Mavis Baker *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees, and the Charter Committee on Poverty Issues *Interveners*

INDEXED AS: BAKER *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

File No.: 25823.

1998: November 4; 1999: July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Humanitarian and compassionate considerations — Children's interests — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Application denied without hearing or formal reasons — Whether procedural fairness violated — Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) — Immigration Regulations, 1978, SOR/93-44, s. 2.1 — Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law — Procedural fairness — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Whether participatory rights accorded consistent with duty of procedural fairness — Whether failure to provide reasons violated principles of procedural fairness — Whether reasonable apprehension of bias.

Mavis Baker *Appelante*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et

Le Conseil canadien des églises, la Canadian Foundation for Children, Youth and the Law, la Défense des enfants-International-Canada, le Conseil canadien pour les réfugiés et le Comité de la Charte et des questions de pauvreté *Intervenants*

RÉPERTORIÉ: BAKER *c.* CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION)

N° du greffe: 25823.

1998: 4 novembre; 1999: 9 juillet.

Présents: Les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Raisons d'ordre humanitaire — Intérêts des enfants — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Demande rejetée sans audience ni motifs écrits — Y a-t-il eu violation de l'équité procédurale? — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 82.1(1), 114(2) — Règlement sur l'immigration de 1978, DORS/93-44, art. 2.1 — Convention relative aux droits de l'enfant, R.T. Can. 1992 n° 3, art. 3, 9, 12.

Droit administratif – Équité procédurale — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Les droits de participation accordés étaient-ils compatibles avec l'obligation d'équité procédurale? — Le défaut d'exposer les motifs de décision a-t-il enfreint les principes d'équité procédurale? — Y a-t-il une crainte raisonnable de partialité?

Courts — Appellate review — Judge on judicial review certifying question for consideration of Court of Appeal — Legal effect of certified question — Immigration Act, R.S.C., 1985, c. I-2, s. 83(1).

Immigration — Humanitarian and compassionate considerations — Standard of review of humanitarian and compassionate decision — Best interests of claimant's children — Approach to be taken in reviewing humanitarian and compassionate decision where children affected.

Administrative law — Review of discretion — Approach to review of discretionary decision making.

The appellant, a woman with Canadian-born dependent children, was ordered deported. She then applied for an exemption, based on humanitarian and compassionate considerations under s. 114(2) of the *Immigration Act*, from the requirement that an application for permanent residence be made from outside Canada. This application was supported by letters indicating concern about the availability of medical treatment in her country of origin and the effect of her possible departure on her Canadian-born children. A senior immigration officer replied by letter stating that there were insufficient humanitarian and compassionate reasons to warrant processing the application in Canada. This letter contained no reasons for the decision. Counsel for the appellant, however, requested and was provided with the notes made by the investigating immigration officer and used by the senior officer in making his decision. The Federal Court — Trial Division, dismissed an application for judicial review but certified the following question pursuant to s. 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?" The Court of Appeal limited its consideration to the question and found that the best interests of the children did not need to be given primacy in assessing such an application. The order that the appellant be removed from Canada, which was made after the immigration officer's decision, was stayed pending the result of this appeal.

Tribunaux — Contrôle en appel — Certification, par le juge siégeant en contrôle judiciaire, d'une question à soumettre à la Cour d'appel — Effet juridique d'une question certifiée — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 83(1).

Immigration — Raisons d'ordre humanitaire — Norme de contrôle d'une décision fondée sur des raisons d'ordre humanitaire — Intérêt supérieur des enfants de la demanderesse — Approche du contrôle d'une décision fondée sur des raisons d'ordre humanitaire touchant des enfants.

Droit administratif — Contrôle du pouvoir discrétionnaire — Approche du contrôle de décisions discrétionnaires.

Une mesure d'expulsion a été prise contre l'appelante, mère d'enfants à charge nés au Canada. Elle a alors demandé d'être dispensée de faire sa demande de résidence permanente de l'extérieur du Canada, pour des raisons d'ordre humanitaire, conformément au par. 114(2) de la *Loi sur l'immigration*. Sa demande était appuyée de lettres exprimant des inquiétudes quant à la possibilité d'obtenir un traitement médical dans son pays d'origine et quant à l'effet de son départ éventuel sur ses enfants nés au Canada. Un agent d'immigration supérieur a répondu par lettre qu'il n'y avait pas suffisamment de raisons humanitaires pour justifier de traiter sa demande au Canada. Cette lettre ne donnait pas les motifs de la décision. L'avocat de l'appelante a cependant demandé et reçu les notes de l'agent investigateur, que l'agent supérieur d'immigration avait utilisées pour rendre sa décision. La Section de première instance de la Cour fédérale a rejeté une demande de contrôle judiciaire mais a certifié la question suivante en application du par. 83(1) de la Loi: «Vu que la Loi sur l'immigration n'incorpore pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention internationale relative aux droits de l'enfant, les autorités d'immigration fédérales doivent-elles considérer l'intérêt supérieur de l'enfant né au Canada comme une considération primordiale dans l'examen du cas d'un requérant sous le régime du par. 114(2) de la *Loi sur l'immigration*?» La Cour d'appel a limité son examen à cette question et a conclu qu'il n'était pas nécessaire d'accorder la primauté à l'intérêt supérieur des enfants dans l'appréciation d'une telle demande. Un sursis à la mesure d'expulsion de l'appelante prononcée après la décision de l'agent d'immigration, a été ordonné jusqu'à l'issue du présent pourvoi.

Held: The appeal should be allowed.

Per L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ.: Section 83(1) of the *Immigration Act* does not require the Court of Appeal to address only the certified question. Once a question has been certified, the Court of Appeal may consider all aspects of the appeal lying within its jurisdiction.

The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.

A duty of procedural fairness applies to humanitarian and compassionate decisions. In this case, there was no legitimate expectation affecting the content of the duty of procedural fairness. Taking into account the other factors, although some suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model. The duty of fairness owed in these circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered. Nevertheless, taking all the factors into account, the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient.

It is now appropriate to recognize that, in certain circumstances, including when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision. Reasons are

Arrêt: Le pourvoi est accueilli.

Les juges L'Heureux-Dubé, Gonthier, McLachlin, Bastarache et Binnie: Le paragraphe 83(1) de la *Loi sur l'immigration* n'exige pas que la Cour d'appel traite seulement la question certifiée. Lorsqu'une question a été certifiée, la Cour d'appel peut examiner tous les aspects de l'appel qui relèvent de sa compétence.

L'obligation d'équité procédurale est souple et variable et repose sur une appréciation du contexte de la loi et des droits visés. Les droits de participation qui en font partie visent à garantir que les décisions administratives sont prises au moyen d'une procédure équitable et ouverte, adaptée au type de décision et à son contexte légal, institutionnel et social, comprenant la possibilité donnée aux personnes visées de présenter leur point de vue et des éléments de preuve qui seront dûment pris en considération par le décideur. Plusieurs facteurs sont pertinents pour déterminer le contenu de l'obligation d'équité procédurale: (1) la nature de la décision recherchée et le processus suivi pour y parvenir; (2) la nature du régime législatif et les termes de la loi régissant l'organisme; (3) l'importance de la décision pour les personnes visées; (4) les attentes légitimes de la personne qui conteste la décision; (5) les choix de procédure que l'organisme fait lui-même. Cette liste de facteurs n'est pas exhaustive.

L'obligation d'équité procédurale s'applique aux décisions d'ordre humanitaire. En l'espèce, il n'y avait pas d'attente légitime ayant une incidence sur la nature de l'obligation d'équité procédurale. Compte tenu des autres facteurs, bien que certains indiquent des exigences plus strictes en vertu de l'obligation d'équité, d'autres indiquent des exigences moins strictes et plus éloignées du modèle judiciaire. L'obligation d'équité dans ces circonstances est plus que minimale, et le demandeur et les personnes dont les intérêts sont profondément touchés par la décision doivent avoir une possibilité valable de présenter les divers types de preuves qui se rapportent à leur affaire et de les voir évalués de façon complète et équitable. Néanmoins, compte tenu de tous ces facteurs, le fait qu'il n'y ait pas eu d'audience ni d'avis d'audience ne constituait pas un manquement à l'obligation d'équité procédurale. La possibilité de produire une documentation écrite complète était suffisante.

Il est maintenant approprié de reconnaître que, dans certaines circonstances, notamment lorsque la décision revêt une grande importance pour l'individu, ou lorsqu'il existe un droit d'appel prévu par la loi, l'obligation d'équité procédurale requerra une explication écrite de

required here given the profound importance of this decision to those affected. This requirement was fulfilled by the provision of the junior immigration officer's notes, which are to be taken to be the reasons for decision. Accepting such documentation as sufficient reasons upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that, in the administrative context, this transparency may take place in various ways.

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. This duty applies to all immigration officers who play a role in the making of decisions. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference. Statements in the immigration officer's notes gave the impression that he may have been drawing conclusions based not on the evidence before him, but on the fact that the appellant was a single mother with several children and had been diagnosed with a psychiatric illness. Here, a reasonable and well-informed member of the community would conclude that the reviewing officer had not approached this case with the impartiality appropriate to a decision made by an immigration officer. The notes therefore give rise to a reasonable apprehension of bias.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. Review of the substantive aspects of discretionary decisions is best approached within the pragmatic and functional framework defined by this Court's decisions, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. Though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

la décision. Des motifs écrits sont nécessaires en l'espèce, étant donné l'importance cruciale de la décision pour les personnes visées. Cette obligation a été remplie par la production des notes de l'agent subalterne, qui doivent être considérées comme les motifs de la décision. L'admission de ces documents comme motifs de la décision confirme le principe selon lequel les individus ont droit à une procédure équitable et à la transparence de la prise de décision, mais reconnaît aussi qu'en matière administrative, cette transparence peut être atteinte de différentes façons.

L'équité procédurale exige également que les décisions soient rendues par un décideur impartial, sans crainte raisonnable de partialité. Cette obligation s'applique à tous les agents d'immigration qui jouent un rôle significatif dans la prise de décision. Parce qu'elles visent nécessairement des personnes de provenances diverses, issues de cultures, de races et de continents différents, les décisions en matière d'immigration exigent de ceux qui les rendent sensibilité et compréhension. Elles exigent la reconnaissance de la diversité, la compréhension des autres et l'ouverture d'esprit à la différence. Les déclarations contenues dans les notes de l'agent d'immigration donnent l'impression qu'il peut avoir tiré des conclusions en se fondant non pas sur la preuve dont il disposait, mais sur le fait que l'appelante était une mère célibataire ayant plusieurs enfants, et était atteinte de troubles psychiatriques. En l'espèce, un membre raisonnable et bien informé de la communauté conclurait que l'agent n'a pas traité cette affaire avec l'impartialité requise dans une décision rendue par un agent d'immigration. Les notes donnent donc lieu à une crainte raisonnable de partialité.

La notion de pouvoir discrétionnaire s'applique dans les cas où le droit ne dicte pas une décision précise, ou quand le décideur se trouve devant un choix d'options à l'intérieur de limites imposées par la loi. Le droit administratif a traditionnellement abordé le contrôle judiciaire des décisions discrétionnaires séparément de décisions sur l'interprétation de règles de droit. Le contrôle des éléments de fond d'une décision discrétionnaire est mieux envisagé selon la démarche pragmatique et fonctionnelle définie par la jurisprudence de notre Cour, compte tenu particulièrement de la difficulté de faire des classifications rigides entre les décisions discrétionnaires et les décisions non discrétionnaires. Même si en général il sera accordé un grand respect aux décisions discrétionnaires, il faut que le pouvoir discrétionnaire soit exercé conformément aux limites imposées dans la loi, aux principes de la primauté du droit, aux principes du droit administratif, aux valeurs fondamentales de la société canadienne, et aux principes de la *Charte*.

In applying the applicable factors to determining the standard of review, considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division, and the individual rather than polycentric nature of the decision also suggest that the standard should not be as deferential as "patent unreasonableness". The appropriate standard of review is, therefore, reasonableness *simpliciter*.

Dans l'application des facteurs pertinents à la détermination de la norme de contrôle appropriée, on devrait faire preuve d'une retenue considérable envers les décisions d'agents d'immigration exerçant les pouvoirs conférés par la loi, compte tenu de la nature factuelle de l'analyse, de son rôle d'exception au sein du régime législatif et de la large discrétion accordée par le libellé de la loi. Toutefois, l'absence de clause privative, la possibilité expressément prévue d'un contrôle judiciaire par la Cour fédérale — Section de première instance, ainsi que la nature individuelle plutôt que polycentrique de la décision, tendent aussi à indiquer que la norme applicable ne devrait pas en être une d'aussi grande retenue que celle du caractère «manifestement déraisonnable». La norme de contrôle appropriée est celle de la décision raisonnable *simpliciter*.

The wording of the legislation shows Parliament's intention that the decision be made in a humanitarian and compassionate manner. A reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children since children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of these values may be found in the purposes of the Act, in international instruments, and in the Minister's guidelines for making humanitarian and compassionate decisions. Because the reasons for this decision did not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of the appellant's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to the appellant's country of origin might cause her.

Le libellé de la législation révèle l'intention du Parlement de faire en sorte que la décision soit fondée sur des raisons d'ordre humanitaire. L'exercice raisonnable du pouvoir conféré par l'article exige que soit prêtée une attention minutieuse aux intérêts et aux besoins des enfants puisque les droits des enfants, et la considération de leurs intérêts, sont des valeurs humanitaires centrales dans la société canadienne. Une indication de ces valeurs se trouve dans les objectifs de la Loi, dans les instruments internationaux, et dans les lignes directrices régissant les décisions d'ordre humanitaire publiées par le ministre. Étant donné que les motifs de la décision n'indiquent pas qu'elle a été rendue d'une manière réceptive, attentive ou sensible à l'intérêt des enfants de l'appelante, ni que leur intérêt a été considéré comme un facteur décisionnel important, elle constituait un exercice déraisonnable du pouvoir conféré par la loi. En outre, les motifs de la décision n'accordent pas suffisamment d'importance ou de poids aux difficultés qu'un retour de l'appelante dans son pays d'origine pouvait lui susciter.

Per Cory and Iacobucci JJ.: The reasons and disposition of L'Heureux-Dubé J. were agreed with apart from the effect of international law on the exercise of ministerial discretion under s. 114(2) of the *Immigration Act*. The certified question must be answered in the negative. The principle that an international convention ratified by the executive is of no force or effect within the Canadian legal system until incorporated into domestic law does not survive intact the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation.

Les juges Cory et Iacobucci: Les motifs du juge L'Heureux-Dubé et le dispositif qu'elle propose sont acceptés sauf pour ce qui concerne la question de l'effet du droit international sur l'exercice du pouvoir discrétionnaire conféré au ministre par le par. 114(2) de la *Loi sur l'immigration*. La question certifiée devrait recevoir une réponse négative. Le principe qu'une convention internationale ratifiée par le pouvoir exécutif n'a aucun effet en droit canadien tant qu'elle n'est pas incorporée dans le droit interne ne peut pas survivre intact après l'adoption d'un principe de droit qui autorise le recours dans le processus d'interprétation des lois, aux dispositions d'une convention qui n'a pas été intégrée dans la législation.

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Citée par le juge L'Heureux-Dubé

Arrêts appliqués: *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; **arrêts critiqués:** *Liyanagamage c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1994), 176 N.R. 4; *Shah c. Ministre de l'Emploi et de l'Immigration* (1994), 170 N.R. 238; **arrêts non suivis:** *Tylo c. Ministre de l'Emploi et de l'Immigration* (1995), 90 F.T.R. 157; *Gheorlan c. Canada (Secrétaire d'État)* (1995), 26 Imm. L.R. (2d) 170; *Chan c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1994), 87 F.T.R. 62; *Marques c. Canada (Ministre de la Citoyenneté et de l'Immigration) (nº 1)* (1995), 116 F.T.R. 241; *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *Supermarchés Jean Labrecque Inc. c. Flamand*, [1987] 2 R.C.S. 219; *Public Service Board of New South Wales c. Osmond* (1986), 159 C.L.R. 656; *Williams c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1997] 2 C.F. 646; **arrêts mentionnés:** *Ramoutar c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 3 C.F. 370; *Ministre de l'Emploi et de l'Immigration c. Jiminez-Perez*, [1984] 2 R.C.S. 565; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Sobrie c. Canada (Ministre de l'Emploi et de l'Immigration)* (1987), 3 Imm. L.R. (2d) 81; *Said c. Canada (Ministre de l'Emploi et de l'Immigration)* (1992), 6 Admin. L.R. (2d) 23; *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Russell c. Duke of Norfolk*, [1949] 1 All E.R. 109; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879; *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105; *R. c. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *Qi c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1995), 33 Imm. L.R. (2d) 57; *Mercier-Néron c. Canada (Ministre de la Santé nationale et du Bien-être social)* (1995), 98 F.T.R. 36; *Bendahmane c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1989] 3 C.F. 16; *Canada (Procureur général) c. Comité du tribunal des droits de la personne (Canada)* (1994), 76 F.T.R. 1; *IWA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282; *Renvoi relatif à la rémunération des juges de la Cour*

State for the Home Department, ex parte Doody, [1994] 1 A.C. 531; *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120; *Orlowski v. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541; *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 55 N.S.R. (2d) 71; *Taabea v. Refugee Status Advisory Committee*, [1980] 2 F.C. 316; *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 179 N.B.R. (2d) 43; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Francis v. The Queen*, [1956] S.C.R. 618; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Young v. Young*, [1993] 4 S.C.R. 3.

provinciale de l'Île-du-Prince-Édouard, [1997] 3 R.C.S. 3; *R. c. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310; *R. c. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531; *Norton Tool Co. c. Tewson*, [1973] 1 W.L.R. 45; *Alexander Machinery (Dudley) Ltd. c. Crabtree*, [1974] I.C.R. 120; *Orlowski c. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541; *R.D.R. Construction Ltd. c. Rent Review Commission* (1982), 55 N.S.R. (2d) 71; *Taabea c. Comité consultatif sur le statut de réfugié*, [1980] 2 C.F. 316; *Boyle c. Commission de la santé, de la sécurité et de l'indemnisation des accidents au travail (N.-B.)* (1996), 179 R.N.-B. (2e) 43; *R. c. S. (R.D.)*, [1997] 3 R.C.S. 484; *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623; *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048; *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Maple Lodge Farms Ltd. c. Gouvernement du Canada*, [1982] 2 R.C.S. 2; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231; *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corporation*, [1948] 1 K.B. 223; *Roncarelli c. Duplessis*, [1959] R.C.S. 121; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *R. c. Gladue*, [1999] 1 R.C.S. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Francis c. The Queen*, [1956] R.C.S. 618; *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141; *Tavita c. Minister of Immigration*, [1994] 2 N.Z.L.R. 257; *Vishaka c. Rajasthan*, [1997] 3 L.R.C. 361; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *Young c. Young*, [1993] 4 R.C.S. 3.

By Iacobucci J.

Applied: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141; **referred to:** *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

Citée par le juge Iacobucci

Arrêt appliqué: *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141; **arrêt mentionné:** *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038.

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APPEAL from a judgment of the Federal Court of Appeal, [1997] 2 F.C. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] F.C.J. No. 1726 (QL), dismissing an appeal from a judgment of Simpson J. (1995), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] F.C.J. No. 1441 (QL), dismissing an application for judicial review. Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1997] 2 C.F. 127, 207 N.R. 57, 142 D.L.R. (4th) 554, [1996] A.C.F. nº 1726 (QL), qui a rejeté un appel d'un jugement du juge Simpson (1995), 101 F.T.R. 110, 31 Imm. L.R. (2d) 150, [1995] A.C.F. nº 1441 (QL), qui avait rejeté une demande de contrôle judiciaire. Pourvoi accueilli.

Roger Rowe and *Rocco Galati*, for the appellant.

Roger Rowe et *Rocco Galati*, pour l'appelante.

Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for the respondent.

Urszula Kaczmarczyk et *Cheryl D. Mitchell*, pour l'intimé.

Sheena Scott and *Sharryn Aiken*, for the interveners the Canadian Foundation for Children,

Sheena Scott et *Sharryn Aiken*, pour les intervenants la Canadian Foundation for Children, Youth

Youth and the Law, the Defence for Children International-Canada, and the Canadian Council for Refugees.

John Terry and *Craig Scott*, for the intervener the Charter Committee on Poverty Issues.

Barbara Jackman and *Marie Chen*, for the intervener the Canadian Council of Churches.

The judgment of L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ. was delivered by

L'HEUREUX-DUBÉ J. — Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live -in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their

and the Law, la Défense des enfants-International-Canada et le Conseil canadien pour les réfugiés.

John Terry et *Craig Scott*, pour l'intervenant le Comité de la Charte et des questions de pauvreté.

Barbara Jackman et *Marie Chen*, pour l'intervenant le Conseil canadien des églises.

Version française du jugement des juges L'Heureux-Dubé, Gonthier, McLachlin, Bastarache et Binnie rendu par

LE JUGE L'HEUREUX-DUBÉ — Le règlement passé en vertu du par. 114(2) de la *Loi sur l'immigration*, L.R.C. (1985), ch. I-2, autorise le ministre intimé à faciliter l'admission au Canada d'une personne quand il est convaincu, pour des raisons d'ordre humanitaire, que l'admission devrait être facilitée ou qu'une dispense d'application des règlements passés aux termes de la Loi devrait être accordée. Le présent pourvoi porte essentiellement sur la démarche à suivre lorsqu'un tribunal procède au contrôle judiciaire de ces décisions, à la fois sur le fond et sur le plan de la procédure. Ce pourvoi soulève également des questions relatives à la crainte raisonnable de partialité, à la rédaction de motifs écrits dans le cadre de l'obligation d'agir équitablement et au rôle de l'intérêt des enfants dans le contrôle judiciaire de décisions rendues conformément au par. 114(2). 1

I. Les faits

Mavis Baker, citoyenne de la Jamaïque, est entrée au Canada à titre de visiteur en août 1981 et y vit depuis. Elle n'a jamais obtenu le statut de résidente permanente, mais a subvenu illégalement à ses besoins en travaillant pendant 11 ans comme travailleur domestique. Elle a eu quatre enfants (qui sont tous citoyens canadiens) au Canada: Paul Brown, né en 1985, les jumeaux Patricia et Peter Robinson, nés en 1989, et Desmond Robinson, né en 1992. Après la naissance de Desmond, M^me^ Baker a souffert d'une psychose post-partum et on a diagnostiqué qu'elle était atteinte d'une schizophrénie paranoïde. À cette époque, elle a présenté une demande d'assistance sociale. Quand 2

natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that, although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter dated April 18, 1994 and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary

on a découvert qu'elle était atteinte de troubles mentaux, deux de ses enfants ont été confiés aux soins de leur père naturel et les deux autres ont été placés en foyer d'accueil. Son état s'étant amélioré, elle a de nouveau la garde des deux enfants placés en foyer d'accueil.

En décembre 1992, une ordonnance d'expulsion a été prise contre l'appelante, lorsqu'on a découvert qu'elle avait travaillé illégalement au Canada et avait séjourné au-delà de son visa de visiteur. En 1993, M^me^ Baker a demandé d'être dispensée de faire sa demande de résidence permanente de l'extérieur du Canada, pour des raisons d'ordre humanitaire, conformément au par. 114(2) de la *Loi sur l'immigration*. Elle a obtenu l'aide d'un avocat pour remplir cette demande, et a notamment ajouté, comme documents additionnels, des observations de son avocat, une lettre de son médecin et une lettre d'un travailleur social de la Société d'aide à l'enfance. Les documents présentés indiquaient que, même si elle éprouvait toujours des problèmes psychiatriques, elle faisait des progrès, mais qu'elle pourrait retomber malade si elle était forcée de retourner en Jamaïque, parce qu'elle ne pourrait peut-être pas y bénéficier d'un traitement. Madame Baker a aussi clairement indiqué qu'elle était la seule à pouvoir prendre soin de deux de ses enfants nés au Canada et que ses deux autres enfants avaient besoin de son soutien affectif et étaient régulièrement en contact avec elle. Les documents mentionnaient également qu'elle subirait aussi des difficultés d'ordre émotionnel si elle était séparée d'eux.

En réponse à cette demande, une lettre datée du 18 avril 1994 et signée par l'agent d'immigration M. Caden a informé M^me^ Baker de la décision qu'il n'y avait pas suffisamment de raisons humanitaires pour justifier de traiter au Canada sa demande de résidence permanente, sans toutefois donner les motifs de la décision.

À la demande de l'avocat de l'appelante, les notes de l'agent d'immigration G. Lorenz, que l'agent Caden a utilisées pour rendre sa décision, ont été remises à l'appelante. Après un résumé de

of the history of the case, Lorenz's notes read as follows:

PC is unemployed — on Welfare. No income shown — no assets. Has four Cdn.-born children — four other children in Jamaica — HAS A TOTAL OF EIGHT CHILDREN

Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two). There is nothing for her in Jamaica — hasn't been there in a long time — no longer close to her children there — no jobs there — she has no skills other than as a domestic — children would suffer — can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 — is now an outpatient and is improving. If sent back will have a relapse.

Letter from Children's Aid — they say PC has been diagnosed as a paranoid schizophrenic. — children would suffer if returned — Letter of Aug. '93 from psychiatrist from Ont. Govm't. Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well — deportation would be an extremely stressful experience.

Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.

This case is a catastrophy [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!

The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity. However, because of the circumstances involved, there

l'historique de l'affaire, les notes de M. Lorenz se lisent:

[TRADUCTION] PC est sans emploi — reçoit l'assistance sociale. Aucun revenu connu — pas de biens. A quatre enfants nés au Canada, quatre autres en Jamaïque — HUIT ENFANTS AU TOTAL

Dit que seulement deux enfants sont sous sa garde directe. (Aucun renseignement sur la garde des deux autres). Il n'y a rien qui l'attend en Jamaïque — n'y est pas allée depuis longtemps — n'est plus proche de ses enfants qui s'y trouvent — pas d'emplois — n'a pas d'autre métier que celui de domestique — les enfants souffriraient — elle ne peut pas les emmener avec elle et elle n'a personne ici à qui les confier. Dit qu'elle souffre de troubles mentaux depuis 1981 — elle est actuellement une patiente en consultation externe et son état s'améliore. Si elle est renvoyée là-bas, elle fera une rechute.

Lettre de la Société d'aide à l'enfance — dit que PC souffre d'une schizophrénie paranoïde — les enfants souffriraient, si elle était renvoyée. Lettre d'août 1993 d'un psychiatre du gouvernement de l'Ontario — dit que PC a une psychose post-partum et a eu une brève période de psychose en Jamaïque quand elle avait 25 ans. Elle est maintenant patiente en consultation externe et se porte relativement bien — l'expulsion serait une expérience extrêmement stressante.

L'avocat dit que PC est une mère célibataire et qu'elle est la seule à pouvoir prendre soin de deux de ses enfants nés au Canada. L'état mental de PC se détériorerait si elle devait être déportée etc.

Cette affaire est une catastrophe. C'est aussi une condamnation de notre système: la cliente est arrivée comme visiteur en août 1981, une ordonnance d'expulsion n'a été prise qu'en décembre 1992 et en AVRIL 1994 ELLE EST TOUJOURS ICI!

PC est atteinte de schizophrénie paranoïde et reçoit l'assistance sociale. Elle n'a pas d'autres qualifications que de domestique. Elle a QUATRE ENFANTS EN JAMAÏQUE ET QUATRE AUTRES NÉS ICI. Elle sera, bien entendu, un fardeau excessif pour nos systèmes d'aide sociale (probablement) pour le reste de sa vie. Il n'existe pas d'autres facteurs d'ordre humanitaire que ses QUATRE ENFANTS NÉS AU CANADA. Devons-nous lui permettre de rester pour ça? Je suis d'avis que le Canada ne peut plus se permettre cette sorte de générosité. Toutefois, compte tenu des circonstances, il est possible qu'il y ait une mauvaise presse.

is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.

There is also a potential for violence — see charge of "assault with a weapon" [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

82.1 (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.

83. (1) A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

114. . . .

(2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amended by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to

Je recommande le rejet, mais vous désirerez peut-être obtenir l'approbation de quelqu'un au centre régional.

Violence possible — voir l'accusation d'agression armée. [Majuscules dans l'original.]

À la suite du rejet de sa demande, M^me^ Baker a reçu signification, le 27 mai 1994, de l'ordre de se présenter à l'aéroport Pearson le 17 juin pour son renvoi du Canada. Un sursis d'expulsion a été ordonné jusqu'à l'issue du présent pourvoi.

II. Les dispositions législatives et des traités internationaux

Loi sur l'immigration, L.R.C. (1985), ch. I-2

82.1 (1) La présentation d'une demande de contrôle judiciaire aux termes de la *Loi sur la Cour fédérale* ne peut, pour ce qui est des décisions ou ordonnances rendues, des mesures prises ou de toute question soulevée dans le cadre de la présente loi ou de ses textes d'application — règlements ou règles — se faire qu'avec l'autorisation d'un juge de la Section de première instance de la Cour fédérale.

83. (1) Le jugement de la Section de première instance de la Cour fédérale rendu sur une demande de contrôle judiciaire relative à une décision ou ordonnance rendue, une mesure prise ou toute question soulevée dans le cadre de la présente loi ou de ses textes d'application — règlements ou règles — ne peut être porté en appel devant la Cour d'appel fédérale que si la Section de première instance certifie dans son jugement que l'affaire soulève une question grave de portée générale et énonce celle-ci.

114. . . .

(2) Le gouverneur en conseil peut, par règlement, autoriser le ministre à accorder, pour des raisons d'ordre humanitaire, une dispense d'application d'un règlement pris aux termes du paragraphe (1) ou à faciliter l'admission de toute autre manière.

