

(d) the report with respect to the environmental assessment or the reconsideration report that is taken into account by the Governor in Council for the purpose of making a decision under section 31, or a summary of that report and an indication of how a copy of that report may be obtained;

(e) notice of the responsible authority's decision to terminate the environmental assessment under section 62 or 63;

(f) any other information that the responsible authority considers appropriate, including information in the form of a list of relevant records and an indication of how a copy of them may be obtained; and

(g) any other record or information prescribed by regulations made under paragraph 84(f).

a) un avis public lancé par elle sollicitant la participation du public — ou, s'agissant d'un projet dont la réalisation requiert la délivrance d'un certificat au titre d'un décret pris en vertu de l'article 54 de la *Loi sur l'Office national de l'énergie*, des parties intéressées — à l'évaluation environnementale;

b) une description des éléments à prendre en compte dans le cadre de l'évaluation environnementale et de la portée de ceux-ci ou une indication de la façon d'en obtenir copie;

c) soit le rapport d'évaluation environnementale sur lequel se fondent les décisions prises par elle ou le ministre au titre des articles 27 ou 36, soit un résumé du rapport et une indication de la façon d'obtenir copie du rapport;

d) soit le rapport d'évaluation environnementale ou le rapport de réexamen sur lequel se fonde la décision prise par le gouverneur en conseil au titre de l'article 31, soit un résumé du rapport en cause et une indication de la façon d'obtenir copie du rapport;

e) un avis de sa décision de mettre fin, au titre des articles 62 ou 63, à l'évaluation environnementale;

f) tous autres renseignements, notamment sous la forme d'une liste de documents utiles — accompagnée, dans ce cas, d'une indication de la façon d'obtenir copie de ceux-ci —, que l'autorité responsable juge indiqués;

g) tout autre document ou renseignement prévu par règlement pris en vertu de l'alinéa 84f).

Contents — Agency

(3) The Agency must ensure that, in the case of an assessment conducted by a review panel or an environmental assessment completed under section 50, the following records or information are posted on the Internet site:

(a) the review panel's terms of reference;

(b) any public notice that is issued by the review panel to request public participation in an environmental assessment;

(c) the report with respect to the environmental assessment that is taken into account by the Minister for the purpose of making decisions under section 47 or 51, or a summary of the report and an indication of how a copy of the report may be obtained;

Contenu — Agence

(3) L'Agence veille à ce que, dans le cas d'un examen par une commission ou d'une évaluation environnementale complétée au titre de l'article 50, soient affichés sur le site Internet les documents et renseignements suivants :

a) le mandat de la commission;

b) un avis public lancé par la commission sollicitant la participation du public à l'évaluation environnementale;

c) soit le rapport d'évaluation environnementale sur lequel se fondent les décisions prises par le ministre au titre des articles 47 ou 51, soit un résumé du rapport et une indication de la façon d'obtenir copie du rapport;

(d) notice of the termination of an assessment conducted by the review panel under section 49;

(e) notice of the Minister's decision to terminate an environmental assessment under section 62 or 64;

(f) any other information that the Agency considers appropriate, including information in the form of a list of relevant documents and an indication of how a copy of them may be obtained; and

(g) any other record or information prescribed by regulations made under paragraph 84(f).

Management of Internet site

(4) The Agency must determine

(a) what the form of the Internet site is to be and how it is to be kept;

(b) what information must be contained in any record required to be posted on the Internet site under this Act; and

(c) when information may be removed from the Internet site.

Project Files

Establishment and maintenance

80 (1) In respect of every designated project for which a screening or an environmental assessment is conducted, a project file must be established and maintained

(a) by the Agency when there is a screening of the designated project, during the screening; and

(b) by the responsible authority from the commencement of the environmental assessment until any follow-up program in respect of the designated project is completed.

Contents of project file

(2) A project file must contain all records produced, collected or received for the purpose of conducting the screening and the environmental assessment of the designated project, including

(a) all records posted on the Internet site;

(b) the description of the designated project;

(c) any report relating to the environmental assessment;

d) un avis du fait que l'examen a pris fin au titre de l'article 49;

e) un avis de la décision du ministre de mettre fin, au titre des articles 62 ou 64, à l'évaluation environnementale;

f) tous autres renseignements, notamment sous la forme d'une liste de documents utiles — accompagnée, dans ce cas, d'une indication de la façon d'obtenir copie de ceux-ci —, que l'Agence juge indiqués;

g) tout autre document ou renseignement prévu par règlement pris en vertu de l'alinéa 84f).

Gestion du site Internet

(4) L'Agence décide :

a) des modalités de forme et de tenue du site Internet;

b) des renseignements qui doivent se trouver dans les documents à afficher sur le site Internet en application de la présente loi;

c) du moment où les documents peuvent être retirés du site Internet.

Dossiers de projet

Établissement et tenue des dossiers de projet

80 (1) Les dossiers de projet sont, à l'égard de chacun des projets désignés pour lesquels un examen préalable ou une évaluation environnementale est effectué, établis et tenus :

a) par l'Agence, dans le cas où un examen préalable est effectué, au cours de cet examen;

b) par l'autorité responsable, dès le début de l'évaluation environnementale et jusqu'à ce que le programme de suivi soit terminé.

Contenu des dossiers de projet

(2) Chaque dossier de projet contient tous les documents produits, recueillis ou reçus dans le cadre de l'examen préalable et de l'évaluation environnementale du projet désigné, notamment :

a) les documents affichés sur le site Internet;

b) la description du projet;

c) tout rapport d'évaluation environnementale;

(d) any comments that are received from the public in relation to the screening and the environmental assessment;

(e) any records relating to the design or implementation of any follow-up program; and

(f) any records relating to mitigation measures to be implemented.

d) toute observation du public à l'égard de l'examen préalable et de l'évaluation;

e) tous les documents préparés pour l'élaboration et la mise en œuvre d'un programme de suivi;

f) tous les documents relatifs à la mise en œuvre de mesures d'atténuation.

General

Categories of available information

81 (1) Despite any other provision of this Act, the Registry must contain a record, part of a record or information only if

(a) it has otherwise been made publicly available; or

(b) the responsible authority, in the case of a record under its control, or the Minister, in the case of a record under the Agency's control,

(i) determines that it would have been disclosed to the public in accordance with the *Access to Information Act* if a request had been made in respect of that record under that Act at the time the record came under the control of the responsible authority or the Agency, including any record that would be disclosed in the public interest under subsection 20(6) of that Act, or

(ii) believes on reasonable grounds that it would be in the public interest to disclose it because it is required for the public to participate effectively in the environmental assessment — other than any record the disclosure of which would be prohibited under section 20 of the *Access to Information Act*.

Applicability of sections 27, 28 and 44 of *Access to Information Act*

(2) Sections 27, 28 and 44 of the *Access to Information Act* apply to any information described in subsection 27(1) of that Act that the Agency or a responsible authority intends to be included in the Registry with any necessary modifications, including the following:

(a) the information is deemed to be a record that the head of a government institution intends to disclose; and

(b) any reference to the person who requested access must be disregarded.

Dispositions générales

Genre d'information disponible

81 (1) Malgré toute autre disposition de la présente loi, le registre ne comporte que les documents, parties de document ou renseignements :

a) qui ont par ailleurs été rendus publics;

b) dont, de l'avis de l'autorité responsable, dans le cas de documents qu'elle contrôle, ou de l'avis du ministre, dans le cas de documents que l'Agence contrôle :

(i) soit la communication serait faite conformément à la *Loi sur l'accès à l'information* si une demande en ce sens était faite aux termes de celle-ci au moment où l'autorité responsable ou l'Agence prend le contrôle des documents, y compris les documents qui seraient communiqués dans l'intérêt public aux termes du paragraphe 20(6) de cette loi,

(ii) soit il existe des motifs raisonnables de croire qu'il serait dans l'intérêt public de les communiquer parce qu'ils sont nécessaires à une participation efficace du public à l'évaluation environnementale, à l'exception des documents contenant des renseignements dont la communication doit être refusée en vertu de l'article 20 de la *Loi sur l'accès à l'information*.

Application des articles 27, 28 et 44 de la *Loi sur l'accès à l'information*

(2) Sous réserve des adaptations nécessaires, notamment de celles ci-après, les articles 27, 28 et 44 de la *Loi sur l'accès à l'information* s'appliquent à tout renseignement visé au paragraphe 27(1) de cette loi que l'Agence ou l'autorité responsable a l'intention de faire verser au registre :

a) le renseignement est réputé constituer un document que le responsable d'une institution fédérale a l'intention de communiquer;

b) il ne doit pas être tenu compte des mentions de la personne qui fait la demande de communication des renseignements.

Protection from civil proceeding or prosecution

82 Despite any other Act of Parliament, no civil or criminal proceedings lie against a responsible authority, the Agency or the Minister, or against any person acting on behalf of, or under the direction of, any one of them and no proceedings lie against the Crown, the Agency or any responsible authority, for the disclosure in good faith of any record or any part of a record under this Act or for any consequences that flow from that disclosure or for the failure to give any notice required under section 27 or 28 of the *Access to Information Act* if reasonable care is taken to give the required notice.

Immunité

82 Malgré toute autre loi fédérale, l'autorité responsable, l'Agence ou le ministre et les personnes qui agissent en leur nom ou sous leur autorité bénéficient de l'immunité en matière civile ou pénale, et la Couronne, l'Agence ainsi que les autorités responsables bénéficient de l'immunité devant toute juridiction, pour la communication totale ou partielle d'un document faite de bonne foi en vertu de la présente loi ainsi que pour les conséquences qui en découlent; ils bénéficient également de l'immunité dans les cas où, ayant fait preuve de la diligence nécessaire, ils n'ont pu donner les avis prévus aux articles 27 et 28 de la *Loi sur l'accès à l'information*.

Administration

Regulations — Governor in Council

83 The Governor in Council may make regulations

(a) amending Schedule 1 or 3 by adding or deleting a body or a class of bodies;

(b) prescribing, for the purposes of paragraph 15(c), the federal authority that performs regulatory functions and that may hold public hearings;

(c) exempting any class of proponents or class of designated projects from the application of section 59;

(d) varying or excluding any requirement set out in this Act or the regulations as it applies to physical activities to be carried out

(i) on reserves, surrendered lands or other lands that are vested in Her Majesty and subject to the *Indian Act*,

(ii) on lands covered by land claim agreements referred to in section 35 of the *Constitution Act, 1982*,

(iii) under international agreements or arrangements entered into by the Government of Canada, or

(iv) in relation to which there are matters of national security;

(e) prescribing anything that, by this Act, is to be prescribed;

Administration

Règlement du gouverneur en conseil

83 Le gouverneur en conseil peut, par règlement :

a) modifier les annexes 1 ou 3 pour y ajouter ou en retrancher un organisme ou une catégorie d'organismes;

b) pour l'application de l'alinéa 15c), prévoir une autorité fédérale exerçant des fonctions de réglementation et pouvant tenir des audiences publiques;

c) soustraire toute catégorie de promoteurs ou de projets désignés à l'application de l'article 59;

d) modifier ou exclure toute exigence prévue par la présente loi ou les règlements quant à son application aux activités concrètes :

(i) devant être exercées dans les réserves, terres cédées ou autres terres dévolues à Sa Majesté et assujetties à la *Loi sur les Indiens*,

(ii) devant être exercées dans les terres visées par tout accord sur des revendications territoriales visé à l'article 35 de la *Loi constitutionnelle de 1982*,

(iii) devant être exercées en vertu d'accords internationaux conclus par le gouvernement du Canada,

(iv) qui soulèvent des questions de sécurité nationale;

e) prendre toute mesure d'ordre réglementaire prévue par la présente loi;

(f) prescribing the way in which anything that is required or authorized by this Act to be prescribed is to be determined; and

(g) generally, for carrying out the purposes and provisions of this Act.

f) préciser la façon de déterminer ce qui peut ou doit faire l'objet d'une mesure d'ordre réglementaire prévue par la présente loi;

g) prendre toute autre mesure d'application de la présente loi.

Regulations — Minister

84 The Minister may make regulations

(a) for the purpose of the definition ***designated project*** in subsection 2(1), designating a physical activity or class of physical activities and specifying for each designated physical activity or class of physical activities one of the following federal authorities to which the physical activity is linked:

(i) the Canadian Nuclear Safety Commission,

(ii) the National Energy Board,

(iii) any federal authority that performs regulatory functions, that may hold public hearings and that is prescribed in regulations made under paragraph 83(b), or

(iv) the Agency;

(b) prescribing the information that must be contained in a description of a designated project;

(c) respecting the procedures, requirements and time periods relating to environmental assessments, including the manner of designing a follow-up program;

(d) respecting a participant funding program established under section 57 or established under section 58 by the responsible authority referred to in paragraph 15(d);

(e) designating, for the purposes of section 58, a physical activity or class of physical activities;

(f) respecting the Registry, including the identification of records or information to be posted on the Internet site and the establishment and maintenance of project files referred to in section 80; and

(g) respecting the charging of fees for providing copies of documents contained in the Registry.

Règlement du ministre

84 Le ministre peut, par règlement :

a) pour l'application de la définition de ***projet désigné*** au paragraphe 2(1), désigner une activité concrète ou une catégorie d'activités concrètes et préciser, pour chaque activité ou catégorie ainsi désignée, à laquelle des autorités fédérales ci-après elle est liée :

(i) la Commission canadienne de sûreté nucléaire,

(ii) l'Office national de l'énergie,

(iii) toute autorité fédérale exerçant des fonctions de réglementation et pouvant tenir des audiences publiques prévue par règlement pris en vertu de l'alinéa 83b),

(iv) l'Agence;

b) prévoir les renseignements qui doivent être compris dans une description de projet désigné;

c) régir les procédures et les exigences relatives à l'évaluation environnementale et les délais applicables, notamment les modalités applicables à l'élaboration de programmes de suivi;

d) prendre toute mesure relativement au programme d'aide financière créé au titre de l'article 57 ou créé par l'autorité responsable visée à l'alinéa 15d) au titre de l'article 58;

e) pour l'application de l'article 58, désigner une activité concrète ou une catégorie d'activités concrètes;

f) régir le registre, notamment la désignation des documents et renseignements à afficher sur le site Internet et l'établissement et la tenue des dossiers de projet visés à l'article 80;

g) régir les droits à payer pour obtenir copie de tout document versé au registre.

Externally produced documents

85 (1) A regulation made under this Act may incorporate by reference documents that are produced by a person or body other than the Agency, including a federal

Documents externes

85 (1) Peut être incorporé par renvoi dans un règlement pris en vertu de la présente loi tout document établi par une personne ou un organisme autre que l'Agence, notamment toute autorité fédérale visée à l'un des alinéas

authority referred to in any of paragraphs (a) to (d) of the definition ***federal authority*** in subsection 2(1).

Ambulatory incorporation by reference

(2) A document may be incorporated by reference either as it exists on a particular date or as amended from time to time.

Accessibility of incorporated document

(3) The Minister must ensure that any document incorporated by reference in a regulation is accessible.

No registration or publication

(4) For greater certainty, a document that is incorporated by reference into a regulation is not required to be transmitted for registration or published in the *Canada Gazette* by reason only that it is incorporated by reference.

Minister's powers

86 (1) For the purposes of this Act, the Minister may

(a) issue guidelines and codes of practice respecting the application of this Act and, without limiting the generality of the foregoing, establish criteria to determine whether a designated project, taking into account the implementation of any appropriate mitigation measures, is likely to cause significant adverse environmental effects or whether such effects are justified in the circumstances;

(b) establish research and advisory bodies in the area of environmental assessment;

(c) enter into agreements or arrangements with any jurisdiction referred to in paragraphs (a) to (f) of the definition ***jurisdiction*** in subsection 2(1) respecting assessments of environmental effects;

(d) enter into agreements or arrangements with any jurisdiction for the purposes of coordination, consultation, exchange of information and the determination of factors to be considered in relation to the assessment of the environmental effects of designated projects of common interest;

(e) establish criteria for the appointment of members of review panels; and

(f) establish criteria for the appointment of members of committees established under section 73 or 74.

Power to enter into international agreements

(2) The Minister and the Minister of Foreign Affairs may enter into agreements or arrangements with any

a) à d) de la définition de ***autorité fédérale*** au paragraphe 2(1).

Portée de l'incorporation par renvoi

(2) L'incorporation par renvoi peut viser le document soit dans sa version à une date donnée, soit avec ses modifications successives.

Accessibilité

(3) Le ministre veille à ce que tout document incorporé par renvoi dans le règlement soit accessible.

Ni enregistrement ni publication

(4) Il est entendu que les documents incorporés par renvoi dans le règlement n'ont pas à être transmis pour enregistrement ni à être publiés dans la *Gazette du Canada* du seul fait de leur incorporation.

Pouvoirs du ministre

86 (1) Pour l'application de la présente loi, le ministre peut :

a) donner des lignes directrices et établir des codes de pratique concernant l'application de la présente loi, y compris établir des critères servant à déterminer si, compte tenu de l'application de mesures d'atténuation indiquées, un projet désigné est susceptible d'entraîner des effets environnementaux négatifs importants ou si ces effets sont justifiables dans les circonstances;

b) constituer des organismes de recherche et de consultation en matière d'évaluation environnementale;

c) conclure des accords avec toute instance visée à l'un des alinéas a) à f) de la définition de ***instance*** au paragraphe 2(1) en matière d'évaluation des effets environnementaux;

d) conclure des accords avec toute instance en matière de coordination, de consultation, d'échange d'information et de détermination des éléments à prendre en compte relativement à l'évaluation des effets environnementaux de projets désignés d'intérêt commun;

e) fixer les critères de nomination des membres des commissions;

f) fixer les critères de nomination des membres des comités constitués au titre des articles 73 ou 74.

Accords internationaux

(2) Le ministre et le ministre des Affaires étrangères peuvent conclure des accords avec toute instance visée à

jurisdiction referred to in paragraphs (g) and (h) of the definition ***jurisdiction*** in subsection 2(1) respecting assessments of environmental effects, including, without limiting the generality of the foregoing, for the purposes of implementing the provisions of any international agreement or arrangement to which the Government of Canada is a party respecting the assessment of environmental effects.

Opportunity for public to comment

(3) The Minister must provide reasonable public notice of and a reasonable opportunity for anyone to comment on draft guidelines, codes of practice, agreements, arrangements or criteria under this section.

Availability to public

(4) Any guidelines, codes of practice, agreements, arrangements or criteria must be made available to the public.

Non-application — national security

87 (1) The Governor in Council may, by order, exclude a designated project from the application of this Act if, in the Governor in Council's opinion, the designated project is one in relation to which there are matters of national security.

Non-application — national emergency or emergency

(2) The Minister may, by order, exclude a designated project from the application of this Act if, in the Minister's opinion, the designated project is one to be carried out in response to

(a) a national emergency for which special temporary measures are being taken under the *Emergencies Act*; or

(b) an emergency, and carrying out the designated project without delay is in the interest of preventing damage to property or the environment or is in the interest of public health or safety.

Posting of notice of order on Internet site

(3) The Agency must post on the Internet site a notice of any order made under subsection (2).

Statutory Instruments Act

88 An order made under subsection 14(2), 37(1), 87(1) or (2), 125(7) or 128(2) is not a statutory instrument for the purposes of the *Statutory Instruments Act*.

l'un des alinéas g) et h) de la définition de ***instance*** au paragraphe 2(1) en matière d'évaluation des effets environnementaux, notamment pour la mise en œuvre de tout accord international auquel le gouvernement du Canada est partie concernant l'examen des effets environnementaux.

Préavis

(3) Le ministre donne un préavis public raisonnable des projets de lignes directrices, de codes de pratique, d'accords ou de critères établis en application du présent article, ainsi que la possibilité, pour quiconque, de faire des observations à leur sujet.

Accessibilité

(4) Les lignes directrices, codes de pratique, accords et critères sont accessibles au public.

Non-application — sécurité nationale

87 (1) Le gouverneur en conseil peut, par décret, soustraire tout projet désigné à l'application de la présente loi s'il est d'avis que le projet soulève une question de sécurité nationale.

Non-application — crise nationale ou situation d'urgence

(2) Le ministre peut, par arrêté, soustraire tout projet désigné à l'application de la présente loi s'il est d'avis, selon le cas :

a) que le projet est réalisé en réaction à des situations de crise nationale pour lesquelles des mesures d'intervention sont prises aux termes de la *Loi sur les mesures d'urgence*;

b) que le projet est réalisé en réaction à une situation d'urgence et qu'il importe, soit pour la protection de biens ou de l'environnement, soit pour la santé ou la sécurité publiques, de le réaliser sans délai.

Avis de l'arrêté affiché sur le site Internet

(3) L'Agence affiche sur le site Internet un avis de tout arrêté pris en application du paragraphe (2).

Loi sur les textes réglementaires

88 Le décret ou l'arrêté pris en application des paragraphes 14(2), 37(1), 87(1) ou (2), 125(7) ou 128(2) n'est pas un texte réglementaire au sens de la *Loi sur les textes réglementaires*.

Administration and Enforcement

Designation

Power to designate

89 (1) The Minister may designate persons or classes of persons for the purposes of the administration and enforcement of this Act.

Certificate

(2) The Minister must provide every person designated under subsection (1) with a certificate of designation. That person must, if so requested, produce the certificate to the occupant or person in charge of a place referred to in subsection 90(1).

Powers

Authority to enter

90 (1) A person who is designated to verify compliance or prevent non-compliance with this Act or orders made under section 94 may, for those purposes, enter a place in which they have reasonable grounds to believe a designated project is being carried out or a record or anything relating to a designated project is located.

Powers on entry

(2) The designated person may, for those purposes,

(a) examine anything in the place;

(b) use any means of communication in the place or cause it to be used;

(c) use any computer system in the place, or cause it to be used, to examine data contained in or available to it;

(d) prepare a document, or cause one to be prepared, based on the data;

(e) use any copying equipment in the place, or cause it to be used;

(f) remove anything from the place for examination or copying;

(g) take photographs and make recordings or sketches;

Exécution et contrôle d'application

Désignation

Pouvoir de désignation

89 (1) Le ministre peut désigner toute personne — individuellement ou au titre de son appartenance à une catégorie déterminée — pour l'exécution et le contrôle d'application de la présente loi.

Certificat

(2) Il remet à chaque personne désignée un certificat attestant sa qualité; elle le présente, sur demande, au responsable ou à l'occupant du lieu visé au paragraphe 90(1).

Pouvoirs

Accès au lieu

90 (1) La personne désignée pour vérifier le respect de la présente loi ou des ordres donnés en vertu de l'article 94 — ou en prévenir le non-respect — peut, à ces fins, entrer dans tout lieu si elle a des motifs raisonnables de croire qu'un projet désigné y est réalisé ou qu'un document ou une autre chose relatif à un tel projet s'y trouve.

Autres pouvoirs

(2) Elle peut, à ces mêmes fins :

a) examiner toute chose se trouvant dans le lieu;

b) faire usage, directement ou indirectement, des moyens de communication se trouvant dans le lieu;

c) faire usage, directement ou indirectement, de tout système informatique se trouvant dans le lieu pour examiner les données qu'il contient ou auxquelles il donne accès;

d) établir ou faire établir tout document à partir de ces données;

e) faire usage, directement ou indirectement, du matériel de reproduction se trouvant dans le lieu;

f) emporter toute chose se trouvant dans le lieu à des fins d'examen ou pour en faire des copies;

g) prendre des photographies, effectuer des enregistrements et faire des croquis;

(h) order the owner or person in charge of the place or a person at the place to establish their identity to the designated person's satisfaction or to stop or start an activity;

(i) order the owner or a person having possession, care or control of anything in the place to not move it, or to restrict its movement, for as long as, in the designated person's opinion, is necessary;

(j) direct any person to put any machinery, vehicle or equipment in the place into operation or to cease operating it; and

(k) prohibit or limit access to all or part of the place.

h) ordonner au propriétaire ou au responsable du lieu ou à quiconque s'y trouve d'établir, à sa satisfaction, son identité ou d'arrêter ou de reprendre toute activité;

i) ordonner au propriétaire de toute chose se trouvant dans le lieu ou à la personne qui en a la possession, la responsabilité ou la charge de ne pas la déplacer ou d'en limiter le déplacement pour la période de temps qu'elle estime suffisante;

j) ordonner à quiconque de faire fonctionner ou de cesser de faire fonctionner une machine, un véhicule ou de l'équipement se trouvant dans le lieu;

k) interdire ou limiter l'accès à tout ou partie du lieu.

Duty to assist

(3) The owner or person in charge of the place and every person in the place must give all assistance that is reasonably required to enable the designated person to exercise a power or perform a duty or function under this section and must provide any documents, data or information that are reasonably required for that purpose.

Assistance

(3) Le propriétaire ou le responsable du lieu, ainsi que quiconque s'y trouve, sont tenus de prêter à la personne désignée toute l'assistance qu'elle peut valablement exiger pour lui permettre d'exercer ses attributions au titre du présent article, et de lui fournir les documents, données et renseignements qu'elle peut valablement exiger.

Warrant for dwelling-house

91 (1) If the place is a dwelling-house, the designated person must not enter it without the occupant's consent except under the authority of a warrant issued under subsection (2).

Mandat pour maison d'habitation

91 (1) Dans le cas d'une maison d'habitation, la personne désignée ne peut toutefois y entrer sans le consentement de l'occupant que si elle est munie du mandat prévu au paragraphe (2).

Authority to issue warrant

(2) On *ex parte* application, a justice may issue a warrant authorizing a designated person who is named in it to enter a dwelling-house, subject to any conditions specified in the warrant, if the justice is satisfied by information on oath that

(a) the dwelling-house is a place referred to in subsection 90(1);

(b) entry to the dwelling-house is necessary for any of the purposes of that subsection; and

(c) entry was refused by the occupant or there are reasonable grounds to believe that entry will be refused or that consent to entry cannot be obtained from the occupant.

Délivrance du mandat

(2) Sur demande *ex parte*, le juge de paix peut décerner un mandat autorisant, sous réserve des conditions éventuellement fixées, la personne désignée qui y est nommée à entrer dans une maison d'habitation s'il est convaincu, sur la foi d'une dénonciation sous serment, que les conditions ci-après sont réunies :

a) la maison d'habitation est un lieu visé au paragraphe 90(1);

b) l'entrée est nécessaire à toute fin prévue à ce paragraphe;

c) soit l'occupant a refusé l'entrée à la personne désignée, soit il y a des motifs raisonnables de croire que tel sera le cas ou qu'il est impossible d'obtenir le consentement de l'occupant.

Entry on private property

92 (1) For the purpose of gaining entry to a place referred to in subsection 90(1), a designated person may enter private property and pass through it, and is not

Entrée dans une propriété privée

92 (1) La personne désignée peut, pour accéder au lieu visé au paragraphe 90(1), entrer dans une propriété privée et y passer, et ce, sans encourir de poursuites à cet

liable for doing so. For greater certainty, no person has a right to object to that use of the property and no warrant is required for the entry, unless the property is a dwelling-house.

Person accompanying designated person

(2) A person may, at the designated person's request, accompany the designated person to assist them to gain entry to the place referred to in subsection 90(1) and is not liable for doing so.

Use of force

93 In executing a warrant to enter a dwelling-house, a designated person must not use force unless the use of force has been specifically authorized in the warrant and the designated person is accompanied by a peace officer.

Orders

Measures required

94 (1) If a person designated to verify compliance with this Act believes on reasonable grounds that there is a contravention of this Act, they may, among other things, order a person to

(a) stop doing something that is in contravention of this Act or cause it to be stopped; or

(b) take any measure that is necessary in order to comply with this Act or to mitigate the effects of non-compliance.

Notice

(2) The order must be provided in the form of a written notice and must include

(a) a statement of the reasons for the order; and

(b) the time and manner in which the order must be carried out.

Duty to comply with order

(3) Any person to whom an order is given under subsection (1) must comply with the order given.

Measures taken by designated person

95 If a person does not comply with an order made under subsection 94(1) within the time specified, the designated person may, on their own initiative and at that person's expense, carry out the measure required.

égard; il est entendu que nul ne peut s'y opposer et qu'aucun mandat n'est requis, sauf s'il s'agit d'une maison d'habitation.

Personne accompagnant la personne désignée

(2) Toute personne peut, à la demande de la personne désignée, accompagner celle-ci en vue de l'aider à accéder au lieu, et ce, sans encourir de poursuites à cet égard.

Usage de la force

93 La personne désignée ne peut recourir à la force dans l'exécution d'un mandat relatif à une maison d'habitation que si celui-ci en autorise expressément l'usage et qu'elle est accompagnée d'un agent de la paix.

Ordres

Mesures exigées

94 (1) Si elle a des motifs raisonnables de croire qu'il y a contravention à la présente loi, la personne désignée pour vérifier le respect de la présente loi peut notamment ordonner à toute personne :

a) de cesser de faire toute chose en contravention de la présente loi ou de la faire cesser;

b) de prendre les mesures qu'elle précise pour se conformer à la présente loi ou pour atténuer les effets découlant de la contravention.

Avis

(2) L'ordre est communiqué sous forme d'avis écrit précisant les motifs ainsi que les délais et modalités d'exécution.

Obligation de se conformer à l'ordre

(3) La personne à qui l'ordre est donné est tenue de s'y conformer.

Prise de mesures par la personne désignée

95 Si la personne ne se conforme pas à l'ordre donné en vertu du paragraphe 94(1) dans le délai imparti, la personne désignée peut, de sa propre initiative, prendre la mesure en cause aux frais de la personne.

Injunctions

Court's power

96 (1) If, on the Minister's application, it appears to a court of competent jurisdiction that a person has done, is about to do or is likely to do any act constituting or directed toward the commission of an offence under section 99, the court may issue an injunction ordering the person who is named in the application to

(a) refrain from doing an act that, in the court's opinion, may constitute or be directed toward the commission of the offence; or

(b) do an act that, in the opinion of the court, may prevent the commission of the offence.

Notice

(2) At least 48 hours before the injunction is issued, notice of the application must be given to persons named in the application, unless the urgency of the situation is such that the delay involved in giving the notice would not be in the public interest.

Prohibitions and Offences

Obstruction

97 It is prohibited to obstruct or hinder a designated person who is exercising their powers or performing their duties and functions under this Act.

False statements or information

98 It is prohibited to knowingly make a false or misleading statement or knowingly provide false or misleading information in connection with any matter under this Act to any person who is exercising their powers or performing their duties and functions under this Act.

Contravention — section 6

99 (1) Any proponent who contravenes section 6 is guilty of an offence punishable on summary conviction and is liable, for a first offence, to a fine of not more than $200,000 and, for any subsequent offence, to a fine of not more than $400,000.

Contravention — subsection 94(3)

(2) A person who contravenes subsection 94(3) is guilty of an offence punishable on summary conviction and is liable, for a first offence, to a fine of not more than $200,000 and, for any subsequent offence, to a fine of not more than $400,000.

Injonction

Pouvoir du tribunal compétent

96 (1) Si, sur demande présentée par le ministre, il conclut à l'existence, l'imminence ou la probabilité d'un fait constituant une infraction visée à l'article 99, ou tendant à sa perpétration, le tribunal compétent peut, par ordonnance, enjoindre à la personne nommée dans la demande :

a) de s'abstenir de tout acte susceptible, selon lui, de constituer l'infraction ou de tendre à sa perpétration;

b) d'accomplir tout acte susceptible, selon lui, d'empêcher la perpétration de l'infraction.

Préavis

(2) L'injonction est subordonnée à la signification d'un préavis d'au moins quarante-huit heures aux parties nommées dans la demande, sauf lorsque cela serait contraire à l'intérêt public en raison de l'urgence de la situation.

Interdictions et infractions

Entrave

97 Il est interdit d'entraver l'action de toute personne désignée qui agit dans l'exercice des attributions qui lui sont conférées par la présente loi.

Renseignements faux ou trompeurs

98 Il est interdit de faire sciemment une déclaration fausse ou trompeuse ou de communiquer sciemment des renseignements faux ou trompeurs, relativement à toute question visée par la présente loi, à toute personne qui agit dans l'exercice des attributions qui lui sont conférées par la présente loi.

Contravention à l'article 6

99 (1) Tout promoteur qui contrevient à l'article 6 commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 200 000 $ lors d'une première infraction et, en cas de récidive, une amende maximale de 400 000 $.

Contravention au paragraphe 94(3)

(2) Quiconque contrevient au paragraphe 94(3) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 200 000 $ lors d'une première infraction et, en cas de récidive, une amende maximale de 400 000 $.

Contravention — section 97

(3) Any person who contravenes section 97 is guilty of an offence punishable on summary conviction and is liable, for a first offence, to a fine of not more than $100,000 and, for any subsequent offence, to a fine of not more than $300,000.

Continuing offences

(4) If an offence under subsection (1) or (2) is committed or continued on more than one day, it constitutes a separate offence for each day on which it is committed or continued.

Due diligence defence

(5) A person must not be found guilty of an offence under subsection (1), (2) or (3) if they establish that they exercised due diligence to prevent the commission of the offence.

Contravention — section 98

100 Any person who contravenes section 98 is guilty of an offence punishable on summary conviction and is liable to a fine of not more than $300,000.

Limitation period

101 Proceedings by way of summary conviction in respect of an offence under this Act may be instituted at any time within two years after the day on which the Minister becomes aware of the acts or omissions that constitute the alleged offence.

Admissibility of evidence

102 (1) In proceedings for an offence under this Act, a statement, certificate, report or other document of the Minister, the responsible authority or the designated person that is purported to have been signed by that person or authority is admissible in evidence without proof of the signature or official character of the person appearing to have signed it and, in the absence of evidence to the contrary, is proof of the matters asserted in it.

Copies and extracts

(2) In proceedings for an offence under this Act, a copy of or an extract from any document that is made by the Minister, the responsible authority or the designated person that appears to have been certified under the signature of that person or authority as a true copy or extract is admissible in evidence without proof of the signature or official character of the person appearing to have signed it and, in the absence of evidence to the contrary, has the same probative force as the original would have if it were proved in the ordinary way.

Contravention à l'article 97

(3) Quiconque contrevient à l'article 97 commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 100 000 $ lors d'une première infraction et, en cas de récidive, une amende maximale de 300 000 $.

Infraction continue

(4) Il est compté une infraction distincte pour chacun des jours au cours desquels se réalise ou se continue la perpétration de l'infraction prévue aux paragraphes (1) ou (2).

Disculpation : précautions voulues

(5) Nul ne peut être déclaré coupable de l'infraction prévue aux paragraphes (1), (2) ou (3) s'il prouve qu'il a pris toutes les précautions voulues pour prévenir sa perpétration.

Contravention à l'article 98

100 Quiconque contrevient à l'article 98 commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 300 000 $.

Prescription

101 Les poursuites pour une infraction à la présente loi punissable sur déclaration de culpabilité par procédure sommaire se prescrivent par deux ans à compter de la date où le ministre a eu connaissance des faits reprochés.

Admissibilité

102 (1) Dans les poursuites pour infraction à la présente loi, la déclaration, le certificat, le rapport ou tout autre document paraissant signé par le ministre, l'autorité responsable ou la personne désignée est admissible en preuve sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ni la qualité officielle du signataire; sauf preuve contraire, il fait foi de son contenu.

Copies ou extraits

(2) De même, la copie ou l'extrait de documents établis par le ministre, l'autorité responsable ou la personne désignée et paraissant certifié conforme par lui est admissible en preuve sans qu'il soit nécessaire de prouver l'authenticité de la certification ni la qualité officielle du certificateur; sauf preuve contraire, il a la force probante d'un original dont l'authenticité serait prouvée de la manière habituelle.

Presumed date of issue

(3) A document referred to in this section is, in the absence of evidence to the contrary, presumed to have been issued on the date that it bears.

Notice

(4) No document referred to in this section may be received in evidence unless the party intending to produce it has provided reasonable notice of that intention to the party against whom it is intended to be produced together with a copy of the document.

Canadian Environmental Assessment Agency

Agency continued

103 (1) The Canadian Environmental Assessment Agency is continued and must advise and assist the Minister in exercising the powers and performing the duties and functions conferred on him or her by this Act.

Minister's responsibility

(2) The Minister is responsible for the Agency.

Delegation to Agency

104 (1) The Minister may, subject to any terms and conditions that the Minister specifies, delegate to an officer or employee of the Agency any of the powers, duties and functions that the Minister is authorized to exercise or perform under this Act.

Restriction

(2) However, the Minister is not authorized to delegate a power to make regulations nor a power to delegate under subsection (1).

Agency's objects

105 The Agency's objects are

(a) to conduct or administer environmental assessments and administer any other requirements and procedures established by this Act and the regulations;

(b) to promote uniformity and harmonization in relation to the assessment of environmental effects across Canada at all levels of government;

(c) to promote or conduct research in matters of environmental assessment and to encourage the development of environmental assessment techniques and

Date

(3) Sauf preuve contraire, les documents visés au présent article sont présumés avoir été établis à la date qu'ils portent.

Préavis

(4) Ils ne sont reçus en preuve que si la partie qui entend les produire contre une autre lui donne un préavis suffisant, en y joignant une copie de ceux-ci.

Agence canadienne d'évaluation environnementale

Maintien

103 (1) Est maintenue l'Agence canadienne d'évaluation environnementale chargée de conseiller et d'assister le ministre dans l'exercice des attributions qui lui sont conférées par la présente loi.

Responsabilité du ministre

(2) L'Agence est placée sous la responsabilité du ministre.

Délégation d'attributions à l'Agence

104 (1) Le ministre peut, selon les modalités qu'il fixe, déléguer à tout dirigeant ou employé de l'Agence les attributions qui lui sont conférées sous le régime de la présente loi.

Réserve

(2) Il ne peut toutefois déléguer le pouvoir de prendre des règlements ni le pouvoir de délégation prévu au paragraphe (1).

Mission

105 L'Agence a pour mission :

a) d'effectuer ou de gérer les évaluations environnementales et de gérer toute autre procédure ou exigence établies par la présente loi et les règlements;

b) de promouvoir l'uniformisation et l'harmonisation en matière d'évaluation des effets environnementaux à l'échelle du Canada et à tous les niveaux administratifs;

c) seule ou en collaboration avec d'autres organismes, de promouvoir la recherche en matière d'évaluation environnementale ainsi que de mener des recherches

practices, including testing programs, alone or in co-operation with other agencies or organizations;

(d) to promote environmental assessment in a manner that is consistent with the purposes of this Act;

(e) to promote, monitor and facilitate compliance with this Act;

(f) to promote and monitor the quality of environmental assessments conducted under this Act; and

(g) to engage in consultation with Aboriginal peoples on policy issues related to this Act.

et de favoriser l'élaboration de techniques en la matière, notamment en ce qui a trait aux programmes d'essais;

d) de promouvoir les évaluations environnementales conformément à l'objet de la présente loi;

e) de promouvoir, de surveiller et de faciliter l'observation de la présente loi;

f) de promouvoir et de contrôler la qualité des évaluations effectuées sous le régime de la présente loi;

g) de tenir des consultations avec les peuples autochtones au sujet des questions de politique liées à la présente loi.

Agency's duties

106 (1) In carrying out its objects, the Agency must

(a) provide support for review panels and any committees established under section 73 or under an agreement or arrangement entered into under paragraph 74(1)(a) or (b);

(b) provide, on the Minister's request, administrative support for any research and advisory body established under paragraph 86(1)(b); and

(c) provide information or training to facilitate the application of this Act.

Attributions de l'Agence

106 (1) Dans l'exécution de sa mission, l'Agence :

a) fournit un soutien aux commissions et à tout comité constitué aux termes de l'article 73 ou au titre d'un accord conclu aux termes des alinéas 74(1)a) ou b);

b) à la demande du ministre, fournit un soutien administratif aux organismes de recherche et de consultation créés en vertu de l'alinéa 86(1)b);

c) fournit toute information ou formation en vue de faciliter l'application de la présente loi.

Agency's powers

(2) In carrying out its objects, the Agency may

(a) undertake studies or activities or conduct research relating to environmental assessment;

(b) advise persons and organizations on matters relating to the assessment of environmental effects; and

(c) negotiate agreements or arrangements referred to in paragraph 86(1)(c) or (d) on the Minister's behalf.

Pouvoirs de l'Agence

(2) Dans l'exécution de sa mission, l'Agence peut :

a) mener des études, réaliser des travaux ou mener des recherches en matière d'évaluation environnementale;

b) conseiller toute personne ou tout organisme en matière d'évaluation des effets environnementaux;

c) négocier, au nom du ministre, les accords prévus aux alinéas 86(1)c) et d).

Using government facilities

107 In exercising its powers and performing its duties and functions under this Act, the Agency must, when appropriate, make use of the services and facilities of departments, boards and agencies of the Government of Canada.

Usage des services fédéraux

107 Dans l'exercice de ses attributions, l'Agence fait usage, au besoin, des installations et services des ministères et organismes fédéraux.

President

108 (1) The Governor in Council appoints an officer to be the President of the Agency, to hold office during pleasure, who is, for the purposes of this Act, a deputy of the Minister.

President — chief executive officer

(2) The President is the Agency's chief executive officer, and may exercise all of the Minister's powers under this Act as authorized by the Minister.

Acting President — Executive Vice-president

(3) Subject to subsection (5), in the event of the absence or incapacity of the President or a vacancy in that office, the Executive Vice-president acts as, and exercises the powers of, the President in the interim.

Acting President — other person

(4) Subject to subsection (5), the Minister may appoint a person other than the Executive Vice-president to act as the President in the interim.

Governor in Council's approval required

(5) The Executive Vice-president, or a person appointed under subsection (4), must not act as the President for a period exceeding 90 days without the Governor in Council's approval.

Executive Vice-president

109 (1) The Governor in Council may appoint an officer to be the Executive Vice-president of the Agency and to hold office during pleasure.

Powers, duties and functions

(2) The Executive Vice-president must exercise any powers and perform any duties and functions that the President may assign.

Remuneration

110 The President and the Executive Vice-president are to be paid any remuneration that the Governor in Council may fix.

Appointment under *Public Service Employment Act*

111 The employees who are necessary to carry out the Agency's work are to be appointed in accordance with the *Public Service Employment Act*.

Président

108 (1) Le gouverneur en conseil nomme à titre amovible le président de l'Agence; celui-ci a, pour l'application de la présente loi, rang d'administrateur général de ministère.

Premier dirigeant

(2) Le président est le premier dirigeant de l'Agence et peut exercer les pouvoirs que la présente loi confère au ministre et que celui-ci l'autorise à exercer.

Absence ou empêchement — premier vice-président

(3) Sous réserve du paragraphe (5), en cas d'absence ou d'empêchement du président ou de vacance de son poste, l'intérim est assuré par le premier vice-président.

Absence ou empêchement — autre personne

(4) Sous réserve du paragraphe (5), le ministre peut nommer une autre personne que le premier vice-président pour assurer l'intérim.

Approbation du gouverneur en conseil

(5) Le premier vice-président ou une personne nommée aux termes du paragraphe (4) ne peut assurer l'intérim que pour une période de quatre-vingt-dix jours, sauf approbation du gouverneur en conseil.

Premier vice-président

109 (1) Le gouverneur en conseil peut nommer à titre amovible le premier vice-président de l'Agence.

Pouvoirs et fonctions

(2) Le premier vice-président exerce les pouvoirs et fonctions que lui attribue le président.

Rémunération

110 Les président et premier vice-président reçoivent la rémunération fixée par le gouverneur en conseil.

Nominations : *Loi sur l'emploi dans la fonction publique*

111 Le personnel nécessaire à l'exécution des travaux de l'Agence est nommé conformément à la *Loi sur l'emploi dans la fonction publique*.

Head office

112 The head office of the Agency is to be in the National Capital Region as described in the schedule to the *National Capital Act*.

Contracts, etc., binding on Her Majesty

113 (1) Every contract, memorandum of understanding and arrangement entered into by the Agency in its own name is binding on Her Majesty in right of Canada to the same extent as it is binding on the Agency.

Legal proceedings

(2) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Agency, whether in its own name or in the name of Her Majesty in right of Canada, may be brought or taken by or against the Agency in its own name in any court that would have jurisdiction if the Agency were a corporation that is not an agent of Her Majesty.

Annual Report

Annual report to Parliament

114 (1) The Minister must, at the end of each fiscal year, prepare a report on the Agency's activities and the administration and implementation of this Act during the previous fiscal year.

Tabling in Parliament

(2) The Minister must, during the fiscal year after the fiscal year for which the report is prepared, cause the report to be laid before each House of Parliament.

Transitional Provisions

Definitions

115 The following definitions apply in this section and sections 116 to 129.

former Act means the *Canadian Environmental Assessment Act*, chapter 37 of the Statutes of Canada, 1992. (*ancienne loi*)

former Agency means the Canadian Environmental Assessment Agency established by section 61 of the former Act. (*ancienne Agence*)

Siège

112 Le siège de l'Agence est fixé dans la région de la capitale nationale définie à l'annexe de la *Loi sur la capitale nationale*.

Contrats

113 (1) Les contrats ou ententes conclus par l'Agence sous son propre nom lient Sa Majesté du chef du Canada au même titre qu'elle-même.

Actions en justice

(2) À l'égard des droits et obligations qu'elle assume sous le nom de Sa Majesté du chef du Canada ou le sien, l'Agence peut ester en justice sous son propre nom devant tout tribunal qui serait compétent si elle était dotée de la personnalité morale et n'avait pas la qualité de mandataire de Sa Majesté.

Rapport annuel

Rapport annuel du ministre

114 (1) À la fin de chaque exercice, le ministre établit un rapport sur l'application de la présente loi et les activités de l'Agence au cours de l'exercice précédent.

Dépôt au Parlement

(2) Il fait déposer le rapport avant la fin de l'exercice en cours devant chaque chambre du Parlement.

Dispositions transitoires

Définitions

115 Les définitions qui suivent s'appliquent au présent article et aux articles 116 à 129.

ancienne Agence L'Agence canadienne d'évaluation environnementale constituée par l'article 61 de l'ancienne loi. (*former Agency*)

ancienne loi La *Loi canadienne sur l'évaluation environnementale*, chapitre 37 des Lois du Canada (1992). (*former Act*)

President of former Agency

116 The person who holds the office of President of the former Agency immediately before the day on which this Act comes into force continues in office as the President of the Agency until the expiry or revocation of the appointment.

Executive Vice-president of former Agency

117 The person who holds the office of Executive Vice-president of the former Agency immediately before the day on which this Act comes into force continues in office as the Executive Vice-president of the Agency until the expiry or revocation of the appointment.

Employment continued

118 (1) Nothing in this Act is to be construed to affect the status of an employee who, immediately before the day on which this Act comes into force, occupied a position in the former Agency, except that the employee is to, on that day, occupy their position in the Agency.

Definition of *employee*

(2) For the purposes of this section, ***employee*** has the same meaning as in subsection 2(1) of the *Public Service Employment Act*.

References

119 Every reference to the former Agency in any deed, contract, agreement or other document executed by the former Agency in its own name is, unless the context otherwise requires, to be read as a reference to the Agency.

Transfer of rights and obligations

120 All rights and property of the former Agency and of Her Majesty in right of Canada that are under the administration and control of the former Agency and all obligations of the former Agency are transferred to the Agency.

Commencement of legal proceedings

121 Any action, suit or other legal proceeding in respect of an obligation or liability incurred by the former Agency may be brought against the Agency in any court that would have had jurisdiction if the action, suit or other legal proceeding had been brought against the former Agency.

Continuation of legal proceedings

122 Any action, suit or other legal proceeding to which the former Agency is party that is pending in any court immediately before the day on which this Act comes into force may be continued by or against the Agency in like manner and to the same extent as it could have been continued by or against the former Agency.

Président de l'ancienne Agence

116 La personne qui occupe la charge de président de l'ancienne Agence à la date d'entrée en vigueur de la présente loi continue d'exercer ses fonctions, à titre de président de l'Agence, jusqu'à l'expiration ou la révocation de son mandat.

Premier vice-président de l'ancienne Agence

117 La personne qui occupe la charge de premier vice-président de l'ancienne Agence à la date d'entrée en vigueur de la présente loi continue d'exercer ses fonctions, à titre de premier vice-président de l'Agence, jusqu'à l'expiration ou la révocation de son mandat.

Postes

118 (1) La présente loi ne change rien à la situation des fonctionnaires qui occupaient un poste à l'ancienne Agence à la date d'entrée en vigueur de la présente loi, à la différence près que, à compter de cette date, ils l'occupent à l'Agence.

Définition de *fonctionnaire*

(2) Pour l'application du présent article, ***fonctionnaire*** s'entend au sens du paragraphe 2(1) de la *Loi sur l'emploi dans la fonction publique*.

Renvois

119 Sauf indication contraire du contexte, dans tous les contrats, actes et autres documents signés par l'ancienne Agence sous son nom, les renvois à l'ancienne Agence valent renvois à l'Agence.

Transfert des droits et obligations

120 Les biens et les droits de Sa Majesté du chef du Canada dont la gestion était confiée à l'ancienne Agence ainsi que les biens et les droits et obligations de celle-ci sont transférés à l'Agence.

Procédures judiciaires nouvelles

121 Les procédures judiciaires relatives aux obligations supportées ou aux engagements pris par l'ancienne Agence peuvent être intentées contre l'Agence devant tout tribunal qui aurait eu compétence pour être saisi des procédures intentées contre l'ancienne Agence.

Procédures en cours devant les tribunaux

122 L'Agence prend la suite de l'ancienne Agence, au même titre et dans les mêmes conditions que celle-ci, comme partie aux procédures judiciaires en cours à la date d'entrée en vigueur de la présente loi et auxquelles l'ancienne Agence est partie.

Appropriations

123 Any amount appropriated, for the fiscal year in which this Act comes into force, by an appropriation Act based on the Estimates for that year for defraying the charges and expenses of the former Agency and that, on the day on which this Act comes into force, is unexpended is considered, on that day, to be an amount appropriated for defraying the charges and expenses of the Agency.

Transfert de crédits

123 Les sommes affectées — et non engagées —, pour l'exercice en cours à l'entrée en vigueur de la présente loi, par toute loi de crédits consécutive aux prévisions budgétaires de cet exercice, aux frais et dépenses d'administration publique de l'ancienne Agence sont réputées être affectées aux dépenses d'administration publique de l'Agence.

Completion of screenings commenced under former Act

124 (1) Subject to subsections (3) to (5), any screening of a project commenced under the former Act before the day on which this Act comes into force must, if the project is a designated project, be continued and completed as if the former Act had not been repealed.

Achèvement des examens préalables commencés sous le régime de l'ancienne loi

124 (1) Sous réserve des paragraphes (3) à (5), tout examen préalable d'un projet commencé sous le régime de l'ancienne loi avant la date d'entrée en vigueur de la présente loi est mené à terme comme si l'ancienne loi n'avait pas été abrogée dans le cas où le projet en cause est un projet désigné.

Minister's power

(2) The Minister may, only on the day on which this Act comes into force, exercise the power conferred by subsection 14(2) with respect to a physical activity that is included in a project that was the subject of a screening commenced under the former Act before the day on which this Act comes into force, and that is not completed on that day and that is not, on that day, a designated project.

Pouvoir du ministre

(2) Le ministre ne peut exercer qu'à la date d'entrée en vigueur de la présente loi le pouvoir que le paragraphe 14(2) lui confère à l'égard d'une activité concrète comprise dans un projet dont l'examen préalable, commencé sous le régime de l'ancienne loi avant cette date d'entrée en vigueur, n'est pas complété à cette date et qui n'est pas, à la même date, un projet désigné.

Time limit

(3) The responsible authority with respect to the project to which subsection (1) applies must take a course of action under section 20 of the former Act no later than 365 days after the day on which this Act comes into force.

Délai

(3) L'autorité responsable à l'égard du projet assujetti au paragraphe (1) doit prendre une décision au titre de l'article 20 de l'ancienne loi dans les trois cent soixante-cinq jours suivant la date d'entrée en vigueur de la présente loi.

Exclusion

(4) If the responsible authority under subsection 18(2) of the former Act requires the proponent of the project to collect information or undertake a study with respect to the project, the period that is taken by the proponent, in the opinion of the responsible authority, to comply with the requirement, is not included in the calculation of the 365-day time limit.

Période exclue du délai

(4) Dans le cas où l'autorité responsable exige du promoteur du projet, au titre du paragraphe 18(2) de l'ancienne loi, qu'il procède à des études ou à la collecte de renseignements relativement au projet, la période prise, de l'avis de l'autorité responsable, par le promoteur pour remplir l'exigence n'est pas comprise dans le calcul du délai de trois cent soixante-cinq jours.

Project requiring assessment by review panel

(5) If, during the screening or once the screening is completed, the Minister is of the opinion that the project must be referred to a review panel, the environmental assessment of the project is continued under the process established under this Act. The project is considered to be a designated project and the Minister must refer the

Projet devant faire l'objet d'un examen par une commission

(5) Si au cours de l'examen préalable ou au terme de celui-ci le ministre est d'avis que le projet doit faire l'objet d'un examen par une commission, l'évaluation environnementale de celui-ci se poursuit sous le régime de la présente loi, le projet étant réputé être un projet désigné, et le ministre renvoie, au titre de l'article 38, cette évaluation pour examen par une commission.

environmental assessment of the project to a review panel under section 38.

Completion of comprehensive studies commenced under former Act

125 (1) Subject to subsections (2) to (6), any comprehensive study of a project commenced under the former Act before the day on which this Act comes into force is continued and completed as if the former Act had not been repealed.

Establishing Timelines for Comprehensive Studies Regulations

(2) The *Establishing Timelines for Comprehensive Studies Regulations* are deemed to have come into force on July 12, 2010 with respect to a comprehensive study to which subsection (1) applies.

Six-month time limit

(3) With respect to any comprehensive study commenced before July 12, 2010 to which subsection (1) applies with respect to a project for which the responsible authority is not the Canadian Nuclear Safety Commission, the responsible authority must ensure that the Minister and the Agency are provided with the comprehensive study report no later than six months after the day on which this Act comes into force.

Six-month time limit

(4) With respect to any comprehensive study to which subsection (1) applies and which was commenced before July 12, 2010 by a port authority established under section 8 of the *Canada Marine Act*, the port authority must ensure that the comprehensive study report is provided to the Minister of Transport and the Agency no later than six months after the day on which this Act comes into force.

Excluded periods

(5) If, under the former Act, the responsible authority or the port authority requires the proponent to collect information or undertake a study with respect to the project, then

(a) the period that is taken by the proponent, in the opinion of the responsible authority, to comply with the requirement, is not included in the calculation of the six-month time limit referred to in subsection (3); and

(b) the period that is taken by the proponent, in the opinion of the port authority, to comply with the requirement, is not included in the calculation of the six-month time limit referred to in subsection (4).

Achèvement des études approfondies commencées sous le régime de l'ancienne loi

125 (1) Sous réserve des paragraphes (2) à (6), toute étude approfondie d'un projet commencée sous le régime de l'ancienne loi avant la date d'entrée en vigueur de la présente loi est menée à terme comme si l'ancienne loi n'avait pas été abrogée.

Règlement établissant les échéanciers relatifs aux études approfondies

(2) Le *Règlement établissant les échéanciers relatifs aux études approfondies* est réputé être entré en vigueur le 12 juillet 2010 relativement aux études approfondies assujetties au paragraphe (1).

Délai de six mois

(3) En ce qui a trait à toute étude approfondie assujettie au paragraphe (1) qui est commencée avant le 12 juillet 2010 relativement à un projet dont l'autorité responsable n'est pas la Commission canadienne de sûreté nucléaire, l'autorité responsable veille à ce que le rapport d'étude approfondie soit présenté au ministre et à l'Agence dans les six mois suivant la date d'entrée en vigueur de la présente loi.

Délai de six mois

(4) En ce qui a trait à toute étude approfondie assujettie au paragraphe (1) qui est commencée avant le 12 juillet 2010 par une administration portuaire constituée en vertu de l'article 8 de la *Loi maritime du Canada*, l'administration portuaire veille à ce que le rapport d'étude approfondie soit présenté au ministre des Transports et à l'Agence dans les six mois suivant la date d'entrée en vigueur de la présente loi.

Périodes exclues du délai

(5) Dans le cas où l'autorité responsable ou l'administration portuaire exigent du promoteur du projet, au titre de l'ancienne loi, qu'il procède à des études ou à la collecte de renseignements :

a) la période prise, de l'avis de l'autorité responsable, par le promoteur pour remplir l'exigence n'est pas comprise dans le calcul du délai de six mois visé au paragraphe (3);

b) la période prise, de l'avis de l'administration portuaire, pour remplir l'exigence n'est pas comprise dans le calcul du délai de six mois visé au paragraphe (4).

Project requiring assessment by review panel

(6) If, during the comprehensive study, the Minister is of the opinion that the project must be referred to a review panel, the environmental assessment of the project is continued under the process established under this Act. The project is considered to be a designated project and the Minister must refer the environmental assessment of the project to a review panel under section 38.

Minister's powers

(7) The Minister may, by order, exclude any comprehensive study of a project from the application of subsection (1) and provide that the environmental assessment of the project is continued under the process established under this Act. In such a case, the project is considered to be a designated project and, despite subsection 27(2), when the Minister must make decisions under section 27 with respect to the designated project, he or she must specify in the order the time limit for the decisions to be made. Subsections 27(3), (4) and (6) apply with respect to the time limit.

Posting of notice of order on Internet site

(8) The Agency must post a notice of any order made under subsection (7) on the Internet site.

Completion of assessment by a review panel commenced under former Act

126 (1) Despite subsection 38(6) and subject to subsections (2) to (6), any assessment by a review panel, in respect of a project, commenced under the process established under the former Act before the day on which this Act comes into force is continued under the process established under this Act as if the environmental assessment had been referred by the Minister to a review panel under section 38. The project is considered to be a designated project for the purposes of this Act and Part 3 of the *Jobs, Growth and Long-term Prosperity Act*, and

(a) if, before that day, a review panel was established under section 33 of the former Act, in respect of the project, that review panel is considered to have been established — and its members are considered to have been appointed — under subsection 42(1) of this Act;

(b) if, before that day, an agreement or arrangement was entered into under subsection 40(2) of the former Act, in respect of the project, that agreement or arrangement is considered to have been entered into under section 40 of this Act; and

(c) if, before that day, a review panel was established by an agreement or arrangement entered into under subsection 40(2) of the former Act or by document

Projet devant faire l'objet d'un examen par une commission

(6) Si, au cours de l'étude approfondie, le ministre est d'avis que le projet doit faire l'objet d'un examen par une commission, l'évaluation environnementale de celui-ci se poursuit sous le régime de la présente loi, le projet étant réputé être un projet désigné, et le ministre renvoie, au titre de l'article 38, cette évaluation pour examen par une commission.

Pouvoir du ministre

(7) Le ministre peut, par arrêté, soustraire toute étude approfondie d'un projet à l'application du paragraphe (1) et prévoir que l'évaluation environnementale de celui-ci se poursuivra sous le régime de la présente loi; le cas échéant, le projet est réputé être un projet désigné et, si le ministre doit prendre des décisions au titre de l'article 27 relativement au projet, il précise dans l'arrêté, malgré le paragraphe 27(2), le délai qui lui est imparti pour prendre les décisions et les paragraphes 27(3), (4) et (6) s'appliquent à ce délai.

Avis de l'arrêté affiché sur le site Internet

(8) L'Agence affiche sur le site Internet un avis de tout arrêté pris en application du paragraphe (7).

Achèvement des examens par une commission commencés sous le régime de l'ancienne loi

126 (1) Malgré le paragraphe 38(6) et sous réserve des paragraphes (2) à (6), tout examen par une commission d'un projet commencé sous le régime de l'ancienne loi avant la date d'entrée en vigueur de la présente loi se poursuit sous le régime de la présente loi comme si le ministre avait renvoyé, au titre de l'article 38, l'évaluation environnementale du projet pour examen par une commission; le projet est réputé être un projet désigné pour l'application de la présente loi et de la partie 3 de la *Loi sur l'emploi, la croissance et la prospérité durable* et :

a) si, avant cette date d'entrée en vigueur, une commission avait été constituée aux termes de l'article 33 de l'ancienne loi relativement au projet, elle est réputée avoir été constituée — et ses membres sont réputés avoir été nommés — aux termes du paragraphe 42(1) de la présente loi;

b) si, avant cette date, un accord avait été conclu aux termes du paragraphe 40(2) de l'ancienne loi relativement au projet, il est réputé avoir été conclu en vertu de l'article 40 de la présente loi;

c) si, avant cette date, une commission avait été constituée en vertu d'un accord conclu aux termes du paragraphe 40(2) de l'ancienne loi ou du document

referred to in subsection 40(2.1) of the former Act, in respect of the project, it is considered to have been established by — and its members are considered to have been appointed under — an agreement or arrangement entered into under section 40 of this Act or by document referred to in subsection 41(2) of this Act.

visé au paragraphe 40(2.1) de l'ancienne loi relativement au projet, elle est réputée avoir été constituée — et ses membres sont réputés avoir été nommés — en vertu d'un accord conclu aux termes de l'article 40 de la présente loi ou du document visé au paragraphe 41(2) de la présente loi.

Time limit for issuing decision statement under section 54

(2) The Minister must establish the time limit within which, from the day on which this Act comes into force, the decision statement that is required under section 54 in respect of the project must be issued. Subsection 54(3) applies with respect to the time limit.

Délai pour faire une déclaration au titre de l'article 54

(2) Le ministre fixe le délai qui est imparti pour faire une déclaration, au titre de l'article 54, relativement au projet, lequel délai court à compter de la date d'entrée en vigueur de la présente loi. Le paragraphe 54(3) s'applique alors à ce délai.

Other time limits

(3) The Minister must, in respect of the project, also establish any of the time limits set out in paragraphs 38(3)(a) to (c) — which combined are not to exceed the time limit referred to in subsection (2) — that are necessary, depending on whether, on the day on which this Act comes into force, the review panel has or has not been established or the report with respect to the environmental assessment of the project has or has not been submitted to the Minister.

Autres délais

(3) Il fixe également relativement au projet ceux des délais visés aux alinéas 38(3)a) à c) — dont la somme ne peut excéder le délai visé au paragraphe (2) — qui sont indiqués selon que, à la date d'entrée en vigueur de la présente loi, la commission a ou non été constituée ou le rapport d'évaluation environnementale lui a ou non été présenté.

Certain time limits established jointly

(4) In respect of a project to which paragraph (1)(b) applies and for which the responsible authority is referred to in paragraph 15(a) or (b), the Minister jointly establishes the time limits under subsections (2) and (3) with the responsible authority with respect to the project.

Certains délais fixés conjointement avec l'autorité responsable

(4) S'agissant d'un projet pour lequel l'alinéa (1)b) s'applique et pour lequel l'autorité responsable est visée aux alinéas 15a) ou b), le ministre fixe les délais au titre des paragraphes (2) et (3) conjointement avec l'autorité responsable à l'égard du projet.

Posting time limits on Internet site

(5) The Agency must post on the Internet site a notice of any time limits established under subsection (2) or (3) in respect of the project.

Avis des délais affiché sur le site Internet

(5) L'Agence affiche sur le site Internet un avis des délais fixés au titre des paragraphes (2) ou (3) relativement au projet.

Excluded periods

(6) If the Agency, the review panel or the Minister, under section 39 or subsection 44(2) or 47(2), respectively, requires the proponent of the project to collect information or undertake a study with respect to the designated project, the following periods are not included in the calculation of the time limit within which the Minister must issue the decision statement in respect of the project nor in the calculation of any of the time limits that are established under subsection (3):

(a) the period that is taken by the proponent, in the opinion of the Agency, to comply with the requirement under section 39;

Périodes exclues des délais

(6) Dans le cas où l'Agence, la commission ou le ministre exigent du promoteur du projet, au titre de l'article 39 ou des paragraphes 44(2) ou 47(2), selon le cas, qu'il procède à des études ou à la collecte de renseignements relativement au projet, ne sont pas comprises dans le calcul du délai dont dispose le ministre pour faire la déclaration relativement au projet ni dans celui des délais fixés au titre du paragraphe (3) :

a) la période prise, de l'avis de l'Agence, par le promoteur pour remplir l'exigence au titre de l'article 39;

(b) the period that is taken by the proponent, in the opinion of the review panel, to comply with the requirement under subsection 44(2); and

(c) the period that is taken by the proponent, in the opinion of the Minister, to comply with the requirement under subsection 47(2).

b) la période prise, de l'avis de la commission, par le promoteur pour remplir l'exigence au titre du paragraphe 44(2);

c) la période prise, de l'avis du ministre, par le promoteur pour remplir l'exigence au titre du paragraphe 47(2).

Substitution under former Act

127 The environmental assessment of a project commenced under the former Act before the day on which this Act comes into force for which the Minister has, before that date, approved the substitution of a process under section 43 of the former Act is continued and completed as if the former Act had not been repealed.

Substitution

127 L'évaluation environnementale d'un projet commencée sous le régime de l'ancienne loi avant la date d'entrée en vigueur de la présente loi et pour laquelle le ministre a accordé, avant cette date, une autorisation en vertu de l'article 43 de l'ancienne loi est menée à terme comme si l'ancienne loi n'avait pas été abrogée.

Non-application of this Act

128 (1) This Act does not apply to a project, as defined in the former Act, that is a designated project as defined in this Act, if one of the following conditions applies:

(a) the proponent of the project has, before the day on which this Act comes into force, initiated the construction of the project;

(b) it was determined by the Agency or a federal authority under the former Act that an environmental assessment of the project was likely not required;

(c) the responsible authority has taken a course of action under paragraph 20(1)(a) or (b) or subsection 37(1) of the former Act in relation to the project; or

(d) an order issued under subsection (2) applies to the project.

Non-application de la présente loi

128 (1) La présente loi ne s'applique pas à un projet, au sens de l'ancienne loi, qui est un projet désigné au sens de la présente loi si l'une des conditions ci-après est remplie :

a) le promoteur du projet a entamé la construction du projet avant la date d'entrée en vigueur de la présente loi;

b) l'Agence ou l'autorité fédérale a décidé sous le régime de l'ancienne loi qu'une évaluation environnementale du projet n'était vraisemblablement pas nécessaire;

c) l'autorité responsable a pris une décision au titre des alinéas 20(1)a) ou b) ou du paragraphe 37(1) de l'ancienne loi relativement au projet;

d) le projet est visé par un arrêté pris en vertu du paragraphe (2).

Exception

(1.1) Paragraph (1)(b) does not apply if the carrying out of the project in whole or in part requires that a federal authority exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act and that power, duty or function was a power, duty or function referred to in subsection 5(1) of the former Act.

Exception

(1.1) L'alinéa (1)b) ne s'applique pas si la réalisation en tout ou en partie du projet exige l'exercice par une autorité fédérale d'attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi et qui étaient des attributions visées au paragraphe 5(1) de l'ancienne loi.

Cessation of effect

(1.2) Subsection (1.1) ceases to have effect on January 1, 2014.

Cessation d'effet

(1.2) Le paragraphe (1.1) cesse d'avoir effet le 1er janvier 2014.

Minister's powers

(2) On the day on which this Act comes into force, the Minister may, by order, exclude from the application of this Act a project, as defined in the former Act, that is a

Pouvoir du ministre

(2) À la date d'entrée en vigueur de la présente loi, le ministre peut, par arrêté, soustraire à l'application de la présente loi un projet, au sens de l'ancienne loi, qui est

designated project under this Act, if the Minister is of the opinion that the project was not subject to the former Act and that another jurisdiction that has powers, duties or functions in relation to the assessment of the environmental effects of the project has commenced that assessment.

Posting of notice of order on Internet site

(3) The Agency must post a notice of any order made under subsection (2) on the Internet site.

2012, c. 19, s. 52 "128", c. 31, s. 432.

Privileged evidence, documents or things

129 The evidence, documents or things that, before the day on which this Act comes into force, are privileged under subsection 35(4) or (4.1) of the former Act are considered to be privileged under subsection 45(4) or (5), respectively, of this Act.

un projet désigné au sens de la présente loi, s'il est d'avis que le projet n'était pas assujetti à l'ancienne loi et qu'une instance ayant des attributions relatives à l'évaluation des effets environnementaux du projet en a commencé l'évaluation avant cette date.

Avis de l'arrêté affiché sur le site Internet

(3) L'Agence affiche sur le site Internet un avis de tout arrêté pris en application du paragraphe (2).

2012, ch. 19, art. 52 « 128 », ch. 31, art. 432.

Éléments de preuve, documents ou objets protégés

129 Les éléments de preuve, documents ou objets qui, avant l'entrée en vigueur de la présente loi, sont protégés au titre des paragraphes 35(4) ou (4.1) de l'ancienne loi sont réputés l'être respectivement au titre des paragraphes 45(4) ou (5) de la présente loi.

SCHEDULE 1

(Subsection 2(1) and paragraph 83(a))

Federal Authorities

1 Port authority as defined in subsection 2(1) of the *Canada Marine Act*.

2 Board as defined in section 2 of the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*.

3 Board as defined in section 2 of the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*.

2012, c. 19, s. 52 "Sch. 1"; 2014, c. 13, s. 115.

