Federal Court of Appeal  Cour d'appel fédérale

Date: 20160906

Docket: A-386-14

Citation: 2016 FCA 219

CORAM: **GAUTHIER J.A.**
WEBB J.A.
GLEASON J.A.

BETWEEN:

TSLEIL-WAUTUTH NATION

Appellant

And

NATIONAL ENERGY BOARD,
TRANS MOUNTAIN PIPELINE ULC, and
ATTORNEY GENERAL OF CANADA

Respondents

Heard at Vancouver, British Columbia, on October 27, 2015 and January 22, 2016.

Last written submissions filed June 17, 2016.

Judgment delivered at Ottawa, Ontario, on September 6, 2016.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.
GLEASON J.A.

CONCURRED IN BY: WEBB J.A.

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REASONS FOR JUDGMENT

GAUTHIER and GLEASON JJ.A.

[1] The Tsleil-Waututh Nation (TWN) appeals from three interlocutory decisions of the National Energy Board (NEB) made pursuant to subsection 22(1) of the *National Energy Board Act*, R.S.C., 1985, c. N-7 (*NEBA*).

I. Overview

[2] These three decisions were made in the context of the NEB's review of an application filed by Trans Mountain Pipeline ULC (TM) for the construction of a project which, broadly speaking, consists of:

i) An extension of its existing TM pipeline system, which will include completing a twinning of the existing pipeline in Alberta and British Columbia with about 987 km of new buried pipeline as well as the reactivation of 193 km of existing pipeline;

ii) New and modified facilities including such installations as several pump stations; and

iii) Tanks and additional tanker loading facilities at the existing Westridge Marine Terminal (WMT) in British Columbia;

(together, the Project).

[3] The stated purpose of the Project is to enable Canadian producers to export oil (light and crude oil including diluted bitumen) from the WMT to foreign markets. Among other things, the Project, if completed, will result in increased marine shipping activities, particularly in the Burrard Inlet, raising the number of tanker calls from 5 per month to 34 per month, depending on market conditions.

[4] The Tsleil-Waututh are also known as the people of the Burrard Inlet. Their traditions and way of life are largely centered on the Inlet. About 500 Tsleil-Waututh live in the TWN

primary community (Indian Reserve #3) on the North Shore of Eastern Burrard Inlet, only a few kilometres from the WMT.

[5] It is not disputed that the Crown owes the TWN a duty to consult in respect of the Project within the meaning of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511. Indeed, it appears on the basis of its Preliminary Depth of Consultation assessment that the Crown concluded that the TWN was entitled to a high level of consultation in respect of the Project (Affidavit of Mark Youden dated January 21, 2016, Exhibit A, page 9).

[6] The *NEBA* requires that companies apply for a certificate of public convenience and necessity (CPCN) before constructing or operating an inter-provincial pipeline, such as that involved in the Project. To this end, the NEB must, within the strict and short timeline set out in the *NEBA*, provide a report to the Minister of Natural Resources (Minister) for consideration by the Governor in Council (GIC). The NEB's report must include a recommendation as to whether a CPCN should be issued to enable a project to proceed (subsection 52(1) of the *NEBA*).

[7] In addition, as the Project involves the construction of more than 40 kilometres of pipeline other than offshore pipelines, it is a "designated project" as defined in section 2 of the *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19, s. 52) (*CEAA 2012*) and section 46 of the *Regulations Designating Physical Activities*, SOR/2012-147. Pursuant to subsection 52(3) of the *NEBA*, the NEB was therefore required to conduct an environmental assessment (EA) of the Project pursuant to the *CEAA 2012*. The NEB's report submitted to the Minister under the *NEBA* must therefore also include the conclusions drawn from its assessment

under the *CEAA 2012* and its recommendations based on the factors set out in sections 5 and 19 of the *CEAA 2012* (subsection 52(3) of *NEBA*; subsections 29(1) and 31(1) of *CEAA 2012*).

[8] The decisions under appeal (collectively, the Decisions) are all dated April 2, 2014. While the parties describe them somewhat differently in their respective original memoranda, the Decisions may be described as follows:

i) A determination that TM's Project application is sufficiently complete to proceed to an assessment and a public hearing under the *NEBA* (Completeness Decision) (Appeal Book, Volume 1 at pages 16-18);

ii) A confirmation that the Project is a "designated project" that ought to be assessed under the *CEAA 2012*, and setting out the list of factors and scope of factors to be considered for the purpose of the EA (*CEAA 2012* Decision) (Appeal Book, Volume 1 at pages 300-303); and

iii) An order detailing the steps and deadlines for the application assessment process, including the public hearing process (Hearing Order) (Appeal Book, Volume 1 at pages 31-49).

[9] On April 2, 2014, the NEB also ruled on 2118 applications filed by persons seeking participatory rights and granted intervener status to 400 applicants. This included the TWN (one of 73 Aboriginal Groups granted intervener status), various federal government departments, as well as other governmental authorities such as the City of Burnaby. This last decision is not on appeal before us.

[10] As can be seen from their mere descriptions, the Decisions were issued very early on in the application review process undertaken by the NEB. TM filed its Project application on December 16, 2013, a little over three months before the Decisions were issued.

[11] It is not disputed that the TWN has had the opportunity to use the NEB process to seek information from TM and various federal agencies involved. The TWN has also been able to file considerable evidence, including the final report of its own environmental assessment and its own expert reports. It has also had the opportunity to present traditional oral evidence and to make written and oral submissions in respect of all issues identified by the NEB, including the impact of the increased marine shipping that would result from the exportation of greater quantities of oil from the WMT once the Project was completed and Canadian producers used the new facilities.

[12] There is no evidence before us that the TWN filed any motion, or raised with the NEB, either orally or in writing at any time before April 2, 2014, any of the arguments it raises before us.

[13] As nobody sought a stay of the NEB proceedings, on May 20, 2016, and as scheduled in its last hearing order, the NEB issued its final 533-page report (the Report). The Report includes the NEB's recommendation that the GIC approve the Project, subject to 157 conditions listed therein. The NEB found the Project to be in Canada's public interest despite significant impacts of increased marine shipping resulting from the future exportation of oil from the WMT which could not wholly be mitigated.

[14] It is public knowledge that a three member panel has started another round of consultation on the Report. That round must be completed before the GIC makes its decision as to whether or not the NEB should issue a CPCN to TM or whether the NEB should be required to reconsider some issues under section 54 of the *NEBA.* It is expected that the GIC decision will be made sometime towards the end of December 2016.

[15] It also appears from the public record of this Court that, since May 20, 2016, at least seven applications for judicial review challenging the Report have been filed.

[16] This Court also very recently issued its decision in *Gitxaala Nation v. Canada*, 2016 FCA 187 [*Northern Gateway*], which, for the first time, deals extensively with the new statutory regime applicable to applications for a CPCN like the one filed for the Project. In *Northern Gateway* (at paragraphs 120 – 123), this Court indicated that the GIC is the only decision-maker tasked with approving an application for a project similar to the one before us.

[17] For a number of reasons, the hearing of the appeal before us occurred in stages and the matter was not taken under reserve until mid-June 2016. The manner in which this case proceeded was unusual. First, the parties sought and were afforded the opportunity to file additional memoranda when, during the course of the first hearing, the TWN changed its position as to the role of the NEB in respect of the Crown's duty to consult, an issue at the core of its appeal. According to the TWN, this change in position was necessary because of recent case law of this Court such as *Hamlet of Clyde River v. TGS-NOPEC Geophysical Company ASA (TGS)*, 2015 FCA 179, 474 N.R. 96 (August 17, 2015) [*Clyde River*] and *Chippewas of the Thames First*

Nation v. Enbridge Pipelines Inc., 2015 FCA 222, [2016] 3 F.C.R. 96 (October 20, 2015) the latter of which deals with the impact of the Supreme Court of Canada's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 [*Carrier Sekani*]. However, the TWN could not explain why it was not possible for it to give prior notice of this significant change of position before the hearing. Such prior notice could have avoided the delay that resulted from such a change.

[18] Secondly, by notice of motion filed the day before the second hearing scheduled on January 22, 2016, the Attorney General of Canada (AG) sought a three-month adjournment so it could reconsider its position as part of the newly elected government's overall review of its position on Aboriginal law matters. The AG's request was supported by the TWN, even though it was known by the parties that the NEB would issue its Report in May 2016 and that an adjournment would most likely prevent this Court from deciding this matter prior to the issuance of the Report. The motion for adjournment, although poorly timed, was granted by this Court (with costs to be dealt with at a later stage) so as to afford the requested opportunity to foster reconciliation between First Nations and the Crown. To minimize the inconvenience and waste of resources that flowed from the adjournment, the Court, on consent, completed the hearing of all issues on January 22, 2016, with the exception of those related to the AG's position on the TWN's duty to consult arguments and any subsequent reply by the TWN on this issue.

[19] On April 11, 2016, the TWN wrote to the Court to advise that TWN and federal government representatives had met twice and that it was agreed by the parties that the appeal should be decided on the basis of the materials filed and submissions made.

[20] However, the Report was issued on the heels of this correspondence. Because the Report contained information of likely relevance to some of the issues before us, the parties were given an opportunity to comment on its potential impact. They took up the offer to do so, and filed submissions on the impact of the Report on this appeal, with the last of their submissions being filed on June 17, 2016.

[21] For the reasons that follow, we are of the view that this appeal should be dismissed. This conclusion is without prejudice to the TWN's right to raise all the issues it raised before us (with the exception of the allegation that the Decisions were final and that the NEB breached section 18 of *CEAA 2012* before April 2, 2014) in subsequent proceedings that it might deem necessary to institute to contest the ultimate decision of the GIC in respect of the Project.

[22] All the provisions of the *NEBA* and the *CEAA 2012* referred to herein are reproduced in Annex 1 of these Reasons.

II. Issues

[23] When drafting reasons, one usually summarizes the relevant facts before enumerating the issues to be decided by the court. However, in this particular case, we find it useful to summarize the issues put to us before turning to an overview of the relevant factual context of the case. Setting things out in this order will help understand why the parties presented as relevant a number of facts that both pre-date and post-date April 2, 2014, i.e., the date of the Decisions under review.