Règlement sur l'immigration de 1978, DORS/78-172, modifié par DORS/93-44

2.1 Le ministre est autorisé à accorder, pour des raisons d'ordre humanitaire, une dispense d'application d'un règlement pris aux termes du paragraphe 114(1) de

Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

la Loi ou à faciliter l'admission au Canada de toute autre manière.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family

Convention relative aux droits de l'enfant, R.T. Can. 1992 nº 3

Article 3

1. Dans toutes les décisions qui concernent les enfants, qu'elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit être une considération primordiale.

2. Les États parties s'engagent à assurer à l'enfant la protection et les soins nécessaires à son bien-être, compte tenu des droits et des devoirs de ses parents, de ses tuteurs ou des autres personnes légalement responsables de lui, et ils prennent à cette fin toutes les mesures législatives et administratives appropriées.

Article 9

1. Les États parties veillent à ce que l'enfant ne soit pas séparé de ses parents contre leur gré, à moins que les autorités compétentes ne décident, sous réserve de révision judiciaire et conformément aux lois et procédures applicables, que cette séparation est nécessaire dans l'intérêt supérieur de l'enfant. Une décision en ce sens peut être nécessaire dans certains cas particuliers, par exemple lorsque les parents maltraitent ou négligent l'enfant, ou lorsqu'ils vivent séparément et qu'une décision doit être prise au sujet du lieu de résidence de l'enfant.

2. Dans tous les cas prévus au paragraphe 1 du présent article, toutes les parties intéressées doivent avoir la possibilité de participer aux délibérations et de faire connaître leurs vues.

3. Les États parties respectent le droit de l'enfant séparé de ses deux parents ou de l'un d'eux d'entretenir régulièrement des relations personnelles et des contacts directs avec ses deux parents, sauf si cela est contraire à l'intérêt supérieur de l'enfant.

4. Lorsque la séparation résulte de mesures prises par un État partie, telles que la détention, l'emprisonnement, l'exil, l'expulsion ou la mort (y compris la mort, quelle qu'en soit la cause, survenue en cours de détention) des deux parents ou de l'un d'eux, ou de l'enfant, l'État partie donne sur demande aux parents, à l'enfant ou, s'il y a lieu, à un autre membre de la famille les renseignements

with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

III. Judgments

A. *Federal Court — Trial Division* (1995), 101 F.T.R. 110

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence

essentiels sur le lieu où se trouvent le membre ou les membres de la famille, à moins que la divulgation de ces renseignements ne soit préjudiciable au bien-être de l'enfant. Les États parties veillent en outre à ce que la présentation d'une telle demande n'entraîne pas en elle-même de conséquences fâcheuses pour la personne ou les personnes intéressées.

Article 12

1. Les États parties garantissent à l'enfant qui est capable de discernement le droit d'exprimer librement son opinion sur toute question l'intéressant, les opinions de l'enfant étant dûment prises en considération eu égard à son âge et à son degré de maturité.

2. À cette fin, on donnera notamment à l'enfant la possibilité d'être entendu dans toute procédure judiciaire ou administrative l'intéressant, soit directement, soit par l'intermédiaire d'un représentant ou d'un organisme approprié, de façon compatible avec les règles de procédure de la législation nationale.

III. Les jugements

A. *Cour fédérale — Section de première instance* (1995), 101 F.T.R. 110

Le juge Simpson a prononcé à l'audience les motifs rejetant la demande de contrôle judiciaire de l'appelante. Elle a statué que, puisque l'agent Caden n'avait pas motivé sa décision, qu'aucun affidavit n'avait été fourni, et qu'aucun motif n'était requis, elle présumerait, en l'absence de preuve contraire, qu'il avait agi de bonne foi et avait rendu la décision en se fondant sur des principes appropriés. Elle a rejeté l'argument de l'appelante selon lequel l'affirmation dans les notes de l'agent Lorenz que M^me^ Baker serait un fardeau pour le système d'aide sociale n'était pas étayée par la preuve, concluant qu'il était raisonnable de conclure au vu des rapports fournis que M^me^ Baker ne pourrait pas reprendre le travail. Elle a conclu que le langage de l'agent Lorenz ne donnait pas lieu à une crainte raisonnable de partialité, et a également conclu que les opinions exprimées dans ses notes étaient sans importance parce qu'elles n'étaient pas celles du décideur, l'agent Caden. Elle a rejeté l'argument de l'appelante selon lequel la *Convention relative aux droits de l'enfant* commandait que l'intérêt de l'appelante prime dans les décisions fondées sur le par. 114(2), concluant que

showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

Simpson J. certified the following as a "serious question of general importance" under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the *Immigration Act*?"

B. *Federal Court of Appeal*, [1997] 2 F.C. 127

The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He

la Convention ne s'appliquait pas à cette situation, et ne faisait pas partie du droit interne. Elle a également conclu que la preuve démontrait que les enfants avaient constitué un facteur important dans le processus décisionnel et a rejeté l'argument de l'appelante selon lequel la Convention donnait lieu à une attente légitime que l'intérêt des enfants serait une considération primordiale dans la décision.

9 Le juge Simpson a certifié la question suivante comme «question grave de portée générale» en vertu du par. 83(1) de la *Loi sur l'immigration*: «Vu que la Loi sur l'immigration n'incorpore pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention internationale relative aux droits de l'enfant, les autorités d'immigration fédérales doivent-elles considérer l'intérêt supérieur de l'enfant né au Canada comme une considération primordiale dans l'examen du cas d'un requérant sous le régime du par. 114(2) de la *Loi sur l'immigration*?»

B. *Cour d'appel fédérale*, [1997] 2 C.F. 127

10 Les motifs de la Cour d'appel sont exposés par le juge Strayer. Il déclare que, conformément au par. 83(1) de la *Loi sur l'immigration*, l'appel est limité à la question certifiée par le juge Simpson. Il rejette également la contestation par l'appelante de la constitutionnalité du par. 83(1). Le juge Strayer note qu'un traité ne peut pas avoir d'effet juridique au Canada s'il n'a pas été mis en vigueur par une loi adoptée à cet effet, et que la Convention n'avait pas été adoptée par une loi fédérale ou provinciale. Il conclut que, bien que la loi doive, dans la mesure du possible, être interprétée de façon à ne pas entraîner de conflit avec les obligations internationales du Canada, dire que le par. 114(2) exige que le pouvoir discrétionnaire conféré s'exerce conformément à la Convention enfreindrait la séparation des pouvoirs entre l'exécutif et le législatif. Il conclut qu'un tel principe pourrait également toucher des droits et obligations relevant de la compétence des législatures provinciales. Le juge Strayer rejette également l'argument selon lequel quelque article de la Convention peut s'interpréter de façon à imposer l'obligation au gouvernement d'accorder priorité à l'intérêt des

held that the deportation of a parent was not a decision "concerning" children within the meaning of article 3. Finally, Strayer J.A. considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

enfants dans une procédure comme l'expulsion. Il conclut que l'expulsion du père ou de la mère n'est pas une décision «concernant» les enfants au sens de l'article 3. Enfin, le juge Strayer, examinant l'argument de l'appelante fondé sur la doctrine de l'attente légitime, conclut que puisque l'attente légitime ne crée aucun droit matériel et que le fait d'exiger qu'un décideur donne priorité à l'intérêt supérieur des enfants sous le régime du par. 114(2) aurait pour effet de créer un droit matériel, la doctrine ne s'appliquait pas.

IV. Issues

IV. Les questions en litige

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

Comme, à mon avis, l'appel peut être tranché en vertu des principes du droit administratif et de l'interprétation des lois, il n'est pas nécessaire d'examiner les divers moyens fondés sur la *Charte* qui ont été invoqués par l'appelante et les intervenants qui l'ont appuyée. Par conséquent, les questions examinées sont les suivantes:

(1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?

(2) Were the principles of procedural fairness violated in this case?

(i) Were the participatory rights accorded consistent with the duty of procedural fairness?

(ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?

(iii) Was there a reasonable apprehension of bias in the making of this decision?

(3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

(1) Quel effet juridique la question énoncée aux termes du par. 83(1) de la *Loi sur l'immigration* a-t-elle sur la portée de l'examen en appel?

(2) Les principes d'équité procédurale ont-ils été enfreints en l'espèce?

(i) Les droits de participation accordés étaient-ils compatibles avec l'obligation d'équité procédurale?

(ii) Le défaut de l'agent Caden d'exposer les motifs de sa décision a-t-il enfreint les principes d'équité procédurale?

(iii) Y avait-il une crainte raisonnable de partialité dans la prise de cette décision?

(3) Le pouvoir discrétionnaire a-t-il été incorrectement exercé en raison de la façon d'aborder l'intérêt des enfants de M^me^ Baker?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by Simpson J.

Je note que c'est la troisième question qui soulève directement les points mentionnés dans la question certifiée de portée générale énoncée par le juge Simpson.

V. Analysis

A. *Stated Questions Under Section 83(1) of the Immigration Act*

The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4, that the requirement, in s. 83(1), that a "serious question of general importance" be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

> The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not merely the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 370 (T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a "question of general importance" has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

B. *The Statutory Scheme and the Nature of the Decision*

Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

V. Analyse

A. *Les questions énoncées en vertu du par. 83(1) de la Loi sur l'immigration*

12 La Cour d'appel a conclu, conformément à son arrêt *Liyanagamage c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1994), 176 N.R. 4, que le par. 83(1), en exigeant qu'une «question grave de portée générale» soit certifiée pour qu'un appel puisse être autorisé, limite l'appel aux questions soulevées par la question certifiée. Toutefois, dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, au par. 25, notre Cour a conclu que le par. 83(1) n'exige pas que la Cour d'appel traite uniquement de la question énoncée et des points qui s'y rapportent:

> Sans la certification d'une «question grave de portée générale», l'appel ne serait pas justifié. L'objet de l'appel est bien le jugement lui-même, et non simplement la question certifiée.

Le juge Rothstein dit, dans le jugement *Ramoutar c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1993] 3 C.F. 370 (1re inst.), que lorsqu'une question a été certifiée, la Cour d'appel peut examiner tous les aspects de l'appel qui relèvent de sa compétence. Je suis d'accord. Le libellé du par. 83(1) indique, et l'arrêt *Pushpanathan* le confirme, que la certification d'une «question grave de portée générale» permet un appel du jugement de première instance qui, normalement, ne serait pas autorisé, mais ne limite pas la Cour d'appel ni notre Cour à la question énoncée ou aux points qui s'y rapportent directement. Par conséquent, nous pouvons examiner tous les points soulevés dans le pourvoi.

B. *Le régime législatif et la nature de la décision*

13 Avant d'examiner les divers moyens invoqués dans la demande de contrôle judiciaire, il est nécessaire d'aborder brièvement la nature de la décision rendue en vertu du par. 114(2) de la *Loi sur l'immigration*, du rôle que joue cette décision dans le régime législatif, et des directives données par le ministre aux agents d'immigration à ce sujet.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the Act, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

> The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the Act and the Regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Minister of Employment and Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565, at p. 569. In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of

Le paragraphe 114(2) habilite le gouverneur en conseil à autoriser le ministre à accorder une dispense d'application d'un règlement pris aux termes de la Loi, ou à faciliter l'admission d'une personne au Canada. Le pouvoir du ministre d'accorder une dispense pour des raisons d'ordre humanitaire découle de l'art. 2.1 du *Règlement sur l'immigration*:

> Le ministre est autorisé à accorder, pour des raisons d'ordre humanitaire, une dispense d'application d'un règlement pris aux termes du paragraphe 114(1) de la Loi ou à faciliter l'admission au Canada de toute autre manière.

Pour plus de clarté, je référerai aux décisions rendues conformément à une combinaison du par. 114(2) de la Loi et de l'art. 2.1 du règlement de «décisions d'ordre humanitaire».

Les demandes de résidence permanente doivent normalement être présentées à l'extérieur du Canada, conformément au par. 9(1) de la Loi. L'une des exceptions à cette règle est l'admission fondée sur des raisons d'ordre humanitaire. En droit, conformément à la Loi et au règlement, c'est le ministre qui prend les décisions d'ordre humanitaire, alors qu'en pratique, ces décisions sont prises en son nom par des agents d'immigration: voir, par exemple, *Ministre de l'Emploi et de l'Immigration c. Jiminez-Perez*, [1984] 2 R.C.S. 565, à la p. 569. En outre, même si, en droit, une décision d'ordre humanitaire est une décision qui prévoit une dispense d'application du règlement ou de la Loi, en pratique, il s'agit d'une décision, dans des affaires comme celle dont nous sommes saisis, qui détermine si une personne qui est au Canada, mais qui n'a pas de statut, peut y demeurer ou sera tenue de quitter l'endroit où elle s'est établie. Il s'agit d'une décision importante qui a des conséquences capitales sur l'avenir des personnes visées. Elle peut également avoir des répercussions importantes sur la vie des enfants canadiens de la personne qui a fait la demande fondée sur des raisons d'ordre humanitaire puisqu'ils peuvent être séparés d'un de leurs parents ou déracinés de leur pays de

citizenship, where they have settled and have connections.

Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the Regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined — public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, has become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address

citoyenneté, où ils se sont installés et ont des attaches.

16 Les agents d'immigration qui prennent des décisions d'ordre humanitaire reçoivent une série de lignes directrices, figurant au chapitre 9 du *Guide de l'immigration: examen et application de la loi*, qui leur servent d'instructions sur la façon d'exercer le pouvoir discrétionnaire qui leur est délégué. Le public a aussi accès à ces lignes directrices. Dans ces lignes directrices, plusieurs énoncés s'appliquent à la demande de M^me^ Baker. La directive 9.05 met l'accent sur le devoir des agents de décider quelles affaires devraient recevoir une recommandation favorable, en étudiant avec soin les cas sous tous leurs aspects, en faisant preuve de discernement, et en se demandant ce qu'une personne sensée ferait dans une telle situation. Elle dit également que les agents ne doivent pas «tente[r] d'approfondir des questions qui ne sont pas soulevées au cours des examens ou des entrevues. Toutefois, ils doivent essayer d'obtenir des précisions relativement à des raisons possibles d'intérêt public ou d'ordre humanitaire, même si celles-ci ne sont pas clairement formulées».

17 Ces directives définissent également les fondements de l'exercice du pouvoir discrétionnaire conféré par le par. 114(2) et le règlement. Deux types de raisons pouvant mener à une décision favorable sont indiqués — les raisons d'intérêt public et les considérations humanitaires. Conformément à la directive 9.07, les agents d'immigration doivent s'assurer d'abord qu'il n'existe pas de raisons d'intérêt public, et, s'il n'y en a pas, s'il existe des considérations humanitaires. Les raisons d'intérêt public comprennent, notamment, le mariage à un résident du Canada, le fait qu'une personne a vécu au Canada, s'y est établie et est devenue un résident «de fait en situation administrative irrégulière», et le fait que la personne est titulaire d'un permis de travail de longue date ou a travaillé comme travailleur domestique étranger. La directive 9.07 dit qu'il existe des considérations humanitaires lorsque «des difficultés inhabituelles, injustes ou indues seraient causées à la personne sollicitant l'examen de son cas si celle-ci devait quitter le Canada». Les directives traitent expressé-

situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

ment de situations où il existe des liens familiaux de dépendance, et soulignent que l'obligation de quitter le Canada pour présenter une demande de l'étranger peut occasionner des difficultés à certains membres de la famille proche d'un résident canadien, parents, enfants ou autres proches qui n'ont pas de liens de sang avec le demandeur. Elles précisent que dans de tels cas, il faut aussi tenir compte des raisons pour lesquelles la personne n'a pas présenté sa demande à l'étranger et de la présence d'une famille ou d'autres personnes susceptibles de l'aider dans son pays d'origine.

C. *Procedural Fairness*

C. *L'équité procédurale*

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

Comme premier moyen pour contester la décision de l'agent Caden, l'appelante allègue qu'elle n'a pas bénéficié de l'équité procédurale. L'appelante estime que l'obligation d'agir équitablement exige le respect des procédures suivantes quand des parents ayant des enfants canadiens présentent une demande fondée sur des raisons d'ordre humanitaire: une entrevue orale devant le décideur, un avis de la tenue de cette entrevue aux enfants et à l'autre parent, un droit pour les enfants et l'autre parent de présenter des arguments au cours de cette entrevue, un avis à l'autre parent de la tenue de l'entrevue et du droit de cette personne d'être représentée par un avocat. Elle allègue également que l'équité procédurale exige que le décideur, soit l'agent Caden, motive sa décision, et que les notes de l'agent Lorenz donnent lieu à une crainte raisonnable de partialité.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

En traitant des questions d'équité, j'examinerai d'abord les principes applicables à la détermination de la nature de l'obligation d'équité procédurale, et ensuite les arguments de M^me^ Baker sur l'insuffisance des droits de participation qui lui ont été accordés, sur l'existence d'une obligation de motiver la décision et sur la crainte raisonnable de partialité.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Director of Kent Institution,*

Les deux parties admettent que l'obligation d'équité procédurale s'applique aux décisions d'ordre humanitaire. Le fait qu'une décision soit administrative et touche «les droits, privilèges ou biens d'une personne» suffit pour entraîner l'application de l'obligation d'équité: *Cardinal c.*

[1985] 2 S.C.R. 643, at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H & C decisions: *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 81 (F.C.T.D.), at p. 88; *Said v. Canada (Minister of Employment and Immigration)* (1992), 6 Admin. L.R. (2d) 23 (F.C.T.D.); *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238 (F.C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

Directeur de l'établissement Kent, [1985] 2 R.C.S. 643, à la p. 653. Il est évident que la décision quant à savoir si un demandeur sera dispensé des exigences prévues par la Loi entre dans cette catégorie, et il est admis depuis longtemps que l'obligation d'équité s'applique aux décisions d'ordre humanitaire: *Sobrie c. Canada (Ministre de l'Emploi et de l'Immigration)* (1987), 3 Imm. L.R. (2d) 81 (C.F. 1re inst.), à la p. 88; *Said c. Canada (Ministre de l'Emploi et de l'Immigration)* (1992), 6 Admin. L.R. (2d) 23 (C.F. 1re inst.); *Shah c. Ministre de l'Emploi et de l'Immigration* (1994), 170 N.R. 238 (C.A.F.).

(1) Les facteurs ayant une incidence sur la nature de l'obligation d'équité

L'existence de l'obligation d'équité, toutefois, ne détermine pas quelles exigences s'appliqueront dans des circonstances données. Comme je l'écrivais dans l'arrêt *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, à la p. 682, «la notion d'équité procédurale est éminemment variable et son contenu est tributaire du contexte particulier de chaque cas». Il faut tenir compte de toutes les circonstances pour décider de la nature de l'obligation d'équité procédurale: *Knight*, aux pp. 682 et 683; *Cardinal*, précité, à la p. 654; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170, le juge Sopinka. 21

Bien que l'obligation d'équité soit souple et variable et qu'elle repose sur une appréciation du contexte de la loi particulière et des droits visés, il est utile d'examiner les critères à appliquer pour définir les droits procéduraux requis par l'obligation d'équité dans des circonstances données. Je souligne que l'idée sous-jacente à tous ces facteurs est que les droits de participation faisant partie de l'obligation d'équité procédurale visent à garantir que les décisions administratives sont prises au moyen d'une procédure équitable et ouverte, adaptée au type de décision et à son contexte légal institutionnel et social, comprenant la possibilité donnée aux personnes visées par la décision de présenter leur points de vue complètement ainsi que des éléments de preuve de sorte qu'ils soient considérés par le décideur. 22

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission*), [1989] 2 S.C.R. 879, at p. 896, *per* Sopinka J.

La jurisprudence reconnaît plusieurs facteurs pertinents en ce qui a trait aux exigences de l'obligation d'équité procédurale en common law dans des circonstances données. Un facteur important est la nature de la décision recherchée et le processus suivi pour y parvenir. Dans l'arrêt *Knight*, précité, à la p. 683, on a conclu que «la mesure dans laquelle le processus administratif se rapproche du processus judiciaire est de nature à indiquer jusqu'à quel point ces principes directeurs devraient s'appliquer dans le domaine de la prise de décisions administratives». Plus le processus prévu, la fonction du tribunal, la nature de l'organisme rendant la décision et la démarche à suivre pour parvenir à la décision ressemblent à une prise de décision judiciaire, plus il est probable que l'obligation d'agir équitablement exigera des protections procédurales proches du modèle du procès. Voir également *Vieux St-Boniface*, précité, à la p. 1191; *Russell c. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), à la p. 118; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879, à la p. 896, le juge Sopinka.

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

Le deuxième facteur est la nature du régime législatif et les «termes de la loi en vertu de laquelle agit l'organisme en question»: *Vieux St-Boniface*, précité, à la p. 1191. Le rôle que joue la décision particulière au sein du régime législatif, et d'autres indications qui s'y rapportent dans la loi, aident à définir la nature de l'obligation d'équité dans le cadre d'une décision administrative précise. Par exemple, des protections procédurales plus importantes seront exigées lorsque la loi ne prévoit aucune procédure d'appel, ou lorsque la décision est déterminante quant à la question en litige et qu'il n'est plus possible de présenter d'autres demandes: voir D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), aux pp. 7-66 et 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its

Le troisième facteur permettant de définir la nature et l'étendue de l'obligation d'équité est l'importance de la décision pour les personnes visées. Plus la décision est importante pour la vie des personnes visées et plus ses répercussions sont

impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty

grandes pour ces personnes, plus les protections procédurales requises seront rigoureuses. C'est ce que dit par exemple le juge Dickson (plus tard Juge en chef) dans l'arrêt *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, à la p. 1113:

> Une justice de haute qualité est exigée lorsque le droit d'une personne d'exercer sa profession ou de garder son emploi est en jeu. [. . .] Une suspension de nature disciplinaire peut avoir des conséquences graves et permanentes sur une carrière.

Comme le juge Sedley (maintenant Lord juge Sedley) le dit dans *R. c. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), à la p. 667:

> [TRADUCTION] Dans le monde moderne, les décisions rendues par des organismes administratifs peuvent avoir un effet plus immédiat et plus important sur la vie des gens que les décisions des tribunaux et le droit public a depuis l'arrêt *Ridge c. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40, reconnu ce fait. Bien que le caractère judiciaire d'une fonction puisse élever les exigences pratiques en matière d'équité au-delà de ce qu'elles seraient autrement, par exemple en exigeant que soit présenté et vérifié oralement un élément de preuve contesté, ce qui le rend «judiciaire» dans ce sens est principalement la nature de la question à trancher, et non le statut formel de l'organisme décisionnel.

L'importance d'une décision pour les personnes visées a donc une incidence significative sur la nature de l'obligation d'équité procédurale.

26 Quatrièmement, les attentes légitimes de la personne qui conteste la décision peuvent également servir à déterminer quelles procédures l'obligation d'équité exige dans des circonstances données. Notre Cour a dit que, au Canada, l'attente légitime fait partie de la doctrine de l'équité ou de la justice naturelle, et qu'elle ne crée pas de droits matériels: *Vieux St-Boniface*, précité, à la p. 1204; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, à la p. 557. Au Canada, la reconnaissance qu'une attente légitime existe aura une incidence sur la nature de l'obligation d'équité envers les personnes visées par la décision. Si le demandeur s'attend légitimement à ce qu'une certaine procédure soit suivie, l'obliga-

of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed

tion d'équité exigera cette procédure: *Qi c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1995), 33 Imm. L.R. (2d) 57 (C.F. 1re inst.); *Mercier-Néron c. Canada (Ministre de la Santé nationale et du Bien-être social)* (1995), 98 F.T.R. 36; *Bendahmane c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1989] 3 C.F. 16 (C.A.). De même, si un demandeur s'attend légitimement à un certain résultat, l'équité peut exiger des droits procéduraux plus étendus que ceux qui seraient autrement accordés: D. J. Mullan, *Administrative Law* (3e éd. 1996), aux pp. 214 et 215; D. Shapiro, «Legitimate Expectation and its Application to Canadian Immigration Law» (1992), 8 *J.L. & Social Pol'y* 282, à la p. 297; *Canada (Procureur général) c. Comité du tribunal des droits de la personne (Canada)* (1994), 76 F.T.R. 1. Néanmoins, la doctrine de l'attente légitime ne peut pas donner naissance à des droits matériels en dehors du domaine de la procédure. Cette doctrine, appliquée au Canada, est fondée sur le principe que les «circonstances» touchant l'équité procédurale comprennent les promesses ou pratiques habituelles des décideurs administratifs, et qu'il serait généralement injuste de leur part d'agir en contravention d'assurances données en matière de procédures, ou de revenir sur des promesses matérielles sans accorder de droits procéduraux importants.

Cinquièmement, l'analyse des procédures requises par l'obligation d'équité devrait également prendre en considération et respecter les choix de procédure que l'organisme fait lui-même, particulièrement quand la loi laisse au décideur la possibilité de choisir ses propres procédures, ou quand l'organisme a une expertise dans le choix des procédures appropriées dans les circonstances: Brown et Evans, *op. cit.*, aux pp. 7-66 à 7-70. Bien que, de toute évidence, cela ne soit pas déterminant, il faut accorder une grande importance au choix de procédures par l'organisme lui-même et à ses contraintes institutionnelles: *IWA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, le juge Gonthier.

Je dois mentionner que cette liste de facteurs n'est pas exhaustive. Tous ces principes aident le tribunal à déterminer si les procédures suivies res-

respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

pectent l'obligation d'équité. D'autres facteurs peuvent également être importants, notamment dans l'examen des aspects de l'obligation d'agir équitablement non reliés aux droits de participation. Les valeurs qui sous-tendent l'obligation d'équité procédurale relèvent du principe selon lequel les personnes visées doivent avoir la possibilité de présenter entièrement et équitablement leur position, et ont droit à ce que les décisions touchant leurs droits, intérêts ou privilèges soient prises à la suite d'un processus équitable, impartial et ouvert, adapté au contexte légal, institutionnel et social de la décision.

(2) Legitimate Expectations

(2) L'attente légitime

I turn now to an application of these principles to the circumstances of this case to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H & C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H & C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

29 Je passe maintenant à une application de ces principes aux circonstances de l'espèce pour déterminer si les procédures suivies respectaient l'obligation d'équité procédurale. Je déciderai d'abord si l'existence d'une attente légitime fondée sur le texte des articles de la Convention et le fait que le Canada l'ait ratifiée a une incidence, comme l'appelante le soutient, sur l'obligation d'équité procédurale qui serait autrement applicable. À mon avis, les articles de la Convention et leur libellé n'ont pas créé chez M^me^ Baker l'attente légitime que sa demande fondée sur des raisons d'ordre humanitaire donne lieu à l'application de droits procéduraux particuliers autres que ceux qui seraient normalement exigés en vertu de l'obligation d'équité, à une conclusion positive, ou à l'utilisation de critères particuliers. Cette convention n'est pas, à mon avis, l'équivalent d'une déclaration gouvernementale sur la façon dont les demandes fondées sur des raisons d'ordre humanitaire doivent être tranchées, elle n'indique pas non plus que des droits autres que les droits de participation dont il est question ci-dessous seront accordés. Par conséquent, dans la présente affaire, il n'existe pas d'attente légitime ayant une incidence sur la nature de l'obligation d'équité et le quatrième facteur identifié plus haut n'affecte donc pas l'analyse. Il n'est pas nécessaire de décider si un instrument international ratifié par le Canada pourrait, dans d'autres circonstances, donner lieu à une attente légitime.

(3) Participatory Rights

30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its role is also, within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court — Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result — the claimant and his or her close family members — and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative

(3) Les droits de participation

La question suivante est de savoir si, compte tenu des autres facteurs déterminant la nature de l'obligation d'équité, le défaut d'accorder une audience et de donner avis à M^me^ Baker ou à ses enfants était incompatible avec les droits de participation qu'exige l'obligation d'équité dans ces circonstances. Au cœur de cette analyse, il faut se demander si, compte tenu de toutes les circonstances, les personnes dont les intérêts étaient en jeu ont eu une occasion valable de présenter leur position pleinement et équitablement. La procédure en l'espèce se composait d'une demande écrite accompagnée de documents justificatifs, résumée par l'agent subalterne (Lorenz) et transmise avec une recommandation faite par ce dernier. Le résumé, la recommandation et les documents ont alors été examinés par l'agent principal (Caden), qui a pris la décision.

Plusieurs des facteurs susmentionnés servent à déterminer quel type de droits de participation sont requis par l'obligation d'équité procédurale dans les circonstances. En premier lieu, une décision d'ordre humanitaire est très différente d'une décision judiciaire, car elle suppose l'exercice d'un pouvoir discrétionnaire étendu et l'examen de facteurs multiples. Deuxièmement, son rôle est aussi, dans le cadre du régime législatif, une exception aux principes généraux du droit canadien de l'immigration. Ces facteurs militent en faveur d'une application moins stricte de l'obligation d'équité. D'autre part, il n'existe pas de procédure d'appel, bien qu'il puisse y avoir un contrôle judiciaire sur autorisation de la Cour fédérale, Section de première instance. En outre, au vu du troisième facteur, il s'agit là d'une décision qui, en pratique, a une importance exceptionnelle sur la vie des personnes concernées — le demandeur et les membres de sa famille proche, ce qui accroît l'étendue de l'obligation d'équité. Enfin, appliquant le cinquième facteur ci-haut décrit, la loi donne au ministre une grande latitude pour décider de la procédure appropriée, et les agents d'immigration, dans la pratique, ne procèdent pas à des entrevues dans tous les cas. Les pratiques et les choix institutionnels que fait le ministre sont

factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah*, *supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.

I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or

importants, bien que ce ne soient évidemment pas des facteurs déterminants dans l'analyse. On peut donc voir que, si certains facteurs indiquent des exigences plus strictes en matière d'obligation d'équité, d'autres indiquent des exigences moins strictes, plus éloignées du modèle judiciaire.