ANNEXE 1

(paragraphe 2(1) et alinéa 83a))

Autorités fédérales

1 Administration portuaire au sens du paragraphe 2(1) de la *Loi maritime du Canada*.

2 Office au sens de l'article 2 de la *Loi de mise en œuvre de l'Accord atlantique Canada — Terre-Neuve-et-Labrador*.

3 Office au sens de l'article 2 de la *Loi de mise en œuvre de l'Accord Canada — Nouvelle-Écosse sur les hydrocarbures extracôtiers*.

2012, ch. 19, art. 52 « ann. 1 »; 2014, ch. 13, art. 115.

SCHEDULE 2

(Subparagraph 5(1)(a)(iv) and subsection 5(3))

Components of the Environment

ANNEXE 2

(sous-alinéa 5(1)a)(iv) et paragraphe 5(3))

Composantes de l'environnement

SCHEDULE 3

(Section 66 and paragraph 83(a))

Bodies

1 Designated airport authority as defined in subsection 2(1) of the *Airport Transfer (Miscellaneous Matters) Act*.

ANNEXE 3

(article 66 et alinéa 83a))

Organismes

1 Administration aéroportuaire désignée au sens du paragraphe 2(1) de la *Loi relative aux cessions d'aéroports*.

RELATED PROVISIONS

— 2012, c. 19, s. 100

Definitions

100 The following definitions apply in this section and sections 101 to 109.

Board means the National Energy Board established by section 3 of the other Act. (*Office*)

Chairperson means the Chairperson of the National Energy Board. (*Version anglaise seulement*)

commencement day means the day on which this section and sections 68 to 85, 89, 90, 92 to 97, 99 and 101 to 114 come into force. (*entrée en vigueur*)

designated project means a project that is considered to be a designated project under subsection 126(1) of the *Canadian Environmental Assessment Act, 2012*. (*projet désigné*)

Minister responsible for the other Act means the member of the Queen's Privy Council for Canada that is designated by the Governor in Council as the Minister for the purposes of the other Act. (*ministre responsable de l'autre loi*)

other Act means the *National Energy Board Act*. (*autre loi*)

— 2012, c. 19, s. 104

Section 52 application — review panel

104 (1) Subsections (2) to (9) apply in respect of an application for a certificate under section 52 of the other Act if

(a) the application was made before the commencement day;

(b) a review panel had been jointly established before that day under an agreement entered into under subsection 40(2) of the *Canadian Environmental Assessment Act* in relation to the pipeline to which the application relates; and

(c) no final decision in respect of the application had been made before that day.

Sections 52 to 55.2

(2) Subject to subsection (3) and (5) to (9), sections 52 to 55.2 of the other Act, as enacted by section 83, apply in

DISPOSITIONS CONNEXES

— 2012, ch. 19, art. 100

Définitions

100 Les définitions qui suivent s'appliquent au présent article et aux articles 101 à 109.

autre loi La *Loi sur l'Office national de l'énergie*. (*other Act*)

entrée en vigueur L'entrée en vigueur du présent article et des articles 68 à 85, 89, 90, 92 à 97, 99 et 101 à 114. (*commencement date*)

ministre responsable de l'autre loi Le membre du Conseil privé de la Reine pour le Canada chargé par le gouverneur en conseil de l'application de l'autre loi. (*Minister responsible for the other Act*)

Office L'Office national de l'énergie constitué par l'article 3 de l'autre loi. (*Board*)

projet désigné Projet qui est réputé, en vertu du paragraphe 126(1) de la *Loi canadienne sur l'évaluation environnementale (2012)*, être un projet désigné. (*designated project*)

— 2012, ch. 19, art. 104

Demande au titre de l'article 52 — commission conjointe

104 (1) Les paragraphes (2) à (9) s'appliquent à l'égard d'une demande de certificat présentée sous le régime de l'article 52 de l'autre loi si toutes les conditions ci-après sont remplies :

a) la demande a été présentée avant la date d'entrée en vigueur;

b) une commission a été constituée conjointement à l'égard du pipeline visé par la demande, avant cette date et aux termes d'un accord conclu en vertu du paragraphe 40(2) de la *Loi canadienne sur l'évaluation environnementale*;

c) la demande n'a pas, avant cette date, fait l'objet d'une décision finale.

Articles 52 à 55.2

(2) Les articles 52 à 55.2 de l'autre loi, édictés par l'article 83, s'appliquent, sous réserve des paragraphes (3) et (5) à

respect of the application, as though it had been made on the commencement day.

Subsection 52(3)

(3) Unless subsection (8) or (9) applies, the reference in subsection 52(3) of the other Act, as enacted by section 83, to the Board is to be read as a reference to the review panel.

Canadian Environmental Assessment Act, 2012

(4) For the purposes of the environmental assessment under the *Canadian Environmental Assessment Act, 2012* of the designated project to which the application relates,

(a) sections 47 and 48 of that Act are to be read as follows:

Governor in Council's decision

47 (1) The Governor in Council, after taking into account the review panel's report with respect to the environmental assessment, must make decisions under subsection 52(1).

Studies and collection of information

(2) Before making decisions referred to in subsection 52(1), the Governor in Council may, by order, direct the National Energy Board to require the proponent of the designated project to collect any information or undertake any studies that, in the Governor in Council's opinion, are necessary for the Governor in Council to make decisions.

Publication

(3) A copy of the order must be published in the *Canada Gazette* within 15 days after it is made.

Excluded periods

48 (1) If the review panel under subsection 44(2) requires the proponent of the designated project to collect information or undertake a study with respect to the designated project and the review panel, with the approval of the Chairperson of the National Energy Board, states publicly that this subsection applies, the period that is taken by the proponent, in the opinion of the review panel, to comply with the requirement under subsection 44(2) is not included in the calculation of the period referred to in paragraph 38(3)(b) that is established under subsection 126(4).

Excluded periods

(2) If the National Energy Board, acting under an order made under subsection 47(2), requires a proponent of the designated project to collect information or undertake a study with respect to the designated project, the period

(9), à l'égard de la demande et ce, comme si elle avait été présentée à la date même d'entrée en vigueur.

Paragraphe 52(3)

(3) Sauf si les paragraphes (8) ou (9) s'appliquent, la mention de l'Office au paragraphe 52(3) de l'autre loi, édicté par l'article 83, vaut mention de la commission.

Loi canadienne sur l'évaluation environnementale (2012)

(4) À l'égard de l'examen, sous le régime de la *Loi canadienne sur l'évaluation environnementale (2012)*, du projet désigné visé par la demande :

a) les articles 47 et 48 de cette loi, se lisent comme suit :

Décisions du gouverneur en conseil

47 (1) Après avoir pris en compte le rapport d'évaluation environnementale de la commission, le gouverneur en conseil prend les décisions prévues au paragraphe 52(1).

Études et collectes de renseignements

(2) Avant de prendre ces décisions, le gouverneur en conseil peut, par décret, donner instruction à l'Office national de l'énergie d'exiger du promoteur du projet désigné en cause qu'il procède aux études et à la collecte de renseignements que le gouverneur en conseil estime nécessaires à la prise des décisions.

Publication

(3) Une copie du décret est publiée dans la *Gazette du Canada* dans les quinze jours de sa prise.

Période exclue du délai

48 (1) Dans le cas où la commission exige du promoteur d'un projet désigné, au titre du paragraphe 44(2), qu'il procède à des études ou à la collecte de renseignements relativement au projet désigné et déclare publiquement, avec l'approbation du président de l'Office national de l'énergie, que le présent paragraphe s'applique, la période prise, de l'avis de la commission, par le promoteur pour remplir l'exigence au titre du paragraphe 44(2) n'est pas comprise dans le calcul du délai visé à l'alinéa 38(3)b) qui est fixé en vertu du paragraphe 126(4).

Période exclue du délai

(2) Dans le cas où l'Office national de l'énergie exige du promoteur, en application d'un décret pris en vertu du paragraphe 47(2), qu'il procède à des études ou à la collecte de renseignements relativement au projet désigné,

that is taken by the proponent, in the opinion of the National Energy Board, to comply with the requirement is not included in the calculation of the period referred to in paragraph 38(3)(c) that is established under subsection 126(4).

(b) section 54 of that Act is to be read as follows:

Decision statement

54 (1) The National Energy Board must issue a decision statement to the proponent of a designated project that

(a) informs the proponent of the designated project of the decisions made under paragraphs 52(1)(a) and (b), and under subsection 52(4), if that subsection applies, in relation to the designated project; and

(b) includes any conditions that are established under section 53 in relation to the designated project and that must be complied with by the proponent.

Extension of time limit

(2) The Governor in Council may extend the time limits established under subsection 126(4) by any further period.

Public notice of extension

(3) The National Energy Board must make public any extension granted under subsection (2).

Excluded period

(4) If the National Energy Board, acting under an order made under subsection 47(2), requires a proponent of the designated project to collect information or undertake a study with respect to the designated project, the period that is taken by the proponent, in the opinion of the National Energy Board, to comply with the requirement is not included in the calculation of the period referred to in subsection 126(2) that is established under subsection 126(4).

Time limit

(5) The time limit established under subsection 126(4) of the *Canadian Environmental Assessment Act, 2012* for the submission of the review panel's report with respect to the environmental assessment of the designated project to which the application relates is to be considered, despite the period of 15 months referred to in subsection 52(4) of the other Act, as enacted by section 83, to be the time limit specified by the Chairperson under that subsection 52(4).

Extension

(6) If a time limit is extended under subsection 52(7) of the other Act, as enacted by section 83, the same extension is considered to have been made under subsection 54(2) of the *Canadian Environmental Assessment Act,*

n'est pas comprise, dans le calcul du délai visé à l'alinéa 38(3)c) qui a été fixé en vertu du paragraphe 126(4), la période prise, de l'avis de l'Office national de l'énergie, par le promoteur pour remplir l'exigence.

b) l'article 54 de cette loi, se lit comme suit :

Déclaration

54 (1) L'Office national de l'énergie fait une déclaration qu'il remet au promoteur du projet désigné dans laquelle :

a) il donne avis des décisions prises relativement au projet au titre des alinéas 52(1)a) et b) et, le cas échéant, au titre du paragraphe 52(4);

b) il énonce toute condition qui est fixée en vertu de l'article 53 relativement au projet et que le promoteur est tenu de respecter.

Prolongation du délai

(2) Le gouverneur en conseil peut prolonger tout délai fixé en vertu du paragraphe 126(4).

Avis public des prolongations

(3) L'Office national de l'énergie rend publique toute prolongation accordée en vertu du paragraphe (2).

Période exclue du délai

(4) Dans le cas où l'Office national de l'énergie exige du promoteur, en application d'un décret pris en vertu du paragraphe 47(2), qu'il procède à des études ou à la collecte de renseignements relativement au projet, n'est pas comprise, dans le calcul du délai visé au paragraphe 126(2) qui a été fixé en vertu du paragraphe 126(4), la période prise, de l'avis de l'Office national de l'énergie, par le promoteur pour remplir l'exigence.

Délai

(5) Tout délai imparti à la commission en vertu du paragraphe 126(4) de la *Loi canadienne sur l'évaluation environnementale (2012)* pour présenter son rapport d'évaluation environnementale du projet désigné visé par la demande est réputé, malgré le délai de quinze mois visé au paragraphe 52(4) de l'autre loi, édicté par l'article 83, être un délai fixé par le président de l'Office pour l'application de ce paragraphe 52(4).

Prorogation

(6) Si une prorogation est accordée en vertu du paragraphe 52(7) de l'autre loi, édicté par l'article 83, une prorogation de même durée est réputée avoir été accordée en vertu du paragraphe 54(2) de la *Loi canadienne sur*

2012, as that subsection reads by reason of paragraph (4)(b).

Extension

(7) If a time limit is extended under subsection 54(4) of the *Canadian Environmental Assessment Act, 2012*, as that subsection reads by reason of paragraph (4)(b), the same extension is considered to have been made under subsection 52(7) of the other Act, as enacted by section 83.

Exercise of Chairperson's powers

(8) If a time limit is considered by virtue of subsection (5) to have been specified by the Chairperson under subsection 52(4) of the other Act, as enacted by section 83, and the Minister of the Environment and the Chairperson are of the opinion that the time limit is not likely to be met, the Chairperson may exercise any of the Chairperson's powers under subsection 6(2.2) of the other Act, as enacted by subsection 71(2). If any of those powers are exercised,

(a) for greater certainty, subsections 6(2.3) to (2.5), as enacted by that subsection 71(2), apply; and

(b) the Minister of the Environment is considered to have terminated, under subsection 49(2) of the *Canadian Environmental Assessment Act, 2012*, the review panel's environmental assessment of the designated project to which the application relates.

Exercise of Minister's powers

(9) If the review panel's environmental assessment of the designated project to which the application relates is terminated by the Minister of the Environment under subsection 49(1) or (2) of the *Canadian Environmental Assessment Act, 2012*, or is considered to have been terminated under subsection (8),

(a) despite section 50 of that Act, the Board shall complete the environmental assessment of the designated project and prepare a report with respect to the environmental assessment; and

(b) section 51 of that Act is to be read as follows in respect of that designated project:

Governor in Council's decision

51 The Governor in Council, after taking into account the report with respect to the environmental assessment of the designated project, must make decisions under subsection 52(1).

l'évaluation environnementale (2012), dans sa version visée à l'alinéa (4)b).

Prorogation

(7) Si une prorogation est accordée en vertu du paragraphe 54(4) de la *Loi canadienne sur l'évaluation environnementale (2012)*, dans sa version visée à l'alinéa (4)b), une prorogation de même durée est réputée avoir été accordée en vertu du paragraphe 52(7) de l'autre loi, édicté par l'article 83.

Exercice des pouvoirs du président

(8) Si le ministre de l'Environnement et le président de l'Office sont d'avis qu'un délai que ce dernier est réputé, en vertu du paragraphe (5), avoir fixé en vertu du paragraphe 52(4) de l'autre loi, édicté par l'article 83, ne sera vraisemblablement pas respecté à l'égard de toute demande, le président peut exercer les attributions que lui confère le paragraphe 6(2.2) de l'autre loi, édicté par le paragraphe 71(2). En cas d'exercice de ces attributions :

a) il est entendu que les paragraphes 6(2.3) à (2.5) de l'autre loi, édictés par le paragraphe 71(2), s'appliquent;

b) le ministre de l'Environnement est réputé avoir mis fin, en vertu du paragraphe 49(2) de la *Loi canadienne sur l'évaluation environnementale (2012)*, à l'examen par la commission du projet désigné visé par la demande.

Exercice des pouvoirs du ministre

(9) Si le ministre de l'Environnement met fin, en vertu des paragraphes 49(1) ou (2) de la *Loi canadienne sur l'évaluation environnementale (2012)*, à l'examen, par une commission, du projet désigné visé par la demande ou s'il est réputé, en vertu du paragraphe (8), avoir mis fin à cet examen :

a) l'Office est tenu, malgré l'article 50 de cette loi, de compléter l'évaluation environnementale du projet désigné et d'établir le rapport d'évaluation environnementale relatif à celui-ci;

b) l'article 51 de cette loi se lit comme suit à l'égard du projet désigné :

Décisions

51 Après avoir pris en compte le rapport d'évaluation environnementale relatif au projet désigné, le gouverneur en conseil prend les décisions prévues au paragraphe 52(1).

TAB D2

CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of January 1, 2013

CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

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[80] Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members. **(81)**

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be. **(82)**

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months. **(83)**

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

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(81) See section 50, and footnotes (40) and (42) to sections 85 and 88, of the *Constitution Act, 1867*.

(82) Replaces part of Class 1 of section 91 of the *Constitution Act, 1867*, which was repealed as set out in subitem 1(3) of the schedule to the *Constitution Act, 1982*.

(83) See footnotes (10), (41) and (42) to sections 20, 86 and 88 of the *Constitution Act, 1867*.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. **(84)**

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed. **(85)**

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(84) Subsection 32(2) provides that section 15 shall not have effect until three years after section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, section 15 had effect on April 17, 1985.

(85) Section 16.1 was added by the *Constitution Amendment, 1993 (New Brunswick)* (*see* SI/93-54).

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. **(86)**

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick. **(87)**

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative. **(88)**

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative. **(89)**

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. **(90)**

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick. **(91)**

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

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(86) **See section 133 of the *Constitution Act, 1867* and footnote (67).**

(87) ***Ibid.***

(88) ***Ibid.***

(89) ***Ibid.***

(90) ***Ibid.***

(91) ***Ibid.***

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada. **(92)**

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

MINORITY LANGUAGE EDUCATIONAL RIGHTS

Language of instruction

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province. **(93)**

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have

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(92) See, for example, section 133 of the *Constitution Act, 1867* and the reference to the *Manitoba Act, 1870* in footnote (67) to that section.

(93) Paragraph 23(1)(*a*) is not in force in respect of Quebec. See section 59, below.

all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

GENERAL

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. **(94)**

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools. **(95)**

Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

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(94) Paragraph 25(*b*) was repealed and re-enacted by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102). Paragraph 25(*b*) originally read as follows:

(*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

(95) See section 93 of the *Constitution Act, 1867* and footnote (50).

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

APPLICATION OF CHARTER

Application of Charter

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

CITATION

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. [96]

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. [97]

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[96] Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

[97] Section 35.1 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).

PART III

EQUALIZATION AND REGIONAL DISPARITIES

Commitment to promote equal opportunities

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(*a*) promoting equal opportunities for the well-being of Canadians;

(*b*) furthering economic development to reduce disparity in opportunities; and

(*c*) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. **(98)**

PART IV

CONSTITUTIONAL CONFERENCE

37. Repealed. **(99)**

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(98) See footnotes (58) and (59) to sections 114 and 118 of the *Constitution Act, 1867*.

(99) Section 54 of the *Constitution Act, 1982* provided for the repeal of Part IV (section 37) one year after Part VII came into force. Part VII came into force on April 17, 1982 repealing Part IV on April 17, 1983. Section 37 read as follows:

37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

PART IV.I

CONSTITUTIONAL CONFERENCES

37.1 Repealed. [100]

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA [101]

General procedure for amending Constitution of Canada

38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(*a*) resolutions of the Senate and House of Commons; and

(*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the

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[100] Part IV.1 (section 37.1), which was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102), was repealed on April 18, 1987 by section 54.1 of the *Constitution Act, 1982*. Section 37.1 read as follows:

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

[101] Prior to the enactment of Part V, certain provisions of the Constitution of Canada and the provincial constitutions could be amended pursuant to the *Constitution Act, 1867*. See footnotes (44) and (48) to section 91, Class 1 and section 92, Class 1 of that Act, respectively. Other amendments to the Constitution could only be made by enactment of the Parliament of the United Kingdom.

members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Expression of dissent

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Revocation of dissent

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Restriction on proclamation

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Idem

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Compensation

40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

Amendment by general procedure

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

Exception

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Amendment of provisions relating to some but not all provinces

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(*a*) any alteration to boundaries between provinces, and

(*b*) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Amendments by Parliament

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Amendments by provincial legislatures

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

Initiation of amendment procedures

46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

Revocation of authorization

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Amendments without Senate resolution

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Computation of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Advice to issue proclamation

48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Constitutional conference

49. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part. **(102)**

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(102) A First Ministers Meeting was held June 20-21, 1996.

PART VI

AMENDMENT TO THE CONSTITUTION ACT, 1867

50. [(103)]

51. [(104)]

PART VII

GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53. (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

[(103)] The text of this amendment is set out in the *Constitution Act, 1867*, as section 92A.

[(104)] The text of this amendment is set out in the *Constitution Act, 1867*, as the Sixth Schedule.

Repeal and consequential amendments

54. Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada. **(105)**

54.1 Repealed. **(106)**

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada. **(107)**

English and French versions of certain constitutional texts

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

English and French versions of this Act

57. The English and French versions of this Act are equally authoritative.

Commencement

58. Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada. **(108)**

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(105) Part VII came into force on April 17, 1982 (*see* SI/82-97).

(106) Section 54.1, which was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102), provided for the repeal of Part IV.1 and section 54.1 on April 18, 1987. Section 54.1 read as follows:

54.1 Part IV.1 and this section are repealed on April 18, 1987.

(107) The French Constitutional Drafting Committee was established in 1984 with a mandate to assist the Minister of Justice in that task. The Committee's Final Report was tabled in Parliament in December 1990.

(108) The Act, with the exception of paragraph 23(1)(*a*) in respect of Quebec, came into force on April 17, 1982 by proclamation issued by the Queen (*see* SI/82-97).

Commencement of paragraph 23(1)(*a*) in respect of Quebec

59. (1) Paragraph 23(1)(*a*) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Authorization of Quebec

(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec. **(109)**

Repeal of this section

(3) This section may be repealed on the day paragraph 23(1)(*a*) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Short title and citations

60. This Act may be cited as the *Constitution Act, 1982*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1982*.

References

61. A reference to the "*Constitution Acts, 1867 to 1982*" shall be deemed to include a reference to the "*Constitution Amendment Proclamation, 1983*". **(110)**

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(109) No proclamation has been issued under section 59.

(110) Section 61 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102). See also section 3 of the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I and the *Constitution Amendment, 1987 (Newfoundland Act)* (*see* SI/88-11).

SCHEDULE TO THE CONSTITUTION ACT, 1982
(Section 53)

MODERNIZATION OF THE CONSTITUTION

Item	Column I Act Affected	Column II Amendment	Column III New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	(1) Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1867*." (2) Section 20 is repealed. (3) Class 1 of section 91 is repealed. (4) Class 1 of section 92 is repealed.	Constitution Act, 1867
2.	An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)	(1) The long title is repealed and the following substituted therefor: "*Manitoba Act, 1870*." (2) Section 20 is repealed.	Manitoba Act, 1870
3.	Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June, 1870		Rupert's Land and North-Western Territory Order
4.	Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871.		British Columbia Terms of Union
5.	British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)	Section 1 is repealed and the following substituted therefor: "1. This Act may be cited as the *Constitution Act, 1871*."	Constitution Act, 1871
6.	Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873.		Prince Edward Island Terms of Union
7.	Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.)		Parliament of Canada Act, 1875

Item	Column I Act Affected	Column II Amendment	Column III New Name
8.	Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880.		Adjacent Territories Order
9.	British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1886*."	Constitution Act, 1886
10.	Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)		Canada (Ontario Boundary) Act, 1889
11.	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	
12.	The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)		Alberta Act
13.	The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.)		Saskatchewan Act
14.	British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1907*."	Constitution Act, 1907
15.	British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1915*."	Constitution Act, 1915
16.	British North America Act, 1930, 20-21 Geo. V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act, 1930*."	Constitution Act, 1930
17.	Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)	In so far as they apply to Canada, (*a*) section 4 is repealed; and (*b*) subsection 7(1) is repealed.	Statute of Westminster, 1931
18.	British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1940*."	Constitution Act, 1940

Item	Column I Act Affected	Column II Amendment	Column III New Name
19.	British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.)	The Act is repealed.	
20.	British North America Act, 1946, 9-10 Geo. VI, c. 63 (U.K.)	The Act is repealed.	
21.	British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Newfoundland Act*."	Newfoundland Act
22.	British North America (No. 2) Act, 1949, 13 Geo. VI, c. 81 (U.K.)	The Act is repealed.	
23.	British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)	The Act is repealed.	
24.	British North America Act, 1952, 1 Eliz. II, c. 15 (Can.)	The Act is repealed.	
25.	British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1960*."	Constitution Act, 1960
26.	British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)	Section 2 is repealed and the following substituted therefor: "2. This Act may be cited as the *Constitution Act, 1964*."	Constitution Act, 1964
27.	British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)	Section 2 is repealed and the following substituted therefor: "2. This Part may be cited as the *Constitution Act, 1965*."	Constitution Act, 1965
28.	British North America Act, 1974, 23 Eliz. II, c. 13, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 38(1) (Can.), is repealed and the following substituted therefor: "3. This Part may be cited as the *Constitution Act, 1974*."	Constitution Act, 1974
29.	British North America Act, 1975, 23-24 Eliz. II, c. 28, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 31 (Can.), is repealed and the following substituted therefor: "3. This Part may be cited as the *Constitution Act (No. 1), 1975*."	Constitution Act (No. 1), 1975

Item	Column I Act Affected	Column II Amendment	Column III New Name
30.	British North America Act (No. 2), 1975, 23-24 Eliz. II, c. 53 (Can.)	Section 3 is repealed and the following substituted therefor: "3. This Act may be cited as the *Constitution Act (No. 2), 1975*."	Constitution Act (No. 2), 1975

ENDNOTES

ENDNOTE 1

FURTHER DETAILS OF CONSTITUTION ACT, 1867, SECTION 5 [FOOTNOTE (6)]

The first territories added to the Union were Rupert's Land and the North-Western Territory (subsequently designated the Northwest Territories), which were admitted pursuant to section 146 of the *Constitution Act, 1867* and the *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.), by the *Rupert's Land and North-Western Territory Order* of June 23, 1870, effective July 15, 1870. Prior to the admission of those territories, the Parliament of Canada enacted *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada* (32-33 Vict., c. 3), and the *Manitoba Act, 1870* (33 Vict., c. 3), which provided for the formation of the Province of Manitoba.

British Columbia was admitted into the Union pursuant to section 146 of the *Constitution Act, 1867*, by the *British Columbia Terms of Union*, being Order in Council of May 16, 1871, effective July 20, 1871.

Prince Edward Island was admitted pursuant to section 146 of the *Constitution Act, 1867*, by the *Prince Edward Island Terms of Union*, being Order in Council of June 26, 1873, effective July 1, 1873.

On June 29, 1871, the United Kingdom Parliament enacted the *Constitution Act, 1871* (34-35 Vict., c. 28) authorizing the creation of additional provinces out of territories not included in any province. Pursuant to this statute, the Parliament of Canada enacted the *Alberta Act* (July 20, 1905, 4-5 Edw. VII, c. 3) and the *Saskatchewan Act* (July 20, 1905, 4-5 Edw. VII, c. 42), providing for the creation of the provinces of Alberta and Saskatchewan, respectively. Both of these Acts came into force on September 1, 1905.

Meanwhile, all remaining British possessions and territories in North America and the islands adjacent thereto, except the colony of Newfoundland and its dependencies, were admitted into the Canadian Confederation by the *Adjacent Territories Order*, dated July 31, 1880.

The Parliament of Canada added portions of the Northwest Territories to the adjoining provinces in 1912 by *The Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c. 40, *The Quebec Boundaries Extension Act, 1912*, 2 Geo. V, c. 45 and *The Manitoba Boundaries Extension Act, 1912*, 2 Geo. V, c. 32, and further additions were made to Manitoba by *The Manitoba Boundaries Extension Act, 1930*, 20-21 Geo. V, c. 28.

The Yukon Territory was created out of the Northwest Territories in 1898 by *The Yukon Territory Act*, 61 Vict., c. 6 (Can.).

Newfoundland was added on March 31, 1949, by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), which ratified the Terms of Union of Newfoundland with Canada.

Nunavut was created out of the Northwest Territories in 1999 by the *Nunavut Act*, S.C. 1993, c. 28.

Endnote 2

Further details of Constitution Act, 1867, section 51 [Footnote 27]

Section 51 was amended by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.) by repealing the words after "of the census" to "seventy-one and" and the word "subsequent".

By the *British North America Act, 1943*, 6-7 Geo. VI, c. 30 (U.K.), which Act was repealed by the *Constitution Act, 1982*, redistribution of seats following the 1941 census was postponed until the first session of Parliament after the war. The section was re-enacted by the *British North America Act, 1946*, 9-10 Geo. VI, c. 63 (U.K.), which Act was also repealed by the *Constitution Act, 1982*, to read as follows:

51. (1) The number of members of the House of Commons shall be two hundred and fifty-five and the representation of the provinces therein shall forthwith upon the coming into force of this section and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

(1) Subject as hereinafter provided, there shall be assigned to each of the provinces a number of members computed by dividing the total population of the provinces by two hundred and fifty-four and by dividing the population of each province by the quotient so obtained, disregarding, except as hereinafter in this section provided, the remainder, if any, after the said process of division.

(2) If the total number of members assigned to all the provinces pursuant to rule one is less than two hundred and fifty-four, additional members shall be assigned to the provinces (one to a province) having remainders in the computation under rule one commencing with the province having the largest remainder and continuing with the other provinces in the order of the magnitude of their respective remainders until the total number of members assigned is two hundred and fifty-four.

(3) Notwithstanding anything in this section, if upon completion of a computation under rules one and two, the number of members to be assigned to a province is less than the number of senators representing the said province, rules one and two shall cease to apply in respect of the said province, and there shall be assigned to the said province a number of members equal to the said number of senators.

(4) In the event that rules one and two cease to apply in respect of a province then, for the purpose of computing the number of members to be assigned to the provinces in respect of which rules one and two continue to apply, the total population of the provinces shall be reduced by the number of the population of the province in respect of which rules one and two have ceased to apply and the number two hundred and fifty-four shall be reduced by the number of members assigned to such province pursuant to rule three.

(5) Such readjustment shall not take effect until the termination of the then existing Parliament.

(2) The Yukon Territory as constituted by Chapter forty-one of the Statutes of Canada, 1901, together with any Part of Canada not comprised within a province which may from time to time be included therein by the Parliament of Canada for the purposes of representation in Parliament, shall be entitled to one member.

The section was re-enacted as follows by the *British North America Act, 1952*, S.C. 1952, c. 15 (which Act was also repealed by the *Constitution Act, 1982*):

51. (1) Subject as hereinafter provided, the number of members of the House of Commons shall be two hundred and sixty-three and the representation of the provinces therein shall forthwith upon the coming into force of this section and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

1. There shall be assigned to each of the provinces a number of members computed by dividing the total population of the provinces by two hundred and sixty-one and by dividing the population of each province by the quotient so obtained, disregarding, except as hereinafter in this section provided, the remainder, if any, after the said process of division.

2. If the total number of members assigned to all the provinces pursuant to rule one is less than two hundred and sixty-one, additional members shall be assigned to the provinces (one to a province) having remainders in the computation under rule one commencing with the province having the largest remainder and continuing with

the other provinces in the order of the magnitude of their respective remainders until the total number of members assigned is two hundred and sixty-one.

3. Notwithstanding anything in this section, if upon completion of a computation under rules one and two the number of members to be assigned to a province is less than the number of senators representing the said province, rules one and two shall cease to apply in respect of the said province, and there shall be assigned to the said province a number of members equal to the said number of senators.

4. In the event that rules one and two cease to apply in respect of a province then, for the purposes of computing the number of members to be assigned to the provinces in respect of which rules one and two continue to apply, the total population of the provinces shall be reduced by the number of the population of the province in respect of which rules one and two have ceased to apply and the number two hundred and sixty-one shall be reduced by the number of members assigned to such province pursuant to rule three.

5. On any such readjustment the number of members for any province shall not be reduced by more than fifteen per cent below the representation to which such province was entitled under rules one to four of this subsection at the last preceding readjustment of the representation of that province, and there shall be no reduction in the representation of any province as a result of which that province would have a smaller number of members than any other province that according to the results of the then last decennial census did not have a larger population; but for the purposes of any subsequent readjustment of representation under this section any increase in the number of members of the House of Commons resulting from the application of this rule shall not be included in the divisor mentioned in rules one to four of this subsection.

6. Such readjustment shall not take effect until the termination of the then existing Parliament.

(2) The Yukon Territory as constituted by chapter forty-one of the statutes of Canada, 1901, shall be entitled to one member, and such other part of Canada not comprised within a province as may from time to time be defined by the Parliament of Canada shall be entitled to one member.

Subsection 51(1) was re-enacted by the *Constitution Act, 1974*, S.C. 1974-75-76, c. 13, to read as follows:

51. (1) The number of members of the House of Commons and the representation of the provinces therein shall upon the coming into force of this subsection and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following Rules:

1. There shall be assigned to Quebec seventy-five members in the readjustment following the completion of the decennial census taken in the year 1971, and thereafter four additional members in each subsequent readjustment.

2. Subject to Rules 5(2) and (3), there shall be assigned to a large province a number of members equal to the number obtained by dividing the population of the large province by the electoral quotient of Quebec.

3. Subject to Rules 5(2) and (3), there shall be assigned to a small province a number of members equal to the number obtained by dividing

(*a*) the sum of the populations, determined according to the results of the penultimate decennial census, of the provinces (other than Quebec) having populations of less than one and a half million, determined according to the results of that census, by the sum of the numbers of members assigned to those provinces in the readjustment following the completion of that census; and

(*b*) the population of the small province by the quotient obtained under paragraph (*a*).

4. Subject to Rules 5(1)(*a*), (2) and (3), there shall be assigned to an intermediate province a number of members equal to the number obtained

(*a*) by dividing the sum of the populations of the provinces (other than Quebec) having populations of less than one and a half million by the sum of the number of members assigned to those provinces under any of Rules 3, 5(1)(*b*), (2) and (3);

(*b*) by dividing the population of the intermediate province by the quotient obtained under paragraph (*a*); and

(*c*) by adding to the number of members assigned to the intermediate province in the readjustment following the completion of the penultimate decennial census one-half of the difference resulting from the subtraction of that number from the quotient obtained under paragraph (*b*).

5. (1) On any readjustment,

(*a*) if no province (other than Quebec) has a population of less than one and a half million, Rule 4 shall not be applied and, subject to Rules 5(2) and (3), there shall be assigned to an intermediate province a number of members equal to the number obtained by dividing

(i) the sum of the populations, determined according to the results of the penultimate decennial census, of the provinces, (other than Quebec) having populations of not less than one and a half million and not more than two and a half million, determined according to the results of that census, by the sum of the numbers of members assigned to those provinces in the readjustment following the completion of that census, and

(ii) the population of the intermediate province by the quotient obtained under subparagraph (i);

(*b*) if a province (other than Quebec) having a population of

(i) less than one and a half million, or

(ii) not less than one and a half million and not more than two and a half million

does not have a population greater than its population determined according to the results of the penultimate decennial census, it shall, subject to Rules 5(2) and (3), be assigned the number of members assigned to it in the readjustment following the completion of that census.

(2) On any readjustment,

(*a*) if, under any of Rules 2 to 5(1), the number of members to be assigned to a province (in this paragraph referred to as "the first province") is smaller than the number of members to be assigned to any other province not having a population greater than that of the first province, those Rules shall not be applied to the first province and it shall be assigned a number of members equal to the largest number of members to be assigned to any other province not having a population greater than that of the first province;

(*b*) if, under any of Rules 2 to 5(1)(*a*), the number of members to be assigned to a province is smaller than the number of members assigned to it in the readjustment following the completion of the penultimate decennial census, those Rules shall not be applied to it and it shall be assigned the latter number of members;

(*c*) if both paragraphs (*a*) and (*b*) apply to a province, it shall be assigned a number of members equal to the greater of the numbers produced under those paragraphs.

(3) On any readjustment,

(*a*) if the electoral quotient of a province (in this paragraph referred to as "the first province") obtained by dividing its population by the number of members to be assigned to it under any of Rules 2 to 5(2) is greater than the electoral quotient of Quebec, those Rules shall not be applied to the first province and it shall be assigned a number of members equal to the number obtained by dividing its population by the electoral quotient of Quebec;

(*b*) if, as a result of the application of Rule 6(2)(*a*), the number of members assigned to a province under paragraph (*a*) equals the number of members to be assigned to it under any of Rules 2 to 5(2), it shall be assigned that number of members and paragraph (*a*) shall cease to apply to that province.

6. (1) In these Rules,

"electoral quotient" means, in respect of a province, the quotient obtained by dividing its population, determined according to the results of the then most recent decennial census, by the number of members to be assigned to it under any of Rules 1 to 5(3) in the readjustment following the completion of that census;

"intermediate province" means a province (other than Quebec) having a population greater than its population determined according to the results of the penultimate decennial census but not more than two and a half million and not less than one and a half million;

"large province" means a province (other than Quebec) having a population greater than two and a half million;

"penultimate decennial census" means the decennial census that preceded the then most recent decennial census;

"population" means, except where otherwise specified, the population determined according to the results of the then most recent decennial census;

"small province" means a province (other than Quebec) having a population greater than its population determined according to the results of the penultimate decennial census and less than one and half million.

(2) For the purposes of these Rules,

(*a*) if any fraction less than one remains upon completion of the final calculation that produces the number of members to be assigned to a province, that number of members shall equal the number so produced disregarding the fraction;

(*b*) if more than one readjustment follows the completion of a decennial census, the most recent of those readjustments shall, upon taking effect, be deemed to be the only readjustment following the completion of that census;

(*c*) a readjustment shall not take effect until the termination of the then existing Parliament.

Subsection 51(1) was re-enacted by the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I, as follows:

51. (1) The number of members of the House of Commons and the representation of the provinces therein shall, on the coming into force of this subsection and thereafter on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

Rules

1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the total population of the provinces by two hundred and seventy-nine and by dividing the population of each province by the quotient so obtained, counting any remainder in excess of 0.50 as one after the said process of division.

2. If the total number of members that would be assigned to a province by the application of rule 1 is less than the total number assigned to that province on the date of coming into force of this subsection, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

ENDNOTE 3

FURTHER DETAILS OF CONSTITUTION ACT, 1867, SECTION 91 [FOOTNOTE (47)]

Acts conferring legislative authority on Parliament:

1. The *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.):

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

3. The Parliament of Canada may from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively, — "An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada"; and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of "the Province of Manitoba", shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respect-

ing the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

The *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.) (repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.)), had previously conferred similar authority in relation to Rupert's Land and the North-Western Territory upon admission of those areas.

2. The *Constitution Act, 1886*, 49-50 Vict., c. 35 (U.K.):

1. The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

3. The *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.):

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. Under section 44 of the *Constitution Act, 1982*, Parliament has exclusive authority to amend the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons. Sections 38, 41, 42 and 43 of that Act authorize the Senate and House of Commons to give their approval to certain other constitutional amendments by resolution.

Endnote 4

Further details of Constitution Act, 1867, section 93 [Footnote (50)]

An alternative was provided for Manitoba by section 22 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (confirmed by the *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.)), which section reads as follows:

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:

(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:

(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege, of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:

(3) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section.

An alternative was provided for Alberta by section 17 of the *Alberta Act*, 1905, 4-5 Edw. VII, c. 3, which section reads as follows:

17. Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in

amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

An alternative was provided for Saskatchewan by section 17 of the *Saskatchewan Act*, 1905, 4-5 Edw. VII, c. 42, which section reads as follows:

17. Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression "at the Union" is employed in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

An alternative was provided for Newfoundland by Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.)). Term 17 of the Terms of Union of Newfoundland with Canada, set out in the penultimate paragraph of this note, was amended by the *Constitution Amendment, 1998 (Newfoundland Act)* (*see* SI/98-25) and the *Constitution Amendment, 2001 (Newfoundland and Labrador)* (*see* SI/2001-117), and now reads as follows:

17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, this term shall apply in respect of the Province of Newfoundland and Labrador.

(2) In and for the Province of Newfoundland and Labrador, the Legislature shall have exclusive authority to make laws in relation to education, but shall provide for courses in religion that are not specific to a religious denomination.

(3) Religious observances shall be permitted in a school where requested by parents.

Prior to the *Constitution Amendment, 1998 (Newfoundland Act)*, Term 17 of the Terms of Union of Newfoundland with Canada had been amended by the *Constitution Amendment, 1997 (Newfoundland Act)* (*see* SI/97-55) to read as follows:

17. In lieu of section ninety-three of the *Constitution Act, 1867*, the following shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland, the Legislature shall have exclusive authority to make laws in relation to education but

(*a*) except as provided in paragraphs (*b*) and (*c*), schools established, maintained and operated with public funds shall be denominational schools, and any class of persons having rights under this Term as it read on January 1, 1995 shall continue to have the right to provide for religious education, activities and observances for the children of that class in those schools, and the group of classes that formed one integrated school system by agreement in 1969 may exercise the same rights under this Term as a single class of persons;

(*b*) subject to provincial legislation that is uniformly applicable to all schools specifying conditions for the establishment or continued operation of schools,

(i) any class of persons referred to in paragraph (*a*) shall have the right to have a publicly funded denominational school established, maintained and operated especially for that class, and

(ii) the Legislature may approve the establishment, maintenance and operation of a publicly funded school, whether denominational or non-denominational;

(*c*) where a school is established, maintained and operated pursuant to subparagraph (*b*)(i), the class of persons referred to in that subparagraph shall continue to have the right to provide for religious education, activities and observances and to direct the teaching of aspects of curriculum affecting religious beliefs, student admission policy and the assignment and dismissal of teachers in that school;

(*d*) all schools referred to in paragraphs (*a*) and (*b*) shall receive their share of public funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature; and

(*e*) if the classes of persons having rights under this Term so desire, they shall have the right to elect in total not less than two thirds of the members of a school board, and any class so desiring shall have the right to elect the portion of that total that is proportionate to the population of that class in the area under the board's jurisdiction.

Prior to the *Constitution Amendment, 1997 (Newfoundland Act)*, Term 17 of the Terms of Union of Newfoundland with Canada had been amended by the *Constitution Amendment, 1987 (Newfoundland Act)* (*see* SI/88-11) to read as follows:

17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, the following term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

(*a*) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and

(*b*) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

(2) For the purposes of paragraph one of this Term, the Pentecostal Assemblies of Newfoundland have in Newfoundland all the same rights and privileges with respect to denominational schools and denominational colleges as any other class or classes of persons had by law in Newfoundland at the date of Union, and the words "all such schools" in paragraph (*a*) of paragraph one of this Term and the words "all such colleges" in paragraph (*b*) of paragraph one of this Term include, respectively, the schools and the colleges of the Pentecostal Assemblies of Newfoundland.

Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.)), which Term provided an alternative for Newfoundland, originally read as follows:

17. In lieu of section ninety-three of the *Constitution Act, 1867*, the following term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

(*a*) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and

(*b*) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

See also sections 23, 29 and 59 of the *Constitution Act, 1982*. Section 23 provides for new minority language educational rights and section 59 permits a delay in respect of the coming into force in Quebec of one aspect of those rights. Section 29 provides that

nothing in the *Canadian Charter of Rights and Freedoms* abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

ENDNOTE 5

FURTHER DETAILS OF CONSTITUTION ACT, 1867, SECTION 118 [FOOTNOTE (59)]

The section originally read as follows:

118. The following Sums shall be paid yearly by Canada to the several Provinces for the Support of their Governments and Legislatures:

	Dollars.
Ontario	Eighty thousand.
Quebec	Seventy thousand.
Nova Scotia	Sixty thousand.
New Brunswick	Fifty thousand.
	Two hundred and sixty thousand;

and an annual Grant in aid of each Province shall be made, equal to Eighty Cents per Head of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the Case of Nova Scotia and New Brunswick, by each subsequent Decennial Census until the Population of each of those two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grants shall be in full Settlement of all future Demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such Grants, as against any Province, all Sums chargeable as Interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act.

The section was made obsolete by the *Constitution Act, 1907*, 7 Edw. VII, c. 11 (U.K.), which provided:

1. (1) The following grants shall be made yearly by Canada to every province, which at the commencement of this Act is a province of the Dominion, for its local purposes and the support of its Government and Legislature:

(*a*) A fixed grant

where the population of the province is under one hundred and fifty thousand, of one hundred thousand dollars;

where the population of the province is one hundred and fifty thousand, but does not exceed two hundred thousand, of one hundred and fifty thousand dollars;

where the population of the province is two hundred thousand, but does not exceed four hundred thousand, of one hundred and eighty thousand dollars;

where the population of the province is four hundred thousand, but does not exceed eight hundred thousand, of one hundred and ninety thousand dollars;

where the population of the province is eight hundred thousand, but does not exceed one million five hundred thousand, of two hundred and twenty thousand dollars;

where the population of the province exceeds one million five hundred thousand, of two hundred and forty thousand dollars; and

(*b*) Subject to the special provisions of this Act as to the provinces of British Columbia and Prince Edward Island, a grant at the rate of eighty cents per head of the population of the province up to the number of two million five hundred thousand, and at the rate of sixty cents per head of so much of the population as exceeds that number.

(2) An additional grant of one hundred thousand dollars shall be made yearly to the province of British Columbia for a period of ten years from the commencement of this Act.

(3) The population of a province shall be ascertained from time to time in the case of the provinces of Manitoba, Saskatchewan, and Alberta respectively by the last quinquennial census or statutory estimate of population made under the Acts establishing those provinces or any other Act of the Parliament of Canada making provision for the purpose, and in the case of any other province by the last decennial census for the time being.

(4) The grants payable under this Act shall be paid half-yearly in advance to each province.

(5) The grants payable under this Act shall be substituted for the grants or subsidies (in this Act referred to as existing grants) payable for the like purposes at the commencement of this Act to the several provinces of the Dominion under the provisions of section one hundred and eighteen of the *Constitution Act, 1867*, or of any Order in Council establishing a province, or of any Act of the Parliament of Canada containing directions for the payment of any such grant or subsidy, and those provisions shall cease to have effect.

(6) The Government of Canada shall have the same power of deducting sums charged against a province on account of the interest on public debt in the case of the grant payable under this Act to the province as they have in the case of the existing grant.

(7) Nothing in this Act shall affect the obligation of the Government of Canada to pay to any province any grant which is payable to that province, other than the existing grant for which the grant under this Act is substituted.

(8) In the case of the provinces of British Columbia and Prince Edward Island, the amount paid on account of the grant payable per head of the population to the provinces under this Act shall not at any time be less than the amount of the corresponding grant payable at the commencement of this Act, and if it is found on any decennial census that the population of the province has decreased since the last decennial census, the amount paid on account of the grant shall not be decreased below the amount then payable, notwithstanding the decrease of the population.

See the *Provincial Subsidies Act*, R.S.C. 1985, c. P-26, and the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8.

See also Part III of the *Constitution Act, 1982*, which sets out commitments by Parliament and the provincial legislatures respecting equal opportunities, economic development and the provision of essential public services and a commitment by Parliament and the government of Canada to the principle of making equalization payments.

TAB D3

CANADA

CONSOLIDATION

CODIFICATION

Oceans Act

Loi sur les océans

S.C. 1996, c. 31

L.C. 1996, ch. 31

Current to March 27, 2019

Last amended on February 26, 2015

À jour au 27 mars 2019

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to March 27, 2019. The last amendments came into force on February 26, 2015. Any amendments that were not in force as of March 27, 2019 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 27 mars 2019. Les dernières modifications sont entrées en vigueur le 26 février 2015. Toutes modifications qui n'étaient pas en vigueur au 27 mars 2019 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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An Act respecting the oceans of Canada

[*Assented to 18th December 1996*]

Preamble

WHEREAS Canada recognizes that the three oceans, the Arctic, the Pacific and the Atlantic, are the common heritage of all Canadians;

WHEREAS Parliament wishes to reaffirm Canada's role as a world leader in oceans and marine resource management;

WHEREAS Parliament wishes to affirm in Canadian domestic law Canada's sovereign rights, jurisdiction and responsibilities in the exclusive economic zone of Canada;

WHEREAS Canada promotes the understanding of oceans, ocean processes, marine resources and marine ecosystems to foster the sustainable development of the oceans and their resources;

WHEREAS Canada holds that conservation, based on an ecosystem approach, is of fundamental importance to maintaining biological diversity and productivity in the marine environment;

WHEREAS Canada promotes the wide application of the precautionary approach to the conservation, management and exploitation of marine resources in order to protect these resources and preserve the marine environment;

WHEREAS Canada recognizes that the oceans and their resources offer significant opportunities for economic diversification and the generation of wealth for the benefit of all Canadians, and in particular for coastal communities;

WHEREAS Canada promotes the integrated management of oceans and marine resources;

AND WHEREAS the Minister of Fisheries and Oceans, in collaboration with other ministers, boards and

L.C. 1996, ch. 31

Loi concernant les océans du Canada

[*Sanctionnée le 18 décembre 1996*]

Préambule

Attendu :

que le Canada reconnaît que les trois océans qui le bordent, l'Arctique, le Pacifique et l'Atlantique, font partie du patrimoine de tous les Canadiens;

que le Parlement désire réaffirmer le rôle du Canada en tant que chef de file mondial en matière de gestion des océans et des ressources marines;

que le Parlement désire affirmer, dans les lois internes, les droits souverains du Canada sur sa zone économique exclusive et les responsabilités qu'il compte assumer à cet égard;

que le Canada est déterminé à promouvoir la connaissance des océans, des phénomènes océaniques ainsi que des ressources et des écosystèmes marins, en vue d'assurer la préservation des océans et la durabilité de leurs ressources;

que le Canada estime que la conservation, selon la méthode des écosystèmes, présente une importance fondamentale pour la sauvegarde de la diversité biologique et de la productivité du milieu marin;

que le Canada encourage l'application du principe de la prévention relativement à la conservation, à la gestion et à l'exploitation des ressources marines afin de protéger ces ressources et de préserver l'environnement marin;

que le Canada reconnaît que les océans et les ressources marines offrent des possibilités importantes de diversification et de croissance économiques au profit de tous les Canadiens et, en particulier, des collectivités côtières;

que le Canada est déterminé à promouvoir la gestion intégrée des océans et des ressources marines;

agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, is encouraging the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

Short title

1 This Act may be cited as the *Oceans Act*.

Interpretation

Definitions

2 In this Act,

artificial island means any man-made extension of the seabed or a seabed feature, whether or not the extension breaks the surface of the superjacent waters; (*île artificielle*)

Department means the Department of Fisheries and Oceans; (*ministère*)

federal laws includes Acts of Parliament, regulations as defined in subsection 2(1) of the *Interpretation Act* and any other rules of law within the jurisdiction of Parliament, but does not include laws of the Legislature of Yukon, of the Northwest Territories or for Nunavut; (*droit*)

law, in respect of a province, includes a law or rule of law from time to time in force in the province, other than federal laws, and the provisions of any instrument having effect under any such law; (*droit*)

marine installation or structure includes

(a) any ship and any anchor, anchor cable or rig pad used in connection therewith,

(b) any offshore drilling unit, production platform, subsea installation, pumping station, living accommodation, storage structure, loading or landing platform, dredge, floating crane, pipelaying or other barge or

que le ministre des Pêches et des Océans, en collaboration avec d'autres ministres et organismes fédéraux, les gouvernements provinciaux et territoriaux et les organisations autochtones, les collectivités côtières et les autres personnes de droit public et de droit privé intéressées, y compris celles constituées dans le cadre d'accords sur des revendications territoriales, encourage l'élaboration et la mise en œuvre d'une stratégie nationale de gestion des écosystèmes estuariens, côtiers et marins,

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

Titre abrégé

Titre abrégé

1 *Loi sur les océans*.

Définitions et interprétation

Définitions

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

droit Au sens objectif :

a) s'agissant du droit fédéral, les lois fédérales et les règlements au sens du paragraphe 2(1) de la *Loi d'interprétation* ainsi que les autres règles de droit qui relèvent de la compétence du Parlement. Sont toutefois exclues les lois de la Législature du Yukon, de la Législature des Territoires du Nord-Ouest ou de la Législature du Nunavut;

b) s'agissant du droit d'une province, les lois de celle-ci et les textes d'application en vigueur sous le régime de ces lois, ainsi que les autres règles de droit relevant de la compétence de la province et en vigueur dans celle-ci. (*lawfederal laws*)

île artificielle Toute adjonction d'origine humaine aux fonds marins ou à un élément de ces fonds, émergée ou immergée. (*artificial island*)

ministère Le ministère des Pêches et des Océans. (*Department*)

ministre Le ministre des Pêches et des Océans. (*Minister*)

navire Tout genre de navire, bateau, embarcation ou bâtiment conçu, utilisé ou utilisable, exclusivement ou

pipeline and any anchor, anchor cable or rig pad used in connection therewith, and

(c) any other work or work within a class of works prescribed pursuant to paragraph 26(1)(a); (*ouvrages en mer*)

Minister means the Minister of Fisheries and Oceans; (*ministre*)

ship includes any description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation without regard to method or lack of propulsion. (*navire*)

1996, c. 31, s. 2; 1993, c. 28, s. 78; 1998, c. 15, s. 35; 2002, c. 7, s. 223; 2014, c. 2, s. 46.

non, pour la navigation maritime, autopropulsé ou non et indépendamment de son mode de propulsion. (*ship*)

ouvrages en mer Sont compris parmi les ouvrages en mer :

a) les navires, ainsi que les ancres, câbles d'ancrage et assises de sonde utilisés à leur égard;

b) les unités de forage en mer, les stations de pompage, les plates-formes de chargement, de production ou d'atterrissage, les installations sous-marines, les unités de logement ou d'entreposage, les dragues, les grues flottantes, les barges, les unités d'installation de canalisations et les canalisations, ainsi que les ancres, câbles d'ancrage et assises de sonde utilisés à leur égard;

c) les autres ouvrages désignés — ou qui font partie d'une catégorie désignée — sous le régime de l'alinéa 26(1)a). (*marine installation or structure*)

1996, ch. 31, art. 2; 1993, ch. 28, art. 78; 1998, ch. 15, art. 35; 2002, ch. 7, art. 223; 2014, ch. 2, art. 46.

Saving

2.1 For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*.

Droits des peuples autochtones

2.1 Il demeure entendu que la présente loi ne porte pas atteinte aux droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada visés à l'article 35 de la *Loi constitutionnelle de 1982*.

Her Majesty

Her Majesty

3 This Act is binding on Her Majesty in right of Canada or a province.

Sa Majesté

Obligation de Sa Majesté

3 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

PART I

PARTIE I

Canada's Maritime Zones

Territorial Sea and Contiguous Zone

Territorial sea of Canada

4 The territorial sea of Canada consists of a belt of sea that has as its inner limit the baselines described in section 5 and as its outer limit

(a) subject to paragraph (b), the line every point of which is at a distance of 12 nautical miles from the nearest point of the baselines; or

(b) in respect of the portions of the territorial sea of Canada for which geographical coordinates of points

Zones maritimes du Canada

Mer territoriale et zone contiguë

Mer territoriale du Canada

4 La mer territoriale du Canada est la zone maritime comprise entre la ligne de base déterminée selon l'article 5 et :

a) soit la ligne dont chaque point est à une distance de 12 milles marins du point le plus proche de la ligne de base;

b) soit, pour toute partie de la mer territoriale ayant fait l'objet d'une liste de coordonnées géographiques

have been prescribed pursuant to subparagraph 25(a)(ii), lines determined from the geographical coordinates of points so prescribed.

de points établie sous le régime du sous-alinéa 25a)(ii), les géodésiques reliant ces points.

Determination of the baselines

5 (1) Subject to subsections (2) and (3), the baseline is the low-water line along the coast or on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea of Canada from the mainland or an island.

Détermination de la ligne de base

5 (1) Sous réserve des paragraphes (2) et (3), la ligne de base est la laisse de basse mer soit du littoral, soit des hauts-fonds découvrants situés, en tout ou en partie, à une distance de la côte ou d'une île qui ne dépasse pas la largeur de la mer territoriale.

Geographical coordinates of points

(2) In respect of any area for which geographical coordinates of points have been prescribed pursuant to subparagraph 25(a)(i) and subject to any exceptions in the regulations for

(a) the use of the low-water line along the coast between given points, and

(b) the use of the low-water lines of low-tide elevations that are situated wholly or partly at a distance not exceeding the breadth of the territorial sea of Canada from the mainland or an island,

the baselines are straight lines interpreted as geodesics joining the consecutive geographical coordinates of points so prescribed.

Coordonnées géographiques de points

(2) Dans les secteurs ayant fait l'objet d'une liste de coordonnées géographiques de points établie sous le régime du sous-alinéa 25a)(i), la ligne de base est constituée des géodésiques joignant les différents points énumérés sur la liste, sous réserve des exceptions de celle-ci quant à la prise en compte de la laisse de basse mer soit du littoral, soit des hauts-fonds découvrants situés, en tout ou en partie, à une distance de la côte qui ne dépasse pas la largeur de la mer territoriale.

Baselines where historic title

(3) In respect of any area not referred to in subsection (2), the baselines are the outer limits of any area, other than the territorial sea of Canada, over which Canada has a historic or other title of sovereignty.

Ligne de base : souveraineté historique

(3) Dans le cas d'un espace maritime non compris dans la mer territoriale et non visé au paragraphe (2) sur lequel le Canada a un titre de souveraineté historique ou autre, la ligne de base est la limite extérieure de cet espace.

Low-tide elevations

(4) For the purposes of this section, a low-tide elevation is a naturally formed area of land that is surrounded by and above water at low tide but submerged at high tide.

Définition de « hauts-fonds découvrants »

(4) Pour l'application du présent article, les hauts-fonds découvrants sont des élévations naturelles submergées à marée haute et découvertes à marée basse.

Internal waters of Canada

6 The internal waters of Canada consist of the waters on the landward side of the baselines of the territorial sea of Canada.

Eaux intérieures du Canada

6 Les eaux intérieures du Canada sont les eaux situées en deçà de la ligne de base de la mer territoriale.

Part of Canada

7 For greater certainty, the internal waters of Canada and the territorial sea of Canada form part of Canada.

Territoire canadien

7 Il est entendu que les eaux intérieures et la mer territoriale du Canada font partie du territoire de celui-ci.

Rights of Her Majesty

8 (1) For greater certainty, in any area of the sea not within a province, the seabed and subsoil below the internal waters of Canada and the territorial sea of Canada are vested in Her Majesty in right of Canada.

Saving

(2) Nothing in this section abrogates or derogates from any legal right or interest held before February 4, 1991.

Application of provincial law

9 (1) Subject to this section and to any other Act of Parliament, the laws of a province apply in any area of the sea

(a) that forms part of the internal waters of Canada or the territorial sea of Canada;

(b) that is not within any province; and

(c) that is prescribed by the regulations.

Limitation

(2) Subject to any regulations made pursuant to paragraph 26(1)(d), subsection (1) does not apply in respect of any provision of a law of a province that

(a) imposes a tax or royalty; or

(b) relates to mineral or other non-living natural resources.

Interpretation

(3) For the purposes of this section, the laws of a province shall be applied as if the area of the sea in which those laws apply under this section were within the territory of that province.

Sums due to province

(4) Any sum due under a law of a province that applies in an area of the sea under this section belongs to Her Majesty in right of the province.

Limitation

(5) For greater certainty, this section shall not be interpreted as providing a basis for any claim, by or on behalf of a province, in respect of any interest in or legislative jurisdiction over any area of the sea in which a law of a province applies under this section or the living or non-living resources of that area, or as limiting the application of any federal laws.

Droits de Sa Majesté

8 (1) Il est entendu que, dans le cas des espaces maritimes non compris dans le territoire d'une province, le fond et le sous-sol des eaux intérieures et de la mer territoriale appartiennent à Sa Majesté du chef du Canada.

Réserve

(2) Le présent article n'a pas pour effet de porter atteinte aux droits acquis avant le 4 février 1991.

Application du droit provincial

9 (1) Sous réserve des autres dispositions du présent article et de toute autre loi fédérale, le droit d'une province côtière s'applique aux espaces maritimes extracôtiers faisant partie des eaux intérieures ou de la mer territoriale qui ne sont compris dans le territoire d'aucune province et qui sont désignés par règlement.

Restriction

(2) Sous réserve des règlements pris en vertu de l'alinéa 26(1)d), le paragraphe (1) ne s'applique pas aux règles du droit provincial qui, selon le cas :

a) imposent une taxe ou des redevances;

b) traitent des ressources minérales ou autres ressources naturelles non biologiques.

Interprétation

(3) Dans les cas visés par le présent article, le droit provincial s'applique comme si l'espace visé était situé à l'intérieur de la province.

Remise à la province

(4) Les sommes payables au titre d'une règle du droit provincial qui s'applique à l'espace visé au présent article appartiennent à Sa Majesté du chef de la province.

Restriction

(5) Il demeure entendu que ni les provinces, ni quiconque en leur nom, ne peuvent se fonder sur le présent article pour prétendre à des droits ou à une compétence législative sur les espaces extracôtiers visés ou sur leurs ressources biologiques ou non biologiques; en outre, le présent article n'a pas pour effet de limiter l'application du droit fédéral.

Contiguous zone of Canada

10 The contiguous zone of Canada consists of an area of the sea that has as its inner limit the outer limit of the territorial sea of Canada and as its outer limit the line every point of which is at a distance of 24 nautical miles from the nearest point of the baselines of the territorial sea of Canada, but does not include an area of the sea that forms part of the territorial sea of another state or in which another state has sovereign rights.

Prevention in contiguous zone of infringement of federal laws

11 A person who is responsible for the enforcement of a federal law that is a customs, fiscal, immigration or sanitary law and who has reasonable grounds to believe that a person in the contiguous zone of Canada would, if that person were to enter Canada, commit an offence under that law may, subject to Canada's international obligations, prevent the entry of that person into Canada or the commission of the offence and, for greater certainty, section 25 of the *Criminal Code* applies in respect of the exercise by a person of any powers under this section.

Enforcement in contiguous zone of federal laws

12 (1) Where there are reasonable grounds to believe that a person has committed an offence in Canada in respect of a federal law that is a customs, fiscal, immigration or sanitary law, every power of arrest, entry, search or seizure or other power that could be exercised in Canada in respect of that offence may also be exercised in the contiguous zone of Canada.

Limitation

(2) A power of arrest referred to in subsection (1) shall not be exercised in the contiguous zone of Canada on board any ship registered outside Canada without the consent of the Attorney General of Canada.

Exclusive Economic Zone

Exclusive economic zone of Canada

13 (1) The exclusive economic zone of Canada consists of an area of the sea beyond and adjacent to the territorial sea of Canada that has as its inner limit the outer limit of the territorial sea of Canada and as its outer limit

(a) subject to paragraph (b), the line every point of which is at a distance of 200 nautical miles from the nearest point of the baselines of the territorial sea of Canada; or

Zone contiguë du Canada

10 La zone contiguë du Canada est la zone maritime comprise entre la limite extérieure de la mer territoriale et la ligne dont chaque point est à une distance de 24 milles marins du point le plus proche de la ligne de base de la mer territoriale, à l'exclusion de tout espace maritime faisant partie de la mer territoriale d'un autre État, ou assujetti aux droits souverains d'un autre État.

Prévention des infractions

11 Sous réserve des obligations internationales du Canada, tout agent chargé de l'application d'une règle du droit fédéral touchant les douanes, la fiscalité, l'immigration ou l'hygiène publique peut, s'il a des motifs raisonnables de croire qu'une personne se trouvant dans la zone contiguë du Canada serait, si elle entrait au Canada, en situation d'infraction à une telle règle de droit, empêcher cette personne d'entrer au Canada ou prévenir la perpétration de l'infraction. Il est entendu que l'article 25 du *Code criminel* s'applique à toute intervention pratiquée en vertu du présent article.

Pouvoirs accessoires

12 (1) Lorsqu'il existe des motifs raisonnables de croire qu'une infraction à une règle du droit fédéral touchant les douanes, la fiscalité, l'immigration ou l'hygiène publique a été commise au Canada, tous les pouvoirs — notamment ceux d'arrestation, d'accès à des lieux, de perquisition, de fouille et de saisie — qui peuvent être exercés au Canada relativement à une telle infraction peuvent l'être également dans la zone contiguë.

Réserve

(2) L'exercice du pouvoir d'arrestation dans la zone contiguë, à bord d'un navire immatriculé à l'étranger, est subordonné au consentement du procureur général du Canada.

Zone économique exclusive

Zone économique exclusive du Canada

13 (1) La zone économique exclusive est la zone maritime adjacente à la mer territoriale qui est comprise entre la limite extérieure de celle-ci et :

a) soit la ligne dont chaque point est à 200 milles marins du point le plus proche de la ligne de base de la mer territoriale;

b) soit, pour toute partie de la zone économique exclusive ayant fait l'objet d'une liste de coordonnées géographiques de points établie sous le régime du

(b) in respect of a portion of the exclusive economic zone of Canada for which geographical coordinates of points have been prescribed pursuant to subparagraph 25(a)(iii), lines determined from the geographical coordinates of points so prescribed.

Determination of the outer limit of the exclusive economic zone of Canada

(2) For greater certainty, paragraph (1)(a) applies regardless of whether regulations are made pursuant to subparagraph 25(a)(iv) prescribing geographical coordinates of points from which the outer limit of the exclusive economic zone of Canada may be determined.

Sovereign rights and jurisdiction of Canada

14 Canada has

(a) sovereign rights in the exclusive economic zone of Canada for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the exclusive economic zone of Canada, such as the production of energy from the water, currents and winds;

(b) jurisdiction in the exclusive economic zone of Canada with regard to

(i) the establishment and use of artificial islands, installations and structures,

(ii) marine scientific research, and

(iii) the protection and preservation of the marine environment; and

(c) other rights and duties in the exclusive economic zone of Canada provided for under international law.

Rights of Her Majesty

15 (1) For greater certainty, any rights of Canada in the seabed and subsoil of the exclusive economic zone of Canada and their resources are vested in Her Majesty in right of Canada.

Saving

(2) Nothing in this section abrogates or derogates from any legal right or interest held before February 4, 1991.

Fishing zones of Canada

16 The fishing zones of Canada consist of areas of the sea adjacent to the coast of Canada that are prescribed in the regulations.

sous-alinéa 25a)(iii), les géodésiques reliant ces points.

Précision

(2) Il est entendu que l'absence de règlement d'application du sous-alinéa 25a)(iv) n'a pas pour effet de restreindre la portée des droits que peut exercer le Canada au titre de l'alinéa (1)a).

Droits souverains du Canada

14 Le Canada a, sur sa zone économique exclusive :

a) des droits souverains quant à l'exploration et à l'exploitation, la conservation et la gestion des ressources naturelles — biologiques et non biologiques — de celle-ci, des fonds marins, de leur sous-sol et des eaux surjacentes, y compris toute activité liée à l'exploration et à l'exploitation de la zone à des fins économiques, telle la production d'énergie à partir de l'eau, des courants et des vents;

b) compétence pour la mise en place et l'utilisation d'îles artificielles et d'ouvrages en mer, à la recherche scientifique marine, ainsi qu'à la protection et la préservation du milieu marin;

c) les autres droits et obligations prévus par le droit international.

Droits de Sa Majesté

15 (1) Il est entendu que les droits du Canada sur le fond et le sous-sol de sa zone économique exclusive, ainsi que sur les ressources qui s'y trouvent, appartiennent à Sa Majesté du chef du Canada.

Réserve

(2) Le présent article n'a pas pour effet de porter atteinte aux droits acquis avant le 4 février 1991.

Zones de pêche du Canada

16 Les zones de pêche du Canada sont les zones maritimes adjacentes à la côte canadienne qui sont désignées comme telles par règlement.

Continental Shelf

Continental shelf of Canada

17 (1) The continental shelf of Canada is the seabed and subsoil of the submarine areas, including those of the exclusive economic zone of Canada, that extend beyond the territorial sea of Canada throughout the natural prolongation of the land territory of Canada

(a) subject to paragraphs (b) and (c), to the outer edge of the continental margin, determined in the manner under international law that results in the maximum extent of the continental shelf of Canada, the continental margin being the submerged prolongation of the land mass of Canada consisting of the seabed and subsoil of the shelf, the slope and the rise, but not including the deep ocean floor with its oceanic ridges or its subsoil;

(b) to a distance of 200 nautical miles from the baselines of the territorial sea of Canada where the outer edge of the continental margin does not extend up to that distance; or

(c) in respect of a portion of the continental shelf of Canada for which geographical coordinates of points have been prescribed pursuant to subparagraph 25(a)(iii), to lines determined from the geographical coordinates of points so prescribed.

Determination of the outer limit of the continental shelf of Canada

(2) For greater certainty, paragraphs (1)(a) and (b) apply regardless of whether regulations are made pursuant to subparagraph 25(a)(iv) prescribing geographical coordinates of points from which the outer edge of the continental margin or other outer limit of the continental shelf of Canada may be determined.

1996, c. 31, s. 17; 2015, c. 3, s. 137(E).

Sovereign rights of Canada

18 Canada has sovereign rights over the continental shelf of Canada for the purpose of exploring it and exploiting the mineral and other non-living natural resources of the seabed and subsoil of the continental shelf of Canada, together with living organisms belonging to sedentary species, that is to say, organisms that, at the harvestable stage, either are immobile on or under the seabed of the continental shelf of Canada or are unable to move except in constant physical contact with the seabed or the subsoil of the continental shelf of Canada.

Plateau continental

Plateau continental du Canada

17 (1) Le plateau continental du Canada est constitué des fonds marins et de leur sous-sol — y compris ceux de la zone économique exclusive — qui s'étendent, au-delà de la mer territoriale, sur tout le prolongement naturel du territoire terrestre du Canada :

a) soit jusqu'au rebord externe de la marge continentale — la limite la plus éloignée que permet le droit international étant à retenir — , c'est-à-dire les fonds marins correspondant au plateau, au talus et au glacis, ainsi que leur sous-sol, qui constituent le prolongement immergé de la masse terrestre du Canada, à l'exclusion, toutefois, des grands fonds des océans, de leurs dorsales océaniques et de leur sous-sol;

b) soit jusqu'à 200 milles marins de la ligne de base de la mer territoriale, là où ce rebord se trouve à une distance inférieure;

c) soit, pour toute partie du plateau continental ayant fait l'objet d'une liste de coordonnées géographiques de points établie sous le régime du sous-alinéa 25a)(iii), jusqu'à la ligne constituée des géodésiques reliant ces points.