[24] The TWN raises four issues before us. They can be set out as follows:

i) Does the NEB, when acting as a responsible authority under the *CEAA 2012*, have the authority and obligation to discharge the Crown's duty to consult? We note that this involves the interpretation of the relevant statutory framework to confirm whether the *CEAA 2012* delegated any procedural obligations in respect of the Crown's duty to consult to the NEB. If so, did the Crown, through the NEB, breach its duty to consult prior to the issuance of the Decisions? If not, and in the alternative, is the NEB still required under the *NEBA* or *CEAA 2012* to assess the adequacy of consultation prior to issuing the Decisions, such that it erred in law by failing to determine whether the Crown had breached its duty to consult prior to making the Decisions?

ii) Did the NEB breach its legal obligation to offer to consult and collaborate with the TWN as a "jurisdiction" within the meaning of section 18 of the *CEAA 2012* prior to making the Decisions?

iii) Did the NEB breach its duty of fairness to the TWN as an intervener by failing to obtain its comments in respect of all the issues raised in the Decisions?

iv) Did the NEB err in law by failing to include marine shipping activities that will likely result from the export of oil from WMT in the designated project description so as to widen the scope of factors to be examined under the *CEAA 2012* (as opposed to under the *NEBA*)?

[25] The AG and TM also raised, as preliminary issues, that the Court should refuse to deal with these questions at this stage because the TWN failed to put them directly to the NEB and it would thus be inappropriate for this Court to address them for the first time on appeal. They also submitted that it would be premature to comment on the adequacy of the Crown's consultation in a vacuum at the inception stage of the NEB process, knowing that the TWN has had the ability to voice all its Project-related concerns to the NEB and to utilize the NEB process to obtain information from the Crown and TM.

[26] Lastly, the parties do not agree as to whether the issue relating to the inclusion of marine shipping activities as part of the designated project is a question of law (pure or extricable) or a question of mixed fact and law (see, for example, TM's Memorandum of Fact and Law dated January 22, 2015 at para. 59). This is obviously important, considering the limits of our Court's jurisdiction pursuant to section 22 of the *NEBA*, which provides for the review of questions of law or jurisdiction only. On this issue, the TWN argues that this Court is bound to deal with all questions before it since leave to appeal was granted on July 10, 2014 and the matter has thus been decided (*res judicata*).

[27] Although the NEB was a party to the proceedings, it made it clear that it would not take any position on any of the issues as it was engaged in the public hearing process when the parties appeared before us. It was agreed that its role would be limited to providing factual information about the process so far as deemed appropriate by the Court.

[28] Finally, the Court must deal with the costs of the appeal, of two motions (one for the above-discussed adjournment, the other to add materials to the record) and the costs related to the TWN's change of position during the first hearing.

III. Chronology of Events as Described by the Parties

[29] The first issues to be examined are the preliminary ones regarding the appropriateness of this Court's considering this appeal at this stage based on the record before the Court. For reasons detailed below, we are of the view that the appeal should be dismissed based on our determination of the preliminary issues, without prejudice to the rights of the TWN to again raise these issues (other than the alleged finality of the Decisions and that the NEB breached section 18 of *CEAA 2012* before April 2, 2014), if it wishes, at the appropriate time. This conclusion is largely a factual one that requires appreciation of the way in which matters transpired before the NEB as well as the overall context.

[30] The following chronology helps understand the extent to which each party sought to engage the others, but not all the reasons why they may, by contrast, have refrained from doing so. The chronology also highlights the ambiguities of this case as well as the fact that this Court has not had the benefit of a complete picture of the parties' discussions and interactions regarding the extent of Aboriginal consultation undertaken to date relating to the Project. This picture remains incomplete despite the parties' filing of some evidence on facts that occurred both before and after the Decisions were issued. The chronology may nonetheless offer a helpful aide to any eventual decision-maker that might be called upon to determine whether the Crown satisfactorily discharged its duty to consult in this case.

[31] From the outset, we note that the Court does not have complete details of when TM's activities relating to the Project started. Although there is some reference to a tolling application in some correspondence, it is unclear how this relates to the matter before us. However, it appears from the Affidavit of Maximilian Nock dated May 21, 2014 that TM initiated attempts to consult with the TWN regarding the Project in the fall of 2011 (Appeal Book, Volume 3, Tab 6). It also appears from the record that the TWN has been represented by experienced legal counsel since the early days of the Project application, as a number of letters exchanged by the parties were copied to the TWN's counsel throughout the NEB proceedings.

[32] The portion of the log recording TM's attempts to communicate and meet with the TWN before us covers the period from the fall of 2011 up until September 30, 2013. During that time, there were at least 102 entries of calls and correspondence between the two parties. Indeed, there were probably more communications as some correspondence between the President of TM and the TWN is not recorded in the log. However, it appears that these numerous attempts by TM did not result in any meeting or in any TWN participation in any study or discussion organised by TM because the TWN refused to do so. This refusal is somewhat surprising considering that, according to the TWN's own environmental Stewardship Policy, proponents were encouraged to contact the TWN as early as possible in respect of any project that may have an impact on the First Nation. The following exchange of correspondence sheds some light on why this is so.

[33] As early as October 31, 2011, the TWN declined an offer to meet with the President of TM, indicating that it had decided to oppose the Project. It is worth reproducing a portion of this letter:

> Tsleil-Waututh will no longer participate bilaterally with you in any processes that may be styled at some point as "consultation" in respect of this proposed project. We will rely on our network of relationships with governments and regulators and our own efforts to keep ourselves informed and to participate in making the public and the stakeholders aware of the risks associated with the Kinder Morgan and Trans Mountain pipeline extension proposal.
>
> (Reference to Kinder Morgan in any documents will be treated hereinafter as a reference to TM, given that Kinder Morgan is the parent company of TM.)

[34] Despite this, TM continued its efforts to engage with the TWN throughout the period covered by the log, as well as after, since there is evidence of communication of information from TM to the TWN later on.

[35] Of note is a letter from TM to the TWN dated March 21, 2012, requesting, among other things, when and how to trigger the TWN Stewardship Policy to begin consultation with the community (Appeal Book, Volume 4, Tab 6S). This is relevant in that this is the same policy that will be referred to later on in the discussion with respect to the TWN's desire to be recognized as a "jurisdiction" pursuant to section 18 of the *CEAA 2012*.

[36] Sometime in August 2012, TM sent a cheque in the amount of $250.00 to initiate the Stewardship Policy application process of the TWN (See TWN letter of December 12, 2012 below).

[37] In a letter to TM dated December 12, 2012, the TWN returned TM's $250 fee (Appeal Book, Volume 4, Tab 6T). In the letter returning the cheque, the TWN advised TM that the obligation to consult and to accommodate is the duty of the Crown unless there is an express delegation of procedural or operational obligations. In its view, there was no such delegation and

such obligation could not be contracted or implicitly delegated to a third party. The TWN then explained that it viewed the NEB process as problematic, *viz*:

> …The National Energy Board alleges that they cannot maintain quasi-judicial objectivity and engage with First Nations in a bilateral process of consultation. In their July 2008 publication "Consideration of Aboriginal Concerns in National Energy Board Decisions", they state that they rely upon project proponents to carry out the Crown's responsibility to share information, identify impacts and propose mitigation. This policy is totally inconsistent with what we understand is the obligation of the Crown and Crown agencies…

[38] The TWN confirmed that it had appealed to the Minister to establish an appropriate government to government consultation process and that without such a process it would not engage the Stewardship Policy for the proposed Project. Again, it reiterated the message conveyed in its previous letter of October 31, 2011 that it would not participate bilaterally with TM in any processes that may be styled as "consultation" and would "continue to seek a commitment from the Crown to either amend the NEB process or establish an appropriate government to government consultation process with [it] as in parallel process to the NEB to achieve meaningful and substantive consultation with respect to the potential adverse effects associated with the … pipeline expansion proposal" (Appeal Book, Volume 4, Tab 6T).

[39] The aforementioned appeal to the Minister refers to a letter from the TWN to the Minister dated November 5, 2012 (Appeal Book, Volume 2, Tab 4J). In this letter, the TWN complained about the fact that the NEB had not granted it intervener status in respect of a tolling application related to the Project and filed in February, 2011. After reiterating its view that the Crown could not delegate its responsibility for consultation to a project proponent and referring to the July 2008 publication from the NEB, the TWN noted that it could not be relegated to the status of stakeholder as opposed to a self-governing entity holding constitutionally protected rights and

titles. The TWN added that if, as alleged, the NEB "cannot engage First Nations on a government to government basis and maintain its quasi-judicial objectivity, then it is incumbent upon [either the NEB or the Minister] to establish a parallel process that will ensure that direct input from First Nations is considered throughout the NEB decision-making process".

[40] In his reply dated January 18, 2013, the Minister indicated that the NEB "is an independent and arms-length quasi-judicial regulator" and that it would thus be inappropriate for him to intervene with respect to its decision not to grant intervener status in relation to the tolling application (Appeal Book, Volume 2, Tab 4K). That said, the Minister strongly encouraged the TWN to participate in any opportunity to discuss the project with TM, which had launched a broad-based engagement process. As for the Crown's duty to consult, the Minister stated that the Crown would rely, to the extent possible, on the NEB's review of the TWN's application in fulfilling any Crown duty to consult Aboriginal groups. Having noted that under the *NEBA*, the NEB is required to consider any issues and concerns raised by Aboriginal groups, the Minister noted that "the Crown would monitor the adequacy or sufficiency of Aboriginal consultation efforts throughout the [NEB]'s process" and "urge[d] [the TWN] to participate in any eventual facilities review process by providing information and by bringing concerns or unresolved issues to the attention of [TM] and the [NEB]". Finally, the Minister noted that the NEB cannot engage in one-on-one discussions outside of its process, but that the NEB had taken steps to ensure that evidence of the impact that the proposed Project could have would be in hand, as it expects companies to engage in consultations as early as possible when planning a project.

[41] There is no evidence that any of this correspondence between the TWN and the Minister was provided to the NEB at any relevant time. At this stage, it is important to note that all correspondence received or sent by the NEB was posted on its website, for the knowledge of all parties concerned.

[42] On or about May 26-27, 2013, TM submitted a project description to the NEB for the proposed Project. On July 26, 2013, TWN representatives advised TM that the TWN would oppose the Project.

[43] On July 29, 2013, the NEB released a "List of Issues" that it would consider in the context of the public hearings concerning the anticipated project under the *NEBA* (Appeal Book, Volume 2, Tab 5A). This list included "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 may occur". On August 8, 2013, TM transmitted the said list to the TWN (Appeal Book, Volume 2, Tab 6P).