32 Pondérant ces facteurs, je ne suis pas d'accord avec la conclusion de la Cour d'appel fédérale dans l'arrêt *Shah*, précité, à la p. 239, que l'obligation d'équité dans ces circonstances est simplement «minimale». Au contraire, les circonstances nécessitent un examen complet et équitable des questions litigieuses, et le demandeur et les personnes dont les intérêts sont profondément touchés par la décision doivent avoir une possibilité valable de présenter les divers types de preuves qui se rapportent à leur affaire et de les voir évalués de façon complète et équitable.

33 Toutefois, on ne peut pas dire non plus qu'une audience est toujours nécessaire pour garantir l'audition et l'examen équitables des questions en jeu. La nature souple de l'obligation d'équité reconnaît qu'une participation valable peut se faire de différentes façons dans des situations différentes. La Cour fédérale a statué que l'équité procédurale n'exige pas la tenue d'une audience dans ces circonstances: voir, par exemple, *Said*, précité, à la p. 30.

34 Je conviens que la tenue d'une audience n'est pas une exigence générale pour les décisions fondées sur des raisons d'ordre humanitaire. Il n'est pas indispensable qu'il y ait une entrevue pour exposer à un agent d'immigration les renseignements relatifs à une demande fondée sur des raisons d'ordre humanitaire et pour que les raisons d'ordre humanitaire présentées puissent être évaluées de façon complète et équitable. En l'espèce, l'appelante a eu la possibilité d'exposer par écrit, par l'entremise de son avocat, sa situation, celle de ses enfants et leur dépendance émotive vis-à-vis d'elle, et de présenter à l'appui de sa demande des lettres d'un travailleur social de la Société d'aide à l'enfance et de son psychiatre. Ces documents étaient à la disposition des décideurs, et ils contenaient les renseignements nécessaires pour la prise de décision. Compte tenu de tous les facteurs

notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

(4) The Provision of Reasons

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah*, *supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker's reasons: see *Tylo v. Minister of Employment and Immigration* (1995), 90 F.T.R. 157, at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170 (F.C.T.D.), and *Chan v. Canada (Minister of Citizenship and Immigration)* (1994), 87 F.T.R. 62, it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada (Minister of Citizenship and Immigration) (No. 1)* (1995), 116 F.T.R. 241, an H & C decision was set aside because the decision-making officer

pertinents pour évaluer le contenu de l'obligation d'équité, le fait qu'il n'y a pas eu d'audience ni d'avis d'audience ne constituait pas, selon moi, un manquement à l'obligation d'équité procédurale envers M^me^ Baker dans les circonstances, particulièrement en raison du fait que plusieurs des facteurs militaient en faveur d'une norme plus souple. La possibilité qui a été offerte à l'appelante et à ses enfants de produire une documentation écrite complète relativement à tous les aspects de sa demande remplit les exigences en matière de droits de participation que commandait l'obligation d'équité en l'espèce.

(4) L'exposé des motifs

L'appelante soutient également que l'obligation d'équité, dans les circonstances, exige que le décideur motive ses décisions. Elle soutient qu'il faut soit considérer les notes de l'agent Lorenz comme les motifs de la décision, soit conclure que le défaut de l'agent Caden de donner les motifs écrits de sa décision, ou un affidavit subséquent les expliquant, est un manquement aux principes d'équité.

Cette question a été abordée dans plusieurs cas de contrôle judiciaire de demandes fondées sur des raisons d'ordre humanitaire. La Cour d'appel fédérale a statué qu'il n'était pas nécessaire que les décisions soient motivées: *Shah*, précité, aux pp. 239 et 240. Elle a également statué que les notes de l'historique des faits préparées par un agent subalterne ne doivent pas être considérées comme les motifs du décideur: voir *Tylo c. Ministre de l'Emploi et de l'Immigration* (1995), 90 F.T.R. 157, aux pp. 159 et 160. Les décisions *Gheorlan c. Canada (Secrétaire d'État)* (1995), 26 Imm. L.R. (2d) 170 (C.F. 1^re^ inst.), et *Chan c. Canada (Ministre de la Citoyenneté et de l'Immigration)* (1994), 87 F.T.R. 62, concluent qu'il ne faut pas considérer les notes de l'agent de réexamen comme des motifs de décision, mais que ces notes peuvent servir à déterminer s'il existe une erreur susceptible de contrôle judiciaire. Dans *Marques c. Canada (Ministre de la Citoyenneté et de l'Immigration) (n^o^ 1)* (1995), 116 F.T.R. 241, une décision d'ordre humanitaire a été annulée parce que le décideur n'avait pas motivé sa

failed to provide reasons or an affidavit explaining the reasons for his decision.

More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (H.C.A.), at pp. 665-66.

Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

> This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal. . . .

The importance of reasons was recently reemphasized by this Court in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 180-81.

Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A.), at para. 38. Those affected may

décision, ni fourni d'affidavit expliquant les motifs de sa décision.

37 Plus généralement, la common law a traditionnellement reconnu que l'obligation d'équité n'exige pas, en règle générale, que les décisions administratives soient motivées: *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *Supermarchés Jean Labrecque Inc. c. Flamand*, [1987] 2 R.C.S. 219, à la p. 233; *Public Service Board of New South Wales c. Osmond* (1986), 159 C.L.R. 656 (H.C.A.), aux pp. 665 et 666.

38 Toutefois, les tribunaux et les auteurs ont maintes fois souligné l'utilité des motifs pour assurer la transparence et l'équité de la prise de décision. Quoique l'arrêt *Northwestern Utilities* traite d'une obligation légale de motiver des décisions, le juge Estey fait l'observation suivante, à la p. 706, sur l'utilité d'une règle de common law qui exigerait la production de motifs:

> Cette obligation est salutaire: elle réduit considérablement les risques de décisions arbitraires, raffermit la confiance du public dans le jugement et l'équité des tribunaux administratifs et permet aux parties aux procédures d'évaluer la possibilité d'un appel . . .

L'importance des motifs a récemment été réitérée par la Cour dans le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, aux par. 180 et 181.

39 On a soutenu que la rédaction de motifs favorise une meilleure prise de décision en ce qu'elle exige une bonne formulation des questions et du raisonnement et, en conséquence, une analyse plus rigoureuse. Le processus de rédaction des motifs d'une décision peut en lui-même garantir une meilleure décision. Les motifs permettent aussi aux parties de voir que les considérations applicables ont été soigneusement étudiées, et ils sont de valeur inestimable si la décision est portée en appel, contestée ou soumise au contrôle judiciaire: R. A. Macdonald et D. Lametti, «Reasons for Decision in Administrative Law» (1990), 3 *C.J.A.L.P.* 123, à la p. 146; *Williams c. Canada*

be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

(Ministre de la Citoyenneté et de l'Immigration), [1997] 2 C.F. 646 (C.A.), au par. 38. Il est plus probable que les personnes touchées ont l'impression d'être traitées avec équité et de façon appropriée si des motifs sont fournis: de Smith, Woolf & Jowell, *Judicial Review of Administrative Action* (5e éd. 1995), aux pp. 459 et 460. Je suis d'accord qu'il s'agit là d'avantages importants de la rédaction de motifs écrits.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it "might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

D'autres ont émis des réserves quant à l'utilité d'une règle de common law qui exigerait la production de motifs écrits. Dans l'arrêt *Osmond*, précité, le juge en chef Gibbs a dit, à la p. 668, qu'il craignait qu'une obligation de rédiger des motifs puisse finir par imposer un fardeau indu aux décideurs administratifs, entraîner une augmentation des coûts et des délais, et [TRADUCTION] «dans certains cas occasionner un manque de sincérité de la part des fonctionnaires concernés». Même s'ils conviennent que l'équité devrait exiger que des motifs soient donnés dans certaines circonstances, Macdonald et Lametti, *loc. cit.*, font une mise en garde contre une exigence donnant lieu à des motifs [TRADUCTION] «d'archives» s'apparentant aux décisions judiciaires, et notent qu'il faut tenir compte de la nature particulière de l'organisme décisionnel dans différents contextes pour évaluer l'exigence des motifs. À mon avis, cependant, on peut répondre à ces préoccupations en veillant à ce que toute obligation de motiver la décision en raison de l'obligation d'équité laisse aux décideurs assez de latitude, en acceptant comme suffisants divers types d'explications écrites.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M. H. Morris, "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155, at pp. 164-68; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310 (C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department, ex parte Doody*, [1994] 1 A.C. 531, imposed a reasons requirement on the Home

En Angleterre, un droit de common law à la production de motifs dans certaines circonstances est apparu dans la jurisprudence: voir M. H. Morris, «Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate» (1997), 11 *C.J.A.L.P.* 155, aux pp. 164 à 168; de Smith, Woolf & Jowell, *op. cit.*, aux pp. 462 à 465. L'arrêt *R. c. Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All E.R. 310 (C.A.), a conclu qu'une commission décidant de l'appel du congédiement d'un agent de prison devait motiver sa décision. La Chambre des lords, dans l'arrêt *R. c. Secretary of State for the Home Department, ex*

Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances, a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.), at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

parte Doody, [1994] 1 A.C. 531, a exigé que le Secrétaire de l'Intérieur fournisse des motifs quand il exerce le pouvoir discrétionnaire dont l'investit la loi de décider du temps qu'une personne condamnée à l'emprisonnement à perpétuité devait passer en prison avant d'avoir droit à un réexamen. Lord Mustill, au nom de tous les lords juristes dans l'affaire, conclut que même s'il n'existe pas d'obligation générale de fournir des motifs en common law, dans les circonstances visées, il était inéquitable de ne pas fournir des motifs. D'autres décisions anglaises ont conclu que la common law exige que les décisions soient motivées quand il existe un droit d'appel prévu par la loi: voir *Norton Tool Co. c. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.), à la p. 49; *Alexander Machinery (Dudley) Ltd. c. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541 (B.C.C.A.), at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 55 N.S.R. (2d) 71 (C.A.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabea v. Refugee Status Advisory Committee*, [1980] 2 F.C. 316 (T.D.), imposed a reasons requirement on a ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 179 N.B.R. (2d) 43 (C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in rela-

42 Certains tribunaux canadiens ont imposé aux décideurs administratifs, dans des circonstances particulières, une obligation de common law de motiver leurs décisions, tandis que d'autres ont été plus hésitants à le faire. L'arrêt *Orlowski c. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541 (C.A.C.-B.), aux pp. 551 et 552, conclut qu'en général une commission d'examen agissant sous le régime de la partie XX.1 du *Code criminel* devait motiver ses décisions, en raison notamment de l'existence d'un droit d'appel prévu par la loi et de l'importance des droits touchés par ces décisions. Dans l'arrêt *R.D.R. Construction Ltd. c. Rent Review Commission* (1982), 55 N.S.R. (2d) 71 (C.A.), la cour a statué qu'en raison de l'existence d'un droit d'appel prévu par la loi, il existait implicitement une obligation de donner des motifs. Le juge suppléant Smith, dans l'affaire *Taabea c. Comité consultatif sur le statut de réfugié*, [1980] 2 C.F. 316 (1re inst.), a imposé une obligation de motiver une décision ministérielle portant sur le statut de réfugié, en raison du droit d'en demander le réexamen devant la Commission d'appel de l'immigration. De même, alors qu'il examinait si l'exigence prévue par la loi de donner des motifs avait été convenablement remplie, le juge Bastarache (alors juge à la Cour d'appel) a souligné, dans l'arrêt *Boyle c. Commission de la santé, de la sécurité et de l'indemnisation des accidents au travail (N.-B.)* (1996), 179 R.N.-B. (2e) 43

tion to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams*, *supra*.

(C.A.), à la p. 55, qu'il était important de disposer de motifs appropriés quand une décision est portée en appel. Toutefois, la Cour d'appel fédérale a récemment conclu qu'il n'était pas nécessaire de motiver une décision dont le but était de déclarer qu'un résident permanent constituait un danger pour le public en vertu du par. 70(5) de la *Loi sur l'immigration*: *Williams*, précité.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in *Orlowski*, *Cunningham*, and *Doody*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

À mon avis, il est maintenant approprié de reconnaître que, dans certaines circonstances, l'obligation d'équité procédurale requerra une explication écrite de la décision. Les solides arguments démontrant les avantages de motifs écrits indiquent que, dans des cas comme en l'espèce où la décision revêt une grande importance pour l'individu, dans des cas où il existe un droit d'appel prévu par la loi, ou dans d'autres circonstances, une forme quelconque de motifs écrits est requise. Cette exigence est apparue dans la common law ailleurs. Les circonstances de l'espèce, à mon avis, constituent l'une de ces situations où des motifs écrits sont nécessaires. L'importance cruciale d'une décision d'ordre humanitaire pour les personnes visées, comme celles dont il est question dans les arrêts *Orlowski*, *Cunningham* et *Doody*, milite en faveur de l'obligation de donner des motifs. Il serait injuste à l'égard d'une personne visée par une telle décision, si essentielle pour son avenir, de ne pas lui expliquer pourquoi elle a été prise.

44 In my view, however, the reasons requirement was fulfilled in this case since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness

J'estime, toutefois, que cette obligation a été remplie en l'espèce par la production des notes de l'agent Lorenz à l'appelante. Les notes ont été remises à M^me^ Baker lorsque son avocat a demandé des motifs. Pour cette raison, et parce qu'il n'existe pas d'autres documents indiquant les motifs de la décision, les notes de l'agent subalterne devraient être considérées, par déduction, comme les motifs de la décision. L'admission de documents tels que ces notes comme motifs de la décision fait partie de la souplesse nécessaire, ainsi que l'ont souligné Macdonald et Lametti, *loc. cit.*, quand des tribunaux évaluent les exigences de l'obligation d'équité tout en tenant compte de la réalité quotidienne des organismes administratifs et des nombreuses façons d'assurer le respect des

can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an

valeurs qui fondent les principes de l'équité procédurale. Cela confirme le principe selon lequel les individus ont droit à une procédure équitable et à la transparence de la prise de décision, mais reconnaît aussi qu'en matière administrative, cette transparence peut être atteinte de différentes façons. Je conclus qu'en l'espèce les notes de l'agent Lorenz remplissent l'obligation de donner des motifs en vertu de l'obligation d'équité procédurale, et qu'elles seront considérées comme les motifs de la décision.

(5) La crainte raisonnable de partialité

45 L'équité procédurale exige également que les décisions soient rendues par un décideur impartial, sans crainte raisonnable de partialité. L'intimé soutient que le juge Simpson a eu raison de conclure que les notes de l'agent Lorenz ne peuvent pas donner lieu à une crainte raisonnable de partialité, parce que le vrai décideur était l'agent Caden, qui a simplement fait une revue de la recommandation préparée par son subalterne. L'obligation d'agir équitablement et, en conséquence, d'une façon qui ne donne pas lieu à une crainte raisonnable de partialité, s'applique, à mon avis, à tous les agents d'immigration qui jouent un rôle significatif dans la prise de décision, qu'ils soient des agents de réexamen subalternes, ou ceux qui rendent la décision finale. L'agent subordonné joue un rôle important dans le processus, et si une personne ayant un rôle aussi central n'agit pas de façon impartiale, la décision elle-même ne peut pas être considérée comme ayant été rendue de façon impartiale. En outre, comme je le dis au paragraphe précédent, les notes de l'agent Lorenz constituent les motifs de la décision, et si elles donnent lieu à une crainte raisonnable de partialité, la décision elle-même en est viciée.

46 Le test de la crainte raisonnable de partialité a été exposé par le juge de Grandpré, dissident, dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, à la p. 394:

> . . . la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. [. . .] [C]e critère consiste à se

informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 11, *per* Major J.; at para. 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

48 In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they

demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Croirait-elle que, selon toute vraisemblance, [le décideur], consciemment ou non, ne rendra pas une décision juste?»

Notre Cour a souvent souscrit à cette définition du test, plus récemment dans l'arrêt *R. c. S. (R.D.)*, [1997] 3 R.C.S. 484, au par. 11, le juge Major; au par. 31, les juges L'Heureux-Dubé et McLachlin; et au par. 111, le juge Cory.

Il a été décidé que le test relatif à la crainte raisonnable de partialité pouvait varier, comme d'autres éléments de l'équité procédurale, selon le contexte et le genre de fonction exercée par le décideur administratif concerné: *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623; *Vieux St-Boniface*, précité, à la p. 1192. Le contexte en l'espèce est que les agents d'immigration doivent régulièrement prendre des décisions qui ont une très grande importance pour les personnes visées, mais qui souvent ont aussi une incidence sur les intérêts du Canada comme pays. Ce sont des décisions de nature individuelle plutôt que générale. Elles exigent également une grande sensibilité. Le Canada est une nation en grande partie composée de gens dont les familles ont émigré dans les siècles derniers. Notre histoire démontre l'importance de l'immigration, et notre société est l'exemple des avantages de la diversité de gens originaires d'une multitude de pays. Parce qu'elles visent nécessairement des personnes de provenances diverses, issues de cultures, de races et de continents différents, les décisions en matière d'immigration exigent de ceux qui les rendent sensibilité et compréhension. Elles exigent qu'on reconnaisse la diversité ainsi qu'une compréhension des autres et une ouverture d'esprit à la différence.

À mon avis, les membres bien informés de la communauté percevraient la partialité dans les commentaires de l'agent Lorenz. Ses notes, et la façon dont elles sont rédigées, ne témoignent ni d'un esprit ouvert ni d'une absence de stéréotypes dans l'évaluation des circonstances particulières de l'affaire. Plus regrettable encore est le fait qu'elles

seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

semblent établir un lien entre les troubles mentaux de M^me^ Baker, sa formation comme domestique, le fait qu'elle ait plusieurs enfants, et la conclusion qu'elle serait, en conséquence, un fardeau pour notre système d'aide sociale pour le restant de sa vie. En outre, la conclusion tirée était contraire à la lettre du psychiatre, qui disait qu'avec un traitement, l'état de M^me^ Baker pouvait continuer de s'améliorer et qu'elle pouvait redevenir un membre productif de la société. Qu'elles aient été faites dans cette intention ou non, ces déclarations donnent l'impression que l'agent Lorenz peut avoir tiré des conclusions en se fondant non pas sur la preuve dont il disposait, mais sur le fait que M^me^ Baker était une mère célibataire ayant plusieurs enfants, et était atteinte de troubles psychiatriques. L'utilisation de majuscules par l'agent pour souligner le nombre des enfants de M^me^ Baker peut également indiquer au lecteur que c'était là une raison de lui refuser sa demande. À la lecture des commentaires de l'agent, je ne crois pas qu'un membre raisonnable et bien informé de la communauté conclurait que l'agent a traité cette affaire avec l'impartialité requise de la part d'un agent d'immigration rendant ce genre de décision. Un observateur raisonnable noterait que la propre frustration de l'agent face au «système» l'empêchait d'évaluer avec impartialité si l'admission de l'appelante devrait être facilitée pour des raisons d'ordre humanitaire. Je conclus que les notes de l'agent Lorenz donnent lieu à une crainte raisonnable de partialité.

D. *Review of the Exercise of the Minister's Discretion*

Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the Regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

D. *Le contrôle de l'exercice du pouvoir discrétionnaire du ministre*

49 Bien que l'existence d'une crainte raisonnable de partialité suffise pour trancher le présent pourvoi, cette conclusion ne règle pas les points litigieux énoncés dans la «question grave de portée générale», certifiée par le juge Simpson, concernant la façon d'aborder l'intérêt des enfants dans le contrôle de l'exercice du pouvoir discrétionnaire conféré par la Loi et le règlement. Comme il est important de traiter des questions centrales qui ont conduit au présent pourvoi, j'examinerai également si, sur le fond, la décision d'ordre humanitaire a été incorrectement rendue dans la présente affaire.

50 The appellant argues that the notes provided to her show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness, that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the Regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

L'appelante allègue que les notes qu'on lui a remises montrent que, en droit, la décision devrait être annulée par voie de contrôle judiciaire. Elle soutient que la décision devrait respecter la norme de la décision correcte, que les principes de droit administratif exigent que ce pouvoir discrétionnaire soit exercé conformément à la Convention, et que le ministre devrait faire de l'intérêt supérieur de l'enfant une considération primordiale dans les décisions d'ordre humanitaire. L'intimé soutient que la Convention n'a pas été incorporée dans le droit canadien, et qu'il serait inapproprié d'exiger que le par. 114(2) et son règlement d'application soient interprétés conformément à la Convention, parce que cela empiéterait sur le pouvoir discrétionnaire étendu conféré par le Parlement, et sur le partage des pouvoirs entre les gouvernements fédéral et provinciaux.

(1) The Approach to Review of Discretionary Decision-Making

(1) La démarche relative au contrôle de décisions discrétionnaires

51 As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that "[t]he Minister is . . . authorized to" grant an exemption or otherwise facilitate the admission to Canada of any person "where the Minister is satisfied that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

Comme je l'ai dit précédemment, la loi et le règlement délèguent un très large pouvoir discrétionnaire au ministre dans la décision d'accorder une dispense pour des raisons d'ordre humanitaire. Le règlement dit que «[l]e ministre est autorisé à accorder, pour des raisons d'ordre humanitaire, une dispense [. . .] ou à faciliter l'admission au Canada de toute autre manière». Ce langage témoigne de l'intention de laisser au ministre une grande latitude dans sa décision d'accorder ou non une demande fondée sur des raisons d'ordre humanitaire.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

La notion de pouvoir discrétionnaire s'applique dans les cas où le droit ne dicte pas une décision précise, ou quand le décideur se trouve devant un choix d'options à l'intérieur de limites imposées par la loi. K. C. Davis écrit ceci dans *Discretionary Justice* (1969), à la p. 4:

> [TRADUCTION] Un fonctionnaire possède un pouvoir discrétionnaire quand les limites réelles de son pouvoir lui donnent la liberté de choisir entre divers modes d'action ou d'inaction possibles.

It is necessary in this case to consider the approach to judicial review of administrative discretion,

Il faut examiner en l'espèce l'approche du contrôle judiciaire en matière de pouvoir discrétionnaire

taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; and *Pushpanathan*, *supra*.

Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231. A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v.*

administratif, en tenant compte de l'analyse «pragmatique et fonctionnelle» du contrôle judiciaire qui a été énoncée pour la première fois dans l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, et appliquée dans des arrêts postérieurs dont *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554, aux pp. 601 à 607, le juge L'Heureux-Dubé, dissidente sur d'autres points; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; et *Pushpanathan*, précité.

53 Le droit administratif a traditionnellement abordé le contrôle judiciaire des décisions discrétionnaires séparément de décisions sur l'interprétation de règles de droit. Le principe est qu'on ne peut exercer un contrôle judiciaire sur les décisions discrétionnaires que pour des motifs limités, comme la mauvaise foi des décideurs, l'exercice du pouvoir discrétionnaire dans un but incorrect, et l'utilisation de considérations non pertinentes: voir, par exemple, *Maple Lodge Farms Ltd. c. Gouvernement du Canada*, [1982] 2 R.C.S. 2, aux pp. 7 et 8; *Produits Shell Canada Ltée c. Vancouver (Ville)*, [1994] 1 R.C.S. 231. Un principe général relatif au «caractère déraisonnable» a parfois été appliqué aussi à des décisions discrétionnaires: *Associated Provincial Picture Houses, Ltd. c. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). À mon avis, ces principes englobent deux idées centrales — qu'une décision discrétionnaire, comme toute autre décision administrative, doit respecter les limites de la compétence conférée par la loi, mais que les tribunaux devront exercer une grande retenue à l'égard des décideurs lorsqu'ils contrôlent ce pouvoir discrétionnaire et déterminent l'étendue de la compétence du décideur. Ces principes reconnaissent que lorsque le législateur confère par voie législative des choix étendus aux organismes administratifs, son intention est d'indiquer que les tribunaux ne devraient pas intervenir à la légère dans de telles décisions, et devraient accorder une marge considérable de respect aux décideurs lorsqu'ils révisent la façon dont les décideurs ont exercé leur discrétion. Toutefois, l'exercice du pouvoir discrétionnaire doit quand même rester dans les limites d'une

Duplessis, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as "structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications

interprétation raisonnable de la marge de manœuvre envisagée par le législateur, conformément aux principes de la primauté du droit (*Roncarelli c. Duplessis*, [1959] R.C.S. 121), suivant les principes généraux de droit administratif régissant l'exercice du pouvoir discrétionnaire, et de façon conciliable avec la *Charte canadienne des droits et libertés* (*Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038).

J'estime qu'il est inexact de parler d'une dichotomie stricte entre les décisions «discrétionnaires» et les décisions «non discrétionnaires». La plupart des décisions administratives comporte l'exercice d'un pouvoir discrétionnaire implicite relativement à de nombreux aspects de la prise de décision. Pour ne donner qu'un seul exemple, les décideurs peuvent avoir un pouvoir discrétionnaire très étendu dans les réparations qu'ils accordent. En outre, il n'est pas facile d'établir une distinction entre l'interprétation et l'exercice du pouvoir discrétionnaire; l'interprétation de règles de droit comporte un pouvoir discrétionnaire étendu pour ce qui est de clarifier, de combler les vides juridiques, et de choisir entre différentes options. Comme le disent Brown et Evans, *op. cit.*, à la p. 14-47:

> [TRADUCTION] Le degré de discrétion dans l'attribution d'un pouvoir peut aller d'un pouvoir dans lequel le décideur est contraint seulement par les objectifs de la loi, à un pouvoir si défini que n'intervient pratiquement pas de discrétion. Entre les deux, évidemment, il existe plusieurs limites à la liberté de choix du décideur, parfois appelé une discrétion «structurée».

La démarche «pragmatique et fonctionnelle» reconnaît qu'il y a une large gamme de normes de contrôle judiciaire des erreurs de droit, certaines décisions exigeant plus de retenue, et d'autres moins: *Pezim*, précité, aux pp. 589 et 590; *Southam*, précité, au par. 30; *Pushpanathan*, précité, au par. 27. Trois normes de contrôle ont été définies: la décision manifestement déraisonnable, la décision raisonnable *simpliciter* et la décision correcte: *Southam*, précité, aux par. 54 à 56. Je suis d'avis que la norme de contrôle des éléments de fond d'une décision discrétionnaire est mieux envisagée dans ce cadre, compte tenu particulièrement

between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam*, *supra*.

de la difficulté de faire des classifications rigides entre les décisions discrétionnaires et les décisions non discrétionnaires. La démarche pragmatique et fonctionnelle tient compte de considérations comme l'expertise du tribunal, la nature de la décision qui est prise, et le libellé de la disposition et des lois qui s'y rapportent. Elle comprend des facteurs comme le caractère «polycentrique» d'une décision et l'intention exprimée par le langage employé par la loi. La latitude que laisse le Parlement au décideur administratif et la nature de la décision qui est prise sont également d'importantes considérations dans l'analyse. La gamme de normes de contrôle peut comprendre le principe que, dans certains cas, la législature a fait part de son intention de laisser des choix plus grands aux décideurs que dans d'autres, mais qu'il faut qu'un tribunal intervienne quand une telle décision dépasse l'étendue du pouvoir conféré par le Parlement. Enfin, je signalerais que notre Cour a déjà appliqué ce cadre à des dispositions législatives qui accordent une latitude importante à des organismes administratifs, par exemple, en contrôlant l'exercice des pouvoirs de réparation conférés par la loi en cause dans l'arrêt *Southam*, précité.

Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

56 L'intégration du contrôle judiciaire de décisions comportant un large pouvoir discrétionnaire dans l'analyse pragmatique et fonctionnelle en raison d'erreurs de droit ne devrait pas être considérée comme une diminution du niveau de retenue accordé aux décisions de nature hautement discrétionnaire. En fait, des normes de contrôle judiciaire empreintes de retenue peuvent donner au décideur discrétionnaire une grande liberté d'action dans la détermination des «objectifs appropriés» ou des «considérations pertinentes». La démarche pragmatique et fonctionnelle peut tenir compte du fait que plus le pouvoir discrétionnaire accordé à un décideur est grand, plus les tribunaux devraient hésiter à intervenir dans la manière dont les décideurs ont choisi entre diverses options. Toutefois, même si, en général, il sera accordé un grand respect aux décisions discrétionnaires, il faut que le pouvoir discrétionnaire soit exercé conformément aux limites imposées dans la loi, aux principes de la primauté du droit, aux principes du droit administratif, aux valeurs fondamentales de la société canadienne, et aux principes de la *Charte*.

(2) The Standard of Review in This Case

57 I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan*, *supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

58 The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court — Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a "serious question of general importance" by the Federal Court — Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

(2) La norme de contrôle en l'espèce

J'examine maintenant l'application de la démarche pragmatique et fonctionnelle pour déterminer la norme de contrôle appropriée à l'égard de décisions rendues en vertu du par. 114(2) et de l'art. 2.1 du règlement, et les facteurs à considérer mis en évidence dans l'arrêt *Pushpanathan*, précité. Cet arrêt conclut que la décision, qui se rapportait à la détermination d'une question de droit par la Commission de l'immigration et du statut de réfugié, devait respecter la norme de la décision correcte. Bien qu'elle ait également été rendue sous le régime de la *Loi sur l'immigration*, la décision en litige était très différente, tout comme l'était le décideur. Il faut donc évaluer la norme de contrôle appropriée distinctement dans la présente affaire.

Le premier facteur à examiner est la présence ou l'absence d'une clause privative et, le cas échéant, le libellé de cette clause: *Pushpanathan*, au par. 30. La *Loi sur l'immigration* ne contient pas de clause privative, mais le contrôle judiciaire ne peut se faire sans l'autorisation de la Cour fédérale, Section de première instance, selon l'art. 82.1. Comme je l'ai dit précédemment, le par. 83(1) exige la certification d'une «question grave de portée générale» par la Cour fédérale, Section de première instance, pour que cette décision puisse être portée en appel devant la Cour d'appel. L'arrêt *Pushpanathan* montre que l'existence de cette disposition signifie un degré moindre de retenue à l'égard des points litigieux liés à la question certifiée. Toutefois, il ne s'agit que de l'un des facteurs à considérer pour déterminer la norme de contrôle, et il faut également évaluer les autres.