Précision

(2) Il est entendu que l'absence de règlement d'application du sous-alinéa 25a)(iv) n'a pas pour effet de restreindre la portée des droits que peut exercer le Canada au titre des alinéas (1)a) et b).

1996, ch. 31, art. 17; 2015, ch. 3, art. 137(A).

Droits souverains du Canada

18 Les droits souverains du Canada sur son plateau continental s'étendent à l'exploration de celui-ci et à l'exploitation de ses ressources minérales et autres ressources naturelles non biologiques, ainsi que des organismes vivants qui appartiennent aux espèces sédentaires, c'est-à-dire les organismes qui, au stade où ils peuvent être pêchés, sont soit immobiles sur le fond ou au-dessous du fond, soit incapables de se déplacer autrement qu'en restant constamment en contact avec le fond ou le sous-sol.

Rights of Her Majesty

19 (1) For greater certainty, any rights of Canada in the continental shelf of Canada are vested in Her Majesty in right of Canada.

Saving

(2) Nothing in this section abrogates or derogates from any legal right or interest held before February 4, 1991.

Application of federal laws — continental shelf installations

20 (1) Subject to any regulations made pursuant to paragraph 26(1)(j) or (k), federal laws apply

(a) on or under any marine installation or structure from the time it is attached or anchored to the continental shelf of Canada in connection with the exploration of that shelf or the exploitation of its mineral or other non-living resources until the marine installation or structure is removed from the waters above the continental shelf of Canada;

(b) on or under any artificial island constructed, erected or placed on the continental shelf of Canada; and

(c) within such safety zone surrounding any marine installation or structure or artificial island referred to in paragraph (a) or (b) as is determined by or pursuant to the regulations.

Interpretation

(2) For the purposes of subsection (1), federal laws shall be applied

(a) as if the places referred to in that subsection formed part of the territory of Canada;

(b) notwithstanding that by their terms their application is limited to Canada; and

(c) in a manner that is consistent with the rights and freedoms of other states under international law and, in particular, with the rights and freedoms of other states in relation to navigation and overflight.

Application of provincial law

21 (1) Subject to this section and to any other Act of Parliament, the laws of a province apply to the same extent as federal laws apply pursuant to section 20 in any area of the sea

(a) that forms part of the exclusive economic zone of Canada or is above the continental shelf of Canada;

Droits de Sa Majesté

19 (1) Il est entendu que les droits du Canada sur son plateau continental appartiennent à Sa Majesté du chef du Canada.

Réserve

(2) Le présent article n'a pas pour effet de porter atteinte aux droits acquis avant le 4 février 1991.

Application du droit fédéral

20 (1) Sous réserve des règlements d'application des alinéas 26(1)j) ou k), le droit fédéral s'applique :

a) aux ouvrages en mer et sous ceux-ci, depuis le moment de leur fixation au plateau continental ou à son sous-sol, à l'occasion de l'exploration de celui-ci ou de l'exploitation de ses ressources minérales ou autres ressources naturelles non biologiques, jusqu'à ce qu'ils quittent les eaux surjacentes;

b) aux îles artificielles construites ou mises en place sur le plateau continental, ou sous celles-ci;

c) à l'intérieur de la zone de sécurité située autour des ouvrages et des îles mentionnés aux alinéas a) et b), et délimitée conformément aux règlements.

Interprétation

(2) Pour l'application du paragraphe (1), les règles du droit fédéral s'appliquent :

a) comme si les lieux visés faisaient partie du territoire du Canada;

b) même si, selon leurs propres termes, elles ne s'appliquent qu'au Canada;

c) d'une façon compatible avec les droits et libertés que le droit international reconnaît aux autres États, notamment en matière de navigation et de survol.

Application du droit provincial

21 (1) Sous réserve des autres dispositions du présent article et de toute autre loi fédérale, et dans la même mesure que le droit fédéral s'applique en vertu de l'article 20, le droit d'une province côtière s'applique à l'espace maritime extracôtier faisant partie de la zone économique exclusive ou situé au-dessus du plateau continental qui n'est compris dans le territoire d'aucune province et qui est désigné par règlement.

(b) that is not within any province; and

(c) that is prescribed by the regulations.

Limitation

(2) Subject to any regulations made pursuant to paragraph 26(1)(d), subsection (1) does not apply in respect of any provision of a law of a province that

(a) imposes a tax or royalty; or

(b) relates to mineral or other non-living natural resources.

Interpretation

(3) For the purposes of this section, the laws of a province shall be applied as if the area of the sea in which those laws apply under this section were within the territory of that province.

Sums due to province

(4) Any sum due under a law of a province that applies in an area of the sea under this section belongs to Her Majesty in right of the province.

Limitation

(5) For greater certainty, this section shall not be interpreted as providing a basis for any claim, by or on behalf of a province, in respect of any interest in or legislative jurisdiction over any area of the sea in which a law of a province applies under this section or the living or non-living resources of that area, or as limiting the application of any federal laws.

Court Jurisdiction

Jurisdiction extended

22 (1) Subject to subsection (4) and to any regulations made pursuant to paragraph 26(1)(h), a court that would have jurisdiction in respect of any matter had the matter arisen in a province has jurisdiction in respect of any such matter involving a federal law that applies pursuant to this Act to the extent that the matter arises in whole or in part in any area of the sea that is not within any province and

(a) that area of the sea is nearer to the coast of that province than to the coast of any other province; or

(b) that province is prescribed by the regulations.

Jurisdiction extended — provincial laws

(2) Subject to any regulations made pursuant to paragraph 26(1)(h), a court that would have jurisdiction in

Restriction

(2) Sous réserve des règlements pris en vertu de l'alinéa 26(1)d), le paragraphe (1) ne s'applique pas aux règles du droit provincial qui, selon le cas :

a) imposent une taxe ou des redevances;

b) traitent des ressources minérales ou autres ressources naturelles non biologiques.

Interprétation

(3) Dans les cas visés par le présent article, le droit provincial s'applique comme si l'espace visé était situé à l'intérieur de la province.

Remise à la province

(4) Les sommes payables au titre d'une règle du droit provincial qui s'applique à l'espace visé au présent article appartiennent à Sa Majesté du chef de la province.

Restriction

(5) Il demeure entendu que ni les provinces, ni quiconque en leur nom, ne peuvent se fonder sur le présent article pour prétendre à des droits ou à une compétence législative sur les espaces extracôtiers visés ou sur leurs ressources biologiques ou non biologiques; en outre, le présent article n'a pas pour effet de limiter l'application du droit fédéral.

Compétence juridictionnelle

Compétence extraterritoriale : droit fédéral

22 (1) Sous réserve du paragraphe (4) et des règlements d'application de l'alinéa 26(1)h), l'affaire mettant en jeu une règle du droit fédéral et survenue, en tout ou en partie, dans un espace maritime extracôtier qui n'est compris dans le territoire d'aucune province et où s'applique le droit fédéral en vertu de la présente loi ressortit aux tribunaux ayant compétence dans la province côtière la plus proche ou celle désignée par règlement, dans la mesure où ceux-ci auraient compétence si l'affaire était survenue dans cette province.

Compétence extraterritoriale : droit provincial

(2) Sous réserve des règlements d'application de l'alinéa 26(1)h), l'affaire mettant en jeu une règle du droit d'une

respect of any matter had the matter arisen in a province has jurisdiction in respect of any such matter involving a law of the province that applies pursuant to this Act to the extent that the matter arises in whole or in part in any area of the sea to which the law of that province applies pursuant to this Act.

province et survenue, en tout ou en partie, dans un espace maritime extracôtier auquel s'applique le droit de cette province en vertu de la présente loi ressortit aux tribunaux ayant compétence dans la province, dans la mesure où ils auraient compétence si l'affaire était survenue dans celle-ci.

Orders and powers

(3) A court referred to in subsection (1) or (2) may make any order or exercise any power it considers necessary in respect of any matter referred to in that subsection.

Exercice des pouvoirs

(3) Les tribunaux visés aux paragraphes (1) ou (2) peuvent, dans le cadre des affaires dont ils sont saisis, exercer tous leurs pouvoirs selon qu'ils le jugent nécessaire.

Criminal offences

(4) The jurisdiction and powers of courts with respect to offences under any federal law are determined pursuant to sections 477.3, 481.1 and 481.2 of the *Criminal Code*.

Infractions au droit fédéral

(4) Leur compétence à l'égard des infractions au droit fédéral est déterminée conformément aux articles 477.3, 481.1 et 481.2 du *Code criminel*.

Saving

(5) Nothing in this section limits the jurisdiction that a court may exercise apart from this Act.

Réserve

(5) Le présent article n'a pas pour effet de restreindre la compétence qu'ils exercent par ailleurs.

Definition of "court"

(6) In this section, ***court*** includes a judge of a court and a justice of the peace.

Définition de « tribunaux »

(6) Pour l'application du présent article, sont assimilés aux tribunaux les juges qui y siègent et les juges de paix.

Miscellaneous Provisions

Certificate — Minister of Foreign Affairs

23 (1) In any legal or other proceedings, a certificate issued by or under the authority of the Minister of Foreign Affairs containing a statement that any geographic location specified in the certificate was, at any time material to the proceedings,

(a) in the internal waters of Canada,

(b) in the territorial sea of Canada,

(c) in the contiguous zone of Canada,

(d) in the exclusive economic zone of Canada, or

(e) in or above the continental shelf of Canada

is conclusive proof of the truth of the statement without proof of the signature or official character of the person appearing to have issued the certificate.

Certificate — Minister of Fisheries and Oceans

(2) In any legal or other proceedings, a certificate issued by or under the authority of the Minister containing a statement that any geographic location specified in the certificate was, at any time material to the proceedings,

Dispositions diverses

Certificat du ministre des Affaires étrangères

23 (1) Dans toute procédure, vaut preuve concluante des renseignements qui y sont énoncés le certificat délivré sous l'autorité du ministre des Affaires étrangères et attestant qu'un lieu se trouvait, à l'époque en cause :

a) dans les eaux intérieures;

b) dans la mer territoriale;

c) dans la zone contiguë;

d) dans la zone économique exclusive;

e) sur le plateau continental ou dans les eaux surjacentes.

Le certificat est recevable en preuve sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualité officielle du signataire.

Certificat du ministre des Pêches et des Océans

(2) Dans toute procédure, vaut preuve concluante des renseignements qui y sont énoncés le certificat délivré sous l'autorité du ministre et attestant qu'un lieu se trouvait, à l'époque en cause, dans un espace maritime

within an area of the sea in which a law of the province named in the certificate applies under section 9 or 21 is conclusive proof of the truth of the statement without proof of the signature or official character of the person appearing to have issued the certificate.

Certificate cannot be compelled

(3) A certificate referred to in subsection (1) or (2) is admissible in evidence in proceedings referred to in that subsection, but its production cannot be compelled.

Saving

24 Nothing in this Part limits the operation that any Act, rule of law or instrument has apart from this Part.

Regulations

Recommendation — Minister of Foreign Affairs

25 The Governor in Council may, on the recommendation of the Minister of Foreign Affairs, make regulations

(a) prescribing geographical coordinates of points from which

(i) baselines may be determined under subsection 5(2) as straight lines interpreted as geodesics,

(ii) in respect of a portion of the territorial sea of Canada prescribed in the regulations, an outer limit line may be determined, where, in the opinion of the Governor in Council, a portion of the territorial sea of Canada determined in accordance with paragraph 4(a) would conflict with the territorial sea of another state or other area of the sea in which another state has sovereign rights or would be unreasonably close to the coast of another state,

(iii) in respect of a portion of the exclusive economic zone of Canada or the continental shelf of Canada prescribed in the regulations, an outer limit line may be determined, where, in the opinion of the Governor in Council, a portion of the exclusive economic zone of Canada or the continental shelf of Canada determined in accordance with paragraph 13(1)(a) or 17(1)(a) or (b) would conflict with the territorial sea of another state or other area of the sea in which another state has sovereign rights or would be unreasonably close to the coast of another state or is otherwise inappropriate, and

(iv) the outer limit of the exclusive economic zone of Canada or the outer edge of the continental margin or other outer limit of the continental shelf of Canada may be determined; and

extracôtier où le droit de la province désignée dans le certificat s'appliquait en vertu des articles 9 ou 21. Le certificat est recevable en preuve sans qu'il soit nécessaire de prouver l'authenticité de la signature ou la qualité officielle du signataire.

Non-exigibilité des certificats

(3) La production des certificats visés aux paragraphes (1) et (2) n'est pas susceptible de contrainte.

Réserve

24 Les dispositions de la présente partie n'ont pas pour effet de limiter l'applicabilité que des lois, des règles de droit ou des actes juridiques peuvent avoir par ailleurs.

Règlements

Recommandation du ministre des Affaires étrangères

25 Le gouverneur en conseil peut, sur la recommandation du ministre des Affaires étrangères, prendre des règlements :

a) pour fixer les coordonnées géographiques de points permettant de déterminer :

(i) les géodésiques constituant, aux termes du paragraphe 5(2), la ligne de base de la mer territoriale,

(ii) la limite extérieure de la mer territoriale dans les secteurs désignés par règlement où il estime que l'application de l'alinéa 4a) entraînerait un empiétement sur la mer territoriale d'un autre État ou sur un espace maritime assujetti aux droits souverains d'un autre État, ou placerait cette limite à un endroit trop proche du littoral d'un autre État,

(iii) la limite extérieure de la zone économique exclusive ou du plateau continental dans les secteurs désignés par règlement où il estime que l'application des alinéas 13(1)a) ou 17(1)a) ou b) entraînerait un empiétement sur la mer territoriale d'un autre État ou sur un espace maritime assujetti aux droits souverains d'un autre État, placerait la limite à un endroit trop proche du littoral d'un autre État ou serait inopportune pour quelque autre raison,

(iv) la limite extérieure de la zone économique exclusive, ou celle du plateau continental, notamment le rebord externe de la marge continentale;

b) pour constituer en zone de pêche tout espace maritime adjacent à la côte du Canada.

(b) prescribing areas of the sea adjacent to the coast of Canada as fishing zones of Canada.

Recommendation — Minister of Justice

26 (1) The Governor in Council may, on the recommendation of the Minister of Justice, make regulations

(a) prescribing a work or a class of works for the purpose of the definition "marine installation or structure" in section 2;

(b) making any law of a province applicable in respect of any part of the area of the sea in which laws of the province apply under section 9 or 21, even though the law, by its own terms, is applicable only in respect of a particular area within the province;

(c) restricting the application of subsection 9(1) or 21(1) to such laws of a province as are specified in the regulations;

(d) making subsection 9(1) or 21(1) applicable, on the terms and conditions, if any, specified in the regulations, in respect of any laws of a province that impose a tax or royalty or relate to mineral or other non-living natural resources;

(e) excluding any law of a province from the application of subsection 9(1) or 21(1);

(f) determining or prescribing the method of determining the safety zone referred to in paragraph 20(1)(c);

(g) prescribing an area of the sea and a province for the purposes of subsection 9(1), 21(1) or 22(1);

(h) restricting the application of subsection 22(1), (2) or (3) to courts of a district or territorial division of a province;

(i) prescribing, in respect of any area of the sea and for the purpose of subsection 22(1), the manner of determining the province that has the coast nearest to that area;

(j) excluding any federal laws or laws of a province or any of their provisions from the application of subsection 20(1) or 21(1), as the case may be, in respect of any area in or above the continental shelf of Canada or in respect of any specified activity in any such area; and

(k) making federal laws or laws of a province or any of their provisions applicable, in such circumstances as are specified in the regulations,

Recommandation du ministre de la Justice

26 (1) Le gouverneur en conseil peut, sur la recommandation du ministre de la Justice, prendre des règlements pour :

a) désigner des ouvrages ou catégories d'ouvrages pour l'application de la définition de « ouvrages en mer », à l'article 2;

b) étendre l'application d'une règle du droit provincial à tout espace maritime extracôtier où le droit de la province en cause s'applique en vertu des articles 9 ou 21, même si cette règle, selon ses propres termes, n'est applicable qu'à une partie du territoire de la province;

c) restreindre l'application des paragraphes 9(1) ou 21(1) à telle règle du droit de la province visée;

d) rendre les paragraphes 9(1) ou 21(1) applicables, en conformité avec les conditions spécifiées dans le règlement, à toute règle du droit provincial imposant une taxe ou des redevances ou traitant des ressources minérales ou autres ressources naturelles non biologiques;

e) exclure toute règle du droit provincial de l'application des paragraphes 9(1) ou 21(1);

f) délimiter ou prescrire le mode de délimitation de la zone de sécurité visée à l'alinéa 20(1)c);

g) désigner tout espace maritime extracôtier pour l'application des paragraphes 9(1), 21(1) ou 22(1);

h) restreindre l'application des paragraphes 22(1), (2) ou (3) aux tribunaux de telle circonscription ou autre division territoriale de la province;

i) prévoir, pour l'application du paragraphe 22(1), la façon de déterminer la province côtière la plus proche d'un espace maritime donné;

j) exclure une règle du droit fédéral ou provincial de l'application des paragraphes 20(1) ou 21(1), selon le cas, à l'égard de tout ou partie du plateau continental ou des eaux surjacentes, ou à l'égard de certaines activités déterminées;

k) rendre une règle du droit fédéral ou provincial applicable, dans les circonstances spécifiées, à tout ou partie, selon le cas :

(i) de la zone économique exclusive,

(i) in the exclusive economic zone of Canada or in a portion of that zone,

(ii) in or above the continental shelf of Canada or a portion of that shelf, or

(iii) in any area beyond the continental shelf of Canada, where that application is made pursuant to an international agreement or arrangement entered into by Canada.

(ii) du plateau continental ou des eaux surjacentes,

(iii) des espaces maritimes situés au-delà du plateau continental et faisant l'objet d'une entente ou d'un accord international conclu par le Canada.

Restriction

(2) A regulation made pursuant to subsection (1) in relation to a law of a province may be restricted to a specific area or place or to a specific provision of the law.

Précision

(2) Le règlement pris en vertu du paragraphe (1) peut ne s'appliquer qu'à un endroit ou à un espace déterminé, ou ne viser que telle règle du droit provincial.

Interpretation

(3) For the purposes of paragraphs (1)(j) and (k), federal laws and the laws of a province shall be applied

(a) as if the places referred to in any regulations made pursuant to either of those paragraphs formed part of the territory of Canada;

(b) notwithstanding that by their terms their application is limited to Canada or a province; and

(c) in a manner that is consistent with the rights and freedoms of other states under international law and, in particular, with the rights and freedoms of other states in relation to navigation and overflight.

Interprétation

(3) Pour l'application des alinéas (1)j) et k), les règles du droit fédéral ou provincial visées s'appliquent :

a) comme si les lieux visés faisaient partie du territoire du Canada;

b) même si, selon leurs propres termes, elles ne s'appliquent qu'au Canada ou à la province, selon le cas;

c) d'une façon compatible avec les droits et libertés que le droit international reconnaît aux autres États, notamment en matière de navigation et de survol.

Publication of proposed regulations

27 (1) A copy of each regulation that the Governor in Council proposes to make pursuant to paragraph 25(b) or section 26 shall be published in the *Canada Gazette* at least 60 days before its proposed effective date, and a reasonable opportunity shall be given to interested persons and provinces to make representations with respect to the proposed regulation.

Publication

27 (1) Le projet de règlement d'application de l'alinéa 25b) ou de l'article 26 est publié dans la *Gazette du Canada* au moins soixante jours avant la date envisagée pour sa prise d'effet, les intéressés — notamment les provinces — se voyant accorder la possibilité de présenter leurs observations.

Exception

(2) No proposed regulation that has been published pursuant to this section need again be published under this section, whether or not it has been altered.

Dispense

(2) Il n'est pas nécessaire de publier de nouveau le projet de règlement même s'il a été modifié.

PART II

Oceans Management Strategy

PARTIE II

Stratégie de gestion des océans

Part does not apply to inland waters

28 For greater certainty, this Part does not apply in respect of rivers and lakes.

Eaux internes

28 Il est entendu que la présente partie ne s'applique pas aux lacs, fleuves et rivières.

Development and implementation of strategy

29 The Minister, in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, shall lead and facilitate the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems in waters that form part of Canada or in which Canada has sovereign rights under international law.

Principles of strategy

30 The national strategy will be based on the principles of

(a) sustainable development, that is, development that meets the needs of the present without compromising the ability of future generations to meet their own needs;

(b) the integrated management of activities in estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law; and

(c) the precautionary approach, that is, erring on the side of caution.

Integrated management plans

31 The Minister, in collaboration with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, shall lead and facilitate the development and implementation of plans for the integrated management of all activities or measures in or affecting estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law.

Implementation of integrated management plans

32 For the purpose of the implementation of integrated management plans, the Minister

(a) shall develop and implement policies and programs with respect to matters assigned by law to the Minister;

(b) shall coordinate with other ministers, boards and agencies of the Government of Canada the implementation of policies and programs of the Government

Élaboration et mise en œuvre

29 Le ministre, en collaboration avec d'autres ministres et organismes fédéraux, les gouvernements provinciaux et territoriaux et les organisations autochtones, les collectivités côtières et les autres personnes de droit public et de droit privé intéressées, y compris celles constituées dans le cadre d'accords sur des revendications territoriales, dirige et favorise l'élaboration et la mise en œuvre d'une stratégie nationale de gestion des écosystèmes estuariens, côtiers et marins des eaux faisant partie du Canada ou sur lesquelles le droit international reconnaît à celui-ci des droits souverains.

Principes directeurs

30 La stratégie nationale repose sur les principes suivants :

a) le développement durable, c'est-à-dire le développement qui permet de répondre aux besoins actuels sans compromettre la possibilité pour les générations futures de satisfaire les leurs;

b) la gestion intégrée des activités qui s'exercent dans les estuaires et les eaux côtières et marines faisant partie du Canada ou sur lesquelles le droit international reconnaît à celui-ci des droits souverains;

c) la prévention, c'est-à-dire pécher par excès de prudence.

Plans de gestion intégrée

31 Le ministre, en collaboration avec d'autres ministres et organismes fédéraux, les gouvernements provinciaux et territoriaux et les organisations autochtones, les collectivités côtières et les autres personnes de droit public et de droit privé intéressées, y compris celles constituées dans le cadre d'accords sur des revendications territoriales, dirige et favorise l'élaboration et la mise en œuvre de plans pour la gestion intégrée de toutes les activités ou mesures qui s'exercent ou qui ont un effet dans les estuaires et les eaux côtières et marines faisant partie du Canada ou sur lesquelles le droit international reconnaît à celui-ci des droits souverains.

Mise en œuvre des plans de gestion intégrée

32 En vue de la mise en œuvre des plans de gestion intégrée, le ministre :

a) élabore et met en œuvre des orientations, des objectifs et des programmes dans les domaines de compétence qui lui sont attribués de droit;

b) recommande et coordonne, avec d'autres ministres ou organismes fédéraux, la mise en œuvre d'autres orientations, objectifs et programmes du

with respect to all activities or measures in or affecting coastal waters and marine waters;

(c) may, on his or her own or jointly with another person or body or with another minister, board or agency of the Government of Canada, and taking into consideration the views of other ministers, boards and agencies of the Government of Canada, provincial and territorial governments and affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements,

(i) establish advisory or management bodies and appoint or designate, as appropriate, members of those bodies, and

(ii) recognize established advisory or management bodies; and

(d) may, in consultation with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements, establish marine environmental quality guidelines, objectives and criteria respecting estuaries, coastal waters and marine waters.

gouvernement fédéral, relativement aux activités ou mesures touchant les eaux côtières ou marines;

c) peut, de sa propre initiative ou conjointement avec d'autres ministres ou organismes fédéraux ou d'autres personnes de droit public ou de droit privé, et après avoir pris en considération le point de vue d'autres ministres et organismes fédéraux, des gouvernements provinciaux et territoriaux et des organisations autochtones, des collectivités côtières et des autres personnes de droit public et de droit privé intéressées, y compris celles constituées dans le cadre d'accords sur des revendications territoriales, constituer des organismes de consultation ou de gestion et, selon le cas, y nommer ou désigner des membres, ou mandater des organismes existants à cet égard;

d) peut, en consultation avec d'autres ministres et organismes fédéraux, les gouvernements provinciaux et territoriaux et les organisations autochtones, les collectivités côtières et les autres personnes de droit public et de droit privé intéressées, y compris celles constituées dans le cadre d'accords sur des revendications territoriales, établir des directives, des objectifs et des critères concernant la qualité du milieu dans les estuaires et les eaux côtières et marines.

Cooperation and agreements

33 (1) In exercising the powers and performing the duties and functions assigned to the Minister by this Act, the Minister

(a) shall cooperate with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements;

(b) may enter into agreements with any person or body or with another minister, board or agency of the Government of Canada;

(c) shall gather, compile, analyse, coordinate and disseminate information;

(d) may make grants and contributions on terms and conditions approved by the Treasury Board; and

(e) may make recoverable expenditures on behalf of and at the request of any other minister, board or agency of the Government of Canada or of a province or any person or body.

Coopération et accords

33 (1) Dans l'exercice des attributions qui lui sont conférées par la présente loi, le ministre :

a) coopère avec d'autres ministres et organismes fédéraux, les gouvernements provinciaux et territoriaux et les organisations autochtones, les collectivités côtières et les autres personnes de droit public et de droit privé intéressées, y compris celles constituées dans le cadre d'accords sur des revendications territoriales;

b) peut conclure des accords avec d'autres ministres ou toute personne de droit public ou de droit privé;

c) recueille, dépouille, analyse, coordonne et diffuse de l'information;

d) peut accorder des subventions ou contributions suivant les modalités approuvées par le Conseil du Trésor;

e) peut, à la demande d'autres ministres fédéraux ou de personnes de droit public — fédérales ou provinciales — ou de droit privé, engager des dépenses pour leur compte et recouvrer les sommes ainsi exposées.

Consultation

(2) In exercising the powers and performing the duties and functions mentioned in this Part, the Minister may consult with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements.

Logistics support, etc.

34 The Minister may coordinate logistics support and provide related assistance for the purposes of advancing scientific knowledge of estuarine, coastal and marine ecosystems.

Marine protected areas

35 (1) A marine protected area is an area of the sea that forms part of the internal waters of Canada, the territorial sea of Canada or the exclusive economic zone of Canada and has been designated under this section for special protection for one or more of the following reasons:

(a) the conservation and protection of commercial and non-commercial fishery resources, including marine mammals, and their habitats;

(b) the conservation and protection of endangered or threatened marine species, and their habitats;

(c) the conservation and protection of unique habitats;

(d) the conservation and protection of marine areas of high biodiversity or biological productivity; and

(e) the conservation and protection of any other marine resource or habitat as is necessary to fulfil the mandate of the Minister.

Marine protected areas

(2) For the purposes of integrated management plans referred to in sections 31 and 32, the Minister will lead and coordinate the development and implementation of a national system of marine protected areas on behalf of the Government of Canada.

Regulations

(3) The Governor in Council, on the recommendation of the Minister, may make regulations

(a) designating marine protected areas; and

Consultation

(2) Dans l'exercice des attributions prévues par la présente partie, le ministre peut consulter d'autres ministres et organismes fédéraux, les gouvernements provinciaux et territoriaux et les organisations autochtones, les collectivités côtières et les autres personnes de droit public et de droit privé intéressées, y compris celles constituées dans le cadre d'accords sur des revendications territoriales.

Soutien logistique

34 Le ministre peut prendre en charge la coordination du soutien logistique d'activités visant à faire progresser la connaissance scientifique des écosystèmes estuariens, côtiers et marins.

Zones de protection marine

35 (1) Une zone de protection marine est un espace maritime qui fait partie des eaux intérieures, de la mer territoriale ou de la zone économique exclusive du Canada et qui a été désigné en application du présent article en vue d'une protection particulière pour l'une ou plusieurs des raisons suivantes :

a) la conservation et la protection des ressources halieutiques, commerciales ou autres, y compris les mammifères marins, et de leur habitat;

b) la conservation et la protection des espèces en voie de disparition et des espèces menacées, et de leur habitat;

c) la conservation et la protection d'habitats uniques;

d) la conservation et la protection d'espaces marins riches en biodiversité ou en productivité biologique;

e) la conservation et la protection d'autres ressources ou habitats marins, pour la réalisation du mandat du ministre.

Zones de protection marine

(2) Pour la planification de la gestion intégrée mentionnée aux articles 31 et 32, le ministre dirige et coordonne l'élaboration et la mise en œuvre d'un système national de zones de protection marine au nom du gouvernement du Canada.

Règlements

(3) Sur la recommandation du ministre, le gouverneur en conseil peut, par règlement :

a) désigner des zones de protection marine;

(b) prescribing measures that may include but not be limited to

(i) the zoning of marine protected areas,

(ii) the prohibition of classes of activities within marine protected areas, and

(iii) any other matter consistent with the purpose of the designation.

b) prendre toute mesure compatible avec l'objet de la désignation, notamment :

(i) la délimitation de zones de protection marine,

(ii) l'interdiction de catégories d'activités dans ces zones.

Interim marine protected areas in emergency situations

36 (1) The Governor in Council, on the recommendation of the Minister, may make orders exercising any power under section 35 on an emergency basis, where the Minister is of the opinion that a marine resource or habitat is or is likely to be at risk to the extent that such orders are not inconsistent with a land claims agreement that has been given effect and has been ratified or approved by an Act of Parliament.

Situations d'urgence

36 (1) Sur la recommandation du ministre, le gouverneur en conseil peut exercer par décret les pouvoirs que lui confère l'article 35 lorsqu'il estime qu'une ressource ou un habitat marins sont menacés ou risquent de l'être dans la mesure où le décret n'est pas incompatible avec quelque accord sur des revendications territoriales ratifié, mis en vigueur et déclaré valide par une loi fédérale.

Exemption from *Statutory Instruments Act*

(2) An order made under this section is exempt from the application of sections 3, 5 and 11 of the *Statutory Instruments Act*.

Loi sur les textes réglementaires

(2) Les articles 3, 5 et 11 de la *Loi sur les textes réglementaires* ne s'appliquent pas au décret pris au titre du présent article.

Temporary effect

(3) An order made under this section that is not repealed ceases to have effect 90 days after it is made.

Durée de validité

(3) Sauf révocation, le décret produit ses effets pendant une période maximale de quatre-vingt-dix jours à compter de sa prise.

Offence and punishment

37 Every person who contravenes a regulation made under paragraph 35(3)(b) or an order made under subsection 36(1) in the exercise of a power under that paragraph

(a) is guilty of an offence punishable on summary conviction and liable to a fine not exceeding $100,000; or

(b) is guilty of an indictable offence and liable to a fine not exceeding $500,000.

Infraction et peine

37 Quiconque contrevient aux règlements d'application de l'alinéa 35(3)b) ou à un décret pris en vertu du paragraphe 36(1) dans l'exercice d'un pouvoir prévu à l'alinéa 35(3)b) commet une infraction et encourt, sur déclaration de culpabilité :

a) par procédure sommaire, une amende maximale de 100 000 $;

b) par mise en accusation, une amende maximale de 500 000 $.

Contravention of unpublished order

38 No person may be convicted of an offence consisting of a contravention of an order made under subsection 36(1) in the exercise of a power under paragraph 35(3)(b) that, at the time of the alleged contravention, had not been published in the *Canada Gazette* in both official languages unless it is proved that reasonable steps had been taken before that time to bring the purport of the order to the attention of those persons likely to be affected by it.

Violation d'un décret non publié

38 Nul ne peut être condamné pour violation d'un décret pris en vertu du paragraphe 36(1) dans l'exercice d'un pouvoir prévu à l'alinéa 35(3)b) et qui, à la date du fait reproché, n'avait pas été publié dans la *Gazette du Canada* dans les deux langues officielles, sauf s'il est établi qu'à cette date les mesures nécessaires avaient été prises pour porter la substance du décret à la connaissance des personnes susceptibles d'être touchées par celui-ci.

Enforcement officers

39 (1) The Minister may designate any person or class of persons to act as enforcement officers for the purposes of this Act and the regulations.

Designation of provincial government employees

(2) The Minister may not designate any person or class of persons employed by the government of a province unless that government agrees.

Certificate of designation

(3) Every enforcement officer must be provided with a certificate of designation as an enforcement officer in a form approved by the Minister and, on entering any place under this Act, the officer shall, if so requested, show the certificate to the occupant or person in charge of the place.

Powers of peace officers

(4) For the purposes of this Act and the regulations, enforcement officers have all the powers of a peace officer, but the Minister may specify limits on those powers when designating any person or class of persons.

Exemptions for law enforcement activities

(5) For the purpose of investigations and other law enforcement activities under this Act, the Minister may, on any terms and conditions the Minister considers necessary, exempt enforcement officers who are carrying out duties or functions under this Act, and persons acting under their direction and control, from the application of any provision of this Act or the regulations.

Obstruction

(6) When an enforcement officer is carrying out duties or functions under this Act or the regulations, no person shall

(a) knowingly make any false or misleading statement either orally or in writing to the enforcement officer; or

(b) otherwise wilfully obstruct the enforcement officer.

Inspections

39.1 (1) For the purpose of ensuring compliance with this Act and the regulations, an enforcement officer may, subject to subsection (3), at any reasonable time enter and inspect any place in which the enforcement officer believes, on reasonable grounds, there is any thing to which this Act or the regulations apply or any document

Désignation d'agents de l'autorité

39 (1) Le ministre peut désigner, individuellement ou par catégorie, les agents de l'autorité jugés nécessaires au contrôle d'application de la présente loi et des règlements.

Fonctionnaires provinciaux

(2) La désignation de fonctionnaires provinciaux est toutefois subordonnée à l'agrément du gouvernement provincial intéressé.

Présentation du certificat

(3) Les agents de l'autorité sont munis d'un certificat de désignation en la forme approuvée par le ministre qu'ils présentent, sur demande, au responsable ou à l'occupant des lieux qui font l'objet de leur visite.

Assimilation à un agent de la paix

(4) Pour l'application de la présente loi et de ses règlements, les agents de l'autorité ont tous les pouvoirs d'un agent de la paix; le ministre peut toutefois restreindre ceux-ci lors de la désignation.

Exemptions

(5) Pour les enquêtes et autres mesures de contrôle d'application de la loi, le ministre peut, aux conditions qu'il juge nécessaires, soustraire tout agent de l'autorité agissant dans l'exercice de ses fonctions — ainsi que toute personne agissant sous la direction ou l'autorité de celui-ci — à l'application de la présente loi ou des règlements, ou de leurs dispositions.

Entrave

(6) Il est interdit d'entraver volontairement l'action des agents de l'autorité dans l'exercice de leurs fonctions ou de leur faire sciemment, oralement ou par écrit, une déclaration fausse ou trompeuse.

Visite

39.1 (1) Dans le but de faire observer la présente loi et ses règlements, l'agent de l'autorité peut, à toute heure convenable et sous réserve du paragraphe (3), procéder à la visite de tout lieu s'il a des motifs raisonnables de croire que s'y trouve un objet visé par la présente loi ou les règlements ou un document relatif à l'application de ceux-ci. Il peut en outre :

relating to the administration of this Act or the regulations, and the enforcement officer may

(a) open or cause to be opened any container that the enforcement officer believes, on reasonable grounds, contains any such thing or document;

(b) inspect the thing and take samples free of charge;

(c) require any person to produce the document for inspection or copying, in whole or in part; and

(d) seize any thing by means of or in relation to which the enforcement officer believes, on reasonable grounds, this Act or the regulations have been contravened or that the enforcement officer believes, on reasonable grounds, will provide evidence of a contravention.

a) ouvrir ou faire ouvrir tout contenant où, à son avis, se trouve un tel objet ou document;

b) examiner tout objet et en prélever, sans compensation, des échantillons;

c) exiger la communication du document, pour examen ou reproduction totale ou partielle;

d) saisir tout objet qui, à son avis, a servi ou donné lieu à une contravention à la présente loi ou à ses règlements ou qui peut servir à la prouver.

L'avis de l'agent de l'autorité doit être fondé sur des motifs raisonnables.

Conveyance

(2) For the purposes of carrying out the inspection, the enforcement officer may stop a conveyance or direct that it be moved to a place where the inspection can be carried out.

Moyens de transport

(2) L'agent de l'autorité peut procéder à l'immobilisation du moyen de transport qu'il entend visiter et le faire conduire en tout lieu où il peut effectuer la visite.

Dwelling-place

(3) The enforcement officer may not enter a dwelling-place except with the consent of the occupant or person in charge of the dwelling-place or under the authority of a warrant.

Local d'habitation

(3) Dans le cas d'un local d'habitation, l'agent de l'autorité ne peut procéder à la visite sans l'autorisation du responsable ou de l'occupant que s'il est muni d'un mandat de perquisition.

Warrant

(4) Where on *ex parte* application a justice, as defined in section 2 of the *Criminal Code*, is satisfied by information on oath that

(a) the conditions for entry described in subsection (1) exist in relation to a dwelling-place,

(b) entry to the dwelling-place is necessary in relation to the administration of this Act or the regulations, and

(c) entry to the dwelling-place has been refused or there are reasonable grounds for believing that entry will be refused,

the justice may issue a warrant authorizing the enforcement officer to enter the dwelling-place subject to any conditions that may be specified in the warrant.

Mandat de perquisition

(4) Sur demande *ex parte*, le juge de paix — au sens de l'article 2 du *Code criminel* — peut signer un mandat autorisant, sous réserve des conditions éventuellement fixées, l'agent de l'autorité à procéder à la visite d'un local d'habitation s'il est convaincu, sur la foi d'une dénonciation sous serment, que sont réunis les éléments suivants :

a) les circonstances prévues au paragraphe (1) existent;

b) la visite est nécessaire pour l'application de la présente loi ou de ses règlements;

c) un refus a été opposé à la visite ou il y a des motifs raisonnables de croire que tel sera le cas.

Search and seizure without warrant

39.2 For the purpose of ensuring compliance with this Act and the regulations, an enforcement officer may exercise the powers of search and seizure provided in section 487 of the *Criminal Code* without a warrant, if the

Perquisition sans mandat

39.2 Dans le but de faire observer la présente loi et ses règlements, l'agent de l'autorité peut exercer sans mandat les pouvoirs mentionnés à l'article 487 du *Code criminel* en matière de perquisition et de saisie lorsque

conditions for obtaining a warrant exist but by reason of exigent circumstances it would not be feasible to obtain the warrant.

l'urgence de la situation rend difficilement réalisable l'obtention du mandat, sous réserve que les conditions de délivrance de celui-ci soient réunies.

Custody of things seized

39.3 (1) Subject to subsections (2) and (3), where an enforcement officer seizes a thing under this Act or under a warrant issued under the *Criminal Code*,

(a) sections 489.1 and 490 of the *Criminal Code* apply; and

(b) the enforcement officer, or any person that the officer may designate, shall retain custody of the thing, subject to any order made under section 490 of the *Criminal Code*.

Garde

39.3 (1) Sous réserve des paragraphes (2) et (3) :

a) les articles 489.1 et 490 du *Code criminel* s'appliquent en cas de saisies d'objets effectuées par l'agent de l'autorité en vertu de la présente loi ou d'un mandat délivré au titre du *Code criminel*;

b) la responsabilité de ces objets incombe, sous réserve d'une ordonnance rendue aux termes de l'article 490 du *Code criminel*, à l'agent de l'autorité ou à la personne qu'il désigne.

Forfeiture where ownership not ascertainable

(2) Where the lawful ownership of or entitlement to the seized thing cannot be ascertained within thirty days after its seizure, the thing or any proceeds of its disposition are forfeited to

(a) Her Majesty in right of Canada, if the thing was seized by an enforcement officer employed in the federal public administration; or

(b) Her Majesty in right of a province, if the thing was seized by an enforcement officer employed by the government of that province.

Confiscation de plein droit

(2) Dans le cas où leur propriétaire légitime — ou la personne qui a légitimement droit à leur possession — ne peut être identifié dans les trente jours suivant la saisie, les objets, ou le produit de leur aliénation, sont confisqués au profit de Sa Majesté du chef du Canada ou d'une province, selon que l'agent de l'autorité saisissant est un fonctionnaire de l'administration publique fédérale ou un fonctionnaire de la province en question.

Perishable things

(3) Where the seized thing is perishable, the enforcement officer may dispose of it or destroy it, and any proceeds of its disposition must be

(a) paid to the lawful owner or person lawfully entitled to possession of the thing, unless proceedings under this Act are commenced within ninety days after its seizure; or

(b) retained by the enforcement officer pending the outcome of the proceedings.

Biens périssables

(3) L'agent de l'autorité peut aliéner ou détruire les objets saisis périssables; le produit de l'aliénation est soit remis à leur propriétaire légitime ou à la personne qui a légitimement droit à leur possession, soit, lorsque des poursuites fondées sur la présente loi ont été intentées dans les quatre-vingt-dix jours suivant la saisie, retenu par lui jusqu'au règlement de l'affaire.

Abandonment

(4) The owner of the seized thing may abandon it to Her Majesty in right of Canada or a province.

1996, c. 31, s. 39.3; 2003, c. 22, s. 224(E).

Abandon

(4) Le propriétaire légitime de tout objet saisi en application de la présente loi peut l'abandonner au profit de Sa Majesté du chef du Canada ou d'une province.

1996, ch. 31, art. 39.3; 2003, ch. 22, art. 224(A).

Disposition by Minister

39.4 Any thing that has been forfeited or abandoned under this Act must be dealt with and disposed of as the Minister may direct.

Disposition par le ministre

39.4 Il est disposé des objets saisis ou du produit de leur aliénation conformément aux instructions du ministre.

Liability for costs

39.5 The lawful owner and any person lawfully entitled to possession of any thing seized, abandoned or forfeited under this Act are jointly and severally liable for all the costs of inspection, seizure, abandonment, forfeiture or disposition incurred by Her Majesty in right of Canada in excess of any proceeds of disposition of the thing that have been forfeited to Her Majesty under this Act.

Contravention of Act or regulations

39.6 (1) Every person who contravenes subsection 39(6) or any regulation made under section 52.1

(a) is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding $100,000; or

(b) is guilty of an indictable offence and is liable to a fine not exceeding $500,000.

Subsequent offence

(2) Where a person is convicted of an offence under this Act a second or subsequent time, the amount of the fine for the subsequent offence may, notwithstanding subsection (1), be double the amount set out in that subsection.

Continuing offence

(3) A person who commits or continues an offence on more than one day is liable to be convicted for a separate offence for each day on which the offence is committed or continued.

Fines cumulative

(4) A fine imposed for an offence involving more than one animal, plant or other organism may be calculated in respect of each one as though it had been the subject of a separate information and the fine then imposed is the total of that calculation.

Additional fine

(5) Where a person has been convicted of an offence and the court is satisfied that monetary benefits accrued to the person as a result of the commission of the offence,

(a) the court may order the person to pay an additional fine in an amount equal to the court's estimation of the amount of the monetary benefits; and

(b) the additional fine may exceed the maximum amount of any fine that may otherwise be imposed under this Act.

Frais

39.5 Le propriétaire légitime et toute personne ayant légitimement droit à la possession des objets saisis, abandonnés ou confisqués au titre de la présente loi sont solidairement responsables des frais — liés à la visite, à l'abandon, à la saisie, à la confiscation ou à l'aliénation — supportés par Sa Majesté du chef du Canada lorsqu'ils en excèdent le produit de l'aliénation.

Infraction et peine

39.6 (1) Quiconque contrevient au paragraphe 39(6) ou aux règlements d'application de l'article 52.1 commet une infraction et encourt, sur déclaration de culpabilité :

a) par procédure sommaire, une amende maximale de 100 000 $;

b) par mise en accusation, une amende maximale de 500 000 $.

Récidive

(2) Le montant des amendes prévues au paragraphe (1) peut être doublé en cas de récidive.

Infraction continue

(3) Il est compté une infraction distincte pour chacun des jours au cours desquels se commet ou se continue l'infraction.

Amendes cumulatives

(4) En cas de déclaration de culpabilité pour une infraction portant sur plusieurs animaux, végétaux ou autres organismes, l'amende peut être calculée sur chacun d'eux, comme s'ils avaient fait l'objet de dénonciations distinctes; l'amende finale infligée est alors la somme totale obtenue.

Amende supplémentaire

(5) Le tribunal saisi d'une poursuite pour infraction à la présente loi peut, s'il constate que le contrevenant a tiré des avantages financiers de la perpétration de celle-ci, lui infliger, en sus de l'amende maximale prévue par la présente loi, une amende supplémentaire correspondant à son évaluation de ces avantages.

Forfeiture

39.7 (1) Where a person is convicted of an offence, the convicting court may, in addition to any punishment imposed, order that any seized thing by means of or in relation to which the offence was committed, or any proceeds of its disposition, be forfeited to Her Majesty in right of Canada.

Return where no forfeiture ordered

(2) Where the convicting court does not order the forfeiture, the seized thing, or the proceeds of its disposition, must be returned to its lawful owner or the person lawfully entitled to it.

Retention or sale

39.8 Where a fine is imposed on a person convicted of an offence, any seized thing, or any proceeds of its disposition, may be retained until the fine is paid, or the thing may be sold in satisfaction of the fine and the proceeds applied, in whole or in part, in payment of the fine.

Orders of court

39.9 Where a person is convicted of an offence, the court may, in addition to any punishment imposed and having regard to the nature of the offence and the circumstances surrounding its commission, make an order containing one or more of the following prohibitions, directions or requirements:

(a) prohibiting the person from doing any act or engaging in any activity that could, in the opinion of the court, result in the continuation or repetition of the offence;

(b) directing the person to take any action that the court considers appropriate to remedy or avoid any harm to estuarine, coastal or ocean waters, or their resources that resulted or may result from the commission of the offence;

(c) directing the person to publish, in any manner that the court considers appropriate, the facts relating to the commission of the offence;

(d) directing the person to pay the Minister or the government of a province compensation, in whole or in part, for the cost of any remedial or preventive action taken by or on behalf of the Minister or that government as a result of the commission of the offence;

(e) directing the person to perform community service in accordance with any reasonable conditions that may be specified in the order;

Confiscation

39.7 (1) Sur déclaration de culpabilité du contrevenant, le tribunal peut prononcer, en sus de la peine infligée, la confiscation au profit de Sa Majesté du chef du Canada des objets saisis ou du produit de leur aliénation.

Restitution des objets non confisqués

(2) Si le tribunal ne prononce pas la confiscation, les objets saisis, ou le produit de leur aliénation, sont restitués au propriétaire légitime ou à la personne qui a légitimement droit à leur possession.

Rétention ou vente

39.8 En cas de déclaration de culpabilité, les objets saisis, ou le produit de leur aliénation, peuvent être retenus jusqu'au paiement de l'amende; ces objets peuvent, s'ils ne l'ont pas déjà été, être vendus, et le produit de leur aliénation peut être affecté en tout ou en partie au paiement de l'amende.

Ordonnance du tribunal

39.9 En plus de toute peine infligée et compte tenu de la nature de l'infraction ainsi que des circonstances de sa perpétration, le tribunal peut rendre une ordonnance imposant au contrevenant tout ou partie des obligations suivantes :

a) s'abstenir de tout acte ou activité risquant, selon le tribunal, d'entraîner la continuation de l'infraction ou la récidive;

b) prendre les mesures que le tribunal estime indiquées pour réparer ou éviter les dommages aux estuaires et aux eaux côtières et marines résultant ou pouvant résulter de la perpétration de l'infraction;

c) publier, de la façon indiquée par le tribunal, les faits liés à la perpétration de l'infraction;

d) indemniser le ministre ou le gouvernement de la province, en tout ou en partie, des frais supportés pour la réparation ou la prévention des dommages résultant ou pouvant résulter de la perpétration de l'infraction;

e) exécuter des travaux d'intérêt collectif à des conditions raisonnables;

f) fournir au ministre, sur demande présentée par celui-ci dans les trois ans suivant la déclaration de culpabilité, les renseignements relatifs à ses activités que le tribunal estime justifiés en l'occurrence;

(f) directing the person to submit to the Minister, on application to the court by the Minister within three years after the conviction, any information respecting the activities of the person that the court considers appropriate in the circumstances;

(g) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences; and

(h) directing the person to post a bond or pay into court an amount of money that the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement under this section.

g) satisfaire aux autres exigences que le tribunal estime justifiées pour assurer sa bonne conduite et empêcher toute récidive;

h) en garantie de l'exécution des obligations imposées au titre du présent article, fournir le cautionnement ou déposer auprès du tribunal le montant que celui-ci estime indiqué.

Suspended sentence

39.10 (1) Where a person is convicted of an offence and the court suspends the passing of sentence pursuant to the *Criminal Code*, the court may, in addition to any probation order made on suspending the passing of that sentence, make an order containing one or more of the prohibitions, directions or requirements mentioned in section 39.9.

Condamnation avec sursis

39.10 (1) Lorsque, en vertu du *Code criminel*, il sursoit au prononcé de la peine, le tribunal, en plus de toute ordonnance de probation rendue au titre de cette loi à l'occasion du sursis, peut, par ordonnance, enjoindre au contrevenant de se conformer à l'une ou plusieurs des obligations mentionnées à l'article 39.9.

Imposition of sentence

(2) Where the person does not comply with the order or is convicted of another offence, within three years after the order was made, the court may, on the application of the prosecution, impose any sentence that could have been imposed if the passing of sentence had not been suspended.

Prononcé de la peine

(2) Sur demande de la poursuite, le tribunal peut, lorsque la personne visée par l'ordonnance ne se conforme pas aux modalités de celle-ci ou est déclarée coupable d'une autre infraction à la présente loi dans les trois ans qui suivent la date de l'ordonnance, prononcer la peine qui aurait pu être infligée s'il n'y avait pas eu sursis.

Limitation period

39.11 (1) Proceedings by way of summary conviction in respect of an offence may be commenced at any time within, but not later than, two years after the day on which the subject-matter of the proceedings became known to the Minister.

Prescription

39.11 (1) Les poursuites visant une infraction punissable sur déclaration de culpabilité par procédure sommaire se prescrivent par deux ans à compter de la date où le ministre a eu connaissance des éléments constitutifs de l'infraction.

Minister's certificate

(2) A document appearing to have been issued by the Minister, certifying the day on which the subject-matter of any proceedings became known to the Minister, is admissible in evidence without proof of the signature or official character of the person appearing to have signed the document and is proof of the matter asserted in it.

Certificat

(2) Le document censé délivré par le ministre et attestant la date où les éléments sont parvenus à sa connaissance est admissible en preuve et fait foi de son contenu sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Procedure

39.12 (1) In addition to the procedures set out in the *Criminal Code* for commencing a proceeding, proceedings in respect of any offence prescribed by the regulations may be commenced by an enforcement officer

(a) completing a ticket that consists of a summons portion and an information portion;

(b) delivering the summons portion to the accused or mailing it to the accused at the accused's latest known address; and

(c) filing the information portion with a court of competent jurisdiction before the summons portion has been delivered or mailed or as soon as is practicable afterward.

Content of ticket

(2) The summons and information portions of the ticket must

(a) set out a description of the offence and the time and place of its alleged commission;

(b) include a statement, signed by the enforcement officer who completes the ticket, that the officer has reasonable grounds to believe that the accused committed the offence;

(c) set out the amount of the fine prescribed by the regulations for the offence and the manner in which and period within which it may be paid;

(d) include a statement that if the accused pays the fine within the period set out in the ticket, a conviction will be entered and recorded against the accused; and

(e) include a statement that if the accused wishes to plead not guilty or for any other reason fails to pay the fine within the period set out in the ticket, the accused must appear in the court on the day and at the time set out in the ticket.

Notice of forfeiture

(3) Where a thing is seized under this Act and proceedings relating to it are commenced by way of the ticketing procedure, the enforcement officer who completes the ticket shall give written notice to the accused that, if the accused pays the fine prescribed by the regulations within the period set out in the ticket, the thing, or any proceeds of its disposition, will be immediately forfeited to Her Majesty.

Procédure

39.12 (1) En plus des modes prévus au *Code criminel*, la poursuite des infractions précisées par règlement peut être intentée de la façon suivante :

a) l'agent de l'autorité remplit les deux parties — sommation et dénonciation — du formulaire de contravention;

b) il remet la sommation à l'accusé ou la lui envoie par la poste à sa dernière adresse connue;

c) avant la remise ou l'envoi de la sommation, ou dès que possible par la suite, il dépose la dénonciation auprès du tribunal compétent.

Contenu du formulaire de contravention

(2) Les deux parties du formulaire de contravention comportent les éléments suivants :

a) définition de l'infraction et indication du lieu et du moment où elle aurait été commise;

b) déclaration signée dans laquelle l'agent de l'autorité atteste qu'il a des motifs raisonnables de croire que l'accusé a commis l'infraction;

c) indication du montant de l'amende réglementaire pour l'infraction, ainsi que mention du mode et du délai de paiement;

d) avertissement précisant que, en cas de paiement de l'amende dans le délai fixé, une déclaration de culpabilité sera inscrite au dossier de l'accusé;

e) mention du fait que, en cas de plaidoyer de non-culpabilité ou de non-paiement de l'amende dans le délai fixé, l'accusé est tenu de comparaître au tribunal, aux lieu, jour et heure indiqués.

Préavis de confiscation

(3) En cas de poursuite par remise d'un formulaire de contravention, l'agent de l'autorité est tenu de remettre à l'accusé un avis précisant que, sur paiement de l'amende réglementaire dans le délai fixé, les objets saisis, ou le produit de leur aliénation, seront immédiatement confisqués au profit de Sa Majesté du chef du Canada.

Consequences of payment

(4) Where an accused to whom the summons portion of a ticket is delivered or mailed pays the prescribed fine within the period set out in the ticket,

(a) the payment constitutes a plea of guilty to the offence and a conviction must be entered against the accused and no further action may be taken against the accused in respect of that offence; and

(b) notwithstanding section 39.3, any thing seized from the accused under this Act that relates to the offence, or any proceeds of its disposition, are forfeited to

(i) Her Majesty in right of Canada, if the thing was seized by an enforcement officer employed in the federal public administration, or

(ii) Her Majesty in right of a province, if the thing was seized by an enforcement officer employed by the government of that province.

Regulations

(5) The Governor in Council may make regulations prescribing

(a) offences in respect of which this section applies and the manner in which the offences are to be described in tickets; and

(b) the amount of the fine for a prescribed offence, but the amount may not exceed $2,000.

1996, c. 31, s. 39.12; 2003, c. 22, s. 224(E).

Effet du paiement

(4) Lorsque, après réception de la sommation, l'accusé paie l'amende réglementaire dans le délai fixé :

a) d'une part, le paiement constitue un plaidoyer de culpabilité à l'égard de l'infraction et une déclaration de culpabilité est inscrite à son dossier, aucune autre poursuite ne pouvant dès lors être intentée contre lui à cet égard;

b) d'autre part, malgré l'article 39.3, les objets saisis entre ses mains en rapport avec l'infraction, ou le produit de leur aliénation, sont confisqués au profit de Sa Majesté du chef du Canada ou d'une province, selon que l'agent de l'autorité saisissant est fonctionnaire de l'administration publique fédérale ou fonctionnaire de la province en question.

Règlements

(5) Le gouverneur en conseil peut, par règlement, déterminer :

a) les infractions visées par le présent article ainsi que leur désignation dans le formulaire de contravention;

b) le montant de l'amende afférente à concurrence de 2 000 $.

1996, ch. 31, art. 39.12; 2003, ch. 22, art. 224(A).

PART III

Powers, Duties and Functions of the Minister

General

Powers, duties and functions of the Minister

40 (1) As the Minister responsible for oceans, the powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not assigned by law to any other department, board or agency of the Government of Canada, relating to the policies and programs of the Government of Canada respecting oceans.

PARTIE III

Attributions du ministre

Dispositions générales

Attributions

40 (1) Le ministre étant responsable des océans, ses pouvoirs et fonctions s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés à des orientations, objectifs et programmes du gouvernement fédéral touchant les océans.

Encouragement of activities

(2) For the purpose of subsection (1), the Minister shall encourage activities necessary to foster understanding, management and sustainable development of oceans and marine resources and the provision of coast guard and hydrographic services to ensure the facilitation of marine trade, commerce and safety in collaboration with other ministers of the Government of Canada.

Coast Guard Services

Coast guard services

41 (1) As the Minister responsible for coast guard services, the powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not assigned by law to any other department, board or agency of the Government of Canada, relating to

(a) services for the safe, economical and efficient movement of ships in Canadian waters through the provision of

(i) aids to navigation systems and services,

(ii) marine communications and traffic management services,

(iii) ice breaking and ice management services, and

(iv) channel maintenance;

(b) the marine component of the federal search and rescue program;

(c) [Repealed, 2005, c. 29, s. 36]

(d) marine pollution response; and

(e) the support of departments, boards and agencies of the Government of Canada through the provision of ships, aircraft and other marine services.

Cost effective

(2) The Minister shall ensure that the services referred to in subparagraphs (1)(a)(i) to (iv) are provided in a cost effective manner.

1996, c. 31, s. 41; 1999, c. 31, s. 170(F); 2005, c. 29, s. 36.

Activités

(2) Dans l'exercice de ses attributions et en collaboration avec d'autres ministres fédéraux, il encourage les activités propres à promouvoir la connaissance, la gestion et la préservation des océans et des ressources marines, dans la perspective du développement durable, et fournit des services de garde côtière et des services hydrographiques destinés à assurer la sécurité de la navigation et à faciliter le commerce maritime.

Garde côtière

Responsabilité du ministre

41 (1) Le ministre étant responsable des services de garde côtière, ses pouvoirs et fonctions s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux concernant :

a) les services destinés à assurer la sécurité, la rentabilité et l'efficacité du déplacement des navires dans les eaux canadiennes par la fourniture :

(i) de systèmes et de services d'aide à la navigation,

(ii) de services de communication maritime et de gestion du trafic maritime,

(iii) de services de brise-glace et de surveillance des glaces,

(iv) de services d'entretien des chenaux;

b) le volet maritime du programme fédéral de recherche et de sauvetage;

c) [Abrogé, 2005, ch. 29, art. 36]

d) l'intervention environnementale en milieu marin;

e) les services de navigation maritime et aérienne et les autres services maritimes fournis aux ministères et organismes fédéraux.

Obligation du ministre

(2) Le ministre devra s'assurer que les services mentionnés aux sous-alinéas (1)a)(i) à (iv) sont dispensés de la manière la plus économique et la plus judicieuse possible.

1996, ch. 31, art. 41; 1999, ch. 31, art. 170(F); 2005, ch. 29, art. 36.

Marine Sciences

Functions

42 In exercising the powers and performing the duties and functions assigned by paragraph 4(1)(c) of the *Department of Fisheries and Oceans Act*, the Minister may

(a) collect data for the purpose of understanding oceans and their living resources and ecosystems;

(b) conduct hydrographic and oceanographic surveys of Canadian and other waters;

(c) conduct marine scientific surveys relating to fisheries resources and their supporting habitat and ecosystems;

(d) conduct basic and applied research related to hydrography, oceanography and other marine sciences, including the study of fish and their supporting habitat and ecosystems;

(e) carry out investigations for the purpose of understanding oceans and their living resources and ecosystems;

(f) prepare and publish data, reports, statistics, charts, maps, plans, sections and other documents;

(g) authorize the distribution or sale of data, reports, statistics, charts, maps, plans, sections and other documents;

(h) prepare in collaboration with the Minister of Foreign Affairs, publish and authorize the distribution or sale of charts delineating, consistently with the nature and scale of the charts, all or part of the territorial sea of Canada, the contiguous zone of Canada, the exclusive economic zone of Canada and the fishing zones of Canada and adjacent waters;

(i) participate in ocean technology development; and

(j) conduct studies to obtain traditional ecological knowledge for the purpose of understanding oceans and their living resources and ecosystems.

Powers

43 Subject to section 4 of the *Department of Fisheries and Oceans Act* respecting the powers, duties and functions of the Minister in relation to matters mentioned in that section over which Parliament has jurisdiction, the Minister

Sciences de la mer

Pouvoirs du ministre

42 Dans le cadre de ses attributions au titre de l'alinéa 4(1)c) de la *Loi sur le ministère des Pêches et des Océans*, le ministre est investi des pouvoirs suivants :

a) assurer la collecte de données en vue d'une meilleure connaissance des océans, de leurs ressources biologiques et de leurs écosystèmes;

b) effectuer des levés hydrographiques et océanographiques dans les eaux canadiennes et autres;

c) effectuer des levés scientifiques concernant les ressources halieutiques, leur habitat et les écosystèmes;

d) entreprendre des recherches fondamentales et appliquées dans les domaines de l'hydrographie, de l'océanographie et des autres sciences de la mer, y compris l'étude des poissons, de leur habitat et des écosystèmes;

e) procéder à des enquêtes en vue d'une meilleure connaissance des océans, de leurs ressources biologiques et de leurs écosystèmes;

f) établir et publier des données, rapports, statistiques, cartes, plans, sections et autres documents;

g) autoriser la distribution ou la vente de données, rapports, statistiques, cartes, plans, sections et autres documents;

h) dresser, en collaboration avec le ministre des Affaires étrangères, et publier des cartes marines montrant, en fonction de leur échelle et de leur finalité, tout ou partie de la mer territoriale, de la zone contiguë, de la zone économique exclusive et des zones de pêche du Canada, ainsi que des eaux adjacentes, et en autoriser la distribution ou la vente;

i) participer à l'avancement de la technologie marine;

j) effectuer des études pour mettre à profit les connaissances écologiques traditionnelles en vue d'une meilleure connaissance des océans, de leurs ressources biologiques et de leurs écosystèmes.

Orientations, objectifs et programmes

43 Dans le cadre fixé pour l'exercice de ses attributions par l'article 4 de la *Loi sur le ministère des Pêches et des Océans*, il incombe au ministre de recommander, de promouvoir et de coordonner les orientations, les objectifs et les programmes du gouvernement fédéral en ce qui touche les pêches, l'hydrographie, l'océanographie et les

(a) is responsible for coordinating, promoting and recommending national policies and programs with respect to fisheries science, hydrography, oceanography and other marine sciences;

(b) in carrying out his or her responsibilities under this section, may

(i) conduct or cooperate with persons conducting applied and basic research programs and investigations and economic studies for the purpose of understanding oceans and their living resources and ecosystems, and

(ii) for that purpose maintain and operate ships, research institutes, laboratories and other facilities for research, surveying and monitoring for the purpose of understanding oceans and their living resources and ecosystems; and

(c) may provide marine scientific advice, services and support to the Government of Canada and, on behalf of the Government, to the governments of the provinces, to other states, to international organizations and to other persons.

autres sciences de la mer. À cette fin, il peut exécuter — ou collaborer avec des personnes qui exécutent — des programmes de recherche fondamentale et appliquée, ainsi que des analyses et des études économiques, en vue d'une meilleure connaissance des océans, de leurs ressources biologiques et de leurs écosystèmes. Il peut à cet effet établir ou maintenir — notamment à bord de navires — des instituts de recherche, des laboratoires et d'autres installations de recherche, d'étude et de contrôle, et veiller à leur fonctionnement. Il peut, de plus, fournir conseils, services et soutien dans le domaine des sciences de la mer au gouvernement du Canada et, au nom de celui-ci, aux gouvernements des provinces, aux autres États, aux organismes internationaux et à toute autre personne.

Marine scientific research by foreign ships

44 The Minister may

(a) request the Minister of Foreign Affairs to attach to a consent of the Minister of Foreign Affairs under paragraph 3(2)(c) of the *Coasting Trade Act* a condition that the foreign ship or non-duty paid ship supply the Minister with the results of the marine scientific research conducted by that ship in waters that form part of Canada or in which Canada has sovereign rights under international law; and

(b) establish guidelines, not inconsistent with Canada's international obligations, for use by foreign ships and non-duty paid ships in conducting marine scientific research in waters that form part of Canada or in which Canada has sovereign rights under international law.

Recherche scientifique : navires étrangers

44 Le ministre peut demander au ministre des Affaires étrangères d'assujettir l'octroi de la licence visée à l'alinéa 3(2)c) de la *Loi sur le cabotage* à la condition que lui soient fournis, pour le compte du navire étranger ou non dédouané en cause, les résultats des recherches océanographiques auxquelles a servi ce dernier dans les eaux faisant partie du Canada ou sur lesquelles le droit international reconnaît à celui-ci des droits souverains. Il peut en outre établir, à l'intention des navires étrangers et non dédouanés, des directives compatibles avec les obligations internationales du Canada au sujet de la recherche océanographique dans ces mêmes zones maritimes.

Minister's powers

45 As the Minister responsible for hydrographic services, the powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not assigned by law to any other department, board or agency of the Government of Canada, relating to

(a) setting standards and establishing guidelines for use by hydrographers and others in collecting data and preparing charts on behalf of the Minister; and

Services hydrographiques

45 Le ministre étant responsable des services hydrographiques, ses pouvoirs et fonctions s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux concernant :

a) l'établissement de normes et de directives, à l'intention notamment des hydrographes, relativement à la collecte des données et à la préparation des cartes sous l'autorité du ministre;

(b) providing hydrographic advice, services and support to the Government of Canada and, on behalf of the Government, to the governments of the provinces, to other states, to international organizations and to other persons.

b) la prestation de conseils et de services en matière hydrographique au gouvernement du Canada et, au nom de celui-ci, aux gouvernements des provinces, aux autres États, aux organismes internationaux et à toute autre personne.

Entry on lands

46 A hydrographer may, for the purpose of conducting a hydrographic survey on behalf of the Minister, enter on or pass over the lands of any person, but shall take all reasonable precautions to avoid causing any damage in doing so.

Propriété privée

46 Tout hydrographe peut, afin d'effectuer un levé hydrographique sous l'autorité du ministre, pénétrer sur la propriété de qui que ce soit ou la traverser; il prend toutefois toutes les précautions voulues pour éviter d'y causer des dommages.

Fees

Facturation

Fees for services or use of facilities

47 (1) The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix the fees to be paid for a service or the use of a facility provided under this Act by the Minister, the Department or any board or agency of the Government of Canada for which the Minister has responsibility.

Facturation des services et installations

47 (1) Le ministre peut, sous réserve des règlements d'application du présent article éventuellement pris par le Conseil du Trésor, fixer les prix à payer pour la fourniture de services ou d'installations au titre de la présente loi par lui-même ou le ministère, ou tout organisme fédéral dont il est, du moins en partie, responsable.

Amount not to exceed cost

(2) Fees for a service or the use of a facility that are fixed under subsection (1) may not exceed the cost to Her Majesty in right of Canada of providing the service or the use of the facility.

Plafonnement

(2) Les prix fixés dans le cadre du paragraphe (1) ne peuvent excéder les coûts supportés par Sa Majesté du chef du Canada pour la fourniture des services ou des installations.

Fees for products, rights and privileges

48 The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix fees in respect of products, rights and privileges provided under this Act by the Minister, the Department or any board or agency of the Government of Canada for which the Minister has responsibility.

Facturation des produits, droits et avantages

48 Le ministre peut, sous réserve des règlements d'application du présent article éventuellement pris par le Conseil du Trésor, fixer les prix à payer pour la fourniture de produits ou l'attribution de droits ou d'avantages au titre de la présente loi par lui-même ou le ministère ou tout organisme fédéral dont il est, du moins en partie, responsable.

Fees in respect of regulatory processes, etc.

49 (1) The Minister may, subject to any regulations that the Treasury Board may make for the purposes of this section, fix fees in respect of regulatory processes or approvals provided under this Act by the Minister, the Department or any board or agency of the Government of Canada for which the Minister has responsibility.

Facturation des procédés ou autorisations réglementaires

49 (1) Le ministre peut, sous réserve des règlements d'application du présent article éventuellement pris par le Conseil du Trésor, fixer les prix à payer pour la fourniture de procédés réglementaires ou l'attribution d'autorisations réglementaires au titre de la présente loi par lui-même ou le ministère, ou tout organisme fédéral dont il est, du moins en partie, responsable.

Amount

(2) Fees that are fixed under subsection (1) shall in the aggregate not exceed an amount sufficient to compensate

Montant

(2) Les prix fixés dans le cadre du paragraphe (1) ne peuvent dépasser, dans l'ensemble, un montant suffisant pour indemniser Sa Majesté du chef du Canada des dépenses entraînées pour elle par la fourniture des

Her Majesty in right of Canada for any reasonable outlays incurred by Her Majesty for the purpose of providing the regulatory processes or approvals.

procédés réglementaires ou l'attribution des autorisations réglementaires.

Consultation

50 (1) Before fixing a fee under this Act, the Minister shall consult with such persons or bodies as the Minister considers to be interested in the matter.

Consultations

50 (1) Avant de fixer un prix dans le cadre de la présente loi, le ministre consulte les personnes de droit public et de droit privé qu'il juge intéressées.

Publication

(2) The Minister shall, within 30 days after fixing a fee under this Act, publish the fee in the *Canada Gazette* and by such appropriate electronic or other means that the Treasury Board may authorize by regulation.

Publication

(2) Dans les trente jours suivant la fixation d'un prix dans le cadre de la présente loi, le ministre publie celui-ci dans la *Gazette du Canada* et par tout autre moyen indiqué, notamment électronique, que le Conseil du Trésor peut, par règlement, autoriser.