[44] On August 12, 2013, the NEB wrote to the TWN in order to provide it with a summary of the proposed Project, a map of the proposed pipeline itinerary, information about participant funding, its process and where to find the details of TM's consultation program, its outcome and proposed mitigation measures. The NEB also offered to respond to any question about its process by phone or at a meeting in the First Nation community. Appended to the NEB letter was a separate letter from Natural Resources Canada (NRCan) providing information about the Crown consultation process. It advised Aboriginal communities concerned that the review

process would be managed through the Government Major Project Management Office (MPMO) initiative. Among other things, it encouraged Aboriginal groups to communicate any Project-related concerns to TM and to subsequently convey any unresolved concerns to the NEB, either orally or in writing, in the context of the public hearing process. Again, it was noted that the Crown would rely on the NEB public hearing process, to the extent possible, to fulfill any duty to consult owed to Aboriginal groups for the proposed Project. It ended by advising that any question as to the overall Crown approach to consultation should be referred to the MPMO while questions pertaining to the NEB process should be directed to the staff of the NEB.

[45] It is apparent from the Report that the MPMO and the NEB staff held several meetings with First Nations who expressed an interest. There is little evidence about these meetings; nor is there any evidence that the TWN ever contacted the MPMO or the NEB staff before April 2, 2014 to ask any question about the consultation process of the Crown or about the NEB process under either the *NEBA* or *CEAA 2012*.

[46] On September 10, 2013, the NEB wrote to TM to provide it with additional filing requirements relating to the potential environmental and socio-economic effects of increased marine shipping, reiterating that although the increased marine shipping to and from the WMT was not part of the proposed Project, the NEB had determined, as indicated in its List of Issues, that the potential environmental and socio-economic effect of those marine shipping activities were relevant to the NEB's consideration of the application under the *NEBA*.

[47] It is worth mentioning that, according to the NEB Filing Manual, all proponents of projects that involve an assessment by the NEB under the *NEBA* are required to start an in-depth consultation process much earlier than the filing of their application. In their consultation, proponents are required to consult with all federal, provincial, municipal and Aboriginal authorities as well as any other stakeholders and members of the public that may have concerns about the project. It is also to be noted that in its Filing Manual, the NEB states that all proponents must address all the issues set out in section 19 of *CEAA 2012*, regardless of whether or not the project is a "designated project" under that statute.

[48] On December 16, 2013, TM filed its application for the Project's CPCN. Only parts of this application, which covers more than 15,000 pages, have been filed in the record before us. On December 20, 2013, the NEB updated the webpage on the Canadian Environmental Assessment Registry internet site (CEARIS) to indicate that the NEB had been designated as the responsible authority charged with conducting the EA of the designated project. The update also included a description of the Project as well as a section dealing with consultation and cooperation with other jurisdictions. It indicated that pursuant to section 18 of the *CEAA 2012*, a responsible authority must offer to consult and cooperate with respect to the EA of the designated project with any jurisdiction referred to in paragraphs (c) to (h) of the definition of "jurisdiction" in subsection 2(1) of the *CEAA 2012*, if that jurisdiction has powers, duties and functions in relation to the assessment of environmental effects of the designated project. More importantly, the NEB noted that should any stakeholder be of the opinion that it is such a jurisdiction and wish to be consulted under section 18, it should contact the NEB as soon as

possible – and at the latest by January 31, 2014 – describing how it met the definition and outlining its relevant environmental assessment powers, duties and functions.

[49] On December 31, 2013 and after acknowledging receipt of the application, the NEB directed TM to solicit applications from stakeholders desiring to participate in the public hearing (Appeal Book, Volume 3, Tab 6D). The NEB directed TM not to solicit such applications before January 15 or after January 29. TM provided the TWN with such a notification on January 15, 2014.

[50] On January 31, 2014, the TWN wrote to the NEB stating that, in its opinion, it was a "jurisdiction" within the meaning of section 18 of *CEAA 2012* and wished to be consulted. It noted, however, that such consultation and cooperation would not replace or supersede the Crown duty to consult directly with the TWN. As a basis for its opinion, the TWN referred to the following three documents which were not attached to its letter:

i. The TWN's 2009 Stewardship Policy, which provides for TWN assessment of proposed projects in a defined consultation area. The Project is said to be located squarely within the consultation area (Appeal Book, Volume 4, Tab 7A);
ii. *The Framework Agreement* on First Nation Land Management with the Government of Canada to which the TWN is a 2005 signatory, which confirms the TWN's legal power to develop and implement an environmental assessment process (Appeal Book, Volume 2, Tab 4G); and
iii. The 2007 TWN *Land Code* adopted pursuant to the *Framework Agreement* on First Nation Land Management (Appeal Book, Volume 2, Tab 4H).

The TWN letter did not indicate whether these documents were publicly available.

[51] On February 12, 2014, the TWN also filed an application to participate, requesting intervener status.

[52] On March 4, 2014, the NEB wrote to the TWN seeking clarification as to its letter of January 31, 2014, and more particularly, clarification as to whether the TWN sought any consultation or cooperation in addition to the rights it would be granted as intervener (Appeal Book, Volume 2, Tab 4P). The NEB outlined in its letter how an intervener participates in the NEB hearing and how an intervener would be able to test the applicant's evidence through questioning, filing of evidence and the provision of final arguments. It noted that if the TWN wished for more consultation, it would have to provide details of what it was envisioning and details about its own environmental assessment process, including anticipated timelines. In its letter, the NEB also noted that:

> [it was] currently determining the completeness of the project application. If the application is found to be complete, the Board will issue a Hearing Order providing details on the hearing process. The Board will also determine the list of participants, including the method of participation for each (i.e., commenter or intervenor), in due course.

[53] On March 5, 2014, the TWN wrote to the Minister (Appeal Book, Volume 2, Tab 4M) to explain why it felt that the Crown had a duty of consultation with respect to the Project and why the Crown's position on consultation was legally deficient and failed to uphold the honour of the Crown. Among other things, it indicated that the duty included, in its view, consulting the TWN in designing the overall framework for consultation and environmental assessment of the Project, that is, upstream of the NEB role, and to accommodate its traditional laws and decision-making rights in doing so. The TWN added that this had not occurred to date. It noted that "the NEB cannot consult with TWN or delegate procedural aspects of the Crown's duty to [TM] in relation to its facilities application because the NEBA does not empower the NEB to consult with Aboriginal peoples". It noted that under the current statutory framework, the NEB could not design and implement a decision-making process which would accommodate the TWN's

governance rights and could not alter timelines which would accommodate decision-making in respect of TWN rights and interests. It further noted that, in its view, the timelines imposed by the *NEBA* and the *CEAA 2012* did not provide sufficient time for the TWN to evaluate the Project and gather and provide traditional ecological knowledge and information as to its customs, practices and traditions nor was the time allowed sufficient to have a meaningful dialogue and participation. It added that the public hearing could not be a substitute for formal First Nations consultation. Direct engagement with First Nations, including with the TWN, was required.

[54] It is important to mention that in its March 5, 2014 letter, the TWN acknowledged that the NEB was in the process of making decisions about the definition of the Project, the scope of factors that were to be assessed under the *CEAA 2012* and other key environmental assessment issues in the absence of consultation with the TWN.

[55] It is also worth noting that the TWN appears to have been opposed to the List of Issues issued in July, 2013, saying that the List excluded consideration of effects arising from upstream and downstream development, and that it was not consulted in this respect. It noted that this might prevent the NEB and subsequently the Crown from considering critical issues that would adversely impact the TWN's rights and interests. Although a copy of this letter was sent to the Prime Minister of Canada and the Minister of Aboriginal Affairs and Northern Development Canada, the NEB was not apprised of these concerns by the TWN at any time relevant to this appeal.

[56] On April 2, 2014, the NEB issued the Decisions.

[57] On April 22, 2014, the TWN answered the NEB's letter of March 4, 2014 that had requested details on what kind of consultation it would be expecting and sought details on the TWN's own assessment process and timelines (Appeal Book, Volume 2, Tab 4Q). The April 22nd letter did not provide any detail regarding the TWN's Stewardship Policy or the other two documents referred to in its January 31, 2014 letter. Nor did the TWN provide any timeline in respect of its own process. In fact, it would have been difficult for it to have provided any such timeline, given that, as noted earlier, in December 2012, the TWN had decided not to engage its Stewardship Policy and had refused TM's request to start a formal evaluation process. (However, see paragraph 59 below regarding a subsequent change in position of the TWN).

[58] In its April 22nd letter, the TWN took the position that the NEB process or decision could not act as a substitute or replacement for its own assessment of the Project or the decision that it would ultimately make under its own Stewardship Policy. As section 18 of *CEAA 2012* applied regardless of the TWN's role as an intervener, it took the position that the NEB's questions as to the TWN's expectations in respect of consultation should be deferred until the jurisdictional issues "have been fully canvassed". It then noted that the NEB had made three important decisions on April 2, 2014 without consulting or cooperating with the TWN, and asked "the NEB to change course and reverse [its] priorities" which appeared to be responding to a specific application instead of advancing jurisdictional cooperation. It noted that the NEB's approach raised concerns that "it will now be more difficult for the NEB to cooperate with TWN to ensure that both jurisdictions, to the extent possible, take a coordinated approach to their respective

environmental assessments" (Appeal Book, Volume 2, Tab 4Q). It also asked the NEB for transparency regarding its duty under section 18 of *CEAA 2012* by requesting that the NEB disclose whom it had been dealing with as a jurisdiction and how it proposed to coordinate its assessment process with that of other jurisdictions, including the TWN.

[59] On April 30, 2014, the TWN wrote to TM asking it to reapply for an evaluation under the TWN Stewardship Policy. It noted that its request to the Crown that it establish a government to government consultation process had remained unanswered (see its letter of December 12, 2012), and that, since then, TM's formal application had been filed and the Project would result in an EA under *CEAA 2012* (referring to CEARIS website). It mentioned that the TWN anticipated that its letter to the NEB would result in a further discussion on a cooperative approach to assess the Project (referring, presumably, its letter of January 31, 2014). The TWN added that it was "surprised and disappointed with the many things decided on April 2, 2014 without any discussion with TWN". It stated that, nevertheless, the TWN had determined that it was appropriate to conduct a technical review of the Project and its potential impact on the TWN, and thus invited TM to refile its $250 fee, noting that the process would require complete cost recovery for all TWN activities associated with its assessment. The TWN also stated that, given the continued absence of Crown involvement and an agreed-upon TWN-Crown consultation process, the Stewardship Policy assessment would be carried out without any Crown consultation and that no aspect of any interaction between the TWN and TM, including the letter dated April 30, 2014, constituted a Crown engagement or consultation in respect of the Project.