Le deuxième facteur est l'expertise du décideur. En l'espèce, le décideur est le ministre de la Citoyenneté et de l'Immigration ou son représentant. Le fait que, officiellement, le décideur soit le ministre est un facteur militant en faveur de la retenue. Le ministre a une certaine expertise par rapport aux tribunaux en matière d'immigration, surtout en ce qui concerne les dispenses d'application des exigences habituelles.

The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively "open-textured" legal principles, a factor militating in favour of greater deference: *Pushpanathan*, *supra*, at para. 36. The purpose of the provision in question is also to exempt applicants, in certain circumstances, from the requirements of the Act or its Regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

60 Le troisième facteur est l'objet de la disposition en particulier, et de la Loi dans son ensemble. Cette décision implique une grande latitude pour le ministre qui doit décider si des raisons d'ordre humanitaire justifient une dispense des exigences de la Loi. La décision commande aussi l'application de principes juridiques relativement peu «limitatifs», un facteur militant en faveur d'une plus grande retenue: *Pushpanathan*, précité, au par. 36. L'objet de la disposition en question est également de dispenser les demandeurs, dans certaines circonstances, des exigences de la Loi ou de son règlement. Ce facteur joue aussi en faveur d'une plus grande retenue envers la décision du ministre. Toutefois, il faut également signaler, en faveur d'une norme plus stricte, que cette décision vise directement les droits et les intérêts d'un individu par rapport au gouvernement plutôt qu'elle n'évalue ou ne pondère les intérêts de divers groupes. Le but de la décision est de déterminer si l'admission au Canada d'un individu particulier, dans des circonstances données, devrait être facilitée.

The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to the determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

61 Le quatrième facteur mis en relief dans l'arrêt *Pushpanathan* vise la nature du problème en question, particulièrement s'il s'agit de droit ou de faits. La décision d'accorder une dispense fondée sur des raisons d'ordre humanitaire demande principalement l'appréciation de faits relatifs au cas d'une personne, et ne porte pas sur l'application ni sur l'interprétation de règles de droit précises. Le fait que cette décision soit de nature hautement discrétionnaire et factuelle est un facteur qui milite en faveur de la retenue.

These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather

62 Tous ces facteurs doivent être soupesés afin d'en arriver à la norme d'examen appropriée. Je conclus qu'on devrait faire preuve d'une retenue considérable envers les décisions d'agents d'immigration exerçant les pouvoirs conférés par la loi, compte tenu de la nature factuelle de l'analyse, de son rôle d'exception au sein du régime législatif, du fait que le décideur est le ministre, et de la large discrétion accordée par le libellé de la loi. Toutefois, l'absence de clause privative, la possibilité expressément prévue d'un contrôle judiciaire par la Cour fédérale, Section de première instance, et la Cour d'appel fédérale dans certaines circonstances, ainsi

than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

que la nature individuelle plutôt que polycentrique de la décision, tendent aussi à indiquer que la norme applicable ne devrait pas en être une d'aussi grande retenue que celle du caractère «manifestement déraisonnable». Je conclus, après avoir évalué tous ces facteurs, que la norme de contrôle appropriée est celle de la décision raisonnable *simpliciter*.

(3) Was this Decision Unreasonable?

(3) La décision était-elle déraisonnable?

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, were unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:

J'examinerai maintenant si la décision dans la présente affaire, et l'interprétation par l'agent d'immigration de l'étendue du pouvoir discrétionnaire qui lui était conféré, étaient déraisonnables au sens où l'entend le juge Iacobucci dans l'arrêt *Southam*, précité, au par. 56:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

> Est déraisonnable la décision qui, dans l'ensemble, n'est étayée par aucun motif capable de résister à un examen assez poussé. En conséquence, la cour qui contrôle une conclusion en regard de la norme de la décision raisonnable doit se demander s'il existe quelque motif étayant cette conclusion. Le défaut, s'il en est, pourrait découler de la preuve elle-même ou du raisonnement qui a été appliqué pour tirer les conclusions de cette preuve.

In particular, the examination of this question should focus on the issues arising from the "serious question of general importance" stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

L'examen de cette question devrait être axé sur les points découlant de la «question grave de portée générale» énoncée par le juge Simpson: la façon d'aborder la question de l'intérêt des enfants dans le contrôle d'une décision d'ordre humanitaire.

64 The notes of Officer Lorenz, in relation to the consideration of "H & C factors", read as follows:

Les notes de l'agent Lorenz relatives à l'examen des raisons d'ordre humanitaire, disent ceci:

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this type of generosity.

> [TRADUCTION] PC est atteinte de schizophrénie paranoïde et reçoit l'assistance sociale. Elle n'a pas d'autres qualifications que de domestique. Elle a QUATRE ENFANTS EN JAMAÏQUE ET QUATRE AUTRES NÉS ICI. Elle sera, bien entendu, un fardeau excessif pour nos systèmes d'aide sociale (probablement) pour le reste de sa vie. Il n'existe pas d'autres facteurs d'ordre humanitaire que ses QUATRE ENFANTS NÉS AU CANADA. Devons-nous lui permettre de rester pour ça? Je suis d'avis que le Canada ne peut plus se permettre cette sorte de générosité.

65 In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam*,

À mon avis, la façon dont elle traite l'intérêt des enfants montre que cette décision était déraisonnable au sens de l'arrêt *Southam*, précité. L'agent n'a

supra. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

> Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision. . . .
>
> (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

prêté aucune attention à l'intérêt des enfants de M^me^ Baker. Comme je le démontrerai avec plus de détails dans les paragraphes qui suivent, j'estime que le défaut d'accorder de l'importance et de la considération à l'intérêt des enfants constitue un exercice déraisonnable du pouvoir discrétionnaire conféré par l'article, même s'il faut exercer un degré élevé de retenue envers la décision de l'agent d'immigration. Le professeur Dyzenhaus énonce ainsi la notion de la [TRADUCTION] «retenue au sens de respect»:

> [TRADUCTION] La retenue au sens de respect ne demande pas la soumission, mais une attention respectueuse aux motifs donnés ou qui pourraient être donnés à l'appui d'une décision . . .
>
> (D. Dyzenhaus, «The Politics of Deference: Judicial Review and Democracy», dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, à la p. 286.)

Les motifs de l'agent d'immigration démontrent que sa décision n'était pas compatible avec les valeurs sous-jacentes à l'octroi d'un pouvoir discrétionnaire. Ils ne peuvent donc pas résister à l'examen assez poussé qu'exige la norme du caractère raisonnable.

66 The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

66 Le libellé du par. 114(2) et de l'art. 2.1 du règlement exige que le décideur exerce le pouvoir en se fondant sur «des raisons d'ordre humanitaire» (je souligne). Ces mots et leur sens doivent se situer au cœur de la réponse à la question de savoir si une décision d'ordre humanitaire particulière constituait un exercice raisonnable du pouvoir conféré par le Parlement. La loi et le règlement demandent au ministre de décider si l'admission d'une personne devrait être facilitée pour des raisons humanitaires. Ils démontrent que l'intention du Parlement est que ceux qui exercent le pouvoir discrétionnaire conféré par la loi agissent de façon humanitaire. Notre Cour a jugé que le ministre est tenu d'examiner les demandes d'ordre humanitaire qui sont présentées: *Jiminez-Perez*, précité. De même, quand il procède à cet examen, le ministre doit évaluer la demande d'une manière qui soit respectueuse des raisons d'ordre humanitaire.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

Afin de décider si la démarche de l'agent d'immigration respectait les limites imposées par le libellé de la loi et les valeurs du droit administratif, une analyse contextuelle est requise comme l'exige en général l'interprétation des lois: voir *R. c. Gladue*, [1999] 1 R.C.S. 688; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 20 à 23. À mon avis, l'exercice raisonnable du pouvoir conféré par l'article exige que soit prêtée une attention minutieuse aux intérêts et aux besoins des enfants. Les droits des enfants, et la considération de leurs intérêts, sont des valeurs d'ordre humanitaire centrales dans la société canadienne. Une indication que l'intérêt des enfants est une considération importante dans l'exercice des pouvoirs en matière humanitaire se trouve, par exemple, dans les objectifs de la Loi, dans les instruments internationaux, et dans les lignes directrices régissant les décisions d'ordre humanitaire publiées par le ministre lui-même.

(a) *The Objectives of the Act*

a) *Les objectifs de la Loi*

68 The objectives of the Act include, in s. 3(*c*):

Un des objectifs de la Loi est notamment, selon l'al. 3*c*):

to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

de faciliter la réunion au Canada des citoyens canadiens et résidents permanents avec leurs proches parents de l'étranger;

Although this provision speaks of Parliament's objective of reuniting citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(*c*).

Bien que cette disposition traite de l'objectif du Parlement de réunir des citoyens et des résidents permanents avec leurs proches parents de l'étranger, elle permet, à mon avis, en utilisant une interprétation large et libérale des valeurs sous-jacentes à cette loi et à son objet, de présumer que le Parlement estime important également de garder ensemble des citoyens et des résidents permanents avec leurs proches parents qui sont déjà au Canada. L'objectif à l'al. 3*c*) énonce l'obligation d'accorder une grande importance au maintien des enfants en contact avec leurs deux parents, si cela est possible, et au maintien du lien entre les membres d'une proche famille.

(b) *International Law*

b) *Le droit international*

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratifi-

Un autre indice de l'importance de tenir compte de l'intérêt des enfants dans une décision d'ordre humanitaire est la ratification par le Canada de la

cation by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India), at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697.

The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assis-

Convention relative aux droits de l'enfant, et la reconnaissance de l'importance des droits des enfants et de l'intérêt supérieur des enfants dans d'autres instruments internationaux ratifiés par le Canada. Les conventions et les traités internationaux ne font pas partie du droit canadien à moins d'être rendus applicables par la loi: *Francis c. The Queen*, [1956] R.C.S. 618, à la p. 621; *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141, aux pp. 172 et 173. Je suis d'accord avec l'intimé et la Cour d'appel que la Convention n'a pas été mise en vigueur par le Parlement. Ses dispositions n'ont donc aucune application directe au Canada.

70 Les valeurs exprimées dans le droit international des droits de la personne peuvent, toutefois, être prises en compte dans l'approche contextuelle de l'interprétation des lois et en matière de contrôle judiciaire. Comme le dit R. Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994), à la p. 330:

> [TRADUCTION] [L]a législature est présumée respecter les valeurs et les principes contenus dans le droit international, coutumier et conventionnel. Ces principes font partie du cadre juridique au sein duquel une loi est adoptée et interprétée. Par conséquent, dans la mesure du possible, il est préférable d'adopter des interprétations qui correspondent à ces valeurs et à ces principes. [Je souligne.]

D'autres pays de common law ont aussi mis en relief le rôle important du droit international des droits de la personne dans l'interprétation du droit interne: voir, par exemple, *Tavita c. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.), à la p. 266; *Vishaka c. Rajasthan*, [1997] 3 L.R.C. 361 (C.S. Inde), à la p. 367. Il a également une incidence cruciale sur l'interprétation de l'étendue des droits garantis par la *Charte*: *Slaight Communications*, précité; *R. c. Keegstra*, [1990] 3 R.C.S. 697.

71 Les valeurs et les principes de la Convention reconnaissent l'importance d'être attentif aux droits des enfants et à leur intérêt supérieur dans les décisions qui ont une incidence sur leur avenir. En outre, le préambule, rappelant la *Déclaration universelle des droits de l'homme*, reconnaît que «l'enfance a droit à une aide et à une assistance

tance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

spéciales». D'autres instruments internationaux mettent également l'accent sur la grande valeur à accorder à la protection des enfants, à leurs besoins et à leurs intérêts. La *Déclaration des droits de l'enfant* (1959) de l'Organisation des Nations Unies, dans son préambule, dit que l'enfant «a besoin d'une protection spéciale et de soins spéciaux». Les principes de la Convention et d'autres instruments internationaux accordent une importance spéciale à la protection des enfants et de l'enfance, et à l'attention particulière que méritent leurs intérêts, besoins et droits. Ils aident à démontrer les valeurs qui sont essentielles pour déterminer si la décision en l'espèce constituait un exercice raisonnable du pouvoir en matière humanitaire.

(c) *The Ministerial Guidelines*

c) *Les lignes directrices ministérielles*

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

Troisièmement, les directives données par le ministre aux agents d'immigration reconnaissent et révèlent les valeurs et la démarche qui sont décrites ci-dessus et qui sont énoncées dans la Convention. Comme il est dit plus haut, les agents d'immigration sont censés rendre la décision qu'une personne raisonnable rendrait, en portant une attention particulière à des considérations humanitaires comme maintenir des liens entre les membres d'une famille et éviter de renvoyer des gens à des endroits où ils n'ont plus d'attaches. Les directives révèlent ce que le ministre considère comme une décision d'ordre humanitaire, et elles sont très utiles à notre Cour pour décider si les motifs de l'agent Lorenz sont valables. Elles soulignent que le décideur devrait être conscient des considérations humanitaires possibles, devrait tenir compte des difficultés qu'une décision défavorable imposerait au demandeur ou aux membres de sa famille proche, et devrait considérer comme un facteur important les liens entre les membres d'une famille. Les directives sont une indication utile de ce qui constitue une interprétation raisonnable du pouvoir conféré par l'article, et le fait que cette décision était contraire aux directives est d'une grande utilité pour évaluer si la décision constituait un exercice déraisonnable du pouvoir en matière humanitaire.

The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and "compassionate" considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

73 Les facteurs susmentionnés montrent que les droits, les intérêts, et les besoins des enfants, et l'attention particulière à prêter à l'enfance sont des valeurs importantes à considérer pour interpréter de façon raisonnable les raisons d'ordre humanitaire qui guident l'exercice du pouvoir discrétionnaire. Je conclus qu'étant donné que les motifs de la décision n'indiquent pas qu'elle a été rendue d'une manière réceptive, attentive ou sensible à l'intérêt des enfants de M^me^ Baker, ni que leur intérêt ait été considéré comme un facteur décisionnel important, elle constituait un exercice déraisonnable du pouvoir conféré par la loi et doit donc être infirmée. En outre, les motifs de la décision n'accordent pas suffisamment d'importance ou de poids aux difficultés qu'un retour en Jamaïque pouvait susciter pour M^me^ Baker, alors qu'elle avait passé 12 ans au Canada, qu'elle était malade et n'était pas assurée de pouvoir suivre un traitement en Jamaïque, et qu'elle serait forcément séparée d'au moins certains de ses enfants.

It follows that I disagree with the Federal Court of Appeal's holding in *Shah*, *supra*, at p. 239, that a s. 114(2) decision is "wholly a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the Regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines them-

74 Il en résulte que je ne suis pas d'accord avec la conclusion de la Cour d'appel fédérale dans l'arrêt *Shah*, précité, à la p. 239, qu'une décision en vertu du par. 114(2) «relève entièrement [du] jugement et [du] pouvoir discrétionnaire» (je souligne). Le libellé du par. 114(2) et du règlement montre que le pouvoir discrétionnaire conféré est assorti de limites. Bien que je sois d'accord avec la Cour d'appel que la Loi ne donne au demandeur aucun droit à un résultat précis ou à l'application d'un critère juridique particulier, et que la doctrine de l'attente légitime ne commande pas un résultat conforme au libellé d'instruments internationaux, la décision doit être prise suivant une démarche qui respecte les valeurs humanitaires. Par conséquent, l'attention et la sensibilité à l'importance des droits des enfants, de leur intérêt supérieur, et de l'épreuve qui pourrait leur être infligée par une décision défavorable sont essentielles pour qu'une décision d'ordre humanitaire soit raisonnable. Même s'il faut faire preuve de retenue dans le contrôle judiciaire de décisions rendues par les agents d'immigration en vertu du par. 114(2), ces décisions ne doivent pas être maintenues quand elles résultent d'une démarche ou sont elles-mêmes en

selves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the Regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

E. *Conclusions and Disposition*

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, [1993] 4 S.C.R. 3, at p. 134:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-

conflit avec des valeurs humanitaires. Les directives du ministre elles-mêmes soutiennent cette approche. Toutefois, la décision en l'espèce était incompatible avec cette approche.

La question certifiée demande s'il faut considérer l'intérêt supérieur des enfants comme une considération primordiale dans l'examen du cas d'un demandeur sous le régime du par. 114(2) et du règlement. Les principes susmentionnés montrent que, pour que l'exercice du pouvoir discrétionnaire respecte la norme du caractère raisonnable, le décideur devrait considérer l'intérêt supérieur des enfants comme un facteur important, lui accorder un poids considérable, et être réceptif, attentif et sensible à cet intérêt. Cela ne veut pas dire que l'intérêt supérieur des enfants l'emportera toujours sur d'autres considérations, ni qu'il n'y aura pas d'autres raisons de rejeter une demande d'ordre humanitaire même en tenant compte de l'intérêt des enfants. Toutefois, quand l'intérêt des enfants est minimisé, d'une manière incompatible avec la tradition humanitaire du Canada et les directives du ministre, la décision est déraisonnable.

E. *Conclusions et dispositif*

En conséquence, parce qu'il y a eu manquement aux principes d'équité procédurale en raison d'une crainte raisonnable de partialité, et parce que l'exercice du pouvoir en matière humanitaire était déraisonnable, je suis d'avis d'accueillir le présent pourvoi.

L'appelante a demandé que lui soient adjugés les dépens comme entre procureur et client si elle avait gain de cause dans son pourvoi. Notre Cour a conclu à la majorité dans l'arrêt *Young c. Young*, [1993] 4 R.C.S. 3, à la p. 134:

> Les dépens comme entre procureur et client ne sont généralement accordés que s'il y a eu conduite répréhensible, scandaleuse ou outrageante d'une des parties.

Il n'a pas été démontré que le ministre a eu une telle conduite au cours du présent litige, et je ne crois pas qu'il s'agisse d'un des cas exceptionnels où les dépens devraient être adjugés comme entre procureur et client. Je suis d'avis d'accueillir le pourvoi, et d'annuler la décision de l'agent Caden

and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

The reasons of Cory and Iacobucci JJ. were delivered by

IACOBUCCI J. — I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141. I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system.

In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the

en date du 18 avril 1994, avec les dépens entre parties dans toutes les cours. L'affaire sera renvoyée au ministre pour qu'un agent d'immigration différent rende une nouvelle décision.

Version française des motifs des juges Cory et Iacobucci rendus par

78 LE JUGE IACOBUCCI — Je souscris aux motifs du juge L'Heureux-Dubé et au dispositif qu'elle propose dans le présent pourvoi, sauf pour la question de l'effet du droit international sur l'exercice du pouvoir discrétionnaire conféré au ministre par le par. 114(2) de la *Loi sur l'immigration*, L.R.C. (1985), ch. I-2. La question certifiée en l'espèce vise à déterminer si les autorités d'immigration fédérales doivent traiter l'intérêt supérieur de l'enfant comme une considération primordiale dans l'examen d'une demande fondée sur des raisons d'ordre humanitaire en vertu du par. 114(2) de la Loi, alors que cette loi ne donne pas effet aux dispositions de la *Convention relative aux droits de l'enfant*, R.T. Can. 1992 nº 3, une convention multilatérale dont le Canada est signataire. À mon avis, la question certifiée devrait recevoir une réponse négative.

79 Il est bien établi qu'une convention internationale ratifiée par le pouvoir exécutif n'a aucun effet en droit canadien tant que ses dispositions ne sont pas incorporées dans le droit interne par une loi les rendant applicables: *Capital Cities Communications Inc. c. Conseil de la Radio-Télévision canadienne*, [1978] 2 R.C.S. 141. Je ne suis pas d'accord avec l'analyse de ma collègue lorsqu'elle se réfère aux valeurs sous-jacentes à un traité international non-applicable dans une approche contextuelle de l'interprétation des lois et du droit administratif, parce qu'une telle approche n'est pas conforme à la jurisprudence de la Cour sur la question du statut du droit international dans le système juridique interne.

80 À mon avis, il faut aborder avec prudence des décisions de ce genre, sous peine de rompre l'équilibre établi par notre tradition parlementaire ou de conférer par inadvertance à l'exécutif le pouvoir de

power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament.

lier les administrés sans la participation du pouvoir législatif. Je ne partage pas la certitude de ma collègue que le précédent établi par notre Cour dans *Capital Cities*, précité, peut survivre intact après l'adoption d'un principe de droit qui autorise le recours, dans le processus d'interprétation des lois, aux dispositions d'une convention qui n'a pas été intégrée dans la législation. Au lieu de cela, le résultat sera que l'appelante pourra parvenir indirectement à ce qu'elle ne peut faire directement, c'est-à-dire donner effet dans le système juridique interne à des obligations internationales assumées par le pouvoir exécutif seul et qui n'ont pas encore été soumises à la volonté démocratique du Parlement.

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my colleague concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

La primauté donnée aux droits des enfants dans la Convention — à supposer pour les fins de la discussion que les faits du pourvoi ressortissent aux dispositions pertinentes — est sans effet tant et aussi longtemps que ces dispositions n'ont pas été incorporées par une loi adoptée par le Parlement. En donnant une réponse négative à la question certifiée, je suis conscient du fait que le résultat aurait pu être différent si ma collègue avait conclu que la demande de l'appelante relevait de l'application des droits garantis par la *Charte canadienne des droits et libertés*. Si cela avait été le cas, la Cour aurait eu la possibilité d'envisager l'application de la présomption interprétative établie par notre Cour dans l'arrêt *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, et confirmée dans la jurisprudence qui a suivi, selon laquelle le pouvoir administratif discrétionnaire touchant des droits garantis par la *Charte* doit être exercé en conformité avec des normes internationales similaires en matière de droits de la personne.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellant: Roger Rowe and Rocco Galati, North York.

Procureurs de l'appelante: Roger Rowe et Rocco Galati, North York.

Solicitor for the respondent: The Deputy Attorney General of Canada, Toronto.

Procureur de l'intimé: Le sous-procureur général du Canada, Toronto.

Solicitor for the interveners the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, and

Procureur des intervenants la Canadian Foundation for Children, Youth and the Law, la Défense des enfants-International-Canada et le

the Canadian Council for Refugees: The Canadian Foundation for Children, Youth and the Law, Toronto.

Solicitors for the intervener the Charter Committee on Poverty Issues: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitors for the intervener the Canadian Council of Churches: Jackman and Associates, Toronto.

Conseil canadien pour les réfugiés: La Canadian Foundation for Children, Youth and the Law, Toronto.

Procureurs de l'intervenant le Comité de la Charte et des questions de pauvreté: Tory, Tory, DesLauriers & Binnington, Toronto.

Procureurs de l'intervenant le Conseil canadien des églises: Jackman and Associates, Toronto.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20180830

**Dockets: A-78-17 (lead file); A-217-16; A-218-16;
A-223-16; A-224-16; A-225-16; A-232-16;
A-68-17; A-74-17; A-75-17;
A-76-17; A-77-17; A-84-17; A-86-17**

Citation: 2018 FCA 153

CORAM: **DAWSON J.A.**
DE MONTIGNY J.A.
WOODS J.A.

BETWEEN:

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝAM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY

Applicants

and

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

Respondents

and

ATTORNEY GENERAL OF ALBERTA and ATTORNEY GENERAL OF BRITISH COLUMBIA

Interveners

Heard at Vancouver, British Columbia, on October 2-5, 10, 12-13, 2017.

Judgment delivered at Ottawa, Ontario, on August 30, 2018.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

Federal Court of Appeal | Cour d'appel fédérale

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COLUMBIA**

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REASONS FOR JUDGMENT

DAWSON J.A.

Para.

Para.

Para.

I. Introduction

[1] On May 19, 2016, the National Energy Board issued its report concerning the proposed expansion of the Trans Mountain pipeline system. The Board's report recommended that the Governor in Council approve the expansion. The Board's recommendation was based on the Board's findings that the expansion is in Canada's public interest, and that if certain environmental protection procedures and mitigation measures are implemented, and if the conditions the Board recommended are implemented, the expansion is not likely to cause significant adverse environmental effects.

[2] On November 29, 2016, the Governor in Council accepted the Board's recommendation and issued Order in Council P.C. 2016-1069. The Order in Council recited the Governor in Council's acceptance of the Board's recommendation, and directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the expansion project, subject to the conditions recommended by the Board.

[3] A number of applications for judicial review of the Board's report and the Order in Council were filed in this Court. These applications were consolidated. These are the Court's reasons for judgment in respect of the consolidated proceeding. Pursuant to the order consolidating the applications, a copy of these reasons shall be placed in each file.

A. Summary of Conclusions

[4] While a number of applicants challenge the report of the National Energy Board, as explained below, the Order in Council is legally the only decision under review. Its validity is challenged on two principal grounds: first, the Board's process and findings were so flawed that the Governor in Council could not reasonably rely on the Board's report; second, Canada failed to fulfil the duty to consult owed to Indigenous peoples.

[5] Applying largely uncontested legal principles established by the Supreme Court of Canada to the factual record, a factual record that is also largely not contested, I conclude that most of the flaws asserted against the Board's process and findings are without merit. However, the Board made one critical error. The Board unjustifiably defined the scope of the Project under review not to include Project-related tanker traffic. The unjustified exclusion of marine shipping from the scope of the Project led to successive, unacceptable deficiencies in the Board's report and recommendations. As a result, the Governor in Council could not rely on the Board's report and recommendations when assessing the Project's environmental effects and the overall public interest.

[6] Applying the largely uncontested legal principles that underpin the duty to consult Indigenous peoples and First Nations set out by the Supreme Court, I also conclude that Canada acted in good faith and selected an appropriate consultation framework. However, at the last stage of the consultation process prior to the decision of the Governor in Council, a stage called Phase III, Canada's efforts fell well short of the mark set by the Supreme Court of Canada. Canada failed in Phase III to engage, dialogue meaningfully and grapple with the real concerns of the Indigenous applicants so as to explore possible accommodation of those concerns. The duty to consult was not adequately discharged.

[7] Accordingly, for the following reasons, I would quash the Order in Council and remit the matter back to the Governor in Council for appropriate action, if it sees fit, to address these flaws and, later, proper redetermination.

[8] These reasons begin by describing: (i) the expansion project; (ii) the applicants who challenge the Board's report and the Order in Council; (iii) the pending applications for judicial review; (iv) the legislative regime; (v) the report of the Board; and, (vi) the decision of the Governor in Council. The reasons then set out the factual background relevant to the challenges before the Court before turning to the issues raised in these applications and the consideration of those issues.

II. The Project

[9] No company may operate an interprovincial or international pipeline in Canada unless the National Energy Board has issued a certificate of public convenience and necessity, and given

leave to the company to open the pipeline (subsection 30(1) of the *National Energy Board Act*, R.S.C. 1985, c. N-7).

[10] Trans Mountain Pipeline ULC is the general partner of Trans Mountain Pipeline L.P. (together referred to as Trans Mountain). Trans Mountain owns and holds operating certificates issued by the National Energy Board for the existing Trans Mountain pipeline system. This system includes a pipeline approximately 1,147 kilometres long that moves crude oil, and refined and semi-refined petroleum products from Edmonton, Alberta to marketing terminals and refineries in the central region and lower mainland area of British Columbia, as well as to the Puget Sound area in Washington State.

[11] On December 16, 2013, Trans Mountain submitted an application to the National Energy Board for a certificate of public convenience and necessity (and certain amended certificates) for the Trans Mountain Expansion Project (Project).

[12] The application described the Project to consist of a number of components, including: (i) twinning the existing pipeline system with approximately 987 kilometres of new pipeline segments, including new proposed pipeline corridors and rights-of-way, for the purpose of transporting diluted bitumen from Edmonton, Alberta to Burnaby, British Columbia; (ii) new and modified facilities, including pump stations and tanks (in particular, an expanded petroleum tank farm in Burnaby which would be expanded from 13 to 26 storage tanks); (iii) a new and expanded dock facility, including three new berths, at the Westridge Marine Terminal in

Burnaby; and, (iv) two new pipelines running from the Burnaby storage facility to the Westridge Marine Terminal.

[13] The Project would increase the number of tankers loaded at the Westridge Marine Terminal from approximately five Panamax and Aframax class tankers per month to approximately 34 Aframax class tankers per month. Aframax tankers are larger and carry more product than Panamax tankers. The Project would increase the overall capacity of Trans Mountain's existing pipeline system from 300,000 barrels per day to 890,000 barrels per day.

[14] Trans Mountain's application stated that the primary purpose of the Project is to provide additional capacity to transport crude oil from Alberta to markets in the Pacific Rim, including Asia. If built, the system would continue to transport crude oil—primarily diluted bitumen.

III. The Applicants

[15] A number of First Nations and two large cities are significantly concerned about the Project and its impact upon them, and challenge its approval. Two non-governmental agencies also challenge the Project. These applicants are described below.

A. Tsleil-Waututh Nation

[16] The applicant Tsleil-Waututh Nation is a Coast Salish Nation. It is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 and its members are Aboriginal peoples within the

meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

[17] In the traditional dialect of Halkomelem, the name Tsleil-Waututh means "People of the Inlet". Tsleil-Waututh's asserted traditional territory extends approximately from the vicinity of Mount Garibaldi to the north to the 49th parallel and beyond to the south. The traditional territory extends west to Gibsons and east to Coquitlam Lake. The traditional territory includes areas across British Columbia's Lower Mainland, including sections of the Lower Fraser River, Howe Sound, Burrard Inlet and Indian Arm.

[18] Tsleil-Waututh's traditional territory encompasses the proposed Westridge Marine Terminal and fuel storage facility expansion, and approximately 18 kilometres of pipeline right-of-way. Approximately 45 kilometres of marine shipping route will pass within Tsleil-Waututh's asserted traditional territory.