Reference to Scrutiny Committee

(3) Any fee fixed under this Act shall stand referred to the Committee referred to in section 19 of the *Statutory Instruments Act* to be reviewed and scrutinized as if it were a statutory instrument.

Renvoi en comité

(3) Le comité visé à l'article 19 de la *Loi sur les textes réglementaires* est saisi d'office des prix fixés dans le cadre de la présente loi pour que ceux-ci fassent l'objet de l'étude et du contrôle prévus pour les textes réglementaires.

Power to make regulations

51 The Treasury Board may make regulations for the purposes of section 47, 48, 49 or 50.

Pouvoir réglementaire

51 Le Conseil du Trésor peut prendre des règlements d'application des articles 47 à 50.

Review

52 (1) The administration of this Act shall, within three years after the coming into force of this section, be reviewed by the Standing Committee on Fisheries and Oceans.

Examen

52 (1) Le Comité permanent des pêches et des océans est chargé de l'examen de l'application de la présente loi, dans les trois ans suivant l'entrée en vigueur du présent article.

Report to Parliament

(2) The Committee shall undertake a comprehensive review of the provisions and operation of this Act, including the consequences of its implementation, and shall, within a year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes to this Act or its administration that the Committee would recommend.

Rapport au Parlement

(2) Le comité examine à fond les dispositions de la présente loi ainsi que les conséquences de son application en vue de la présentation, dans un délai d'un an à compter du début de l'examen ou tel délai plus long autorisé par la Chambre des communes, d'un rapport au Parlement où seront consignées ses conclusions ainsi que ses recommandations, s'il y a lieu, quant aux modifications de la présente loi ou des modalités d'application de celle-ci qui seraient souhaitables.

Regulations

52.1 The Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes and provisions of this Act and, in particular, but without restricting the generality of the foregoing, may make regulations

(a) prescribing marine environmental quality requirements and standards;

Règlements

52.1 Sur la recommandation du ministre, le gouverneur en conseil peut, par règlement, prendre les mesures nécessaires à l'application de la présente loi, notamment :

a) établir des exigences et des normes concernant la qualité du milieu marin;

b) régir l'exercice des attributions conférées aux agents de l'autorité désignés par le ministre;

(b) respecting the powers and duties of persons designated by the Minister as enforcement officers; and

(c) respecting the implementation of provisions of agreements made under this Act.

c) mettre en œuvre les dispositions des accords conclus en vertu de la présente loi.

Conditional Amendments

53 [Amendments]

Repeals

54 and 55 [Repeals]

Related Amendments

56 to 108 [Amendments]

Coming into Force

Coming into force

***109 This Act or any of its provisions, other than section 53, comes into force on a day or days to be fixed by order of the Governor in Council.**

*** [Note: Act, except section 53, in force January 31, 1997, *see* SI/97-21.]**

Modifications conditionnelles

53 [Modifications]

Abrogations

54 et 55 [Abrogations]

Modifications corrélatives

56 à 108 [Modifications]

Entrée en vigueur

Entrée en vigueur

***109 Exception faite de l'article 53, la présente loi ou telle de ses dispositions entre en vigueur à la date ou aux dates fixées par décret.**

*** [Note : Loi, sauf article 53, en vigueur le 31 janvier 1997, *voir* TR/97-21.]**

AMENDMENTS NOT IN FORCE

— 2019, c. 1, s. 133

133 Subsection 41(1) of the *Oceans Act* is amended by adding the following after paragraph (b):

(c) response to wrecks and hazardous or dilapidated ships;

MODIFICATIONS NON EN VIGUEUR

— 2019, ch. 1, art. 133

133 Le paragraphe 41(1) de la *Loi sur les océans* est modifié par adjonction, après l'alinéa b), de ce qui suit :

c) l'intervention à l'égard d'épaves et de navires dangereux ou délabrés;

TAB D4

CANADA

CONSOLIDATION

CODIFICATION

Species at Risk Act

Loi sur les espèces en péril

S.C. 2002, c. 29

L.C. 2002, ch. 29

Current to December 12, 2018

Last amended on May 30, 2018

À jour au 12 décembre 2018

Dernière modification le 30 mai 2018

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to December 12, 2018. The last amendments came into force on May 30, 2018. Any amendments that were not in force as of December 12, 2018 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 12 décembre 2018. Les dernières modifications sont entrées en vigueur le 30 mai 2018. Toutes modifications qui n'étaient pas en vigueur au 12 décembre 2018 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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An Act respecting the protection of wildlife species at risk in Canada

[*Assented to 12th December 2002*]

Preamble

Recognizing that

Canada's natural heritage is an integral part of our national identity and history,

wildlife, in all its forms, has value in and of itself and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological and scientific reasons,

Canadian wildlife species and ecosystems are also part of the world's heritage and the Government of Canada has ratified the United Nations Convention on the Conservation of Biological Diversity,

providing legal protection for species at risk will complement existing legislation and will, in part, meet Canada's commitments under that Convention,

the Government of Canada is committed to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty,

responsibility for the conservation of wildlife in Canada is shared among the governments in this country and that it is important for them to work cooperatively to pursue the establishment of complementary legislation and programs for the protection and recovery of species at risk in Canada,

it is important that there be cooperation between the governments in this country to maintain and

L.C. 2002, ch. 29

Loi concernant la protection des espèces sauvages en péril au Canada

[*Sanctionnée le 12 décembre 2002*]

Préambule

Attendu :

que le patrimoine naturel du Canada fait partie intégrante de notre identité nationale et de notre histoire;

que les espèces sauvages, sous toutes leurs formes, ont leur valeur intrinsèque et sont appréciées des Canadiens pour des raisons esthétiques, culturelles, spirituelles, récréatives, éducatives, historiques, économiques, médicales, écologiques et scientifiques;

que les espèces sauvages et les écosystèmes du Canada font aussi partie du patrimoine mondial et que le gouvernement du Canada a ratifié la Convention des Nations Unies sur la diversité biologique;

que l'attribution d'une protection juridique aux espèces en péril complétera les textes législatifs existants et permettra au Canada de respecter une partie des engagements qu'il a pris aux termes de cette convention;

que le gouvernement du Canada s'est engagé à conserver la diversité biologique et à respecter le principe voulant que, s'il existe une menace d'atteinte grave ou irréversible à une espèce sauvage, le manque de certitude scientifique ne soit pas prétexte à retarder la prise de mesures efficientes pour prévenir sa disparition ou sa décroissance;

que la conservation des espèces sauvages au Canada est une responsabilité partagée par les gouvernements du pays et que la collaboration entre eux est importante en vue d'établir des lois et des programmes complémentaires pouvant assurer la protection et le rétablissement des espèces en péril au Canada;

strengthen national standards of environmental conservation and that the Government of Canada is committed to the principles set out in intergovernmental agreements respecting environmental conservation,

the Canadian Endangered Species Conservation Council is to provide national leadership for the protection of species at risk, including the provision of general direction to the Committee on the Status of Endangered Wildlife in Canada in respect of that Committee's activities and general directions in respect of the development, coordination and implementation of recovery efforts,

the roles of the aboriginal peoples of Canada and of wildlife management boards established under land claims agreements in the conservation of wildlife in this country are essential,

all Canadians have a role to play in the conservation of wildlife in this country, including the prevention of wildlife species from becoming extirpated or extinct,

there will be circumstances under which the cost of conserving species at risk should be shared,

the conservation efforts of individual Canadians and communities should be encouraged and supported,

stewardship activities contributing to the conservation of wildlife species and their habitat should be supported to prevent species from becoming at risk,

community knowledge and interests, including socio-economic interests, should be considered in developing and implementing recovery measures,

the traditional knowledge of the aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures,

knowledge of wildlife species and ecosystems is critical to their conservation,

the habitat of species at risk is key to their conservation, and

Canada's protected areas, especially national parks, are vital to the protection and recovery of species at risk,

que la coopération entre les gouvernements du pays pour le maintien et le renforcement des normes nationales de conservation de l'environnement est importante et que le gouvernement du Canada est attaché aux principes énoncés dans les accords intergouvernementaux en matière de conservation de l'environnement;

que le Conseil canadien pour la conservation des espèces en péril a la responsabilité d'établir les orientations pour l'ensemble du pays en matière de protection des espèces en péril, notamment en ce qui concerne les activités du Comité sur la situation des espèces en péril au Canada et l'élaboration et la coordination des mesures de protection et de rétablissement de ces espèces;

qu'est essentiel le rôle que peuvent jouer les peuples autochtones du Canada et les conseils de gestion des ressources fauniques établis en application d'accords sur des revendications territoriales dans la conservation des espèces sauvages dans ce pays;

que tous les Canadiens ont un rôle à jouer dans la conservation des espèces sauvages, notamment en ce qui a trait à la prévention de leur disparition du pays ou de la planète;

que, dans certains cas, les frais de la conservation des espèces en péril devraient être partagés;

que les efforts de conservation des Canadiens et des collectivités devraient être encouragés et appuyés;

que les activités d'intendance visant la conservation des espèces sauvages et de leur habitat devraient bénéficier de l'appui voulu pour éviter que celles-ci deviennent des espèces en péril;

que la connaissance et les intérêts — notamment socioéconomiques — des collectivités devraient être pris en compte lors de l'élaboration et de la mise en œuvre des mesures de rétablissement;

que les connaissances traditionnelles des peuples autochtones du Canada devraient être prises en compte pour découvrir quelles espèces sauvages peuvent être en péril et pour l'élaboration et la mise en œuvre des mesures de rétablissement;

que la connaissance des espèces sauvages et des écosystèmes est essentielle à leur conservation;

que l'habitat des espèces en péril est important pour leur conservation;

que les aires protégées au Canada, plus particulièrement les parcs nationaux, sont importants pour la protection et le rétablissement des espèces en péril,

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

Short Title

Short title

1 This Act may be cited as the *Species at Risk Act*.

Titre abrégé

Titre abrégé

1 *Loi sur les espèces en péril*.

Interpretation

Definitions

2 (1) The definitions in this subsection apply in this Act.

action plan means an action plan included in the public registry under subsection 50(3) and includes any amendment to it included in the public registry under section 52. (*plan d'action*)

alternative measures means measures, other than judicial proceedings, that are used to deal with a person who is alleged to have committed an offence. (*mesures de rechange*)

aquatic species means a wildlife species that is a fish, as defined in section 2 of the *Fisheries Act*, or a marine plant, as defined in section 47 of that Act. (*espèce aquatique*)

Attorney General means the Attorney General of Canada or, for the purposes of sections 108 to 113, an agent of the Attorney General of Canada. (*procureur général*)

Canadian Endangered Species Conservation Council means the Council referred to in subsection 7(1). (*Conseil canadien pour la conservation des espèces en péril*)

competent minister means

(a) the Minister responsible for the Parks Canada Agency with respect to individuals in or on federal lands administered by that Agency;

(b) the Minister of Fisheries and Oceans with respect to aquatic species, other than individuals mentioned in paragraph (a); and

(c) the Minister of the Environment with respect to all other individuals. (*ministre compétent*)

conveyance means a vehicle, aircraft or water-borne craft or any other contrivance that is used to move persons or goods. (*moyen de transport*)

Définitions et interprétation

Définitions

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

accord sur des revendications territoriales Accord sur des revendications territoriales au sens de l'article 35 de la *Loi constitutionnelle de 1982*. (*land claims agreement*)

Conseil canadien pour la conservation des espèces en péril Le conseil visé au paragraphe 7(1). (*Canadian Endangered Species Conservation Council*)

conseil de gestion des ressources fauniques Tout organisme, notamment un conseil, constitué en application d'un accord sur des revendications territoriales qui est habilité à exercer des attributions à l'égard d'espèces sauvages. (*wildlife management board*)

COSEPAC Le Comité sur la situation des espèces en péril au Canada, constitué en application de l'article 14. (*COSEWIC*)

décret d'urgence Décret pris au titre de l'article 80. (*emergency order*)

espèce aquatique Espèce sauvage de poissons, au sens de l'article 2 de la *Loi sur les pêches*, ou de plantes marines, au sens de l'article 47 de cette loi. (*aquatic species*)

espèce disparue du pays Espèce sauvage qu'on ne trouve plus à l'état sauvage au Canada, mais qu'on trouve ailleurs à l'état sauvage. (*extirpated species*)

espèce en péril Espèce sauvage disparue du pays, en voie de disparition, menacée ou préoccupante. (*species at risk*)

espèce en voie de disparition Espèce sauvage qui, de façon imminente, risque de disparaître du pays ou de la planète. (*endangered species*)

COSEWIC means the Committee on the Status of Endangered Wildlife in Canada established by section 14. (*COSEPAC*)

critical habitat means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species. (*habitat essentiel*)

emergency order means an order made under section 80. (*décret d'urgence*)

endangered species means a wildlife species that is facing imminent extirpation or extinction. (*espèce en voie de disparition*)

extirpated species means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild. (*espèce disparue du pays*)

federal land means

(a) land that belongs to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above that land;

(b) the internal waters of Canada and the territorial sea of Canada; and

(c) reserves and any other lands that are set apart for the use and benefit of a band under the *Indian Act*, and all waters on and airspace above those reserves and lands. (*territoire domanial*)

habitat means

(a) in respect of aquatic species, spawning grounds and nursery, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced; and

(b) in respect of other wildlife species, the area or type of site where an individual or wildlife species naturally occurs or depends on directly or indirectly in order to carry out its life processes or formerly occurred and has the potential to be reintroduced. (*habitat*)

individual means an individual of a wildlife species, whether living or dead, at any developmental stage and includes larvae, embryos, eggs, sperm, seeds, pollen, spores and asexual propagules. (*individu*)

espèce menacée Espèce sauvage susceptible de devenir une espèce en voie de disparition si rien n'est fait pour contrer les facteurs menaçant de la faire disparaître. (*threatened species*)

espèce préoccupante Espèce sauvage qui peut devenir une espèce menacée ou une espèce en voie de disparition par l'effet cumulatif de ses caractéristiques biologiques et des menaces signalées à son égard. (*species of special concern*)

espèce sauvage Espèce, sous-espèce, variété ou population géographiquement ou génétiquement distincte d'animaux, de végétaux ou d'autres organismes d'origine sauvage, sauf une bactérie ou un virus, qui, selon le cas :

a) est indigène du Canada;

b) s'est propagée au Canada sans intervention humaine et y est présente depuis au moins cinquante ans. (*wildlife species*)

habitat

a) S'agissant d'une espèce aquatique, les frayères, aires d'alevinage, de croissance et d'alimentation et routes migratoires dont sa survie dépend, directement ou indirectement, ou aires où elle s'est déjà trouvée et où il est possible de la réintroduire;

b) s'agissant de toute autre espèce sauvage, l'aire ou le type d'endroit où un individu ou l'espèce se trouvent ou dont leur survie dépend directement ou indirectement ou se sont déjà trouvés, et où il est possible de les réintroduire. (*habitat*)

habitat essentiel L'habitat nécessaire à la survie ou au rétablissement d'une espèce sauvage inscrite, qui est désigné comme tel dans un programme de rétablissement ou un plan d'action élaboré à l'égard de l'espèce. (*critical habitat*)

individu Individu d'une espèce sauvage, vivant ou mort, à toute étape de son développement. La présente définition vise également les larves, le sperme, les œufs, les embryons, les semences, le pollen, les spores et les propagules asexuées. (*individual*)

infraction Infraction à la présente loi. (*offence*)

inscrite Se dit de toute espèce sauvage qui est inscrite sur la liste. (*listed*)

liste La Liste des espèces en péril figurant à l'annexe 1. (*List*)

land claims agreement means a land claims agreement within the meaning of section 35 of the *Constitution Act, 1982*. (*accord sur des revendications territoriales*)

List means the List of Wildlife Species at Risk set out in Schedule 1. (*liste*)

listed means listed on the List. (*inscrite*)

Minister means the Minister of the Environment. (*ministre*)

offence means an offence under this Act. (*infraction*)

provincial minister means any minister of the government of a province who is responsible for the conservation and management of a wildlife species in that province. (*ministre provincial*)

public registry means the registry established under section 120. (*registre*)

recovery strategy means a recovery strategy included in the public registry under subsection 43(2), and includes any amendment to it included in the public registry under section 45. (*programme de rétablissement*)

residence means a dwelling-place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating. (*résidence*)

sell includes to offer for sale or lease, have in possession for sale or lease or deliver for sale or lease. (*vente*)

species at risk means an extirpated, endangered or threatened species or a species of special concern. (*espèce en péril*)

species of special concern means a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats. (*espèce préoccupante*)

status report means a report, prepared in accordance with the requirements of regulations made under subsection 21(2), that contains a summary of the best available information on the status of a wildlife species, including scientific knowledge, community knowledge and aboriginal traditional knowledge. (*rapport de situation*)

territorial minister means any minister of the government of a territory who is responsible for the conservation and management of a wildlife species in that territory. (*ministre territorial*)

mesures de rechange Mesures — autres que le recours aux procédures judiciaires — prises contre une personne à qui une infraction est imputée. (*alternative measures*)

ministre Le ministre de l'Environnement. (*Minister*)

ministre compétent

a) En ce qui concerne les individus présents dans les parties du territoire domanial dont la gestion relève de l'Agence Parcs Canada, le ministre responsable de celle-ci;

b) en ce qui concerne les espèces aquatiques dont les individus ne sont pas visés par l'alinéa a), le ministre des Pêches et des Océans;

c) en ce qui concerne tout autre individu, le ministre de l'Environnement. (*competent minister*)

ministre provincial Tout ministre d'une province chargé de la conservation et de la gestion d'une espèce sauvage dans la province. (*provincial minister*)

ministre territorial Tout ministre d'un territoire chargé de la conservation et de la gestion d'une espèce sauvage dans le territoire. (*territorial minister*)

moyen de transport Tout véhicule, aéronef, bateau ou autre moyen servant au transport des personnes ou des biens. (*conveyance*)

plan d'action Plan d'action mis dans le registre en application du paragraphe 50(3), y compris ses modifications qui sont mises dans celui-ci en application de l'article 52. (*action plan*)

procureur général Le procureur général du Canada ou, pour l'application des articles 108 à 113, le procureur général du Canada ou son représentant. (*Attorney General*)

programme de rétablissement Programme de rétablissement mis dans le registre en application du paragraphe 43(2), y compris ses modifications qui sont mises dans celui-ci en application de l'article 45. (*recovery strategy*)

rapport de situation Sommaire de la meilleure information accessible sur la situation d'une espèce sauvage, notamment les données scientifiques ainsi que les connaissances des collectivités et les connaissances traditionnelles des peuples autochtones, dont la forme et le contenu sont conformes aux exigences réglementaires prévues en application du paragraphe 21(2). (*status report*)

threatened species means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction. (*espèce menacée*)

treaty means a treaty within the meaning of section 35 of the *Constitution Act, 1982*. (*traité*)

wildlife management board means any board or other body established under a land claims agreement that is authorized by the agreement to perform functions in respect of wildlife species. (*conseil de gestion des ressources fauniques*)

wildlife species means a species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism, other than a bacterium or virus, that is wild by nature and

(a) is native to Canada; or

(b) has extended its range into Canada without human intervention and has been present in Canada for at least 50 years. (*espèce sauvage*)

registre Le registre public dont l'établissement est prévu à l'article 120. (*public registry*)

résidence Gîte — terrier, nid ou autre aire ou lieu semblable — occupé ou habituellement occupé par un ou plusieurs individus pendant tout ou partie de leur vie, notamment pendant la reproduction, l'élevage, les haltes migratoires, l'hivernage, l'alimentation ou l'hibernation. (*residence*)

territoire domanial

a) Les terres qui appartiennent à Sa Majesté du chef du Canada ou qu'elle a le pouvoir d'aliéner, ainsi que leurs eaux et leur espace aérien;

b) les eaux intérieures et la mer territoriale du Canada;

c) les réserves ou autres terres qui ont été mises de côté à l'usage et au profit d'une bande en application de la *Loi sur les Indiens*, ainsi que leurs eaux et leur espace aérien. (*federal land*)

traité Traité au sens de l'article 35 de la *Loi constitutionnelle de 1982*. (*treaty*)

vente Sont assimilées à la vente l'offre de vente ou de location ainsi que la possession et la livraison en vue de la vente ou de la location. (*sell*)

Deeming

(2) For the purposes of the definition ***wildlife species*** in subsection (1), a species, subspecies, variety or geographically or genetically distinct population is, in the absence of evidence to the contrary, presumed to have been present in Canada for at least 50 years.

Competent minister

(3) A reference to a competent minister in any provision of this Act is to be read as a reference to the competent minister in respect of the wildlife species, or the individuals of the wildlife species, to which the provision relates.

2002, c. 29, ss. 2, 141.1; 2005, c. 2, s. 14.

Aboriginal and treaty rights

3 For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982.*

Présomption

(2) Dans la définition de ***espèce sauvage*** au paragraphe (1), une espèce, une sous-espèce, une variété ou une population géographiquement ou génétiquement distincte est, sauf preuve contraire, réputée être présente au Canada depuis au moins cinquante ans.

Ministre compétent

(3) La mention de ministre compétent dans une disposition de la présente loi vaut celle du ministre compétent à l'égard d'une espèce sauvage, ou des individus d'une telle espèce, auxquels la disposition s'applique.

2002, ch. 29, art. 2 et 141.1; 2005, ch. 2, art. 14.

Droits des autochtones

3 Il est entendu que la présente loi ne porte pas atteinte à la protection des droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada découlant de leur reconnaissance et de leur confirmation au titre de l'article 35 de la *Loi constitutionnelle de 1982*.

Sedentary living organisms

4 (1) This Act also applies to sedentary living organisms on or under the continental shelf of Canada outside the exclusive economic zone.

Meaning of *sedentary*

(2) For the purpose of subsection (1), a living organism is sedentary if it is, at the harvestable stage, either immobile on or under the seabed or is unable to move except in constant physical contact with the seabed or subsoil.

Her Majesty

Binding on Her Majesty

5 This Act is binding on Her Majesty in right of Canada or a province.

Purposes

Purposes

6 The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.

Canadian Endangered Species Conservation Council

Composition

7 (1) The Canadian Endangered Species Conservation Council consists of the Minister of the Environment, the Minister of Fisheries and Oceans, the Minister responsible for the Parks Canada Agency and ministers of the government of a province or a territory who are responsible for the conservation and management of a wildlife species in that province or territory.

Role

(2) The role of the Canadian Endangered Species Conservation Council is to

(a) provide general direction on the activities of COSEWIC, the preparation of recovery strategies and

Organismes vivants sédentaires

4 (1) La présente loi s'applique aussi aux organismes vivants sédentaires se trouvant sur ou sous la partie du plateau continental du Canada située à l'extérieur de la zone économique exclusive.

Sens de *sédentaire*

(2) Pour l'application du paragraphe (1), un organisme est sédentaire si, au stade où il peut être pêché, il est soit immobile sur le fond ou au-dessous du fond, soit incapable de se déplacer autrement qu'en restant constamment en contact avec le fond ou le sous-sol.

Sa Majesté

Obligation de Sa Majesté

5 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

Objet

Objet

6 La présente loi vise à prévenir la disparition — de la planète ou du Canada seulement — des espèces sauvages, à permettre le rétablissement de celles qui, par suite de l'activité humaine, sont devenues des espèces disparues du pays, en voie de disparition ou menacées et à favoriser la gestion des espèces préoccupantes pour éviter qu'elles ne deviennent des espèces en voie de disparition ou menacées.

Conseil canadien pour la conservation des espèces en péril

Composition du conseil

7 (1) Le Conseil canadien pour la conservation des espèces en péril se compose du ministre de l'Environnement, du ministre des Pêches et des Océans et du ministre responsable de l'Agence Parcs Canada ainsi que des ministres d'une province ou d'un territoire chargés de la conservation et de la gestion d'une espèce sauvage dans la province ou dans le territoire.

Mission

(2) Le Conseil canadien pour la conservation des espèces en péril a pour mission :

a) de diriger d'une façon générale les activités du COSEPAC, l'élaboration des programmes de

the preparation and implementation of action plans; and

(b) coordinate the activities of the various governments represented on the Council relating to the protection of species at risk.

2002, c. 29, s. 7; 2005, c. 2, s. 15.

rétablissement et l'élaboration et la mise en œuvre des plans d'action;

b) de coordonner les activités de protection des espèces en péril exercées par les divers gouvernements représentés au conseil.

2002, ch. 29, art. 7; 2005, ch. 2, art. 15.

Administration of Act

Responsibility of Minister

8 (1) The Minister is responsible for the administration of this Act, except in so far as this Act gives responsibility to another minister.

Delegation

(2) The Minister, the Minister responsible for the Parks Canada Agency or the Minister of Fisheries and Oceans may, after consultation with the other two ministers, delegate to any minister of the Crown in right of Canada or of a province or to any person who is employed by the Government of Canada, the government of a province or any other government in Canada any of that Minister's powers or functions under this Act, relating to its enforcement.

Agreement and reporting obligation

(3) The delegation must be the subject of an agreement between the delegating minister and the delegate and the agreement must provide that the delegate is to prepare an annual report for the delegating minister on the activities undertaken under the agreement. A copy of the agreement must be included in the public registry within 45 days after it is entered into, and a copy of every annual report must be included in the public registry within 45 days after it is received by the delegating minister.

2002, c. 29, s. 8; 2005, c. 2, s. 16.

National Aboriginal Council on Species at Risk

8.1 The Minister shall establish a Council, to be known as the National Aboriginal Council on Species at Risk, consisting of six representatives of the aboriginal peoples of Canada selected by the Minister based upon recommendations from aboriginal organizations that the Minister considers appropriate. The role of the Council is to

(a) advise the Minister on the administration of this Act; and

(b) provide advice and recommendations to the Canadian Endangered Species Conservation Council.

Application de la loi

Responsabilité du ministre

8 (1) Sous réserve des dispositions de la présente loi conférant une responsabilité particulière à un autre ministre, le ministre est responsable de l'application de la présente loi.

Délégation

(2) Le ministre, le ministre responsable de l'Agence Parcs Canada ou le ministre des Pêches et des Océans peut, après consultation des deux autres ministres, déléguer à un ministre fédéral ou provincial ou à quiconque est à l'emploi du gouvernement du Canada, d'une province ou de tout autre gouvernement au Canada telle de ses attributions prévues par la présente loi en matière de contrôle d'application de celle-ci.

Accord et rapport annuel

(3) La délégation se fait par la conclusion d'un accord, entre le délégant et le délégataire, stipulant que ce dernier fait rapport annuellement au premier sur les activités qu'il exerce dans le cadre de l'accord. Est mise dans le registre une copie de l'accord dans les quarante-cinq jours suivant sa conclusion et une copie de tout rapport annuel dans les quarante-cinq jours suivant sa réception par le délégant.

2002, ch. 29, art. 8; 2005, ch. 2, art. 16.

Conseil autochtone national sur les espèces en péril

8.1 Le ministre constitue un conseil, dénommé Conseil autochtone national sur les espèces en péril, composé de six représentants des peuples autochtones du Canada choisis par lui sur recommandation des organisations autochtones qu'il juge indiquées. La mission du conseil est :

a) de conseiller le ministre en matière d'application de la présente loi;

b) de fournir au Conseil canadien pour la conservation des espèces en péril des conseils et des recommandations.

Advisory committees to assist Minister

9 (1) The Minister may, after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, establish one or more committees to advise the Minister on the administration of this Act.

Advisory committees to assist Council

(2) The Minister may, after consultation with the Minister responsible for the Parks Canada Agency, the Minister of Fisheries and Oceans and the Canadian Endangered Species Conservation Council, establish one or more committees to advise the Council on matters related to the Council's role.

2002, c. 29, s. 9; 2005, c. 2, s. 17.

Administrative agreements

10 A competent minister may, after consultation with every other competent minister, enter into an agreement with any government in Canada, organization or wildlife management board with respect to the administration of any provision of this Act for which that competent minister has responsibility, including the preparation and implementation of recovery strategies, action plans and management plans.

Stewardship Action Plan

Stewardship action plan

10.1 The Minister, after consultation with the Canadian Endangered Species Conservation Council, may establish a stewardship action plan that creates incentives and other measures to support voluntary stewardship actions taken by any government in Canada, organization or person. A copy of the stewardship action plan must be included in the public registry.

Contents

10.2 The stewardship action plan must include, but is not limited to, commitments to

(a) regularly examine incentives and programs that support actions taken by persons to protect species at risk;

(b) provide information and increase public awareness about species at risk;

(c) methods for sharing information about species at risk, including community and aboriginal traditional knowledge, that respect, preserve and maintain knowledge and promote their wider application with

Comités consultatifs : ministre

9 (1) Après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le ministre peut constituer un ou plusieurs comités pour le conseiller en matière d'application de la présente loi.

Comités consultatifs : Conseil

(2) Après consultation du ministre responsable de l'Agence Parcs Canada, du ministre des Pêches et des Océans et du Conseil canadien pour la conservation des espèces en péril, le ministre peut constituer un ou plusieurs comités pour conseiller ce dernier relativement à l'exécution de sa mission.

2002, ch. 29, art. 9; 2005, ch. 2, art. 17.

Accords sur l'application de la loi

10 Après consultation de tout autre ministre compétent, le ministre compétent peut conclure avec un gouvernement au Canada, un conseil de gestion des ressources fauniques ou une organisation un accord relatif à l'application des dispositions de la présente loi dont il est responsable, notamment en ce qui concerne l'élaboration et la mise en œuvre de programmes de rétablissement, de plans d'action et de plans de gestion.

Plan d'action pour l'intendance

Plan d'action pour l'intendance

10.1 Le ministre peut, après consultation du Conseil canadien pour la conservation des espèces en péril, établir un plan d'action pour l'intendance qui prévoit des incitatifs et d'autres mesures destinées à appuyer les activités volontaires d'intendance menées par tout gouvernement au Canada ou toute personne ou organisation. Le cas échéant, une copie du plan d'action pour l'intendance est mise dans le registre.

Contenu

10.2 Le plan d'action pour l'intendance comporte notamment les engagements suivants :

a) examiner périodiquement les incitatifs et les programmes d'appui aux activités menées par des personnes pour protéger les espèces en péril;

b) fournir de l'information et accroître la sensibilisation du public sur les espèces en péril;

c) les méthodes de partage, avec d'autres gouvernements et personnes, de l'information concernant les espèces en péril, y compris les connaissances des collectivités et les connaissances traditionnelles autochtones, lesquelles méthodes respectent, préservent et

the approval of the holders of such knowledge, with other governments and persons;

(d) create awards and recognition programs;

(e) provide information respecting programs related to stewardship agreements, land conservation easements and other such agreements; and

(f) provide information relating to the technical and scientific support available to persons engaged in stewardship activities.

maintiennent les connaissances et favorisent leur application sur une plus grande échelle avec l'accord des dépositaires de ces connaissances;

d) élaborer des programmes de reconnaissance et de récompense;

e) fournir de l'information sur les programmes liés aux accords d'intendance, y compris les servitudes de conservation et tout autre accord semblable;

f) fournir de l'information concernant l'appui technique et scientifique accessible aux personnes menant des activités d'intendance.

Stewardship

Intendance

Conservation agreements — species at risk

11 (1) A competent minister may, after consultation with every other competent minister, and with the Canadian Endangered Species Conservation Council or any of its members if he or she considers it appropriate to do so, enter into a conservation agreement with any government in Canada, organization or person to benefit a species at risk or enhance its survival in the wild.

Accord de conservation : espèce en péril

11 (1) Après consultation de tout autre ministre compétent et, s'il l'estime indiqué, du Conseil canadien pour la conservation des espèces en péril ou de tout membre de celui-ci, le ministre compétent peut conclure avec un gouvernement au Canada, une organisation ou une personne un accord de conservation qui est bénéfique pour une espèce en péril ou qui améliore ses chances de survie à l'état sauvage.

Contents

(2) The agreement must provide for the taking of conservation measures and any other measures consistent with the purposes of this Act, and may include measures with respect to

(a) monitoring the status of the species;

(b) developing and implementing education and public awareness programs;

(c) developing and implementing recovery strategies, action plans and management plans;

(d) protecting the species' habitat, including its critical habitat; or

(e) undertaking research projects in support of recovery efforts for the species.

Contenu de l'accord

(2) L'accord doit prévoir des mesures de conservation et d'autres mesures compatibles avec l'objet de la présente loi, et peut prévoir des mesures en ce qui concerne :

a) le suivi de la situation de l'espèce;

b) l'élaboration et la mise en œuvre de programmes d'éducation et de sensibilisation du public;

c) l'élaboration et la mise en œuvre de programmes de rétablissement, de plans d'action et de plans de gestion;

d) la protection de l'habitat de l'espèce, notamment son habitat essentiel;

e) la mise sur pied de projets de recherche visant à favoriser le rétablissement de l'espèce.

Conservation agreements — other species

12 (1) A competent minister may, after consultation with every other competent minister, and with the Canadian Endangered Species Conservation Council or any of its members if he or she considers it appropriate to do so, enter into an agreement with any government in Canada, organization or person to provide for the conservation of a wildlife species that is not a species at risk.

Accord de conservation : autre espèce

12 (1) Après consultation de tout autre ministre compétent et, s'il l'estime indiqué, du Conseil canadien pour la conservation des espèces en péril ou de tout membre de celui-ci, le ministre compétent peut conclure avec un gouvernement au Canada, une organisation ou une personne un accord portant sur la conservation d'une espèce sauvage qui n'est pas une espèce en péril.

Contents

(2) The agreement may provide for the taking of conservation measures and any other measures consistent with the purposes of this Act, including measures with respect to

(a) monitoring the status of the species;

(b) developing and implementing education and public awareness programs;

(c) protecting the species' habitat; and

(d) preventing the species from becoming a species at risk.

Funding agreements

13 (1) A competent minister may enter into an agreement with any government in Canada, organization or person to provide for the payment of contributions towards the costs of programs and measures for the conservation of wildlife species, including programs and measures under an agreement entered into under subsection 11(1) or 12(1).

Provisions to be included

(2) The agreement must specify

(a) the contribution towards the cost of the program or measure that is payable by any party and the time or times at which any amounts under the agreement will be paid;

(b) the authority or person who will be responsible for operating and maintaining the program or measure or any part of it;

(c) the proportions of any revenue from the program or measure that is payable to the parties; and

(d) the terms and conditions governing the operation and maintenance of the program or measure.

Wildlife Species Listing Process

Committee on the Status of Endangered Wildlife in Canada

Establishment

14 The Committee on the Status of Endangered Wildlife in Canada is hereby established.

Contenu de l'accord

(2) L'accord peut prévoir des mesures de conservation et d'autres mesures compatibles avec l'objet de la présente loi, notamment en ce qui concerne :

a) le suivi de la situation de l'espèce;

b) l'élaboration et la mise en œuvre de programmes d'éducation et de sensibilisation du public;

c) la protection de l'habitat de l'espèce;

d) la prévention, afin que l'espèce ne devienne pas une espèce en péril.

Accords de financement

13 (1) Le ministre compétent peut conclure avec un gouvernement au Canada, une organisation ou une personne un accord prévoyant le partage des coûts de la mise en œuvre de mesures et de programmes en matière de conservation des espèces sauvages, notamment des mesures et des programmes prévus dans un accord conclu au titre des paragraphes 11(1) ou 12(1).

Dispositions obligatoires

(2) L'accord doit préciser les points suivants :

a) la quote-part des parties à l'accord, ainsi que la date du ou des versements correspondants;

b) l'autorité ou la personne qui sera responsable de l'exécution de tout ou partie des mesures ou des programmes;

c) la répartition entre les parties à l'accord des éventuelles recettes d'exploitation relatives aux mesures ou aux programmes;

d) les modalités d'exécution des mesures ou des programmes.

Processus d'inscription des espèces sauvages

Comité sur la situation des espèces en péril au Canada

Constitution

14 Est constitué le Comité sur la situation des espèces en péril au Canada.

Functions

15 (1) The functions of COSEWIC are to

(a) assess the status of each wildlife species considered by COSEWIC to be at risk and, as part of the assessment, identify existing and potential threats to the species and

(i) classify the species as extinct, extirpated, endangered, threatened or of special concern,

(ii) indicate that COSEWIC does not have sufficient information to classify the species, or

(iii) indicate that the species is not currently at risk;

(b) determine when wildlife species are to be assessed, with priority given to those more likely to become extinct;

(c) conduct a new assessment of the status of species at risk and, if appropriate, reclassify or declassify them;

(c.1) indicate in the assessment whether the wildlife species migrates across Canada's boundary or has a range extending across Canada's boundary;

(d) develop and periodically review criteria for assessing the status of wildlife species and for classifying them and recommend the criteria to the Minister and the Canadian Endangered Species Conservation Council; and

(e) provide advice to the Minister and the Canadian Endangered Species Conservation Council and perform any other functions that the Minister, after consultation with that Council, may assign.

Best information and knowledge

(2) COSEWIC must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.

Treaties and land claims agreements

(3) COSEWIC must take into account any applicable provisions of treaty and land claims agreements when carrying out its functions.

Mission

15 (1) Le COSEPAC a pour mission :

a) d'évaluer la situation de toute espèce sauvage qu'il estime en péril ainsi que, dans le cadre de l'évaluation, de signaler les menaces réelles ou potentielles à son égard et d'établir, selon le cas :

(i) que l'espèce est disparue, disparue du pays, en voie de disparition, menacée ou préoccupante,

(ii) qu'il ne dispose pas de l'information voulue pour la classifier,

(iii) que l'espèce n'est pas actuellement en péril;

b) de déterminer le moment auquel doit être effectuée l'évaluation des espèces sauvages, la priorité étant donnée à celles dont la probabilité d'extinction est la plus grande;

c) d'évaluer de nouveau la situation des espèces en péril et, au besoin, de les reclassifier ou de les déclassifier;

c.1) de mentionner dans l'évaluation le fait que l'espèce sauvage traverse la frontière du Canada au moment de sa migration ou que son aire de répartition chevauche cette frontière, le cas échéant;

d) d'établir des critères, qu'il révise périodiquement, en vue d'évaluer la situation des espèces sauvages et d'effectuer leur classification, ainsi que de recommander ces critères au ministre et au Conseil canadien pour la conservation des espèces en péril;

e) de fournir des conseils au ministre et au Conseil canadien pour la conservation des espèces en péril et d'exercer les autres fonctions que le ministre, après consultation du conseil, peut lui confier.

Critères

(2) Il exécute sa mission en se fondant sur la meilleure information accessible sur la situation biologique de l'espèce en question notamment les données scientifiques ainsi que les connaissances des collectivités et les connaissances traditionnelles des peuples autochtones.

Traités et accords sur des revendications territoriales

(3) Pour l'exécution de sa mission, il prend en compte les dispositions applicables des traités et des accords sur des revendications territoriales.

Composition

16 (1) COSEWIC is to be composed of members appointed by the Minister after consultation with the Canadian Endangered Species Conservation Council and with any experts and expert bodies, such as the Royal Society of Canada, that the Minister considers to have relevant expertise.

Qualifications of members

(2) Each member must have expertise drawn from a discipline such as conservation biology, population dynamics, taxonomy, systematics or genetics or from community knowledge or aboriginal traditional knowledge of the conservation of wildlife species.

Term of appointment

(3) The members are to be appointed to hold office for renewable terms of not more than four years.

Not part of the public service of Canada

(4) The members are not, because of being a member, part of the public service of Canada.

Remuneration and expenses

(5) The members may be paid remuneration and expenses for their services in amounts that the Minister may set.

Discretion

(6) Each member of COSEWIC shall exercise his or her discretion in an independent manner.

Regulations and guidelines

17 The Minister may, after consultation with the Canadian Endangered Species Conservation Council and COSEWIC, establish regulations or guidelines respecting the appointment of members and the carrying out of COSEWIC's functions.

Subcommittees

18 (1) COSEWIC must establish subcommittees of specialists to assist in the preparation and review of status reports on wildlife species considered to be at risk, including subcommittees specializing in groups of wildlife species and a subcommittee specializing in aboriginal traditional knowledge, and it may establish other subcommittees to advise it or to exercise or perform any of its functions.

Composition

16 (1) Le COSEPAC se compose de membres nommés par le ministre après consultation du Conseil canadien pour la conservation des espèces en péril et des experts et organismes d'experts — telle la Société royale du Canada — qui, de l'avis du ministre, possèdent l'expertise appropriée.

Critères d'admission

(2) Chaque membre du COSEPAC possède une expertise liée soit à une discipline telle que la biologie de la conservation, la dynamique des populations, la taxinomie, la systématique ou la génétique, soit aux connaissances des collectivités ou aux connaissances traditionnelles des peuples autochtones en matière de conservation des espèces sauvages.

Mandat

(3) Les membres sont nommés pour des mandats renouvelables d'au plus quatre ans.

Statut

(4) Ils ne font pas, en cette qualité, partie de l'administration publique fédérale.

Rémunération et indemnités

(5) Ils peuvent recevoir la rémunération et les indemnités que fixe le ministre.

Fonctions

(6) Chaque membre du COSEPAC exerce ses fonctions de façon indépendante.

Règlement et directives

17 Après consultation du Conseil canadien pour la conservation des espèces en péril et du COSEPAC, le ministre peut prendre des règlements et élaborer des directives en ce qui concerne la nomination des membres et l'exécution de la mission du COSEPAC.

Sous-comités

18 (1) Le COSEPAC est tenu de constituer des sous-comités de spécialistes chargés de l'assister dans l'élaboration et l'examen des rapports de situation portant sur des espèces sauvages qu'on estime être en péril — notamment des sous-comités compétents à l'égard de catégories d'espèces sauvages et un sous-comité compétent en matière de connaissances traditionnelles des peuples autochtones — et de le conseiller ou d'exercer telle de ses fonctions.

Membership

(2) Each subcommittee must be presided over by a member of COSEWIC, but the subcommittee may include persons who are not members of COSEWIC.

Aboriginal traditional knowledge subcommittee

(3) Subject to subsection (2), the chairperson and members of the aboriginal traditional knowledge subcommittee must be appointed by the Minister after consultation with any aboriginal organization he or she considers appropriate.

Rules

19 COSEWIC may make rules respecting the holding of meetings and the general conduct of its activities, including rules respecting

(a) the selection of persons to chair its meetings; and

(b) the meetings and activities of any of its subcommittees.

Staff and facilities

20 The Minister must provide COSEWIC with any professional, technical, secretarial, clerical and other assistance, and any facilities and supplies, that, in his or her opinion, are necessary to carry out its functions.

Status reports

21 (1) COSEWIC's assessment of the status of a wildlife species must be based on a status report on the species that COSEWIC either has had prepared or has received with an application.

Content

(2) The Minister may, after consultation with COSEWIC, the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations establishing the content of status reports.

2002, c. 29, s. 21; 2005, c. 2, s. 18.

Applications

22 (1) Any person may apply to COSEWIC for an assessment of the status of a wildlife species.

Regulations

(2) The Minister may, after consultation with the Minister responsible for the Parks Canada Agency, the Minister of Fisheries and Oceans and the Canadian Endangered Species Conservation Council, make regulations

Membres

(2) Les sous-comités sont présidés par un membre du COSEPAC et peuvent être composés de personnes qui n'en sont pas membres.

Sous-comité compétent en matière de connaissances traditionnelles des peuples autochtones

(3) Sous réserve du paragraphe (2), le président et les membres du sous-comité compétent en matière de connaissances traditionnelles des peuples autochtones sont nommés par le ministre après consultation de toute organisation autochtone qu'il estime indiquée.

Règles

19 Le COSEPAC peut établir des règles régissant la tenue de ses réunions et la conduite de ses activités en général, notamment :

a) le choix des personnes devant présider ses réunions;

b) le déroulement des réunions et les activités de ses sous-comités.

Personnel et installations

20 Le ministre fournit au COSEPAC le personnel — professionnels, techniciens, secrétaires, commis et autres personnes — et les installations et fournitures qu'il estime nécessaires à l'exécution de sa mission.

Rapport de situation

21 (1) L'évaluation de la situation d'une espèce sauvage par le COSEPAC se fonde obligatoirement sur le rapport de situation relatif à l'espèce qu'il a soit fait rédiger, soit reçu à l'appui d'une demande.

Contenu

(2) Le ministre peut, par règlement pris après consultation du COSEPAC, du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, prévoir le contenu des rapports de situation.

2002, ch. 29, art. 21; 2005, ch. 2, art. 18.

Demandes du public

22 (1) Toute personne peut présenter au COSEPAC une demande d'évaluation de la situation d'une espèce sauvage.

Règlements

(2) Après consultation du ministre responsable de l'Agence Parcs Canada, du ministre des Pêches et des Océans et du Conseil canadien pour la conservation des espèces en péril, le ministre peut prendre des règlements

respecting the making of applications to COSEWIC under subsection (1) and the dealing with of those applications by COSEWIC.

2002, c. 29, s. 22; 2005, c. 2, s. 19.

concernant la présentation des demandes au COSEPAC en vertu du paragraphe (1) et le traitement des demandes par celui-ci.

2002, ch. 29, art. 22; 2005, ch. 2, art. 19.

Time for assessment

23 (1) COSEWIC must assess the status of a wildlife species within one year after it receives a status report on the species, and it must provide reasons for its assessment.

Délai d'évaluation

23 (1) Le COSEPAC évalue, motifs à l'appui, la situation d'une espèce sauvage dans l'année suivant la réception du rapport de situation qui la concerne.

Notification of applicant

(2) If the assessment results from an application, COSEWIC must notify the applicant of the assessment and the reasons.

Communication au demandeur

(2) Si l'évaluation fait suite à une demande, le COSEPAC la communique, motifs à l'appui, à l'auteur de la demande.

Reviews and Reports

Review of classifications

24 COSEWIC must review the classification of each species at risk at least once every 10 years, or at any time if it has reason to believe that the status of the species has changed significantly.

Copies to Minister and Council

25 (1) When COSEWIC completes an assessment of the status of a wildlife species, it must provide the Minister and the Canadian Endangered Species Conservation Council with a copy of the assessment and the reasons for it. A copy of the assessment and the reasons must also be included in the public registry.

COSEWIC list

(2) COSEWIC must annually prepare a complete list of every wildlife species it has assessed since the coming into force of this section and a copy of that list must be included in the public registry.

Report on response

(3) On receiving a copy of an assessment of the status of a wildlife species from COSEWIC under subsection (1), the Minister must, within 90 days, include in the public registry a report on how the Minister intends to respond to the assessment and, to the extent possible, provide time lines for action.

Annual reports

26 COSEWIC must annually provide a report on its activities to the Canadian Endangered Species Conservation Council and a copy of that report must be included in the public registry.

Révision et rapports

Révision de la classification

24 Le COSEPAC révise la classification de chaque espèce en péril s'il a des motifs de croire que sa situation a changé de façon significative, mais en tout état de cause au moins une fois tous les dix ans.

Rapport au ministre et au Conseil

25 (1) Dès qu'il termine l'évaluation de la situation d'une espèce sauvage, le COSEPAC en fournit une copie, motifs à l'appui, au ministre et au Conseil canadien pour la conservation des espèces en péril. Une copie en est mise dans le registre.

Liste du COSEPAC

(2) Le COSEPAC établit annuellement une liste complète des espèces sauvages dont la situation a été évaluée depuis l'entrée en vigueur du présent article. Une copie en est mise dans le registre.

Réponse du ministre

(3) Dans les quatre-vingt-dix jours suivant la réception de l'évaluation visée au paragraphe (1), le ministre est tenu de mettre dans le registre une déclaration énonçant comment il se propose de réagir à l'évaluation et, dans la mesure du possible, selon quel échéancier.

Rapport annuel

26 Le COSEPAC présente annuellement au Conseil canadien pour la conservation des espèces en péril un rapport sur ses activités. Une copie en est mise dans le registre.

List of Wildlife Species at Risk

Power to amend List

27 (1) The Governor in Council may, on the recommendation of the Minister, by order amend the List in accordance with subsections (1.1) and (1.2) by adding a wildlife species, by reclassifying a listed wildlife species or by removing a listed wildlife species, and the Minister may, by order, amend the List in a similar fashion in accordance with subsection (3).

Decision in respect of assessment

(1.1) Subject to subsection (3), the Governor in Council, within nine months after receiving an assessment of the status of a species by COSEWIC, may review that assessment and may, on the recommendation of the Minister,

(a) accept the assessment and add the species to the List;

(b) decide not to add the species to the List; or

(c) refer the matter back to COSEWIC for further information or consideration.

Statement of reasons

(1.2) Where the Governor in Council takes a course of action under paragraph (1.1)(b) or (c), the Minister shall, after the approval of the Governor in Council, include a statement in the public registry setting out the reasons.

Pre-conditions for recommendation

(2) Before making a recommendation in respect of a wildlife species or a species at risk, the Minister must

(a) take into account the assessment of COSEWIC in respect of the species;

(b) consult the competent minister or ministers; and

(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of a wildlife species, consult the wildlife management board.

Amendment of List by Minister

(3) Where the Governor in Council has not taken a course of action under subsection (1.1) within nine months after receiving an assessment of the status of a species by COSEWIC, the Minister shall, by order, amend the List in accordance with COSEWIC's assessment.

Liste des espèces en péril

Modification de la liste

27 (1) Sur recommandation du ministre, le gouverneur en conseil peut, par décret, modifier la liste conformément aux paragraphes (1.1) et (1.2) soit par l'inscription d'une espèce sauvage, soit par la reclassification ou la radiation d'une espèce sauvage inscrite et le ministre peut, par arrêté, modifier la liste conformément au paragraphe (3) de la même façon.

Gouverneur en conseil

(1.1) Sous réserve du paragraphe (3), dans les neuf mois suivant la réception de l'évaluation de la situation d'une espèce faite par le COSEPAC, le gouverneur en conseil peut examiner l'évaluation et, sur recommandation du ministre :

a) confirmer l'évaluation et inscrire l'espèce sur la liste;

b) décider de ne pas inscrire l'espèce sur la liste;

c) renvoyer la question au COSEPAC pour renseignements supplémentaires ou pour réexamen.

Ministre

(1.2) Si le gouverneur en conseil prend des mesures en application des alinéas (1.1)b) ou c), le ministre est tenu, avec l'agrément du gouverneur en conseil, de mettre dans le registre une déclaration énonçant les motifs de la prise des mesures.

Conditions préalables à la recommandation

(2) Avant de faire une recommandation à l'égard d'une espèce sauvage ou d'une espèce en péril, le ministre :

a) prend en compte l'évaluation de la situation de l'espèce faite par le COSEPAC;

b) consulte tout ministre compétent;

c) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, consulte le conseil.

Modification de la liste

(3) Si, dans les neuf mois après avoir reçu l'évaluation de la situation de l'espèce faite par le COSEPAC, le gouverneur en conseil n'a pas pris de mesures aux termes du paragraphe (1.1), le ministre modifie, par arrêté, la liste en conformité avec cette évaluation.

Applications for assessment of imminent threat

28 (1) Any person who considers that there is an imminent threat to the survival of a wildlife species may apply to COSEWIC for an assessment of the threat for the purpose of having the species listed on an emergency basis under subsection 29(1) as an endangered species.

Information to be included in application

(2) The application must include relevant information indicating that there is an imminent threat to the survival of the species.

Regulations

(3) The Minister may, after consultation with the Minister responsible for the Parks Canada Agency, the Minister of Fisheries and Oceans and the Canadian Endangered Species Conservation Council, make regulations respecting the making of applications to COSEWIC under subsection (1) and the dealing with of those applications by COSEWIC.

Notice

(4) COSEWIC must provide the applicant, the Minister and the Canadian Endangered Species Conservation Council with a copy of its assessment. A copy of the assessment must be included in the public registry.

2002, c. 29, s. 28; 2005, c. 2, s. 20.

Emergency listing

29 (1) If the Minister is of the opinion that there is an imminent threat to the survival of a wildlife species, the Minister must, on an emergency basis, after consultation with every other competent minister, make a recommendation to the Governor in Council that the List be amended to list the species as an endangered species.

Formation of opinion

(2) The Minister may arrive at that opinion on the basis of his or her own information or on the basis of COSEWIC's assessment.

Exemption

(3) If a recommendation is made under subsection (1), subsection 27(2) does not apply to any order that is made under subsection 27(1) on the basis of that recommendation, and the order is exempt from the application of section 3 of the *Statutory Instruments Act*.

Review

30 (1) As soon as possible after an order is made on the basis of a recommendation referred to in subsection 29(1), COSEWIC must have a status report on the wildlife species prepared and, within one year after the making of

Demandes d'évaluation : menace imminente

28 (1) Toute personne estimant que la survie d'une espèce sauvage est menacée de façon imminente peut demander au COSEPAC d'évaluer la menace en vue de faire inscrire d'urgence l'espèce comme espèce en voie de disparition en application du paragraphe 29(1).

Renseignements joints à la demande

(2) La demande doit comporter les renseignements pertinents indiquant que la survie de l'espèce est menacée de façon imminente.

Règlements

(3) Le ministre, après consultation du ministre responsable de l'Agence Parcs Canada, du ministre des Pêches et des Océans et du Conseil canadien pour la conservation des espèces en péril, peut prendre des règlements concernant la présentation des demandes au COSEPAC en vertu du paragraphe (1) et le traitement des demandes par celui-ci.

Notification

(4) Le COSEPAC remet une copie de l'évaluation à l'auteur de la demande, au ministre et au Conseil canadien pour la conservation des espèces en péril. Une copie de cette évaluation est mise dans le registre.

2002, ch. 29, art. 28; 2005, ch. 2, art. 20.

Inscription d'urgence

29 (1) Si le ministre est d'avis que la survie d'une espèce sauvage est menacée de façon imminente, il est tenu, après consultation de tout autre ministre compétent, de recommander d'urgence au gouverneur en conseil de modifier la liste pour y inscrire l'espèce comme espèce en voie de disparition.

Fondement de l'arrêté

(2) Le ministre peut fonder son avis soit sur l'information à laquelle il a accès, soit sur l'évaluation du COSEPAC.

Exclusion

(3) Le décret pris en vertu du paragraphe 27(1) sur le fondement de la recommandation visée au paragraphe (1) est soustrait à l'application du paragraphe 27(2) et de l'article 3 de la *Loi sur les textes réglementaires*.

Révision

30 (1) Dès que possible après la prise d'un décret sur le fondement de la recommandation visée au paragraphe 29(1), le COSEPAC fait préparer un rapport de situation concernant l'espèce sauvage et, au plus tard un an après

the order, COSEWIC must, in a report in writing to the Minister,

(a) confirm the classification of the species;

(b) recommend to the Minister that the species be reclassified; or

(c) recommend to the Minister that the species be removed from the List.

Copy of report

(2) Within 30 days after the report is received by the Minister, a copy of the report must be included in the public registry.

Recommendation to amend List

31 If COSEWIC makes a recommendation under paragraph 30(1)(b) or (c), the Minister may make a recommendation to the Governor in Council with respect to amending the List.

Measures to Protect Listed Wildlife Species

General Prohibitions

Killing, harming, etc., listed wildlife species

32 (1) No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.

Possession, collection, etc.

(2) No person shall possess, collect, buy, sell or trade an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or any part or derivative of such an individual.

Deeming

(3) For the purposes of subsection (2), any animal, plant or thing that is represented to be an individual, or a part or derivative of an individual, of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species is deemed, in the absence of evidence to the contrary, to be such an individual or a part or derivative of such an individual.

Damage or destruction of residence

33 No person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed

la prise du décret, présente au ministre un rapport écrit comportant une des énonciations suivantes :

a) la classification de l'espèce est confirmée;

b) sa reclassification est recommandée au ministre;

c) sa radiation de la liste est recommandée au ministre.

Copie du rapport

(2) Dans les trente jours suivant la réception du rapport par le ministre, une copie en est mise dans le registre.

Modification de la liste

31 Si le COSEPAC fait la recommandation visée aux alinéas 30(1)b) ou c), le ministre peut faire une recommandation au gouverneur en conseil concernant la modification de la liste.

Mesures de protection des espèces sauvages inscrites

Interdictions générales

Abattage, harcèlement, etc.

32 (1) Il est interdit de tuer un individu d'une espèce sauvage inscrite comme espèce disparue du pays, en voie de disparition ou menacée, de lui nuire, de le harceler, de le capturer ou de le prendre.

Possession, achat, etc.

(2) Il est interdit de posséder, de collectionner, d'acheter, de vendre ou d'échanger un individu — notamment partie d'un individu ou produit qui en provient — d'une espèce sauvage inscrite comme espèce disparue du pays, en voie de disparition ou menacée.

Présomption

(3) Pour l'application du paragraphe (2), tout animal, toute plante ou toute chose présentée comme un individu — notamment partie d'un individu ou produit qui en provient — d'une espèce sauvage inscrite comme espèce disparue du pays, en voie de disparition ou menacée est réputée, sauf preuve contraire, être tel individu, telle partie ou tel produit.

Endommagement ou destruction de la résidence

33 Il est interdit d'endommager ou de détruire la résidence d'un ou de plusieurs individus soit d'une espèce

as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada.

Application — certain species in provinces

34 (1) With respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*, sections 32 and 33 do not apply in lands in a province that are not federal lands unless an order is made under subsection (2) to provide that they apply.

Order

(2) The Governor in Council may, on the recommendation of the Minister, by order, provide that sections 32 and 33, or either of them, apply in lands in a province that are not federal lands with respect to individuals of a listed wildlife species that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*.

Obligation to make recommendation

(3) The Minister must recommend that the order be made if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals.

Consultation

(4) Before recommending that the Governor in Council make an order under subsection (2), the Minister must consult

(a) the appropriate provincial minister; and

(b) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board.

Application — certain species in territories

35 (1) Sections 32 and 33 apply in each of the territories in respect of a listed wildlife species only to the extent that the Governor in Council, on the recommendation of the Minister, makes an order providing that they, or any of them, apply.

Exception

(2) Subsection (1) does not apply

sauvage inscrite comme espèce en voie de disparition ou menacée, soit d'une espèce sauvage inscrite comme espèce disparue du pays dont un programme de rétablissement a recommandé la réinsertion à l'état sauvage au Canada.

Application : certaines espèces dans une province

34 (1) S'agissant des individus d'une espèce sauvage inscrite, autre qu'une espèce aquatique ou une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, les articles 32 et 33 ne s'appliquent dans une province, ailleurs que sur le territoire domanial, que si un décret prévu au paragraphe (2) prévoit une telle application.

Décret

(2) Sur recommandation du ministre, le gouverneur en conseil peut prévoir, par décret, l'application des articles 32 et 33, ou de l'un de ceux-ci, dans une province, ailleurs que sur le territoire domanial, à l'égard des individus d'une espèce sauvage inscrite, autre qu'une espèce aquatique ou une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*.

Obligation du ministre

(3) S'il estime que le droit de la province ne protège pas efficacement l'espèce ou la résidence de ses individus, le ministre est tenu de recommander au gouverneur en conseil la prise du décret.

Consultation

(4) Le ministre ne recommande la prise du décret :

a) qu'après avoir consulté le ministre provincial compétent;

b) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, qu'après avoir consulté le conseil.

Application : certaines espèces dans les territoires

35 (1) Les articles 32 et 33 ne s'appliquent dans un territoire à l'égard d'une espèce sauvage inscrite que si le gouverneur en conseil, sur recommandation du ministre, prend un décret prévoyant l'application de ces articles ou de l'un de ceux-ci.

Exception

(2) Le paragraphe (1) ne s'applique pas :

(a) in respect of individuals of aquatic species and their habitat or species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*; or

(b) on land under the authority of the Minister or the Parks Canada Agency.

Obligation to make recommendation

(3) The Minister must recommend that the order be made if the Minister is of the opinion that the laws of the territory do not effectively protect the species or the residences of its individuals.

Pre-conditions for recommendation

(4) Before recommending that an order be made under subsection (1), the Minister must

(a) consult the appropriate territorial minister; and

(b) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, consult the wildlife management board.

Prohibitions re provincial and territorial classifications

36 (1) If a wildlife species that is not listed has been classified as an endangered species or a threatened species by a provincial or territorial minister, no person shall

(a) kill, harm, harass, capture or take an individual of that species that is on federal lands in the province or territory;

(b) possess, collect, buy, sell or trade an individual of that species that is on federal lands in the province or territory, or any part or derivative of such an individual; or

(c) damage or destroy the residence of one or more individuals of that species that is on federal lands in the province or territory.

Application

(2) Subsection (1) applies only in respect of the portions of the federal lands that the Governor in Council may, on the recommendation of the competent minister, by order, specify.

a) à l'égard des individus d'une espèce aquatique et de leur habitat ou d'une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*;

b) sur les terres relevant du ministre ou de l'Agence Parcs Canada.

Obligation du ministre

(3) S'il estime que le droit du territoire ne protège pas efficacement cette espèce ou la résidence de ses individus, le ministre est tenu de recommander au gouverneur en conseil la prise du décret.

Consultation

(4) Le ministre ne recommande la prise du décret :

a) qu'après avoir consulté le ministre territorial compétent;

b) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, qu'après avoir consulté le conseil.

Interdictions : espèces provinciales ou territoriales

36 (1) Si une espèce sauvage non inscrite est classée par un ministre provincial ou territorial comme espèce en voie de disparition ou menacée, il est interdit :

a) de tuer un individu de cette espèce se trouvant sur le territoire domanial situé dans la province ou le territoire, de lui nuire, de le harceler, de le capturer ou de le prendre;

b) de posséder, de collectionner, d'acheter, de vendre ou d'échanger un individu — notamment partie d'un individu ou produit qui en provient — de cette espèce se trouvant sur le territoire domanial situé dans la province ou le territoire;

c) d'endommager ou de détruire la résidence d'un ou de plusieurs individus de cette espèce se trouvant sur le territoire domanial situé dans la province ou le territoire.

Application

(2) Le paragraphe (1) ne s'applique qu'aux parties du territoire domanial que le gouverneur en conseil désigne par décret pris sur recommandation du ministre compétent.

Recovery of Endangered, Threatened and Extirpated Species

Recovery Strategy

Preparation — endangered or threatened species

37 (1) If a wildlife species is listed as an extirpated species, an endangered species or a threatened species, the competent minister must prepare a strategy for its recovery.

More than one competent minister

(2) If there is more than one competent minister with respect to the wildlife species, they must prepare the strategy together and every reference to competent minister in sections 38 to 46 is to be read as a reference to the competent ministers.

Commitments to be considered

38 In preparing a recovery strategy, action plan or management plan, the competent minister must consider the commitment of the Government of Canada to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to the listed wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty.

Cooperation with others

39 (1) To the extent possible, the recovery strategy must be prepared in cooperation with

(a) the appropriate provincial and territorial minister for each province and territory in which the listed wildlife species is found;

(b) every minister of the Government of Canada who has authority over federal land or other areas on which the species is found;

(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board;

(d) every aboriginal organization that the competent minister considers will be directly affected by the recovery strategy; and

(e) any other person or organization that the competent minister considers appropriate.

Rétablissement des espèces en voie de disparition, menacées et disparues du pays

Programme de rétablissement

Élaboration

37 (1) Si une espèce sauvage est inscrite comme espèce disparue du pays, en voie de disparition ou menacée, le ministre compétent est tenu d'élaborer un programme de rétablissement à son égard.

Élaboration conjointe

(2) Si plusieurs ministres compétents sont responsables de l'espèce sauvage, le programme de rétablissement est élaboré conjointement par eux. Le cas échéant, la mention du ministre compétent aux articles 38 à 46 vaut mention des ministres compétents.

Engagements applicables

38 Pour l'élaboration d'un programme de rétablissement, d'un plan d'action ou d'un plan de gestion, le ministre compétent tient compte de l'engagement qu'a pris le gouvernement du Canada de conserver la diversité biologique et de respecter le principe selon lequel, s'il existe une menace d'atteinte grave ou irréversible à l'espèce sauvage inscrite, le manque de certitude scientifique ne doit pas être prétexte à retarder la prise de mesures efficientes pour prévenir sa disparition ou sa décroissance.

Collaboration

39 (1) Dans la mesure du possible, le ministre compétent élabore le programme de rétablissement en collaboration avec :

a) le ministre provincial ou territorial compétent dans la province ou le territoire où se trouve l'espèce sauvage inscrite;

b) tout ministre fédéral dont relèvent le territoire domanial ou les autres aires où se trouve l'espèce;

c) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le conseil;

d) toute organisation autochtone qu'il croit directement touchée par le programme de rétablissement;

e) toute autre personne ou organisation qu'il estime compétente.

Land claims agreement

(2) If the listed wildlife species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the recovery strategy must be prepared, to the extent that it will apply to that area, in accordance with the provisions of the agreement.

Consultation

(3) To the extent possible, the recovery strategy must be prepared in consultation with any landowners and other persons whom the competent minister considers to be directly affected by the strategy, including the government of any other country in which the species is found.

Determination of feasibility

40 In preparing the recovery strategy, the competent minister must determine whether the recovery of the listed wildlife species is technically and biologically feasible. The determination must be based on the best available information, including information provided by COSEWIC.

Contents if recovery feasible

41 (1) If the competent minister determines that the recovery of the listed wildlife species is feasible, the recovery strategy must address the threats to the survival of the species identified by COSEWIC, including any loss of habitat, and must include

(a) a description of the species and its needs that is consistent with information provided by COSEWIC;

(b) an identification of the threats to the survival of the species and threats to its habitat that is consistent with information provided by COSEWIC and a description of the broad strategy to be taken to address those threats;

(c) an identification of the species' critical habitat, to the extent possible, based on the best available information, including the information provided by COSEWIC, and examples of activities that are likely to result in its destruction;

(c.1) a schedule of studies to identify critical habitat, where available information is inadequate;

(d) a statement of the population and distribution objectives that will assist the recovery and survival of the species, and a general description of the research and management activities needed to meet those objectives;

Accord sur des revendications territoriales

(2) Si l'espèce sauvage inscrite se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le programme de rétablissement est élaboré, dans la mesure où il s'applique à cette aire, en conformité avec les dispositions de cet accord.

Consultation

(3) Le programme de rétablissement est élaboré, dans la mesure du possible, en consultation avec les propriétaires fonciers et les autres personnes que le ministre compétent croit directement touchés par le programme, notamment le gouvernement de tout autre pays où se trouve l'espèce.

Caractère réalisable du rétablissement

40 Pour l'élaboration du programme de rétablissement, le ministre compétent vérifie si le rétablissement de l'espèce sauvage inscrite est réalisable au point de vue technique et biologique. Il fonde sa conclusion sur la meilleure information accessible, notamment les renseignements fournis par le COSEPAC.

Rétablissement réalisable

41 (1) Si le ministre compétent conclut que le rétablissement de l'espèce sauvage inscrite est réalisable, le programme de rétablissement doit traiter des menaces à la survie de l'espèce — notamment de toute perte de son habitat — précisées par le COSEPAC et doit comporter notamment :

a) une description de l'espèce et de ses besoins qui soit compatible avec les renseignements fournis par le COSEPAC;

b) une désignation des menaces à la survie de l'espèce et des menaces à son habitat qui soit compatible avec les renseignements fournis par le COSEPAC, et des grandes lignes du plan à suivre pour y faire face;

c) la désignation de l'habitat essentiel de l'espèce dans la mesure du possible, en se fondant sur la meilleure information accessible, notamment les informations fournies par le COSEPAC, et des exemples d'activités susceptibles d'entraîner sa destruction;

c.1) un calendrier des études visant à désigner l'habitat essentiel lorsque l'information accessible est insuffisante;

d) un énoncé des objectifs en matière de population et de dissémination visant à favoriser la survie et le rétablissement de l'espèce, ainsi qu'une description

(e) any other matters that are prescribed by the regulations;

(f) a statement about whether additional information is required about the species; and

(g) a statement of when one or more action plans in relation to the recovery strategy will be completed.

(e) tout autre élément prévu par règlement;

f) un énoncé sur l'opportunité de fournir des renseignements supplémentaires concernant l'espèce;

g) un exposé de l'échéancier prévu pour l'élaboration d'un ou de plusieurs plans d'action relatifs au programme de rétablissement.

Contents if recovery not feasible

(2) If the competent minister determines that the recovery of the listed wildlife species is not feasible, the recovery strategy must include a description of the species and its needs, an identification of the species' critical habitat to the extent possible, and the reasons why its recovery is not feasible.

Rétablissement irréalisable

(2) Si le ministre compétent conclut que le rétablissement de l'espèce sauvage inscrite est irréalisable, le programme de rétablissement doit comporter une description de l'espèce et de ses besoins, dans la mesure du possible, et la désignation de son habitat essentiel, ainsi que les motifs de la conclusion.

Multi-species or ecosystem approach permissible

(3) The competent minister may adopt a multi-species or an ecosystem approach when preparing the recovery strategy if he or she considers it appropriate to do so.

Plusieurs espèces ou écosystème

(3) Pour l'élaboration du programme de rétablissement, le ministre compétent peut, s'il l'estime indiqué, traiter de plusieurs espèces simultanément ou de tout un écosystème.

Regulations

(4) The Governor in Council may, on the recommendation of the Minister after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations for the purpose of paragraph (1)(e) prescribing matters to be included in a recovery strategy.

2002, c. 29, s. 41; 2005, c. 2, s. 21.