[60] On May 2, 2014, the TWN served and filed its application for leave to appeal the Decisions.

[61] On May 15, 2014, the NEB replied to the TWN's April 22, 2014 letter (Appeal Book, Volume 3, Tab 6K). It indicated that only one other First Nation had responded to its offer to consult and cooperate with respect to the EA of the Project as a jurisdiction within the meaning of section 18 of *CEAA 2012*. It referred the TWN to the correspondence with that First Nation available on the NEB's online public registry. With respect to its general views on section 18, the NEB said:

> The Board considers the purposes of section 18 to, among other things, enable improved effectiveness and efficiency of the [NEB] and any other applicable jurisdictions' processes for assessing the environmental effects of a designated project. This could include, among other things, considering ways to avoid duplication between those assessments, coordinating process steps, facilitating information exchanges, and coordinating timing. As noted in section 4 of the CEAA 2012, this legislation is also intended to promote communication and cooperation with Aboriginal peoples regarding environmental assessments.

[62] The NEB further mentioned that, in order to explore the opportunities for cooperation, the NEB needed information from potential jurisdictions about how they met the definition of jurisdiction and their intended environmental assessment process for the Project or how they intend to exercise their powers, duties and functions in that respect. Once the information was received, the NEB noted that there "are likely some opportunities that could be realized, although there are some constraints as well" because, for example, the NEB is required to complete its assessment of a designated project within certain time limits. The NEB noted that this was one of the considerations that it must take into account when determining the extent to which cooperation is practical. The NEB went on to say that:

> "[t]he [NEB] must remain mindful of its quasi-judicial role, and cannot enter into cooperation arrangements that could conflict with that role" (Appeal Book, Volume 3, Tab 6K).

[63] The NEB also dealt with a concern expressed by the TWN with respect to the oral questioning of First Nations' traditional knowledge holders and referred to its Procedural Direction number 1. It noted that when it issued its Hearing Order and other correspondence on April 2, 2014, there had not yet been a response to its own letter and without details as to the TWN's environmental assessment process or how it intended to exercise its powers, duties and functions, it was not possible for the NEB to consider opportunities for cooperation. The NEB reiterated the rights of an intervener in the process and mentioned the fact that the TWN had already asked written questions to TM through the NEB process.

[64] Between the summer of 2014 and the summer of 2015, the TWN continued to correspond with the Minister to seek direct government to government consultation about the Project outside the NEB hearing process. The TWN also corresponded with the NEB regarding its status as a jurisdiction and how the two could collaborate. It also corresponded with the MPMO expressing its dissatisfaction with the consultation process of the Crown. Given that the issue of whether the NEB actually fulfilled all its obligations under section 18 after April 2, 2014 is not before us, we do not propose to go into the details of this correspondence to which the parties made little, if any, reference. Suffice it to say that after the TWN provided its documentation to the NEB and then its proposed timeline in November 2014, the NEB confirmed the TWN's status as a "jurisdiction" on what it described as a broad interpretation of section 18 of *CEAA 2012*.

[65] The TWN filed various information requests (IR), using the NEB process. Apart from sending an IR to TM in May 2014, it made an IR on June 21, 2014 to the "federal agencies", including several pages of questions in respect of how the Crown had met its duty to consult to that point. The response to such an IR is not in the record before us. The MPMO also filed an IR asking the TWN various questions in relation to the concerns that the MPMO had identified as having been raised by the TWN to that point, asking what specific concerns remained to be addressed. Again, the response of the TWN is not before us.

[66] On May 26, 2015, the TWN filed its technical assessment report, as well as its expert evidence before the NEB. The TWN concluded that it cannot accept any risk of a spill, even on a small scale, let alone a worse-case spill, and that it would thus not consent to the Project going ahead.

[67] On May 27, 2015, as part of the evidence submitted by NRCan (MPMO), the NEB received the preliminary assessment of the rights of the First Nations involved in the Crown consultation process (see paragraph 5 above), as well as details of the consultation plan of the Crown (Supplemental Appeal Book, Volume 2, Tab 15, and Affidavit of Mark Youden dated January 21, 2016.) There is no evidence that the NEB was made aware of the result of this assessment or of the details of this consultation plan at any time prior to April 2, 2014.

[68] It is worth reproducing the following passage of the May 27, 2015 submissions of NRCan in respect of the Crown consultation plan:

> 49. Information made available to the Crown throughout each phase of the consultation process will be consolidated into a Crown Consultation Report,

> which is separate and distinct from the NEB report to the GIC. The Crown Consultation Report will summarize the procedural aspects of consultations undertaken and the substantive issues raised by Aboriginal groups, as well as how these issues may be addressed in this process. Draft sections of the Crown Consultation Report will be shared with Aboriginal groups for review and comment before it is finalized and used to inform the GIC.
>
> 50. In addition to providing an opportunity to review and comment on the Crown Consultation Report, Aboriginal groups may have an opportunity to provide a submission outlining any outstanding concerns, issues or fundamental views in respect of the Project that would, along with the Crown Consultation Report, fully inform the Crown about Aboriginal views.
>
> 51. The results of the early engagement, NEB review process and post-hearing consultations are consolidated into an information package that supports GIC decision-making with respect to the Project.
>
> (Page 1286, paragraphs 49 to 51 of the May 27, 2015 written evidence submission)

[69] The above-mentioned documents namely, the consultation report and any submissions made by First Nations on this report, particularly those of the TWN, are not included in the record before us.

IV. Analysis

A. *Preliminary Issues*

[70] The role of the courts when administrative decisions are challenged, be it by way of appeals or applications for judicial review, is the same. It is to first to "deal with any preliminary issues, determine the standard of review, use that standard of review to assess the administrative decisions to see if the court should interfere, and then, if we consider interference to be warranted, decide what remedy, if any, should be granted": *Northern Gateway* at paragraphs 76-

77 and *Laïque Québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (*Laïque Québécois*).

[71] We will thus proceed first with the preliminary issues described earlier at paragraphs 25 and 26 above. Broadly speaking, what the AG and TM posit is that it would be inappropriate for this Court to decide the questions raised by the TWN (see paragraph 24 above) that were not raised by it before the NEB, knowing that the TWN could have raised them and chose not to do so. Also to be considered is the fact that, in the subsequent process, the TWN was fully heard on issues related to its substantive concerns flowing from the impact and the risks associated with increased marine shipping. Further, before the GIC makes one of the decisions set out at sections 53 and 54 of the *NEBA*, the TWN will have the ability to address any concern as to whether the Crown's duty to consult has been met, or whether the process set out in the *NEBA* and the *CEAA 2012* has been followed (see also sections 30 and 31 of the *CEAA 2012*).

[72] To deal with the preliminary issues, we will consider the statutory scheme, the relevant principles of administrative law, the nature of the Decisions and whether they were intended to be final in respect of any issue, and the particular circumstances of this case as it stands today.

1) Statutory Framework and administrative law principles

[73] The distinctive features and the uniqueness of the legislative framework which provide a complete code for the issuance of a CPCN have very recently been fully described in *Northern Gateway* at paragraphs 92 to 124. We adopt that description, and there is no need for us to repeat

it here. What is important to recall is that the GIC is the only decision-maker in respect of the approval of an application for a CPCN.

[74] We will however reproduce subsections 22(1) and (4) of the *NEBA* because the TWN's proceedings were instituted pursuant to subsection 22(1) and subsection 22(4) was subsequently added when the legislator adopted the new statutory framework for the issuance of a CPCN:

Appeal to Federal Court of Appeal	**Appel à la Cour d'appel fédérale**
22 (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.	22 (1) Il peut être interjeté appel devant la Cour d'appel fédérale, avec l'autorisation de celle-ci, d'une décision ou ordonnance de l'Office, sur une question de droit ou de compétence.
(4) For greater certainty, for the purpose of this section, no report submitted by the Board under section 52 or 53 — or under section 29 or 30 of the Canadian Environmental Assessment Act, 2012 — and no part of any such report, is a decision or order of the Board.	(4) Pour l'application du présent article, il est entendu que tout rapport — ou partie de rapport — présenté par l'Office au titre des articles 52 ou 53 ou au titre des articles 29 ou 30 de la Loi canadienne sur l'évaluation environnementale (2012) ne constitue ni une décision ni une ordonnance de celui-ci.

[75] It is only in 2012 that the legislator added subsection 22(4) to make it clear that for the purpose of this section, the report submitted by the NEB under sections 52 and 53 of the *NEBA*, or sections 29 and 30 of the *CEAA 2012* does not constitute a decision or order of the Board. The same applies to any part of any such report.

[76] *CEAA 2012* does not contain a provision dealing with the review of decisions made thereunder.

[77] Subsection 22(1) of the *NEBA* applies to a large number of decisions where the NEB is the final decision maker. These include interlocutory decisions such as a final ruling on an application to intervene or a final decision disposing of an application to approve an application under sections 44, 58 and 58.11 of the *NEBA*, for example. However, in our view, it does not apply to the Decisions made in this case, for the reasons that follow.

[78] The legislator is presumed to know the general principles of administrative law that have been applied by the courts in their review of administrative decisions. The relevant principles here are at the very core of administrative law. First, whether the review is initiated by way of an appeal or a judicial review application, the Supreme Court of Canada made it clear that courts do not review decisions of administrative tribunals on the same standard of review as they review decisions of courts such as the Federal Court (*Laïque Québécois)*. Second, except in exceptional cases, courts should not intervene prematurely in the administrative process set out by the legislator and the administrative tribunal (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at paragraphs 30-33). Finally, courts do not generally deal with issues that could have been raised before the administrative tribunal but were not so raised (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011SCC 61at paragraph 23, [2011] 3 S.C.R. 654; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, as per paragraphs 46, 47, 54, 55 and 57, [2015] 4 F.C.R. 75). A corollary to these principles is that decisions of administrative tribunals are generally assessed on the basis of the record that was before that decision-maker at the time it made its decision.