[19] Much of Tsleil-Waututh's population of 500 people live in its primary community of Tsleil-Waututh, which is located on the north shore of Burrard Inlet, approximately 3 kilometres across the Inlet from the Westridge Marine Terminal.

[20] Tsleil-Waututh asserts Aboriginal title to the land, water, air, marine foreshore and resources in Eastern Burrard Inlet. It also asserts freestanding stewardship, harvesting and cultural rights in this area. The Crown states that it assessed its duty to consult with Tsleil-Waututh on the deeper end of the consultation spectrum.

B. City of Vancouver

[21] The City of Vancouver is the third most densely populated city in North America, after New York City and San Francisco. It has 69.8 kilometres of waterfront along Burrard Inlet, English Bay, False Creek and the Fraser River, with 18 kilometres of beaches and a 22-kilometre long seawall.

[22] Approximately 25,000 residents of Vancouver live within 300 metres of the Burrard Inlet and English Bay shorelines.

C. City of Burnaby

[23] The City of Burnaby is the third largest city in British Columbia, with a population of over 223,000 people.

[24] A number of elements of the Project infrastructure will be located in Burnaby: (i) the new Westridge Marine Terminal; (ii) the Burnaby Terminal, including thirteen new storage tanks and one replacement storage tank; (iii) two new delivery lines following a new route connecting the Burnaby Terminal to the Westridge Marine Terminal through a new tunnel to be drilled under the Burnaby Mountain Conservation Area; and, (iv) a portion of the main pipeline along a new route to the Burnaby Terminal.

D. The Squamish Nation

[25] The applicant Squamish Nation is a Coast Salish Nation. It is a band within the meaning of the *Indian Act* and its members are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. There are currently just over 4,000 registered members of the Squamish Nation.

[26] The Squamish assert that since a time before contact with Europeans, Squamish have used and occupied lands and waters on the southwest coast of what is now British Columbia, extending from the Lower Mainland north to Whistler. This territory includes Burrard Inlet, English Bay, Howe Sound and the Squamish Valley. The boundaries of asserted Squamish territory thus encompass all of Burrard Inlet, English Bay and Howe Sound, as well as the rivers and creeks that flow into these bodies of water.

[27] Squamish has three reserves located in and at the entrance to Burrard Inlet:

i. Seymour Creek Reserve No. 2 (ch'ích'elxwi7kw) on the North shore close to the Westridge Marine Terminal;
ii. Mission Reserve No. 1 (eslhá7an); and,
iii. Capilano Reserve No. 5 (xwmelchstn).

Also located in the area are Kitsilano Reserve No. 6 (senákw) near the entrance to False Creek, and three other waterfront reserves in Howe Sound.

[28] Project infrastructure, including portions of the main pipeline, the Westridge Marine Terminal, the Burnaby Terminal, two new delivery lines connecting the terminals, and sections of the tanker routes for the Project will be located in Squamish's asserted traditional territory and close to its reserves across the Burrard Inlet. The shipping route for the Project will also travel past three Squamish reserves through to the Salish Sea.

[29] Squamish asserts Aboriginal rights, including title and self-government, within its traditional territory. Squamish also asserts Aboriginal rights to fish in the Fraser River and its tributaries. The Crown assessed its duty to consult Squamish at the deeper end of the consultation spectrum.

E. Coldwater Indian Band

[30] The applicant Coldwater is a band within the meaning of section 2 of the *Indian Act*. Its members are Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. Coldwater, together with 14 other bands, comprise the Nlaka'pamux Nation.

[31] The Nlaka'pamux Nation's asserted traditional territory encompasses part of south-central British Columbia extending from the northern United States to north of Kamloops. This territory includes the Lower Thompson River area, the Fraser Canyon, the Nicola and Coldwater Valleys and the Coquihalla area.

[32] Coldwater's registered population is approximately 850 members. Approximately 330 members live on Coldwater's reserve lands. Coldwater holds three reserves: (i) Coldwater Indian Reserve No. 1 (Coldwater Reserve) approximately 10 kilometres southwest of Merritt, British Columbia; (ii) Paul's Basin Indian Reserve No. 2 located to the southwest of the Coldwater Reserve, upstream on the Coldwater River; and, (iii) Gwen Lake Indian Reserve No. 3 located on Gwen Lake.

[33] Approximately 226 kilometres of the proposed pipeline right-of-way and four pipeline facilities (the Kamloops Terminal, the Stump Station, the Kingsvale Station and the Hope Station) will be located within the Nlaka'pamux Nation's asserted traditional territory. The Kingsvale Station is located in the Coldwater Valley. The approved pipeline right-of-way skirts the eastern edges of the Coldwater Reserve. The existing Trans Mountain pipeline system transects both the Coldwater Reserve and the Coldwater Valley.

[34] Coldwater asserts Aboriginal rights and title in, and the ongoing use of, the Coldwater and Nicola Valleys and the Nlaka'pamux territory more generally. The Crown assessed its duty to consult Coldwater at the deeper end of the consultation spectrum.

F. The Stó:lō Collective

[35] One translation of the term "Stó:lō" is "People of the River", referencing the Fraser River. The Stó:lō are a Halkomelem-speaking Coast Salish people. Traditionally, they have been tribally organized.

[36] The "Stó:lō Collective" was formed for the sole purpose of coordinating and representing the interests of its membership before the National Energy Board and in Crown consultations about the Project. The Stó:lō Collective represents the following applicants:

(a) Aitchelitz, Skowkale, Tzeachten, Squiala First Nation, Yakweakwioose, Shxwa:y Village and Soowahlie, each of which are villages and also bands within the meaning of section 2 of the *Indian Act* (the Ts'elxweyeqw Villages). The Ts'elxweyeqw Villages collectively comprise the Ts'elxweyeqw Tribe. Members of the Ts'elxweyeqw Villages are Stó:lō people and Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*; and,

(b) Skwah and Kwaw-Kwaw-Apilt, each of whom are villages and also bands within the meaning of section 2 of the *Indian Act* (the Pil'Alt Villages). The Pil'Alt Villages are members of the Pil'Alt Tribe. Members of the Pil'Alt Villages are Stó:lō people and Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*. The Pil'Alt Villages are represented by the Ts'elxweyeqw Tribe in matters relating to the Project. (On March 6, 2018, Kwaw-Kwaw-Apilt filed a notice of discontinuance.)

[37] The Stó:lō's asserted traditional territory, known as S'olh Temexw, includes the lower Fraser River watershed.

[38] The Stó:lō live in many villages, all of which are located in the lower Fraser River watershed.

[39] The existing Trans Mountain pipeline crosses, and the Project's proposed new pipeline route would cross, approximately 170 kilometres of the Stó:lō Collective applicants' asserted

traditional territory, beginning from an eastern point of entry near the Coquihalla Highway and continuing to the Burrard Inlet.

[40] The Stó:lō possess established Aboriginal fishing rights on the Fraser River (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289). The Crown assessed its duty to consult Stó:lō at the deeper end of the consultation spectrum.

G. Upper Nicola Band

[41] The applicant Upper Nicola is a member community of the Syilx (Okanagan) Nation and a band within the meaning of section 2 of the *Indian Act*. Upper Nicola and Syilx are an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*.

[42] The Syilx Nation's asserted traditional territory extends from the north past Revelstoke around Kinbasket to the south to the vicinity of Wilbur, Washington. It extends from the east near Kootenay Lake to the west to the Nicola Valley. Upper Nicola currently has eight Indian Reserves within Upper Nicola's/Syilx's asserted territory. The primary residential communities are Spaxomin, located on Upper Nicola Indian Reserve No. 3 on the western shore of Douglas Lake, and Quilchena, located on Upper Nicola Indian Reserve No. 1 on the eastern shore of Nicola Lake.

[43] Approximately 130 kilometres of the Project's proposed new pipeline will cross through Upper Nicola's area of responsibility within Syilx territory. The Stump Station and the Kingsvale Station are also located within Syilx/Upper Nicola's asserted territory.

[44] Upper Nicola asserts responsibility to protect and preserve the claimed Aboriginal title and harvesting and other rights held collectively by the Syilx, particularly within its area of responsibility in the asserted Syilx territory. The Crown assessed its duty to consult Upper Nicola at the deeper end of the consultation spectrum.

H. Stk'emlupsemc te Secwepemc of the Secwepemc Nation

[45] The Secwepemc are an Aboriginal people living in the area around the confluence of the Fraser and Thompson Rivers. The Secwepemc Nation is comprised of seven large territorial groupings referred to as "Divisions". The Stk'emlupsemc te Secwepemc Division (SSN) is comprised of the Skeetchestn Indian Band and the Kamloops (or Tk'emlups) Indian Band. Both are bands within the meaning of section 2 of the *Indian Act*. SSN's members are also Aboriginal peoples within the meaning of section 35 of the *Constitution Act, 1982* and paragraph 5(1)(*c*) of the *Canadian Environmental Assessment Act, 2012*.

[46] The Skeetchestn Indian Band is located along the northern bank of the Thompson River, approximately 50 kilometres west of Kamloops and has four reserves. Its total registered population is 533. The Tk'emlups Indian Band is located in the Kamloops area and has six reserves. Its total registered population is 1,322. Secwepemc Territory is asserted to be a

substantial landmass which encompasses many areas, including the area in the vicinity of Kamloops Lake.

[47] The existing and proposed pipeline right-of-way crosses through SSN's asserted traditional territory for approximately 350 kilometres. Approximately 80 kilometres of the proposed pipeline right-of-way and two pipeline facilities, the Black Pines Station and the Kamloops Terminal, will be located within SSN's asserted traditional territory.

[48] The SSN claim Aboriginal title over its traditional territory. The Crown assessed its duty to consult SSN at the deeper end of the consultation spectrum.

I. Raincoast Conservation Foundation and Living Oceans Society

[49] These applicants are not-for-profit organizations. Their involvement in the National Energy Board review process focused primarily on the effects of Project-related marine shipping.

IV. The applications challenging the report of the National Energy Board and the Order in Council

[50] As will be discussed in more detail below, two matters are challenged in this consolidated proceeding: first, the report of the National Energy Board which recommended that the Governor in Council approve the Project and direct the Board to issue the necessary certificate of public convenience and necessity; and, second, the decision of the Governor in Council to accept the recommendation of the Board and issue the Order in Council directing the Board to issue the certificate.

[51] The following applicants applied for judicial review of the report of the National Energy Board:

- Tsleil-Waututh Nation (Court File A-232-16)
- City of Vancouver (Court File A-225-16)
- City of Burnaby (Court File A-224-16)
- The Squamish Nation and Xálek/Sekyú Siý am, Chief Ian Campbell on his own behalf and on behalf of all members of Squamish (Court File A-217-16)
- Coldwater Indian Band and Chief Lee Spahan in his capacity as Chief of Coldwater on behalf of all members of Coldwater (Court File A-223-16)
- Raincoast Conservation Foundation and Living Oceans Society (Court File A-218-16).

[52] The following applicants applied, with leave, for judicial review of the decision of the Governor in Council:

- Tsleil-Waututh Nation (Court File A-78-17)
- City of Burnaby (Court File A-75-17)
- The Squamish Nation and Xálek/Sekyú Siý am, Chief Ian Campbell on his own behalf and on behalf of all members of Squamish (Court File A-77-17)
- Coldwater Indian Band and Chief Lee Spahan in his capacity as Chief of Coldwater on behalf of all members of Coldwater (Court File A-76-17)
- The Stó:lō Collective applicants (Court File A-86-17)
- Upper Nicola Band (Court File A-74-17)
- Chief Ron Ignace and Chief Fred Seymour, on their own behalf and on behalf of all other members of Stk'emlupsemc te Secwepemc of the Secwepemc Nation (Court File A-68-17)
- Raincoast Conservation Foundation and Living Oceans Society (Court File A-84-17).

V. The legislative regime

[53] For ease of reference the legislative provisions referred to in this section of the reasons are set out in the Appendix to these reasons.

A. The requirements of the *National Energy Board Act*

[54] As explained above, no company may operate an interprovincial or international pipeline in Canada unless the National Energy Board has issued a certificate of public convenience and necessity, and, after the pipeline is built, has given leave to the company to open the pipeline.

[55] Trans Mountain's completed application for a certificate of public convenience and necessity for the Project triggered the National Energy Board's obligation to assess the Project pursuant to section 52 of the *National Energy Board Act*. Subsection 52(1) of that Act requires the Board to prepare and submit to the Minister of Natural Resources, for transmission to the Governor in Council, a report which sets out the Board's recommendation as to whether the certificate should be granted, together with all of the terms and conditions that the Board considers the certificate should be subject to if issued. The Board is to provide its reasons for its recommendation. When considering whether to recommend issuance of a certificate the Board is required to take into account "whether the pipeline is and will be required by the present and future public convenience and necessity".

[56] The Board's recommendation is, pursuant to subsection 52(2) of the *National Energy Board Act*, to be based on "all considerations that appear to it to be directly related to the

pipeline and to be relevant" and the Board may have regard to five specifically enumerated factors which include "any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application."

[57] If an application relates to a "designated" project, as defined in section 2 of the *Canadian Environmental Assessment Act, 2012*, the Board's report must also set out the Board's environmental assessment of the project. This assessment is to be prepared under the *Canadian Environmental Assessment Act, 2012* (subsection 52(3) of the *National Energy Board Act*). A designated project is defined in section 2 of the *Canadian Environmental Assessment Act, 2012*:

designated project means one or more physical activities that	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 84*a*), 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.

[58] The remaining subsections in section 52 deal with the timeframe in which the Board must complete its report. Generally, a report must be submitted to the Minister within the time limit specified by the Chair of the Board. The specified time limit must not be longer than 15 months after the completed application has been submitted to the Board.

B. The requirements of the *Canadian Environmental Assessment Act, 2012*

[59] Pursuant to subsection 4(3) of the *Regulations Designating Physical Activities*, SOR/2012-147, and section 46 of the Schedule thereto, because the Project includes a new onshore pipeline longer than 40 kilometres, the Project is a designated project as defined in part (*b*) of the definition of "designated project" set out in paragraph 57 above. In consequence, the Board was required to conduct an environmental assessment under the *Canadian Environmental Assessment Act, 2012*. For this purpose, subsection 15(*b*) of the *Canadian Environmental Assessment Act, 2012* designated the National Energy Board to be the sole responsible authority for the environmental assessment.

[60] As the responsible authority, the Board was required to take into account the environmental effects enumerated in subsection 5(1) of the *Canadian Environmental Assessment Act, 2012*. These effects include changes caused to the land, water or air and to the life forms that inhabit these elements of the environment. The effects to be considered are to include the effects upon Aboriginal peoples' health and socio-economic conditions, their physical and cultural heritage, their current use of lands and resources for traditional purposes, and any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

[61] Subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* required the Board to take into account a number of enumerated factors when conducting the environmental assessment, including:

- the environmental effects of the designated project (including the environmental effects of malfunctions or accidents that may occur in connection with the

designated project) and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

- mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;
- alternative means of carrying out the designated project that are technically and economically feasible, and the environmental effects of any such alternative means; and
- any other matter relevant to the environmental assessment that the responsible authority, here the Board, requires to be taken into account.

[62] The Board was also required under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* to make recommendations to the Governor in Council with respect to the decision to be made by the Governor in Council under paragraph 31(1)(*a*) of that Act—a decision about the existence of significant adverse environmental effects and whether those effects can be justified in the circumstances.

C. Consideration by the Governor in Council

[63] Once in receipt of the report prepared in accordance with the requirements of the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*, the Governor in Council may make its decision concerning the proponent's application for a certificate.

[64] Three decisions are available to the Governor in Council. It may, by order:

i. "direct the Board to issue a certificate in respect of the pipeline or any part of it and to make the certificate subject to the terms and conditions set out in the report" (paragraph 54(1)(*a*) of the *National Energy Board Act*); or

ii. "direct the Board to dismiss the application for a certificate" (paragraph 54(1)(*b*) of the *National Energy Board Act*); or

iii. "refer the recommendation, or any of the terms and conditions, set out in the report back to the Board for reconsideration" and specify a time limit for the reconsideration (subsections 53(1) and (2) of the *National Energy Board Act*).

[65] Subsection 54(2) of the *National Energy Board Act* requires that the Governor in Council's order "must set out the reasons for making the order."

[66] Subsection 54(3) of the *National Energy Board Act* requires the Governor in Council to issue its order within three months after the Board's report is submitted to the Minister. The Governor in Council may, on the recommendation of the Minister, extend this time limit.

[67] Additionally, once the National Energy Board as the responsible authority for the designated project has submitted its report with respect to the environmental assessment, pursuant to subsection 31(1) of the *Canadian Environmental Assessment Act, 2012*, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*, "decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment … that the designated project":

(i) is not likely to cause significant adverse environmental effects,	(i) n'est pas susceptible d'entraîner des effets environnementaux négatifs et importants,
(ii) is likely to cause significant adverse environmental effects that can	(ii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui sont justifiables dans

be justified in the circumstances, or	les circonstances,
(iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances;	(iii) est susceptible d'entraîner des effets environnementaux négatifs et importants qui ne sont pas justifiables dans les circonstances;

VI. The report of the National Energy Board

[68] On May 19, 2016, the Board issued its report which recommended approval of the Project. The recommendation was based on a number of findings, including:

- With the implementation of Trans Mountain's environmental protection procedures and mitigation measures, and the Board's recommended conditions, the Project is not likely to cause significant adverse environmental effects.
- However, effects from the operation of Project-related marine vessels would contribute to the total cumulative effects on the Southern resident killer whales, and would further impede the recovery of that species. Southern resident killer whales are an endangered species that reside in the Salish Sea. Project-related marine shipping follows a route through the Salish Sea to the open ocean that travels through the whales' critical habitat as identified in the Recovery Strategy for the Northern and Southern resident killer whales. The Board's finding was that "the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, and that it is likely to result in significant adverse effects on Aboriginal cultural uses associated with these marine mammals."
- The likelihood of a spill from the Project or from a Project-related tanker would be very low in light of the mitigation and safety measures to be implemented. However, the consequences of large spills could be high.
- The Board's recommendation and decisions with respect to the Project were consistent with subsection 35(1) of the *Constitution Act, 1982*.

- The Project would be in the Canadian public interest and would be required by the present and future public convenience and necessity.
- If approved, the Board would attach 157 conditions to the certificate of public convenience and necessity. The conditions dealt with a broad range of matters, including the safety and integrity of the pipeline, emergency preparedness and response and ongoing consultation with affected entities, including Indigenous communities.

VII. The decision of the Governor in Council

[69] On November 29, 2016, the Governor in Council issued the Order in Council, accepting the Board's recommendation that the Project be approved and directing the Board to issue a certificate of public convenience and necessity to Trans Mountain.

[70] The Order in Council contained a number of recitals, two of which are relevant to these applications. First, the Governor in Council stated its satisfaction "that the consultation process undertaken is consistent with the honour of the Crown and the [Aboriginal] concerns and interests have been appropriately accommodated". Second, the Governor in Council accepted the Board's recommendation that the Project is required by present and future public convenience and necessity and that it will not likely cause significant adverse environmental effects.

[71] The Order in Council was followed by a 20-page explanatory note which was stated not to form part of the Order in Council. The Explanatory Note described the Project and its objectives and the review process before the National Energy Board, and summarized the issues raised before the Board. The Explanatory Note also dealt with matters that post-dated the Board's report and set out the government's "response to what was heard".

VIII. Factual background

A. Canada's consultation process

[72] The first step in the consultation process was determining the Indigenous groups whose rights and interests might be adversely impacted by the Project. In order to do this, a number of federal departments and the National Energy Board coordinated research and analysis on the proximity of Indigenous groups' traditional territories to elements of the Project, including the proposed pipeline right-of-way, the marine terminal expansion, and the designated shipping lanes. Approximately 130 Indigenous groups were identified, including all of the Indigenous applicants.

[73] On August 12, 2013, the National Energy Board wrote to the identified Indigenous groups to advise that Trans Mountain had filed a Project description on May 23, 2013, and to provide preliminary information about the upcoming review process. This letter also attached a letter from the Major Projects Management Office of Natural Resources Canada. The Major Projects Management Office's letter advised that Canada would rely on the National Energy Board's public hearing process:

> to the extent possible, to fulfil any Crown duty to consult Aboriginal groups for the proposed Project. Through the [National Energy Board] process, the [Board] will consider issues and concerns raised by Aboriginal groups. The Crown will utilise the [National Energy Board] process to identify, consider and address the potential adverse impacts of the proposed Project on established or potential Aboriginal and treaty rights.

[74] In subsequent letters sent to Indigenous groups between August 2013 and February 19, 2016, the Major Projects Management Office directed Indigenous groups that could be impacted

by the Project to participate in and communicate their concerns through the National Energy Board public hearings. Additionally, Indigenous groups were advised that Canada viewed the consultation process to be as follows:

i. Canada would rely, to the extent possible, on the Board's process to fulfil its duty to consult Indigenous peoples about the Project;
ii. There would be four phases of Crown consultation:
    a. "Phase I": early engagement, from the submission of the Project description to the start of the National Energy Board hearing;
    b. "Phase II": the National Energy Board hearing, commencing with the start of the Board hearing and continuing until the close of the hearing record;
    c. "Phase III": consideration by the Governor in Council, commencing with the close of the hearing record and continuing until the Governor in Council rendered its decision in relation to the Project; and
    d. "Phase IV": regulatory authorization should the Project be approved, commencing with the decision of the Governor in Council and continuing until the issuance of department regulatory approvals, if required.
iii. Natural Resources Canada's Major Projects Management Office would serve as the Crown Consultation Coordinator for the Project.
iv. Following Phase III consultations, an adequacy of consultation assessment would be prepared by the Crown. The assessment would be based upon the depth of consultation owed to each Indigenous group. The depth of consultation owed would in turn be based upon the Project's potential impact on each group and the strength of the group's claim to potential or established Aboriginal or treaty rights.

[75] On May 25, 2015, towards the end of Phase II, the Major Projects Management Office wrote to Indigenous groups, including the applicants, to provide additional information on the scope and timing of Phase III Crown consultation. Indigenous groups were advised that:

i. Canada intended to submit summaries of the concerns and issues Indigenous groups had brought forward to date and to seek feedback on the completeness and accuracy of the summaries. The summaries would be issued in the form of Information Requests, a Board hearing process explained below. Canada would also seek Indigenous groups' views on adverse impacts not yet addressed by Trans Mountain's mitigation measures. The Crown would use the information provided by Indigenous groups to "refine our current understanding of the potential impacts of the project on asserted or established Aboriginal or treaty rights."

ii. Phase III consultation would focus on two questions:

   a. Are there outstanding concerns with respect to Project-related impacts to potential or established Aboriginal or treaty rights?

   b. Are there incremental accommodation measures that should be considered by the Crown to address any outstanding concerns?

iii. Information made available to the Crown throughout each phase of the consultation process would be consolidated into a "Crown Consultation Report". "This report will summarize both the procedural aspects of consultations undertaken and substantive issues raised by Aboriginal groups, as well as how these issues may be addressed in the process". The section of the Crown Consultation Report dealing with each Indigenous group would be provided to the group for review and comment before the report was placed before the Governor in Council.

iv. If Indigenous groups identified outstanding concerns there were a number of options which might "be considered and potentially acted upon." The options were described to be:

> The Governor in Council has the option of asking the [National Energy Board] to reconsider its recommendation and conditions. Federal and provincial governments could undertake additional consultations prior to issuing additional permits and/or authorizations. Finally, federal and provincial governments can also use existing or new policy and program measures to address outstanding concerns.

(underlining added)

B. Prehearing matters and the Project application

[76] To facilitate participation in the National Energy Board hearing process, the Board operates a participant funding program. On July 22, 2013, the Board announced that it was making funding available under this program to assist landowners, Indigenous groups and other interested parties to participate in the Board's consideration of the Project. To apply for funding, a party required standing as an intervener in the Board's process.

[77] On July 29, 2013, the Board released its "list of issues" which identified the topics the Board would consider in its review of the Project. The following issues of relevance to these applications were included:

- the need for the proposed Project.
- the potential environmental and socio-economic effects of the proposed Project, including any cumulative environmental effects that were likely to result from the Project, including those the Board's Filing Manual required to be considered.
- the potential environmental and socio-economic effects of marine shipping activities that would result from the proposed Project, including the potential effects of accidents or malfunctions that might occur.
- the terms and conditions to be included in any recommendation to approve the Project that the Board might issue.
- the potential impacts of the Project on Indigenous interests.
- contingency plans for spills, accidents or malfunctions, during construction and operation of the Project.

[78] On September 10, 2013, the Board issued "Filing Requirements Related to the Potential Environmental and Socio-Economic Effects of Increased Marine Shipping Activities." This was

a guidance document intended to assist the proponent. The document described requirements that supplemented those set out in the Board's Filing Manual.

[79] In particular, this guidance document required Trans Mountain's assessment of accidents and malfunctions to deal with a number of things, including measures to reduce the potential for accidents and malfunctions, credible worst case spill scenarios together with smaller spill scenarios and information on the fate and behaviour of any spilled hydrocarbons. For all mitigation measures Trans Mountain proposed, it was required to describe the roles, responsibilities and capabilities of each relevant organization in implementing mitigation measures, and the level of care and control Trans Mountain would have in overseeing or implementing the measures.

[80] On December 16, 2013, Trans Mountain formally filed its application, seeking approval to construct and operate the Project.

C. The scoping decision and the hearing order

[81] On April 2, 2014, the Board issued a number of decisions setting the parameters of the Project's environmental assessment and establishing the hearing process for the Project. Three of these decisions are of particular relevance to these applications.

[82] First, the Board issued a hearing order which set out timelines and a process for the hearing. The hearing order did not allow any right of oral cross-examination. Instead, the hearing order provided a process whereby interveners and the Board could submit written interrogatories,

referred to as Information Requests, to Trans Mountain. The hearing order also set out a process for interveners and the Board to compel adequate responses to their Information Requests, an opportunity for Indigenous groups to provide oral traditional evidence, and allowed both written arguments in chief and summary oral arguments.

[83] Next, in the decision referred to as the "scoping" decision, the Board defined the "designated project" to be assessed, and described the factors to be assessed under the *Canadian Environmental Assessment Act, 2012* (and the scope of each factor). In defining the "designated project", the Board did not include marine shipping activities as part of the "designated project". Rather, the Board stated that it would consider the effects of increased marine shipping under the *National Energy Board Act*. To the extent there was potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board would consider those effects under the cumulative effects portion of the *Canadian Environmental Assessment Act, 2012* environmental assessment.

[84] Finally, the Board ruled on participation rights in the hearing. The Board granted participation status to 400 interveners and 1,250 commentators. All of the applicants before the Court applied for, and were granted, intervener status. Additionally, a number of government departments were granted intervener status; both Health Canada and the Pacific Pilotage Authority were granted commentator status.

D. Challenges to the hearing order and the scoping decision

[85] Of relevance to issues raised in these applications are two challenges brought against the hearing order and the scoping decision.

[86] The first challenge requested that all evidence filed in the hearing be subject to oral cross-examination. The Board dismissed this request in Ruling No. 14. In Ruling No. 51, the Board dismissed motions seeking reconsideration of Ruling No. 14.

[87] The second challenge was brought by Tsleil-Waututh to aspects of both the hearing order and the scoping decision. Tsleil-Waututh asserted, among other things, that the Board erred in law by failing to include marine shipping activities in the Project description. This Court granted Tsleil-Waututh leave to appeal this and other issues. On September 6, 2016, this Court dismissed the appeal (2016 FCA 219). The dismissal of the appeal was expressly stated, at paragraph 21 of the Court's reasons, to be without prejudice to Tsleil-Waututh's right to raise the issue of the proper scope of the Project "in subsequent proceedings".

E. The TERMPOL review process

[88] In view of the Project's impact on marine shipping, it is useful to describe this process.

[89] Trans Mountain requested that the marine transportation components of the Project be assessed under the voluntary Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL). The review process was chaired by Transport Canada and the

review committee was composed of representatives of other federal agencies and Port Metro Vancouver.

[90] The purpose of the review process was to objectively appraise operational vessel safety, route safety and cargo transfer operations associated with the Project, with a focus on improving, where possible, elements of the Project.

[91] The review committee did not identify regulatory concerns for the tankers, tanker operations, the proposed route, navigability, other waterway users or the marine terminal operations associated with tankers supporting the Project. It found that Trans Mountain's commitments to the existing marine safety regime would provide for a higher level of safety for tanker operations appropriate to the increase in traffic.

[92] The review committee also proposed certain measures to provide for a high level of safety for tanker operations. Examples of such proposed measures were the extended use of tethered and untethered tug escorts and the extension of the pilot disembarkation zone. Trans Mountain agreed to adopt each of the recommended measures.

[93] The TERMPOL report formed part of Transport Canada's written evidence before the National Energy Board.

F. The applicants' participation in the hearing before the Board

[94] The applicants, as interveners before the Board, were entitled to:

- issue Information Requests to Trans Mountain and others;
- file motions, including motions to compel adequate responses to Information Requests;
- file written evidence;
- comment on draft conditions; and,
- present written and oral summary argument.

[95] All of the applicants issued Information Requests, filed or supported motions and filed written evidence. Interveners who filed evidence were required to respond in writing to written questions about their evidence from the Board, Trans Mountain or other interveners.

[96] All of the applicants filed written submissions commenting on draft conditions except for the City of Vancouver and SSN.

[97] All of the applicants filed written arguments and all of the applicants except SSN delivered oral summary arguments.

[98] Indigenous interveners could adduce traditional Indigenous evidence, either orally or in writing. Oral evidence could be questioned orally by other interveners, Trans Mountain or the Board. Tsleil-Waututh, Squamish, Coldwater, SSN, and Upper Nicola provided oral, Indigenous traditional evidence. The Stó:lō Collective formally objected to the Board's procedure for introducing Indigenous oral traditional evidence and did not provide such evidence.