Règlement

(4) Sur recommandation faite par le ministre après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le gouverneur en conseil peut prévoir par règlement, pour l'application de l'alinéa (1)e), les éléments additionnels à inclure dans un programme de rétablissement.

2002, ch. 29, art. 41; 2005, ch. 2, art. 21.

Proposed recovery strategy

42 (1) Subject to subsection (2), the competent minister must include a proposed recovery strategy in the public registry within one year after the wildlife species is listed, in the case of a wildlife species listed as an endangered species, and within two years after the species is listed, in the case of a wildlife species listed as a threatened species or an extirpated species.

Projet de programme de rétablissement

42 (1) Sous réserve du paragraphe (2), le ministre compétent met le projet de programme de rétablissement dans le registre dans l'année suivant l'inscription de l'espèce sauvage comme espèce en voie de disparition ou dans les deux ans suivant l'inscription de telle espèce comme espèce menacée ou disparue du pays.

First listed wildlife species

(2) With respect to wildlife species that are set out in Schedule 1 on the day section 27 comes into force, the competent minister must include a proposed recovery strategy in the public registry within three years after that day, in the case of a wildlife species listed as an endangered species, and within four years after that day, in the case of a wildlife species listed as a threatened species or an extirpated species.

Liste des espèces en péril originale

(2) En ce qui concerne les espèces sauvages inscrites à l'annexe 1 à l'entrée en vigueur de l'article 27, le ministre compétent met le projet de programme de rétablissement dans le registre dans les trois ans suivant cette date dans le cas de l'espèce sauvage inscrite comme espèce en voie de disparition ou dans les quatre ans suivant cette date dans le cas de l'espèce sauvage inscrite comme espèce menacée ou disparue du pays.

Comments

43 (1) Within 60 days after the proposed recovery strategy is included in the public registry, any person may file written comments with the competent minister.

Finalization of recovery strategy

(2) Within 30 days after the expiry of the period referred to in subsection (1), the competent minister must consider any comments received, make any changes to the proposed recovery strategy that he or she considers appropriate and finalize the recovery strategy by including a copy of it in the public registry.

Existing plans

44 (1) If the competent minister is of the opinion that an existing plan relating to a wildlife species meets the requirements of subsection 41(1) or (2), and the plan is adopted by the competent minister as the proposed recovery strategy, he or she must include it in the public registry as the proposed recovery strategy in relation to the species.

Incorporation of existing plans

(2) The competent minister may incorporate any part of an existing plan relating to a wildlife species into a proposed recovery strategy for the species.

Amendments

45 (1) The competent minister may at any time amend the recovery strategy. A copy of the amendment must be included in the public registry.

Amendments relating to time for completing action plan

(2) If the amendment relates to the time for completing an action plan, the competent minister must provide reasons for the amendment and include a copy of the reasons in the public registry.

Amendment procedure

(3) Sections 39 and 43 apply to amendments to a recovery strategy, with any modifications that the circumstances require.

Exception

(4) Subsection (3) does not apply if the competent minister considers the amendment to be minor.

Reporting

46 The competent minister must report on the implementation of the recovery strategy, and the progress towards meeting its objectives, within five years after it is

Observations

43 (1) Dans les soixante jours suivant la mise du projet dans le registre, toute personne peut déposer par écrit auprès du ministre compétent des observations relativement au projet.

Texte définitif du programme de rétablissement

(2) Dans les trente jours suivant la fin du délai prévu au paragraphe (1), le ministre compétent étudie les observations qui lui ont été présentées, apporte au projet les modifications qu'il estime indiquées et met le texte définitif du programme de rétablissement dans le registre.

Plans existants

44 (1) Si le ministre compétent estime qu'un plan existant s'applique à l'égard d'une espèce sauvage et est conforme aux exigences des paragraphes 41(1) ou (2), et qu'il l'adopte à titre de projet de programme de rétablissement, il en met une copie dans le registre pour tenir lieu de projet de programme de rétablissement de l'espèce.

Incorporation d'un plan existant

(2) Il peut incorporer toute partie d'un plan existant relatif à une espèce sauvage dans un projet de programme de rétablissement de celle-ci.

Modifications

45 (1) Le ministre compétent peut modifier le programme de rétablissement. Une copie de la modification est mise dans le registre.

Modification du délai

(2) Si la modification porte sur le délai pour terminer un plan d'action, le ministre compétent est tenu de fournir les motifs de la modification et de mettre une copie de ceux-ci dans le registre.

Procédure de modification

(3) Les articles 39 et 43 s'appliquent, avec les adaptations nécessaires, à la modification du programme de rétablissement.

Exception

(4) Le paragraphe (3) ne s'applique pas si le ministre compétent estime que la modification est mineure.

Suivi

46 Il incombe au ministre compétent d'établir un rapport sur la mise en œuvre du programme de rétablissement et sur les progrès effectués en vue des objectifs qu'il

included in the public registry and in every subsequent five-year period, until its objectives have been achieved or the species' recovery is no longer feasible. The report must be included in the public registry.

Action Plan

Preparation

47 The competent minister in respect of a recovery strategy must prepare one or more action plans based on the recovery strategy. If there is more than one competent minister with respect to the recovery strategy, they may prepare the action plan or plans together.

Cooperation with other ministers and governments

48 (1) To the extent possible, an action plan must be prepared in cooperation with

(a) the appropriate provincial and territorial minister of each province and territory in which the listed wildlife species is found;

(b) every minister of the Government of Canada who has authority over federal land or other areas on which the species is found;

(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board;

(d) every aboriginal organization that the competent minister considers will be directly affected by the action plan; and

(e) any other person or organization that the competent minister considers appropriate.

Land claims agreement

(2) If the listed wildlife species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, an action plan must be prepared, to the extent that it will apply to that area, in accordance with the provisions of the agreement.

Consultation

(3) To the extent possible, an action plan must be prepared in consultation with any landowners, lessees and other persons whom the competent minister considers to be directly affected by, or interested in, the action plan, including the government of any other country in which the species is found.

expose, à intervalles de cinq ans à compter de sa mise dans le registre, et ce, jusqu'à ce que ces objectifs soient atteints ou que le rétablissement de l'espèce ne soit plus réalisable. Il met son rapport dans le registre.

Plan d'action

Élaboration

47 Le ministre compétent responsable d'un programme de rétablissement est tenu d'élaborer un ou plusieurs plans d'action sur le fondement de celui-ci. Si plusieurs ministres compétents sont responsables du programme, les plans d'action peuvent être élaborés conjointement par eux.

Collaboration

48 (1) Dans la mesure du possible, le plan d'action est élaboré en collaboration avec :

a) le ministre provincial ou territorial compétent dans la province ou le territoire où se trouve l'espèce sauvage inscrite;

b) tout ministre fédéral dont relèvent le territoire domanial ou les autres aires où se trouve l'espèce;

c) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le conseil;

d) toute organisation autochtone que le ministre compétent croit directement touchée par le plan d'action;

e) toute autre personne ou organisation qu'il estime compétente.

Accord sur des revendications territoriales

(2) Si l'espèce sauvage inscrite se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le plan d'action est élaboré, dans la mesure où il s'applique à cette aire, en conformité avec les dispositions de cet accord.

Consultation

(3) Le plan d'action est élaboré, dans la mesure du possible, en consultation avec les propriétaires fonciers, les locataires et les autres personnes que le ministre compétent croit directement touchés ou intéressés, notamment le gouvernement de tout autre pays où se trouve l'espèce.

Contents

49 (1) An action plan must include, with respect to the area to which the action plan relates,

(a) an identification of the species' critical habitat, to the extent possible, based on the best available information and consistent with the recovery strategy, and examples of activities that are likely to result in its destruction;

(b) a statement of the measures that are proposed to be taken to protect the species' critical habitat, including the entering into of agreements under section 11;

(c) an identification of any portions of the species' critical habitat that have not been protected;

(d) a statement of the measures that are to be taken to implement the recovery strategy, including those that address the threats to the species and those that help to achieve the population and distribution objectives, as well as an indication as to when these measures are to take place;

(d.1) the methods to be used to monitor the recovery of the species and its long-term viability;

(e) an evaluation of the socio-economic costs of the action plan and the benefits to be derived from its implementation; and

(f) any other matters that are prescribed by the regulations.

Regulations

(2) The Governor in Council may, on the recommendation of the Minister after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations for the purpose of paragraph (1)(f) prescribing matters to be included in an action plan.

2002, c. 29, s. 49; 2005, c. 2, s. 22.

Proposed action plan

50 (1) The competent minister must include a proposed action plan in the public registry.

Comments

(2) Within 60 days after the proposed action plan is included in the public registry, any person may file written comments with the competent minister.

Contenu du plan d'action

49 (1) Le plan d'action comporte notamment, en ce qui concerne l'aire à laquelle il s'applique :

a) la désignation de l'habitat essentiel de l'espèce dans la mesure du possible, en se fondant sur la meilleure information accessible et d'une façon compatible avec le programme de rétablissement, et des exemples d'activités susceptibles d'entraîner sa destruction;

b) un exposé des mesures envisagées pour protéger l'habitat essentiel de l'espèce, notamment la conclusion d'accords en application de l'article 11;

c) la désignation de toute partie de l'habitat essentiel de l'espèce qui n'est pas protégée;

d) un exposé des mesures à prendre pour mettre en œuvre le programme de rétablissement, notamment celles qui traitent des menaces à la survie de l'espèce et celles qui aident à atteindre les objectifs en matière de population et de dissémination, ainsi qu'une indication du moment prévu pour leur exécution;

d.1) les méthodes à utiliser pour surveiller le rétablissement de l'espèce et sa viabilité à long terme;

e) l'évaluation des répercussions socioéconomiques de sa mise en œuvre et des avantages en découlant;

f) tout autre élément prévu par règlement.

Règlement

(2) Sur recommandation faite par le ministre après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le gouverneur en conseil peut prévoir par règlement, pour l'application de l'alinéa (1)f), les éléments additionnels à inclure dans un plan d'action.

2002, ch. 29, art. 49; 2005, ch. 2, art. 22.

Projet de plan d'action

50 (1) Le ministre compétent met le projet de plan d'action dans le registre.

Observations

(2) Dans les soixante jours suivant la mise du projet dans le registre, toute personne peut déposer par écrit auprès du ministre compétent des observations relativement au projet.

Finalization of action plan

(3) Within 30 days after the expiry of the period referred to in subsection (2), the competent minister must consider any comments received, make any changes to the proposed action plan that he or she considers appropriate and finalize the action plan by including a copy of it in the public registry.

Summary if action plan not completed in time

(4) If an action plan is not finalized in the time set out in the recovery strategy, the competent minister must include in the public registry a summary of what has been prepared with respect to the plan.

Existing plans

51 (1) If the competent minister is of the opinion that an existing plan relating to a wildlife species meets the requirements of section 49, and the plan is adopted by the competent minister as a proposed action plan, he or she must include it in the public registry as a proposed action plan in relation to the species.

Incorporation of existing plans

(2) The competent minister may incorporate any part of an existing plan relating to a wildlife species into a proposed action plan for the species.

Amendments

52 (1) The competent minister may at any time amend an action plan. A copy of the amendment must be included in the public registry.

Amendment procedure

(2) Section 48 applies to amendments to an action plan, with any modifications that the circumstances require.

Exception

(3) Subsection (2) does not apply if the competent minister considers the amendment to be minor.

Regulations

53 (1) The competent minister must, with respect to aquatic species, species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*, regardless of where they are located, or with respect to any other wildlife species on federal lands, make any regulations that are necessary in the opinion of the competent minister for the purpose of implementing the measures included in an action plan, but, if the measures relate to the protection of critical habitat on federal lands, the regulations must be made under section 59.

Texte définitif du plan d'action

(3) Dans les trente jours suivant la fin du délai prévu au paragraphe (2), le ministre compétent étudie les observations qui lui ont été présentées, apporte au projet les modifications qu'il estime indiquées et met le texte définitif du plan d'action dans le registre.

Sommaire en cas de retard

(4) Si le plan d'action n'est pas terminé dans le délai prévu par le programme de rétablissement, le ministre compétent est tenu de mettre dans le registre un sommaire des éléments du plan qui sont élaborés.

Plans existants

51 (1) Si le ministre compétent estime qu'un plan existant s'applique à l'égard d'une espèce sauvage et est conforme aux exigences de l'article 49, et qu'il l'adopte à titre de projet de plan d'action, il en met une copie dans le registre pour tenir lieu de projet de plan d'action à l'égard de l'espèce.

Incorporation d'un plan existant

(2) Il peut incorporer toute partie d'un plan existant relatif à une espèce sauvage dans un projet de plan d'action portant sur celle-ci.

Modifications

52 (1) Le ministre compétent peut modifier le plan d'action. Une copie de la modification est mise dans le registre.

Procédure de modification

(2) L'article 48 s'applique, avec les adaptations nécessaires, à la modification du plan d'action.

Exception

(3) Le paragraphe (2) ne s'applique pas si le ministre compétent estime que la modification est mineure.

Règlements

53 (1) Le ministre compétent prend, par règlement, à l'égard des espèces aquatiques, des espèces d'oiseaux migrateurs protégées par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, où qu'elles se trouvent, ou de toute autre espèce sauvage se trouvant sur le territoire domanial, les mesures qu'il estime nécessaires pour la mise en œuvre d'un plan d'action. Si les mesures concernent la protection de l'habitat essentiel sur le territoire domanial, les règlements sont pris en vertu de l'article 59.

Consultation

(2) If the competent minister is of the opinion that a regulation would affect a reserve or any other lands that are set apart for the use and benefit of a band under the *Indian Act*, he or she must consult the Minister of Indian Affairs and Northern Development and the band before making the regulation.

Consultation

(3) If the competent minister is of the opinion that a regulation would affect an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, he or she must consult the wildlife management board before making the regulation.

Incorporation by reference

(4) The regulations may incorporate by reference any legislation of a province or territory, as amended from time to time, insofar as the regulations apply in that province or territory.

Consultation

(5) If the competent minister is of the opinion that a regulation would affect land in a territory, he or she must consult the territorial minister before making the regulation.

Exception

(6) Subsection (5) does not apply

(a) in respect of individuals of aquatic species and their habitat or species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994* and their habitat; or

(b) in respect of land under the authority of the Minister or the Parks Canada Agency.

Use of powers under other Acts

54 For the purpose of implementing the measures included in an action plan, the competent minister may use any powers that he or she has under any other Act of Parliament.

Monitoring and reporting

55 The competent minister must monitor the implementation of an action plan and the progress towards meeting its objectives and assess and report on its implementation and its ecological and socio-economic impacts five years after the plan comes into effect. A copy of the report must be included in the public registry.

Consultation

(2) Si le ministre compétent estime que le règlement touchera une réserve ou une autre terre qui a été mise de côté à l'usage et au profit d'une bande en application de la *Loi sur les Indiens*, il est tenu de consulter le ministre des Affaires indiennes et du Nord canadien et la bande avant de le prendre.

Consultation

(3) Si le ministre compétent estime que le règlement touchera une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, il est tenu de consulter le conseil avant de le prendre.

Incorporation par renvoi

(4) Les règlements peuvent incorporer par renvoi, dans la mesure où ils s'appliquent à une province ou à un territoire, toute mesure législative de la province ou du territoire, avec ses modifications successives.

Application dans les territoires

(5) Si le ministre compétent estime que le règlement touchera des terres dans un territoire, il est tenu de consulter le ministre territorial avant de le prendre.

Exception

(6) Le paragraphe (5) ne s'applique pas :

a) à l'égard des individus d'une espèce aquatique ou d'une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, et de leur habitat;

b) à l'égard des terres relevant du ministre ou de l'Agence Parcs Canada.

Pouvoirs conférés au titre d'autres lois

54 Le ministre compétent peut, en vue de la mise en œuvre d'un plan d'action, exercer tout pouvoir qui lui est conféré au titre d'une autre loi fédérale.

Suivi et rapport

55 Cinq ans après la mise du plan d'action dans le registre, il incombe au ministre compétent d'assurer le suivi de sa mise en œuvre et des progrès réalisés en vue de l'atteinte de ses objectifs. Il l'évalue et établit un rapport, notamment sur ses répercussions écologiques et socioéconomiques. Il met une copie de son rapport dans le registre.

Protection of Critical Habitat

Codes of practice, national standards or guidelines

56 The competent minister may, after consultation with the Canadian Endangered Species Conservation Council and any person whom he or she considers appropriate, establish codes of practice, national standards or guidelines with respect to the protection of critical habitat.

Purpose

57 The purpose of section 58 is to ensure that, within 180 days after the recovery strategy or action plan that identified the critical habitat referred to in subsection 58(1) is included in the public registry, all of the critical habitat is protected by

(a) provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or

(b) the application of subsection 58(1).

Destruction of critical habitat

58 (1) Subject to this section, no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species — or of any listed extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada — if

(a) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;

(b) the listed species is an aquatic species; or

(c) the listed species is a species of migratory birds protected by the *Migratory Birds Convention Act, 1994*.

Protected areas

(2) If the critical habitat or a portion of the critical habitat is in a national park of Canada named and described in Schedule 1 to the *Canada National Parks Act*, the Rouge National Urban Park established by the *Rouge National Urban Park Act*, a marine protected area under the *Oceans Act*, a migratory bird sanctuary under the *Migratory Birds Convention Act, 1994* or a national wildlife area under the *Canada Wildlife Act*, the competent Minister must, within 90 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, publish in the *Canada Gazette* a

Protection de l'habitat essentiel

Codes de pratique et normes ou directives nationales

56 Le ministre compétent peut, après consultation du Conseil canadien pour la conservation des espèces en péril et de toute personne qu'il estime compétente, élaborer des codes de pratique et des normes ou directives nationales en matière de protection de l'habitat essentiel.

Objet

57 L'article 58 a pour objet de faire en sorte que, dans les cent quatre-vingts jours suivant la mise dans le registre du programme de rétablissement ou du plan d'action ayant défini l'habitat essentiel visé au paragraphe 58(1), tout l'habitat essentiel soit protégé :

a) soit par des dispositions de la présente loi ou de toute autre loi fédérale, ou une mesure prise sous leur régime, notamment les accords conclus au titre de l'article 11;

b) soit par l'application du paragraphe 58(1).

Destruction de l'habitat essentiel

58 (1) Sous réserve des autres dispositions du présent article, il est interdit de détruire un élément de l'habitat essentiel d'une espèce sauvage inscrite comme espèce en voie de disparition ou menacée — ou comme espèce disparue du pays dont un programme de rétablissement a recommandé la réinsertion à l'état sauvage au Canada :

a) si l'habitat essentiel se trouve soit sur le territoire domanial, soit dans la zone économique exclusive ou sur le plateau continental du Canada;

b) si l'espèce inscrite est une espèce aquatique;

c) si l'espèce inscrite est une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*.

Zone de protection

(2) Si l'habitat essentiel ou une partie de celui-ci se trouve dans un parc national du Canada dénommé et décrit à l'annexe 1 de la *Loi sur les parcs nationaux du Canada*, le parc urbain national de la Rouge, créé par la *Loi sur le parc urbain national de la Rouge*, une zone de protection marine sous le régime de la *Loi sur les océans*, un refuge d'oiseaux migrateurs sous le régime de la *Loi de 1994 sur la convention concernant les oiseaux migrateurs* ou une réserve nationale de la faune sous le régime de la *Loi sur les espèces sauvages du Canada*, le ministre compétent est tenu, dans les quatre-vingt-dix jours suivant la mise dans le registre du programme de

description of the critical habitat or portion that is in that park, area or sanctuary.

Application

(3) If subsection (2) applies, subsection (1) applies to the critical habitat or the portion of the critical habitat described in the *Canada Gazette* under subsection (2) 90 days after the description is published in the *Canada Gazette*.

Application

(4) If all of the critical habitat or any portion of the critical habitat is not in a place referred to in subsection (2), subsection (1) applies in respect of the critical habitat or portion of the critical habitat, as the case may be, specified in an order made by the competent minister.

Obligation to make order or statement

(5) Within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the public registry, the competent minister must, after consultation with every other competent minister, with respect to all of the critical habitat or any portion of the critical habitat that is not in a place referred to in subsection (2),

(a) make the order referred to in subsection (4) if the critical habitat or any portion of the critical habitat is not legally protected by provisions in, or measures under, this or any other Act of Parliament, including agreements under section 11; or

(b) if the competent minister does not make the order, he or she must include in the public registry a statement setting out how the critical habitat or portions of it, as the case may be, are legally protected.

Habitat of migratory birds

(5.1) Despite subsection (4), with respect to the critical habitat of a species of bird that is a migratory bird protected by the *Migratory Birds Convention Act, 1994* that is not on federal land, in the exclusive economic zone of Canada, on the continental shelf of Canada or in a migratory bird sanctuary referred to in subsection (2), subsection (1) applies only to those portions of the critical habitat that are habitat to which that Act applies and that the Governor in Council may, by order, specify on the recommendation of the competent minister.

rétablissement ou du plan d'action ayant défini l'habitat essentiel, de publier dans la *Gazette du Canada* une description de l'habitat essentiel ou de la partie de celui-ci qui se trouve dans le parc, la zone, le refuge ou la réserve.

Application

(3) Le paragraphe (1) s'applique à l'habitat essentiel ou à la partie de celui-ci visés au paragraphe (2) après les quatre-vingt-dix jours suivant la publication de sa description dans la *Gazette du Canada* en application de ce paragraphe.

Application

(4) Le paragraphe (1) s'applique à l'habitat essentiel ou à la partie de celui-ci qui ne se trouve pas dans un lieu visé au paragraphe (2), selon ce que précise un arrêté pris par le ministre compétent.

Obligation : arrêté ou déclaration

(5) Dans les cent quatre-vingts jours suivant la mise dans le registre du programme de rétablissement ou du plan d'action ayant défini l'habitat essentiel, le ministre compétent est tenu, après consultation de tout autre ministre compétent, à l'égard de l'habitat essentiel ou de la partie de celui-ci qui ne se trouve pas dans un lieu visé au paragraphe (2) :

a) de prendre l'arrêté visé au paragraphe (4), si l'habitat essentiel ou la partie de celui-ci ne sont pas protégés légalement par des dispositions de la présente loi ou de toute autre loi fédérale, ou une mesure prise sous leur régime, notamment les accords conclus au titre de l'article 11;

b) s'il ne prend pas l'arrêté, de mettre dans le registre une déclaration énonçant comment l'habitat essentiel ou la partie de celui-ci sont protégés légalement.

Habitat d'oiseaux migrateurs

(5.1) Par dérogation au paragraphe (4), en ce qui concerne l'habitat essentiel d'une espèce d'oiseaux migrateurs protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs* situé hors du territoire domanial, de la zone économique exclusive ou du plateau continental du Canada ou d'un refuge d'oiseaux migrateurs visé au paragraphe (2), le paragraphe (1) ne s'applique qu'aux parties de cet habitat essentiel — constituées de tout ou partie de l'habitat auquel cette loi s'applique — précisées par le gouverneur en conseil par décret pris sur recommandation du ministre compétent.

Obligation to make recommendation

(5.2) The competent minister must, within 180 days after the recovery strategy or action plan that identified the critical habitat that includes habitat to which the *Migratory Birds Convention Act, 1994* applies is included in the public registry, and after consultation with every other competent minister,

(a) make the recommendation if he or she is of the opinion there are no provisions in, or other measures under, this or any other Act of Parliament, including agreements under section 11, that legally protect any portion or portions of the habitat to which that Act applies; or

(b) if the competent minister does not make the recommendation, he or she must include in the public registry a statement setting out how the critical habitat that is habitat to which that Act applies, or portions of it, as the case may be, are legally protected.

Consultation

(6) If the competent minister is of the opinion that an order under subsection (4) or (5.1) would affect land in a territory that is not under the authority of the Minister or the Parks Canada Agency, he or she must consult the territorial minister before making the order under subsection (4) or the recommendation under subsection (5.2).

Consultation

(7) If the competent minister is of the opinion that an order under subsection (4) or (5.1) would affect a reserve or any other lands that are set apart for the use and benefit of a band under the *Indian Act*, he or she must consult the Minister of Indian Affairs and Northern Development and the band before making the order under subsection (4) or the recommendation under subsection (5.2).

Consultation

(8) If the competent minister is of the opinion that an order under subsection (4) or (5.1) would affect an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, he or she must consult the wildlife management board before making the order under subsection (4) or the recommendation under subsection (5.2).

Obligation : recommandation ou déclaration

(5.2) Dans les cent quatre-vingts jours suivant la mise dans le registre du programme de rétablissement ou du plan d'action ayant défini l'habitat essentiel qui comporte tout ou partie de l'habitat auquel la *Loi de 1994 sur la convention concernant les oiseaux migrateurs* s'applique, le ministre compétent est tenu, après consultation de tout autre ministre compétent :

a) de faire la recommandation si, à son avis, aucune disposition de la présente loi ou de toute autre loi fédérale, ni aucune mesure prise sous leur régime, notamment les accords conclus au titre de l'article 11, ne protège légalement toute partie de l'habitat auquel cette loi s'applique;

b) s'il ne fait pas la recommandation, de mettre dans le registre une déclaration énonçant comment est protégé légalement tout ou partie de l'habitat essentiel constitué de tout ou partie de l'habitat auquel cette loi s'applique.

Consultation

(6) Si le ministre compétent estime que l'arrêté visé au paragraphe (4) ou le décret visé au paragraphe (5.1) touchera des terres dans un territoire qui ne relèvent pas du ministre ou de l'Agence Parcs Canada, il est tenu de consulter le ministre territorial avant de prendre l'arrêté au titre du paragraphe (4) ou de faire la recommandation au titre du paragraphe (5.2).

Consultation

(7) Si le ministre compétent estime que l'arrêté visé au paragraphe (4) ou le décret visé au paragraphe (5.1) touchera une réserve ou une autre terre qui a été mise de côté à l'usage et au profit d'une bande en application de la *Loi sur les Indiens*, il est tenu de consulter le ministre des Affaires indiennes et du Nord canadien et la bande avant de prendre l'arrêté au titre du paragraphe (4) ou de faire la recommandation au titre du paragraphe (5.2).

Consultation

(8) Si le ministre compétent estime que l'arrêté visé au paragraphe (4) ou le décret visé au paragraphe (5.1) touchera une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, il est tenu de consulter le conseil avant de prendre l'arrêté au titre du paragraphe (4) ou de faire la recommandation au titre du paragraphe (5.2).

Consultation

(9) If the competent minister is of the opinion that an order under subsection (4) or (5.1) would affect land that is under the authority of another federal minister, other than a competent minister, he or she must consult the other federal minister before making the order under subsection (4) or the recommendation under subsection (5.2).

2002, c. 29, s. 58; 2015, c. 10, s. 60.

Regulations re federal lands

59 (1) The Governor in Council may, on the recommendation of the competent minister after consultation with every other competent minister, make regulations to protect critical habitat on federal lands.

Obligation to make recommendation

(2) The competent minister must make the recommendation if the recovery strategy or an action plan identifies a portion of the critical habitat as being unprotected and the competent minister is of the opinion that the portion requires protection.

Contents

(3) The regulations may include provisions requiring the doing of things that protect the critical habitat and provisions prohibiting activities that may adversely affect the critical habitat.

Consultation

(4) If the competent minister is of the opinion that a regulation would affect land in a territory that is not under the authority of the Minister or the Parks Canada Agency, he or she must consult the territorial minister before recommending the making of the regulation.

Consultation

(5) If the competent minister is of the opinion that a regulation would affect a reserve or any other lands that are set apart for the use and benefit of a band under the *Indian Act*, he or she must consult the Minister of Indian Affairs and Northern Development and the band before recommending the making of the regulation.

Consultation

(6) If the competent minister is of the opinion that a regulation would affect an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, he or she must consult the wildlife management board before recommending the making of the regulation.

Consultation

(9) Si le ministre compétent estime que l'arrêté visé au paragraphe (4) ou le décret visé au paragraphe (5.1) touchera des terres relevant d'un autre ministre fédéral, sauf un ministre compétent, il est tenu de consulter cet autre ministre fédéral avant de prendre l'arrêté au titre du paragraphe (4) ou de faire la recommandation au titre du paragraphe (5.2).

2002, ch. 29, art. 58; 2015, ch. 10, art. 60.

Règlements : territoire domanial

59 (1) Sur recommandation faite par le ministre compétent après consultation de tout autre ministre compétent, le gouverneur en conseil peut, par règlement, prendre des mesures de protection de l'habitat essentiel sur le territoire domanial.

Obligation du ministre compétent

(2) Le ministre compétent est tenu de faire la recommandation si, d'une part, un programme de rétablissement ou un plan d'action désigne une partie de l'habitat essentiel comme non protégée et, d'autre part, il estime qu'il est nécessaire de la protéger.

Contenu des règlements

(3) Les règlements peuvent comporter des mesures visant à protéger l'habitat essentiel et d'autres interdisant les activités susceptibles de lui nuire.

Consultation

(4) Si le ministre compétent estime que le règlement touchera des terres dans un territoire qui ne relèvent pas du ministre ou de l'Agence Parcs Canada, il est tenu de consulter le ministre territorial avant d'en recommander la prise.

Consultation

(5) Si le ministre compétent estime que le règlement touchera une réserve ou une autre terre qui a été mise de côté à l'usage et au profit d'une bande en application de la *Loi sur les Indiens*, il est tenu de consulter le ministre des Affaires indiennes et du Nord canadien et la bande avant d'en recommander la prise.

Consultation

(6) Si le ministre compétent estime que le règlement touchera une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, il est tenu de consulter le conseil avant d'en recommander la prise.

Provincial and territorial classifications

60 (1) If a wildlife species has been classified as an endangered species or a threatened species by a provincial or territorial minister, no person shall destroy any part of the habitat of that species that the provincial or territorial minister has identified as essential to the survival or recovery of the species and that is on federal lands in the province or territory.

Application

(2) Subsection (1) applies only to the portions of the habitat that the Governor in Council may, on the recommendation of the competent minister, by order, specify.

Destruction of critical habitat

61 (1) No person shall destroy any part of the critical habitat of a listed endangered species or a listed threatened species that is in a province or territory and that is not part of federal lands.

Exception

(1.1) Subsection (1) does not apply in respect of

(a) an aquatic species; or

(b) the critical habitat of a species of bird that is a migratory bird protected by the *Migratory Birds Convention Act, 1994* that is habitat referred to in subsection 58(5.1).

Application

(2) Subsection (1) applies only to the portions of the critical habitat that the Governor in Council may, on the recommendation of the Minister, by order, specify.

Power to make recommendation

(3) The Minister may make a recommendation if

(a) a provincial minister or territorial minister has requested that the recommendation be made; or

(b) the Canadian Endangered Species Conservation Council has recommended that the recommendation be made.

Obligation to make recommendation

(4) The Minister must make a recommendation if he or she is of the opinion, after consultation with the appropriate provincial or territorial minister, that

(a) there are no provisions in, or other measures under, this or any other Act of Parliament that protect

Classification par une province ou un territoire

60 (1) Si une espèce sauvage est classée comme espèce en voie de disparition ou menacée par un ministre provincial ou territorial, il est interdit de détruire un élément de l'habitat de cette espèce se trouvant sur le territoire domanial situé dans la province ou le territoire et désigné par le ministre provincial ou territorial comme nécessaire à la survie ou au rétablissement de l'espèce.

Application

(2) Le paragraphe (1) ne s'applique qu'aux parties de l'habitat que le gouverneur en conseil désigne par décret pris sur recommandation du ministre compétent.

Destruction de l'habitat essentiel

61 (1) Il est interdit de détruire un élément de l'habitat essentiel d'une espèce en voie de disparition inscrite ou d'une espèce menacée inscrite se trouvant dans une province ou un territoire, ailleurs que sur le territoire domanial.

Non-application

(1.1) Le paragraphe (1) ne s'applique pas :

a) aux espèces aquatiques;

b) aux parties de l'habitat essentiel d'une espèce d'oiseaux migrateurs protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, étant l'habitat visé au paragraphe 58(5.1).

Application

(2) Le paragraphe (1) ne s'applique qu'aux parties de l'habitat essentiel que le gouverneur en conseil désigne par décret pris sur recommandation du ministre.

Pouvoir de recommandation

(3) Le ministre peut faire la recommandation dans les cas suivants :

a) un ministre provincial ou territorial a demandé qu'elle soit faite;

b) le Conseil canadien pour la conservation des espèces en péril a recommandé qu'elle soit faite.

Obligation de recommandation

(4) Le ministre est tenu de faire la recommandation s'il estime, après avoir consulté le ministre provincial ou territorial compétent :

a) d'une part, qu'aucune disposition de la présente loi ou de toute autre loi fédérale, ni aucune mesure prise sous leur régime — notamment les accords conclus au

the particular portion of the critical habitat, including agreements under section 11; and

(b) the laws of the province or territory do not effectively protect the critical habitat.

titre de l'article 11 —, ne protègent la partie de l'habitat essentiel;

b) d'autre part, que le droit de la province ou du territoire ne protège pas efficacement cette partie.

Expiry and renewal of order

(5) An order made under subsection (2) expires five years after the day on which it is made or renewed, unless the Governor in Council, by order, renews it.

Expiration et prorogation

(5) La durée d'application du décret visé au paragraphe (2) est de cinq ans, sauf prorogation par décret.

Recommendation to repeal order

(6) If the Minister is of the opinion that an order made under subsection (2) is no longer necessary to protect the portion of the critical habitat to which the order relates or that the province or territory has brought into force laws that protect the portion, the Minister must recommend that the order be repealed.

Recommandation d'abrogation

(6) Le ministre est tenu de recommander l'abrogation du décret visé au paragraphe (2) s'il estime soit que son application n'est plus nécessaire pour la protection de la partie de l'habitat essentiel visée par le décret, soit que la province ou le territoire a pris les mesures législatives voulues pour protéger la partie visée.

Acquisition of lands

62 A competent minister may enter into an agreement with any government in Canada, organization or person to acquire any lands or interests in land for the purpose of protecting the critical habitat of any species at risk.

Acquisition de terres

62 Le ministre compétent peut conclure avec un gouvernement au Canada, une organisation ou une personne un accord pour l'acquisition de terres ou de droits sur des terres en vue de la protection de l'habitat essentiel d'une espèce en péril.

Progress reports on unprotected portions of critical habitat

63 If in the opinion of the Minister any portion of the critical habitat of a listed wildlife species remains unprotected 180 days after the recovery strategy or action plan that identified the critical habitat was included in the public registry, the Minister must include in that registry a report on the steps taken to protect the critical habitat. The Minister must continue to report with respect to every subsequent period of 180 days until the portion is protected or is no longer identified as critical habitat.

Rapports sur la partie non protégée de l'habitat essentiel

63 Si le ministre estime qu'une partie de l'habitat essentiel d'une espèce sauvage inscrite n'est pas encore protégée à l'expiration d'un délai de cent quatre-vingts jours suivant la mise dans le registre du programme de rétablissement ou du plan d'action dans lequel cet habitat a été désigné, il est tenu de mettre dans le registre un rapport sur les mesures prises pour le protéger à cette date et à des intervalles de cent quatre-vingts jours par la suite jusqu'à ce que la partie visée soit protégée ou que sa désignation soit révoquée.

Compensation

64 (1) The Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of

(a) section 58, 60 or 61; or

(b) an emergency order in respect of habitat identified in the emergency order that is necessary for the survival or recovery of a wildlife species.

Indemnisation

64 (1) Le ministre peut, en conformité avec les règlements, verser à toute personne une indemnité juste et raisonnable pour les pertes subies en raison des conséquences extraordinaires que pourrait avoir l'application :

a) des articles 58, 60 ou 61;

b) d'un décret d'urgence en ce qui concerne l'habitat qui y est désigné comme nécessaire à la survie ou au rétablissement d'une espèce sauvage.

Regulations

(2) The Governor in Council shall make regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of subsection (1), including regulations prescribing

(a) the procedures to be followed in claiming compensation;

(b) the methods to be used in determining the eligibility of a person for compensation, the amount of loss suffered by a person and the amount of compensation in respect of any loss; and

(c) the terms and conditions for the provision of compensation.

Règlements

(2) Le gouverneur en conseil doit, par règlement, prendre toute mesure qu'il juge nécessaire à l'application du paragraphe (1), notamment fixer :

a) la marche à suivre pour réclamer une indemnité;

b) le mode de détermination du droit à indemnité, de la valeur de la perte subie et du montant de l'indemnité pour cette perte;

c) les modalités de l'indemnisation.

Management of Species of Special Concern

Preparation of management plan

65 If a wildlife species is listed as a species of special concern, the competent minister must prepare a management plan for the species and its habitat. The plan must include measures for the conservation of the species that the competent minister considers appropriate and it may apply with respect to more than one wildlife species.

Cooperation with other ministers and governments

66 (1) To the extent possible, the management plan must be prepared in cooperation with

(a) the appropriate provincial and territorial minister of each province and territory in which the listed wildlife species is found;

(b) every minister of the Government of Canada who has authority over federal land or other areas on which the species is found;

(c) if the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the wildlife management board;

(d) every aboriginal organization that the competent minister considers will be directly affected by the management plan; and

(e) any other person or organization that the competent minister considers appropriate.

Gestion des espèces préoccupantes

Élaboration du plan de gestion

65 Dans le cas où une espèce sauvage est inscrite comme espèce préoccupante, le ministre compétent est tenu d'élaborer un plan de gestion comportant les mesures qu'il estime indiquées pour la conservation de l'espèce et celle de son habitat. Le plan peut s'appliquer à plus d'une espèce.

Collaboration

66 (1) Dans la mesure du possible, le plan de gestion est élaboré en collaboration avec :

a) le ministre provincial ou territorial compétent dans la province ou le territoire où se trouve l'espèce sauvage inscrite;

b) tout ministre fédéral dont relèvent le territoire domanial ou les autres aires où se trouve l'espèce;

c) si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le conseil;

d) toute organisation autochtone que le ministre compétent croit directement touchée par le plan de gestion;

e) toute autre personne ou organisation qu'il estime compétente.

Land claims agreement

(2) If the listed wildlife species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the management plan must be prepared, to the extent that it will apply to that area, in accordance with the provisions of the agreement.

Consultation

(3) To the extent possible, the management plan must be prepared in consultation with any landowners, lessees and other persons whom the competent minister considers to be directly affected by, or interested in, the management plan, including the government of any other country in which the species is found.

Multi-species or ecosystem approach permissible

67 The competent minister may adopt a multi-species or an ecosystem approach when preparing the management plan if he or she considers it appropriate to do so.

Proposed management plan

68 (1) Subject to subsection (2), the competent minister must include a proposed management plan in the public registry within three years after the wildlife species is listed as a species of special concern.

First listed species

(2) With respect to a wildlife species that is set out in Schedule 1 as a species of special concern on the day section 27 comes into force, the competent minister must include a proposed management plan in the public registry within five years after that day.

Comments

(3) Within 60 days after the proposed management plan is included in the public registry, any person may file written comments with the competent minister.

Finalization of management plan

(4) Within 30 days after the expiry of the period referred to in subsection (3), the competent minister must consider any comments received, make any changes to the proposed management plan that he or she considers appropriate and finalize the management plan by including a copy of it in the public registry.

Existing plans

69 (1) If the competent minister is of the opinion that an existing plan relating to a wildlife species includes adequate measures for the conservation of the species and

Accord sur des revendications territoriales

(2) Si l'espèce sauvage inscrite se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le plan de gestion est élaboré, dans la mesure où il s'applique à cette aire, en conformité avec les dispositions de cet accord.

Consultation

(3) Le plan de gestion est élaboré, dans la mesure du possible, en consultation avec les propriétaires fonciers, les locataires et les autres personnes que le ministre compétent croit directement touchés ou intéressés, notamment le gouvernement de tout autre pays où se trouve l'espèce.

Plusieurs espèces ou écosystème

67 Pour l'élaboration du plan de gestion, le ministre compétent peut, s'il l'estime indiqué, traiter de plusieurs espèces simultanément ou de tout un écosystème.

Projet de plan de gestion

68 (1) Sous réserve du paragraphe (2), le ministre compétent met le projet de plan de gestion dans le registre dans les trois ans suivant l'inscription de l'espèce sauvage comme espèce préoccupante.

Espèces déjà inscrites

(2) En ce qui concerne les espèces sauvages inscrites à l'annexe 1 à l'entrée en vigueur de l'article 27 comme espèces préoccupantes, le ministre compétent met le projet de plan de gestion dans le registre dans les cinq ans suivant cette date.

Observations

(3) Dans les soixante jours suivant la mise du projet dans le registre, toute personne peut déposer par écrit auprès du ministre compétent des observations relativement au projet.

Texte définitif du plan de gestion

(4) Dans les trente jours suivant la fin du délai prévu au paragraphe (3), le ministre compétent étudie les observations qui lui ont été présentées, apporte au projet les modifications qu'il estime indiquées et met le texte définitif du plan de gestion dans le registre.

Plans existants

69 (1) Si le ministre compétent estime qu'un plan existant s'applique à l'égard d'une espèce sauvage et comporte les mesures voulues pour la conservation de

the competent minister adopts the existing plan as the proposed management plan, he or she must include a copy of it in the public registry as the proposed management plan in relation to the species.

Incorporation of existing plans

(2) The competent minister may incorporate any part of an existing plan relating to a wildlife species into a proposed management plan for the species.

Amendments

70 (1) The competent minister may at any time amend a management plan. A copy of the amendment must be included in the public registry.

Amendment procedure

(2) Section 66 applies to amendments to the management plan, with any modifications that the circumstances require.

Exception

(3) Subsection (2) does not apply if the competent minister considers the amendment to be minor.

Regulations

71 (1) The Governor in Council may, on the recommendation of the competent minister, make any regulations with respect to aquatic species or species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*, regardless of where they are located, or with respect to any other wildlife species on federal lands, that the Governor in Council considers appropriate for the purpose of implementing the measures included in the management plan.

Consultation

(2) If the competent minister is of the opinion that a regulation would affect a reserve or any other lands that are set apart for the use and benefit of a band under the *Indian Act*, he or she must consult the Minister of Indian Affairs and Northern Development and the band before recommending the making of the regulation.

Consultation

(3) If the competent minister is of the opinion that a regulation would affect an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, he or she must consult the wildlife management board before recommending the making of the regulation.

l'espèce et de son habitat, il en met une copie dans le registre pour tenir lieu de projet de plan de gestion à l'égard de l'espèce.

Incorporation d'un plan existant

(2) Il peut incorporer toute partie d'un plan existant relatif à une espèce sauvage dans un projet de plan de gestion portant sur celle-ci.

Modifications

70 (1) Le ministre compétent peut modifier le plan de gestion. Une copie de la modification est mise dans le registre.

Procédure de modification

(2) L'article 66 s'applique, avec les adaptations nécessaires, à la modification du plan de gestion.

Exception

(3) Le paragraphe (2) ne s'applique pas si le ministre compétent estime que la modification est mineure.

Règlements

71 (1) Sur recommandation du ministre compétent, le gouverneur en conseil peut, à l'égard des espèces aquatiques ou des espèces d'oiseaux migrateurs protégées par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, où qu'elles se trouvent, ou à l'égard de toute autre espèce sauvage se trouvant sur le territoire domanial, prendre les règlements qu'il estime indiqués pour la mise en œuvre du plan de gestion.

Consultation

(2) Si le ministre compétent estime que le règlement touchera une réserve ou une autre terre qui a été mise de côté à l'usage et au profit d'une bande en application de la *Loi sur les Indiens*, il est tenu de consulter le ministre des Affaires indiennes et du Nord canadien et la bande avant d'en recommander la prise.

Consultation

(3) Si le ministre compétent estime que le règlement proposé touche une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, il est tenu de consulter le conseil avant d'en recommander la prise.

Incorporation by reference

(4) The regulations may incorporate by reference any legislation of a province or territory, as amended from time to time, insofar as the regulations apply in that province or territory.

Consultation

(5) If the competent minister is of the opinion that a regulation would affect land in a territory, he or she must consult the territorial minister before recommending the making of the regulation.

Exception

(6) Subsection (5) does not apply

(a) in respect of individuals of aquatic species and their habitat or species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994* and their habitat; or

(b) in respect of land under the authority of the Minister or the Parks Canada Agency.

Monitoring

72 The competent minister must monitor the implementation of the management plan and must assess its implementation five years after the plan is included in the public registry, and in every subsequent five-year period, until its objectives have been achieved. The report must be included in the public registry.

Agreements and Permits

Powers of competent minister

73 (1) The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.

Purpose

(2) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

(a) the activity is scientific research relating to the conservation of the species and conducted by qualified persons;

(b) the activity benefits the species or is required to enhance its chance of survival in the wild; or

(c) affecting the species is incidental to the carrying out of the activity.

Incorporation par renvoi

(4) Les règlements peuvent incorporer par renvoi, dans la mesure où ils s'appliquent à une province ou à un territoire, toute mesure législative de la province ou du territoire, avec ses modifications successives.

Application dans les territoires

(5) Si le ministre compétent estime que le règlement touchera des terres dans un territoire, il est tenu de consulter le ministre territorial avant d'en recommander la prise.

Exception

(6) Le paragraphe (5) ne s'applique pas :

a) à l'égard des individus d'une espèce aquatique ou d'une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*, et de leur habitat;

b) à l'égard des terres relevant du ministre ou de l'Agence Parcs Canada.

Suivi

72 Il incombe au ministre compétent d'assurer le suivi de la mise en œuvre du plan de gestion et d'évaluer celle-ci cinq ans après sa mise dans le registre et à intervalles de cinq ans par la suite, jusqu'à ce que ses objectifs soient atteints. Il doit également verser au registre un rapport de chaque évaluation.

Accords et permis

Pouvoirs du ministre compétent

73 (1) Le ministre compétent peut conclure avec une personne un accord l'autorisant à exercer une activité touchant une espèce sauvage inscrite, tout élément de son habitat essentiel ou la résidence de ses individus, ou lui délivrer un permis à cet effet.

Activités visées

(2) Cette activité ne peut faire l'objet de l'accord ou du permis que si le ministre compétent estime qu'il s'agit d'une des activités suivantes :

a) des recherches scientifiques sur la conservation des espèces menées par des personnes compétentes;

b) une activité qui profite à l'espèce ou qui est nécessaire à l'augmentation des chances de survie de l'espèce à l'état sauvage;

c) une activité qui ne touche l'espèce que de façon incidente.

Pre-conditions

(3) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

(a) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;

(b) all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and

(c) the activity will not jeopardize the survival or recovery of the species.

Explanation in public registry

(3.1) If an agreement is entered into or a permit is issued, the competent minister must include in the public registry an explanation of why it was entered into or issued, taking into account the matters referred to in paragraphs (3)(a), (b) and (c).

Consultation

(4) If the species is found in an area in respect of which a wildlife management board is authorized by a land claims agreement to perform functions in respect of wildlife species, the competent minister must consult the wildlife management board before entering into an agreement or issuing a permit concerning that species in that area.

Consultation

(5) If the species is found in a reserve or any other lands that are set apart for the use and benefit of a band under the *Indian Act*, the competent minister must consult the band before entering into an agreement or issuing a permit concerning that species in that reserve or those other lands.

Terms and conditions

(6) The agreement or permit must contain any terms and conditions governing the activity that the competent minister considers necessary for protecting the species, minimizing the impact of the authorized activity on the species or providing for its recovery.

Date of expiry

(6.1) The agreement or permit must set out the date of its expiry.

Conditions préalables

(3) Le ministre compétent ne conclut l'accord ou ne délivre le permis que s'il estime que :

a) toutes les solutions de rechange susceptibles de minimiser les conséquences négatives de l'activité pour l'espèce ont été envisagées et la meilleure solution retenue;

b) toutes les mesures possibles seront prises afin de minimiser les conséquences négatives de l'activité pour l'espèce, son habitat essentiel ou la résidence de ses individus;

c) l'activité ne mettra pas en péril la survie ou le rétablissement de l'espèce.

Raisons dans le registre

(3.1) Si un accord est conclu ou un permis délivré, le ministre compétent met dans le registre les raisons pour lesquelles l'accord a été conclu ou le permis délivré, compte tenu des considérations mentionnées aux alinéas (3)a) à c).

Consultation

(4) Si l'espèce se trouve dans une aire à l'égard de laquelle un conseil de gestion des ressources fauniques est habilité par un accord sur des revendications territoriales à exercer des attributions à l'égard d'espèces sauvages, le ministre compétent est tenu de consulter le conseil avant de conclure un accord ou de délivrer un permis concernant cette espèce dans cette aire.

Consultation

(5) Si l'espèce se trouve dans une réserve ou sur une autre terre qui a été mise de côté à l'usage et au profit d'une bande en application de la *Loi sur les Indiens*, le ministre compétent est tenu de consulter la bande avant de conclure un accord ou de délivrer un permis concernant cette espèce dans la réserve ou sur l'autre terre.

Conditions

(6) Le ministre compétent assortit l'accord ou le permis de toutes les conditions — régissant l'exercice de l'activité — qu'il estime nécessaires pour assurer la protection de l'espèce, minimiser les conséquences négatives de l'activité pour elle ou permettre son rétablissement.

Date d'expiration

(6.1) La date d'expiration de l'accord ou du permis doit y figurer.

Review of agreements and permits

(7) The competent minister must review the agreement or permit if an emergency order is made with respect to the species.

Amendment of agreements and permits

(8) The competent minister may revoke or amend an agreement or a permit to ensure the survival or recovery of a species.

(9) [Repealed, 2012, c. 19, s. 163]

Regulations

(10) The Minister may, after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations respecting the entering into of agreements, the issuance of permits and the renewal, revocation, amendment and suspension of agreements and permits.

Time limits

(11) The regulations may include provisions

(a) respecting time limits for issuing or renewing permits, or for refusing to do so;

(b) specifying the circumstances under which any of those time limits does not apply; and

(c) authorizing the competent minister to extend any of those time limits or to decide that a time limit does not apply, when the competent minister considers that it is appropriate to do so.

2002, c. 29, s. 73; 2005, c. 2, s. 23; 2012, c. 19, s. 163.

Competent minister acting under other Acts

74 An agreement, permit, licence, order or other similar document authorizing a person or organization to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals that is entered into, issued or made by the competent minister under another Act of Parliament has the same effect as an agreement or permit under subsection 73(1) if

(a) before it is entered into, issued or made, the competent minister is of the opinion that the requirements of subsections 73(2) to (6.1) are met; and

(b) after it is entered into, issued or made, the competent minister complies with the requirements of subsection 73(7).

2002, c. 29, s. 74; 2012, c. 19, s. 164.

Révision des accords et permis

(7) Le ministre compétent est tenu de réviser l'accord ou le permis si un décret d'urgence est pris à l'égard de l'espèce.

Modification des accords et permis

(8) Il peut révoquer ou modifier l'accord ou le permis au besoin afin d'assurer la survie ou le rétablissement d'une espèce.

(9) [Abrogé, 2012, ch. 19, art. 163]

Règlement

(10) Le ministre peut par règlement, après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, régir la conclusion des accords et la délivrance des permis, ainsi que leur renouvellement, annulation, modification et suspension.

Délais

(11) Les règlements peuvent notamment :

a) régir les délais à respecter pour délivrer ou renouveler le permis ou refuser de le faire;

b) prévoir les circonstances où l'un ou l'autre de ces délais ne s'applique pas;

c) autoriser le ministre compétent, dans les cas où il l'estime indiqué, à proroger l'un ou l'autre de ces délais ou à décider qu'il ne s'applique pas.

2002, ch. 29, art. 73; 2005, ch. 2, art. 23; 2012, ch. 19, art. 163.

Autres lois fédérales : ministres compétents

74 A le même effet qu'un accord ou permis visé au paragraphe 73(1) tout accord, tout permis, toute licence ou tout arrêté — ou autre document semblable — conclu, délivré ou pris par le ministre compétent en application d'une autre loi fédérale et ayant pour objet d'autoriser l'exercice d'une activité touchant une espèce sauvage inscrite, tout élément de son habitat essentiel ou la résidence de ses individus, si :

a) avant la conclusion, la délivrance ou la prise, le ministre compétent estime que les exigences des paragraphes 73(2) à (6.1) sont remplies;

b) après la conclusion, la délivrance ou la prise, le ministre compétent se conforme aux exigences du paragraphe 73(7).

2002, ch. 29, art. 74; 2012, ch. 19, art. 164.

Adding terms and conditions

75 (1) A competent minister may add terms and conditions to protect a listed wildlife species, any part of its critical habitat or the residences of its individuals to any agreement, permit, licence, order or other similar document authorizing a person to engage in an activity affecting the species, any part of its critical habitat or the residences of its individuals that is entered into, issued or made by the competent minister under another Act of Parliament.

Amending terms and conditions

(2) A competent minister may also revoke or amend any term or condition in any of those documents to protect a listed wildlife species, any part of its critical habitat or the residences of its individuals.

Treaties and land claims agreements

(3) The competent minister must take into account any applicable provisions of treaty and land claims agreements when carrying out his or her powers under this section.

Exemption for existing agreements, permits, etc.

76 The Governor in Council may, on the recommendation of a competent minister, by order, provide that section 32, 33, 36, 58, 60 or 61, or any regulation made under section 53, 59 or 71, does not apply, for a period of up to one year from the date of listing of a wildlife species, to agreements, permits, licences, orders or other similar documents authorizing persons to engage in an activity affecting the listed wildlife species, any part of its critical habitat or the residences of its individuals that were entered into, issued or made under another Act of Parliament before the species was listed.

Licences, permits, etc., under other Acts of Parliament

77 (1) Despite any other Act of Parliament, any person or body, other than a competent minister, authorized under any Act of Parliament, other than this Act, to issue or approve a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species may enter into, issue, approve or make the authorization only if the person or body has consulted with the competent minister, has considered the impact on the species' critical habitat and is of the opinion that

(a) all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat have been considered and the best solution has been adopted; and

Adjonction de conditions

75 (1) Le ministre compétent peut ajouter des conditions visant la protection d'une espèce sauvage inscrite, de tout élément de son habitat essentiel ou de la résidence de ses individus à tout accord, tout permis, toute licence ou tout arrêté — ou autre document semblable — conclu, délivré ou pris par lui en application d'une autre loi fédérale et ayant pour objet d'autoriser l'exercice d'une activité touchant l'espèce, tout élément de son habitat essentiel ou la résidence de ses individus.

Modification de conditions

(2) Il peut aussi annuler ou modifier les conditions d'un tel document pour protéger une espèce sauvage inscrite, tout élément de son habitat essentiel ou la résidence de ses individus.

Traités et accords sur des revendications territoriales

(3) Pour l'exercice des pouvoirs qui lui sont conférés en vertu du présent article, le ministre compétent prend en compte les dispositions applicables des traités et des accords sur des revendications territoriales.

Exemption : accords ou permis existants

76 Sur recommandation du ministre compétent, le gouverneur en conseil peut, par décret, soustraire, pendant tout ou partie de l'année suivant l'inscription d'une espèce sauvage, à l'application de l'un ou l'autre des articles 32, 33, 36, 58, 60 et 61 ou des règlements pris en vertu des articles 53, 59 ou 71 tout accord, tout permis, toute licence ou tout arrêté — ou autre document semblable — conclu, délivré ou pris en application d'une autre loi fédérale avant l'inscription de l'espèce et ayant pour objet d'autoriser l'exercice d'une activité touchant l'espèce, tout élément de son habitat essentiel ou la résidence de ses individus.

Permis prévus par une autre loi fédérale

77 (1) Malgré toute autre loi fédérale, toute personne ou tout organisme, autre qu'un ministre compétent, habilité par une loi fédérale, à l'exception de la présente loi, à délivrer un permis ou une autre autorisation, ou à y donner son agrément, visant la mise à exécution d'une activité susceptible d'entraîner la destruction d'un élément de l'habitat essentiel d'une espèce sauvage inscrite ne peut le faire que s'il a consulté le ministre compétent, s'il a envisagé les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce et s'il estime, à la fois :

a) que toutes les solutions de rechange susceptibles de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce ont été envisagées, et la meilleure solution retenue;

(b) all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.

b) que toutes les mesures possibles seront prises afin de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce.

Non-application

(1.1) Subsection (1) does not apply to the National Energy Board when it issues a certificate under an order made under subsection 54(1) of the *National Energy Board Act*.

Non-application

(1.1) Le paragraphe (1) ne s'applique pas à l'Office national de l'énergie lorsqu'il délivre un certificat conformément à un décret pris en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie*.

Application of section 58

(2) For greater certainty, section 58 applies even though a licence, a permit or any other authorization has been issued in accordance with subsection (1).

2002, c. 29, s. 77; 2012, c. 19, s. 165.

Application de l'interdiction

(2) Il est entendu que l'article 58 s'applique même si l'autorisation a été délivrée ou l'agrément a été donné en conformité avec le paragraphe (1).

2002, ch. 29, art. 77; 2012, ch. 19, art. 165.

Agreements and permits under other provincial and territorial Acts

78 (1) An agreement, permit, licence, order or other similar document authorizing a person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals that is entered into, issued or made under an Act of the legislature of a province or a territory by a provincial or territorial minister with whom a competent minister has entered into an agreement under section 10 has the same effect as an agreement or permit under subsection 73(1) if

(a) before it is entered into, issued or made, the provincial or territorial minister determines that the requirements of subsections 73(2), (3), (6) and (6.1) are met;

(b) after it is entered into, issued or made, the provincial or territorial minister complies with the requirements of subsection 73(7).

Accords et permis au titre de lois provinciales ou territoriales

78 (1) A le même effet qu'un accord ou permis visé au paragraphe 73(1) tout accord, tout permis, toute licence ou tout arrêté — ou autre document semblable — conclu, délivré ou pris en application d'une loi provinciale ou territoriale par un ministre provincial ou territorial avec lequel le ministre compétent a conclu un accord au titre de l'article 10 et ayant pour objet d'autoriser l'exercice d'une activité touchant une espèce sauvage inscrite, tout élément de son habitat essentiel ou la résidence de ses individus, si :

a) avant la conclusion, la délivrance ou la prise, le ministre provincial ou territorial s'assure que les exigences des paragraphes 73(2), (3), (6) et (6.1) sont remplies;

b) après la conclusion, la délivrance ou la prise, le ministre provincial ou territorial se conforme aux exigences du paragraphe 73(7).

Interpretation

(2) For the purpose of subsection (1), the references to "competent minister" in subsections 73(2), (3), (6) and (7) are to be read as references to "provincial minister" or "territorial minister", as the case may be.

2002, c. 29, s. 78; 2012, c. 19, s. 166.

Interprétation

(2) Pour l'application du paragraphe (1), la mention du ministre compétent aux paragraphes 73(2), (3), (6) et (7) vaut, selon le cas, mention du ministre provincial ou du ministre territorial.

2002, ch. 29, art. 78; 2012, ch. 19, art. 166.

Clarification — renewals

78.1 For greater certainty, a reference in any of sections 73 to 78 to the entering into, issuing, making or approving of any agreement, permit, licence, order or other similar document or authorization, includes renewing it, and a reference in any of those sections or in paragraph 97(1)(c) to any such document or authorization includes one that has been renewed.

2012, c. 19, s. 167.

Clarification — renouvellement

78.1 Il est entendu que la mention, aux articles 73 à 78, de la conclusion, de la délivrance, de la prise ou de l'agrément d'un accord, d'un permis, d'une licence ou d'un arrêté — ou de tout autre document ou autorisation semblable — vise notamment leur renouvellement et la mention, à ces articles et à l'alinéa 97(1)c), de l'un ou l'autre de ces documents ou autorisations vise notamment le document ou l'autorisation renouvelés.

2012, ch. 19, art. 167.

Project Review

Notification of Minister

79 (1) Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the *Canadian Environmental Assessment Act, 2012* in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

Required action

(2) The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

Definitions

(3) The following definitions apply in this section.

person includes an association, an organization, a federal authority as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*, and any body that is set out in Schedule 3 to that Act. (*personne*)

project means

(a) a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012* or a project as defined in section 66 of that Act;

(b) a project as defined in subsection 2(1) of the *Yukon Environmental and Socio-economic Assessment Act*; or

(c) a development as defined in subsection 111(1) of the *Mackenzie Valley Resource Management Act*. (*projet*)

2002, c. 29, s. 79; 2012, c. 19, s. 59; 2017, c. 26, s. 49(F).

Emergency Orders

Emergency order

80 (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.

Révision des projets

Notification du ministre

79 (1) Toute personne qui est tenue, sous le régime d'une loi fédérale, de veiller à ce qu'il soit procédé à l'évaluation des effets environnementaux d'un projet et toute autorité qui prend une décision au titre des alinéas 67a) ou b) de la *Loi canadienne sur l'évaluation environnementale (2012)* relativement à un projet notifient sans tarder le projet à tout ministre compétent s'il est susceptible de toucher une espèce sauvage inscrite ou son habitat essentiel.

Réalisations escomptées

(2) La personne détermine les effets nocifs du projet sur l'espèce et son habitat essentiel et, si le projet est réalisé, veille à ce que des mesures compatibles avec tout programme de rétablissement et tout plan d'action applicable soient prises en vue de les éviter ou de les amoindrir et les surveiller.

Définitions

(3) Les définitions qui suivent s'appliquent au présent article.

personne S'entend notamment d'une association de personnes, d'une organisation, d'une autorité fédérale au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* et de tout organisme mentionné à l'annexe 3 de cette loi. (*person*)

projet

a) Projet désigné au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* ou projet au sens de l'article 66 de cette loi;

b) projet de développement au sens du paragraphe 2(1) de la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*;

c) projet de développement au sens du paragraphe 111(1) de la *Loi sur la gestion des ressources de la vallée du Mackenzie*. (*project*)

2002, ch. 29, art. 79; 2012, ch. 19, art. 59; 2017, ch. 26, art. 49(F).

Décrets d'urgence

Décrets d'urgence

80 (1) Sur recommandation du ministre compétent, le gouverneur en conseil peut prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite.

Obligation to make recommendation

(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.

Consultation

(3) Before making a recommendation, the competent minister must consult every other competent minister.

Contents

(4) The emergency order may

(a) in the case of an aquatic species,

(i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(ii) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat;

(b) in the case of a species that is a species of migratory birds protected by the *Migratory Birds Convention Act, 1994*,

(i) on federal land or in the exclusive economic zone of Canada,

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

(ii) on land other than land referred to in subparagraph (i),

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and provisions prohibiting activities that may adversely affect the species and that habitat; and

(c) with respect to any other species,

(i) on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada,

Recommandation obligatoire

(2) Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement.

Consultation

(3) Avant de faire la recommandation, il consulte tout autre ministre compétent.

Contenu du décret

(4) Le décret peut :

a) dans le cas d'une espèce aquatique :

(i) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(ii) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire;

b) dans le cas d'une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs* se trouvant :

(i) sur le territoire domanial ou dans la zone économique exclusive du Canada :

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire,

(ii) ailleurs que sur le territoire visé au sous-alinéa (i) :

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) imposer des mesures de protection de l'espèce, et comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat;

c) dans le cas de toute autre espèce se trouvant :

(i) sur le territoire domanial, dans la zone économique exclusive ou sur le plateau continental du Canada :

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

(ii) on land other than land referred to in subparagraph (i),

(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(B) include provisions prohibiting activities that may adversely affect the species and that habitat.

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire,

(ii) ailleurs que sur le territoire visé au sous-alinéa (i) :

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat.

Exemption

(5) An emergency order is exempt from the application of section 3 of the *Statutory Instruments Act*.

Exclusion

(5) Les décrets d'urgence sont soustraits à l'application de l'article 3 de la *Loi sur les textes réglementaires*.

Equivalent measures

81 Despite subsection 80(2), the competent minister is not required to make a recommendation for an emergency order if he or she is of the opinion that equivalent measures have been taken under another Act of Parliament to protect the wildlife species.

Mesures équivalentes

81 Malgré le paragraphe 80(2), le ministre compétent n'est pas tenu de recommander la prise d'un décret d'urgence s'il estime que des mesures équivalentes ont été prises en vertu d'une autre loi fédérale pour protéger l'espèce sauvage.

Recommendation to repeal

82 If the competent minister is of the opinion that the species to which the emergency order relates would no longer face imminent threats to its survival or recovery even if the order were repealed, he or she must make a recommendation to the Governor in Council that the emergency order be repealed.

Recommandation d'abrogation

82 Si le ministre compétent estime que l'espèce sauvage visée par un décret d'urgence ne serait plus exposée à des menaces imminentes pour sa survie ou son rétablissement si le décret était abrogé, il est tenu de recommander au gouverneur en conseil de l'abroger.

Exceptions

General exceptions

83 (1) Subsections 32(1) and (2), section 33, subsections 36(1), 58(1), 60(1) and 61(1), regulations made under section 53, 59 or 71 and emergency orders do not apply to a person who is engaging in

(a) activities related to public safety, health or national security, that are authorized by or under any other Act of Parliament or activities under the *Health of Animals Act* and the *Plant Protection Act* for the health of animals and plants; or

Exceptions

Exceptions générales

83 (1) Les paragraphes 32(1) et (2), l'article 33, les paragraphes 36(1), 58(1), 60(1) et 61(1), les règlements pris en vertu des articles 53, 59 ou 71 et les décrets d'urgence ne s'appliquent pas à une personne exerçant des activités :

a) en matière soit de sécurité ou de santé publiques ou de sécurité nationale autorisées sous le régime de toute autre loi fédérale, soit de santé des animaux et des végétaux autorisées sous le régime de la *Loi sur la santé des animaux* et la *Loi sur la protection des végétaux*;

(b) activities authorized under section 73, 74 or 78 by an agreement, permit, licence, order or similar document.

b) autorisées par un accord, un permis, une licence, un arrêté ou un autre document visé aux articles 73, 74 ou 78.

Authorization of activities under other Acts

(2) A power under an Act described in paragraph (1)(a) may be used to authorize an activity prohibited by subsection 32(1) or (2), section 33, subsection 36(1), 58(1), 60(1) or 61(1), a regulation made under section 53, 59 or 71 or an emergency order only if the person exercising the power

(a) determines that the activity is necessary for the protection of public safety, health, including animal and plant health, or national security; and

(b) respects the purposes of this Act to the greatest extent possible.

Autorisation au titre d'une autre loi

(2) Toute activité interdite aux termes des paragraphes 32(1) ou (2), de l'article 33, des paragraphes 36(1), 58(1), 60(1) ou 61(1), des règlements pris en vertu des articles 53, 59 ou 71 ou d'un décret d'urgence peut être autorisée au titre d'une loi visée à l'alinéa (1)a) si la personne qui l'autorise :

a) conclut qu'elle est nécessaire à la protection de la sécurité ou de la santé publiques — notamment celle des animaux et des végétaux — ou de la sécurité nationale;

b) respecte, dans la mesure du possible, l'objet de la présente loi.

Exceptions — land claims agreements

(3) Subsections 32(1) and (2), section 33, subsections 36(1), 58(1), 60(1) and 61(1) and regulations made under section 53, 59 or 71 do not apply to a person who is engaging in activities in accordance with conservation measures for wildlife species under a land claims agreement.

Exception : accords sur des revendications territoriales

(3) Les paragraphes 32(1) et (2), l'article 33, les paragraphes 36(1), 58(1), 60(1) et 61(1) et les règlements pris en vertu des articles 53, 59 ou 71 ne s'appliquent pas à une personne exerçant des activités conformes aux régimes de conservation des espèces sauvages dans le cadre d'un accord sur des revendications territoriales.

Exemptions for permitted activities

(4) Subsections 32(1) and (2), section 33 and subsections 36(1), 58(1), 60(1) and 61(1) do not apply to a person who is engaging in activities that are permitted by a recovery strategy, an action plan or a management plan and who is also authorized under an Act of Parliament to engage in that activity, including a regulation made under section 53, 59 or 71.

Exemptions : activités autorisées

(4) Les paragraphes 32(1) et (2), l'article 33, les paragraphes 36(1), 58(1), 60(1) et 61(1) ne s'appliquent pas à une personne exerçant des activités autorisées, d'une part, par un programme de rétablissement, un plan d'action ou un plan de gestion et, d'autre part, sous le régime d'une loi fédérale, notamment au titre d'un règlement pris en vertu des articles 53, 59 ou 71.