[79] The Supreme Court of Canada has repeatedly explained that these general principles are meant to ensure that courts respect the legislator's choice that certain questions be decided by expert tribunals or other expert administrative decision makers, and that when courts are called upon to intervene, they should have the benefit of that expertise as well as an appropriate record to do so.

[80] That the record typically must be the one that was before the administrative decision-maker is no trivial matter. This ensures that courts will properly apply the standards of review. Indeed, it is important to underline that if the parties were able to add whatever evidence they thought relevant to argue new issues, the courts would in fact be simply substituting their own views for those of the administrative decision makers. This is inappropriate not only in respect of factual findings that should be left to be made by the administrative decision-maker, but also in respect of questions of law that call for an interpretation of the decision-maker's home statute or a closely-related statute where the presumed standard of review is reasonableness. This standard entitles the decision-maker to deference and, in most cases, to a range of possible interpretations.

[81] Naturally, as is almost always the case, these general principles bear some exceptions to ensure that courts can deal with special circumstances. For example, where there exists an issue of procedural fairness that could not have been raised before the decision-maker, the parties may adduce new evidence supporting their allegation in that respect. Additional evidence may also be allowed to put issues into context, when appropriate (*Association of Universities and Colleges of Canada v. Canadian Copyright Licencing Agency (Access Copyright*), 2012 FCA 22 at paragraphs 18-20, 428 N.R. 297; *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466

N.R. 44; *Delios v. Canada (Attorney General)*, 2015 FCA 117; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at paragraphs 16-28, 479 N.R. 189).

[82] In the present proceeding, it is evident that much of the evidence in the record before us was not before the NEB on April 2, 2014. Some of it was filed by consent and we allowed the filing of additional material to provide context for the arguments with respect to the alleged breach of procedural fairness as well as the assertion that it is not appropriate, at this stage, for the Court to deal with the issues raised by the TWN.

[83] The *NEBA* provides that the NEB has the jurisdiction to decide all questions of fact or law, including constitutional questions such as those raised before us (section 12 of the *NEBA* and *Forest Ethics* at paragraph 49). In fact, it appears from Appendix 7 to the Report that the NEB did deal with constitutional questions in the course of its proceedings, such as the constitutionality of section 55.2 of the *NEBA*, a review of the List of Issues on the basis of an alleged infringement of section 7 of the *Charter of Rights and Freedoms* as well as issues of procedural fairness, such as the alleged bias of a panel member.

[84] Moreover, the legislator expressly provided that, subject to two exceptions that are irrelevant here, the NEB has the power to vary and rescind any of its decisions or orders (subsection 21(1) of the *NEBA*).

[85] We see nothing in the applicable legislative scheme that would enable us to conclude that the legislator intended to allow a review by way of an appeal under section 22 on a broader basis

than what is usually permitted by the application of the general principles of administrative law referred to above.

2) Application of the principles to the Decisions

[86] In its various memoranda (see note 22 and paragraphs 28 to 30 of the TWN's Supplemental Memorandum of Fact and Law dated June 9, 2016), the TWN submits that:

i) The Decisions are final in that they cement the parameters of the EA going forward,

ii) Because the Crown will not be able to correct its failing after the fact, decisions taken in breach of the Crown's duty to consult must be challenged at the first opportunity before the EA is carried out,

iii) The Decisions are all important as they are not simply recommendations but decisions of prescribed steps set out in the statutory scheme,

iv) A refusal to review these Decisions on appeal at the earliest opportunity would deprive the TWN of an effective remedy and would be unfair. It would result in cost, inconvenience and delay.

i. The Hearing Order

[87] The NEB is master of its own process and procedure. It is thus important to first examine the Hearing Order in which the NEB explains, at section 4.4, how to raise a question of procedure or substance that requires a Board decision. The NEB makes it crystal clear that this must be done by way of a motion pursuant to section 35 of the *National Energy Board Rules of Practice and Procedures, 1995.* One cannot thus simply remain silent or totally disregard the process set out by the NEB by raising questions of law in correspondence with the NEB (see letter of April 22, 2014 at paragraph 58 above). A simple review of Annex 7 of the Report (pages

505-506) confirms that the NEB decided hundreds of motions on the merits presented in accordance with the Hearing Order (Subsequent Hearing Orders). This fluid approach is well-adapted to a proceeding involving so many parties. It is evident that, in this proceeding, the NEB exercised its discretion to use its power under section 21 differently than what is described in its general guidelines (Fourth Supplementary Book of Authorities of the TWN, Tab 2) as the NEB determined that it was prepared to revisit determinations upon receipt of a motion.

[88] In light of this, it is difficult to conceive how the Hearing Order before us could be viewed as final and how its issuance without prior consultation of the myriads of potential interveners could constitute a breach of procedural fairness when it is clear that it was subject to amendment. Indeed, the Hearing Order was amended as early as April 24, 2014 after an intervener sought an extension of certain deadlines, and it has since then been substantially amended. In fact, in section 4.4 of the Hearing Order, the NEB refers to the possibility of seeking an extension by way of a motion as one example of how questions should be put to it. The NEB also granted an extension of one month to enable a First Nation that sought collaboration pursuant to section 18 of *CEAA 2012* so that it could file its evaluation report outside of the filing deadlines imposed on other interveners by the version of the Hearing Order that was applicable at that time.

[89] That said, even if the Hearing Order or any of the other Decisions for that matter were considered final and within the ambit of subsection 22 (1), the TWN has not established that they were made in breach of their procedural rights. The TWN also argued before us that the process adopted by the NEB was unfair because it did not provide it with an opportunity to be heard in

respect of the issues addressed by the Hearing Order before the order was issued. However, the TWN failed to explain why the process chosen by the NEB (to make all requests by filing a motion), which clearly enabled the 400 interveners to seek changes to the Hearing Order (or any other Order made without the concerned party's input for that matter), was not sufficient to meet the NEB's duty to act fairly in the context of this massive and complex proceeding. If the TWN felt prejudiced by any part of the Hearing Order, it could have sought to have it changed. It appears it did not do so. In addition, there is no evidence that the Decisions had any impact on the ability of the TWN as an intervener to present all the evidence it thought relevant or to carry out its technical assessment of the Project in a satisfactory manner and to present that assessment to the NEB.

ii. The Completeness Decision

[90] With respect to the Completeness Decision, we first note that, in its reasons, the NEB expressly responded to the views expressed by those who actually raised concerns before April 2, 2014. There was no indication that the TWN could not have presented their views before April 2, 2014, as was done by the City of Burnaby and another First Nation. The TWN certainly was already of the view that there were problems as it expressed in its letter to the Minister dated March 5, 2014.

[91] But more importantly, in its reasons (Appeal Book, Volume 1 at pages16-18), the NEB states that:

> i) The completeness determination is really such an initial threshold question that the Board does not typically seek comments and

makes its determination before deciding which participants it will hear from on a given application.

ii) The completeness determination, as an initial threshold question, does not preclude participants from expressing their views on and/or asking questions about what they consider to be deficiencies in the application through the hearing process.

iii) The NEB takes a holistic approach to completeness and considers whether there are important issues missing from the application that would make participants unable to engage in a debate at the Public Hearing.

[92] Here, the TWN refused to express its concerns to TM in accordance with the process set out in the NEB Filing Manual. That process seeks to ensure that an application such as that of TM would be as complete as possible when filed. In such circumstances, the TWN surely must be required to be proactive and diligent in voicing its concerns to the NEB, given that the deficiencies, if any, could be the direct result of its choice not to participate in the NEB process before the filing of the application.

[93] An application does not need to contain every detail to be found complete enough to engage public debate through the hearing process. That is evidenced by the fact that the NEB, itself, sent a 95-page request for further details to TM on April 15, 2014, and shortly thereafter, the TWN issued its own IR to TM.

[94] Our reading of Appendix 7 of the Report confirms that the NEB was open to vary its Completeness Decision if contested by way of a motion at any time before the final arguments started. But, it was not willing to forego the need to file a motion to do so. Once again, it appears

that the TWN did not follow the process set out by the NEB to raise its concerns and thus did not avail itself of the opportunity to be heard.

iii. The CEAA 2012 Decision

[95] Turning now to the *CEAA 2012* Decision, the NEB Filing Manual states that:

> The NEB will review and assess the scope of the EA based on the evidence before it. Although elements of the project or the scope of factors to be considered may change over the course of a proceeding (*e.g.*, as a result of public or Aboriginal input, or changes to the project), the application is usually the prime source of information and starting point for establishing what the Board will consider in the environmental assessment of a project.
>
> [Our emphasis] (AG Book of Authorities Volume 1, Tab A-2, page 4A-20)

[96] In this case, the *CEAA 2012* Decision was varied when the Project was amended. Although no other motions were filed to seek any other changes, this does not mean that the NEB was not open to do so. In fact, very early on in the process (Ruling No. 25 dated July 23, 2014), the NEB did consider on its merits a motion made by several interveners seeking to expand the List of Issues published on July 29, 2013 so as to include "environmental and socio-economic effects associated with upstream and downstream activities". This occurred even though the NEB had already expressly decided that it would not consider those specific issues. It is thus difficult to conclude that the TWN could not have presented to the NEB the issues raised before us in respect of the description of the designated project first advertised on CEARIS and later included in the *CEAA 2012* Decision.

[97] Furthermore, even if as argued by the TWN, the *CEAA 2012* Decision was a decision within the meaning of subsection 22 (1), it appears unlikely that the description of the designated

project in the *CEAA 2012* Decision is the result of an error of law as opposed to the application of a rather clear definition in *CEAA* 2012 to the facts, i.e. to the Project. Leave was granted by this Court without any comment as to which question raised by the TWN was a question of law within the meaning of section 22. The test applicable to grant leave is not the same as that applicable by the panel hearing the matter, especially when its jurisdiction is involved. Moreover, the record before us contains much more detail than at the leave stages. Thus, *res judicata* simply does not apply.

[98] As mentioned, the NEB included the impact of increased marine shipping in the List of Issues it made public in July 2013. It also included the cumulative effect such increased shipping may have as part of the factors to be reviewed under paragraph 19(1)(a) of *CEAA 2012*. If the TWN believed that there was a material difference between an assessment of the impact of increased marine shipping under the *NEBA* as opposed to under *CEAA 2012*, it ought to have raised the issue with the NEB as deciding that issue calls for an interpretation by this administrative tribunal of its home statute as well as a closely related statute. This is especially so where, as in this case, the argument is directed at what recommendations the NEB is empowered to make under each statute.