G. Participant funding

[99] As previously mentioned, the Board operated a participant funding program. Additional funding was available through the Major Projects Management Office and Trans Mountain.

[100] It is fair to say that the participant funding provided to the applicants by the Board and the Major Projects Management Office was generally viewed to be inadequate by them (see for example the affidavit of Chief Ian Campbell of the Squamish Nation). Concerns were also expressed about delays in funding. Funds provided by the Board could only be applied to work conducted after the funding was approved and a funding agreement was executed.

[101] The following funds were paid or offered.

1. Tsleil-Waututh Nation

[102] Tsleil-Waututh requested $766,047 in participant funding. It was awarded $40,000, plus travel costs for two members to attend the hearing. Additionally, the Major Projects Management Office offered to pay $14,000 for consultation following the close of the hearing record and $12,000 following the release of the Board's report. These offers were not accepted.

2. The Squamish Nation

[103] Squamish applied for $293,350 in participant funding. It was awarded $44,720, plus travel costs for one person to attend the hearing. The Major Projects Management Office offered

$12,000 for consultations following the close of the Board's hearing record, and $14,000 to support participation in consultations following the release of the Board's report. These funds were paid.

3. Coldwater Indian Band

[104] Coldwater was awarded $48,490 in participant funding from the Board. Additionally, the Major Projects Management Office offered an additional $52,000 in participant funding.

4. The Stó:lō Collective

[105] The Stó:lō Collective was awarded $42,307 per First Nation band in participant funding from the Board. Additionally, the Major Projects Management Office offered $4,615.38 per First Nation band for consultation following the close of the Board's hearing record, and $5,384.61 per First Nation band following the release of the Board's report.

5. Upper Nicola Band

[106] Upper Nicola was awarded $40,000 plus travel costs for two members to attend the hearing and an additional $10,000 in special funding through the Board's participant funding program. Additionally, the Major Projects Management Office offered Upper Nicola Band and the Okanagan Nation Alliance $11,977 and $24,000 respectively in participant funding for consultations following the close of the Board's hearing record. The Okanagan Nation Alliance was offered an additional $26,000 following the release of the Board's report.

6. SSN

[107] SSN applied for participant funding in excess of $300,000 in order to participate in the Board's hearing. It was awarded $36,920 plus travel costs for two members to attend the hearing. Additionally, the Major Projects Management Office offered $18,000 in participation funding for consultations following the close of the Board's hearing record and $21,000 for consultations following the release of the Board's report.

7. Raincoast Conservation Foundation and Living Oceans Society

[108] Raincoast was awarded $111,100 plus travel costs for two people to attend the hearing from the Board's participant funding program. Living Oceans was awarded $89,100 plus travel costs for two persons to attend the hearing through the participant funding program.

H. Crown consultation efforts—a brief summary

1. Phase I (from 2013 to April 2014)

[109] In this initial engagement phase some correspondence was exchanged between the Crown and some of the Indigenous applicants. Canada does not suggest that any of this correspondence contained any discussion about any substantive matter.

2. Phase II (from April 2014 to February 2016)

[110] During the Board's hearing process and continuing until the close of its hearing record, Canada continued to exchange correspondence with some of the Indigenous applicants.

Additionally, some informational meetings were held; however, these meetings did not allow for any substantive discussion about any group's title, rights or interests, or the impact of the Project on the group's title, rights or interests.

[111] To illustrate, Crown representatives met with Squamish officials on September 11, 2015, and November 27, 2015. At these meetings Squamish raised a number of concerns, including its concerns that Squamish had not been involved in the design of the consultation process, that the consultation process was inadequate to assess impacts on Squamish rights and title and that inadequate funding was provided for participation in the Board's hearing. Squamish also expressed confusion about the respective roles of the Board and Trans Mountain in consultations with Squamish.

[112] Similarly, informational meetings were held with the Stó:lō Collective on July 18, 2014 and December 3, 2015. Again, no substantive discussion took place about Stó:lō's title, rights and interests or the impact of the Project thereon. The Stó:lō also expressed their concerns about the consultation process, including their concerns that the Board failed to compel Trans Mountain to respond adequately to Information Requests and the lack of specificity of the Board's draft terms and conditions.

[113] Informational hearings of this nature were also held with Upper Nicola and SSN in 2014.

[114] It is fair to say that in Phase II Canada continued to rely upon the National Energy Board process to fulfil the Crown's duty to consult. Canada's efforts in Phase II were largely directed to

using the Information Request process to solicit concerns and potential mitigation measures from First Nations. Canada prepared tables to record potential Project impacts and concerns and to record and monitor whether those potential impacts and concerns were addressed in Trans Mountain's commitments, the Board's draft terms and conditions or other mitigation measures.

3. Phase III (February to November 2016)

[115] Crown representatives met with all of the Indigenous applicants in Phase III. Generally, the Indigenous applicants expressed dissatisfaction with the National Energy Board process and the Crown's reliance on that process. Individual concerns raised by individual Indigenous applicants will be discussed in the context of consideration of the adequacy of Canada's consultation efforts.

[116] Towards the latter part of Phase III, on August 16, 2016, the Major Projects Management Office and the British Columbia Environmental Assessment Office jointly sent a letter to Indigenous groups confirming that they were responsible for conducting consultation efforts for the Project, and that they were coordinating by participating in joint consultation meetings, sharing information and by preparing the draft "Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project" (Crown Consultation Report).

[117] Canada summarized its consultation efforts in the Crown Consultation Report, which included appendices specific to individual Indigenous groups. Indigenous groups were generally provided with a first draft of the Crown Consultation Report, together with the appendix relevant

to that group, in August of 2016. Comments and corrections were to be provided in September 2016. A second draft of the Crown Consultation Report, together with relevant appendices, was provided to Indigenous groups in November of 2016, with comments due by mid-November.

I. Post National Energy Board report events

1. The Interim Measures for Pipeline Reviews

[118] On January 27, 2016, Canada introduced this initiative as part of a strategy to review Canada's environmental assessment processes. The Interim Measures set out five guiding principles to guide the approval of major pipeline projects:

i. No proponent would be required to return to the beginning of the approval process. That is, no proponent would be required to begin the approval process afresh.
ii. Decisions about pipeline approval would be based on science, traditional knowledge of Indigenous peoples and other relevant evidence.
iii. The views of the public and affected communities would be sought and considered.
iv. Indigenous peoples would be meaningfully consulted, and, where appropriate, accommodated.
v. The direct and upstream greenhouse gas emissions linked to a project under review would be assessed.

[119] Canada advised that it planned to apply the Interim Measures to the Project and that in order to do so it would: undertake deeper consultations with Indigenous peoples and provide funding to support participation in these deeper consultations; assess the upstream gas emissions associated with the Project and make this information public; and, appoint a ministerial

representative to engage local communities and Indigenous groups in order to obtain their views and report those views back to the responsible Minister.

[120] The Minister of Natural Resources sought and obtained a four-month extension of time to permit implementation of the Interim Measures. The deadline for the Governor in Council to make its decision on Project approval was, therefore, on or before December 19, 2016.

2. The Ministerial Panel

[121] On May 17, 2016, the Minister announced he was striking a three-member independent Ministerial Panel that would engage local communities and Indigenous groups as contemplated in Canada's implementation of the Interim Measures for the Project.

[122] The Ministerial Panel held a series of public meetings in Alberta and British Columbia, received emails and received responses to an online questionnaire. The Ministerial Panel submitted its report to the Minister on November 1, 2016, in which it identified six "high-level questions" that "remain unanswered" that it commended to Canada for serious consideration.

[123] The report of the Ministerial Panel expressly stated that the panel's work was "not intended as part of the federal government's concurrent commitment to direct consultation with First Nations" and that "full-scale consultation" was never the intent of the panel "especially in the case of First Nations, where the responsibility for consultation fell elsewhere". It follows that no further consideration of the Ministerial Panel is required in the context of consideration of the adequacy of Canada's consultation efforts.

3. Greenhouse gas assessment

[124] For completeness, I note that in November 2016, Environment Canada did publish an assessment estimating the upstream greenhouse gas emissions from the Project.

IX. The issues to be determined

[125] Broadly speaking, the applicants' submissions require the Court to address the following questions.

[126] First, is there merit in any of the preliminary issues raised by the parties?

[127] Second, under the applicable legislative scheme, can the report of the National Energy Board be judicially reviewed?

[128] Finally, should the decision of the Governor in Council be set aside? This in turn requires the Court to consider:

i. What is the standard of review to be applied to the decision of the Governor in Council?

ii. Did the Governor in Council err in determining whether the Board's process of assembling, analyzing, assessing and studying the evidence before it was so deficient that the report submitted by it to the Governor in Council did not qualify as a "report" within the meaning of the *National Energy Board Act*? This will require the Court to consider:

   a. was the process adopted by the Board procedurally fair?

   b. did the Board err by failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*?

c. did the Board err in its treatment of the *Species at Risk Act*, S.C. 2002, c. 29?

d. did the Board impermissibly fail to decide certain issues before it recommended approval of the Project?

e. did the Board impermissibly fail to consider alternatives to the Westridge Marine Terminal?

iii. Did the Governor in Council fail to comply with the statutory requirement to give reasons?

iv. Did the Governor in Council err by concluding that the Indigenous applicants were adequately consulted and, if necessary, accommodated?

X. Consideration of the issues

A. The preliminary issues

[129] Before turning to the substantive issues raised in this application it is necessary to deal with three preliminary issues raised by the parties. They may be broadly characterized as follows.

[130] First, as described above, a number of the applicants commenced applications challenging the report of the National Energy Board. Trans Mountain moves to strike on a preliminary basis the six applications for judicial review commenced in respect of the report of the National Energy Board on the ground that the report is not amenable to judicial review.

[131] Second, the applicants ask that the two affidavits sworn on behalf of Trans Mountain by Robert Love, or portions thereof, be struck or given no weight on a number of grounds, including that Mr. Love had no personal knowledge of the bulk of the matters sworn to in his affidavits.

[132] Finally, the applicants object to the "Consultation Chronologies" found in Canada's compendium.

1. Trans Mountain's motion to strike

[133] In *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418, at paragraph 125, this Court concluded that applications for judicial review do not lie against reports made pursuant to section 52 of the *National Energy Board Act* recommending whether a certificate of public convenience and necessity should issue for all or any portion of a pipeline. Accordingly, Trans Mountain seeks orders striking the six notices of application (listed above at paragraph 51) that challenge the Board's report.

[134] A comparison of the parties enumerated in paragraph 51 with those parties who challenge the decision of the Governor in Council (enumerated in paragraph 52) shows that all but one of the applicants who challenge the report of the National Energy Board also challenge the decision of the Governor in Council. For reasons not apparent on the record, the City of Vancouver elected to challenge only the report of the Board.

[135] The City of Vancouver, supported by the City of Burnaby, Tsleil-Waututh, Raincoast and Living Oceans, responds to Trans Mountain by arguing that *Gitxaala* was wrongly decided on this point and that in any event, the applications should not be struck on a preliminary basis.

[136] Those applicants who challenge both decisions are able to argue, and do argue, that in *Gitxaala* this Court determined that the decision of the Governor in Council cannot be

considered in isolation from the Board's report; it is for the Governor in Council to determine whether the process followed by the Board in assembling, analyzing, assessing, and studying the evidence before it was so deficient that its report does not qualify as a "report" within the meaning of the *National Energy Board Act*.

[137] Put another way, a statutory pre-condition for a valid Order in Council is a report from the Board prepared in accordance with all legislative requirements. The Governor in Council is therefore required to be satisfied that the report was prepared in accordance with the governing legislation. This makes practical sense as well because the Board's report formed the factual basis for the decision of the Governor in Council.

[138] It is in the context of these arguments that I turn to consider whether the applications should be struck on a preliminary basis.

[139] The jurisprudence of this Court is uniformly to the effect that motions to strike applications for judicial review are to be resorted to sparingly: see, for example, *Odynsky v. League for Human Rights of B'Nai Brith Canada*, 2009 FCA 82, 387 N.R. 376, at paragraph 5, citing *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C.R. 588, (1994), 176 N.R. 48.

[140] The rationale for this approach is that judicial review proceedings are designed to proceed with celerity; motions to strike carry the potential to unduly and unnecessarily delay the

expeditious determination of an application. Therefore justice is better served by allowing the Court to deal at one time with all of the issues raised by an application.

[141] This rationale is particularly applicable in the present case where striking the applications would still leave intact the ability of all but one of the applicants to argue the asserted flaws in the Board's report in the context of the Court's review of the decision of the Governor in Council. Little utility would be achieved in deciding the motions when the arguments in support of them will be considered now, in the Court's determination of the merits of the applications.

[142] For this reason, in the exercise of my discretion I would dismiss Trans Mountain's motion to strike the applications brought challenging the report of the National Energy Board. I deal with the merits of the argument that the report is not amenable to judicial review below at paragraph 170 and following.

2. The applicants' motion asking that the two affidavits of Robert Love, or portions thereof, be struck or given no weight

[143] The applicants argue that the Love affidavits, or portions thereof, should be struck or given no weight on three grounds. First, the applicants argue that Mr. Love had no personal knowledge of the bulk of the matters sworn to in his affidavits so that his evidence should be disregarded as inadmissible hearsay. Second, the applicants argue that the affidavits contain irrelevant and impermissible evidence about Trans Mountain's engagement and consultations with the Indigenous applicants. Finally, the applicants argue that the second affidavit impermissibly augments the evidence that was before the Board and the Governor in Council.

(a) The hearsay objection

[144] In both impugned affidavits Mr. Love swore that "I have personal knowledge of the matters in this Affidavit, except where stated to be based on information and belief, in which case I believe the same to be true." Notwithstanding this statement, on cross-examination, Mr. Love admitted that his first affidavit was based almost entirely on facts of which he had no personal knowledge and that his affidavit failed to disclose that he relied on information and belief to assert those facts. He largely relied on Trans Mountain's lawyers to prepare the paragraphs of his affidavit of which he had no direct knowledge. The basis of his belief that his affidavit was truthful and accurate was his "trust in other people". He frequently admitted that there were other Trans Mountain employees who had direct knowledge of the matters set out in his affidavit (cross-examination of Robert Love, June 19, 2017, by counsel for the City of Burnaby, page 14, line 17 to page 50, line 8).

[145] Similarly, under cross-examination Mr. Love admitted that he had no personal knowledge of the contents of his second affidavit which dealt with Trans Mountain's consultation with Squamish (cross-examination Robert Love, June 22, 2017, by counsel for Squamish, page 2, line 7 to page 11, line 4). When cross-examined by counsel for Coldwater, Mr. Love admitted that he was "largely" not involved with Trans Mountain's engagement with Coldwater. Rather, "[i]t was the aboriginal engagement team who did the communications." (cross-examination of Robert Love, June 22, 2017, by counsel for Coldwater, page 2, line 9 to page 2, line 21).

[146] Mr. Love is the Manager, Land and Rights-of-Way for Kinder Morgan Canada Inc., a company related to Trans Mountain. During his cross-examination by counsel for Squamish he described his role to be responsible for securing "all of the private land interest for the Trans Mountain Expansion Project and to obtain all utility crossings". He was also responsible "for undertaking the land rights necessary to go through about 10 reserves that we have agreements with." Later, on his cross-examination, he explained that prior to swearing his affidavit he "sat down with Regan Schlecker and went through most of the First Nation's engagement and high-level [government] engagements that were happening here" because he had no direct involvement in those engagements. Regan Schlecker was Trans Mountain's Aboriginal affairs manager.

[147] On the basis of Mr. Love's many admissions the applicants argue that Mr. Love's evidence should be struck or given no weight.

[148] Trans Mountain argues in response that the City of Burnaby failed to object to the Love affidavits on a timely basis. It also argues that on judicial review the parties can provide background explanations and summaries regarding the administrative proceeding below and that no applicant points to any important statements in the affidavits that were shown to be based on hearsay.

[149] I begin by rejecting Trans Mountain's argument that the arguments raised by Burnaby were raised too late and so should not be considered. While Burnaby may well not have raised its hearsay objection on a timely basis (see the order of the case management Judge issued on July

25, 2017), both the City of Vancouver and Squamish did object to the Love affidavits on a timely basis. Squamish adopts Burnaby's objections (Squamish's memorandum of fact and law, paragraph 133) and the City of Vancouver relies upon the cross-examination of Mr. Love conducted by counsel for Burnaby (Vancouver's memorandum of fact and law, paragraph 109). On this basis, in my view, Burnaby's arguments are properly before the Court.

[150] With respect to Trans Mountain's argument on the merits, I begin by noting that to the extent background statements and summaries are admissible on an application for judicial review, this admissibility is for the sole and limited purpose of orienting the reviewing Court. In any event and more importantly, affidavits must always fully and candidly disclose if an affiant is relying on information and belief and what portions of the affidavit are based on information and belief. In that event, the affiant must disclose both the sources of the information relied upon and the bases for the affiant's belief in the truth of the information sworn to. This was not done in the present case.

[151] Notwithstanding this failure, I do not see the need to strike portions of the Love affidavits. The affidavits are relevant for the purpose of orienting the Court. However, it is unsafe to rely on the contents of the Love affidavits for the purpose of establishing the truth of their contents unless Mr. Love had personal knowledge of a particular fact or matter. Because Mr. Love did not demonstrate any material, personal knowledge of Trans Mountain's engagement with the Indigenous applicants, and because there is no explanation as to why an individual directly involved in that engagement could not have provided evidence, evidence of

Trans Mountain's engagement must come from other sources—such as the consultation logs Trans Mountain placed in evidence before the Board.

[152] As I have determined that it is unsafe except in limited circumstances to rely upon the contents of the Love affidavits to establish the truth of their contents, it is unnecessary for me to consider the applicants' objection to the second affidavit on the ground that it impermissibly supplemented the consultation logs in evidence before the Board.

(b) Relevance of evidence of Trans Mountain's engagement with the Indigenous applicants

[153] In answer to an Information Request issued by Squamish inquiring whether Canada delegated any procedural aspects of consultation to Trans Mountain, Canada responded:

> The Crown has not delegated the procedural aspects of its duty to consult to Trans Mountain. The Crown does rely on the [National Energy Board] review process to the extent possible to fulfill this duty, a process that requires the proponent to work with and potentially accommodate Aboriginal groups impacted by the project. The [National Energy Board] filing manual provides information to the proponent on the requirement to engage potentially affected Aboriginal groups. This does not constitute delegation of the duty to consult.
>
> (underlining added)

[154] Based on this response, the Indigenous applicants argue that evidence of Trans Mountain's engagement with them is irrelevant. It is necessary to consider this submission because it is an issue that transcends the Love affidavits—there is other evidence of Trans Mountain's engagement.

[155] I accept Trans Mountain's submission that proper evidence of its engagement with the Indigenous applicants is relevant. I reach this conclusion for the following reasons.

[156] First, the Indigenous applicants were informed by the Major Projects Management Office's letter of August 12, 2013, that Canada would rely on the Board's public hearing process "to the extent possible" to fulfil the Crown's duty to consult. As Canada noted in its response to the Information Request, the Board's hearing process required Trans Mountain to work with, and potentially accommodate, Indigenous groups impacted by the Project. Thus the Major Projects Management Office's August 12 letter encouraged Indigenous groups with Project-related concerns to discuss those concerns directly with Trans Mountain. Unresolved concerns were to be directed to the National Energy Board. It follows from this that the Indigenous applicants were informed before the commencement of the Board's hearing process that the Board and, in turn, Canada would rely in part on Trans Mountain's engagement with them.

[157] Thereafter, the Board required Trans Mountain "to make all reasonable efforts to consult with potentially affected Aboriginal groups and to provide information about those consultations to the Board." The Board expressly required this information to include "evidence on the nature of the interests potentially affected, the concerns that were raised and the manner and degree to which those concerns have been addressed. Trans Mountain was expected to report to the Board on all Aboriginal concerns that were expressed to it, even if it was unable or unwilling to address those concerns". (Report of the National Energy Board, page 46).

[158] Trans Mountain's consultation was guided by the Board's Filing Manual requirements and directions given by the Board during the Project Description phase.

[159] This demonstrates that Trans Mountain's consultation was central to the decision of the Board. Therefore, evidence of Trans Mountain's efforts is relevant.

[160] My second reason for finding proper evidence of Trans Mountain's engagement to be relevant is that, consistent with Canada's response to Squamish's Information Request, a review of the Crown Consultation Report shows that in Section 3 Canada summarized "the procedural elements and chronology of Aboriginal consultations and engagement activities undertaken by the proponent, the [Board] and the Crown." Elements of Trans Mountain's engagement were summarized in the Crown Consultation Report, and therefore put before the Governor in Council so it could assess the adequacy of consultation. Elements that were summarized include Trans Mountain's Aboriginal Engagement Program and the Mutual Benefit Agreements Trans Mountain entered into with Indigenous groups. Trans Mountain's Aboriginal Engagement Program was noted to have provided approximately $12 million in capacity funding to potentially affected groups. As well, Trans Mountain provided funding to conduct traditional land and resource use and traditional marine resource use studies. As for the Mutual Benefit Agreements, as of November 2016, Canada was aware that 33 potentially affected Indigenous groups had signed such agreements with Trans Mountain. These included a letter of support for the Project.

[161] Canada's reliance on Trans Mountain's engagement also makes evidence about that engagement relevant.

[162] Finally on this point, some Indigenous applicants assert that Trans Mountain's engagement efforts were inadequate. Evidence of Trans Mountain's engagement, including its provision of capacity funding, is relevant to this allegation and to the issue of the adequacy of available funding.

3. Canada's compendium—The Consultation Chronologies

[163] In its compendium, Canada included schedules in the form of charts (referred to as "Consultation Chronologies") which describe events said to have taken place. The Indigenous applicants assert that the schedules are interpretive, inaccurate, and incomplete and that they should not be received by the Court for two reasons.

[164] First, the Indigenous applicants argue that the Consultation Chronologies summarize the facts as perceived by the Crown. As such, the material should have appeared in Canada's affidavit and in its memorandum of fact and law. It is argued that Canada should not be permitted to circumvent page length restrictions on the length of its memorandum by creating additional resources in its compendium.

[165] Second, the Indigenous applicants argue that the Consultation Chronologies are not evidence. Instead, the summaries are newly created documents that were not before the Board or

the Governor in Council. Their admission is also argued to be prejudicial to the Indigenous applicants.

[166] Canada responds that, as the case management Judge noted in his direction of September 7, 2017, "parties often include material in their compendia as an aid to argument. As long as the aid to argument is brief and helpful and is not anything resembling a memorandum of fact and law and as long as the aid to argument presents or is based entirely upon facts and data from the evidentiary record without adding to it, hearing panels of this Court usually permit it. Of course, there is a limit to this."

[167] I agree with the Indigenous applicants that the Consultation Chronologies must be approached with caution. For example, the Consultation Chronology in respect of the Coldwater Indian Band recites that on May 3, 2016, Canada emailed Coldwater a letter dated November 3, 2015 sent in response to Coldwater's letter of August 20, 2015. The Consultation Chronology also recites that the letter contained an offer to meet with Coldwater to discuss the consultation process and Project-related issues. However, Coldwater points to the sworn evidence of its Chief Councillor to the effect that the November 3, 2015 letter did not actually address the concerns detailed in Coldwater's letter of August 20, 2015, and that the meeting was never arranged because the November 3, 2015 letter was not provided to Coldwater until May 3, 2016.

[168] Thus, I well understand the concern of the Indigenous applicants. This said, this Court's understanding of the evidence is not based upon a summary in chart form which briefly summarizes the consultation process. The Court will base its decision upon the evidentiary

record properly before it, which includes the record before the Board and the Governor in Council, the affidavits sworn in this proceeding, the cross-examinations thereon, the statement of agreed facts, and the contents of the agreed book of documents. The sole permissible use of the Consultation Chronologies is as a form of table of contents or finding aid that directs a reader to a particular document in the record. On the basis of this explanation of the limited permissible use of the Consultation Chronologies there is no need to strike them, a point conceded by counsel for Coldwater and Squamish in oral argument.

[169] For completeness, I note that Upper Nicola moved on a preliminary basis to strike portions of the second Love affidavit on the ground that the affidavit impermissibly recited confidential information. That motion is the subject of brief, confidential reasons issued contemporaneously with these reasons. After the parties to the motion have the opportunity to make submissions, a public version of the confidential reasons will issue.

B. Is the report of the National Energy Board amenable to judicial review?

[170] While I would dismiss Trans Mountain's motion to strike the application on a preliminary basis, because some applicants do challenge the report of the National Energy Board it is necessary to decide whether judicial review lies, notwithstanding this Court's conclusion to the contrary in *Gitxaala*.

[171] The applicants who argue that, contrary to *Gitxaala*, the Board's report is amenable to judicial review acknowledge the jurisprudence of this Court to the effect that the test applied for overruling a decision of another panel of this Court is whether the previous decision is

"manifestly wrong" in the narrow sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed: see, for example, *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149, at paragraph 10. The applicants argue that *Gitxaala* was manifestly wrong in deciding that the Board's report was not justiciable. The specific errors asserted are:

a. *Gitxaala* was manifestly wrong in holding that only "decisions about legal or practical interests are judicially reviewable". The Court did not address case law that has interpreted subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 more broadly.
b. The Court failed to deal with the prior decision of this Court in *Forestethics Advocacy v. Canada (Attorney General)*, 2014 FCA 71, 390 D.L.R. (4th) 376.
c. The Court failed to deal with prior jurisprudence of the Federal Court and this Court which did review environmental assessment reports prepared by a joint review panel.
d. The Court referred to provisions of the *Canadian Environmental Assessment Act, 2012* that were inapplicable.
e. The *Gitxaala* decision impermissibly thwarts the right to seek judicial review of the decision of the National Energy Board.

[172] I will deal with each argument in turn after first reviewing this Court's analysis in *Gitxaala*.

1. The decision of this Court in *Gitxaala*

[173] The Court's consideration of the justiciability of the report of the Joint Review Panel began with its detailed analysis of the legislative scheme (reasons, paragraphs 99 to 118). The Court then turned to consider the proper characterization of the legislative scheme, which the

Court described to be "a complete code for decision-making regarding certificate applications."

The Court then reasoned:

> [120] The legislative scheme shows that for the purposes of review the only meaningful decision-maker is the Governor in Council.
>
> [121] Before the Governor in Council decides, others assemble information, analyze, assess and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon. In this scheme, no one but the Governor in Council decides anything.
>
> [122] In particular, the environmental assessment under the *Canadian Environmental Assessment Act, 2012* plays no role other than assisting in the development of recommendations submitted to the Governor in Council so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued.
>
> [123] This is a different role—a much attenuated role—from the role played by environmental assessments under other federal decision-making regimes. It is not for us to opine on the appropriateness of the policy expressed and implemented in this legislative scheme. Rather, we are to read legislation as it is written.
>
> [124] Under this legislative scheme, the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation:
>
> - In the case of the report or portion of the report setting out the environmental assessment, subsection 29(3) of the *Canadian Environmental Assessment Act, 2012* provides that it is "final and conclusive," but this is "[s]ubject to sections 30 and 31." Sections 30 and 31 provide for review of the report by the Governor in Council and, if the Governor in Council so directs, reconsideration and submission of a reconsideration report by the Governor in Council.
>
> - In the case of the report under section 52 of the *National Energy Board Act*, subsection 52(11) of the *National Energy Board Act* provides that it too is "final and conclusive," but this is "[s]ubject to sections 53 and 54." These sections empower the Governor in Council to consider the report and decide what to do with it.
>
> [125] In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative

> scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, as set out above, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.
>
> [126] Under this legislative scheme, the National Energy Board also does not really decide anything, except in a formal sense. After the Governor in Council decides that a proposed project should be approved, it directs the National Energy Board to issue a certificate, with or without a decision statement. The National Energy Board does not have an independent discretion to exercise or an independent decision to make after the Governor in Council has decided the matter. It simply does what the Governor in Council has directed in its Order in Council.
>
> (underlining added)

[174] Having reviewed *Gitxaala*, I now turn to the asserted errors.

> 2. Was *Gitxaala* wrongly decided on this point?
>
> (a) Did the Court err by stating that only "decisions about legal or practical interests" are judicially reviewable?

[175] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by "anyone directly affected by the matter in respect of which relief is sought" (underlining added). In *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, this Court considered the scope of subsection 18.1(1) as follows:

> [24] Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply

> to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> …
>
> [28] The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> [29] One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, (2009), 86 Admin. L.R. (4th) 149.
>
> (underlining added)

[176] To similar effect, in *Democracy Watch v. Conflict of Interest and Ethics Commissioner*, 2009 FCA 15, 387 N.R. 365, the Court wrote, at paragraph 10, that when "administrative action does not affect an applicant's rights or carry legal consequences, it is not amenable to judicial review".

[177] On the basis of these authorities the City of Vancouver, supported by the City of Burnaby and Raincoast and Living Oceans, argues that this Court erred by writing in paragraph 125 in *Gitxaala* that only "decisions about legal or practical interests" are reviewable. The Court is said to have overlooked the established jurisprudence to the effect that "matter" as used in subsection 18.1(1) denotes a broader category than merely decisions.

[178] In my view, when the Court's analysis in *Gitxaala* is read in its entirety no such statement was made and no such error was made.

[179] In *Gitxaala*, the Court found that the only action to carry legal consequences was the decision of the Governor in Council. The environmental assessment conducted by the Joint Review Panel under the *Canadian Environmental Assessment Act, 2012* did not affect legal rights or carry legal consequences. Instead, the assessment played "no role other than assisting in the development of recommendations submitted to the Governor in Council" (reasons, paragraph 122). The same could be said of the balance of the report prepared pursuant to the requirements of the *National Energy Board Act*.

[180] Put another way, on the basis of the legislative scheme enacted by Parliament, the report of the Joint Review Panel constituted a set of recommendations to the Governor in Council that lacked any independent legal or practical effect. It followed that judicial review did not lie from it.