Additional possession exceptions

(5) Subsection 32(2) and paragraph 36(1)(b) do not apply to a person who possesses an individual of a listed extirpated, endangered or threatened species, or any part or derivative of such an individual, if

(a) it was in the person's possession when the species was listed;

(b) it is used by an aboriginal person for ceremonial or medicinal purposes, or it is part of ceremonial dress used for ceremonial or cultural purposes by an aboriginal person;

(c) the person acquired it legally in another country and imported it legally into Canada;

Exception supplémentaire : possession

(5) Le paragraphe 32(2) et l'alinéa 36(1)b) ne s'appliquent pas à une personne qui possède un individu — notamment partie d'un individu ou produit qui en provient — d'une espèce sauvage inscrite comme espèce disparue du pays, en voie de disparition ou menacée si, selon le cas :

a) la personne l'avait en sa possession au moment de l'inscription de l'espèce;

b) l'individu ou l'article est utilisé par une personne autochtone à des fins cérémonielles ou médicinales, ou fait partie d'un habit cérémonial utilisé à des fins cérémonielles ou culturelles par une personne autochtone;

(d) the person acquired it by succession from someone who was entitled to possess it under this Act;

(e) the person acquired it under circumstances that would afford them a defence under section 100 and the person possesses it only for as long as is necessary to donate it to a museum, a zoo, an educational institution, a scientific society or a government;

(f) the person is, or is acting on behalf of, a museum, zoo, educational institution, scientific society or government and the person acquired it from someone who was entitled to possess it under this Act; or

(g) it or the person is otherwise exempt by the regulations.

c) la personne l'a légalement acquis à l'extérieur du Canada, puis l'y a importé légalement;

d) elle en a hérité d'une personne qui avait droit à sa possession au titre de la présente loi;

e) d'une part, elle l'a acquis dans des circonstances qui lui permettraient de se disculper au titre de l'article 100 et, d'autre part, elle ne l'a en sa possession que le temps nécessaire pour en faire don à un musée, un jardin zoologique, un établissement d'enseignement, une association scientifique ou un gouvernement;

f) elle est un musée, un jardin zoologique, un établissement d'enseignement, une association scientifique, un gouvernement ou une personne agissant pour le compte de ces derniers et elle l'a acquis d'une personne qui avait droit à sa possession au titre de la présente loi;

g) l'individu ou le possesseur bénéficient par ailleurs d'une exemption réglementaire.

Regulations

84 The Governor in Council may, on the recommendation of the Minister after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations for the purpose of paragraph 83(5)(g).

2002, c. 29, s. 84; 2005, c. 2, s. 24.

Règlement

84 Sur recommandation faite par le ministre après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le gouverneur en conseil peut, par règlement, prendre des mesures d'application de l'alinéa 83(5)g).

2002, ch. 29, art. 84; 2005, ch. 2, art. 24.

Enforcement Measures

Enforcement Officers

Enforcement officers

85 (1) A competent minister may designate any person or person of a class of persons to act as enforcement officers for the purposes of this Act.

Designation of provincial or territorial government employees

(2) The competent minister may not designate any person or person of a class of persons employed by the government of a province or a territory unless that government agrees.

Certificate of designation

(3) An enforcement officer must be provided with a certificate of designation as an enforcement officer in a form approved by the competent minister and, on entering any place under this Act, the officer must, if so requested,

Contrôle d'application

Agents de l'autorité

Désignation

85 (1) Le ministre compétent peut désigner, individuellement ou par catégorie, les agents de l'autorité chargés de contrôler l'application de la présente loi.

Fonctionnaires provinciaux

(2) La désignation de fonctionnaires provinciaux ou territoriaux est toutefois subordonnée à l'agrément du gouvernement provincial ou territorial intéressé.

Présentation du certificat

(3) Les agents sont munis d'un certificat de désignation en la forme approuvée par le ministre compétent qu'ils présentent, sur demande, au responsable ou à l'occupant du lieu visité.

show the certificate to the occupant or person in charge of the place.

Powers

(4) For the purposes of this Act, enforcement officers have all the powers of a peace officer, but the competent minister may specify limits on those powers when designating any person or person of a class of persons to act as enforcement officers.

Exemptions for law enforcement activities

(5) For the purpose of investigations and other law enforcement activities under this Act, a competent minister may, on any terms and conditions that he or she considers necessary, exempt from the application of any provision of this Act, the regulations or an emergency order enforcement officers whom the competent minister has designated and who are carrying out duties or functions under this Act and persons acting under the direction and control of such enforcement officers.

Inspections

Inspections

86 (1) For the purpose of ensuring compliance with any provision of this Act, the regulations or an emergency order, an enforcement officer may, subject to subsection (3), at any reasonable time enter and inspect any place in which the enforcement officer believes, on reasonable grounds, there is any thing to which the provision applies or any document relating to its administration, and the enforcement officer may

(a) open or cause to be opened any container that the enforcement officer believes, on reasonable grounds, contains that thing or document;

(b) inspect the thing and take samples free of charge;

(c) require any person to produce the document for inspection or copying, in whole or in part; and

(d) seize any thing by means of or in relation to which the enforcement officer believes, on reasonable grounds, the provision has been contravened or that the enforcement officer believes, on reasonable grounds, will provide evidence of a contravention.

Conveyance

(2) For the purposes of carrying out the inspection, the enforcement officer may stop a conveyance or direct that it be moved to a place where the inspection can be carried out.

Pouvoirs

(4) Pour l'application de la présente loi, les agents ont tous les pouvoirs d'un agent de la paix; le ministre compétent peut toutefois restreindre ceux-ci lors de la désignation.

Exemption

(5) Pour les enquêtes et autres mesures de contrôle d'application de la présente loi, le ministre compétent peut, aux conditions qu'il juge nécessaires, soustraire tout agent désigné par lui agissant dans l'exercice de ses fonctions — ainsi que toute autre personne agissant sous la direction ou l'autorité de celui-ci — à l'application de la présente loi, des règlements ou des décrets d'urgence, ou de telle de leurs dispositions.

Visite

Visite

86 (1) En vue de faire observer toute disposition de la présente loi, des règlements et des décrets d'urgence, l'agent de l'autorité peut, à toute heure convenable et sous réserve du paragraphe (3), procéder à la visite de tout lieu s'il a des motifs raisonnables de croire que s'y trouve un objet visé par la disposition ou un document relatif à son application. Il peut :

a) ouvrir ou faire ouvrir tout contenant où, à son avis, se trouve un tel objet ou document;

b) examiner l'objet et en prélever gratuitement des échantillons;

c) exiger la communication du document, pour examen ou reproduction totale ou partielle;

d) saisir tout objet qui, à son avis, a servi ou donné lieu à une contravention à la disposition ou qui peut servir à la prouver.

L'avis de l'agent doit être fondé sur des motifs raisonnables.

Moyens de transport

(2) L'agent peut procéder à l'immobilisation du moyen de transport qu'il entend visiter et le faire conduire en tout lieu où il peut effectuer la visite.

Dwelling-place

(3) The enforcement officer may not enter a dwelling-place except with the consent of the occupant or person in charge of the dwelling-place or under the authority of a warrant.

Authority to issue warrant for inspection of dwelling-place

(4) On an *ex parte* application, a justice, as defined in section 2 of the *Criminal Code*, may issue a warrant, subject to any conditions specified in it, authorizing an enforcement officer to enter a dwelling-place, if the justice is satisfied by information on oath that

(a) the conditions for entry described in subsection (1) exist in relation to the dwelling-place;

(b) entry to the dwelling-place is necessary for the purposes of the administration of this Act, the regulations or an emergency order; and

(c) entry to the dwelling-place has been refused or there are reasonable grounds for believing that entry will be refused.

Authority to issue warrant for inspection of non-dwellings

(5) On an *ex parte* application, a justice, as defined in section 2 of the *Criminal Code*, may issue a warrant, subject to any conditions specified in it, authorizing an enforcement officer to enter a place other than a dwelling-place, if the justice is satisfied by information on oath that

(a) the conditions for entry described in subsection (1) exist in relation to that place;

(b) entry to that place is necessary for the purposes of the administration of this Act, the regulations or an emergency order;

(c) entry to that place has been refused, the enforcement officer is not able to enter without the use of force or the place was abandoned; and

(d) subject to subsection (6), all reasonable attempts were made to notify the owner, operator or person in charge of the place.

Waiving notice

(6) The justice may waive the requirement to give notice referred to in subsection (5) if the justice is satisfied that attempts to give the notice would be unsuccessful because the owner, operator or person in charge is absent

Maison d'habitation

(3) Dans le cas d'une maison d'habitation, l'agent ne peut procéder à la visite sans l'autorisation du responsable ou de l'occupant que s'il est muni d'un mandat.

Mandat de perquisition

(4) Sur demande *ex parte*, le juge de paix — au sens de l'article 2 du *Code criminel* — peut décerner un mandat autorisant, sous réserve des conditions éventuellement fixées, l'agent à procéder à la visite d'une maison d'habitation s'il est convaincu, sur la foi d'une dénonciation faite sous serment, que sont réunis les éléments suivants :

a) les circonstances prévues au paragraphe (1) existent;

b) la visite est nécessaire pour l'application de la présente loi, des règlements ou des décrets d'urgence;

c) un refus a été opposé à la visite ou il y a des motifs raisonnables de croire que tel sera le cas.

Mandat autorisant la visite d'un lieu autre qu'une maison d'habitation

(5) Sur demande *ex parte*, le juge de paix — au sens de l'article 2 du *Code criminel* — peut décerner un mandat autorisant, sous réserve des conditions éventuellement fixées, l'agent à procéder à la visite d'un lieu autre qu'une maison d'habitation, s'il est convaincu, sur la foi d'une dénonciation faite sous serment, que sont réunis les éléments suivants :

a) les circonstances prévues au paragraphe (1) existent;

b) la visite est nécessaire pour l'application de la présente loi, des règlements ou des décrets d'urgence;

c) un refus a été opposé à la visite, l'agent ne peut y procéder sans recourir à la force ou le lieu est abandonné;

d) sous réserve du paragraphe (6), le nécessaire a été fait pour aviser le propriétaire, l'exploitant ou le responsable du lieu.

Avis non requis

(6) Le juge de paix peut supprimer l'obligation d'aviser le propriétaire, l'exploitant ou le responsable du lieu s'il est convaincu soit qu'on ne peut les joindre parce qu'ils se trouvent hors de son ressort, soit qu'il n'est pas dans l'intérêt public de le faire.

from the jurisdiction of the justice or that it is not in the public interest to give the notice.

Use of force

(7) In executing a warrant issued under subsection (4) or (5), an enforcement officer may not use force unless the use of force has been specifically authorized in the warrant.

Operation of computer system and copying equipment

(8) In carrying out an inspection of a place under this section, an enforcement officer may

(a) use or cause to be used any computer system at the place to examine any data contained in or available to the computer system;

(b) reproduce any record or cause it to be reproduced from the data in the form of a printout or other intelligible output;

(c) take a printout or other output for examination or copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the record.

Duty of person in possession or control

(9) Every person who is in possession or control of a place being inspected under this section must permit the enforcement officer to do anything referred to in subsection (8).

Disposition of Things Seized

Custody of things seized

87 (1) Subject to subsections (2) to (4), if an enforcement officer seizes a thing under this Act or under a warrant issued under the *Criminal Code*,

(a) sections 489.1 and 490 of the *Criminal Code* apply; and

(b) the enforcement officer, or any person that the officer may designate, must retain custody of the thing subject to any order made under section 490 of the *Criminal Code*.

Forfeiture if ownership not ascertainable

(2) If the lawful ownership of or entitlement to the seized thing cannot be ascertained within 30 days after its seizure, the thing or any proceeds of its disposition are forfeited to Her Majesty in right of Canada, if the thing

Usage de la force

(7) L'agent ne peut recourir à la force dans l'exécution du mandat que si celui-ci en autorise expressément l'usage.

Usage d'un système informatique

(8) Au cours de la visite, l'agent peut, pour l'application de la présente loi :

a) utiliser ou faire utiliser tout ordinateur se trouvant dans le lieu visité pour vérifier les données que celui-ci contient ou auxquelles il donne accès;

b) à partir de ces données, reproduire ou faire reproduire un document sous forme d'imprimé ou toute autre forme intelligible;

c) emporter tout imprimé ou sortie de données pour examen ou reproduction;

d) utiliser ou faire utiliser le matériel de reproduction pour faire des copies du document.

Obligation du responsable

(9) Le responsable du lieu visité doit faire en sorte que l'agent puisse procéder aux opérations mentionnées au paragraphe (8).

Destination des objets saisis

Garde

87 (1) Sous réserve des paragraphes (2) à (4) :

a) les articles 489.1 et 490 du *Code criminel* s'appliquent en cas de saisie d'objets effectuée par l'agent de l'autorité en vertu de la présente loi ou d'un mandat délivré au titre du *Code criminel*;

b) la garde de ces objets incombe, sous réserve d'une ordonnance rendue en application de l'article 490 du *Code criminel*, à l'agent ou à la personne qu'il désigne.

Confiscation de plein droit

(2) Dans le cas où leur propriétaire légitime — ou la personne qui a légitimement droit à leur possession — ne peut être identifié dans les trente jours suivant la saisie, les objets, ou le produit de leur aliénation, sont

was seized by an enforcement officer employed in the public service of Canada or by the government of a territory, or to Her Majesty in right of a province, if the thing was seized by an enforcement officer employed by the government of that province.

confisqués au profit de Sa Majesté du chef du Canada ou d'une province, selon que l'agent saisissant est un fonctionnaire de l'administration publique fédérale ou d'un territoire ou un fonctionnaire de la province en question.

Perishable things

(3) If the seized thing is perishable, the enforcement officer may dispose of it or destroy it, and any proceeds of its disposition must be paid to the lawful owner or person lawfully entitled to possession of the thing, unless proceedings under this Act are commenced within 90 days after its seizure, in which case the proceeds must be retained by the enforcement officer pending the outcome of the proceedings.

Biens périssables

(3) L'agent peut aliéner ou détruire les objets périssables saisis; le produit de l'aliénation est soit remis à leur propriétaire légitime ou à la personne qui a légitimement droit à leur possession, soit, lorsque des poursuites fondées sur la présente loi ont été intentées dans les quatre-vingt-dix jours suivant la saisie, retenu par l'agent jusqu'au règlement de l'affaire.

Release of individual

(4) An enforcement officer who seizes an individual of a species at risk may, at the time of the seizure, return the individual to the wild if the enforcement officer believes the individual to be alive.

Remise des individus saisis

(4) L'agent peut, au moment de la saisie d'un individu d'une espèce en péril, le remettre à l'état sauvage s'il l'estime encore vivant.

Abandonment

(5) The owner of the seized thing may abandon it to Her Majesty in right of Canada or a province.

Abandon

(5) Le propriétaire légitime de tout objet saisi peut l'abandonner au profit de Sa Majesté du chef du Canada ou d'une province.

Disposition by competent minister

88 Any thing that has been forfeited or abandoned under this Act is to be dealt with and disposed of as the competent minister may direct.

Instructions pour disposition

88 Il est disposé des objets confisqués ou abandonnés ou du produit de leur aliénation conformément aux instructions du ministre compétent.

Liability for costs

89 The lawful owner and any person lawfully entitled to possession of any thing seized, forfeited or abandoned under this Act and who has been convicted of an offence under this Act in relation to that thing, are jointly and severally, or solidarily, liable for all the costs of inspection, seizure, abandonment, forfeiture or disposition incurred by Her Majesty in excess of any proceeds of disposition of the thing that have been forfeited to Her Majesty under this Act.

Frais

89 Le propriétaire légitime et toute personne ayant légitimement droit à la possession des objets saisis, abandonnés ou confisqués au titre de la présente loi et qui a été reconnue coupable d'une infraction à la présente loi relativement à ces objets sont solidairement responsables de toute partie des frais — liés à la visite, à l'abandon, à la saisie, à la confiscation ou à l'aliénation — supportés par Sa Majesté qui excède le produit de l'aliénation.

Assistance to Enforcement Officers

Aide à donner aux agents de l'autorité

Right of passage

90 An enforcement officer may, while carrying out powers, duties or functions under this Act, enter on and pass through or over private property without being liable for trespass or without the owner of the property having the right to object to that use of the property.

Droit de passage

90 L'agent de l'autorité peut, dans l'exercice des fonctions que lui confère la présente loi, pénétrer dans une propriété privée et y circuler sans encourir de poursuites pour violation du droit de propriété.

Assistance

91 The owner or the person in charge of a place entered by an enforcement officer under section 86, and every person found in the place, must

(a) give the enforcement officer all reasonable assistance to enable the enforcement officer to carry out duties and functions under this Act; and

(b) provide the enforcement officer with any information in relation to the administration of this Act, the regulations or an emergency order that the enforcement officer may reasonably require.

Obstruction

92 While an enforcement officer is exercising powers or carrying out duties or functions under this Act, no person shall

(a) knowingly make any false or misleading statement, either orally or in writing, to the enforcement officer; or

(b) otherwise obstruct or hinder the enforcement officer.

Investigations

Application for investigation

93 (1) A person who is a resident of Canada and at least 18 years of age may apply to the competent minister for an investigation of whether an alleged offence has been committed or whether anything directed towards its commission has been done.

Statement to accompany application

(2) The application must be in a form approved by the competent minister and must include a solemn affirmation or declaration containing

(a) the name and address of the applicant;

(b) a statement that the applicant is at least 18 years old and a resident of Canada;

(c) a statement of the nature of the alleged offence and the name of each person alleged to be involved;

(d) a summary of the evidence supporting the allegations;

(e) the name and address of each person who might be able to give evidence about the alleged offence, together with a summary of the evidence that the person

Aide à donner

91 Le propriétaire ou le responsable du lieu visité en vertu de l'article 86, ainsi que quiconque s'y trouve, sont tenus :

a) de prêter à l'agent de l'autorité toute l'assistance possible dans l'exercice de ses fonctions;

b) de donner à l'agent les renseignements qu'il peut valablement exiger quant à l'exécution de la présente loi, des règlements ou des décrets d'urgence.

Entrave

92 Lorsque l'agent de l'autorité agit dans l'exercice des fonctions que lui confère la présente loi, il est interdit :

a) de lui faire sciemment, oralement ou par écrit, une déclaration fausse ou trompeuse;

b) d'une façon générale, d'entraver son action.

Enquêtes

Demande d'enquête

93 (1) Toute personne âgée d'au moins dix-huit ans et résidant au Canada peut demander au ministre compétent l'ouverture d'une enquête visant à vérifier si une infraction a été perpétrée ou si un acte concourant à la perpétration d'une infraction a été commis.

Contenu

(2) La demande, établie en la forme approuvée par le ministre compétent, est accompagnée d'une affirmation ou déclaration solennelle qui énonce :

a) les nom et adresse de l'auteur de la demande;

b) le fait que l'auteur de la demande a au moins dix-huit ans et réside au Canada;

c) la nature de l'infraction reprochée et le nom des personnes à qui elle est imputée;

d) les éléments de preuve à l'appui de la demande, sous forme de bref exposé;

e) les nom et adresse de chaque personne qui pourrait être en mesure de témoigner au sujet de l'infraction imputée, ainsi que les éléments de preuve, sous forme de bref exposé, qu'elle pourrait fournir, dans la

might give, to the extent that information is available to the applicant;

(f) a description of any document or other material that the applicant believes should be considered in the investigation and, if possible, a copy of the document; and

(g) details of any previous contact between the applicant and the competent minister about the alleged offence.

mesure où ces renseignements sont connus de l'auteur de la demande;

f) une description de tout document ou autre pièce dont, selon l'auteur de la demande, il faudrait tenir compte dans le cadre de l'enquête de même que, si possible, une copie de tel document;

g) le détail de toute communication antérieure de l'auteur de la demande avec le ministre compétent au sujet de l'infraction reprochée.

Investigation

94 (1) The competent minister must acknowledge receipt of the application within 20 days after receiving it and, subject to subsections (2) and (3), investigate all matters that he or she considers necessary to determine the facts relating to the alleged offence.

Enquête

94 (1) Le ministre compétent accuse réception de la demande dans les vingt jours et fait, sous réserve des paragraphes (2) et (3), enquête sur tous les éléments qu'il juge indispensables pour établir les faits relatifs à l'infraction reprochée.

Frivolous or vexatious applications

(2) No investigation is required if the competent minister decides that the application is frivolous or vexatious.

Demande futile ou vexatoire

(2) Le ministre compétent ne fait pas enquête s'il estime que la demande est futile ou vexatoire.

Notice of decision

(3) If the competent minister decides not to conduct an investigation, he or she must, within 60 days after the application for investigation is received, give notice of the decision, with reasons, to the applicant.

Avis de la décision de ne pas enquêter

(3) S'il décide qu'une enquête n'est pas requise, le ministre compétent donne, dans les soixante jours suivant réception de la demande, un avis de la décision, motifs à l'appui, à l'auteur de la demande.

When notice need not be given

(4) The competent minister need not give the notice if an investigation in relation to the alleged offence is ongoing apart from the application.

Absence d'avis

(4) Le ministre compétent n'est pas tenu de donner l'avis si l'infraction reprochée dans la demande fait déjà l'objet d'une enquête indépendante de la demande.

Competent minister may send evidence to Attorney General

95 At any stage of the investigation, the competent minister may send any documents or other evidence to the Attorney General for a consideration of whether an offence has been or is about to be committed, and for any action that the Attorney General may wish to take.

Communication de documents au procureur général

95 Le ministre compétent peut, à toute étape de l'enquête, transmettre des documents ou autres éléments de preuve au procureur général pour lui permettre de décider si une infraction a été commise ou est sur le point de l'être et de prendre les mesures de son choix.

Suspension or conclusion of investigation

96 (1) The competent minister may suspend or conclude the investigation if he or she is of the opinion that the alleged offence does not require further investigation or the investigation does not substantiate the alleged offence or any other offence.

Interruption ou clôture de l'enquête

96 (1) Le ministre compétent peut interrompre ou clore l'enquête s'il estime que l'infraction reprochée ne justifie plus sa poursuite ou que ses résultats ne permettent pas de conclure à la perpétration d'une infraction.

Report if investigation suspended

(2) If the investigation is suspended, the competent minister must prepare a written report describing the information obtained during the investigation and stating the reasons for its suspension and the action, if any, that the

Rapport en cas d'interruption

(2) En cas d'interruption de l'enquête, il établit un rapport écrit exposant l'information recueillie, les motifs de l'interruption et les mesures qu'il a prises ou entend

competent minister has taken or proposes to take and send a copy of the report to the applicant. The competent minister must notify the applicant if the investigation is subsequently resumed.

prendre, et en envoie copie à l'auteur de la demande; le cas échéant, il lui notifie la reprise de l'enquête.

Report when investigation concluded

(3) When the investigation is concluded, the competent minister must prepare a written report describing the information obtained during the investigation and stating the reasons for its conclusion and the action, if any, that the competent minister has taken or proposes to take and send a copy of the report to the applicant and to each person whose conduct was investigated.

Rapport de clôture d'enquête

(3) Une fois l'enquête close, il établit un rapport écrit exposant l'information recueillie, les motifs de la clôture et les mesures qu'il a prises ou entend prendre, et en envoie copie à l'auteur de la demande et aux personnes dont la conduite a fait l'objet de l'enquête.

Personal information not to be disclosed

(4) A copy of the report sent to a person whose conduct was investigated must not disclose the name or address of the applicant or any other personal information about him or her.

Renseignements personnels

(4) La copie du rapport envoyée aux personnes dont la conduite a fait l'objet de l'enquête ne doit dévoiler ni les nom et adresse de l'auteur de la demande, ni aucun autre renseignement personnel à son sujet.

When report need not be sent

(5) If another investigation in relation to the alleged offence is ongoing apart from the application, the competent minister need not send copies of a report described in subsection (2) or (3) until the other investigation is suspended or concluded.

Absence de rapport

(5) Si l'infraction reprochée fait déjà l'objet d'une enquête indépendante de la demande, il peut attendre l'interruption ou la clôture de cette enquête avant d'envoyer copie du rapport visé au paragraphe (2) ou (3).

Offences and Punishment

Offences

97 (1) Every person commits an offence who

(a) contravenes subsection 32(1) or (2), section 33, subsection 36(1), 58(1), 60(1) or 61(1) or section 91 or 92;

(b) contravenes a prescribed provision of a regulation or an emergency order;

(c) fails to comply with a term or condition of a permit issued under subsection 73(1); or

(d) fails to comply with an alternative measures agreement that the person has entered into under this Act.

Penalty

(1.1) Every person who commits an offence under subsection (1) is liable

(a) on conviction on indictment,

Infractions et peines

Infractions

97 (1) Commet une infraction quiconque contrevient :

a) aux paragraphes 32(1) ou (2), à l'article 33, aux paragraphes 36(1), 58(1), 60(1) ou 61(1) ou aux articles 91 ou 92;

b) à toute disposition d'un règlement ou d'un décret d'urgence précisée par ce règlement ou ce décret;

c) à toute condition d'un permis délivré en vertu du paragraphe 73(1);

d) à un accord sur des mesures de rechange conclu sous le régime de la présente loi.

Peine

(1.1) Quiconque commet une infraction prévue au paragraphe (1) est passible :

a) sur déclaration de culpabilité par mise en accusation :

(i) in the case of a corporation, other than a non-profit corporation, to a fine of not more than $1,000,000,

(ii) in the case of a non-profit corporation, to a fine of not more than $250,000, and

(iii) in the case of any other person, to a fine of not more than $250,000 or to imprisonment for a term of not more than five years, or to both; or

(b) on summary conviction,

(i) in the case of a corporation, other than a non-profit corporation, to a fine of not more than $300,000,

(ii) in the case of a non-profit corporation, to a fine of not more than $50,000, and

(iii) in the case of any other person, to a fine of not more than $50,000 or to imprisonment for a term of not more than one year, or to both.

(i) dans le cas d'une personne morale autre qu'une personne morale sans but lucratif, d'une amende maximale de 1 000 000 $,

(ii) dans le cas d'une personne morale sans but lucratif, d'une amende maximale de 250 000 $,

(iii) dans le cas d'une personne physique, d'une amende maximale de 250 000 $ et d'un emprisonnement maximal de cinq ans, ou de l'une de ces peines;

b) sur déclaration de culpabilité par procédure sommaire :

(i) dans le cas d'une personne morale autre qu'une personne morale sans but lucratif, d'une amende maximale de 300 000 $,

(ii) dans le cas d'une personne morale sans but lucratif, d'une amende maximale de 50 000 $,

(iii) dans le cas d'une personne physique, d'une amende maximale de 50 000 $ et d'un emprisonnement maximal d'un an, ou de l'une de ces peines.

Exception

(1.2) Paragraph (1)(c) does not apply in respect of the failure to comply with any term or condition of any agreement, permit, licence, order or other similar document referred to in section 74 or subsection 78(1).

Exception

(1.2) L'alinéa (1)c) ne s'applique pas à l'égard de la contravention à toute condition d'un accord, d'un permis, d'une licence ou d'un arrêté — ou d'un autre document semblable — qui est visé à l'article 74 ou au paragraphe 78(1).

Prescription of provisions

(2) A regulation or emergency order may prescribe which of its provisions may give rise to an offence.

Infraction : règlement ou décret

(2) Le règlement ou le décret d'urgence peut préciser lesquelles de ses dispositions créent une infraction.

Subsequent offence

(3) For a second or subsequent conviction, the amount of the fine may, despite subsection (1.1), be double the amount set out in that subsection.

Récidive

(3) Le montant des amendes prévues au paragraphe (1.1) peut être doublé en cas de récidive.

Continuing offence

(4) A person who commits or continues an offence on more than one day is liable to be convicted for a separate offence for each day on which the offence is committed or continued.

Infraction continue

(4) Il est compté une infraction distincte pour chacun des jours au cours desquels se commet ou se continue l'infraction.

Fines cumulative

(5) A fine imposed for an offence involving more than one animal, plant or other organism may be calculated in respect of each one as though it had been the subject of a separate information and the fine then imposed is the total of that calculation.

Amendes cumulatives

(5) En cas de déclaration de culpabilité pour une infraction visant plusieurs animaux, végétaux ou autres organismes, l'amende peut être calculée pour chacun d'eux, comme s'ils avaient fait l'objet de dénonciations distinctes; l'amende finale infligée est alors la somme totale obtenue.

Additional fine

(6) If a person is convicted of an offence and the court is satisfied that monetary benefits accrued to the person as a result of the commission of the offence, the court may order the person to pay an additional fine in an amount equal to the court's estimation of the amount of the monetary benefits, which additional fine may exceed the maximum amount of any fine that may otherwise be imposed under this Act.

Definition of *non-profit corporation*

(7) For the purposes of subsection (1.1), ***non-profit corporation*** means a corporation, no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member or shareholder of the corporation.

2002, c. 29, s. 97; 2012, c. 19, s. 168.

Officers, etc., of corporations

98 If a corporation commits an offence, any officer, director or agent or mandatary of the corporation who directed, authorized, assented to, or acquiesced or participated in, the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.

2002, c. 29, s. 98; 2015, c. 3, s. 153(E).

Offences by employees or agents or mandataries

99 In any prosecution for an offence, the accused may be convicted of the offence if it is established that it was committed by an employee or an agent or mandatary of the accused, whether or not the employee, agent or mandatary has been prosecuted for the offence.

2002, c. 29, s. 99; 2015, c. 3, s. 153(E).

Due diligence

100 Due diligence is a defence in a prosecution for an offence.

Venue

101 A prosecution for an offence may be instituted, heard and determined in the place where the offence was committed, the subject-matter of the prosecution arose, the accused was apprehended or the accused happens to be or is carrying on business.

Sentencing considerations

102 A court that imposes a sentence shall take into account, in addition to any other principles that it is required to consider, the following factors:

Amende supplémentaire

(6) Le tribunal peut, s'il constate que le contrevenant a tiré des avantages financiers de la perpétration de l'infraction, lui infliger, en sus de l'amende maximale prévue par la présente loi, une amende supplémentaire correspondant à son évaluation de ces avantages.

Définition de *personne morale sans but lucratif*

(7) Pour l'application du paragraphe (1.1), ***personne morale sans but lucratif*** s'entend d'une personne morale dont aucune partie du revenu n'est payable à un propriétaire, membre ou actionnaire de celle-ci, ou ne peut par ailleurs servir au profit personnel de ceux-ci.

2002, ch. 29, art. 97; 2012, ch. 19, art. 168.

Dirigeants d'une personne morale

98 En cas de perpétration d'une infraction par une personne morale, ceux de ses dirigeants, administrateurs, agents ou mandataires qui l'ont ordonnée ou autorisée, ou qui y ont consenti ou participé, sont considérés comme des coauteurs de l'infraction et encourent, sur déclaration de culpabilité, la peine prévue, que la personne morale ait été ou non poursuivie ou déclarée coupable.

2002, ch. 29, art. 98; 2015, ch. 3, art. 153(A).

Infraction : agent ou mandataire

99 Dans les poursuites pour infraction, il suffit, pour établir la culpabilité de l'accusé, de prouver que l'infraction a été commise par son agent ou mandataire, que celui-ci ait ou non été poursuivi.

2002, ch. 29, art. 99; 2015, ch. 3, art. 153(A).

Disculpation

100 La prise de précautions voulues peut être opposée en défense à toute accusation portée au titre de la présente loi.

Ressort

101 La poursuite d'une infraction peut être intentée, entendue et jugée soit au lieu de la perpétration, soit au lieu où a pris naissance l'objet de la poursuite, soit encore au lieu où l'accusé est appréhendé, se trouve ou exerce ses activités.

Facteurs à considérer

102 Le tribunal détermine la peine à infliger compte tenu — en plus des principes qu'il doit prendre en considération — des facteurs suivants :

(a) the harm or risk of harm caused by the commission of the offence;

(b) whether the offender was found to have committed the offence intentionally, recklessly or inadvertently;

(c) whether the offender was found by the court to have been negligent or incompetent or to have shown a lack of concern with respect to the commission of the offence;

(d) any property, benefit or advantage received or receivable by the offender to which, but for the commission of the offence, the offender would not have been entitled;

(e) any evidence from which the court may reasonably conclude that the offender has a history of non-compliance with legislation designed to protect wildlife species; and

(f) all available sanctions that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal offenders.

a) le dommage ou le risque de dommage que cause l'infraction;

b) le caractère intentionnel, imprudent ou fortuit de l'infraction;

c) la conclusion du tribunal selon laquelle le contrevenant a fait preuve d'incompétence, de négligence ou d'insouciance;

d) tout avantage procuré par la perpétration de l'infraction;

e) tout élément de preuve l'incitant raisonnablement à croire que le contrevenant a, dans le passé, accompli des actes contraires aux lois portant protection des espèces sauvages;

f) l'examen de toutes les sanctions applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones.

Forfeiture

103 (1) If a person is convicted of an offence, the convicting court may, in addition to any punishment imposed, order that any seized thing by means of or in relation to which the offence was committed, or any proceeds of its disposition, be forfeited to Her Majesty.

Confiscation

103 (1) Sur déclaration de culpabilité du contrevenant, le tribunal peut prononcer, en sus de toute autre peine, la confiscation au profit de Sa Majesté des objets saisis ou du produit de leur aliénation.

Return if no forfeiture ordered

(2) If the convicting court does not order the forfeiture, the seized thing, or the proceeds of its disposition, must be returned to its lawful owner or the person lawfully entitled to it.

Restitution d'un objet non confisqué

(2) S'il ne prononce pas la confiscation, les objets saisis, ou le produit de leur aliénation, sont restitués au propriétaire légitime ou à la personne qui a légitimement droit à leur possession.

Retention or sale

104 If a fine is imposed on a person convicted of an offence, any seized thing, or any proceeds of its disposition, may be retained until the fine is paid or the thing may be sold in satisfaction of the fine and the proceeds applied, in whole or in part, in payment of the fine.

Rétention ou vente

104 En cas de déclaration de culpabilité, les objets saisis, ou le produit de leur aliénation, peuvent être retenus jusqu'au paiement de l'amende; ces objets peuvent être vendus, s'ils ne l'ont pas déjà été, et le produit de leur aliénation peut être affecté en tout ou en partie au paiement de l'amende.

Orders of court

105 If a person is convicted of an offence, the court may, in addition to any punishment imposed and having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects:

Ordonnance du tribunal

105 En sus de toute autre peine et compte tenu de la nature de l'infraction ainsi que des circonstances de sa perpétration, le tribunal peut rendre une ordonnance imposant au contrevenant tout ou partie des obligations suivantes :

(a) prohibiting the person from doing any act or engaging in any activity that could, in the opinion of the court, result in the continuation or repetition of the offence;

(b) directing the person to take any action that the court considers appropriate to remedy or avoid any harm to any wildlife species that resulted or may result from the commission of the offence;

(c) directing the person to have an environmental audit conducted by a person of a class and at the times specified by the court and directing the person to remedy any deficiencies revealed during the audit;

(d) directing the person to publish, in any manner that the court considers appropriate, the facts relating to the commission of the offence;

(e) directing the person to perform community service in accordance with any conditions that the court considers reasonable;

(f) directing the person to submit to the competent minister, on application to the court by the competent minister within three years after the conviction, any information about the activities of the person that the court considers appropriate;

(g) directing the person to pay a competent minister or the government of a province or a territory an amount for all or any of the cost of remedial or preventive action taken, or to be taken, by or on behalf of the competent minister or that government as a result of the commission of the offence;

(h) directing the person to pay, in the manner prescribed by the court, an amount for the purpose of conducting research into the protection of the wildlife species in respect of which the offence was committed;

(i) directing the person to pay, in the manner prescribed by the court, an amount to an educational institution for scholarships for students enrolled in environmental studies;

(j) directing the person to post a bond or pay to the court an amount that the court considers appropriate for the purpose of ensuring compliance with any prohibition, direction or requirement under this section; and

(k) requiring the person to comply with any other conditions that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences.

a) s'abstenir de tout acte ou activité risquant d'entraîner, selon le tribunal, la continuation de l'infraction ou la récidive;

b) prendre les mesures que le tribunal juge indiquées pour réparer ou éviter toute atteinte aux espèces sauvages résultant ou pouvant résulter de la perpétration de l'infraction;

c) faire effectuer, à des moments déterminés, une vérification environnementale par une personne appartenant à la catégorie de personnes désignée, et prendre les mesures appropriées pour remédier aux défauts constatés;

d) publier, de la façon que le tribunal juge indiquée, les faits liés à la perpétration de l'infraction;

e) exécuter des travaux d'intérêt collectif aux conditions que le tribunal estime raisonnables;

f) fournir au ministre compétent, sur demande présentée par celui-ci dans les trois ans suivant la déclaration de culpabilité, les renseignements relatifs à ses activités que le tribunal estime justifiés en l'occurrence;

g) indemniser le ministre compétent ou le gouvernement de la province ou du territoire, en tout ou en partie, des frais supportés ou devant être supportés pour la réparation ou la prévention des dommages résultant ou pouvant résulter de la perpétration de l'infraction;

h) verser, selon les modalités prescrites par le tribunal, une somme d'argent destinée à permettre des recherches sur la protection de l'espèce sauvage à l'égard de laquelle l'infraction a été commise;

i) verser à un établissement d'enseignement, selon les modalités prescrites par le tribunal, une somme d'argent destinée à créer des bourses d'études attribuées à quiconque suit un programme d'études dans un domaine lié à l'environnement;

j) en garantie de l'exécution des obligations imposées au titre du présent article, fournir le cautionnement ou déposer auprès du tribunal le montant que celui-ci juge indiqué;

k) satisfaire aux autres exigences que le tribunal estime justifiées pour assurer sa bonne conduite et empêcher toute récidive.

Suspended sentence

106 (1) If a person is convicted of an offence and the court suspends the passing of sentence under paragraph 731(1)(a) of the *Criminal Code*, the court may, in addition to any probation order made under that Act, make an order containing one or more of the prohibitions, directions or requirements mentioned in section 105.

Imposition of sentence

(2) If the person does not comply with the order or is convicted of another offence, within three years after the order is made, the court may, on the application of the prosecution, impose any sentence that could have been imposed if the passing of sentence had not been suspended.

Limitation period

107 (1) Proceedings by way of summary conviction in respect of an offence may be commenced at any time within, but not later than, two years after the day on which the subject-matter of the proceedings became known to the competent minister.

Competent minister's certificate

(2) A document appearing to have been issued by the competent minister, certifying the day on which the subject-matter of any proceedings became known to the competent minister, is admissible in evidence without proof of the signature or official character of the person appearing to have signed the document and is proof of the matter asserted in it.

References to the competent minister

(3) A reference to the competent minister in this section includes a provincial or territorial minister if the competent minister has delegated responsibility for the enforcement of this Act, the regulations or an emergency order in the province or territory to the provincial or territorial minister and the offence is alleged to have been committed in the province or territory.

Alternative Measures

When alternative measures may be used

108 (1) Alternative measures may be used to deal with a person who is alleged to have committed an offence, but only if it is not inconsistent with the purposes of this Act to do so and the following conditions are met:

(a) the measures are part of a program of alternative measures authorized by the Attorney General, after consultation with the competent minister;

Condamnation avec sursis

106 (1) Lorsque, en vertu de l'alinéa 731(1)a) du *Code criminel*, il sursoit au prononcé de la peine, le tribunal, en plus de toute ordonnance de probation rendue au titre de cette loi, peut, par ordonnance, enjoindre au contrevenant de se conformer à l'une ou plusieurs des obligations visées à l'article 105.

Prononcé de la peine

(2) Sur demande de la poursuite, le tribunal peut, lorsque la personne visée par l'ordonnance ne se conforme pas aux modalités de celle-ci ou est déclarée coupable d'une autre infraction dans les trois ans qui suivent la date de l'ordonnance, prononcer la peine qui aurait pu lui être infligée s'il n'y avait pas eu sursis.

Prescription

107 (1) Les poursuites visant une infraction punissable sur déclaration de culpabilité par procédure sommaire se prescrivent par deux ans à compter de la date où les éléments constitutifs de l'infraction sont venus à la connaissance du ministre compétent.

Certificat

(2) Le document paraissant délivré par le ministre compétent et attestant la date où les éléments sont venus à sa connaissance est admissible en preuve et fait foi de son contenu sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

Ministre provincial ou territorial

(3) Au présent article, toute mention du ministre compétent vise également le ministre provincial ou le ministre territorial si le ministre compétent lui a délégué ses attributions relativement aux mesures d'application de la présente loi, des règlements ou des décrets d'urgence dans la province ou le territoire où l'infraction aurait été commise.

Mesures de rechange

Application

108 (1) Le recours à des mesures de rechange à l'égard d'une personne accusée d'une infraction n'est possible, compte tenu de l'objet de la présente loi, que si les conditions suivantes sont réunies :

a) les mesures font partie d'un programme autorisé par le procureur général après consultation du ministre compétent;

(b) an information has been laid in respect of the offence;

(c) the Attorney General, after consultation with the competent minister, is satisfied that the alternative measures would be appropriate, having regard to the nature of the offence, the circumstances surrounding its commission and the following factors, namely,

(i) the protection of species at risk,

(ii) the person's history of compliance with this Act,

(iii) whether the offence is a repeated occurrence,

(iv) any allegation that information is being or was concealed or other attempts to subvert the purposes and requirements of this Act are being or have been made, and

(v) whether any remedial or preventive action has been taken by or on behalf of the person in relation to the offence;

(d) the person applies, in accordance with regulations made under paragraph 119(a), to participate in the alternative measures after having been informed of them;

(e) the person and the Attorney General have concluded an agreement respecting the alternative measures within 180 days after the person has, with respect to the offence, been served with a summons, been issued an appearance notice or entered into a promise to appear or a recognizance;

(f) before consenting to participate in the alternative measures, the person has been advised of the right to be represented by counsel;

(g) the person accepts responsibility for the act or omission that forms the basis of the offence;

(h) there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence; and

(i) the prosecution of the offence is not barred at law.

Restriction on use

(2) Alternative measures may not be used to deal with a person who

(a) denies participation or involvement in the commission of the alleged offence; or

b) une dénonciation a été déposée à l'égard de l'infraction;

c) le procureur général, après consultation du ministre compétent, est convaincu que les mesures de rechange sont indiquées, compte tenu de la nature de l'infraction, des circonstances de sa perpétration et des éléments suivants :

(i) la protection des espèces en péril,

(ii) les antécédents du suspect en ce qui concerne l'observation de la présente loi,

(iii) la question de savoir si l'infraction constitue une récidive,

(iv) toute prétendue tentative — passée ou actuelle — d'action contraire aux objets ou exigences de la présente loi, notamment toute prétendue dissimulation de renseignements,

(v) la question de savoir si des mesures préventives ou correctives ont été prises par le suspect — ou en son nom — à l'égard de l'infraction;

d) le suspect demande, en conformité avec les règlements pris en vertu de l'alinéa 119a), à collaborer à la mise en œuvre des mesures de rechange;

e) il a conclu avec le procureur général un accord sur les mesures de rechange dans les cent quatre-vingts jours suivant la signification d'une sommation ou la délivrance d'une citation à comparaître ou la remise par lui d'une promesse de comparaître ou d'un engagement;

f) il a été informé de son droit d'être représenté par un avocat avant de consentir à collaborer à la mise en œuvre des mesures de rechange;

g) il se reconnaît responsable de l'acte ou de l'omission à l'origine de l'infraction;

h) le procureur général estime qu'il y a des preuves suffisantes justifiant des poursuites relatives à l'infraction;

i) aucune règle de droit ne fait obstacle aux poursuites relatives à l'infraction.

Restrictions

(2) Il ne peut y avoir de mesures de rechange lorsque le suspect :

a) soit nie toute participation à la perpétration de l'infraction reprochée;

(b) expresses the wish to have any charge against them dealt with by the court.

b) soit manifeste le désir de voir déférer au tribunal toute accusation portée contre lui.

Admissions not admissible in evidence

(3) No admission, confession or statement accepting responsibility for a given act or omission made by a person as a condition of being dealt with by alternative measures is admissible in evidence against the person in any civil or criminal proceedings.

Non-admissibilité des aveux

(3) Les aveux de culpabilité ou les déclarations de responsabilité faits pour pouvoir bénéficier de mesures de rechange ne sont pas admissibles en preuve dans les actions civiles ou les poursuites pénales engagées contre leur auteur.

Dismissal of charge

(4) A court must dismiss a charge laid against a person in respect of an offence if alternative measures have been used to deal with the person in respect of the alleged offence and

(a) the court is satisfied on a balance of probabilities that the person has totally complied with the agreement; or

(b) the court is satisfied on a balance of probabilities that the person has partially complied with the agreement and, in the opinion of the court, the prosecution of the charge would be unfair, having regard to the circumstances and the person's performance with respect to the agreement.

Accusation rejetée

(4) Dans le cas où il y a eu recours aux mesures de rechange, le tribunal rejette l'accusation portée contre le suspect, s'il est convaincu, selon la prépondérance des probabilités :

a) soit que celui-ci a entièrement respecté l'accord;

b) soit qu'il a partiellement respecté l'accord, la poursuite étant, à son avis, injuste eu égard aux circonstances et au degré d'exécution de celui-ci.

No bar to proceedings

(5) The use of alternative measures in respect of a person who is alleged to have committed an offence is not a bar to any proceedings against the person under this Act.

Possibilité de mesures de rechange et poursuites

(5) Le recours aux mesures de rechange n'empêche pas l'exercice de poursuites dans le cadre de la présente loi.

Laying of information, etc.

(6) This section does not prevent any person from laying an information, obtaining the issue or confirmation of any process, or proceeding with the prosecution of any offence, in accordance with law.

Dénonciation

(6) Le présent article n'a pas pour effet d'empêcher, s'ils sont conformes à la loi, les dénonciations, l'obtention ou la confirmation d'un acte judiciaire ou l'engagement de poursuites.

Terms and conditions in agreement

109 (1) An alternative measures agreement may contain any terms and conditions, including

(a) terms and conditions having any or all of the effects set out in section 105 or any other terms and conditions having any of the effects prescribed by regulations that the Attorney General, after consultation with the competent minister, considers appropriate; and

(b) terms and conditions relating to the costs associated with ensuring compliance with the agreement.

Conditions de l'accord

109 (1) L'accord peut être assorti de conditions, notamment en ce qui touche :

a) l'assujettissement du suspect à tout ou partie des obligations visées à l'article 105 ou à toute autre obligation réglementaire que le procureur général estime indiquée après consultation du ministre compétent;

b) les frais entraînés par le contrôle du respect de l'accord.

Supervision of compliance

(2) Any governmental organization may supervise compliance with the agreement.

Duration of agreement

110 An alternative measures agreement comes into effect on the day on which it is concluded or on any later day that is specified in the agreement and continues in effect for a period of not more than three years.

Filing in court for purpose of public access

111 (1) The Attorney General must consult the competent minister before concluding an alternative measures agreement and, subject to subsection (5), must have the agreement filed with the court in which the information was laid within 30 days after the agreement is concluded. The agreement is to be filed as part of the court record of the proceedings to which the public has access.

Reports

(2) A report relating to the administration of, and compliance with, the agreement must be filed with the same court by the Attorney General immediately after all the terms and conditions of the agreement have been complied with or the charges in respect of which the agreement was entered into have been dismissed.

Third party information

(3) Subject to subsection (4), if any of the following information is to be part of the agreement or the report, it must be set out in a schedule to the agreement or to the report:

(a) trade secrets of any person;

(b) financial, commercial, scientific or technical information that is confidential information and is treated consistently in a confidential manner by any person;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to any person, or could reasonably be expected to prejudice the competitive position of any person; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of any person.

Agreement on information to be in schedule

(4) The parties to the agreement must agree on which information that is to be part of the agreement or the report is information that meets the requirements of paragraphs (3)(a) to (d).

Organisme de contrôle

(2) Tout organisme gouvernemental peut contrôler le respect de l'accord.

Durée de l'accord

110 L'accord entre en vigueur à la date de sa conclusion ou à la date ultérieure qui y est fixée et demeure en vigueur pendant la période — d'au plus trois ans — qui y est fixée.

Dépôt auprès du tribunal

111 (1) Le procureur général consulte le ministre compétent avant de conclure un accord et, sous réserve du paragraphe (5) et dans les trente jours suivant la conclusion de l'accord, fait déposer celui-ci auprès du tribunal saisi de la dénonciation, comme partie du dossier judiciaire de la procédure auquel le public a accès.

Rapport

(2) Un rapport relatif à l'application et au respect de l'accord est déposé auprès du même tribunal par le procureur général dès que les conditions dont il est assorti sont exécutées ou que les accusations ayant occasionné sa conclusion sont rejetées.

Renseignements confidentiels

(3) Sous réserve du paragraphe (4), les renseignements suivants sont énoncés en annexe de l'accord ou du rapport :

a) les secrets industriels de toute personne;

b) les renseignements financiers, commerciaux, scientifiques ou techniques qui sont de nature confidentielle et qui sont traités comme tels de façon constante par toute personne;

c) les renseignements dont la communication risquerait vraisemblablement de causer des pertes ou de faire réaliser des profits financiers appréciables à toute personne ou de nuire à sa compétitivité;

d) les renseignements dont la communication risquerait vraisemblablement d'entraver des négociations menées par toute personne en vue de la conclusion de contrats ou à d'autres fins.

Entente sur les renseignements à énoncer en annexe

(4) Les parties à l'accord s'entendent sur la question de savoir quels renseignements correspondent aux catégories précisées par les alinéas (3)a) à d).

How schedule is to be kept secret

(5) The schedule is confidential and must not be filed with the court.

Prohibition of disclosure

(6) The competent minister must not disclose any information set out in a schedule to the agreement or to the report, except as authorized by section 117 or the *Access to Information Act*.

Stay of proceedings

112 (1) Despite section 579 of the *Criminal Code*, the Attorney General must, on filing an alternative measures agreement, stay the proceedings in respect of the alleged offence, or apply to the court for an adjournment of the proceedings, for a period of not more than one year after the expiry of the agreement.

Recommencement of proceedings

(2) Proceedings stayed under subsection (1) may be recommenced without laying a new information or preferring a new indictment, as the case may be, by the Attorney General giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered. If no such notice is given within one year after the expiry of the agreement, the proceedings are deemed to have never been commenced.

Application to vary agreement

113 (1) Subject to subsections 111(2) and (3), the Attorney General may vary the terms and conditions of an alternative measures agreement on application by the person bound by the agreement and after consultation with the competent minister. The Attorney General must be of the opinion that the variation is desirable because of a material change in the circumstances since the agreement was concluded or last varied. The variation may include

(a) decreasing the period for which the agreement is to remain in force; and

(b) relieving the person of compliance with any condition that is specified in the agreement, either absolutely or partially or for any period that the Attorney General considers desirable.

Filing varied agreement

(2) An agreement that has been varied must be filed in accordance with section 111 with the court in which the original agreement was filed.

Façon d'assurer le secret de l'annexe

(5) L'annexe est confidentielle et n'est pas déposée auprès du tribunal.

Interdiction de communication

(6) Le ministre compétent ne peut communiquer les renseignements contenus dans l'annexe que dans le cadre de l'article 117 ou de la *Loi sur l'accès à l'information*.

Suspension d'instance

112 (1) Par dérogation à l'article 579 du *Code criminel*, le procureur général suspend, sur dépôt de l'accord, l'instance à l'égard de l'infraction reprochée — ou demande au tribunal de l'ajourner — jusqu'au plus tard un an après l'expiration de l'accord.

Reprise de l'instance

(2) Il peut reprendre l'instance suspendue, sans que soit nécessaire une nouvelle dénonciation ou un nouvel acte d'accusation, selon le cas, simplement en donnant avis au greffier du tribunal où elle a été suspendue; cependant, lorsqu'un tel avis n'est pas donné dans l'année qui suit l'expiration de l'accord, la poursuite est réputée n'avoir jamais été engagée.

Demande de modification de l'accord

113 (1) Sur demande de la personne liée par un accord, le procureur général peut, sous réserve des paragraphes 111(2) et (3) et après consultation du ministre compétent, modifier les conditions de l'accord dans le sens qui lui paraît justifié par tout changement important en l'espèce depuis la conclusion ou la dernière modification de l'accord :

a) soit en raccourcissant sa période de validité;

b) soit en dégageant la personne, absolument, partiellement ou pour une durée limitée, de l'obligation de se conformer à telle de ses conditions.

Dépôt de l'accord modifié

(2) L'accord modifié est déposé en conformité avec l'article 111 auprès du tribunal devant lequel il a initialement été déposé.

Application of provisions dealing with records

114 Sections 115 to 117 apply only in respect of persons who have entered into an alternative measures agreement, regardless of the degree of their compliance with the terms and conditions of the agreement.

Disclosure of information by peace officer or enforcement officer

115 Where it is necessary in the conduct of an investigation of an offence, a peace officer or enforcement officer may disclose to a department or agency of a government in Canada any information in a record relating to an offence alleged to have been committed by a person, including the original or a copy of any fingerprints or photographs of the person.

Government records

116 (1) The competent minister, any enforcement officer and any department or agency of a government in Canada with which the competent minister has entered into an agreement under section 10 may keep records and use information obtained as a result of the use of alternative measures to deal with a person

(a) for the purposes of an inspection under this Act or an investigation of an offence alleged to have been committed by a person;

(b) in proceedings against a person under this Act;

(c) for the purpose of the administration of alternative measures programs; or

(d) otherwise for the administration of this Act.

Private records

(2) Any person or organization may keep records of information obtained by them as a result of supervising compliance with an alternative measures agreement and use the information for the purpose of supervising such compliance.

Disclosure of records

117 (1) A record or information referred to in section 115 or 116 may be made available to

(a) any judge or court for any purpose with respect to proceedings relating to offences under this or any other Act committed or alleged to have been committed by the person to whom the record relates;

(b) any peace officer, enforcement officer or prosecutor

Dossier des suspects

114 Les articles 115 à 117 ne s'appliquent qu'aux personnes qui ont conclu un accord, qu'elles se conforment ou non aux conditions de cet accord.

Communication par un agent de la paix ou un agent de l'autorité

115 L'agent de la paix ou l'agent de l'autorité peut communiquer à tout ministère ou organisme public canadien l'information contenue dans le dossier relatif à une infraction qu'aurait commise une personne, notamment l'original ou une reproduction des empreintes digitales ou de toute photographie de celle-ci, si la communication s'impose pour la conduite d'une enquête sur l'infraction.

Dossiers gouvernementaux

116 (1) Le ministre compétent, les agents de l'autorité et tout ministère ou organisme public canadien avec qui le ministre compétent a conclu un accord en vertu de l'article 10 peuvent conserver les dossiers qui sont en leur possession par suite du recours à des mesures de rechange et utiliser l'information qu'ils contiennent pour les besoins :

a) d'une visite faite en vertu de la présente loi ou d'une enquête sur une infraction;

b) d'une poursuite engagée contre une personne sous le régime de la présente loi;

c) de l'administration de programmes de mesures de rechange;

d) de l'application de la présente loi en général.

Dossiers privés

(2) Toute personne ou organisation peut conserver les dossiers qui sont en sa possession par suite du contrôle du respect de l'accord et utiliser l'information qu'ils contiennent dans le cadre de ce contrôle.

Accès au dossier

117 (1) Ont accès à tout dossier visé aux articles 115 ou 116 :

a) tout juge ou tribunal, dans le cadre de poursuites relatives à des infractions — à la présente loi ou à d'autres lois — commises par la personne visée par le dossier ou qui lui sont imputées;

b) un agent de la paix, un agent de l'autorité ou un poursuivant, dans le cadre :

(i) for the purpose of investigating an offence under this or any other Act that the person is suspected on reasonable grounds of having committed, or in respect of which the person has been arrested or charged, or

(ii) for any purpose related to the administration of the case to which the record relates;

(c) any member of a department or agency of a government in Canada, or any agent of such a government, that is

(i) engaged in the administration of alternative measures in respect of the person, or

(ii) preparing a report in respect of the person under this Act; or

(d) any other person who is deemed, or any person within a class of persons that is deemed, by a judge of a court to have a valid interest in the record, to the extent directed by the judge, if

(i) the judge is satisfied that the disclosure is desirable in the public interest for research or statistical purposes or in the interest of the proper administration of justice, and

(ii) the person gives a written undertaking not to subsequently disclose the information except in accordance with subsection (2).

(i) d'une enquête sur une infraction — à la présente loi ou à une autre loi — que l'on soupçonne, pour des motifs raisonnables, d'avoir été commise par cette personne ou relativement à laquelle elle a été arrêtée ou inculpée,

(ii) de l'administration de l'affaire visée par le dossier;

c) tout mandataire ou membre du personnel d'un ministère ou d'un organisme public canadien chargé :

(i) de l'application de mesures de rechange concernant la personne,

(ii) de l'établissement d'un rapport sur celle-ci en application de la présente loi;

d) toute autre personne — individuellement ou au titre de son appartenance à une catégorie déterminée — qui s'engage par écrit à s'abstenir de toute communication postérieure, sauf en conformité avec le paragraphe (2), et que le juge d'un tribunal estime avoir un intérêt valable dans le dossier selon la mesure qu'il détermine s'il est convaincu que la communication est souhaitable, selon le cas :

(i) dans l'intérêt public, à des fins statistiques ou de recherche,

(ii) dans l'intérêt de la bonne administration de la justice.

Subsequent disclosure for research or statistical purposes

(2) If a record is made available for inspection to any person under paragraph (1)(d) for research or statistical purposes, that person may subsequently disclose information contained in the record, but may not disclose the information in any form that would reasonably be expected to identify the person to whom it relates.

Révélation postérieure

(2) Quiconque ayant, aux termes de l'alinéa (1)d), accès à un dossier peut postérieurement communiquer l'information qui y est contenue, mais seulement d'une manière qui, normalement, ne permet pas d'identifier la personne en cause.

Information, copies

(3) A person to whom a record is authorized to be made available under this section may be given any information contained in the record and may be given a copy of any part of the record.

Communication d'information et de copies

(3) Les personnes qui peuvent, en vertu du présent article, avoir accès à un dossier ont le droit d'obtenir tout extrait de celui-ci ou toute l'information s'y trouvant.

Evidence

(4) This section does not authorize the introduction into evidence of any part of a record that would not otherwise be admissible in evidence.

Production en preuve

(4) Le présent article n'autorise pas la production en preuve des pièces d'un dossier qui, par ailleurs, ne seraient pas admissibles en preuve.

Exception for public access to court record

(5) For greater certainty, this section does not apply in respect of an alternative measures agreement, a varied alternative measures agreement or a report that is filed with the court in accordance with section 111.

Information exchange agreements

118 The competent minister may enter into an agreement with a department or agency of a government in Canada respecting the exchange of information for the purpose of administering alternative measures or preparing a report in respect of a person's compliance with an alternative measures agreement.

Regulations

119 The competent minister may make regulations respecting the alternative measures that may be used for the purposes of this Act including regulations respecting

(a) the form and manner in which and the period within which an application to participate in the alternative measures is to be made, and the information that must be contained in or accompany the application;

(b) the manner of preparing and filing reports relating to the administration of and compliance with alternative measures agreements;

(c) the types of costs, and the manner of paying the costs, associated with ensuring compliance with alternative measures agreements; and

(d) the terms and conditions that may be included in an alternative measures agreement and the effects of those terms and conditions.

Public Registry

Public registry

120 The Minister must establish a public registry for the purpose of facilitating access to documents relating to matters under this Act.

Regulations

121 The Governor in Council may, on the recommendation of the Minister after consultation with the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations respecting the form of the public registry, the keeping of the public registry and access to it.

2002, c. 29, s. 121; 2005, c. 2, s. 25.

Exception

(5) Il est entendu que le présent article ne s'applique pas à l'accord — notamment dans sa version modifiée — ou au rapport déposé auprès du tribunal en conformité avec l'article 111.

Accord d'échange d'information

118 Le ministre compétent peut conclure avec un ministère ou un organisme public canadien un accord visant l'échange d'information en vue de l'administration des mesures de rechange et de l'établissement d'un rapport concernant le respect par une personne d'un accord sur les mesures de rechange.

Règlements

119 Le ministre compétent peut prendre des règlements concernant les mesures de rechange qui peuvent être prises pour l'application de la présente loi, notamment des règlements visant :

a) les modalités de forme, de présentation et de contenu de la demande en vue de collaborer à la mise en œuvre de mesures de rechange, le délai imparti pour la présenter et les documents qui doivent l'accompagner;

b) les modalités d'établissement et de dépôt des rapports relatifs à l'application et au respect des accords;

c) les catégories et les modalités de paiement des frais entraînés par le contrôle du respect des accords;

d) les conditions dont peuvent être assortis les accords et les obligations qu'elles imposent.

Registre

Établissement du registre

120 Le ministre établit un registre public afin de faciliter l'accès aux documents traitant des questions régies par la présente loi.

Règlements

121 Sur recommandation faite par le ministre après consultation du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le gouverneur en conseil peut, par règlement, fixer les modalités de forme et de tenue du registre, ainsi que les modalités d'accès à celui-ci.

2002, ch. 29, art. 121; 2005, ch. 2, art. 25.

Protection from proceedings

122 Despite any other Act of Parliament, no civil or criminal proceedings may be brought against Her Majesty in right of Canada, the Minister, the Minister responsible for the Parks Canada Agency, the Minister of Fisheries and Oceans or any person acting on behalf of or under the direction of any of them for the full or partial disclosure in good faith of any notice or other document through the public registry or any consequences of its disclosure.

2002, c. 29, s. 122; 2005, c. 2, s. 25.

Documents to be in public registry

123 The public registry shall contain every document required to be included in the public registry by this Act and the following documents, or a copy of the following documents:

(a) regulations and orders made under this Act;

(b) agreements entered into under section 10;

(c) COSEWIC's criteria for the classification of wildlife species;

(d) status reports on wildlife species that COSEWIC has had prepared or has received with an application;

(e) the List of Wildlife Species at Risk;

(f) codes of practice, national standards or guidelines established under this Act;

(g) agreements and reports filed under section 111 or subsection 113(2) or notices that those agreements or reports have been filed in court and are available to the public; and

(h) every report made under sections 126 and 128.

Restriction

124 The Minister, on the advice of COSEWIC, may restrict the release of any information required to be included in the public registry if that information relates to the location of a wildlife species or its habitat and restricting its release would be in the best interests of the species.

Immunité

122 Malgré toute autre loi fédérale, Sa Majesté du chef du Canada de même que le ministre, le ministre responsable de l'Agence Parcs Canada et le ministre des Pêches et des Océans ainsi que les personnes qui agissent en leur nom ou sous leurs ordres bénéficient de l'immunité en matière civile ou pénale pour la communication totale ou partielle d'un avis ou autre document faite de bonne foi par la voie du registre ainsi que pour les conséquences qui en découlent.

2002, ch. 29, art. 122; 2005, ch. 2, art. 25.

Documents à mettre dans le registre

123 Le registre comporte les documents qui doivent y être mis en application de la présente loi et une copie des documents suivants :

a) les règlements, décrets et arrêtés pris en vertu de la présente loi;

b) les accords conclus en application de l'article 10;

c) les critères établis par le COSEPAC pour la classification des espèces sauvages;

d) les rapports de situation relatifs aux espèces sauvages que le COSEPAC a soit fait rédiger, soit reçu à l'appui d'une demande;

e) la Liste des espèces en péril;

f) les codes de pratique et les normes ou directives nationales élaborés sous le régime de la présente loi;

g) soit les accords — dans leurs versions successives — et les rapports visés à l'article 111 ou au paragraphe 113(2), soit un avis portant que ces accords ou rapports ont été déposés auprès du tribunal et sont donc accessibles au public;

h) tout rapport établi aux termes des articles 126 et 128.

Limitation de la communication de certains renseignements

124 Sur l'avis du COSEPAC, le ministre peut limiter la communication de tout renseignement mis dans le registre si ce renseignement concerne l'aire où se trouve une espèce sauvage ou son habitat et si la limitation de sa divulgation est à l'avantage de cette espèce.

Fees and Charges

Regulations

125 (1) The Governor in Council may, on the recommendation of the Minister and the President of the Treasury Board, after the Minister has consulted the Minister responsible for the Parks Canada Agency and the Minister of Fisheries and Oceans, make regulations

(a) prescribing the fees and charges, or the manner of determining them, that may be charged for agreements or permits under section 73, for amendments to or for the renewal of such agreements or permits, for copies of documents in the public registry and for the inclusion of a document in the public registry;

(b) exempting any person or class of persons from the requirement to pay any of those fees or charges; and

(c) generally, in respect of any condition or any other matter in relation to the payment of those fees or charges.

Recovery of fees

(2) A fee or charge required by the regulations to be paid constitutes a debt due to Her Majesty in right of Canada and may be recovered in any court of competent jurisdiction.

2002, c. 29, s. 125; 2005, c. 2, s. 26.

Frais et droits

Règlements

125 (1) Sur recommandation du ministre et du président du Conseil du Trésor, faite après consultation par le ministre du ministre responsable de l'Agence Parcs Canada et du ministre des Pêches et des Océans, le gouverneur en conseil peut prendre des règlements :

a) prévoyant les frais et droits, ou leur mode de calcul, qui peuvent être imposés pour les accords et les permis visés à l'article 73, notamment pour leur renouvellement ou modification, de même que pour la mise de tout document dans le registre ou l'obtention d'une copie d'un document qui s'y trouve;

b) exemptant certaines personnes ou catégories de personnes de l'obligation de paiement;

c) concernant toute condition ou autre question se rapportant au paiement des frais ou des droits.

Recouvrement

(2) Les frais et droits réglementaires constituent des créances de Sa Majesté du chef du Canada dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

2002, ch. 29, art. 125; 2005, ch. 2, art. 26.

Reports and Review of Act

Annual report to Parliament

126 The Minister must annually prepare a report on the administration of this Act during the preceding calendar year and must have a copy of the report tabled in each House of Parliament within the first 15 days that it is sitting after the completion of the report. The report must include a summary addressing the following matters:

(a) COSEWIC's assessments and the Minister's response to each of them;

(b) the preparation and implementation of recovery strategies, action plans and management plans;

(c) all agreements made under sections 10 to 13;

(d) all agreements entered into or renewed under section 73, all permits issued or renewed under that section and all agreements and permits amended under section 75 or exempted under section 76;

Rapports et examen de la loi

Rapport annuel au Parlement

126 Le ministre établit chaque année un rapport sur l'application de la présente loi au cours de la précédente année civile. Il le fait déposer devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant son achèvement. Ce rapport comporte un sommaire relativement aux objets suivants :

a) les évaluations faites par le COSEPAC et la réponse du ministre à chacune de ces évaluations;

b) l'élaboration et la mise en œuvre des programmes de rétablissement, des plans d'action et des plans de gestion;

c) les accords conclus en vertu des articles 10 à 13;

d) les accords conclus ou renouvelés et les permis délivrés ou renouvelés en vertu de l'article 73, les accords et les permis modifiés en vertu de l'article 75, et les exonérations prévues à l'article 76;

(e) enforcement and compliance actions taken, including the response to any requests for investigation;

(f) regulations and emergency orders made under this Act; and

(g) any other matters that the Minister considers relevant.

2002, c. 29, s. 126; 2012, c. 19, s. 169.

(e) les activités d'application et d'observation de la présente loi, y compris la suite donnée aux demandes d'enquête;

f) les règlements, décrets et arrêtés d'urgence pris en vertu de la présente loi;

g) tout autre sujet que le ministre juge pertinent.

2002, ch. 29, art. 126; 2012, ch. 19, art. 169.

Convening round table

127 (1) The Minister must, at least once every two years, convene a round table of persons interested in matters respecting the protection of wildlife species at risk in Canada to advise the Minister on those matters.

Organisation de tables rondes

127 (1) Le ministre organise au moins tous les deux ans une table ronde réunissant des personnes concernées par les questions de protection des espèces sauvages en péril au Canada et chargée de l'aviser sur ces questions.

Recommendations to be in public registry

(2) Any written recommendations from the round table must be included in the public registry.

Mise dans le registre

(2) Les recommandations faites par écrit par la table ronde et présentées au ministre sont mises dans le registre.

Response of Minister

(3) The Minister must respond to any written recommendations from the round table within 180 days after receiving them and a copy of the Minister's response must be included in the public registry.

Réponse du ministre

(3) Le ministre répond aux recommandations dans les cent quatre-vingts jours suivant leur réception. Une copie de sa réponse est mise dans le registre.

Reports on status of wildlife species

128 Five years after this section comes into force and at the end of each subsequent period of five years, the Minister must prepare a general report on the status of wildlife species. The Minister must have the report tabled in each House of Parliament within the first 15 days that it is sitting after the completion of the report.

Rapport sur la situation des espèces sauvages

128 Cinq ans après l'entrée en vigueur du présent article, et à intervalles de cinq ans par la suite, le ministre établit un rapport général sur la situation des espèces sauvages. Il le fait déposer devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant son achèvement.

Parliamentary review of Act

129 Five years after this section comes into force, a committee of the House of Commons, of the Senate or of both Houses of Parliament is to be designated or established for the purpose of reviewing this Act.

Examen de la loi

129 Cinq ans après l'entrée en vigueur du présent article, le comité de la Chambre des communes, du Sénat ou des deux chambres désigné ou constitué à cette fin entreprend l'examen de l'application de la présente loi.

Assessment of Wildlife Species Mentioned in the Schedules

Assessment of status

130 (1) COSEWIC must assess the status of each wildlife species set out in Schedule 2 or 3, and, as part of the assessment, identify existing and potential threats to the species and

(a) classify the species as extinct, extirpated, endangered, threatened or of special concern;

Évaluation des espèces sauvages figurant aux annexes

Évaluation de la situation

130 (1) Le COSEPAC évalue la situation de chaque espèce sauvage visée aux annexes 2 ou 3 ainsi que, dans le cadre de l'évaluation, signale les menaces réelles ou potentielles à son égard et établit, selon le cas :

a) que l'espèce est disparue, disparue du pays, en voie de disparition, menacée ou préoccupante;

(b) indicate that COSEWIC does not have sufficient information to classify the species; or

(c) indicate that the species is not currently at risk.

b) qu'il ne dispose pas de l'information voulue pour la classifier;

c) que l'espèce n'est pas actuellement en péril.