[99] To summarize our views in respect of the Decisions, none were final. They did not cement the parameters of the assessment made by the NEB. Moreover, based on the evidence before us, it appears that the TWN chose not to avail itself of the opportunity to be heard to have the Decisions varied. Such failure would disentitle the TWN from arguing that the Completeness

Decision and the *CEAA 2012* Decision taint the Report and the NEB's recommendations because they were not modified.

B. *Section 18 of CEAA 2012*

[100] We now turn to what was presented as a distinct and separate issue from the constitutional issue of the Crown's duty to consult - an alleged failure to make an offer to consult as per section 18 of *CEAA 2012* prior to making the Decisions.

[101] Contrary to what was argued, in our view, the NEB *did* offer to consult and collaborate pursuant to section 18 of the *CEAA 2012* with any and all parties that might be "jurisdictions" on December 20, 2013, when it published its notice to that effect on CEARIS.

[102] One of the purposes of the legislative scheme adopted in 2012 was to ensure the timely review of applications for a CPCN, whether or not they involve an EA under the *CEAA 2012*. While the TWN did not agree with the strict timelines in the legislation or that this legislative purpose is important, the NEB was nevertheless bound to pursue it and was required to deal with TM's application expeditiously.

[103] Prior to April 2, 2014, the TWN failed to provide the NEB with all the information the NEB reasonably required to determine the jurisdictional issue. It also failed to advise the NEB that it was expecting that no decisions would be made to advance the process set out in the *NEBA* without its status first being confirmed and a collaboration plan established.

[104] In the circumstances, it would be inappropriate for this Court to comment further on how collaboration under section 18 should generally function as it has yet to really be addressed by the NEB. This is especially so, considering that the only issue here is whether the NEB had to offer to consult and collaborate before making the Decisions. There is nothing in the record as to whether the other responsible authorities under *CEAA 2012* have issued any guidelines in that respect. There is no doubt that having guidelines dealing with this point would be beneficial, although the exact nature of the collaboration will likely vary depending on the circumstances. That is not to say, however, that without them, one could unduly delay the process provided for in the legislative scheme.

C. *The Crown's Duty to Consult*

[105] As mentioned, the TWN did not raise this constitutional issue with the NEB before seeking the intervention of this Court. Again, there is no doubt that it could have done so by following the process adopted by the NEB in this matter (see paragraph 83 above). This is particularly troubling with respect to the allegation that NEB had the duty to consult under *CEAA 2012* as it was not until mid-way through its argument before us that the TWN took the position that the duty applied to the NEB, itself. This is contrary to the position the TWN expressed in its correspondence with the Minister. That the NEB could not itself consult was used as justification for requesting a government to government process or the setting up of a parallel process outside of the NEB process.

[106] In addition, in *Forest Ethics* (at paragraphs 46, 47, 54 and 55), this Court reiterated that it is particularly important not to bypass the administrative tribunal process when dealing with

constitutional issues. The Court even expressed some doubt as to whether it had the discretion discussed in *Alberta Teachers* when constitutional questions are raised for the first time before a reviewing court.

[107] In its submissions with respect to the preliminary issue, the TWN particularly focused on the need to raise a potential breach of the Crown's duty to consult at the earliest opportunity to ensure that it can obtain an effective remedy, i.e. to quash the Decisions and send the matter back to the NEB for redetermination.

[108] In this particular case, we see no good reason to exercise our discretion in favour of the TWN on that basis. It cannot be said that putting the issue before the NEB before proceeding under section 22 of the *NEBA* would have unduly delayed the matter. Indeed, how could one conclude that the way the TWN chose to proceed could ever have led to the only prompt solution, when it bypassed the more obvious route of asking the NEB to consider its issues? In fact, the route the TWN chose has caused significant delay. Moreover, the TWN did not conduct itself as if a decision in the present proceeding was urgent.

[109] Also, even if there had been a breach of the duty to consult, is not clear what remedy would be appropriate. It appears that the TWN had the opportunity to fully express its views to the NEB in respect of all of its concerns, including the impact of increased marine shipping and the fact that it was not prepared to accept any risk of a spill. Furthermore, the consultation process is not yet completed. Issuing a declaration in these circumstances about the scope of the duty to consult in respect of interlocutory decisions could have no practical effect as any breach

might well have been remedied by the subsequent process before the Board or may still be remedied through the consultation that is currently ongoing.

[110] The TWN relied on several cases, including some from the British Columbia Court of Appeal, where courts have intervened as soon as a "scoping decision" was made where the tribunal did not consult with an impacted Aboriginal group before issuing the scoping decision. None of these cases involved the unique legislative framework applicable here. They are also not particularly relevant to the determination of the preliminary issues that arise here considering the fluid process adopted by the NEB to ensure that all questions raised by interveners could be dealt with promptly by way of a motion. We therefore do not find the cases cited by the TWN to be of assistance.

[111] Further, considering that the NEB has issued the Report, the question of whether or not the Crown has fulfilled its duty to consult is an issue that will have to be assessed and decided by the GIC (*Northern Gateway* at paragraph 166).The GIC has the power to ask the NEB to reconsider certain issues if it feels that it is necessary to do so. It can also refuse to give its approval if it concludes that the Crown has not met its constitutional duty to consult. Those decisions are themselves subject to review by this Court in due course, as was done in *Northern Gateway*.

[112] Finally, we underscore that the Court must be careful not to use its discretion in a manner that would effectively take the matter out of the hands of the GIC contrary to the clear intention of Parliament.

[113] In light of the foregoing, we have not been persuaded that the Court should intervene at this stage. However, we believe that in the particular circumstances of this case, the Court should ensure that the TWN is not prejudiced by this dismissal as the dismissal is grounded in part on the basis that it would be premature for the Court to address the issues surrounding consultation when the consultation process is ongoing and the GIC has not yet decided if the Crown discharged its duty to consult with the TWN about the Project. Thus, we propose that the dismissal be without prejudice to the TWN's right to raise the issues it raised before us (with the exception of issues pertaining to the alleged final nature of the Decisions and the NEB's alleged breach of section 18 of *CEAA 2012* before April 2, 2014) in any proceeding it might deem necessary to institute to contest the ultimate decision of the GIC.

V. Costs

[114] This leaves only the issue of costs. As there was no further hearing after the adjournment was granted, we are satisfied that no costs should be awarded on the AG's motion which was supported by the TWN. The matter of the costs resulting from the failure of the TWN's counsel to give proper notice that the TWN had changed its legal position on a core component of the case is more serious. We have not been persuaded that the TWN could not have given such notice before October 27, 2015. Its new argument was premised both on this Court's decision in *Clyde River*, issued in August 2015, and the Supreme Court decision in *Carrier Sekani*. Respect for the process of this Court and of the rights of the other parties to respond is essential. The TWN did not even advise the Court at the beginning of the hearing of its fundamental change in position, a change which it ought to have known was serious. Because of the nature of the question at issue, all agreed that the Court should hear the TWN's argument subject to the

parties' right to consider it properly and make further submissions. We thus propose to grant costs in respect of the change in position the amount of $500.00 plus the traveling costs of one counsel only (each) to the AG and TM, who were required to re-attend in Vancouver as a result of the change in position. With respect to the appeal *per se*, considering the result and all the circumstances, we propose that each party bear its own costs.

"Johanne Gauthier"
J.A.

"Mary J.L. Gleason"
J.A.

I agree

Wyman W. Webb J.A.

ANNEX

***National Energy Board Act*, R.S.C., 1985, c. N-7**

Jurisdiction	**Compétence**
12 (1) The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter	12 (1) L'Office a compétence exclusive pour examiner, entendre et trancher les questions soulevées par tout cas où il estime :
(a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Act, or any such regulation, certificate, licence, permit, order or direction; or	a) soit qu'une personne contrevient ou a contrevenu, par un acte ou une omission, à la présente loi ou à ses règlements, ou à un certificat, une licence ou un permis qu'il a délivrés, ou encore à ses ordonnances ou instructions;
(b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.	b) soit que les circonstances peuvent l'obliger, dans l'intérêt public, à prendre une mesure — ordonnance, instruction, autorisation, sanction ou approbation — qu'en droit il est autorisé à prendre ou qui se rapporte à un acte que la présente loi ou ses règlements, un certificat, une licence ou un permis qu'il a délivrés, ou encore ses ordonnances ou instructions interdisent, sanctionnent ou exigent.
Inquiry	**Enquête**
(1.1) The Board may inquire into any accident involving a pipeline, abandoned pipeline, international power line or other facility the construction or operation of which is regulated by the Board and may, at the	(1.1) L'Office peut enquêter sur tout accident relatif à un pipeline, à un pipeline abandonné, à une ligne internationale ou à toute autre installation dont la construction ou l'exploitation est assujettie à sa réglementation, en dégager les causes et facteurs, faire des recommandations sur les moyens d'éviter que des

conclusion of the inquiry, make

(a) findings as to the cause of the accident or factors contributing to it;

(b) recommendations relating to the prevention of future similar accidents; or

(c) any decision or order that the Board can make.

accidents similaires ne se produisent et rendre toute décision ou ordonnance qu'il lui est loisible de rendre.

Matters of law and fact

(2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or of fact.

Questions de droit et de fait

(2) Pour l'application de la présente loi, l'Office a la compétence voulue pour trancher les questions de droit ou de fait.

Review, etc., of decisions and orders

21 (1) Subject to subsection (2), the Board may review, vary or rescind any decision or order made by it or rehear any application before deciding it.

Révision des ordonnances

21 (1) Sous réserve du paragraphe (2), l'Office peut réviser, annuler ou modifier ses ordonnances ou décisions, ou procéder à une nouvelle audition avant de statuer sur une demande.

Variation of certificates, licences and permits

(2) The Board may vary a certificate, licence or permit but the variation of a certificate or licence, other than a variation changing the name of the holder of a certificate in respect of a pipeline or the name of the holder of a licence, is not effective until it is approved by the Governor in Council.