[181] Both the determination about the effect of the report of the Joint Review Panel and the conclusion that it was not justiciable were wholly consistent with *Air Canada* and *Democracy Watch*. It was therefore unnecessary for the Court to expressly deal with these decisions, or with subsection 18.1(1).

[182] To complete this analysis, I note that the City of Vancouver also argues that it was prejudiced because the report of the National Energy Board did not comply with section 19 of the *Canadian Environmental Assessment Act, 2012* and because the Board's process was unfair. However, any detrimental effects upon the City of Vancouver could have been remedied through a challenge to the decision of the Governor in Council; the City has not asserted that it suffered

any prejudice in the interval between the issuance of the Board's report and the issuance of the Order in Council by the Governor in Council.

(b) *Forestethics Advocacy v. Canada (Attorney General)*

[183] In this decision, a single Judge of this Court decided whether this Court or the Federal Court had jurisdiction to entertain applications for judicial review brought in respect of the Report of the Joint Review Panel for the Enbridge Northern Gateway Project. Justice Sharlow found jurisdiction to lie in this Court. The City of Vancouver argues that implicit in this decision is the conclusion the reports prepared by joint review panels under the *Canadian Environmental Assessment Act, 2012* are judicially reviewable.

[184] I respectfully disagree. At issue in *Forestethics* was the proper interpretation of section 28 of the *Federal Courts Act*. The Court made no finding about whether the report is amenable to judicial review—its only finding was that the propriety of the report (which would include whether it was amenable to judicial review) was a matter for this Court, not the Federal Court.

(c) The jurisprudence which reviewed environmental assessment reports

[185] The City of Vancouver also points to jurisprudence in which environmental assessment reports prepared by joint review panels were judicially reviewed, and argues that this Court erred by failing to deal with this jurisprudence. The authorities relied upon by Vancouver are: *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 F.C. 425, 15 Admin. L.R. (3d) 25, (F.C.); *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)*, [2000]

2 F.C.R. 263, (1999), 169 F.T.R. 298 (C.A.); *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, 80 Admin. L.R. (4th) 74; *Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General)*, 2012 FC 1520, 422 F.T.R. 299; and, *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463, 455 F.T.R. 1, rev'd on appeal, 2015 FCA 186, 475 N.R. 247.

[186] All of these authorities predate *Gitxaala*. They do not deal with the "complete code" of legislation that was before the Court in *Gitxaala*. But, more importantly, in none of these decisions was the availability of judicial review put in issue—this availability was assumed. In *Gitxaala* the Court reviewed the legislative scheme and explained why the report of the Joint Review Panel was not justiciable. The Court did not err by failing to refer to case law that had not considered this issue.

(d) The reference to inapplicable provisions of the *Canadian Environmental Assessment Act, 2012*

[187] The City of Vancouver also argues that *Gitxaala* is distinguishable because it dealt with section 38 of the *Canadian Environmental Assessment Act, 2012*, a provision that has no application to the process at issue here. The City also notes that *Gitxaala*, at paragraph 124, referred to sections 30 and 31 of the *Canadian Environmental Assessment Act, 2012*. These sections are said not to apply to the Joint Review Panel at issue in *Gitxaala*.

[188] I accept that pursuant to subsection 126(1) of the *Canadian Environmental Assessment Act, 2012* the environmental assessment of the Northern Gateway project (at issue in *Gitxaala*)

was continued under the process established under the *Canadian Environmental Assessment Act, 2012*. Subsection 126(1) specified that such continuation was to be as if the assessment had been referred to a review panel under section 38 of the *Canadian Environmental Assessment Act, 2012*, and that the Joint Review Panel which continued the environmental assessment was considered to have been established under section 40 of the *Canadian Environmental Assessment Act, 2012*.

[189] It followed that sections 29 through 31 of the *Canadian Environmental Assessment Act, 2012* did not apply to the Northern Gateway project, and ought not to have been referenced by the Court in *Gitxaala* in its analysis of the legislative scheme.

[190] This said, the question that arises is whether these references were material to the Court's analysis. To assess the materiality, if any, of this error I begin by reviewing the content of the provisions said to be erroneously referred to in *Gitxaala*.

[191] Section 29 of the *Canadian Environmental Assessment Act, 2012*, discussed above at paragraph 62, requires a responsible authority to ensure that its environmental assessment report sets out its recommendation to the Governor in Council concerning the decision the Governor in Council must make under paragraph 31(1)(*a*) of the *Canadian Environmental Assessment Act, 2012*. Section 30 allows the Governor in Council to refer any recommendation made by a responsible authority back to the responsible authority for reconsideration. Section 31 sets out the options available to the Governor in Council after it receives a report from a responsible authority. Paragraph 31(1)(*a*), discussed at paragraph 67 above, sets out the three choices

available to the Governor in Council with respect to its assessment of the likelihood that a project will cause significant adverse environmental effects and, if so, whether such effects can be justified.

[192] These provisions, without doubt, do apply to the Project at issue in these proceedings. Therefore, the Project is to be assessed under the legislative scheme analyzed in *Gitxaala*. It follows that *Gitxaala* cannot be meaningfully distinguished.

[193] As to the effect, if any, of the erroneous references in *Gitxaala*, the statutory framework applicable to the Northern Gateway project originated in three sources: the *National Energy Board Act*; the *Canadian Environmental Assessment Act, 2012*; and, transitional provisions found in section 104 of the *Jobs, Growth and Long-Term Prosperity Act*, S.C. 2012, c.19 (Jobs Act).

[194] Provisions relevant to the present analysis are:

- subsection 104(3) of the Jobs Act which required the Joint Review Panel to set out in its report an environmental assessment prepared under the *Canadian Environmental Assessment Act, 2012*;
- subsection 126(1) of the *Canadian Environmental Assessment Act, 2012* which continued the environmental assessment under the process established under that Act; and,
- paragraph 104(4)(*a*) of the Jobs Act which made the Governor in Council the decision-maker under section 52 of the *Canadian Environmental Assessment Act, 2012* (thus, it was for the Governor in Council to determine if the Project was likely to cause significant adverse environmental effects and, if so, whether such effects could be justified).

[195] These provisions are to the same effect as sections 29 and 31 of the *Canadian Environmental Assessment Act, 2012*. I dismiss the relevance of section 30 to this analysis because it had no application to the environmental assessment under review in *Gitxaala*. Further, and more importantly, section 30 played no significant role in the Court's analysis.

[196] It follows that the analysis in *Gitxaala* was based upon a proper understanding of the legislative scheme, notwithstanding the Court's reference to sections 29 and 31 of the *Canadian Environmental Assessment Act, 2012* instead of the applicable provisions.

[197] Put another way, the error was in no way material to the Court's analysis of the respective roles of the Joint Review Panel, which prepared the report to the Governor in Council, and the Governor in Council, which received the panel's recommendations and made the decisions required under the legislative scheme.

[198] Indeed, the technical nature of the erroneous references was acknowledged by Raincoast in its application for leave to appeal the *Gitxaala* decision to the Supreme Court of Canada. At paragraph 49 of its memorandum of argument it described the Court's error to be "technical in nature" (Trans Mountain's Compendium, volume 2, tab 35). To the same effect, Vancouver does not argue that the Court's error was material to its analysis. Vancouver simply notes the error in footnote 118 of its memorandum of fact and law.

[199] Accordingly, I see no error in the *Gitxaala* decision that merits departing from its analysis.

(e) *Gitxaala* thwarts review of the decision of the National Energy Board

[200] Finally, Vancouver argues that subsection 54(1) of the *National Energy Board Act* and 31(1) of the *Canadian Environmental Assessment Act, 2012* both make the Board's report a prerequisite to the decision of the Governor in Council. As the Governor in Council is not an adjudicative body, meaningful review must come in the form of judicial review of the report of the Board. The decision in *Gitxaala* thwarts such review.

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

(f) Conclusion on whether the report of the National Energy Board is amenable to judicial review

[202] For these reasons, I have concluded that the report of the National Energy Board is not justiciable. It follows that I would dismiss the six applications for judicial review which challenge that report. In the circumstance where the arguments about justiciability played a small part in the hearing I would not award costs in respect of these six applications.

[203] As the City of Vancouver did not seek and obtain leave to challenge the Order in Council, it follows that the City is precluded from challenging the Order in Council.

C. Should the decision of the Governor in Council be set aside on administrative law grounds?

1. The standard of review to be applied to the decision of the Governor in Council

[204] In *Gitxaala*, when considering the standard of review to be applied to the decision of the Governor in Council, the Court wrote that it was not legally permissible to adopt a "one-size-fits-all" approach to any particular administrative decision-maker. Rather, the standard of review must be assessed in light of the relevant legislative provisions, the structure of the legislation and the overall purpose of the legislation (*Gitxaala*, paragraph 137).

[205] I agree. Particularly in the present case it is necessary to draw a distinction between the standard of review applied to what I will refer to as the administrative law components of the Governor in Council's decision and that applied to the constitutional component which required

the Governor in Council to consider the adequacy of the process of consultation and, if necessary, accommodation. This is an approach accepted and urged by the parties.

(a) The administrative law components of the decision

[206] In *Gitxaala*, the Court conducted a lengthy standard of review analysis (*Gitxaala*, paragraphs 128-155) and concluded that, because the Governor in Council's decision was a discretionary decision founded on the widest considerations of policy and public interest, the standard of review was reasonableness (*Gitxaala*, paragraph 145).

[207] Canada, Trans Mountain and the Attorney General of Alberta submit that *Gitxaala* was correctly decided on this point.

[208] Tsleil-Waututh, Raincoast and Living Oceans submit that the governing authority is not *Gitxaala*, but rather is the earlier decision of this Court in *Council of the Innu of Ekuanitshit v. Canada (Attorney General*), 2014 FCA 189, 376 D.L.R. (4th) 348. In this case the Court found the reasonableness standard of review applied to a decision of the Governor in Council approving the federal government's response to a report of a joint review panel prepared under the now repealed *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (*Canadian Environmental Assessment Act, 1992*). The Court rejected the submission that the correctness standard applied to the question of whether the Governor in Council and the responsible authorities had respected the requirements of the *Canadian Environmental Assessment Act, 1992* before making their decisions under subsections 37(1) and 37(1.1) of that Act. Under these provisions the Governor in Council and the responsible authorities were required to review the

report of the joint review panel and determine whether the project at issue was justified despite its adverse environmental effects.

[209] This said, while deference was owed to decisions made pursuant to subsections 37(1) and 37(1.1), the Court wrote that "a reviewing court must ensure that the exercise of power delegated by Parliament remains within the bounds established by the statutory scheme." (*Innu of Ekuanitshit*, paragraph 44).

[210] To the submission that *Innu of Ekuanitshit* is the governing authority, Tsleil-Waututh adds two additional points: first and, in any event, the "margin of appreciation" approach followed in *Gitxaala* is no longer good law; and, second, issues of procedural fairness are to be reviewed on the standard of correctness. Tsleil-Waututh's additional submissions are adopted by the City of Burnaby.

[211] I see no inconsistency between the *Innu of Ekuanitshit* and *Gitxaala* for the following reasons.

[212] First, the Court in *Gitxaala* acknowledged that it was bound by *Innu of Ekuanitshit*. However, because of the very different legislative scheme at issue in *Gitxaala*, the earlier decision did not satisfactorily determine the standard of review to be applied to the decision of the Governor in Council at issue in *Gitxaala* (*Gitxaala*, paragraph 136). This Court did not doubt the correctness of *Innu of Ekuanitshit* or purport to overturn it.

[213] Second, in each case the Court determined the standard of review to be applied to the decision of the Governor in Council was reasonableness. It was within the reasonableness standard that the Court found in *Innu of Ekuanitshit* that the Governor in Council's decision must still be made within the bounds of the statutory scheme.

[214] Third, and finally, the conclusion in *Innu of Ekuanitshit* that a reviewing court must ensure that the Governor in Council's decision was exercised "within the bounds established by the statutory scheme" (*Innu of Ekuanitshit*, paragraph 44) is consistent with the requirement in *Gitxaala* that the Governor in Council must determine and be satisfied that the Board's process and assessment complied with the legislative requirements, so that the Board's report qualified as a proper prerequisite to the decision of the Governor in Council. Then, it is for this Court to be satisfied that the decision of the Governor in Council was lawful, reasonable and constitutionally valid. To be lawful and reasonable the Governor in Council must comply with the purview and rationale of the legislative scheme.

[215] Reasonableness review requires a court to assess whether the decision under review falls within a range of possible, acceptable outcomes which are defensible on the facts and the law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47).

[216] Reasonableness review is a contextual inquiry. Reasonableness "takes its colour from the context" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 59; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at paragraph 57); in every case the fundamental question "is the scope of decision-making power

conferred on the decision-maker by the governing legislation." (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at paragraph 18).

[217] Thus, when a court reviews a decision made in the exercise of a statutory power, reasonableness review requires the decision to have been made in accordance with the terms of the statute: see, for example, *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194, [2011] 3 F.C.R. 344, at paragraphs 29-30. Put another way, an administrative decision-maker is constrained in the outcomes it may reach by the statutory wording (*Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paragraph 21).

[218] The Supreme Court recently considered this in the context of a review of a decision of the Specific Claims Tribunal. The Tribunal is required by its governing legislation to adjudicate specific claims "in accordance with law and in a just and timely manner." The majority of the Court observed that the Tribunal's mandate expressly tethered "the scope of its decision-making power to the applicable legal principles." and went on to note that the "range of reasonable outcomes available to the Tribunal is therefore constrained by these principles" (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, 417 D.L.R. (4th) 239, at paragraphs 33-34).

[219] With respect to Tsleil-Waututh's two additional points, I believe the first point was addressed above. Reasonableness "takes its colour from the context." To illustrate, reasonableness review of a policy decision affecting many entities is of a different nature than

reasonableness review of, say, a decision on the credibility of evidence before an adjudication tribunal.

[220] The second point raises the question of the standard of review to be applied to questions of procedural fairness.

[221] As this Court noted in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, 474 N.R. 366, at paragraph 67, the standard of review for questions of procedural fairness is currently unsettled.

[222] As Trans Mountain submits, in cases such as *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75, at paragraphs 70-72, this Court has applied the standard of correctness with some deference to the decision-maker's choice of procedure (see also *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraphs 79 and 89).

[223] This said, in my view it is not necessary to resolve any inconsistency in the jurisprudence because, as will be explained below, even on a correctness review I find there is no basis to set aside the Order in Council on the basis of procedural fairness concerns.

(b) The constitutional component

[224] As explained above, a distinction exists between the standard of review applied to the administrative law components of the Governor in Council's decision and the standard applied to

the component which required the Governor in Council to consider the adequacy of the process of consultation with Indigenous peoples, and if necessary, accommodation.

[225] Citing *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at paragraphs 61-63, the parties agree that the existence and extent of the duty to consult are legal questions reviewable on the standard of correctness. The adequacy of the consultation is a question of mixed fact and law which is reviewable on the standard of reasonableness. I agree.

[226] Reasonableness review does not require perfect satisfaction (*Gitxaala*, paragraphs 182-183 and the cases cited therein). The question to be answered is whether the government action "viewed as a whole, accommodates the collective aboriginal right in question". Thus, "[s]o long as every reasonable effort is made to inform and to consult, such efforts would suffice." (*Haida Nation*, paragraph 62, citing *R. v. Gladstone*, [1996] 2 S.C.R. 723 and *R. v. Nikal*, [1996] 1 S.C.R. 1013). The focus of the analysis should not be on the outcome, but rather on the process of consultation and accommodation (*Haida Nation*, paragraph 63).

[227] Having set out the governing standards of review, I next consider the various flaws that are said to vitiate the decision of the Governor in Council.

2. Did the Governor in Council err in determining that the Board's report qualified as a report so as to be a proper condition precedent to the Governor in Council's decision?

[228] The Board's errors said to vitiate the decision of the Governor in Council were briefly summarized above at paragraph 128. For ease of reference I reorganize and repeat that the applicants variously assert that the Board erred by:

a. breaching the requirements of procedural fairness;
b. failing to decide certain issues before it recommended approval of the Project;
c. failing to consider alternatives to the Westridge Marine Terminal;
d. failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*; and,
e. erring in its treatment of the *Species at Risk Act*.

The effect of each of these errors is said to render the Board's report materially deficient such that it was not a "report" that the Governor in Council could rely upon. A decision made by the Governor in Council without a "report" before it must be unreasonable; the statute makes it clear that the Governor in Council can only reach a decision when informed by a "report" of the Board.

[229] I now turn to consider each alleged deficiency.

(a) Was the Board's process procedurally fair?

(i) Applicable legal principles

[230] The Board, as a public authority that makes administrative decisions that affect the rights, privileges or interests of individuals, owes a duty of procedural fairness to the parties before it. However, the existence of a duty of fairness does not determine what fairness requires in a particular circumstance.

[231] It is said that the concept of procedural fairness is eminently variable, and that its content is to be decided in the context and circumstances of each case. The concept is animated by the desire to ensure fair play. The purpose of the participatory rights contained within the duty of fairness has been described to be:

> … to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

(*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, at paragraph 22).

[232] In *Baker*, the Supreme Court articulated a non-exhaustive list of factors to be considered when determining what procedural fairness requires in a given set of circumstances: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme, including the existence of an appeal procedure; the importance of the decision to the

lives of those affected; the legitimate expectations of the person challenging the decision; and, the choice of procedures made by the decision-maker.

[233] Applying these factors, the City of Burnaby argues that the content of the procedural duty owed to it was significant.

[234] Other applicants and the respondents did not make submissions on the content of the procedural duty of fairness.

[235] Having regard to the adjudicative nature of the decision at issue, the court-like procedures prescribed by the *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208, the absence of an unrestricted statutory right of appeal (subsection 22(1) of the *National Energy Board Act* permits an appeal on a question of law or jurisdiction only with leave of this Court) and the importance of the Board's decision to the parties, I accept Burnaby's submission that the content of the duty of fairness owed by the Board to the parties was significant. The parties were entitled to a meaningful opportunity to present their cases fully and fairly. Included in the right to present a case fully is the right to effectively challenge evidence that contradicts that case. I will consider below more precisely the content of this duty.

[236] Having briefly summarized the legal principles that apply to issues of procedural fairness, I next enumerate the assertions of procedural unfairness.

(ii) The asserted breaches of procedural fairness

[237] The City of Burnaby asserts that the Board breached a duty of fairness owed to it by:

a. failing to hold an oral hearing;
b. failing to provide Burnaby with an opportunity to test Trans Mountain's evidence by cross-examination;
c. failing to require Trans Mountain to respond to Burnaby's written Information Requests and denying Burnaby's motions to compel further and better responses to the Information Requests;
d. delegating the assessment of critically important information until after the Board's report and the Governor in Council's decision;
e. failing to provide sufficient reasons concerning:
    i. alternative means of carrying out the Project;
    ii. the risks, including seismic risk, related to fire and spills;
    iii. the suitability of the Burnaby Mountain Tunnel;
    iv. the protection of municipal water sources; and,
    v. whether, and on what basis, the Project is in the public interest.

[238] Tsleil-Waututh submits that the Board breached the duty of fairness by restricting its ability to test Trans Mountain's evidence and by permitting Trans Mountain to file improper reply evidence.

[239] The Stó:lō submit that it was procedurally unfair to subject their witnesses who gave oral traditional Indigenous evidence to cross-examination when Trans Mountain's witnesses were not cross-examined.

[240] Squamish briefly raised the issue of inadequate response to their Information Request to Natural Resources Canada, and the Board's terse rejection of their requests for further and better responses from Natural Resources Canada, the Department of Fisheries and Oceans and Trans Mountain.

[241] Each assertion will be considered.

(iii) The failure to hold a full oral hearing and to allow cross-examination of Trans Mountain's witnesses

[242] It is convenient to deal with these two asserted errors together.

[243] The applicants argue that the Board's decision precluding oral cross-examination was "a stark departure from the previous practice for a project of this scale." (Burnaby's memorandum of fact and law, paragraph 160) that deprived the Board of an important and established method for determining the truth. The applicants argue that this was particularly unfair because Trans Mountain failed to participate in good faith in the Information Request process with the result that the process did not provide an effective, alternative method to test Trans Mountain's evidence.

[244] The respondents Canada and Trans Mountain answer that:

- The Board has discretion to determine whether a hearing proceeds as a written or oral hearing, and the Board is entitled to deference with respect to its choice of procedure.

- The process was tailored to take into account the number of participants, the volume of evidence and the technical nature of the information to be received by the Board.
- Many aspects of the hearing were conducted orally: the oral Indigenous traditional evidence, Trans Mountain's oral summary argument, the interveners' oral summary arguments and any reply arguments.
- Cross-examination is never an absolute right. A decision-maker may refuse or limit cross-examination so long as there is an effective means to challenge and test evidence.

[245] I acknowledge the importance of cross-examination at common law. However, because the content of the duty of fairness varies according to context and circumstances, the duty of fairness does not always require the right of cross-examination. For example, in a multi-party public hearing related to the public interest, fairness was held not to require oral cross-examination (*Unicity Taxi Ltd. v. Manitoba Taxicab Board* (1992), 80 Man. R. (2d) 241, [1992] 6 W.W.R. 35 (Q.B.); aff'd (1992) 83 Man. R. (2d) 305, [1992] M.J. No. 608 (C.A.)). The Court dismissed the allegation of unfairness because "in the conduct of multi-faceted and multi-party public hearings [cross-examination] tends to become an unwieldy and even dangerous weapon that may lead to disturbance, disruption and delay."

[246] Similarly, in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, the Supreme Court found that the Chippewas of the Thames were given an adequate opportunity to participate in the decision-making process of the Board (reasons, paragraph 51). This finding was supported by the Court's enumeration of the following facts: the Board held an oral hearing; provided early notice of the hearing process to affected Indigenous groups and sought their formal participation; granted intervener status to the

Chippewas of the Thames; provided participant funding to allow the Chippewas of the Thames to tender evidence and pose formal Information Requests to the project proponent, to which they received written responses; and permitted the Chippewas of the Thames to make oral closing submissions. No right of oral cross-examination was granted (reasons, paragraph 52), yet the process provided an adequate right to participate.

[247] These decisions are of course not determinative of the requirements of fairness in the present context.

[248] The relevant context is discussed by the Board in its Ruling No. 14, which dealt with a motion requesting that the hearing order be amended to include a phase for oral cross-examination of witnesses. After quoting an administrative law text to the effect that procedural fairness is not a fixed concept, but rather is one that varies with the context and the interest at stake, the Board wrote:

> Here, the context is that the Board will be making a recommendation to the Governor in Council. The recommendation will take into account whether the pipeline is and will be required by the present and future public convenience and necessity. The Board's recommendation will be polycentric in nature as it involves a wide variety of considerations and interests. Persons directly affected by the Application include Aboriginal communities, land owners, governments, commercial interests, and other stakeholders. The motion and several of the comments in support of it appear to place significant reliance on the potential credibility of witnesses. The Board notes that this is not a criminal or civil trial. The Board's hearing also does not involve an issue of individual liberty. It is a process for gathering and testing evidence for the Board's preparation, as an expert tribunal, of its recommendation to the Governor in Council about whether to issue a certificate under section 52 of the NEB Act. The Board will also be conducting an environmental assessment and making a recommendation under CEAA 2012.
>
> Hearing processes are designed individually and independently by the Board based on the specific circumstances of the application. Each process is designed to provide for a fair hearing, but the processes are not necessarily the same. For

this Application, the Hearing Order provides two opportunities to ask written information requests. There is also an opportunity to file written evidence, and to provide both written and oral final argument. For Aboriginal groups that also wish to present Aboriginal traditional evidence orally, there is an opportunity to do this.

Regarding the nature of the statutory scheme, section 8 of the NEB Act authorizes the Board to make rules about the conduct of hearings before the Board. The Rules provide that public hearings may be oral or written, as determined by the Board. The Board has previously held fully written hearings for section 52 oil and gas pipeline applications. Hearings can also be oral, with significant written components, as is the case here. In addition to the hearing procedures set out in the Rules, the Board makes rules about hearing procedures in its Hearing Order and associated rulings and bulletins.

….

Additional legislative requirements for the Board's public hearings are found in subsection 11(4) of the NEB Act, which requires that applications before the Board are to be dealt with as expeditiously as the circumstances and considerations of fairness permit, and within the time limit provided. This subsection of the NEB Act was added in 2012. For this Application, the legislated time limit, which is 15 months after the completeness determination is made, is 2 July 2015.

As the legislative time limits are recent, there is no legitimate expectation as to the hearing procedures that will be used to test the evidence. In this case, the Board has provided notice about the procedures that will apply.

In the Board's view, the legislation makes it clear that the Board is master of its own procedure and can establish its own procedures for each public hearing with regard to the conduct of hearings. This includes the authority to determine for a particular public hearing the manner in which evidence will be received and tested. In the circumstances of this hearing, where there are 400 intervenors and much of the information is technical in nature, the Board has determined that it is appropriate to test the evidence through written processes. All written evidence submitted will be subject to written questioning by up to 400 parties, and the Board.

(underlining added, footnotes omitted)

[249] Further aspects of the relevant context are discussed in the Board's final report at page 4:

For the Board's review of the Project application, the hearing had significant written processes as well as oral components. With the exception of oral traditional evidence described below, evidence was presented in writing, and

> testing of that evidence was carried out through written questions, known as Information Requests (IRs). Intervenors submitted over 15,000 questions to Trans Mountain over two major rounds of IRs. Hundreds of other questions were asked in six additional rounds of IRs on specific evidence. If an intervenor believed that Trans Mountain provided inadequate responses to its questions, it could ask the Board to compel Trans Mountain to provide a more complete response. Trans Mountain could do the same in respect of IRs it posed to intervenors on their evidence. There was also written questioning on various additional evidence, including supplemental, replacement, late and Trans Mountain's reply evidence.
>
> The Board decided, in its discretion in determining its hearing procedure, to allow testing of evidence by IRs and determined that there would not be cross examination in this hearing. The Board decided that, in the circumstances of this hearing where there were 400 intervenors and legislated time limits, and taking into consideration the technical nature of the information to be examined, it was appropriate to test the evidence through written processes. In the final analysis, the written evidence submitted was subjected to extensive written questioning by up to 400 participants and the Board. The Board is satisfied that the evidence was appropriately tested in its written process and that its hearing was fair for all parties and met natural justice requirements. …
>
> (underlining added, footnote omitted)

[250] Having set out the context relevant to determining the content of the duty of fairness, and the Board's discussion of the context, the next step is to apply the contextual factors enumerated in *Baker* to determine whether the absence of oral cross-examination was inconsistent with the participatory rights required by the duty of fairness. The heart of this inquiry is directed to whether the parties had a meaningful opportunity to present their case fully and fairly.

[251] Applying the first *Baker* factor, the nature of the Board's decision is different from a judicial decision. The Board is required to apply its expertise to the record before it in order to make recommendations about whether the Project is and will be required by public convenience and necessity, and whether the Project is likely to cause significant adverse environmental effects that can or cannot be justified in the circumstances. Each recommendation requires the Board to

consider a broad spectrum of considerations and interests, many of which depend on the Board's discretion. For example, subsection 52(2) of the *National Energy Board Act* requires the Board's recommendation to be based on "all considerations that appear to it to be directly related to the pipeline and to be relevant". The Board's environmental assessment is to take into account "any other matter relevant to the environmental assessment that the [Board] requires to be taken into account" (paragraph 19(1)(*j*) of the *Canadian Environmental Assessment Act, 2012*). The nature of the decision points in favour of more relaxed requirements under the duty of fairness.

[252] The statutory scheme also points to more relaxed requirements. The Board may determine that a pipeline application be dealt with wholly in writing (Rule 22(1), *National Energy Board Rules of Practice and Procedure, 1995*). The Board is required to deal with matters expeditiously, and within the legislated time limit. When the hearing order providing for Information Requests, not oral cross-examination, was issued on April 2, 2014, the Board was required to deliver its report by July 2, 2015. In legislating this time limit Parliament must be presumed to have contemplated that pipeline approval projects could garner significant public interest such that, as in this case, 400 parties successfully applied for leave to intervene. One aspect of the statutory scheme does point to a higher duty of fairness: the legislation does not provide for a right of appeal (save with leave on a question of law or jurisdiction). However, as discussed at length above, the Board's decision is subject to scrutiny in proceedings such as this.

[253] The importance of the decision is a factor that points toward a heightened fairness requirement.

[254] For the reasons given by the Board, I do not see any basis for a legitimate expectation that oral cross-examination would be permitted. To the Board's reasons I would add that such an expectation would be contrary to the Board's right to determine that an application be reviewed wholly in writing. While the Board did permit oral cross-examination in its review of the Northern Gateway Pipeline, in that case the Board's report discloses that intervener status was granted to 206 entities—roughly half the number of entities given intervener status in this case.

[255] Finally, the Board's choice of procedure, while not determinative, must be given some respect, particularly where the legislation gives the Board broad leeway to choose its own procedure, and the Board has experience in deciding appropriate hearing procedures.

[256] I note that when the Board rendered its decision on the request that it reconsider Ruling No. 14 so as to allow oral cross-examination, the applicants had received Trans Mountain's responses to their first round of Information Requests; many had brought motions seeking fuller and better answers. The Board ruled on the objections on September 26, 2014. Therefore, the Board was well familiar with the applicants' stated concerns, as is seen in Ruling No. 51 when it declined to reconsider its earlier ruling refusing to amend the hearing order to allow oral cross-examination.

[257] Overall, while the importance of the decision and the lack of a statutory appeal point to stricter requirements under the duty of fairness, the other factors point to more relaxed requirements. Balancing these factors, I conclude that the duty of fairness was significant. Nevertheless, the duty of fairness was not breached by the Board's decisions not to allow oral

cross-examination and not to allow a full oral hearing. The Board's procedure did allow the applicants a meaningful opportunity to present their cases fully and fairly.