Time for assessment — Schedule 2

(2) In the case of a species set out in Schedule 2, the assessment must be completed within 30 days after section 14 comes into force.

Délai d'évaluation : annexe 2

(2) Dans le cas d'une espèce visée à l'annexe 2, l'évaluation doit être terminée dans les trente jours suivant l'entrée vigueur de l'article 14.

Deemed classification

(3) If an assessment of a wildlife species set out in Schedule 2 is not completed within the required time or, if there has been an extension, within the extended time, COSEWIC is deemed to have classified the species as indicated in Schedule 2.

Présomption de classification

(3) Si l'évaluation d'une espèce visée à l'annexe 2 n'est pas terminée dans le délai imparti ou prorogé, le COSEPAC est réputé avoir classifié cette espèce selon ce qui est indiqué à cette annexe.

Time for assessment — Schedule 3

(4) In the case of a species set out in Schedule 3, the assessment must be completed within one year after the competent minister requests the assessment. If there is more than one competent minister with respect to the species, they must make the request jointly.

Délai d'évaluation : annexe 3

(4) Dans le cas d'une espèce visée à l'annexe 3, l'évaluation doit être terminée dans l'année suivant la date à laquelle le ministre compétent en fait la demande. Si plusieurs ministres compétents sont responsables de l'espèce, la demande est présentée conjointement par eux.

Extension

(5) The Governor in Council may, on the recommendation of the Minister after consultation with the competent minister or ministers, by order, extend the time provided for the assessment of any species set out in Schedule 2 or 3. The Minister must include a statement in the public registry setting out the reasons for the extension.

Prorogation

(5) Sur recommandation faite par le ministre après consultation de tout ministre compétent, le gouverneur en conseil peut, par décret, proroger le délai prévu pour l'évaluation d'une espèce visée aux annexes 2 ou 3. Le ministre met dans le registre une déclaration énonçant les motifs de la prorogation.

Provisions apply

(6) Subsections 15(2) and (3) and 21(1) and section 25 apply with respect to assessments under subsection (1).

Dispositions applicables

(6) Les paragraphes 15(2) et (3) et 21(1) et l'article 25 s'appliquent à l'évaluation faite au titre du paragraphe (1).

Recent reports

(7) In making its assessment of a wildlife species, COSEWIC may take into account and rely on any report on the species that was prepared in the two-year period before this Act receives royal assent.

Rapports récents

(7) Le COSEPAC peut, pour l'évaluation d'une espèce sauvage, prendre en compte et se fonder sur tout rapport portant sur l'espèce qui a été élaboré dans les deux ans précédant la sanction de la présente loi.

Section 27 applies

131 Section 27 applies in respect of a wildlife species referred to in section 130 that COSEWIC classifies as extinct, extirpated, endangered, threatened or of special concern or that is deemed to have been so classified.

Application de l'article 27

131 L'article 27 s'applique à l'égard d'une espèce sauvage visée à l'article 130 que le COSEPAC classe comme espèce disparue, disparue du pays, en voie de disparition, menacée ou préoccupante ou qu'il est réputé avoir classée ainsi.

Time for recovery strategy

132 If a wildlife species is added to the List by the Governor in Council as the result of an assessment under section 130, the recovery strategy for the species must be prepared within three years after the listing in the case of an endangered species, and within four years in the case of a threatened species.

Time for management plan

133 If a wildlife species is added to the List by the Governor in Council as a species of special concern as the result of an assessment under section 130, the management plan for the species must be prepared within five years after the listing.

Related Amendments

134 to 141 [Amendments]

Coordinating Amendment

141.1 [Amendment]

Coming into Force

Order of Governor in Council

***142 Except for section 141.1, the provisions of this Act come into force on a day or days to be fixed by order of the Governor in Council.**

*** [Note: Section 141.1 in force on assent December 12, 2002; sections 1, 134 to 136 and 138 to 141 in force March 24, 2003, *see* SI/2003-43; sections 2 to 31, 37 to 56, 62, 65 to 76, 78 to 84, 120 to 133 and 137 in force June 5, 2003, sections 32 to 36, 57 to 61, 63, 64, 77 and 85 to 119 in force June 1, 2004, *see* SI/2003-111.]**

Délais : programme de rétablissement

132 Si l'inscription d'une espèce sauvage par le gouverneur en conseil découle d'une évaluation faite par le COSEPAC en application de l'article 130, le programme de rétablissement est élaboré dans les trois ans suivant l'inscription en ce qui concerne une espèce en voie de disparition et dans les quatre ans en ce qui concerne une espèce menacée.

Délai : plan de gestion

133 Si l'inscription d'une espèce sauvage comme espèce préoccupante par le gouverneur en conseil découle d'une évaluation faite par le COSEPAC en application de l'article 130, le plan de gestion est élaboré dans les cinq ans suivant l'inscription.

Modifications connexes

134 à 141 [Modifications]

Disposition de coordination

141.1 [Modification]

Entrée en vigueur

Décret

***142 Les dispositions de la présente loi, à l'exception de l'article 141.1, entrent en vigueur à la date ou aux dates fixées par décret.**

*** [Note : Article 141.1 en vigueur à la sanction le 12 décembre 2002; articles 1, 134 à 136 et 138 à 141 en vigueur le 24 mars 2003, *voir* TR/2003-43; articles 2 à 31, 37 à 56, 62, 65 à 76, 78 à 84, 120 à 133 et 137 en vigueur le 5 juin 2003, articles 32 à 36, 57 à 61, 63, 64, 77 et 85 à 119 en vigueur le 1er juin 2004, *voir* TR/2003-111.]**

SCHEDULE 1

(Subsections 2(1), 42(2) and 68(2))

List of Wildlife Species at Risk

PART 1

Extirpated Species

Mammals

Ferret, Black-footed (*Mustela nigripes*)
Putois d'Amérique

Walrus, Atlantic (*Odobenus rosmarus rosmarus*) Northwest Atlantic population
Morse de l'Atlantique population de l'Atlantique Nord-Ouest

Whale, Grey (*Eschrichtius robustus*) Atlantic population
Baleine grise population de l'Atlantique

Birds

Prairie-Chicken, Greater (*Tympanuchus cupido*)
Tétras des prairies

Sage-Grouse *phaios* subspecies, Greater (*Centrocercus urophasianus phaios*)
Tétras des armoises de la sous-espèce phaios

Amphibians

Salamander, Eastern Tiger (*Ambystoma tigrinum*) Carolinian population
Salamandre tigrée de l'Est population carolinienne

Reptiles

Gophersnake, Pacific (*Pituophis catenifer catenifer*)
Couleuvre à nez mince du Pacifique

Lizard, Pygmy Short-horned (*Phrynosoma douglasii*)
Iguane pygmée à cornes courtes

Rattlesnake, Timber (*Crotalus horridus*)
Crotale des bois

Turtle, Pacific Pond (*Actinemys marmorata*)
Tortue de l'Ouest

Fish

Bass, Striped (*Morone saxatilis*) St. Lawrence Estuary population
Bar rayé population de l'estuaire du Saint-Laurent

Chub, Gravel (*Erimystax x-punctatus*)
Gravelier

Paddlefish (*Polyodon spathula*)
Spatulaire

Molluscs

Snail, Puget Oregonian (*Cryptomastix devia*)
Escargot du Puget

Wedgemussel, Dwarf (*Alasmidonta heterodon*)
Alasmidonte naine

ANNEXE 1

(paragraphes 2(1), 42(2) et 68(2))

Liste des espèces en péril

PARTIE 1

Espèces disparues du pays

Mammifères

Baleine grise (*Eschrichtius robustus*) population de l'Atlantique
Whale, Grey Atlantic population

Morse de l'Atlantique (*Odobenus rosmarus rosmarus*) population de l'Atlantique Nord-Ouest
Walrus, Atlantic Northwest Atlantic population

Putois d'Amérique (*Mustela nigripes*)
Ferret, Black-footed

Oiseaux

Tétras des armoises de la sous-espèce *phaios* (*Centrocercus urophasianus phaios*)
Sage-Grouse phaios subspecies, Greater

Tétras des prairies (*Tympanuchus cupido*)
Prairie-Chicken, Greater

Amphibiens

Salamandre tigrée de l'Est (*Ambystoma tigrinum*) population carolinienne
Salamander, Eastern Tiger Carolinian population

Reptiles

Couleuvre à nez mince du Pacifique (*Pituophis catenifer catenifer*)
Gophersnake, Pacific

Crotale des bois (*Crotalus horridus*)
Rattlesnake, Timber

Iguane pygmée à cornes courtes (*Phrynosoma douglasii*)
Lizard, Pygmy Short-horned

Tortue de l'Ouest (*Actinemys marmorata*)
Turtle, Pacific Pond

Poissons

Bar rayé (*Morone saxatilis*) population de l'estuaire du Saint-Laurent
Bass, Striped St. Lawrence Estuary population

Gravelier (*Erimystax x-punctatus*)
Chub, Gravel

Spatulaire (*Polyodon spathula*)
Paddlefish

Mollusques

Alasmidonte naine (*Alasmidonta heterodon*)
Wedgemussel, Dwarf

Escargot du Puget (*Cryptomastix devia*)
Snail, Puget Oregonian

Arthropods

Blue, Karner (*Lycaeides melissa samuelis*)
Bleu mélissa

Burying Beetle, American (*Nicrophorus americanus*)
Nécrophore d'Amérique

Elfin, Frosted (*Callophrys irus*)
Lutin givré

Marble, Island (*Euchloe ausonides insulanus*)
Marbré insulaire

Plants

Lupine, Oregon (*Lupinus oreganus*)
Lupin d'Orégon

Spring Blue-eyed Mary (*Collinsia verna*)
Collinsie printanière

Tick-trefoil, Illinois (*Desmodium illinoense*)
Desmodie d'Illinois

Mosses

Moss, Incurved Grizzled (*Ptychomitrium incurvum*)
Ptychomitre à feuilles incurvées

Arthropodes

Bleu mélissa (*Lycaeides melissa samuelis*)
Blue, Karner

Lutin givré (*Callophrys irus*)
Elfin, Frosted

Marbré insulaire (*Euchlœ ausonides insulanus*)
Marble, Island

Nécrophore d'Amérique (*Nicrophorus americanus*)
Burying Beetle, American

Plantes

Collinsie printanière (*Collinsia verna*)
Spring Blue-eyed Mary

Desmodie d'Illinois (*Desmodium illinœnse*)
Tick-trefoil, Illinois

Lupin d'Orégon (*Lupinus oreganus*)
Lupine, Oregon

Mousses

Ptychomitre à feuilles incurvées (*Ptychomitrium incurvum*)
Moss, Incurved Grizzled

PART 2

Endangered Species

Mammals

Badger *jacksoni* subspecies, American (*Taxidea taxus jacksoni*)
Blaireau d'Amérique de la sous-espèce jacksoni

Badger *jeffersonii* subspecies, American (*Taxidea taxus jeffersonii*) Eastern population
Blaireau d'Amérique de la sous-espèce jeffersonii population de l'Est

Badger *jeffersonii* subspecies, American (*Taxidea taxus jeffersonii*) Western population
Blaireau d'Amérique de la sous-espèce jeffersonii population de l'Ouest

Bat, Tri-coloured (*Perimyotis subflavus*)
Pipistrelle de l'Est

Caribou, Peary (*Rangifer tarandus pearyi*)
Caribou de Peary

Caribou, Woodland (*Rangifer tarandus caribou*) Atlantic — Gaspésie population
Caribou des bois population de la Gaspésie — Atlantique

Kangaroo Rat, Ord's (*Dipodomys ordii*)
Rat kangourou d'Ord

Marmot, Vancouver Island (*Marmota vancouverensis*)
Marmotte de l'île Vancouver

Mole, Townsend's (*Scapanus townsendii*)
Taupe de Townsend

Mouse *dychei* subspecies, Western Harvest (*Reithrodontomys megalotis dychei*)
Souris des moissons de la sous-espèce dychei

PARTIE 2

Espèces en voie de disparition

Mammifères

Baleine à bec commune (*Hyperoodon ampullatus*) population du plateau néo-écossais
Whale, Northern Bottlenose Scotian Shelf population

Baleine noire de l'Atlantique Nord (*Eubalaena glacialis*)
Whale, North Atlantic Right

Baleine noire du Pacifique Nord (*Eubalaena japonica*)
Whale, North Pacific Right

Béluga (*Delphinapterus leucas*) population de l'estuaire du Saint-Laurent
Whale, Beluga St. Lawrence Estuary population

Blaireau d'Amérique de la sous-espèce *jacksoni* (*Taxidea taxus jacksoni*)
Badger jacksoni subspecies, American

Blaireau d'Amérique de la sous-espèce *jeffersonii* (*Taxidea taxus jeffersonii*) population de l'Est
Badger jeffersonii subspecies, American Eastern population

Blaireau d'Amérique de la sous-espèce *jeffersonii* (*Taxidea taxus jeffersonii*) population de l'Ouest
Badger jeffersonii subspecies, American Western population

Caribou de Peary (*Rangifer tarandus pearyi*)
Caribou, Peary

Caribou des bois (*Rangifer tarandus caribou*) population de la Gaspésie — Atlantique
Caribou, Woodland Atlantic — Gaspésie population

Chauve-souris nordique (*Myotis septentrionalis*)
Myotis, Northern

Myotis, Little Brown (*Myotis lucifugus*)
Petite chauve-souris brune

Myotis, Northern (*Myotis septentrionalis*)
Chauve-souris nordique

Seal Lacs des Loups Marins subspecies, Harbour (*Phoca vitulina mellonae*)
Phoque commun de la sous-espèce des Lacs des Loups Marins

Shrew, Pacific Water (*Sorex bendirii*)
Musaraigne de Bendire

Whale, Beluga (*Delphinapterus leucas*) St. Lawrence Estuary population
Béluga population de l'estuaire du Saint-Laurent

Whale, Blue (*Balaenoptera musculus*) Atlantic population
Rorqual bleu population de l'Atlantique

Whale, Blue (*Balaenoptera musculus*) Pacific population
Rorqual bleu population du Pacifique

Whale, Killer (*Orcinus orca*) Northeast Pacific southern resident population
Épaulard population résidente du sud du Pacifique Nord-Est

Whale, North Atlantic Right (*Eubalaena glacialis*)
Baleine noire de l'Atlantique Nord

Whale, North Pacific Right (*Eubalaena japonica*)
Baleine noire du Pacifique Nord

Whale, Northern Bottlenose (*Hyperoodon ampullatus*) Scotian Shelf population
Baleine à bec commune, population du plateau néo-écossais

Whale, Sei (*Balaenoptera borealis*) Pacific population
Rorqual boréal population du Pacifique

Birds

Bobwhite, Northern (*Colinus virginianus*)
Colin de Virginie

Chat *auricollis* subspecies, Yellow-breasted (*Icteria virens auricollis*) Southern Mountain population
Paruline polyglotte de la sous-espèce auricollis population des montagnes du Sud

Chat *virens* subspecies, Yellow-breasted (*Icteria virens virens*)
Paruline polyglotte de la sous-espèce virens

Crane, Whooping (*Grus americana*)
Grue blanche

Crossbill *percna* subspecies, Red (*Loxia curvirostra percna*)
Bec-croisé des sapins de la sous-espèce percna

Curlew, Eskimo (*Numenius borealis*)
Courlis esquimau

Flycatcher, Acadian (*Empidonax virescens*)
Moucherolle vert

Grebe, Horned (*Podiceps auritus*) Magdalen Islands population
Grèbe esclavon population des îles de la Madeleine

Gull, Ivory (*Pagophila eburnea*)
Mouette blanche

Épaulard (*Orcinus orca*) population résidente du sud du Pacifique Nord-Est
Whale, Killer Northeast Pacific southern resident population

Marmotte de l'île Vancouver (*Marmota vancouverensis*)
Marmot, Vancouver Island

Musaraigne de Bendire (*Sorex bendirii*)
Shrew, Pacific Water

Petite chauve-souris brune (*Myotis lucifugus*)
Myotis, Little Brown

Phoque commun de la sous-espèce des Lacs des Loups Marins (*Phoca vitulina mellonae*)
Seal Lacs des Loups Marins subspecies, Harbour

Pipistrelle de l'Est (*Perimyotis subflavus*)
Bat, Tri-coloured

Rat kangourou d'Ord (*Dipodomys ordii*)
Kangaroo Rat, Ord's

Rorqual bleu (*Balaenoptera musculus*) population de l'Atlantique
Whale, Blue Atlantic population

Rorqual bleu (*Balaenoptera musculus*) population du Pacifique
Whale, Blue Pacific population

Rorqual boréal (*Balaenoptera borealis*) population du Pacifique
Whale, Sei Pacific population

Souris des moissons de la sous-espèce *dychei* (*Reithrodontomys megalotis dychei*)
Mouse dychei subspecies, Western Harvest

Taupe de Townsend (*Scapanus townsendii*)
Mole, Townsend's

Oiseaux

Alouette hausse-col de la sous-espèce *strigata* (*Eremophila alpestris strigata*)
Lark strigata subspecies, Horned

Bécasseau maubèche de la sous-espèce *rufa* (*Calidris canutus rufa*)
Knot rufa subspecies, Red

Bec-croisé des sapins de la sous-espèce *percna* (*Loxia curvirostra percna*)
Crossbill percna subspecies, Red

Bruant de Henslow (*Ammodramus henslowii*)
Sparrow, Henslow's

Bruant vespéral de la sous-espèce *affinis* (*Pocœcetes gramineus affinis*)
Sparrow affinis subspecies, Vesper

Chevêche des terriers (*Athene cunicularia*)
Owl, Burrowing

Chouette tachetée de la sous-espèce *caurina* (*Strix occidentalis caurina*)
Owl caurina subspecies, Spotted

Colin de Virginie (*Colinus virginianus*)
Bobwhite, Northern

Courlis esquimau (*Numenius borealis*)
Curlew, Eskimo

Knot *rufa* subspecies, Red (*Calidris canutus rufa*)
Bécasseau maubèche de la sous-espèce rufa

Lark *strigata* subspecies, Horned (*Eremophila alpestris strigata*)
Alouette hausse-col de la sous-espèce strigata

Owl, Barn (*Tyto alba*) Eastern population
Effraie des clochers population de l'Est

Owl, Burrowing (*Athene cunicularia*)
Chevêche des terriers

Owl *caurina* subspecies, Spotted (*Strix occidentalis caurina*)
Chouette tachetée de la sous-espèce caurina

Plover, Mountain (*Charadrius montanus*)
Pluvier montagnard

Plover *circumcinctus* subspecies, Piping (*Charadrius melodus circumcinctus*)
Pluvier siffleur de la sous-espèce circumcinctus

Plover *melodus* subspecies, Piping (*Charadrius melodus melodus*)
Pluvier siffleur de la sous-espèce melodus

Rail, King (*Rallus elegans*)
Râle élégant

Sage-Grouse *urophasianus* subspecies, Greater (*Centrocercus urophasianus urophasianus*)
Tétras des armoises de la sous-espèce urophasianus

Sapsucker, Williamson's (*Sphyrapicus thyroideus*)
Pic de Williamson

Shrike *migrans* subspecies, Loggerhead (*Lanius ludovicianus migrans*)
Pie-grièche migratrice de la sous-espèce migrans

Sparrow *affinis* subspecies, Vesper (*Pooecetes gramineus affinis*)
Bruant vespéral de la sous-espèce affinis

Sparrow, Henslow's (*Ammodramus henslowii*)
Bruant de Henslow

Tern, Roseate (*Sterna dougallii*)
Sterne de Dougall

Thrasher, Sage (*Oreoscoptes montanus*)
Moqueur des armoises

Warbler, Cerulean (*Setophaga cerulea*)
Paruline azurée

Warbler, Kirtland's (*Dendroica kirtlandii*)
Paruline de Kirtland

Warbler, Prothonotary (*Protonotaria citrea*)
Paruline orangée

Woodpecker, White-headed (*Picoides albolarvatus*)
Pic à tête blanche

Amphibians

Frog, Blanchard's Cricket (*Acris blanchardi*)
Rainette grillon de Blanchard

Frog, Northern Leopard (*Lithobates pipiens*) Rocky Mountain population
Grenouille léopard population des Rocheuses

Frog, Oregon Spotted (*Rana pretiosa*)
Grenouille maculée de l'Oregon

Effraie des clochers (*Tyto alba*) population de l'Est
Owl, Barn Eastern population

Grèbe esclavon (*Podiceps auritus*) population des îles de la Madeleine
Grebe, Horned Magdalen Islands population

Grue blanche (*Grus americana*)
Crane, Whooping

Moqueur des armoises (*Oreoscoptes montanus*)
Thrasher, Sage

Moucherolle vert (*Empidonax virescens*)
Flycatcher, Acadian

Mouette blanche (*Pagophila eburnea*)
Gull, Ivory

Paruline azurée (*Setophaga cerulea*)
Warbler, Cerulean

Paruline de Kirtland (*Dendroica kirtlandii*)
Warbler, Kirtland's

Paruline orangée (*Protonotaria citrea*)
Warbler, Prothonotary

Paruline polyglotte de la sous-espèce *auricollis* (*Icteria virens auricollis*) population des montagnes du Sud
Chat auricollis subspecies, Yellow-breasted Southern Mountain population

Paruline polyglotte de la sous-espèce *virens* (*Icteria virens virens*)
Chat virens subspecies, Yellow-breasted

Pic à tête blanche (*Picoides albolarvatus*)
Woodpecker, White-headed

Pic de Williamson (*Sphyrapicus thyroideus*)
Sapsucker, Williamson's

Pie-grièche migratrice de la sous-espèce *migrans* (*Lanius ludovicianus migrans*)
Shrike migrans subspecies, Loggerhead

Pluvier montagnard (*Charadrius montanus*)
Plover, Mountain

Pluvier siffleur de la sous-espèce *circumcinctus* (*Charadrius melodus circumcinctus*)
Plover circumcinctus subspecies, Piping

Pluvier siffleur de la sous-espèce *melodus* (*Charadrius melodus melodus*)
Plover melodus subspecies, Piping

Râle élégant (*Rallus elegans*)
Rail, King

Sterne de Dougall (*Sterna dougallii*)
Tern, Roseate

Tétras des armoises de la sous-espèce *urophasianus* (*Centrocercus urophasianus urophasianus*)
Sage-Grouse urophasianus subspecies, Greater

Amphibiens

Crapaud de Fowler (*Anaxyrus fowleri*)
Toad, Fowler's

Grenouille léopard (*Lithobates pipiens*) population des Rocheuses
Frog, Northern Leopard Rocky Mountain population

Grenouille maculée de l'Oregon (*Rana pretiosa*)
Frog, Oregon Spotted

Salamander, Allegheny Mountain Dusky (*Desmognathus ochrophaeus*) Carolinian population
Salamandre sombre des montagnes population carolinienne

Salamander, Eastern Tiger (*Ambystoma tigrinum*) Prairie population
Salamandre tigrée de l'Est population des Prairies

Salamander, Jefferson (*Ambystoma jeffersonianum*)
Salamandre de Jefferson

Salamander, Northern Dusky (*Desmognathus fuscus*) Carolinian population
Salamandre sombre du Nord population carolinienne

Salamander, Small-mouthed (*Ambystoma texanum*)
Salamandre à nez court

Salamander, Western Tiger (*Ambystoma mavortium*) Southern Mountain population
Salamandre tigrée de l'Ouest population des montagnes du Sud

Toad, Fowler's (*Anaxyrus fowleri*)
Crapaud de Fowler

Reptiles

Foxsnake, Eastern (*Pantherophis gloydi*) Carolinian population
Couleuvre fauve de l'Est population carolinienne

Foxsnake, Eastern (*Pantherophis gloydi*) Great Lakes / St. Lawrence population
Couleuvre fauve de l'Est population des Grands Lacs et du Saint-Laurent

Gartersnake, Butler's (*Thamnophis butleri*)
Couleuvre à petite tête

Lizard, Greater Short-horned (*Phrynosoma hernandesi*)
Grand iguane à petites cornes

Massasauga (*Sistrurus catenatus*) Carolinian population
Massasauga population carolinienne

Nightsnake, Desert (*Hypsiglena chlorophaea*)
Couleuvre nocturne du désert

Queensnake (*Regina septemvittata*)
Couleuvre royale

Racer, Blue (*Coluber constrictor foxii*)
Couleuvre agile bleue

Ratsnake, Gray (*Pantherophis spiloides*) Carolinian population
Couleuvre obscure population carolinienne

Sea Turtle, Leatherback (*Dermochelys coriacea*) Atlantic population
Tortue luth population de l'Atlantique

Sea Turtle, Leatherback (*Dermochelys coriacea*) Pacific population
Tortue luth population du Pacifique

Sea Turtle, Loggerhead (*Caretta caretta*)
Tortue caouanne

Skink, Five-lined (*Plestiodon fasciatus*) Carolinian population
Scinque pentaligne population carolinienne

Skink, Prairie (*Plestiodon septentrionalis*)
Scinque des Prairies

Rainette grillon de Blanchard (*Acris blanchardi*)
Frog, Blanchard's Cricket

Salamandre à nez court (*Ambystoma texanum*)
Salamander, Small-mouthed

Salamandre de Jefferson (*Ambystoma jeffersonianum*)
Salamander, Jefferson

Salamandre sombre des montagnes (*Desmognathus ochrophaeus*) population carolinienne
Salamander, Allegheny Mountain Dusky Carolinian population

Salamandre sombre du Nord (*Desmognathus fuscus*) population carolinienne
Salamander, Northern Dusky Carolinian population

Salamandre tigrée de l'Est (*Ambystoma tigrinum*) population des Prairies
Salamander, Eastern Tiger Prairie population

Salamandre tigrée de l'Ouest (*Ambystoma mavortium*) population des montagnes du Sud
Salamander, Western Tiger Southern Mountain population

Reptiles

Couleuvre agile bleue (*Coluber constrictor foxi*)
Racer, Blue

Couleuvre à petite tête (*Thamnophis butleri*)
Gartersnake, Butler's

Couleuvre à queue fine (*Contia tenuis*)
Snake, Sharp-tailed

Couleuvre d'eau du lac Érié (*Nerodia sipedon insularum*)
Watersnake, Lake Erie

Couleuvre fauve de l'Est (*Pantherophis gloydi*) population carolinienne
Foxsnake, Eastern Carolinian population

Couleuvre fauve de l'Est (*Pantherophis gloydi*) population des Grands Lacs et du Saint-Laurent
Foxsnake, Eastern Great Lakes / St. Lawrence population

Couleuvre nocturne du désert (*Hypsiglena chlorophaea*)
Nightsnake, Desert

Couleuvre obscure (*Pantherophis spiloides*) population carolinienne
Ratsnake, Gray Carolinian population

Couleuvre royale (*Regina septemvittata*)
Queensnake

Grand iguane à petites cornes (*Phrynosoma hernandesi*)
Lizard, Greater Short-horned

Massasauga (*Sistrurus catenatus*) population carolinienne
Massasauga Carolinian population

Scinque des Prairies (*Plestiodon septentrionalis*)
Skink, Prairie

Scinque pentaligne (*Plestiodon fasciatus*) population carolinienne
Skink, Five-lined Carolinian population

Tortue caouanne (*Caretta caretta*)
Sea Turtle, Loggerhead

Snake, Sharp-tailed (*Contia tenuis*)
Couleuvre à queue fine

Turtle, Blanding's (*Emydoidea blandingii*) Nova Scotia population
Tortue mouchetée population de la Nouvelle-Écosse

Turtle, Spotted (*Clemmys guttata*)
Tortue ponctuée

Turtle, Western Painted (*Chrysemys picta bellii*) Pacific Coast population
Tortue peinte de l'Ouest, population de la côte du Pacifique

Watersnake, Lake Erie (*Nerodia sipedon insularum*)
Couleuvre d'eau du lac Érié

Fish

Chubsucker, Lake (*Erimyzon sucetta*)
Sucet de lac

Cisco, Shortnose (*Coregonus reighardi*)
Cisco à museau court

Cisco, Spring (*Coregonus* sp.)
Cisco de printemps

Dace, Nooksack (*Rhinichthys cataractae* ssp.)
Naseux de la Nooksack

Dace, Redside (*Clinostomus elongatus*)
Méné long

Dace, Speckled (*Rhinichthys osculus*)
Naseux moucheté

Lamprey, Western Brook (*Lampetra richardsoni*) Morrison Creek population
Lamproie de l'ouest population du ruisseau Morrison

Madtom, Northern (*Noturus stigmosus*)
Chat-fou du Nord

Redhorse, Copper (*Moxostoma hubbsi*)
Chevalier cuivré

Salmon, Atlantic (*Salmo salar*) Inner Bay of Fundy population
Saumon atlantique population de l'intérieur de la baie de Fundy

Shark, Basking (*Cetorhinus maximus*) Pacific population
Pèlerin population du Pacifique

Shark, White (*Carcharodon carcharias*) Atlantic population
Grand requin blanc population de l'Atlantique

Shiner, Pugnose (*Notropis anogenus*)
Méné camus

Stickleback, Enos Lake Benthic Threespine (*Gasterosteus aculeatus*)
Épinoche à trois épines benthique du lac Enos

Stickleback, Enos Lake Limnetic Threespine (*Gasterosteus aculeatus*)
Épinoche à trois épines limnétique du lac Enos

Stickleback, Misty Lake Lentic Threespine (*Gasterosteus aculeatus*)
Épinoche à trois épines lentique du lac Misty

Tortue luth (*Dermochelys coriacea*) population de l'Atlantique
Sea Turtle, Leatherback Atlantic population

Tortue luth (*Dermochelys coriacea*) population du Pacifique
Sea Turtle, Leatherback Pacific population

Tortue mouchetée (*Emydoidea blandingii*) population de la Nouvelle-Écosse
Turtle, Blanding's Nova Scotia population

Tortue peinte de l'Ouest (*Chrysemys picta bellii*) population de la côte du Pacifique
Turtle, Western Painted Pacific Coast population

Tortue ponctuée (*Clemmys guttata*)
Turtle, Spotted

Poissons

Chat-fou du Nord (*Noturus stigmosus*)
Madtom, Northern

Chevalier cuivré (*Moxostoma hubbsi*)
Redhorse, Copper

Cisco à museau court (*Coregonus reighardi*)
Cisco, Shortnose

Cisco de printemps (*Coregonus* sp.)
Cisco, Spring

Corégone de l'Atlantique (*Coregonus huntsmani*)
Whitefish, Atlantic

Épinoche à trois épines benthique du lac Enos (*Gasterosteus aculeatus*)
Stickleback, Enos Lake Benthic Threespine

Épinoche à trois épines benthique du lac Paxton (*Gasterosteus aculeatus*)
Stickleback, Paxton Lake Benthic Threespine

Épinoche à trois épines benthique du ruisseau Vananda (*Gasterosteus aculeatus*)
Stickleback, Vananda Creek Benthic Threespine

Épinoche à trois épines lentique du lac Misty (*Gasterosteus aculeatus*)
Stickleback, Misty Lake Lentic Threespine

Épinoche à trois épines limnétique du lac Enos (*Gasterosteus aculeatus*)
Stickleback, Enos Lake Limnetic Threespine

Épinoche à trois épines limnétique du lac Paxton (*Gasterosteus aculeatus*)
Stickleback, Paxton Lake Limnetic Threespine

Épinoche à trois épines limnétique du ruisseau Vananda (*Gasterosteus aculeatus*)
Stickleback, Vananda Creek Limnetic Threespine

Épinoche à trois épines lotique du lac Misty (*Gasterosteus aculeatus*)
Stickleback, Misty Lake Lotic Threespine

Esturgeon blanc (*Acipenser transmontanus*) population de la rivière Kootenay
Sturgeon, White Kootenay River population

Esturgeon blanc (*Acipenser transmontanus*) population de la rivière Nechako
Sturgeon, White Nechako River population

Stickleback, Misty Lake Lotic Threespine (*Gasterosteus aculeatus*)
Épinoche à trois épines lotique du lac Misty

Stickleback, Paxton Lake Benthic Threespine (*Gasterosteus aculeatus*)
Épinoche à trois épines benthique du lac Paxton

Stickleback, Paxton Lake Limnetic Threespine (*Gasterosteus aculeatus*)
Épinoche à trois épines limnétique du lac Paxton

Stickleback, Vananda Creek Benthic Threespine (*Gasterosteus aculeatus*)
Épinoche à trois épines benthique du ruisseau Vananda

Stickleback, Vananda Creek Limnetic Threespine (*Gasterosteus aculeatus*)
Épinoche à trois épines limnétique du ruisseau Vananda

Sturgeon, White (*Acipenser transmontanus*) Kootenay River population
Esturgeon blanc population de la rivière Kootenay

Sturgeon, White (*Acipenser transmontanus*) Nechako River population
Esturgeon blanc population de la rivière Nechako

Sturgeon, White (*Acipenser transmontanus*) Upper Columbia River population
Esturgeon blanc population du cours supérieur du Columbia

Sturgeon, White (*Acipenser transmontanus*) Upper Fraser River population
Esturgeon blanc population du cours supérieur du Fraser

Sucker, Salish (*Catostomus catostomus* ssp.)
Meunier de Salish

Whitefish, Atlantic (*Coregonus huntsmani*)
Corégone de l'Atlantique

Esturgeon blanc (*Acipenser transmontanus*) population du cours supérieur du Columbia
Sturgeon, White Upper Columbia River population

Esturgeon blanc (*Acipenser transmontanus*) population du cours supérieur du Fraser
Sturgeon, White Upper Fraser River population

Grand requin blanc (*Carcharodon carcharias*) population de l'Atlantique
Shark, White Atlantic population

Lamproie de l'ouest (*Lampetra richardsoni*) population du ruisseau Morrison
Lamprey, Western Brook Morrison Creek population

Méné camus (*Notropis anogenus*)
Shiner, Pugnose

Méné long (*Clinostomus elongatus*)
Dace, Redside

Meunier de Salish (*Catostomus catostomus* ssp.)
Sucker, Salish

Naseux de la Nooksack (*Rhinichthys cataractae* ssp.)
Dace, Nooksack

Naseux moucheté (*Rhinichthys osculus*)
Dace, Speckled

Pèlerin (*Cetorhinus maximus*) population du Pacifique
Shark, Basking Pacific population

Saumon atlantique (*Salmo salar*) population de l'intérieur de la baie de Fundy
Salmon, Atlantic Inner Bay of Fundy population

Sucet de lac (*Erimyzon sucetta*)
Chubsucker, Lake

Molluscs

Abalone, Northern (*Haliotis kamtschatkana*)
Ormeau nordique

Bean, Rayed (*Villosa fabalis*)
Villeuse haricot

Forestsnail, Oregon (*Allogona townsendiana*)
Escargot-forestier de Townsend

Hickorynut, Round (*Obovaria subrotunda*)
Obovarie ronde

Kidneyshell (*Ptychobranchus fasciolaris*)
Ptychobranche réniforme

Mussel, Mapleleaf (*Quadrula quadrula*) Saskatchewan – Nelson population
Mulette feuille d'érable population de la Saskatchewan – Nelson

Mussel, Rainbow (*Villosa iris*)
Villeuse irisée

Mussel, Salamander (*Simpsonaias ambigua*)
Mulette du Necture

Physa, Hotwater (*Physella wrighti*)
Physe d'eau chaude

Pigtoe, Round (*Pleurobema sintoxia*)
Pleurobème écarlate

Mollusques

Épioblasme tricorne (*Epioblasma triquetra*)
Snuffbox

Épioblasme ventrue (*Epioblasma torulosa rangiana*)
Riffleshell, Northern

Escargot-forestier de Townsend (*Allogona townsendiana*)
Forestsnail, Oregon

Ligumie pointue (*Ligumia nasuta*)
Pondmussel, Eastern

Limace-prophyse bleu-gris (*Prophysaon cœruleum*)
Slug, Blue-grey Taildropper

Mulette du Necture (*Simpsonaias ambigua*)
Mussel, Salamander

Mulette feuille d'érable (*Quadrula quadrula*) population de la Saskatchewan – Nelson
Mussel, Mapleleaf Saskatchewan – Nelson population

Obovarie ronde (*Obovaria subrotunda*)
Hickorynut, Round

Ormeau nordique (*Haliotis kamtschatkana*)
Abalone, Northern

Physe d'eau chaude (*Physella wrighti*)
Physa, Hotwater

Pondmussel, Eastern (*Ligumia nasuta*)
Ligumie pointue

Riffleshell, Northern (*Epioblasma torulosa rangiana*)
Épioblasme ventrue

Slug, Blue-grey Taildropper (*Prophysaon coeruleum*)
Limace-prophyse bleu-gris

Snail, Banff Springs (*Physella johnsoni*)
Physe des fontaines de Banff

Snuffbox (*Epioblasma triquetra*)
Épioblasme tricorne

Arthropods

Blue, Island (*Plebejus saepiolus insulanus*)
Bleu insulaire

Borer, Aweme (*Papaipema aweme*)
Perce-tige d'Aweme

Buckmoth, Bogbean (*Hemileuca* sp.)
Hémileucin du ményanthe

Bumble Bee, Gypsy Cuckoo (*Bombus bohemicus*)
Psithyre bohémien

Bumble Bee, Rusty-patched (*Bombus affinis*)
Bourdon à tache rousse

Checkerspot, Taylor's (*Euphydryas editha taylori*)
Damier de Taylor

Clubtail, Olive (*Stylurus olivaceus*)
Gomphe olive

Clubtail, Rapids (*Gomphus quadricolor*)
Gomphe des rapides

Clubtail, Riverine (*Stylurus amnicola*) Great Lakes Plains population
Gomphe riverain population des plaines des Grands Lacs

Clubtail, Skillet (*Gomphus ventricosus*)
Gomphe ventru

Crawling Water Beetle, Hungerford's (*Brychius hungerfordi*)
Haliplide de Hungerford

Cuckoo Bee, Macropis (*Epeoloides pilosulus*)
Abeille-coucou de Macropis

Diving Beetle, Bert's Predaceous (*Sanfilippodytes bertae*)
Hydropore de Bertha

Duskywing, Eastern Persius (*Erynnis persius persius*)
Hespérie Persius de l'Est

Efferia, Okanagan (*Efferia okanagana*)
Asile de l'Okanagan

Emerald, Hine's (*Somatochlora hineana*)
Cordulie de Hine

Flower Moth, White (*Schinia bimatris*)
Héliotin blanc satiné

Gold-edged Gem (*Schinia avemensis*)
Héliotin d'Aweme

Hairstreak, Behr's (*Satyrium behrii*)
Porte-queue de Behr

Hairstreak, Half-moon (*Satyrium semiluna*)
Porte-queue demi-lune

Physe des fontaines de Banff (*Physella johnsoni*)
Snail, Banff Springs

Pleurobème écarlate (*Pleurobema sintoxia*)
Pigtoe, Round

Ptychobranche réniforme (*Ptychobranchus fasciolaris*)
Kidneyshell

Villeuse haricot (*Villosa fabalis*)
Bean, Rayed

Villeuse irisée (*Villosa iris*)
Mussel, Rainbow

Arthropodes

Abeille-coucou de Macropis (*Epeoloides pilosulus*)
Cuckoo Bee, Macropis

Asile de l'Okanagan (*Efferia okanagana*)
Efferia, Okanagan

Bleu insulaire (*Plebejus saepiolus insulanus*)
Blue, Island

Bourdon à tache rousse (*Bombus affinis*)
Bumble Bee, Rusty-patched

Cicindèle des galets (*Cicindela marginipennis*)
Tiger Beetle, Cobblestone

Cicindèle de Wallis (*Cicindela parowana wallisi*)
Tiger Beetle, Wallis' Dark Saltflat

Cicindèle verte des pinèdes (*Cicindela patruela*)
Tiger Beetle, Northern Barrens

Cordulie de Hine (*Somatochlora hineana*)
Emerald, Hine's

Damier de Taylor (*Euphydryas editha taylori*)
Checkerspot, Taylor's

Fausse-teigne à cinq points du yucca (*Prodoxus quinquepunctellus*)
Moth, Five-spotted Bogus Yucca

Gomphe des rapides (*Gomphus quadricolor*)
Clubtail, Rapids

Gomphe olive (*Stylurus olivaceus*)
Clubtail, Olive

Gomphe riverain (*Stylurus amnicola*) population des plaines des Grands Lacs
Clubtail, Riverine Great Lakes Plains population

Gomphe ventru (*Gomphus ventricosus*)
Clubtail, Skillet

Haliplide de Hungerford (*Brychius hungerfordi*)
Crawling Water Beetle, Hungerford's

Héliotin blanc satiné (*Schinia bimatris*)
Flower Moth, White

Héliotin d'Aweme (*Schinia avemensis*)
Gold-edged Gem

Hémileucin du ményanthe (*Hemileuca* sp.)
Buckmoth, Bogbean

Hespérie du Dakota (*Hesperia dacotae*)
Skipper, Dakota

Hespérie Ottoé (*Hesperia ottoe*)
Skipper, Ottoe

Hespérie Persius de l'Est (*Erynnis persius persius*)
Duskywing, Eastern Persius

Metalmark, Mormon (*Apodemia mormo*) Southern Mountain population
Mormon population des montagnes du Sud

Moth, Dusky Dune (*Copablepharon longipenne*)
Noctuelle sombre des dunes

Moth, Edwards' Beach (*Anarta edwardsii*)
Noctuelle d'Edwards

Moth, Five-spotted Bogus Yucca (*Prodoxus quinquepunctellus*)
Fausse-teigne à cinq points du yucca

Moth, Non-pollinating Yucca (*Tegeticula corruptrix*)
Teigne tricheuse du yucca

Moth, Sand-verbena (*Copablepharon fuscum*)
Noctuelle de l'abronie

Moth, Yucca (*Tegeticula yuccasella*)
Teigne du yucca

Ringlet, Maritime (*Coenonympha nipisiquit*)
Satyre fauve des Maritimes

Skipper, Dakota (*Hesperia dacotae*)
Hespérie du Dakota

Skipper, Ottoe (*Hesperia ottoe*)
Hespérie Ottoé

Tiger Beetle, Cobblestone (*Cicindela marginipennis*)
Cicindèle des galets

Tiger Beetle, Northern Barrens (*Cicindela patruela*)
Cicindèle verte des pinèdes

Tiger Beetle, Wallis' Dark Saltflat (*Cicindela parowana wallisi*)
Cicindèle de Wallis

Hydropore de Bertha (*Sanfilippodytes bertae*)
Diving Beetle, Bert's Predaceous

Mormon (*Apodemia mormo*) population des montagnes du Sud
Metalmark, Mormon Southern Mountain population

Noctuelle d'Edwards (*Anarta edwardsii*)
Moth, Edwards' Beach

Noctuelle de l'abronie (*Copablepharon fuscum*)
Moth, Sand-verbena

Noctuelle sombre des dunes (*Copablepharon longipenne*)
Moth, Dusky Dune

Perce-tige d'Aweme (*Papaipema aweme*)
Borer, Aweme

Porte-queue de Behr (*Satyrium behrii*)
Hairstreak, Behr's

Porte-queue demi-lune (*Satyrium semiluna*)
Hairstreak, Half-moon

Psithyre bohémien (*Bombus bohemicus*)
Bumble Bee, Gypsy Cuckoo

Satyre fauve des Maritimes (*Cœnonympha nipisiquit*)
Ringlet, Maritime

Teigne du yucca (*Tegeticula yuccasella*)
Moth, Yucca

Teigne tricheuse du yucca (*Tegeticula corruptrix*)
Moth, Non-pollinating Yucca

Plants

Agalinis, Gattinger's (*Agalinis gattingeri*)
Gérardie de Gattinger

Agalinis, Rough (*Agalinis aspera*)
Gérardie rude

Agalinis, Skinner's (*Agalinis skinneriana*)
Gérardie de Skinner

Ammannia, Scarlet (*Ammannia robusta*)
Ammannie robuste

Aster, Short-rayed Alkali (*Symphyotrichum frondosum*)
Aster feuillu

Avens, Eastern Mountain (*Geum peckii*)
Benoîte de Peck

Balsamroot, Deltoid (*Balsamorhiza deltoidea*)
Balsamorhize à feuilles deltoïdes

Birch, Cherry (*Betula lenta*)
Bouleau flexible

Bluehearts (*Buchnera americana*)
Buchnéra d'Amérique

Braya, Fernald's (*Braya fernaldii*)
Braya de Fernald

Braya, Hairy (*Braya pilosa*)
Braya poilu

Braya, Long's (*Braya longii*)
Braya de Long

Plantes

Abronie à petites fleurs (*Tripterocalyx micranthus*)
Sand-verbena, Small-flowered

Abronie rose (*Abronia umbellata*)
Sand-verbena, Pink

Adiante cheveux-de-Vénus (*Adiantum capillus-veneris*)
Fern, Southern Maidenhair

Ammannie robuste (*Ammannia robusta*)
Ammannia, Scarlet

Antennaire stolonifère (*Antennaria flagellaris*)
Pussytoes, Stoloniferous

Aristide à rameaux basilaires (*Aristida basiramea*)
Grass, Forked Three-awned

Aster feuillu (*Symphyotrichum frondosum*)
Aster, Short-rayed Alkali

Balsamorhize à feuilles deltoïdes (*Balsamorhiza deltoidea*)
Balsamroot, Deltoid

Benoîte de Peck (*Geum peckii*)
Avens, Eastern Mountain

Bouleau flexible (*Betula lenta*)
Birch, Cherry

Braya de Fernald (*Braya fernaldii*)
Braya, Fernald's

Braya de Long (*Braya longii*)
Braya, Long's

Bugbane, Tall (*Actaea elata*)
Cimicaire élevée

Bulrush, Bashful (*Trichophorum planifolium*)
Trichophore à feuilles plates

Bush-clover, Slender (*Lespedeza virginica*)
Lespédèze de Virginie

Buttercup, California (*Ranunculus californicus*)
Renoncule de Californie

Buttercup, Water-plantain (*Ranunculus alismifolius*)
Renoncule à feuilles d'alisme

Butternut (*Juglans cinerea*)
Noyer cendré

Cactus, Eastern Prickly Pear (*Opuntia humifusa*)
Oponce de l'Est

Campion, Spalding's (*Silene spaldingii*)
Silène de Spalding

Catchfly, Coastal Scouler's (*Silene scouleri grandis*)
Grand silène de Scouler

Centaury, Muhlenberg's (*Centaurium muehlenbergii*)
Petite-centaurée de Muhlenberg

Chestnut, American (*Castanea dentata*)
Châtaignier d'Amérique

Collomia, Slender (*Collomia tenella*)
Collomia délicat

Columbo, American (*Frasera caroliniensis*)
Frasère de Caroline

Coreopsis, Pink (*Coreopsis rosea*)
Coréopsis rose

Dogwood, Eastern Flowering (*Cornus florida*)
Cornouiller fleuri

Evening-primrose, Contorted-pod (*Camissonia contorta*)
Onagre à fruits tordus

Fern, Southern Maidenhair (*Adiantum capillus-veneris*)
Adiante cheveux-de-Vénus

Fringed-orchid, Eastern Prairie (*Platanthera leucophaea*)
Platanthère blanchâtre de l'Est

Fringed-orchid, Western Prairie (*Platanthera praeclara*)
Platanthère blanchâtre de l'Ouest

Gentian, Plymouth (*Sabatia kennedyana*)
Sabatie de Kennedy

Gentian, White Prairie (*Gentiana alba*)
Gentiane blanche

Ginseng, American (*Panax quinquefolius*)
Ginseng à cinq folioles

Goat's-rue, Virginia (*Tephrosia virginiana*)
Téphrosie de Virginie

Goldenrod, Showy (*Solidago speciosa*) Great Lakes Plains population
Verge d'or voyante population des plaines des Grands Lacs

Goldfields, Rayless (*Lasthenia glaberrima*)
Lasthénie glabre

Grass, Forked Three-awned (*Aristida basiramea*)
Aristide à rameaux basilaires

Lady's-slipper, Small White (*Cypripedium candidum*)
Cypripède blanc

Braya poilu (*Braya pilosa*)
Braya, Hairy

Buchnéra d'Amérique (*Buchnera americana*)
Bluehearts

Carex des genévriers (*Carex juniperorum*)
Sedge, Juniper

Carex faux-lupulina (*Carex lupuliformis*)
Sedge, False Hop

Carex tumulicole (*Carex tumulicola*)
Sedge, Foothill

Castilléjie de Victoria (*Castilleja victoriae*)
Owl-clover, Victoria's

Castilléjie dorée (*Castilleja levisecta*)
Paintbrush, Golden

Châtaignier d'Amérique *(Castanea dentata)*
Chestnut, American

Chimaphile maculée (*Chimaphila maculata*)
Wintergreen, Spotted

Cimicaire élevée (*Actaea elata*)
Bugbane, Tall

Collomia délicat (*Collomia tenella*)
Collomia, Slender

Coréopsis rose (*Coreopsis rosea*)
Coreopsis, Pink

Cornouiller fleuri (*Cornus florida*)
Dogwood, Eastern Flowering

Cypripède blanc (*Cypripedium candidum*)
Lady's-slipper, Small White

Droséra filiforme (*Drosera filiformis*)
Sundew, Thread-leaved

Éléocharide fausse-prêle (*Eleocharis equisetoides*)
Spike-rush, Horsetail

Éléocharide géniculée (*Eleocharis geniculata*) population des montagnes du sud
Spike-rush, Bent Southern Mountain population

Éléocharide géniculée (*Eleocharis geniculata*) population des plaines des Grands Lacs
Spike-rush, Bent Great Lakes Plains population

Epilobe densiflore (*Epilobium densiflorum*)
Spike-primrose, Dense

Épilobe de Torrey (*Epilobium torreyi*)
Spike-primrose, Brook

Frasère de Caroline (*Frasera caroliniensis*)
Columbo, American

Gentiane blanche (*Gentiana alba*)
Gentian, White Prairie

Gérardie de Gattinger (*Agalinis gattingeri*)
Agalinis, Gattinger's

Gérardie de Skinner (*Agalinis skinneriana*)
Agalinis, Skinner's

Gérardie rude (*Agalinis aspera*)
Agalinis, Rough

Ginseng à cinq folioles (*Panax quinquefolius*)
Ginseng, American

Grand silène de Scouler (*Silene scouleri grandis*)
Catchfly, Coastal Scouler's

Lewisia, Tweedy's (*Lewisiopsis tweedyi*)
Léwisie de Tweedy

Lipocarpha, Small-flowered (*Lipocarpha micrantha*)
Lipocarphe à petites fleurs

Lotus, Seaside Birds-foot (*Lotus formosissimus*)
Lotier splendide

Lousewort, Furbish's (*Pedicularis furbishiae*)
Pédiculaire de Furbish

Lupine, Dense-flowered (*Lupinus densiflorus*)
Lupin densiflore

Lupine, Prairie (*Lupinus lepidus*)
Lupin élégant

Lupine, Streambank (*Lupinus rivularis*)
Lupin des ruisseaux

Mallow, Virginia (*Sida hermaphrodita*)
Mauve de Virginie

Meconella, White (*Meconella oregana*)
Méconelle d'Orégon

Microseris, Coast (*Microseris bigelovii*)
Microséris de Bigelow

Milkwort, Pink (*Polygala incarnata*)
Polygale incarnat

Mountain-mint, Hoary (*Pycnanthemum incanum*)
Pycnanthème gris

Mulberry, Red (*Morus rubra*)
Mûrier rouge

Owl-clover, Bearded (*Triphysaria versicolor*)
Triphysaire versicolore

Owl-clover, Grand Coulee (*Orthocarpus barbatus*)
Orthocarpe barbu

Owl-clover, Rosy (*Orthocarpus bracteosus*)
Orthocarpe à épi feuillu

Owl-clover, Victoria's (*Castilleja victoriae*)
Castilléjie de Victoria

Paintbrush, Golden (*Castilleja levisecta*)
Castilléjie dorée

Phacelia, Branched (*Phacelia ramosissima*)
Phacélie rameuse

Pine, Whitebark (*Pinus albicaulis*)
Pin à écorce blanche

Plantain, Heart-leaved (*Plantago cordata*)
Plantain à feuilles cordées

Pogonia, Large Whorled (*Isotria verticillata*)
Isotrie verticillée

Pogonia, Nodding (*Triphora trianthophora*)
Triphore penché

Pogonia, Small Whorled (*Isotria medeoloides*)
Isotrie fausse-médéole

Pondweed, Ogden's (*Potamogeton ogdenii*)
Potamot de Ogden

Popcornflower, Fragrant (*Plagiobothrys figuratus*)
Plagiobothryde odorante

Pussytoes, Stoloniferous (*Antennaria flagellaris*)
Antennaire stolonifère

Isoète d'Engelmann (*Isœtes engelmannii*)
Quillwort, Engelmann's

Isotrie fausse-médéole (*Isotria medeoloides*)
Pogonia, Small Whorled

Isotrie verticillée (*Isotria verticillata*)
Pogonia, Large Whorled

Jonc de Kellogg (*Juncus kelloggii*)
Rush, Kellogg's

Lasthénie glabre (*Lasthenia glaberrima*)
Goldfields, Rayless

Lespédèze de Virginie (*Lespedeza virginica*)
Bush-clover, Slender

Léwisie de Tweedy (*Lewisiopsis tweedyi*)
Lewisia, Tweedy's

Lipocarphe à petites fleurs (*Lipocarpha micrantha*)
Lipocarpha, Small-flowered

Lotier à feuilles pennées (*Lotus pinnatus*)
Trefoil, Bog Bird's-foot

Lotier splendide (*Lotus formosissimus*)
Lotus, Seaside Birds-foot

Lupin densiflore (*Lupinus densiflorus*)
Lupine, Dense-flowered

Lupin des ruisseaux (*Lupinus rivularis*)
Lupine, Streambank

Lupin élégant (*Lupinus lepidus*)
Lupine, Prairie

Magnolia acuminé (*Magnolia acuminata*)
Tree, Cucumber

Mauve de Virginie (*Sida hermaphrodita*)
Mallow, Virginia

Méconelle d'Orégon (*Meconella oregana*)
Meconella, White

Microséris de Bigelow (*Microseris bigelovii*)
Microseris, Coast

Minuartie naine (*Minuartia pusilla*)
Sandwort, Dwarf

Mûrier rouge (*Morus rubra*)
Mulberry, Red

Noyer cendré (*Juglans cinerea*)
Butternut

Onagre à fruits tordus (*Camissonia contorta*)
Evening-primrose, Contorted-pod

Oponce de l'Est (*Opuntia humifusa*)
Cactus, Eastern Prickly Pear

Orthocarpe à épi feuillu (*Orthocarpus bracteosus*)
Owl-clover, Rosy

Orthocarpe barbu (*Orthocarpus barbatus*)
Owl-clover, Grand Coulee

Pédiculaire de Furbish (*Pedicularis furbishiae*)
Lousewort, Furbish's

Petite-centaurée de Muhlenberg (*Centaurium muehlenbergii*)
Centaury, Muhlenberg's

Phacélie rameuse (*Phacelia ramosissima*)
Phacelia, Branched

Quillwort, Engelmann's (*Isoetes engelmannii*)
Isoète d'Engelmann

Rush, Kellogg's (*Juncus kelloggii*)
Jonc de Kellogg

Sand-verbena, Pink (*Abronia umbellata*)
Abronie rose

Sand-verbena, Small-flowered (*Tripterocalyx micranthus*)
Abronie à petites fleurs

Sandwort, Dwarf (*Minuartia pusilla*)
Minuartie naine

Sanicle, Bear's-foot (*Sanicula arctopoides*)
Sanicle patte-d'ours

Sedge, False Hop (*Carex lupuliformis*)
Carex faux-lupulina

Sedge, Foothill (*Carex tumulicola*)
Carex tumulicole

Sedge, Juniper (*Carex juniperorum*)
Carex des genévriers

Silverpuffs, Lindley's False (*Uropappus lindleyi*)
Uropappe de Lindley

Spike-primrose, Brook (*Epilobium torreyi*)
Épilobe de Torrey

Spike-primrose, Dense (*Epilobium densiflorum*)
Epilobe densiflore

Spike-rush, Bent (*Eleocharis geniculata*) Great Lakes Plains population
Éléocharide géniculée population des plaines des Grands Lacs

Spike-rush, Bent (*Eleocharis geniculata*) Southern Mountain population
Éléocharide géniculée population des montagnes du Sud

Spike-rush, Horsetail (*Eleocharis equisetoides*)
Éléocharide fausse-prêle

Sundew, Thread-leaved (*Drosera filiformis*)
Droséra filiforme

Tonella, Small-flowered (*Tonella tenella*)
Tonelle délicate

Toothcup (*Rotala ramosior*)
Rotala rameux

Tree, Cucumber (*Magnolia acuminata*)
Magnolia acuminé

Trefoil, Bog Bird's-foot (*Lotus pinnatus*)
Lotier à feuilles pennées

Trillium, Drooping (*Trillium flexipes*)
Trille à pédoncule incliné

Triteleia, Howell's (*Triteleia howellii*)
Tritéléia de Howell

Violet, Bird's-foot (*Viola pedata*)
Violette pédalée

Violet *praemorsa* subspecies, Yellow Montane (*Viola praemorsa* ssp. *praemorsa*)
Violette jaune des monts de la sous-espèce praemorsa

Willow, Barrens (*Salix jejuna*)
Saule des landes

Pin à écorce blanche (*Pinus albicaulis*)
Pine, Whitebark

Plagiobothryde odorante (*Plagiobothrys figuratus*)
Popcornflower, Fragrant

Plantain à feuilles cordées (*Plantago cordata*)
Plantain, Heart-leaved

Platanthère blanchâtre de l'Est (*Platanthera leucophaea*)
Fringed-orchid, Eastern Prairie

Platanthère blanchâtre de l'Ouest (*Platanthera praeclara*)
Fringed-orchid, Western Prairie

Polygale incarnat (*Polygala incarnata*)
Milkwort, Pink

Potamot de Ogden (*Potamogeton ogdenii*)
Pondweed, Ogden's

Psilocarphe élevé (*Psilocarphus elatior*)
Woolly-heads, Tall

Psilocarphe nain (*Psilocarphus brevissimus*) population des montagnes du Sud
Woolly-heads, Dwarf Southern Mountain population

Pycnanthème gris (*Pycnanthemum incanum*)
Mountain-mint, Hoary

Renoncule à feuilles d'alisme (*Ranunculus alismifolius*)
Buttercup, Water-plantain

Renoncule de Californie (*Ranunculus californicus*)
Buttercup, California

Rotala rameux (*Rotala ramosior*)
Toothcup

Sabatie de Kennedy (*Sabatia kennedyana*)
Gentian, Plymouth

Sanicle patte-d'ours (*Sanicula arctopoides*)
Sanicle, Bear's-foot

Saule des landes (*Salix jejuna*)
Willow, Barrens

Silène de Spalding (*Silene spaldingii*)
Campion, Spalding's

Stylophore à deux feuilles (*Stylophorum diphyllum*)
Wood-poppy

Téphrosie de Virginie (*Tephrosia virginiana*)
Goat's-rue, Virginia

Tonelle délicate (*Tonella tenella*)
Tonella, Small-flowered

Trichophore à feuilles plates (*Trichophorum planifolium*)
Bulrush, Bashful

Trille à pédoncule incliné (*Trillium flexipes*)
Trillium, Drooping

Triphore penché (*Triphora trianthophora*)
Pogonia, Nodding

Triphysaire versicolore (*Triphysaria versicolor*)
Owl-clover, Bearded

Tritéléia de Howell (*Triteleia howellii*)
Triteleia, Howell's

Uropappe de Lindley (*Uropappus lindleyi*)
Silverpuffs, Lindley's False

Verge d'or voyante (*Solidago speciosa*) population des plaines des Grands Lacs
Goldenrod, Showy Great Lakes Plains population

Wintergreen, Spotted (*Chimaphila maculata*)
Chimaphile maculée

Wood-poppy (*Stylophorum diphyllum*)
Stylophore à deux feuilles

Woolly-heads, Tall (*Psilocarphus elatior*)
Psilocarphe élevé

Woolly-heads, Dwarf (*Psilocarphus brevissimus*) Southern Mountain population
Psilocarphe nain, population des montagnes du Sud

Lichens

Lichen, Batwing Vinyl (*Leptogium platynum*)
Leptoge à grosses spores

Lichen, Boreal Felt (*Erioderma pedicellatum*) Atlantic population
Érioderme boréal population de l'Atlantique

Lichen, Pale-bellied Frost (*Physconia subpallida*)
Physconie pâle

Lichen, Seaside Centipede (*Heterodermia sitchensis*)
Hétérodermie maritime

Lichen, Vole Ears (*Erioderma mollissimum*)
Érioderme mou

Mosses

Cord-moss, Rusty (*Entosthodon rubiginosus*)
Entosthodon rouilleux

Moss, Margined Streamside (*Scouleria marginata*)
Scoulérie à feuilles marginées

Moss, Nugget (*Microbryum vlassovii*)
Phasque de Vlassov

Moss, Poor Pocket (*Fissidens pauperculus*)
Fissident appauvri

Moss, Rigid Apple (*Bartramia stricta*)
Bartramie à feuilles dressées

Moss, Roell's Brotherella (*Brotherella roellii*)
Brotherelle de Roell

Moss, Silver Hair (*Fabronia pusilla*)
Fabronie naine

Moss, Spoon-leaved (*Bryoandersonia illecebra*)
Andersonie charmante

Violette jaune des monts de la sous-espèce *praemorsa* (*Viola praemorsa* ssp. *praemorsa*)
Violet praemorsa subspecies, Yellow Montane

Violette pédalée (*Viola pedata*)
Violet, Bird's-foot

Lichens

Érioderme boréal (*Erioderma pedicellatum*) population de l'Atlantique
Lichen, Boreal Felt Atlantic population

Érioderme mou (*Erioderma mollissimum*)
Lichen, Vole Ears

Hétérodermie maritime (*Heterodermia sitchensis*)
Lichen, Seaside Centipede

Leptoge à grosses spores (*Leptogium platynum*)
Lichen, Batwing Vinyl

Physconie pâle (*Physconia subpallida*)
Lichen, Pale-bellied Frost

Mousses

Andersonie charmante (*Bryoandersonia illecebra*)
Moss, Spoon-leaved

Bartramie à feuilles dressées (*Bartramia stricta*)
Moss, Rigid Apple

Brotherelle de Roell (*Brotherella roellii*)
Moss, Roell's Brotherella

Entosthodon rouilleux (*Entosthodon rubiginosus*)
Cord-moss, Rusty

Fabronie naine (*Fabronia pusilla*)
Moss, Silver Hair

Fissident appauvri (*Fissidens pauperculus*)
Moss, Poor Pocket

Phasque de Vlassov (*Microbryum vlassovii*)
Moss, Nugget

Scoulérie à feuilles marginées (*Scouleria marginata*)
Moss, Margined Streamside

PART 3

Threatened Species

Mammals

Bat, Pallid (*Antrozous pallidus*)
Chauve-souris blonde

Bison, Wood (*Bison bison athabascae*)
Bison des bois

Caribou, Woodland (*Rangifer tarandus caribou*) Boreal population
Caribou des bois population boréale

Caribou, Woodland (*Rangifer tarandus caribou*) Southern Mountain population
Caribou des bois population des montagnes du Sud

PARTIE 3

Espèces menacées

Mammifères

Béluga (*Delphinapterus leucas*) population de la baie Cumberland
Whale, Beluga Cumberland Sound population

Bison des bois (*Bison bison athabascae*)
Bison, Wood

Caribou des bois (*Rangifer tarandus caribou*) population boréale
Caribou, Woodland Boreal population

Ermine *haidarum* subspecies (*Mustela erminea haidarum*)
Hermine de la sous-espèce haidarum

Fox, Grey (*Urocyon cinereoargenteus*)
Renard gris

Fox, Swift (*Vulpes velox*)
Renard véloce

Marten, American (*Martes americana atrata*) Newfoundland population
Martre d'Amérique population de Terre-Neuve

Prairie Dog, Black-tailed (*Cynomys ludovicianus*)
Chien de prairie

Whale, Beluga (*Delphinapterus leucas*) Cumberland Sound population
Béluga population de la baie Cumberland

Whale, Fin (*Balaenoptera physalus*) Pacific population
Rorqual commun population du Pacifique

Whale, Killer (*Orcinus orca*) Northeast Pacific northern resident population
Épaulard population résidente du nord du Pacifique Nord-Est

Whale, Killer (*Orcinus orca*) Northeast Pacific offshore population
Épaulard population océanique du Pacifique Nord-Est

Whale, Killer (*Orcinus orca*) Northeast Pacific transient population
Épaulard population migratrice du Pacifique Nord-Est

Caribou des bois (*Rangifer tarandus caribou*) population des montagnes du Sud
Caribou, Woodland Southern Mountain population

Chauve-souris blonde (*Antrozous pallidus*)
Bat, Pallid

Chien de prairie (*Cynomys ludovicianus*)
Prairie Dog, Black-tailed

Épaulard (*Orcinus orca*) population migratrice du Pacifique Nord-Est
Whale, Killer Northeast Pacific transient population

Épaulard (*Orcinus orca*) population océanique du Pacifique Nord-Est
Whale, Killer Northeast Pacific offshore population

Épaulard (*Orcinus orca*) population résidente du nord du Pacifique Nord-Est
Whale, Killer Northeast Pacific northern resident population

Hermine de la sous-espèce *haidarum* (*Mustela erminea haidarum*)
Ermine haidarum subspecies

Martre d'Amérique (*Martes americana atrata*) population de Terre-Neuve
Marten, American Newfoundland population

Renard gris (*Urocyon cinereoargenteus*)
Fox, Grey

Renard véloce (*Vulpes velox*)
Fox, Swift

Rorqual commun (*Balaenoptera physalus*) population du Pacifique
Whale, Fin Pacific population

Birds

Albatross, Short-tailed (*Phoebastria albatrus*)
Albatros à queue courte

Bittern, Least (*Ixobrychus exilis*)
Petit Blongios

Bobolink (*Dolichonyx oryzivorus*)
Goglu des prés

Flycatcher, Olive-sided (*Contopus cooperi*)
Moucherolle à côtés olive

Goshawk *laingi* subspecies, Northern (*Accipiter gentilis laingi*)
Autour des palombes de la sous-espèce laingi

Gull, Ross's (*Rhodostethia rosea*)
Mouette rosée

Hawk, Ferruginous (*Buteo regalis*)
Buse rouilleuse

Knot *roselaari* type, Red (*Calidris canutus roselaari* type)
Bécasseau maubèche du type roselaari

Longspur, Chestnut-collared (*Calcarius ornatus*)
Bruant à ventre noir

Meadowlark, Eastern (*Sturnella magna*)
Sturnelle des prés

Murrelet, Marbled (*Brachyramphus marmoratus*)
Guillemot marbré

Nighthawk, Common (*Chordeiles minor*)
Engoulevent d'Amérique

Oiseaux

Albatros à queue courte (*Phœbastria albatrus*)
Albatross, Short-tailed

Autour des palombes de la sous-espèce *laingi* (*Accipiter gentilis laingi*)
Goshawk laingi subspecies, Northern

Bécasseau maubèche du type *roselaari* (*Calidris canutus roselaari* type)
Knot roselaari type, Red

Bruant à ventre noir (*Calcarius ornatus*)
Longspur, Chestnut-collared

Buse rouilleuse (*Buteo regalis*)
Hawk, Ferruginous

Effraie des clochers (*Tyto alba*) population de l'Ouest
Owl, Barn Western population

Engoulevent bois-pourri (*Caprimulgus vociferus*)
Whip-poor-will

Engoulevent d'Amérique (*Chordeiles minor*)
Nighthawk, Common

Goglu des prés (*Dolichonyx oryzivorus*)
Bobolink

Grive de Bicknell (*Catharus bicknelli*)
Thrush, Bicknell's

Grive des bois (*Hylocichla mustelina*)
Thrush, Wood

Owl, Barn (*Tyto alba*) Western population
Effraie des clochers population de l'Ouest

Owl *brooksi* subspecies, Northern Saw-whet (*Aegolius acadicus brooksi*)
Petite Nyctale de la sous-espèce brooksi

Pipit, Sprague's (*Anthus spragueii*)
Pipit de Sprague

Screech-owl *kennicottii* subspecies, Western (*Megascops kennicottii kennicottii*)
Petit-duc des montagnes de la sous-espèce kennicottii

Screech-owl *macfarlanei* subspecies, Western (*Megascops kennicottii macfarlanei*)
Petit-duc des montagnes de la sous-espèce macfarlanei

Shearwater, Pink-footed (*Puffinus creatopus*)
Puffin à pieds roses

Shrike *excubitorides* subspecies, Loggerhead (*Lanius ludovicianus excubitorides*)
Pie-grièche migratrice de la sous-espèce excubitorides