Modification

(2) L'Office peut modifier les certificats, licences ou permis qu'il a délivrés, mais toute modification des certificats et licences ne prend effet qu'une fois qu'elle a été agréée par le gouverneur en conseil sauf lorsqu'elle ne vise qu'à changer le nom du titulaire d'un certificat visant un pipeline ou d'une licence.

Exception

(3) This section does not apply to

(a) a decision, operating licence or authorization to which section 28.2 or 28.3 applies; or

(b) an approval of a development plan under section 5.1 of the Canada Oil and Gas Operations Act.

Appeal to Federal Court of Appeal

22 (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

Application for leave to appeal

(1.1) An application for leave to appeal must be made within thirty days after the release of the decision or order sought to be appealed from or within such further time as a judge of that Court under special circumstances allows.

Entry of appeal

(2) No appeal lies after leave has been obtained under subsection (1) unless it is entered in the Federal Court of Appeal within sixty days from the making of the order granting leave to appeal.

Board may be heard

(3) The Board is entitled to be heard by counsel or otherwise on the argument of an appeal.

Exception

(3) Le présent article ne s'applique pas aux décisions, permis de travaux ou autorisations visés aux articles 28.2 ou 28.3 ni aux approbations de plans de mise en valeur visées à l'article 5.1 de la Loi sur les opérations pétrolières au Canada.

Appel à la Cour d'appel fédérale

22 (1) Il peut être interjeté appel devant la Cour d'appel fédérale, avec l'autorisation de celle-ci, d'une décision ou ordonnance de l'Office, sur une question de droit ou de compétence.

Demande d'autorisation

(1.1) La demande d'autorisation doit être faite dans les trente jours suivant la publication de la décision ou de l'ordonnance ou dans le délai supérieur accordé par l'un des juges de la Cour en raison de circonstances spéciales.

Inscription de l'appel

(2) Sous peine d'irrecevabilité, l'appel doit être inscrit devant la Cour d'appel fédérale dans les soixante jours qui suivent le prononcé de l'ordonnance accordant l'autorisation d'appel.

Plaidoirie de l'Office

(3) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

Report not decision or order

(4) For greater certainty, for the purpose of this section, no report submitted by the Board under section 52 or 53 — or under section 29 or 30 of the Canadian Environmental Assessment Act, 2012 — and no part of any such report, is a decision or order of the Board.

Rapports ne sont ni des décisions ni des ordonnances

(4) Pour l'application du présent article, il est entendu que tout rapport — ou partie de rapport — présenté par l'Office au titre des articles 52 ou 53 ou au titre des articles 29 ou 30 de la Loi canadienne sur l'évaluation environnementale (2012) ne constitue ni une décision ni une ordonnance de celui-ci.

Certificates

Report

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.

. . .

Time limit

Rapport de l'Office

52 (1) S'il estime qu'une demande de certificat visant un pipeline est complète, l'Office établit et présente au ministre un rapport, qu'il doit rendre public, où figurent :

a) sa recommandation motivée à savoir si le certificat devrait être délivré ou non relativement à tout ou partie du pipeline, compte tenu du caractère d'utilité publique, tant pour le présent que pour le futur, du pipeline;

b) quelle que soit sa recommandation, toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de le délivrer, notamment des conditions quant à la prise d'effet de tout ou partie du certificat.

[. . .]

Délai

(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.

(4) Le rapport est présenté dans le délai fixé par le président. Ce délai ne peut excéder quinze mois suivant la date où le demandeur a, de l'avis de l'Office, complété la demande. Le délai est rendu public par l'Office.

Order to reconsider

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.

Décret ordonnant un réexamen

53 (1) Une fois que l'Office a présenté son rapport en vertu de l'article 52, le gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen.

Factors and time limit

(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.

Facteurs et délais

(2) Le décret peut préciser tout facteur dont l'Office doit tenir compte dans le cadre du réexamen ainsi que le délai pour l'effectuer.

Order binding

(3) The order is binding on the Board.

Caractère obligatoire

(3) Le décret lie l'Office.

Publication

(4) A copy of the order must be published in the Canada Gazette within 15 days after it is made.

Publication

(4) Une copie du décret est publiée dans la Gazette du Canada dans les quinze jours de sa prise.

Obligation of Board

(5) The Board shall, before the expiry of the time limit specified in the order, if one was specified, reconsider its recommendation or any term or condition referred back to it, as the case may be, and prepare and submit to the Minister a report on its

Obligation de l'Office

(5) L'Office, dans le délai précisé — le cas échéant — dans le décret, réexamine la recommandation ou toute condition visée par le décret, établit un rapport de réexamen et le présente au ministre.

reconsideration.

Contents of report

(6) In the reconsideration report, the Board shall

(a) if its recommendation was referred back, either confirm the recommendation or set out a different recommendation; and

(b) if a term or condition was referred back, confirm the term or condition, state that it no longer supports it or replace it with another one.

Rapport de réexamen

(6) Dans son rapport de réexamen, l'Office :

a) si le décret vise la recommandation, confirme celle-ci ou en formule une autre;

b) si le décret vise une condition, confirme la condition visée par le décret, déclare qu'il ne la propose plus ou la remplace par une autre.

Terms and conditions

(7) Regardless of what the Board sets out in the reconsideration report, the Board shall also set out in the report all the terms and conditions, that it considers necessary or desirable in the public interest, to which the certificate would be subject if the Governor in Council were to direct the Board to issue the certificate.

Conditions

(7) Peu importe ce qu'il mentionne dans le rapport de réexamen, l'Office y mentionne aussi toutes les conditions qu'il estime utiles, dans l'intérêt public, de rattacher au certificat si le gouverneur en conseil donne instruction à l'Office de délivrer le certificat.

Report is final and conclusive

(8) Subject to section 54, the Board's reconsideration report is final and conclusive.

Caractère définitif

(8) Sous réserve de l'article 54, le rapport de réexamen est définitif et sans appel.

Reconsideration of report under this section

(9) After the Board has submitted its report under subsection (5), the Governor in Council may, by order, refer the Board's recommendation, or any of the terms or conditions, set out in the report, back to the Board for reconsideration. If it does so, subsections (2) to (8) apply.

Réexamen du rapport présenté en application du présent article

(9) Une fois que l'Office a présenté son rapport au titre du paragraphe (5), le gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen. Les paragraphes (2) à (8) s'appliquent alors.

Order regarding issuance or non-issuance

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.

Reasons

(2) The order must set out the reasons for making the order.

Time limit

(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.

Order is final and conclusive

(4) Every order made under subsection (1) or (3) is final and conclusive and is binding on the Board.

Obligation of Board

(5) The Board shall comply with the

Décret concernant la délivrance du certificat

54 (1) Une fois que l'Office a présenté son rapport en application des articles 52 ou 53, le gouverneur en conseil peut, par décret :

a) donner à l'Office instruction de délivrer un certificat à l'égard du pipeline ou d'une partie de celui-ci et de l'assortir des conditions figurant dans le rapport;

b) donner à l'Office instruction de rejeter la demande de certificat.

Motifs

(2) Le gouverneur en conseil énonce, dans le décret, les motifs de celui-ci.

Délais

(3) Le décret est pris dans les trois mois suivant la remise, au titre de l'article 52, du rapport au ministre. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, proroger ce délai une ou plusieurs fois. Dans le cas où le gouverneur en conseil prend un décret en vertu des paragraphes 53(1) ou (9), la période que prend l'Office pour effectuer le réexamen et faire rapport n'est pas comprise dans le calcul du délai imposé pour prendre le décret.

Caractère définitif

(4) Les décrets pris en vertu des paragraphes (1) ou (3) sont définitifs et sans appel et lient l'Office.

Obligation de l'Office

(5) L'Office est tenu de se conformer

order made under subsection (1) within seven days after the day on which it is made.

au décret pris en vertu du paragraphe (1) dans les sept jours suivant sa prise.

Publication

(6) A copy of the order made under subsection (1) must be published in the Canada Gazette within 15 days after it is made.

Publication

(6) Une copie du décret pris en vertu du paragraphe (1) est publiée dans la Gazette du Canada dans les quinze jours de sa prise.

Exempting orders respecting pipelines, etc.

58 (1) The Board may make orders exempting

Pipelines

58 (1) L'Office peut, par ordonnance, soustraire totalement ou partiellement à l'application des articles 29 à 33 et 47 :

(a) pipelines or branches of or extensions to pipelines, not exceeding in any case forty kilometres in length, and

a) les pipelines, ou embranchements ou extensions de ceux-ci, ne dépassant pas quarante kilomètres de long;

(b) any tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property, or immovable and movable, and works connected to them, that the Board considers proper, from any or all of the provisions of sections 29 to 33 and 47.

b) les citernes, réservoirs, installations de stockage et de chargement, pompes, rampes de chargement, compresseurs, systèmes de communication entre stations par téléphone, télégraphe ou radio, ainsi que les ouvrages ou autres immeubles ou meubles, ou biens réels ou personnels, connexes qu'il estime indiqués.

(2) [Repealed, 1990, c. 7, s. 22]

(2) [Abrogé, 1990, ch. 7, art. 22]

Terms

(3) In any order made under this section the Board may impose such terms and conditions as it considers proper.

Conditions

(3) L'Office peut assortir toute ordonnance qu'il rend aux termes du présent article des conditions qu'il estime indiquées.

Time limit

(4) If an application for an order under subsection (1) is made, the Board

Délais

(4) Si une demande d'ordonnance au titre du paragraphe (1) est présentée,

shall, within the time limit specified by the Chairperson, either make an order under that subsection or dismiss the application.

l'Office est tenu, dans le délai fixé par le président, soit de rendre une ordonnance en vertu de ce paragraphe soit de rejeter la demande.

Maximum time limit and obligation to make it public

(5) The time limit specified by the Chairperson must be no longer than 15 months after the day on which the applicant has, in the opinion of the Board, provided a complete application. The Board shall make the time limit public.

Restriction et publicité

(5) Le délai fixé par le président ne peut excéder quinze mois suivant la date où le demandeur a, de l'avis de l'Office, complété la demande. Le délai est rendu public par l'Office.