Swallow, Bank (*Riparia riparia*)
Hirondelle de rivage

Swallow, Barn (*Hirundo rustica*)
Hirondelle rustique

Swift, Chimney (*Chaetura pelagica*)
Martinet ramoneur

Thrush, Bicknell's (*Catharus bicknelli*)
Grive de Bicknell

Thrush, Wood (*Hylocichla mustelina*)
Grive des bois

Warbler, Canada (*Wilsonia canadensis*)
Paruline du Canada

Warbler, Golden-winged (*Vermivora chrysoptera*)
Paruline à ailes dorées

Whip-poor-will (*Caprimulgus vociferus*)
Engoulevent bois-pourri

Woodpecker, Lewis's (*Melanerpes lewis*)
Pic de Lewis

Woodpecker, Red-headed (*Melanerpes erythrocephalus*)
Pic à tête rouge

Amphibians

Frog, Rocky Mountain Tailed (*Ascaphus montanus*)
Grenouille-à-queue des Rocheuses

Frog, Western Chorus (*Pseudacris triseriata*) Great Lakes / St. Lawrence – Canadian Shield population
Rainette faux-grillon de l'Ouest population des Grands Lacs / Saint-Laurent et du Bouclier canadien

Salamander, Allegheny Mountain Dusky (*Desmognathus ochrophaeus*) Great Lakes – St. Lawrence population
Salamandre sombre des montagnes population des Grands Lacs et du Saint-Laurent

Salamander, Coastal Giant (*Dicamptodon tenebrosus*)
Grande salamandre

Guillemot marbré (*Brachyramphus marmoratus*)
Murrelet, Marbled

Hirondelle de rivage (*Riparia riparia*)
Swallow, Bank

Hirondelle rustique (*Hirundo rustica*)
Swallow, Barn

Martinet ramoneur (*Chaetura pelagica*)
Swift, Chimney

Moucherolle à côtés olive (*Contopus cooperi*)
Flycatcher, Olive-sided

Mouette rosée (*Rhodostethia rosea*)
Gull, Ross's

Paruline à ailes dorées (*Vermivora chrysoptera*)
Warbler, Golden-winged

Paruline du Canada (*Wilsonia canadensis*)
Warbler, Canada

Petit Blongios (*Ixobrychus exilis*)
Bittern, Least

Petit-duc des montagnes de la sous-espèce *kennicottii* (*Megascops kennicottii kennicottii*)
Screech-owl kennicottii subspecies, Western

Petit-duc des montagnes de la sous-espèce *macfarlanei* (*Megascops kennicottii macfarlanei*)
Screech-owl macfarlanei subspecies, Western

Petite Nyctale de la sous-espèce *brooksi* (*Aegolius acadicus brooksi*)
Owl brooksi subspecies, Northern Saw-whet

Pic à tête rouge (*Melanerpes erythrocephalus*)
Woodpecker, Red-headed

Pic de Lewis (*Melanerpes lewis*)
Woodpecker, Lewis's

Pie-grièche migratrice de la sous-espèce excubitorides (*Lanius ludovicianus excubitorides*)
Shrike excubitorides subspecies, Loggerhead

Pipit de Sprague (*Anthus spragueii*)
Pipit, Sprague's

Puffin à pieds roses (*Puffinus creatopus*)
Shearwater, Pink-footed

Sturnelle des prés (*Sturnella magna*)
Meadowlark, Eastern

Amphibiens

Crapaud du Grand Bassin (*Spea intermontana*)
Spadefoot, Great Basin

Grande salamandre (*Dicamptodon tenebrosus*)
Salamander, Coastal Giant

Grenouille-à-queue des Rocheuses (*Ascaphus montanus*)
Frog, Rocky Mountain Tailed

Rainette faux-grillon de l'Ouest (*Pseudacris triseriata*) population des Grands Lacs / Saint-Laurent et du Bouclier canadien
Frog, Western Chorus Great Lakes / St. Lawrence – Canadian Shield population

Salamandre pourpre (*Gyrinophilus porphyriticus*) population des Adirondacks et des Appalaches
Salamander, Spring Adirondack / Appalachian population

Salamander, Spring (*Gyrinophilus porphyriticus*) Adirondack / Appalachian population
Salamandre pourpre population des Adirondacks et des Appalaches

Spadefoot, Great Basin (*Spea intermontana*)
Crapaud du Grand Bassin

Reptiles

Gophersnake, Great Basin (*Pituophis catenifer deserticola*)
Couleuvre à nez mince du Grand Bassin

Massasauga (*Sistrurus catenatus*) Great Lakes/St. Lawrence population
Massasauga population des Grands Lacs et du Saint-Laurent

Racer, Eastern Yellow-bellied (*Coluber constrictor flaviventris*)
Couleuvre agile à ventre jaune de l'Est

Ratsnake, Gray (*Pantherophis spiloides*) Great Lakes/St. Lawrence population
Couleuvre obscure population des Grands Lacs et du Saint-Laurent

Rattlesnake, Western (*Crotalus oreganos*)
Crotale de l'Ouest

Ribbonsnake, Eastern (*Thamnophis sauritus*) Atlantic population
Couleuvre mince population de l'Atlantique

Snake, Eastern Hog-nosed (*Heterodon platirhinos*)
Couleuvre à nez plat

Softshell, Spiny (*Apalone spinifera*)
Tortue-molle à épines

Turtle, Blanding's (*Emydoidea blandingii*) Great Lakes / St. Lawrence population
Tortue mouchetée population des Grands Lacs et du Saint-Laurent

Turtle, Wood (*Glyptemys insculpta*)
Tortue des bois

Fish

Darter, Channel (*Percina copelandi*)
Fouille-roche gris

Darter, Eastern Sand (*Ammocrypta pellucida*) Ontario populations
Dard de sable populations de l'Ontario

Darter, Eastern Sand (*Ammocrypta pellucida*) Quebec populations
Dard de sable populations du Québec

Gar, Spotted (*Lepisosteus oculatus*)
Lépisosté tacheté

Lamprey, Vancouver (*Lampetra macrostoma*)
Lamproie de Vancouver

Minnow, Western Silvery (*Hybognathus argyritis*)
Méné d'argent de l'Ouest

Sculpin, Coastrange (*Cottus aleuticus*) Cultus population
Chabot de la chaîne côtière population Cultus

Salamandre sombre des montagnes (*Desmognathus ochrophaeus*) population des Grands Lacs et du Saint-Laurent
Salamander, Allegheny Mountain Dusky Great Lakes – St. Lawrence population

Reptiles

Couleuvre agile à ventre jaune de l'Est (*Coluber constrictor flaviventris*)
Racer, Eastern Yellow-bellied

Couleuvre à nez mince du Grand Bassin (*Pituophis catenifer deserticola*)
Gophersnake, Great Basin

Couleuvre à nez plat (*Heterodon platirhinos*)
Snake, Eastern Hog-nosed

Couleuvre mince (*Thamnophis sauritus*) population de l'Atlantique
Ribbonsnake, Eastern Atlantic population

Couleuvre obscure (*Pantherophis spiloides*) population des Grands Lacs et du Saint-Laurent
Ratsnake, Gray Great Lakes/St. Lawrence population

Crotale de l'Ouest (*Crotalus oreganos*)
Rattlesnake, Western

Massasauga (*Sistrurus catenatus*) population des Grands Lacs et du Saint-Laurent
Massasauga Great Lakes/St. Lawrence population

Tortue des bois (*Glyptemys insculpta*)
Turtle, Wood

Tortue-molle à épines (*Apalone spinifera*)
Softshell, Spiny

Tortue mouchetée (*Emydoidea blandingii*) population des Grands Lacs et du Saint-Laurent
Turtle, Blanding's Great Lakes / St. Lawrence population

Poissons

Chabot de la chaîne côtière (*Cottus aleuticus*) population Cultus
Sculpin, Coastrange Cultus population

Chabot des montagnes Rocheuses (*Cottus* sp.) populations du versant est
Sculpin, Rocky Mountain Eastslope populations

Dard de sable (*Ammocrypta pellucida*) populations de l'Ontario
Darter, Eastern Sand Ontario populations

Dard de sable (*Ammocrypta pellucida*) populations du Québec
Darter, Eastern Sand Quebec populations

Éperlan arc-en-ciel (*Osmerus mordax*) population d'individus de petite taille du lac Utopia
Smelt, Rainbow Lake Utopia small-bodied population

Fouille-roche gris (*Percina copelandi*)
Darter, Channel

Lamproie de Vancouver (*Lampetra macrostoma*)
Lamprey, Vancouver

Sculpin, Rocky Mountain (*Cottus* sp.) Eastslope populations
Chabot des montagnes Rocheuses populations du versant est

Shiner, Carmine (*Notropis percobromus*)
Tête carminée

Smelt, Rainbow (*Osmerus mordax*) Lake Utopia small-bodied population
Éperlan arc-en-ciel population d'individus de petite taille du lac Utopia

Spotted Wolffish (*Anarhichas minor*)
Loup tacheté

Sucker, Mountain (*Catostomus platyrhynchus*) Milk River populations
Meunier des montagnes populations de la rivière Milk

Trout, Westslope Cutthroat (*Oncorhynchus clarkii lewisi*) Alberta population
Truite fardée versant de l'Ouest population de l'Alberta

Wolffish, Northern (*Anarhichas denticulatus*)
Loup à tête large

Molluscs

Atlantic Mud-piddock (*Barnea truncata*)
Pholade tronquée

Jumping-slug, Dromedary (*Hemphillia dromedarius*)
Limace-sauteuse dromadaire

Mussel, Mapleleaf (*Quadrula quadrula*) Great Lakes – Western St. Lawrence population
Mulette feuille d'érable population des Grands Lacs – Ouest du Saint-Laurent

Arthropods

Flower Moth, Verna's (*Schinia verna*)
Héliotin de Verna

Skipper, Dun (*Euphyes vestris*) Western population
Hespérie rurale population de l'Ouest

Skipperling, Poweshiek (*Oarisma poweshiek*)
Hespérie de Poweshiek

Sweat Bee, Sable Island (*Lasioglossum sablense*)
Halicte de l'île de Sable

Tiger Beetle, Audouin's Night-stalking (*Omus audouini*)
Cicindèle d'Audouin

Tiger Beetle, Gibson's Big Sand (*Cicindela formosa gibsoni*)
Cicindèle à grandes taches de Gibson

Plants

Aster, Anticosti (*Symphyotrichum anticostense*)
Aster d'Anticosti

Aster, Gulf of St. Lawrence (*Symphyotrichum laurentianum*)
Aster du golfe Saint-Laurent

Aster, Western Silvery (*Symphyotrichum sericeum*)
Aster soyeux

Aster, White Wood (*Eurybia divaricata*)
Aster à rameaux étalés

Lépisosté tacheté (*Lepisosteus oculatus*)
Gar, Spotted

Loup à tête large (*Anarhichas denticulatus*)
Wolffish, Northern

Loup tacheté (*Anarhichas minor*)
Wolffish, Spotted

Méné d'argent de l'Ouest (*Hybognathus argyritis*)
Minnow, Western Silvery

Meunier des montagnes (*Catostomus platyrhynchus*) populations de la rivière Milk
Sucker, Mountain Milk River populations

Tête carminée (*Notropis percobromus*)
Shiner, Carmine

Truite fardée versant de l'Ouest (*Oncorhynchus clarkii lewisi*) population de l'Alberta
Trout, Westslope Cutthroat Alberta population

Mollusques

Limace-sauteuse dromadaire (*Hemphillia dromedarius*)
Jumping-slug, Dromedary

Mulette feuille d'érable (*Quadrula quadrula*) population des Grands Lacs – Ouest du Saint-Laurent
Mussel, Mapleleaf Great Lakes – Western St. Lawrence population

Pholade tronquée (*Barnea truncata*)
Atlantic Mud-piddock

Arthropodes

Cicindèle à grandes taches de Gibson (*Cicindela formosa gibsoni*)
Tiger Beetle, Gibson's Big Sand

Cicindèle d'Audouin (*Omus audouini*)
Tiger Beetle, Audouin's Night-stalking

Halicte de l'île de Sable (*Lasioglossum sablense*)
Sweat Bee, Sable Island

Héliotin de Verna (*Schinia verna*)
Flower Moth, Verna's

Hespérie de Poweshiek (*Oarisma poweshiek*)
Skipperling, Poweshiek

Hespérie rurale (*Euphyes vestris*) population de l'Ouest
Skipper, Dun Western population

Plantes

Airelle à longues étamines (*Vaccinium stamineum*)
Deerberry

Alétris farineux (*Aletris farinosa*)
Colicroot

Aster à rameaux étalés (*Eurybia divaricata*)
Aster, White Wood

Aster d'Anticosti (*Symphyotrichum anticostense*)
Aster, Anticosti

Aster, Willowleaf (*Symphyotrichum praealtum*)
Aster très élevé

Baccharis, Eastern (*Baccharis halimifolia*)
Baccharis à feuilles d'arroche

Bartonia, Branched (*Bartonia paniculata* ssp. *paniculata*)
Bartonie paniculée

Blazing Star, Dense (*Liatris spicata*)
Liatris à épi

Coffee-tree, Kentucky (*Gymnocladus dioicus*)
Chicot févier

Colicroot (*Aletris farinosa*)
Alétris farineux

Cryptantha, Tiny (*Cryptantha minima*)
Cryptanthe minuscule

Daisy, Lakeside (*Hymenoxys herbacea*)
Hyménoxys herbacé

Deerberry (*Vaccinium stamineum*)
Airelle à longues étamines

Desert-parsley, Gray's (*Lomatium grayi*)
Lomatium de Gray

Fern, Lemmon's Holly (*Polystichum lemmonii*)
Polystic de Lemmon

Fern, Mountain Holly (*Polystichum scopulinum*)
Polystic des rochers

Gentian, Victorin's (*Gentianopsis virgata* ssp. *victorinii*)
Gentiane de Victorin

Goldenrod, Showy (*Solidago speciosa*) Boreal population
Verge d'or voyante population boréale

Goldenseal (*Hydrastis canadensis*)
Hydraste du Canada

Goosefoot, Smooth (*Chenopodium subglabrum*)
Chénopode glabre

Greenbrier, Round-leaved (*Smilax rotundifolia*) Great Lakes Plains population
Smilax à feuilles rondes population des plaines des Grands Lacs

Hackberry, Dwarf (*Celtis tenuifolia*)
Micocoulier rabougri

Hoptree, Common (*Ptelea trifoliata*)
Ptéléa trifolié

Hyacinth, Wild (*Camassia scilloides*)
Camassie faux-scille

Jacob's-ladder, Van Brunt's (*Polemonium vanbruntiae*)
Polémoine de Van Brunt

Locoweed, Hare-footed (*Oxytropis lagopus*)
Oxytrope patte-de-lièvre

Meadowfoam, Macoun's (*Limnanthes macounii*)
Limnanthe de Macoun

Mosquito-fern, Mexican (*Azolla mexicana*)
Azolle du Mexique

Mouse-ear-cress, Slender (*Halimolobos virgata*)
Halimolobos mince

Orchid, Phantom (*Cephalanthera austiniae*)
Céphalanthère d'Austin

Paintbrush, Cliff (*Castilleja rupicola*)
Castilléjie des rochers

Aster du golfe Saint-Laurent (*Symphyotrichum laurentianum*)
Aster, Gulf of St. Lawrence

Aster soyeux (*Symphyotrichum sericeum*)
Aster, Western Silvery

Aster très élevé (*Symphyotrichum praealtum*)
Aster, Willowleaf

Azolle du Mexique (*Azolla mexicana*)
Mosquito-fern, Mexican

Baccharis à feuilles d'arroche (*Baccharis halimifolia*)
Baccharis, Eastern

Bartonie paniculée (*Bartonia paniculata* ssp. *paniculata*)
Bartonia, Branched

Camassie faux-scille (*Camassia scilloides*)
Hyacinth, Wild

Carex des sables (*Carex sabulosa*)
Sedge, Baikal

Carmantine d'Amérique (*Justicia americana*)
Water-willow, American

Castilléjie des rochers (*Castilleja rupicola*)
Paintbrush, Cliff

Céphalanthère d'Austin (*Cephalanthera austiniae*)
Orchid, Phantom

Chardon de Hill (*Cirsium hillii*)
Thistle, Hill's

Chénopode glabre (*Chenopodium subglabrum*)
Goosefoot, Smooth

Chicot févier (*Gymnocladus dioicus*)
Coffee-tree, Kentucky

Clèthre à feuilles d'aulne (*Clethra alnifolia*)
Pepperbush, Sweet

Cryptanthe minuscule (*Cryptantha minima*)
Cryptantha, Tiny

Gentiane de Victorin (*Gentianopsis virgata* ssp. *victorinii*)
Gentian, Victorin's

Halimolobos mince (*Halimolobos virgata*)
Mouse-ear-cress, Slender

Hydraste du Canada (*Hydrastis canadensis*)
Goldenseal

Hyménoxys herbacé (*Hymenoxys herbacea*)
Daisy, Lakeside

Isoète de Bolander (*Isœtes bolanderi*)
Quillwort, Bolander's

Isopyre à feuilles biternées (*Enemion biternatum*)
Rue-anemone, False

Liatris à épi (*Liatris spicata*)
Blazing Star, Dense

Limnanthe de Macoun (*Limnanthes macounii*)
Meadowfoam, Macoun's

Liparis à feuilles de lis (*Liparis liliifolia*)
Twayblade, Purple

Lomatium de Gray (*Lomatium grayi*)
Desert-parsley, Gray's

Micocoulier rabougri (*Celtis tenuifolia*)
Hackberry, Dwarf

Pepperbush, Sweet (*Clethra alnifolia*)
Clèthre à feuilles d'aulne

Phlox, Showy (*Phlox speciosa* ssp. *occidentalis*)
Phlox de l'Ouest

Popcornflower, Slender (*Plagiobothrys tenellus*)
Plagiobothryde délicate

Quillwort, Bolander's (*Isoetes bolanderi*)
Isoète de Bolander

Rue-anemone, False (*Enemion biternatum*)
Isopyre à feuilles biternées

Sanicle, Purple (*Sanicula bipinnatifida*)
Sanicle bipinnatifide

Sedge, Baikal (*Carex sabulosa*)
Carex des sables

Soapweed (*Yucca glauca*)
Yucca glauque

Spiderwort, Western (*Tradescantia occidentalis*)
Tradescantie de l'Ouest

Thistle, Hill's (*Cirsium hillii*)
Chardon de Hill

Twayblade, Purple (*Liparis liliifolia*)
Liparis à feuilles de lis

Water-willow, American (*Justicia americana*)
Carmantine d'Amérique

Willow, Green-scaled (*Salix chlorolepis*)
Saule à bractées vertes

Woodsia, Blunt-lobed (*Woodsia obtusa*)
Woodsie à lobes arrondis

Lichens

Bone, Seaside (*Hypogymnia heterophylla*)
Hypogymnie maritime

Jellyskin, Flooded (*Leptogium rivulare*)
Leptoge des terrains inondés

Lichen, Crumpled Tarpaper (*Collema coniophilum*)
Collème bâche

Waterfan, Eastern (*Peltigera hydrothyria*)
Peltigère éventail d'eau de l'Est

Mosses

Bryum, Porsild's (*Mielichhoferia macrocarpa*)
Bryum de Porsild

Moss, Alkaline Wing-nerved (*Pterygoneurum kozlovii*)
Ptérygoneure de Koslov

Moss, Haller's Apple (*Bartramia halleriana*)
Bartramie de Haller

PART 4

Special Concern

Oxytrope patte-de-lièvre (*Oxytropis lagopus*)
Locoweed, Hare-footed

Phlox de l'Ouest (*Phlox speciosa* ssp. *occidentalis*)
Phlox, Showy

Plagiobothryde délicate (*Plagiobothrys tenellus*)
Popcornflower, Slender

Polémoine de Van Brunt (*Polemonium vanbruntiae*)
Jacob's-ladder, Van Brunt's

Polystic de Lemmon (*Polystichum lemmonii*)
Fern, Lemmon's Holly

Polystic des rochers (*Polystichum scopulinum*)
Fern, Mountain Holly

Ptéléa trifolié (*Ptelea trifoliata*)
Hoptree, Common

Sanicle bipinnatifide (*Sanicula bipinnatifida*)
Sanicle, Purple

Saule à bractées vertes (*Salix chlorolepis*)
Willow, Green-scaled

Smilax à feuilles rondes (*Smilax rotundifolia*) population des plaines des Grands Lacs
Greenbrier, Round-leaved Great Lakes Plains population

Tradescantie de l'Ouest (*Tradescantia occidentalis*)
Spiderwort, Western

Verge d'or voyante (*Solidago speciosa*) population boréale
Goldenrod, Showy Boreal population

Woodsie à lobes arrondis (*Woodsia obtusa*)
Woodsia, Blunt-lobed

Yucca glauque (*Yucca glauca*)
Soapweed

Lichens

Collème bâche (*Collema coniophilum*)
Lichen, Crumpled Tarpaper

Hypogymnie maritime (*Hypogymnia heterophylla*)
Bone, Seaside

Leptoge des terrains inondés (*Leptogium rivulare*)
Jellyskin, Flooded

Peltigère éventail d'eau de l'Est (*Peltigera hydrothyria*)
Waterfan, Eastern

Mousses

Bartramie de Haller (*Bartramia halleriana*)
Moss, Haller's Apple

Bryum de Porsild (*Mielichhoferia macrocarpa*)
Bryum, Porsild's

Ptérygoneure de Koslov (*Pterygoneurum kozlovii*)
Moss, Alkaline Wing-nerved

PARTIE 4

Espèces préoccupantes

Mammals

Badger *taxus* subspecies, American (*Taxidea taxus taxus*)
Blaireau d'Amérique de la sous-espèce taxus

Bat, Spotted (*Euderma maculatum*)
Oreillard maculé

Bear, Grizzly (*Ursus arctos*) Western population
Ours grizzli population de l'Ouest

Bear, Polar (*Ursus maritimus*)
Ours blanc

Beaver, Mountain (*Aplodontia rufa*)
Castor de montagne

Caribou, Barren-ground (*Rangifer tarandus groenlandicus*) Dolphin and Union population
Caribou de la toundra population Dolphin-et-Union

Caribou, Woodland (*Rangifer tarandus caribou*) Northern Mountain population
Caribou des bois population des montagnes du Nord

Cottontail *nuttallii* subspecies, Nuttall's (*Sylvilagus nuttallii nuttallii*)
Lapin de Nuttall de la sous-espèce nuttallii

Mole, Eastern (*Scalopus aquaticus*)
Taupe à queue glabre

Mouse *megalotis* subspecies, Western Harvest (*Reithrodontomys megalotis megalotis*)
Souris des moissons de la sous-espèce megalotis

Otter, Sea (*Enhydra lutris*)
Loutre de mer

Pika, Collared (*Ochotona collaris*)
Pica à collier

Porpoise, Harbour (*Phocoena phocoena*) Pacific Ocean population
Marsouin commun population de l'océan Pacifique

Sea Lion, Steller (*Eumetopias jubatus*)
Otarie de Steller

Vole, Woodland (*Microtus pinetorum*)
Campagnol sylvestre

Whale, Bowhead (*Balaena mysticetus*) Bering-Chukchi-Beaufort population
Baleine boréale, population des mers de Béring, des Tchouktches et de Beaufort

Whale, Fin (*Balaenoptera physalus*) Atlantic population
Rorqual commun population de l'Atlantique

Whale, Grey (*Eschrichtius robustus*) Eastern North Pacific population
Baleine grise population du Pacifique Nord-Est

Whale, Humpback (*Megaptera novaeangliae*) North Pacific population
Rorqual à bosse population du Pacifique Nord

Whale, Sowerby's Beaked (Mesoplodon bidens)
Baleine à bec de Sowerby

Wolf, Eastern (*Canis lupus lycaon*)
Loup de l'Est

Wolverine (*Gulo gulo*)
Carcajou

Mammifères

Baleine à bec de Sowerby (*Mesoplodon bidens*)
Whale, Sowerby's Beaked

Baleine boréale (*Balaena mysticetus*) population des mers de Béring, des Tchouktches et de Beaufort
Whale, Bowhead Bering-Chukchi-Beaufort population

Baleine grise (*Eschrichtius robustus*) population du Pacifique Nord-Est
Whale, Grey Eastern North Pacific population

Blaireau d'Amérique de la sous-espèce *taxus* (*Taxidea taxus taxus*)
Badger taxus subspecies, American

Campagnol sylvestre (*Microtus pinetorum*)
Vole, Woodland

Carcajou (*Gulo gulo*)
Wolverine

Caribou de la toundra (*Rangifer tarandus grœnlandicus*) population Dolphin-et-Union
Caribou, Barren-ground Dolphin and Union population

Caribou des bois (*Rangifer tarandus caribou*) population des montagnes du Nord
Caribou, Woodland Northern Mountain population

Castor de montagne (*Aplodontia rufa*)
Beaver, Mountain

Lapin de Nuttall de la sous-espèce *nuttallii* (*Sylvilagus nuttallii nuttallii*)
Cottontail nuttallii subspecies, Nuttall's

Loup de l'Est (*Canis lupus lycaon*)
Wolf, Eastern

Loutre de mer (*Enhydra lutris*)
Otter, Sea

Marsouin commun (*Phocœna phocœna*) population de l'océan Pacifique
Porpoise, Harbour Pacific Ocean population

Oreillard maculé (*Euderma maculatum*)
Bat, Spotted

Otarie de Steller (*Eumetopias jubatus*)
Sea Lion, Steller

Ours blanc (*Ursus maritimus*)
Bear, Polar

Ours grizzli (*Ursus arctos*) population de l'Ouest
Bear, Grizzly Western population

Pica à collier (*Ochotona collaris*)
Pika, Collared

Rorqual à bosse (*Megaptera novaeangliae*) population du Pacifique Nord
Whale, Humpback North Pacific population

Rorqual commun (*Balaenoptera physalus*) population de l'Atlantique
Whale, Fin Atlantic population

Souris des moissons de la sous-espèce *megalotis* (*Reithrodontomys megalotis megalotis*)
Mouse megalotis subspecies, Western Harvest

Taupe à queue glabre (*Scalopus aquaticus*)
Mole, Eastern

Birds

Albatross, Black-footed (*Phoebastria nigripes*)
Albatros à pieds noirs

Blackbird, Rusty (*Euphagus carolinus*)
Quiscale rouilleux

Curlew, Long-billed (*Numenius americanus*)
Courlis à long bec

Duck, Harlequin (*Histrionicus histrionicus*) Eastern population
Arlequin plongeur population de l'Est

Falcon *anatum/tundrius*, Peregrine (*Falco peregrinus anatum/tundrius*)
Faucon pèlerin anatum/tundrius

Falcon *pealei* subspecies, Peregrine (*Falco peregrinus pealei*)
Faucon pèlerin de la sous-espèce pealei

Goldeneye, Barrow's (*Bucephala islandica*) Eastern population
Garrot d'Islande population de l'Est

Grebe, Horned (*Podiceps auritus*) Western population
Grèbe esclavon population de l'Ouest

Grebe, Western (*Aechmophorus occidentalis*)
Grèbe élégant

Heron *fannini* subspecies, Great Blue (*Ardea herodias fannini*)
Grand héron de la sous-espèce fannini

Knot *islandica* subspecies, Red (*Calidris canutus islandica*)
Bécasseau maubèche de la sous-espèce islandica

Longspur, McCown's (*Calcarius mccownii*)
Bruant de McCown

Murrelet, Ancient (*Synthliboramphus antiquus*)
Guillemot à cou blanc

Owl, Flammulated (*Otus flammeolus*)
Petit-duc nain

Owl, Short-eared (*Asio flammeus*)
Hibou des marais

Pigeon, Band-tailed (*Patagioenas fasciata*)
Pigeon à queue barrée

Rail, Yellow (*Coturnicops noveboracensis*)
Râle jaune

Sandpiper, Buff-breasted (*Tryngites subruficollis*)
Bécasseau roussâtre

Sparrow, Baird's (*Ammodramus bairdii*)
Bruant de Baird

Sparrow *pratensis* subspecies, Grasshopper (*Ammodramus savannarum pratensis*)
Bruant sauterelle de la sous-espèce de l'Est

Sparrow *princeps* subspecies, Savannah (*Passerculus sandwichensis princeps*)
Bruant des prés de la sous-espèce princeps

Waterthrush, Louisiana (*Seiurus motacilla*)
Paruline hochequeue

Wood-pewee, Eastern (*Contopus virens*)
Pioui de l'Est

Oiseaux

Albatros à pieds noirs (*Phœbastria nigripes*)
Albatross, Black-footed

Arlequin plongeur (*Histrionicus histrionicus*) population de l'Est
Duck, Harlequin Eastern population

Bécasseau maubèche de la sous-espèce *islandica* (*Calidris canutus islandica*)
Knot islandica subspecies, Red

Bécasseau roussâtre (*Tryngites subruficollis*)
Sandpiper, Buff-breasted

Bruant de Baird (*Ammodramus bairdii*)
Sparrow, Baird's

Bruant de McCown (*Calcarius mccownii*)
Longspur, McCown's

Bruant des prés de la sous-espèce *princeps* (*Passerculus sandwichensis princeps*)
Sparrow princeps subspecies, Savannah

Bruant sauterelle de la sous-espèce de l'Est (*Ammodramus savannarum pratensis*)
Sparrow pratensis subspecies, Grasshopper

Courlis à long bec (*Numenius americanus*)
Curlew, Long-billed

Faucon pèlerin *anatum/tundrius* (*Falco peregrinus anatum/tundrius*)
Falcon anatum/tundrius, Peregrine

Faucon pèlerin de la sous-espèce *pealei* (*Falco peregrinus pealei*)
Falcon pealei subspecies, Peregrine

Garrot d'Islande (*Bucephala islandica*) population de l'Est
Goldeneye, Barrow's Eastern population

Grand héron de la sous-espèce *fannini* (*Ardea herodias fannini*)
Heron fannini subspecies, Great Blue

Grèbe élégant (*Aechmophorus occidentalis*)
Grebe, Western

Grèbe esclavon (*Podiceps auritus*) population de l'Ouest
Grebe, Horned Western population

Guillemot à cou blanc (*Synthliboramphus antiquus*)
Murrelet, Ancient

Hibou des marais (*Asio flammeus*)
Owl, Short-eared

Paruline hochequeue (*Seiurus motacilla*)
Waterthrush, Louisiana

Petit-duc nain (*Otus flammeolus*)
Owl, Flammulated

Pigeon à queue barrée (*Patagiœnas fasciata*)
Pigeon, Band-tailed

Pioui de l'Est (*Contopus virens*)
Wood-pewee, Eastern

Quiscale rouilleux (*Euphagus carolinus*)
Blackbird, Rusty

Râle jaune (*Coturnicops noveboracensis*)
Rail, Yellow

Amphibians

Frog, Coastal Tailed (*Ascaphus truei*)
Grenouille-à-queue côtière

Frog, Northern Leopard (*Lithobates pipiens*) Western Boreal/Prairie populations
Grenouille léopard populations des Prairies et de l'ouest de la zone boréale

Frog, Red-legged (*Rana aurora*)
Grenouille à pattes rouges

Salamander, Coeur d'Alene (*Plethodon idahoensis*)
Salamandre de Cœur d'Alène

Salamander, Wandering (*Aneides vagrans*)
Salamandre errante

Salamander, Western Tiger (*Ambystoma mavortium*) Prairie/Boreal population
Salamandre tigrée de l'Ouest population boréale et des Prairies

Toad, Great Plains (*Anaxyrus cognatus*)
Crapaud des steppes

Toad, Western (*Anaxyrus boreas*) Calling population
Crapaud de l'Ouest population chantante

Toad, Western (*Anaxyrus boreas*) Non-calling population
Crapaud de l'Ouest population non-chantante

Reptiles

Boa, Rubber (*Charina bottae*)
Boa caoutchouc

Milksnake (*Lampropeltis triangulum*)
Couleuvre tachetée

Racer, Western Yellow-bellied (*Coluber constrictor mormon*)
Couleuvre agile à ventre jaune de l'Ouest

Ribbonsnake, Eastern (*Thamnophis sauritus*) Great Lakes population
Couleuvre mince population des Grands Lacs

Skink, Five-lined (*Plestiodon fasciatus*) Great Lakes/St. Lawrence population
Scinque pentaligne population des Grands Lacs et du Saint-Laurent

Skink, Western (*Plestiodon skiltonianus*)
Scinque de l'Ouest

Turtle, Eastern Musk (*Sternotherus odoratus*)
Tortue musquée

Turtle, Northern Map (*Graptemys geographica*)
Tortue géographique

Turtle, Snapping (*Chelydra serpentina*)
Tortue serpentine

Turtle, Western Painted (*Chrysemys picta bellii*) Intermountain - Rocky Mountain population
Tortue peinte de l'Ouest, population intramontagnarde - des Rocheuses

Fish

Buffalo, Bigmouth (*Ictiobus cyprinellus*) Saskatchewan River and Nelson River populations
Buffalo à grande bouche populations des rivières Saskatchewan et Nelson

Amphibiens

Crapaud de l'Ouest (*Anaxyrus boreas*) population chantante
Toad, Western Calling population

Crapaud de l'Ouest (*Anaxyrus boreas*) population non-chantante
Toad, Western Non-calling population

Crapaud des steppes (*Anaxyrus cognatus*)
Toad, Great Plains

Grenouille à pattes rouges (*Rana aurora*)
Frog, Red-legged

Grenouille-à-queue côtière (*Ascaphus truei*)
Frog, Coastal Tailed

Grenouille léopard (*Lithobates pipiens*) populations des Prairies et de l'ouest de la zone boréale
Frog, Northern Leopard Western Boreal/Prairie populations

Salamandre de Cœur d'Alène (*Plethodon idahœnsis*)
Salamander, Coeur d'Alene

Salamandre errante (*Aneides vagrans*)
Salamander, Wandering

Salamandre tigrée de l'Ouest (*Ambystoma mavortium*) population boréale et des Prairies
Salamander, Western Tiger Prairie/Boreal population

Reptiles

Boa caoutchouc (*Charina bottae*)
Boa, Rubber

Couleuvre agile à ventre jaune de l'Ouest (*Coluber constrictor mormon*)
Racer, Western Yellow-bellied

Couleuvre mince (*Thamnophis sauritus*) population des Grands Lacs
Ribbonsnake, Eastern Great Lakes population

Couleuvre tachetée (*Lampropeltis triangulum*)
Milksnake

Scinque de l'Ouest (*Plestiodon skiltonianus*)
Skink, Western

Scinque pentaligne (*Plestiodon fasciatus*) population des Grands Lacs et du Saint-Laurent
Skink, Five-lined Great Lakes/St. Lawrence population

Tortue géographique (*Graptemys geographica*)
Turtle, Northern Map

Tortue musquée (*Sternotherus odoratus*)
Turtle, Eastern Musk

Tortue peinte de l'Ouest (*Chrysemys picta bellii*) population intramontagnarde - des Rocheuses
Turtle, Western Painted Intermountain - Rocky Mountain population

Tortue serpentine (*Chelydra serpentina*)
Turtle, Snapping

Poissons

Brochet vermiculé (*Esox americanus vermiculatus*)
Pickerel, Grass

Chub, Silver (*Macrhybopsis storeriana*)
Méné à grandes écailles

Dolly Varden (*Salvelinus malma malma*) Western Arctic populations
Dolly Varden populations de l'ouest de l'Arctique

Killifish, Banded (*Fundulus diaphanus*) Newfoundland population
Fondule barré population de Terre-Neuve

Kiyi, Upper Great Lakes (*Coregonus kiyi kiyi*)
Kiyi du secteur supérieur des Grands Lacs

Lamprey, Northern Brook (*Ichthyomyzon fossor*) Great Lakes – Upper St. Lawrence populations
Lamproie du Nord populations des Grands Lacs et du haut Saint-Laurent

Minnow, Pugnose (*Opsopoeodus emiliae*)
Petit-bec

Pickerel, Grass (*Esox americanus vermiculatus*)
Brochet vermiculé

Redhorse, River (*Moxostoma carinatum*)
Chevalier de rivière

Rockfish type I, Rougheye (*Sebastes* sp. *type I*)
Sébaste à œil épineux du type I

Rockfish type II, Rougheye (*Sebastes* sp. *type II*)
Sébaste à œil épineux du type II

Rockfish, Yelloweye (*Sebastes ruberrimus*) Pacific Ocean inside waters population
Sébaste aux yeux jaunes population des eaux intérieures de l'océan Pacifique

Rockfish, Yelloweye (*Sebastes ruberrimus*) Pacific Ocean outside waters population
Sébaste aux yeux jaunes population des eaux extérieures de l'océan Pacifique

Sculpin, Columbia (*Cottus hubbsi*)
Chabot du Columbia

Sculpin, Deepwater (*Myoxocephalus thompsonii*) Great Lakes - Western St. Lawrence populations
Chabot de profondeur, populations des Grands Lacs - Ouest du Saint-Laurent

Sculpin, Rocky Mountain (*Cottus sp.*) Westslope populations
Chabot des montagnes Rocheuses populations du versant ouest

Sculpin, Shorthead (*Cottus confusus*)
Chabot à tête courte

Shark, Bluntnose Sixgill (*Hexanchus griseus*)
Requin griset

Shiner, Bridle (*Notropis bifrenatus*)
Méné d'herbe

Sturgeon, Green (*Acipenser medirostris*)
Esturgeon vert

Sturgeon, Shortnose (*Acipenser brevirostrum*)
Esturgeon à museau court

Sucker, Mountain (*Catostomus platyrhynchus*) Pacific populations
Meunier des montagnes populations du Pacifique

Sucker, Spotted (*Minytrema melanops*)
Meunier tacheté

Buffalo à grande bouche (*Ictiobus cyprinellus*) populations des rivières Saskatchewan et Nelson
Buffalo, Bigmouth Saskatchewan River and Nelson River populations

Chabot à tête courte (*Cottus confusus*)
Sculpin, Shorthead

Chabot de profondeur (*Myoxocephalus thompsonii*) populations des Grands Lacs - Ouest du Saint-Laurent
Sculpin, Deepwater Great Lakes - Western St. Lawrence populations

Chabot des montagnes Rocheuses (*Cottus sp.*) populations du versant ouest
Sculpin, Rocky Mountain Westslope populations

Chabot du Columbia (*Cottus hubbsi*)
Sculpin, Columbia

Chevalier de rivière (*Moxostoma carinatum*)
Redhorse, River

Crapet sac-à-lait (*Lepomis gulosus*)
Warmouth

Dolly Varden (*Salvelinus malma malma*) populations de l'ouest de l'Arctique
Dolly Varden Western Arctic populations

Esturgeon à museau court (*Acipenser brevirostrum*)
Sturgeon, Shortnose

Esturgeon vert (*Acipenser medirostris*)
Sturgeon, Green

Fondule barré (*Fundulus diaphanus*) population de Terre-Neuve
Killifish, Banded Newfoundland population

Fondule rayé (*Fundulus notatus*)
Topminnow, Blackstripe

Kiyi du secteur supérieur des Grands Lacs (*Coregonus kiyi kiyi*)
Kiyi, Upper Great Lakes

Lamproie du Nord (*Ichthyomyzon fossor*) populations des Grands Lacs et du haut Saint-Laurent
Lamprey, Northern Brook Great Lakes – Upper St. Lawrence populations

Loup Atlantique (*Anarhichas lupus*)
Wolffish, Atlantic

Méné à grandes écailles (*Macrhybopsis storeriana*)
Chub, Silver

Méné d'herbe (*Notropis bifrenatus*)
Shiner, Bridle

Meunier des montagnes (*Catostomus platyrhynchus*) populations du Pacifique
Sucker, Mountain Pacific populations

Meunier tacheté (*Minytrema melanops*)
Sucker, Spotted

Milandre (*Galeorhinus galeus*)
Tope

Petit-bec (*Opsopœodus emiliae*)
Minnow, Pugnose

Requin griset (*Hexanchus griseus*)
Shark, Bluntnose Sixgill

Sébaste à œil épineux du type I (*Sebastes* sp. *type I*)
Rockfish type I, Rougheye

Thornyhead, Longspine (*Sebastolobus altivelis*)
Sébastolobe à longues épines

Tope (*Galeorhinus galeus*)
Milandre

Topminnow, Blackstripe (*Fundulus notatus*)
Fondule rayé

Trout, Westslope Cutthroat (*Oncorhynchus clarkii lewisi*) British Columbia population
Truite fardée versant de l'ouest population de la Colombie-Britannique

Warmouth (*Lepomis gulosus*)
Crapet sac-à-lait

Wolffish, Atlantic (*Anarhichas lupus*)
Loup Atlantique

Molluscs

Floater, Brook (*Alasmidonta varicosa*)
Alasmidonte renflée

Jumping-slug, Warty (*Hemphillia glandulosa*)
Limace-sauteuse glanduleuse

Lampmussel, Wavy-rayed (*Lampsilis fasciola*)
Lampsile fasciolée

Lampmussel, Yellow (*Lampsilis cariosa*)
Lampsile jaune

Mantleslug, Magnum (*Magnipelta mycophaga*)
Limace à grand manteau

Mussel, Rocky Mountain Ridged (*Gonidea angulata*)
Gonidée des Rocheuses

Oyster, Olympia (*Ostrea lurida*)
Huître plate du Pacifique

Slug, Haida Gwaii (*Staala gwaii*)
Limace de Haida Gwaii

Vertigo, Threaded (*Nearctula* sp.)
Vertigo à crêtes fines

Arthropods

Bumble Bee, Yellow-banded (*Bombus terricola*)
Bourdon terricole

Grasshopper, Greenish-white (*Hypochlora alba*)
Criquet de l'armoise

Metalmark, Mormon (*Apodemia mormo*) Prairie population
Mormon population des Prairies

Monarch (*Danaus plexippus*)
Monarque

Moth, Pale Yellow Dune (*Copablepharon grandis*)
Noctuelle jaune pâle des dunes

Skipper, Sonora (*Polites sonora*)
Hespérie du Sonora

Snaketail, Pygmy (*Ophiogomphus howei*)
Ophiogomphe de Howe

Spider, Georgia Basin Bog (*Gnaphosa snohomish*)
Gnaphose de Snohomish

Tachinid Fly, Dune (*Germaria angustata*)
Mouche tachinide des dunes

Sébaste à œil épineux du type II (*Sebastes* sp. *type II*)
Rockfish type II, Rougheye

Sébaste aux yeux jaunes (*Sebastes ruberrimus*) population des eaux extérieures de l'océan Pacifique
Rockfish, Yelloweye Pacific Ocean outside waters population

Sébaste aux yeux jaunes (*Sebastes ruberrimus*) population des eaux intérieures de l'océan Pacifique
Rockfish, Yelloweye Pacific Ocean inside waters population

Sébastolobe à longues épines (*Sebastolobus altivelis*)
Thornyhead, Longspine

Truite fardée versant de l'ouest (*Oncorhynchus clarkii lewisi*) population de la Colombie-Britannique
Trout, Westslope Cutthroat British Columbia population

Mollusques

Alasmidonte renflée (*Alasmidonta varicosa*)
Floater, Brook

Gonidée des Rocheuses (*Gonidea angulata*)
Mussel, Rocky Mountain Ridged

Huître plate du Pacifique (*Ostrea lurida*)
Oyster, Olympia

Lampsile fasciolée (*Lampsilis fasciola*)
Lampmussel, Wavy-rayed

Lampsile jaune (*Lampsilis cariosa*)
Lampmussel, Yellow

Limace à grand manteau (*Magnipelta mycophaga*)
Mantleslug, Magnum

Limace de Haida Gwaii (*Staala gwaii*)
Slug, Haida Gwaii

Limace-sauteuse glanduleuse (*Hemphillia glandulosa*)
Jumping-slug, Warty

Vertigo à crêtes fines (*Nearctula* sp.)
Vertigo, Threaded

Arthropodes

Amiral de Weidemeyer (*Limenitis weidemeyerii*)
Weidemeyer's Admiral

Bourdon terricole (*Bombus terricola*)
Bumble Bee, Yellow-banded

Criquet de l'armoise (*Hypochlora alba*)
Grasshopper, Greenish-white

Gnaphose de Snohomish (*Gnaphosa snohomish*)
Spider, Georgia Basin Bog

Hespérie du Sonora (*Polites sonora*)
Skipper, Sonora

Monarque (*Danaus plexippus*)
Monarch

Mormon (*Apodemia mormo*) population des Prairies
Metalmark, Mormon Prairie population

Mouche tachinide des dunes (*Germaria angustata*)
Tachinid Fly, Dune

Noctuelle jaune pâle des dunes (*Copablepharon grandis*)
Moth, Pale Yellow Dune

Weidemeyer's Admiral (*Limenitis weidemeyerii*)
Amiral de Weidemeyer

Plants

Ash, Blue (*Fraxinus quadrangulata*)
Frêne bleu

Aster, Crooked-stem (*Symphyotrichum prenanthoides*)
Aster fausse-prenanthe

Aster, Nahanni (*Symphyotrichum nahanniense*)
Aster de la Nahanni

Aster, White-top (*Sericocarpus rigidus*)
Aster rigide

Beggarticks, Vancouver Island (*Bidens amplissima*)
Grand bident

Blue Flag, Western (*Iris missouriensis*)
Iris du Missouri

Buffalograss (*Bouteloua dactyloides*)
Buchloé faux-dactyle

Fern, American Hart's-tongue (*Asplenium scolopendrium*)
Scolopendre d'Amérique

Fern, Coastal Wood (*Dryopteris arguta*)
Dryoptéride côtière

Goldencrest (*Lophiola aurea*)
Lophiolie dorée

Goldenrod, Houghton's (*Solidago houghtonii*)
Verge d'or de Houghton

Goldenrod, Riddell's (*Solidago riddellii*)
Verge d'or de Riddell

Hairgrass, Mackenzie (*Deschampsia mackenzieana*)
Deschampsie du bassin du Mackenzie

Indian-plantain, Tuberous (*Arnoglossum plantagineum*)
Arnoglosse plantain

Iris, Dwarf Lake (*Iris lacustris*)
Iris lacustre

Lilaeopsis, Eastern (*Lilaeopsis chinensis*)
Liléopsis de l'Est

Lily, Lyall's Mariposa (*Calochortus lyallii*)
Calochorte de Lyall

Milk-vetch, Fernald's (*Astragalus robbinsii* var. *fernaldii*)
Astragale de Fernald

Pennywort, Water (*Hydrocotyle umbellata*)
Hydrocotyle à ombelle

Pinweed, Beach (*Lechea maritima*)
Léchéa maritime

Pondweed, Hill's (*Potamogeton hillii*)
Potamot de Hill

Prairie-clover, Hairy (*Dalea villosa*)
Dalée velue

Quillwort, Prototype (*Isoetes prototypus*)
Isoète prototype

Redroot (*Lachnanthes caroliniana*)
Lachnanthe de Caroline

Rose, Climbing Prairie (*Rosa setigera*)
Rosier sétigère

Ophiogomphe de Howe (*Ophiogomphus howei*)
Snaketail, Pygmy

Plantes

Achillée à gros capitules (*Achillea millefolium* var. *megacephalum*)
Yarrow, Large-headed Woolly

Arméria de l'Athabasca (*Armeria maritima interior*)
Thrift, Athabasca

Arnoglosse plantain (*Arnoglossum plantagineum*)
Indian-plantain, Tuberous

Aster de la Nahanni (*Symphyotrichum nahanniense*)
Aster, Nahanni

Aster fausse-prenanthe (*Symphyotrichum prenanthoides*)
Aster, Crooked-stem

Aster rigide (*Sericocarpus rigidus*)
Aster, White-top

Astragale de Fernald (*Astragalus robbinsii* var. *fernaldii*)
Milk-vetch, Fernald's

Buchloé faux-dactyle (*Bouteloua dactyloides*)
Buffalograss

Calochorte de Lyall (*Calochortus lyallii*)
Lily, Lyall's Mariposa

Chardon de Pitcher (*Cirsium pitcheri*)
Thistle, Pitcher's

Cicutaire de Victorin (*Cicuta maculata* var. *victorinii*)
Water-hemlock, Victorin's

Dalée velue (*Dalea villosa*)
Prairie-clover, Hairy

Deschampsie du bassin du Mackenzie (*Deschampsia mackenzieana*)
Hairgrass, Mackenzie

Dryoptéride côtière (*Dryopteris arguta*)
Fern, Coastal Wood

Éléocharide tuberculée (*Eleocharis tuberculosa*)
Spike-rush, Tubercled

Frêne bleu (*Fraxinus quadrangulata*)
Ash, Blue

Grand bident (*Bidens amplissima*)
Beggarticks, Vancouver Island

Hydrocotyle à ombelle (*Hydrocotyle umbellata*)
Pennywort, Water

Iris du Missouri (*Iris missouriensis*)
Blue Flag, Western

Iris lacustre (*Iris lacustris*)
Iris, Dwarf Lake

Isoète prototype (*Isœtes prototypus*)
Quillwort, Prototype

Jonc du New Jersey (*Juncus caesariensis*)
Rush, New Jersey

Ketmie des marais (*Hibiscus moscheutos*)
Rose-mallow, Swamp

Lachnanthe de Caroline (*Lachnanthes caroliniana*)
Redroot

Léchéa maritime (*Lechea maritima*)
Pinweed, Beach

Rose-mallow, Swamp (*Hibiscus moscheutos*)
Ketmie des marais

Rush, New Jersey (*Juncus caesariensis*)
Jonc du New Jersey

Spike-rush, Tubercled (*Eleocharis tuberculosa*)
Éléocharide tuberculée

Tansy, Floccose (*Tanacetum huronense* var. *floccosum*)
Tanaisie floconneuse

Thistle, Pitcher's (*Cirsium pitcheri*)
Chardon de Pitcher

Thrift, Athabasca (*Armeria maritima interior*)
Arméria de l'Athabasca

Water-hemlock, Victorin's (*Cicuta maculata* var. *victorinii*)
Cicutaire de Victorin

Willow, Felt-leaf (*Salix silicicola*)
Saule silicicole

Willow, Sand-dune Short-capsuled (*Salix brachycarpa* var. *psammophila*)
Saule psammophile

Willow, Turnor's (*Salix turnorii*)
Saule de Turnor

Woolly-heads, Dwarf (*Psilocarphus brevissimus*) Prairie population
Psilocarphe nain, population des Prairies

Yarrow, Large-headed Woolly (*Achillea millefolium* var. *megacephalum*)
Achillée à gros capitules

Mosses

Cord-moss, Banded (*Entosthodon fascicularis*)
Entosthodon fasciculé

Moss, Columbian Carpet (*Bryoerythrophyllum columbianum*)
Érythrophylle du Columbia

Moss, Pygmy Pocket (*Fissidens exilis*)
Fissident pygmée

Moss, Twisted Oak (*Syntrichia laevipila*)
Tortule à poils lisses

Lichens

Glass-whiskers, Frosted (*Sclerophora peronella*) Nova Scotia population
Sclérophore givré population de la Nouvelle-Écosse

Lichen, Blue Felt (*Degelia plumbea*)
Dégélie plombée

Lichen, Boreal Felt (*Erioderma pedicallatum*) Boreal population
Érioderme boréal population boréale

Lichen, Cryptic Paw (*Nephroma occultum*)
Néphrome cryptique

Lichen, Oldgrowth Specklebelly (*Pseudocyphellaria rainierensis*)
Pseudocyphellie des forêts surannées

Lichen, Peacock Vinyl (*Leptogium polycarpum*)
Leptoge à quatre spores

Liléopsis de l'Est (*Lilaeopsis chinensis*)
Lilaeopsis, Eastern

Lophiolie dorée (*Lophiola aurea*)
Goldencrest

Potamot de Hill (*Potamogeton hillii*)
Pondweed, Hill's

Psilocarphe nain (*Psilocarphus brevissimus*) population des Prairies
Woolly-heads, Dwarf Prairie population

Rosier sétigère (*Rosa setigera*)
Rose, Climbing Prairie

Saule de Turnor (*Salix turnorii*)
Willow, Turnor's

Saule psammophile (*Salix brachycarpa* var. *psammophila*)
Willow, Sand-dune Short-capsuled

Saule silicicole (*Salix silicicola*)
Willow, Felt-leaf

Scolopendre d'Amérique (*Asplenium scolopendrium*)
Fern, American Hart's-tongue

Tanaisie floconneuse (*Tanacetum huronense* var. *floccosum*)
Tansy, Floccose

Verge d'or de Houghton (*Solidago houghtonii*)
Goldenrod, Houghton's

Verge d'or de Riddell (*Solidago riddellii*)
Goldenrod, Riddell's

Mousses

Entosthodon fasciculé (*Entosthodon fascicularis*)
Cord-moss, Banded

Érythrophylle du Columbia (*Bryœrythrophyllum columbianum*)
Moss, Columbian Carpet

Fissident pygmée (*Fissidens exilis*)
Moss, Pygmy Pocket

Tortule à poils lisses (*Syntrichia laevipila*)
Moss, Twisted Oak

Lichens

Dégélie plombée (*Degelia plumbea*)
Lichen, Blue Felt

Érioderme boréal (*Erioderma pedicellatum*) population boréale
Lichen, Boreal Felt Boreal population

Leptoge à quatre spores (*Leptogium polycarpum*)
Lichen, Peacock Vinyl

Néphrome cryptique (*Nephroma occultum*)
Lichen, Cryptic Paw

Peltigère éventail d'eau de l'Ouest (*Peltigera gowardii*)
Waterfan, Western

Pseudocyphellie des forêts surannées (*Pseudocyphellaria rainierensis*)
Lichen, Oldgrowth Specklebelly

Waterfan, Western (*Peltigera gowardii*)
Peltigère éventail d'eau de l'Ouest

2002, c. 29, Sch. 1; SOR/2005-14, ss. 1 to 53; SOR/2005-224, ss. 1 to 32; SOR/2006-60, ss. 1, 2; SOR/2006-189, ss. 1 to 22, 23(F), 24 to 26; SOR/2007-284; SOR/2009-86; SOR/2010-32, 33; SOR/2011-8, 128, 233; SOR/2012-133; SOR/2013-34; SOR/2014-274; SOR/2017-10, 59, 112, 130, 229; SOR/2018-10, 112.

Sclérophore givré (*Sclerophora peronella*) population de la Nouvelle-Écosse
Glass-whiskers, Frosted Nova Scotia population

2002, ch. 29, ann. 1; DORS/2005-14, art. 1 à 53; DORS/2005-224, art. 1 à 32; DORS/2006-60, art. 1 et 2; DORS/2006-189, art. 1 à 22, 23(F) et 24 à 26; DORS/2007-284, DORS/2009-86; DORS/2010-32, 33; DORS/2011-8, 128, 233; DORS/2012-133; DORS/2013-34; DORS/2014-274; DORS/2017-10, 59, 112, 130, 229; DORS/2018-10, 112.

SCHEDULE 2

(Section 130)

PART 1

Endangered Species

Mammals

Whale, Beluga (*Delphinapterus leucas*) Ungava Bay population
Béluga population de la baie d'Ungava

Whale, Beluga (*Delphinapterus leucas*) Southeast Baffin Island - Cumberland Sound population
Béluga population du sud-est de l'île de Baffin et de la baie Cumberland

Whale, Bowhead (*Balaena mysticetus*) Eastern Arctic population
Baleine boréale population de l'Arctique de l'Est

Whale, Bowhead (*Balaena mysticetus*) Western Arctic population
Baleine boréale population de l'Arctique de l'Ouest

Birds

Reptiles

Snake, Lake Erie Water (*Nerodia sipedon insularum*)
Couleuvre d'eau du lac Érié

Fish

PART 2

Threatened Species

Mammals

Porpoise, Harbour (*Phocoena phocoena*) Northwest Atlantic population
Marsouin commun population du Nord-Ouest de l'Atlantique

Whale, Beluga (*Delphinapterus leucas*) Eastern Hudson Bay population
Béluga population de l'est de la baie d'Hudson

Birds

Reptiles

Fish

Cisco, Blackfin (*Coregonus nigripinnis*)
Cisco à nageoires noires

Cisco, Shortjaw (*Coregonus zenithicus*)
Cisco à mâchoires égales

Cisco, Shortnose (*Coregonus reighardi*)
Cisco à museau court

Redhorse, Black (*Moxostoma duquesnei*)
Chevalier noir

ANNEXE 2

(article 130)

PARTIE 1

Espèces en voie de disparition

Mammifères

Baleine boréale (*Balaena mysticetus*) population de l'Arctique de l'Est
Whale, Bowhead Eastern Arctic population

Baleine boréale (*Balaena mysticetus*) population de l'Arctique de l'Ouest
Whale, Bowhead Western Arctic population

Béluga (*Delphinapterus leucas*) population de la baie d'Ungava
Whale, Beluga Ungava Bay population

Béluga (*Delphinapterus leucas*) population du sud-est de l'île de Baffin et de la baie Cumberland
Whale, Beluga Southeast Baffin Island - Cumberland Sound population

Oiseaux

Reptiles

Couleuvre d'eau du lac Érié (*Nerodia sipedon insularum*)
Snake, Lake Erie Water

Poissons

PARTIE 2

Espèces menacées

Mammifères

Béluga (*Delphinapterus leucas*) population de l'est de la baie d'Hudson
Whale, Beluga Eastern Hudson Bay population

Marsouin commun (*Phocœna phocœna*) population du Nord-Ouest de l'Atlantique
Porpoise, Harbour Northwest Atlantic population

Oiseaux

Reptiles

Poissons

Chabot de profondeur des Grands Lacs (*Myoxocephalus thompsoni*) population des Grands Lacs
Sculpin, Deepwater Great Lakes population

Chevalier cuivré (*Moxostoma hubbsi*)
Redhorse, Copper

Chevalier noir (*Moxostoma duquesnei*)
Redhorse, Black

Redhorse, Copper (*Moxostoma hubbsi*)
Chevalier cuivré

Sculpin, Deepwater (*Myoxocephalus thompsoni*) Great Lakes population
Chabot de profondeur des Grands Lacs population des Grands Lacs

Plants

2002, c. 29, Sch. 2; SOR/2005-14, ss. 54 to 60; SOR/2005-224, ss. 33 to 36; SOR/2006-60, s. 3; SOR/2006-189, ss. 27 to 29.

Cisco à mâchoires égales (*Coregonus zenithicus*)
Cisco, Shortjaw

Cisco à museau court (*Coregonus reighardi*)
Cisco, Shortnose

Cisco à nageoires noires (*Coregonus nigripinnis*)
Cisco, Blackfin

Plantes

2002, ch. 29, ann. 2; DORS/2005-14, art. 54 à 60; DORS/2005-224, art. 33 à 36; DORS/2006-60, art. 3; DORS/2006-189, art. 27 à 29.

SCHEDULE 3

(Section 130)

Special Concern

Mammals

Bat, Fringed (*Myotis thysanodes*)
Chauve-souris à queue frangée

Bat, Keen's Long-eared (*Myotis keenii*)
Chauve-souris de Keen

Cottontail, Nuttall's (*Sylvilagus nuttallii nuttallii*) British Columbia population
Lapin de Nuttall population de la Colombie-Britannique

Kangaroo Rat, Ord's (*Dipodomys ordii*)
Rat kangourou d'Ord

Mouse, Western Harvest (*Reithrodontomys megalotis megalotis*) British Columbia population
Souris des moissons population de la Colombie-Britannique

Seal, Harbour (*Phoca vitulina mellonae*) Lacs des Loups Marins landlocked population
Phoque commun population confinée aux lacs des Loups Marins

Shrew, Gaspé (*Sorex gaspensis*)
Musaraigne de Gaspé

Squirrel, Southern Flying (*Glaucomys volans*)
Petit polatouche

Whale, Beluga (*Delphinapterus leucas*) Eastern High Arctic/Baffin Bay population
Béluga population de l'Est du haut Arctique et de la baie de Baffin

Whale, Sowerby's Beaked (*Mesoplodon bidens*)
Baleine à bec de Sowerby

Birds

Falcon, Tundra Peregrine (*Falco peregrinus tundrius*)
Faucon pèlerin, toundra

Hawk, Ferruginous (*Buteo regalis*)
Buse rouilleuse

Hawk, Red-shouldered (*Buteo lineatus*)
Buse à épaulettes

Heron, Pacific Great Blue (*Ardea herodias fannini*)
Grand héron population de la côte du Pacifique

Owl, Short-eared (*Asio flammeus*)
Hibou des marais

Thrush, Bicknell's (*Catharus bicknelli*)
Grive de Bicknell

Waterthrush, Louisiana (*Seiurus motacilla*)
Paruline hochequeue

Woodpecker, Red-headed (*Melanerpes erythrocephalus*)
Pic à tête rouge

ANNEXE 3

(article 130)

Espèces préoccupantes

Mammifères

Baleine à bec de Sowerby (*Mesoplodon bidens*)
Whale, Sowerby's Beaked

Béluga (*Delphinapterus leucas*) population de l'Est du haut Arctique et de la baie de Baffin
Whale, Beluga Eastern High Arctic/Baffin Bay population

Chauve-souris à queue frangée (*Myotis thysanodes*)
Bat, Fringed

Chauve-souris de Keen (*Myotis keenii*)
Bat, Keen's Long-eared

Lapin de Nuttall (*Sylvilagus nuttallii nuttallii*) population de la Colombie-Britannique
Cottontail, Nuttall's British Columbia population

Musaraigne de Gaspé (*Sorex gaspensis*)
Shrew, Gaspé

Petit polatouche (*Glaucomys volans*)
Squirrel, Southern Flying

Phoque commun (*Phoca vitulina mellonae*) population confinée aux lacs des Loups Marins
Seal, Harbour Lacs des Loups Marins landlocked population

Rat kangourou d'Ord (*Dipodomys ordii*)
Kangaroo Rat, Ord's

Souris des moissons (*Reithrodontomys megalotis megalotis*) population de la Colombie-Britannique
Mouse, Western Harvest British Columbia population

Oiseaux

Buse à épaulettes (*Buteo lineatus*)
Hawk, Red-shouldered

Buse rouilleuse (*Buteo regalis*)
Hawk, Ferruginous

Faucon pèlerin, toundra (*Falco peregrinus tundrius*)
Falcon, Tundra Peregrine

Grand héron (*Ardea herodias fannini*) population de la côte du Pacifique
Heron, Pacific Great Blue

Grive de Bicknell (*Catharus bicknelli*)
Thrush, Bicknell's

Hibou des marais (*Asio flammeus*)
Owl, Short-eared

Paruline hochequeue (*Seiurus motacilla*)
Waterthrush, Louisiana

Pic à tête rouge (*Melanerpes erythrocephalus*)
Woodpecker, Red-headed

Amphibians

Reptiles

Lizard, Eastern Short-horned (*Phrynosoma douglassii brevirostre*)
Phrynosome de Douglas de l'Est

Skink, Five-lined (*Eumeces fasciatus*)
Scinque pentaligne

Turtle, Wood (*Clemmys insculpta*)
Tortue des bois

Fish

Buffalo, Bigmouth (*Ictiobus cyprinellus*)
Buffalo à grande bouche

Buffalo, Black (*Ictiobus niger*)
Buffalo noir

Cisco, Spring (*Coregonus* sp.)
Cisco de printemps

Cod, Atlantic (*Gadus morhua*)
Morue franche

Dace, Redside (*Clinostomus elongatus*)
Méné long

Dace, Umatilla (*Rhinichthys umatilla*)
Naseux d'Umatilla

Darter, Greenside (*Etheostoma blennioides*)
Dard vert

Kiyi (*Coregonus kiyi*)
Kiyi

Lamprey, Chestnut (*Ichthyomyzon castaneus*)
Lamproie brune

Lamprey, Northern Brook (*Ichthyomyzon fossor*)
Lamproie du Nord

Redhorse, River (*Moxostoma carinatum*)
Chevalier de rivière

Sculpin, Fourhorn (*Myoxocephalus quadricornis*) Freshwater form
Chaboisseau à quatre cornes forme d'eau douce

Shiner, Bigmouth (*Notropis dorsalis*)
Méné à grande bouche

Shiner, Silver (*Notropis photogenis*)
Méné miroir

Stickleback, Charlotte Unarmoured (*Gasterosteus aculeatus*)
Épinoche lisse des îles de la Reine-Charlotte

Stickleback, Giant (*Gasterosteus* sp.)
Épinoche géante

Sturgeon, Shortnose (*Acipenser brevirostrum*)
Esturgeon à museau court

Sunfish, Orangespotted (*Lepomis humilis*)
Crapet menu

Sunfish, Redbreast (*Lepomis auritus*)
Crapet rouge

Whitefish, Squanga (*Coregonus* sp.)
Corégone du Squanga

Amphibiens

Reptiles

Phrynosome de Douglas de l'Est (*Phrynosoma douglassii brevirostre*)
Lizard, Eastern Short-horned

Scinque pentaligne (*Eumeces fasciatus*)
Skink, Five-lined

Tortue des bois (*Clemmys insculpta*)
Turtle, Wood

Poissons

Buffalo à grande bouche (*Ictiobus cyprinellus*)
Buffalo, Bigmouth

Buffalo noir (*Ictiobus niger*)
Buffalo, Black

Chaboisseau à quatre cornes (*Myoxocephalus quadricornis*) forme d'eau douce
Sculpin, Fourhorn Freshwater form

Chevalier de rivière (*Moxostoma carinatum*)
Redhorse, River

Cisco de printemps (*Coregonus* sp.)
Cisco, Spring

Corégone du Squanga (*Coregonus* sp.)
Whitefish, Squanga

Crapet menu (*Lepomis humilis*)
Sunfish, Orangespotted

Crapet rouge (*Lepomis auritus*)
Sunfish, Redbreast

Dard vert (*Etheostoma blennioides*)
Darter, Greenside

Épinoche géante (*Gasterosteus* sp.)
Stickleback, Giant

Épinoche lisse des îles de la Reine-Charlotte (*Gasterosteus aculeatus*)
Stickleback, Charlotte Unarmoured

Esturgeon à museau court (*Acipenser brevirostrum*)
Sturgeon, Shortnose

Kiyi (*Coregonus kiyi*)
Kiyi

Lamproie brune (*Ichthyomyzon castaneus*)
Lamprey, Chestnut

Lamproie du Nord (*Ichthyomyzon fossor*)
Lamprey, Northern Brook

Méné à grande bouche (*Notropis dorsalis*)
Shiner, Bigmouth

Méné long (*Clinostomus elongatus*)
Dace, Redside

Méné miroir (*Notropis photogenis*)
Shiner, Silver

Morue franche (*Gadus morhua*)
Cod, Atlantic

Naseux d'Umatilla (*Rhinichthys umatilla*)
Dace, Umatilla

Plants

Aster, Bathurst (*Symphyotrichum subulatum*) Bathurst population
Aster subulé population de Bathurst

Bulrush, Long's (*Scirpus longii*)
Scirpe de Long

Columbo, American (*Frasera caroliniensis*)
Frasère de Caroline

Fern, Broad Beech (*Phegopteris hexagonoptera*)
Phégoptéride à hexagones

Fleabane, Provancher's (*Erigeron philadelphicus* ssp. *provancheri*)
Vergerette de Provancher

Goosefoot, Smooth (*Chenopodium subglabrum*)
Chénopode glabre

Green Dragon (*Arisaema dracontium*)
Arisème dragon

Helleborine, Giant (*Epipactis gigantea*)
Épipactis géant

Locoweed, Hare-footed (*Oxytropis lagopus*)
Oxytrope patte-de-lièvre

Oak, Shumard (*Quercus shumardii*)
Chêne de Shumard

Quillwort, Bolander's (*Isoëtes bolanderi*)
Isoète de Bolander

Lichens

Cryptic Paw (*Nephroma occultum*)
Lichen cryptique

Oldgrowth Specklebelly (*Pseudocyphellaria rainierensis*)
Pseudocyphellie des forêts surannées

Seaside Bone (*Hypogymnia heterophylla*)
Hypogymnie maritime

2002, c. 29, Sch. 3; SOR/2005-14, ss. 61 to 65; SOR/2005-224, ss. 37 to 40; SOR/2006-60, s. 4; SOR/2006-189, ss. 30 to 35.

Plantes

Arisème dragon (*Arisaema dracontium*)
Green Dragon

Aster subulé (*Symphyotrichum subulatum*) population de Bathurst
Aster, Bathurst Bathurst population

Chêne de Shumard (*Quercus shumardii*)
Oak, Shumard

Chénopode glabre (*Chenopodium subglabrum*)
Goosefoot, Smooth

Épipactis géant (*Epipactis gigantea*)
Helleborine, Giant

Frasère de Caroline (*Frasera caroliniensis*)
Columbo, American

Isoète de Bolander (*Isoëtes bolanderi*)
Quillwort, Bolander's

Oxytrope patte-de-lièvre (*Oxytropis lagopus*)
Locoweed, Hare-footed

Phégoptéride à hexagones (*Phegopteris hexagonoptera*)
Fern, Broad Beech

Scirpe de Long (*Scirpus longii*)
Bulrush, Long's

Vergerette de Provancher (*Erigeron philadelphicus* ssp. *provancheri*)
Fleabane, Provancher's

Lichens

Hypogymnie maritime (*Hypogymnia heterophylla*)
Seaside Bone

Lichen cryptique (*Nephroma occultum*)
Cryptic Paw

Pseudocyphellie des forêts surannées (*Pseudocyphellaria rainierensis*)
Oldgrowth Specklebelly

2002, ch. 29, ann. 3; DORS/2005-14, art. 61 à 65; DORS/2005-224, art. 37 à 40; DORS/2006-60, art. 4; DORS/2006-189, art. 30 à 35.