Environmental assessment

(6) If the application relates to a designated project within the meaning of section 2 of the Canadian Environmental Assessment Act, 2012, the Board shall also, within the time limit,

Évaluation environnementale

(6) Si la demande vise un projet désigné au sens de l'article 2 de la Loi canadienne sur l'évaluation environnementale (2012), l'Office est aussi tenu, dans le même délai :

(a) prepare a report, as required by paragraph 22(b) of that Act, with respect to its environmental assessment of the designated project; and

a) d'une part, d'établir le rapport d'évaluation environnementale relatif au projet exigé par l'alinéa 22b) de cette loi;

(b) comply with subsections 27(1) and 54(1) of that Act with respect to that assessment.

b) d'autre part, de se conformer, s'ils s'appliquent, aux paragraphes 27(1) et 54(1) de cette loi à l'égard de cette évaluation.

Excluded period — applicant

(7) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline or anything referred to in paragraph (1)(b) to which the application relates 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

Période exclue du délai — demandeur

(7) Si l'Office exige du demandeur, relativement au pipeline ou à tout élément visé à l'alinéa (1)b) faisant l'objet de la demande, la communication de renseignements ou la réalisation d'études et déclare publiquement, avec l'approbation du président, que le présent paragraphe s'applique, la période prise par le

the requirement is not included in the calculation of the time limit.

demandeur pour remplir l'exigence n'est pas comprise dans le calcul du délai.

Public notice of excluded period

(8) The Board shall make public the dates of the beginning and ending of the period referred to in subsection (7) as soon as each of them is known.

Avis publics – période exclue

(8) L'Office rend publiques, sans délai, la date où commence la période visée au paragraphe (7) et celle où elle se termine.

Excluded period — Governor in Council

(9) If the Board has referred a matter to the Governor in Council under subsection 52(2) of the Canadian Environmental Assessment Act, 2012, the period that begins on the day on which the reference is made and ends on the day on which the Governor in Council makes a decision in relation to the matter is not included in the calculation of the time limit.

Période exclue du délai — gouverneur en conseil

(9) Si l'Office renvoie au gouverneur en conseil une question en application du paragraphe 52(2) de la Loi canadienne sur l'évaluation environnementale (2012), la période commençant le jour du renvoi et se terminant le jour où le gouverneur en conseil prend une décision sur la question n'est pas comprise dans le calcul du délai.

Extension

(10) 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.

Prorogations

(10) Le ministre peut, par arrêté, proroger le délai pour un maximum de trois mois. Le gouverneur en conseil peut, par décret pris sur la recommandation du ministre, accorder une ou plusieurs prorogations supplémentaires.

Continuation of jurisdiction and obligation

(11) A failure by the Board to comply with subsection (4) within the required time limit does not affect its jurisdiction to deal with the application or its obligation to make the order or to dismiss the application, and anything done by it in relation to the application remains valid.

Maintien de l'obligation et de la compétence

(11) Le défaut de l'Office de se conformer au paragraphe (4) dans le délai fixé ne porte atteinte ni à sa compétence à l'égard de la demande en cause ni à son obligation de rendre l'ordonnance ou de rejeter la demande ni à la validité des actes posés à l'égard de la demande en cause.

Canadian Environmental Assessment Act, 2012, **S.C. 2012, c. 19, s. 52**

Definitions	**Définitions**
	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)
2 (1) The following definitions apply in this Act.	**2 (1) Les définitions qui suivent s'appliquent à la présente loi.**
. . .	[. . .]
designated project means one or more physical activities that	**projet désigné Une ou plusieurs activités concrètes :**
(a) are carried out in Canada or on federal lands;	a) exercées au Canada ou sur un territoire domanial;
(b) are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and	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) are linked to the same federal authority as specified in those regulations or that order.	c) liées à la même autorité fédérale selon ce qui est précisé dans ce règlement ou cet arrêté
It includes any physical activity that is incidental to those physical activities.	Sont comprises les activités concrètes qui leur sont accessoires.
. . .	. . .
jurisdiction means	**instance**
(a) a federal authority;	a) Autorité fédérale;

(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;

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) the government of a province;

c) gouvernement d'une province;

(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;

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) 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;

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) 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;

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) a government of a foreign state or of a subdivision of a foreign state, or any institution of such a government; and

g) gouvernement d'un État étranger ou d'une subdivision politique d'un État étranger ou un de leurs organismes;

(h) an international organization of states or any institution of such an organization. (instance)

h) organisation internationale d'États ou un de ses organismes.

Environmental effects

Effets environnementaux

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

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

designated project or a project are	suivants :
(a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:	a) les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement :
(i) fish and fish habitat as defined in subsection 2(1) of the Fisheries Act,	(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,	(ii) les espèces aquatiques au sens du paragraphe 2(1) de la Loi sur les espèces en péril,
(iii) migratory birds as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and	(iii) les oiseaux migrateurs au sens du paragraphe 2(1) de la Loi de 1994 sur la convention concernant les oiseaux migrateurs,
(iv) any other component of the environment that is set out in Schedule 2;	(iv) toute autre composante de l'environnement mentionnée à l'annexe 2;
(b) a change that may be caused to the environment that would occur	b) les changements qui risquent d'être causés à l'environnement, selon le cas :
(i) on federal lands,	(i) sur le territoire domanial,
(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	(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) outside Canada; and	(iii) à l'étranger
(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on	c) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas :
(i) health and socio-economic conditions,	(i) en matière sanitaire et socio-économique,

(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.

(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.

Marginal note: 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

(i) health and socio-economic conditions,

(ii) physical and cultural heritage, or

Note marginale : 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) sur les plans sanitaire et socio-économique,

(ii) sur le patrimoine naturel et le

patrimoine culturel,

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

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

Marginal note: Schedule 2

(3) The Governor in Council may, by order, amend Schedule 2 to add or remove a component of the environment.

Note marginale : 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.

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.

marginale :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

19 (1) The environmental assessment of a designated project must take into account the following factors:

Éléments

19 (1) L'évaluation environnementale d'un projet désigné prend en compte les éléments suivants :

(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

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

designated project in combination with other physical activities that have been or will be carried out;

l’environnement;

(b) the significance of the effects referred to in paragraph (a);

b) l’importance des effets visés à l’alinéa 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;

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) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;

d) les mesures d’atténuation réalisables, sur les plans technique et économique, des effets environnementaux négatifs importants du projet;

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

e) les exigences du programme de suivi du projet;

(f) the purpose of the designated project;

f) les raisons d’être du projet;

(g) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means;

g) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;

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

h) les changements susceptibles d’être apportés au projet du fait de l’environnement;

(i) the results of any relevant study conducted by a committee established under section 73 or 74; and

i) les résultats de toute étude pertinente effectuée par un comité constitué au titre des articles 73 ou 74;

(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,

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

requires to be taken into account.

ministre peut exiger la prise en compte.

Marginal note: Scope of factors

Note marginale : Portée des éléments

(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

(2) L'évaluation de la portée des éléments visés aux alinéas (1)a), b), d), e), g), h) et j) incombe :

(a) the responsible authority; or

a) à l'autorité responsable;

(b) the Minister, if the environmental assessment is referred to a review panel.

b) au ministre, s'il renvoie l'évaluation environnementale pour examen par une commission.

Marginal note: Community knowledge and Aboriginal traditional knowledge

Note marginale : Connaissances des collectivités et connaissances traditionnelles autochtones

(3) The environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge.

(3) Les connaissances des collectivités et les connaissances traditionnelles autochtones peuvent être prises en compte pour l'évaluation environnementale d'un projet désigné.

Recommendations in environmental assessment report

Recommandations dans le rapport d'évaluation environnementale

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

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) 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;

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;

and

(b) its recommendation with respect to the follow-up program that is to be implemented in respect of the designated project.

b) sa recommandation quant au programme de suivi devant être mis en oeuvre relativement au projet.

Marginal note: 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.

Note marginale : 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.

Marginal note: Report is final and conclusive

(3) Subject to sections 30 and 31, the report with respect to the environmental assessment is final and conclusive.

Note marginale : Caractère définitif

(3) Sous réserve des articles 30 et 31, le rapport d'évaluation environnementale est définitif et sans appel.

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 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.

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 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.

Marginal note: 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

Note marginale : 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.

complete its recon-sideration.

Marginal note: 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.

Note marginale : 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.

Marginal note: 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.

Note marginale : 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 oeuvre relativement au projet.

Marginal note: Report is final and conclusive

(5) Subject to section 31, the

Note marginale : Caractère définitif

(5) Sous réserve de l'article 31, le

responsible authority reconsideration report is final and conclusive.

rapport de réexamen est définitif et sans appel.

Marginal note: Reconsideration of report under this section

Note marginale : Réexamen du rapport présenté en application du présent article

(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, 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.

(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 (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.

Governor in Council's decision

Décisions du gouverneur en conseil

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

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) decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the recon-sideration report, if there is one, that the designated project

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) is not likely to cause significant

(i) n'est pas susceptible d'entraîner des effets environnementaux négatifs

adverse environmental effects,

et importants,

(ii) is likely to cause significant adverse environmental effects that can be justified in the circumstances, or

(ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans les circonstances,

(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and

(iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

(b) direct the responsible authority to issue a decision statement to the proponent of the designated project that

b) donner à l'autorité responsable instruction de faire une déclaration qu'elle remet au promoteur du projet dans laquelle :

(i) informs the proponent of the decision made under paragraph (a) with respect to the designated project and,

(i) elle donne avis de la décision prise par le gouverneur en conseil en vertu de l'alinéa a) relativement au projet,

(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.

(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 oeuvre 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.

Marginal note: Certain conditions subject to exercise of power or performance of duty or function

Note marginale : Certaines conditions subordonnées à l'exercice d'attributions

(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

(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 en

designated project to be carried out, in whole or in part, take effect only if the federal authority exercises the power or performs the duty or function.

partie du projet désigné sont subordonnées à l'exercice par l'autorité fédérale des attributions en cause.

Marginal note: 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.

Note marginale : 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.

Marginal note: Posting of decision statement on Internet site

(4) The responsible authority must ensure that the decision statement is posted on the Internet site.

Note marginale : Déclaration affichée sur le site Internet

(4) Elle veille à ce que la déclaration soit affichée sur le site Internet.

Marginal note: 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.

Note marginale : 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.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM FOUR DECISIONS OF THE NATIONAL ENERGY BOARD DATED APRIL 2, 2014. FILE NUMBER: OF-Fac-Oil-T260-2013-03 02

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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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REASONS FOR JUDGMENT BY:	GAUTHIER J.A. GLEASON J.A.
CONCURRED IN BY:	WEBB J.A.
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