[258] Finally on this issue, the Board allowed oral traditional Indigenous evidence because "Aboriginal people have an oral tradition that cannot always be shared adequately in writing." (Ruling No. 14, page 5). With respect to Stó:lō's concerns about permitting oral questioning of oral traditional evidence, the Board permitted "Aboriginal groups [to] choose to answer any questions in writing or orally, whichever is practical or appropriate by their determination." (Ruling No. 14, page 5). This is a complete answer to the concerns of the Stó:lō.

[259] I now turn to the next asserted breach of procedural fairness.

(iv) Trans Mountain's responses to the Information Requests

[260] The City of Burnaby and Squamish argue that Trans Mountain provided generic, incomplete answers to the Information Requests and the Board failed in its duty to compel further and better responses.

[261] During the oral hearing before this Court Burnaby reviewed in detail: Burnaby's first Information Request questioning Trans Mountain about its consideration of alternatives to expanding the pipeline, tank facilities and marine terminal in a major metropolitan area; Trans Mountain's response; the Board's denial of Burnaby's request for a fuller answer; Burnaby's second Information Request; Trans Mountain's response; the Board's denial of Burnaby's request for a fuller answer; the Board's first Information Request to Trans Mountain questioning

alternative means of carrying out the Project; Trans Mountain's response; the Board's second Information Request; and, Trans Mountain's response to the Board's second Information Request. Burnaby argues that Trans Mountain provided significantly more information to the Board than it did to Burnaby, but the information Trans Mountain provided was still insufficient.

[262] Squamish made brief reference in oral argument to the Board's failure to order fuller answers about the Crown's assessment of the strength of its claims to Aboriginal rights and title.

[263] As can be seen from Burnaby's oral submission, it brought motions before the Board to compel better answers in respect of both of Trans Mountain's responses to Burnaby's Information Requests.

[264] I begin consideration of this issue by acknowledging that most, but not all, of Burnaby's requests for fuller answers were denied by the Board. However, procedural fairness does not guarantee a completely successful outcome. The Board did order some further and better answers in respect of each motion. Burnaby must prove more than just that the Board did not uphold all of its objections.

[265] The Board's reasons for declining to compel further answers are found in two of the Board's rulings: Ruling No. 33 (A4 C4 H7) in respect of the first round of Information Requests directed to Trans Mountain by the interveners, and Ruling No. 63 (A4 K8 G4) in respect of the second round of the interveners' Information Requests. Each ruling was set out in the form of a letter which attached an appendix. The appendix listed each question included in the motions to

compel, organized by intervener, and provided "the primary reason" the motion to compel was granted or denied. Each ruling also provided in the body of the decision "overall comments about the motions and the Board's decision".

[266] The Board set out the test it applied when considering motions to compel in the following terms:

> …the Board looks at the relevance of the information sought, its significance, and the reasonableness of the request. The Board balances these factors so as to satisfy the purpose of the [Information Request] process, while preventing an intervenor from engaging in a 'fishing expedition' that could unfairly burden the applicant.

[267] In its decision the Board also provided general information describing circumstances that led it to decline to compel further answers. Of relevance are the following two situations:

- In some instances, Trans Mountain provided a full answer to the question asked, but the intervener disagreed with the answer. In these cases, rather than seeking to compel a further answer, the Board advised the interveners to file their own evidence in response or to provide their views during final argument.
- In some cases, Trans Mountain may not have answered all parts of an intervener's Information Request. However, in those cases where the Board was of the view that the response provided sufficient information and detail for the Board to consider the application, the Board declined to compel a further response.

[268] It is clear that the Board viewed Burnaby's requests for fuller answers about Trans Mountain's consideration and rejection of alternate locations for the marine terminal to fall within the second situation described above.

[269] The Board's second Information Request to Trans Mountain on this point was answered by Trans Mountain on July 21, 2014, and its answer was served upon all of the interveners. Therefore, the Board was aware of this response when on September 26, 2014, it rejected Burnaby's motion in Ruling No. 33.

[270] That the Board found Trans Mountain's answer to its second Information Request to be sufficient is reflected in the Board's report, where at pages 241 to 242 the Board relied on the content of Trans Mountain's response to its second Information Request to articulate Trans Mountain's consideration of the alternatives to the Westridge Marine Terminal. At page 244 of the report, the Board found Trans Mountain's "alternative means assessment" to be appropriate. The Board went on to acknowledge Burnaby's concern that Trans Mountain had not provided an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat or Roberts Bank. However, the Board disagreed, finding that "Trans Mountain has provided an adequate assessment, including consideration of the technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations."

[271] Obviously, Burnaby disagrees with this assessment. However, it has not demonstrated how the Board's conduct concerning Burnaby's Information Requests breached the requirements of procedural fairness. For example, Burnaby has not pointed to evidence that contradicted Trans Mountain's stated reasons for rejecting alternative marine terminal locations. Trans Mountain stated that its assessment was based on feasibility of coincident marine and pipeline access, and technical, economic and environmental considerations of the screened alternative locations. Any

demonstrated conflict in the evidence on these points may have supported a finding that meaningful participation required Trans Mountain to provide more detailed information.

[272] In support of its submission concerning procedural fairness Squamish pointed to a question it directed to Natural Resources Canada. It asked whether that entity had "assessed the strength of Squamish's claim to aboriginal rights in the area of the proposed Project" and if so, to provide "that assessment and any material upon which that assessment is based."

[273] The response Squamish received to its Information Request was:

> The Crown has conducted preliminary depth of consultation assessments for all Aboriginal groups, including Squamish Nation, whose traditional territory intersects with or is proximate to the proposed pipeline right of way, marine terminal expansion and designated marine shipping lanes. (Depth of consultation assessments consider both potential impacts to rights and the strength of claim to rights.) The Crown's depth of consultation assessment is iterative and is expected to evolve as the [Board] review process unfolds and as Aboriginal groups submit their evidence to the [Board] and engage in Phase III consultations with the Crown. The Crown has assessed depth of consultation for the Squamish Nation as "high." This preliminary conclusion was filed into evidence [by the Major Projects Management Office] on May 27, 2015.
>
> The starting point for these assessments is to work with information the Crown has in hand, but Squamish Nation is invited to provide information that they believe could assist the Crown in understanding the nature and scope of their rights.
>
> (underlining added)

[274] Squamish objected to the Board that its request was only partly addressed, and requested that Natural Resources Canada provide the material on which its assessment was based.

[275] In reply to Squamish's motion to compel a further answer, Natural Resources Canada responded:

> In the context of the current hearing process, it is the view of [the Major Projects Management Office] that the further information and records sought by Squamish Nation will not be of assistance to the Panel in fulfilling its mandate.
>
> However, the Crown will communicate with the Squamish Nation in August 2015 to provide further information on Phase III Crown consultation and the Crown's approach to considering adverse impacts of the Project on potential or established Aboriginal and treaty rights. This forthcoming correspondence will summarize the Crown's understanding of the strength of Squamish Nation's claim for rights and title.

[276] The Board denied Squamish's request for a fuller answer on the primary ground that the information Squamish sought "would not contribute to the record in any substantive way and, therefore, would not be material to the Board's assessment."

[277] Given the mandate of the Board, the iterative nature of the consultation process and the fact that direct Crown consultation would take place in Phase III following the release of the Board's report, Squamish has not shown that it was a breach of procedural fairness for the Board not to compel a fuller answer to its question.

(v) The asserted deferral and delegation of the assessment of important information

[278] The City of Burnaby next argues that the Board impermissibly deferred "the provision of critically important information to after the Report stage, and after the [Governor in Council's decision]" (memorandum of fact and law, paragraph 164). Burnaby says that by doing so, the Board acted contrary to the statutory regime and breached the principle of *delagatus non potest*

delgare. At this point in its submissions, Burnaby did not suggest what specific aspect of the statutory regime was contravened, or how the Board or the Governor in Council improperly delegated their statutory responsibility. At this stage, Burnaby deals with this as an issue of procedural fairness. I deal with the statutory scheme argument commencing at paragraph 322.

[279] Burnaby points to a number of issues where it alleges that the Board failed to weigh the evidence and expert opinions put before it. Burnaby says:

- It provided expert evidence that the Project presents serious and unacceptable safety risks to the neighbourhoods that are proximate to the Burnaby Terminal as a result of fire, explosion and boil-over, and that Trans Mountain had failed to assess these risks.
- It established gaps in Trans Mountain's geotechnical investigation of the tunnel option and a lack of analysis of the feasibility of the tunnel option.
- It identified significant information gaps with respect to the Westridge Marine Terminal, including gaps concerning: the final design; spill risk; fire risk; geotechnical risk; and, the ability to respond to these risks.
- It adduced evidence that the available fire response resources were inadequate.
- It demonstrated the risk to Simon Fraser University following an incident at the Burnaby Terminal because of the tunnel's proximity to the only evacuation route from the University.

[280] Burnaby argues that the Board declined to compel further information from Trans Mountain on these points, and instead imposed conditions that required Trans Mountain to do certain specified things in the future. For example, the Board imposed conditions requiring Trans Mountain to file with the Board for approval a report to revise the terminal risk assessments, including the Burnaby Terminal risk assessment, to include consideration of the risks not assessed (Board Conditions 22 and 129). Board Condition 22 had to be met at least six months

before Trans Mountain commenced construction; Condition 129 had to be met at least three months before Trans Mountain applied to open each terminal. Burnaby also notes that many conditions imposed by the Board were not subject to subsequent Board approval.

[281] Burnaby argues that this process prevented meaningful testing of information filed after the Board issued its report recommending that the Project be approved. Further, the Governor in Council did not have access to the material to be filed in response to the Board's conditions when it made its determination of the public interest.

[282] Underpinning these arguments is Burnaby's assertion that the "Board's rulings deprived Burnaby of the ability to review and assess the validity of the alternatives assessment (or to confirm that one was made)." (memorandum of fact and law, paragraph 41).

[283] I can well understand Burnaby's concern—the consequence of a serious spill or explosion and fire in a densely populated metropolitan area might be catastrophic. However, in my respectful view, Burnaby's understandable desire to be able to independently review and assess the validity of the assessment of alternatives to the expansion of the Westridge Marine Terminal, or other matters that affect the City, is inconsistent with the regulatory scheme enacted by Parliament. Parliament has vested in the Board the authority and responsibility to consider and then make recommendations to the Governor in Council on matters of public interest; the essence of the Board's responsibility is to balance the Project-related benefits against the Project-related burdens and residual burdens, and to then make recommendations to the Governor in Council. In this legislative scheme, the Board is not required to facilitate an interested party's

independent review and assessment of a project. It is not for this Court to opine on the appropriateness of the policy expressed and implemented in the *National Energy Board Act*. Rather, the Court's role is to apply the legislation as Parliament has enacted.

[284] The Supreme Court has recognized the Board's "expertise in the supervision and approval of federally regulated pipeline projects" and described the Board to be "particularly well positioned to assess the risks posed by such projects". The Supreme Court went on to note the Board's "broad jurisdiction to impose conditions on proponents to mitigate those risks" and to acknowledge that it is the Board's "ongoing regulatory role in the enforcement of safety measures [which] permits it to oversee long-term compliance with such conditions" (*Chippewas of the Thames First Nation*, paragraph 48). While the Supreme Court was particularly focused on the Board's expertise in the context of its ability to assess risks posed to Indigenous groups, the Board's expertise extends to the full range of risks inherent in the operation of a pipeline, including the risks raised by Burnaby.

[285] Burnaby's submission must be assessed in the light of the Board's approval process. I will set out the Board's approval process at some length because of the importance of this issue to the City of Burnaby and other applicants.

[286] The Board described its approval process in Section 1.3 of its report:

> Trans Mountain's Application was filed while the Project was at an initial phase of the regulatory lifecycle, as is typical of applications under section 52 of the NEB Act. As set out in the Board's Filing Manual, the Board requires a broad range of information when a section 52 application is filed. At the end of the hearing, the level of information available to the Board must be sufficient to allow it to make a recommendation to the GIC that the Project is or is not in the public

interest. There also must be sufficient information to allow the Board to draft conditions that would attach to any new and amended CPCNs, and other associated regulatory instruments (Instruments), should the Project be approved by the GIC.

The Board does not require final information about every technical detail during the application stage of the regulatory process. For example, much of the information filed with respect to the engineering design would be at the conceptual or preliminary level. Site-specific engineering information would not be filed with the Board until after the detailed routing is confirmed, which would be one of the next steps in the regulatory process should the Project be approved. Completion of the detailed design of the project, as well as subsequent construction and operations, would have to comply with:

- the NEB Act, regulations, including the National Energy Board Onshore Pipeline Regulations (OPR), referenced standards and applicable codes;
- the company's conceptual design presented, and commitments made in the Application and hearing proceedings; and
- conditions which the Board considers necessary.

The Board may impose conditions requiring a company to submit detailed information for review (and in some cases, for approval) by the Board before the company is permitted to begin construction. Further information, such as pressure testing results, could be required in future leave to open applications before a company would be permitted to begin pipeline operations. In compliance with the OPR, a company is also required to fully develop an emergency response plan prior to beginning operations. In some cases, the Board has imposed conditions with specific requirements for the development, content and filing of the emergency response plan (see Table 1). This would be filed and fully assessed at a condition compliance stage once detailed routing is known. Because the detailed routing information is necessary to perform this assessment, it would be premature to require a fully detailed emergency response plan to be filed at the time of the project application.

While the project application stage is important, as set out in Chapter 3, there are further detailed plans, studies and specifications that are required before the project can proceed. Some of these are subject to future Board approval, and others are filed with the Board for information, disclosure, and/or future compliance enforcement purposes. The Board's recommendation on the project application is not a final determination of all issues. While some hearing participants requested the final detailed engineering or emergency response plans, the Board does not require further detailed information and final plans at this stage of the regulatory lifecycle.

> To set the context for its reasons for recommendation, the Board finds it helpful to identify the fundamental consideration used in reaching any section 52 determination. The overarching consideration for the Board's public interest determination at the application stage is: can this pipeline be constructed, operated and maintained in a safe manner. The Board found this to be the case. While this initial consideration is fundamental, a finding that a pipeline could be constructed, operated and maintained in a safe manner does not mean a pipeline is necessarily in the public interest as there are other considerations that the Board must weigh, as discussed below. However, the analysis would go no further if the answer to this fundamental question were answered in the negative, as an unsafe pipeline can never be in the public interest.
>
> (underlining added, footnote omitted)

[287] The Board went on to describe how projects are regulated through their lifecycle in Chapter 3, particularly in Sections 3.1 to 3.5:

> 3.0 Regulating through the Project lifecycle
>
> The approval of a project, through issuance of one or more Certificate of Public Convenience and Necessity (CPCN) and/or orders incorporating applicable conditions, forms just one phase in the Board's lifecycle regulation. The Board's public interest determination relies upon the subsequent execution of detailed design, construction, operation, maintenance and, ultimately, abandonment of a project in compliance with applicable codes, commitments and conditions, such as those discussed in Chapter 1. Throughout the lifecycle of an approved project, as illustrated in Figure 4, the Board holds the pipeline company accountable for meeting its regulatory requirements in order to keep its pipelines and facilities safe and secure, and protect people, property and the environment. To accomplish this, the Board reviews or assesses condition filings, tracks condition compliance, verifies compliance with regulatory requirements, and employs appropriate enforcement measures where necessary to quickly and effectively obtain compliance, prevent harm, and deter future non-compliance.
>
> After a project application is assessed and the Board makes its section 52 recommendation (as described in Chapter 2, section 2.1), the project cannot proceed until and unless the Governor in Council approves the project and directs the Board to issue the necessary CPCN. If approved, the company would then prepare plans showing the proposed detailed route of the pipeline and notify landowners. A detailed route hearing may be required, subject to section 35 of the *National Energy Board Act* (NEB Act). The company would also proceed with the detailed design of the project and could be required to undertake additional studies, prepare plans or meet other requirements pursuant to NEB conditions on any CPCN or related NEB order. The company would be required to comply with

all conditions to move forward with its project, prior to and during construction, and before commencing operations. While NEB specialists would review all condition filings, those requiring approval of the Board would require this approval before the project could proceed.

Once construction is complete, the company would need to apply for the Board's permission (or "leave") to open the project and begin operations. While some conditions may apply for the life of a pipeline, typically the majority must be satisfied prior to beginning operations or within the first few months or years of operation. However, the company must continue to comply with the *National Energy Board Onshore Pipeline Regulations* (OPR) and other regulatory requirements to operate the pipeline safely and protect the environment.

…

If the Project is approved, the Board would employ its established lifecycle compliance verification and enforcement approach to hold Trans Mountain accountable for implementing the proposed conditions and other regulatory requirements during construction, and the subsequent operation and maintenance of the Project.

3.1 Condition compliance

If the Project is approved and Trans Mountain decides to proceed, it would be required to comply with all conditions that are included in the CPCNs and associated regulatory instruments (Instruments). The types of filings that would be required to fulfill the conditions imposed on the Project, if approved, are summarized in Table 4.

If the Project is approved, the Board would oversee condition compliance, make any necessary decisions respecting such conditions, and eventually determine, based on filed results of field testing, whether the Project could safely be granted leave to open.

Documents filed by Trans Mountain on condition compliance and related Board correspondence would be available to the public on the NEB website. All condition filings, whether or not they are for approval, would be reviewed and assessed to determine whether the company has complied with the condition, and whether the filed information is acceptable within the context of regulatory requirements and standards, best practices, professional judgement and the goals the condition sought to achieve. If a condition is "for approval," the company must receive formal approval, by way of a Board letter, for the condition to be fulfilled.

If a filing fails to fulfill the condition requirements or is determined to be inadequate, the Board would request further information or revisions from the company by a specified deadline, or may direct the company to undertake additional steps to meet the goals that the condition was set out to achieve.

> 3.2 Construction phase
>
> During construction, the Board would require Trans Mountain to have qualified inspectors onsite to oversee construction activities. The Board would also conduct field inspections and other compliance verification activities (as described in section 3.5) to confirm that construction activities meet the conditions of the Project approval and other regulatory requirements, to observe whether the company is implementing its own commitments and to monitor the effectiveness of the measures taken to meet the condition goals, and ensure worker and public safety and protection of the environment.
>
> 3.3 Leave to open
>
> If the Project is approved and constructed, the Board will require Trans Mountain to also apply, under section 47 of the NEB Act, for leave to open the pipelines and most related facilities. This is a further step that occurs after conditions applicable to date have been met and the company wishes to begin operating its pipeline and facilities. The Board reviews the company's submissions for leave to open, including the results of field pressure testing, and may seek additional information from the company. Before granting leave to open, the Board must be satisfied that the pipeline or facility has been constructed in compliance with requirements and that it can be operated safely. The Board can impose further terms and conditions on a leave to open order, if needed.
>
> (underlining added, figures and tables omitted)

[288] In Section 3.5 the Board set out its compliance and enforcement programs noting that:

> While all companies are subject to regulatory oversight, some companies receive more than others. In other words, high consequence facilities, challenging projects and those companies who are not meeting the Board's regulatory expectations and goals can expect to see the Board more often than those companies and projects with routine operations.

[289] No applicant challenged the accuracy of the Board's formulation of its approval process and subsequent compliance verification and enforcement approach. The City of Burnaby has not shown how the Board's multi-step approval process is either procedurally unfair or an improper delegation of authority. Implicit in the Board's imposition of a condition, such as a condition requiring a revised risk assessment, or a condition requiring information regarding tunnel

location, construction methods, and the like, is the Board's expectation that the condition may realistically be complied with, and that compliance with the condition will allow the pipeline to be constructed, operated and maintained in a safe manner. Also implicit in the Board's imposition of a condition is its understanding of its ability to assess condition filings (whether or not the condition requires formal approval), and its ability to oversee compliance with its conditions.

[290] Transparency with respect to Trans Mountain's compliance with conditions is provided by the Board publishing on its website all documents filed by Trans Mountain relating to condition compliance and all related, responsive Board correspondence.

[291] As for the role of the Governor in Council in such a tiered approval process, the recitals to the Order in Council show that the Board's conditions were placed before the Governor in Council. Therefore, the Governor in Council must be seen to have been aware of the extent of the matters left for future review by the Board, and to have accepted the Board's assessment and recommendation about the public interest on that basis.

(vi) Failing to provide adequate reasons

[292] The City of Burnaby next argues that the Board erred by failing to provide sufficient reasons on the following issues:

a. alternative means of carrying out the Project;
b. risks relating to fire and spills (including seismic risk);
c. the suitability of the Burnaby Mountain Tunnel;
d. the protection of municipal water sources; and,

e. whether, and on what basis, the Project is in the public interest.

[293] I begin my analysis by noting that the adequacy of reasons is not a "stand-alone basis for quashing a decision". Rather, reasons are relevant to the overall assessment of reasonableness. Further, reasons "must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paragraph 14).

[294] This is consistent with the Court's reasoning in *Dunsmuir* where the Supreme Court explained the notion of reasonableness review and spoke of the role reasons play in reasonableness review:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process

> of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" *(Canada (Attorney General) v. Mossop*, 2008 SCC 9, [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).
>
> (underlining added)

[295] Reasons need not include all of the relevant arguments, statutory provisions or jurisprudence. A decision-maker need not make an explicit finding on each constituent element leading to the final conclusion. Reasons are adequate if they allow the reviewing court to understand why the decision-maker made its decision and permit the reviewing court to determine whether the conclusion is within the range of acceptable outcomes.

[296] I now turn to consider Burnaby's submissions in the context of the Board's reasons.

Alternative means of carrying out the Project

[297] Burnaby's concern about alternative means of carrying out the Project centers on the Board's treatment of alternative locations for the marine terminal. In Section 11.1.2 the Board dealt with the requirement imposed by paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012* that an environmental assessment of a designated project must take into account "alternative means of carrying out the designated project that are technically and economically feasible". The views of the Board are expressed in this section on pages 244 through 245.

[298] Of particular relevance to Burnaby's concern are the first two paragraphs of the Board's reasons:

> The Board finds that Trans Mountain's route selection process, route selection criteria, and level of detail for its alternative means assessment are appropriate. The Board further finds that aligning the majority of the proposed pipeline route alongside, and contiguous to, existing linear disturbances is reasonable, as this would minimize the environmental and socio-economic impacts of the Project.
>
> The Board acknowledges the concern raised by the City of Burnaby that Trans Mountain did not provide an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat, B.C., or Roberts Bank in Delta, B.C. The Board finds that Trans Mountain has provided an adequate assessment, including consideration of technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations.

[299] In my view, these reasons allowed the Governor in Council and allow this Court to know why the Board found Trans Mountain's assessment of alternative means to be adequate or appropriate—the Board accepted the facts conveyed by Trans Mountain and found that these facts provided an appropriately detailed consideration of the alternative means. In my further view, the reasons, when read with the record, also allow the Court to consider whether the Board's treatment of alternatives to the Westridge Marine Terminal were so materially flawed that the Board's report was not a "report" that the Governor in Council could rely upon. This is a substantive issue I deal with below commencing at paragraph 322.

Assessment of risks

[300] Burnaby's concerns about the assessment of risks centre on the Burnaby Terminal risk assessment, the Westridge Marine Terminal risk assessment, the Emergency Fire Response plan and the evacuation of Simon Fraser University.

Burnaby Terminal

[301] The Board's consideration of terminal expansions generally is found in Section 6.4 of its report. The Burnaby Terminal is discussed at pages 92 through 95 of the Board's report. After setting out the evidence, including Burnaby's evidence, at page 95 the Board expressed its reasons on the Burnaby Terminal as follows:

> The Burnaby Terminal is uphill of the neighborhood of Forest Grove. An issue of potential concern is the possibility, however remote, of a multiple-tank failure in a common impounding area exceeding the available secondary containment capacity under certain conditions. The Board would impose a condition requiring Trans Mountain to demonstrate that the secondary containment system would be capable of draining large spills away from Tank 96, 97 or 98 to the partial RI. Trans Mountain must also demonstrate that the secondary containment system has the capacity to contain a spill from a multiple-tank rupture scenario (Condition 24).
>
> The City of Burnaby and the City of Burnaby Fire Department raised concerns about fire and safety risks at the Burnaby Terminal following, in particular, those associated with boil-overs. Trans Mountain claimed that boil-over events are unlikely, yet did not quantify the risks through rigorous analysis. The Board is of the view that a complete assessment of risk requires consideration of the cumulative risk from all tanks at a terminal. The Board would impose conditions requiring Trans Mountain to revise the terminal risk assessments, including the Burnaby Terminal, to demonstrate how the mitigation measures will reduce the risks to levels that are As Low As Reasonably Practicable (ALARP) while complying with the Major Industrial Accidents Council of Canada (MIACC) criteria considering all tanks in each respective terminal (Conditions 22 and 129).

[302] With respect to the geotechnical design, the Board wrote at page 97:

> The Board acknowledges the concerns of participants regarding the preliminary nature of the geotechnical design evidence provided. However, the Board is of the view that the design information and the level of detail provided by Trans Mountain with respect to the geotechnical design for the Edmonton Terminal West Tank Area and the Burnaby Terminal are sufficient for the Board at the application stage. The Board notes that more extensive geotechnical work will be completed for the detailed engineering and design phase of the Project.
>
> …

> With regard to the selection of Seismic Use Group (SUG) for the design of the tanks, the Board notes that Trans Mountain has not made a final determination. Nevertheless, should the Project be approved, the Board will verify that Trans Mountain's tanks have secondary controls to prevent public exposure, in accordance with SUG I design criteria, by way of Conditions 22, 24 and 129.

[303] In my view, these reasons adequately allow the Court to understand why the Board rejected Burnaby's evidence and why it imposed the conditions it did.

Westridge Marine Terminal

[304] The Board dealt with the Westridge Marine Terminal expansion in Section 6.5 of its report.

[305] The Board expressed its views at pages 100 through 102. With respect to the design approach the Board wrote:

> Trans Mountain has committed to design, construct, and operate the Westridge Marine Terminal (WMT) in accordance with applicable regulations, standards, codes and industry best practices. The Board accepts Trans Mountain's design approach, including Trans Mountain's effort to eliminate two vapour recovery tanks in the expanded WMT by modifying the vapour recovery technology. The Board considers this to be a good approach for eliminating potential spills and fire hazards. The Board would impose Condition 21 requiring Trans Mountain to provide its decision as well as its rationale to either retain or eliminate the proposed relief tank.

[306] With respect to the geotechnical design, the Board wrote:

> The Board acknowledges the City of Burnaby's concern regarding the level of detail of the geotechnical information provided in the hearing for the Westridge Marine Terminal (WMT) offshore facilities. However, the Board is of the view that Trans Mountain has demonstrated its awareness of the requirements for the geotechnical design of the offshore facilities and accepts Trans Mountain's geotechnical design approach.

> To confirm that soil conditions have been adequately assessed for input to the final design of the WMT offshore facilities, the Board would impose conditions requiring Trans Mountain to file a final preliminary geotechnical report for the design of the offshore facilities, and the final design basis for the offshore pile foundation layout once Trans Mountain has selected the pile design (Conditions 34 and 83).
>
> To verify the geotechnical design approach for the WMT onshore facilities the Board would impose Condition 33 requiring Trans Mountain to file a preliminary geotechnical report for the onshore facilities prior to the commencement of construction.
>
> The Board would examine the geotechnical reports upon receipt and advise Trans Mountain of any further requirements for the fulfilment of the above conditions prior to the commencement of construction.

[307] I have previously dealt with Burnaby's concern with the Board's failure to compel further and better information from Trans Mountain at the hearing stage, and to instead impose conditions requiring Trans Mountain to do certain things in future. Burnaby's concerns relating to the assessment of risks centre on this approach taken by the Board. Burnaby has not demonstrated how the Board's reasons with respect to the Westridge Marine Terminal risk assessment are inadequate.

Emergency fire response

[308] The Board responded to Burnaby's concerns about adequate resources to respond to a fire as follows at page 156:

> The Board shares concerns raised by the City of Burnaby Fire Department and others about the need for adequate resources to respond in the case of a fire. The Board finds the 6-12 hour response time proposed by Trans Mountain for industrial firefighting contractors to arrive on site as inadequate, should they be needed immediately for a response to a fire at the Burnaby Terminal. The Board would impose conditions requiring Trans Mountain to complete a needs assessment with respect to the development of appropriate firefighting capacity for a safe, timely, and effective response to a fire at the Westridge Marine Terminal (WMT) and at the Edmonton, Sumas, and Burnaby Terminals. The

> conditions would require Trans Mountain to assess and evaluate resources and equipment to address fires, and a summary of consultation with appropriate municipal authorities and first responders that will help inform a Firefighting Capacity Framework (Conditions 118 and 138).

[309] Again, Burnaby's concern is not so much with respect to the adequacy of the Board's reasons, but rather with the Board's approach to dealing with Burnaby's concerns through the imposition of conditions—in this case conditions that do not require formal Board approval. On this last point, the Board's explanation of its process for the review of conditions supports the conclusion that an inadequate response to a condition, even a condition not requiring formal Board approval, would be detected by the Board's specialists. Further, the Board oversees compliance with the conditions it imposes.

[310] In any event, I see no inadequacy in the Board's reasons.

Suitability of the Burnaby Mountain Tunnel

[311] The Board deals with the Burnaby Mountain Tunnel in Sections 6.2.2 and 6.2.3. The Board's views, in part, are expressed as follows at pages 81 and 82:

> Regarding the City of Burnaby's concern with Trans Mountain's geotechnical investigation, the Board is of the view that the level of detail of the geotechnical investigation for the tunnel option is sufficient for the purpose of assessing the feasibility of constructing the tunnel. The Board notes that a second phase of drilling is planned for the development of construction plans at the tunnel portals, and that additional surface boreholes or probe holes could be drilled from the tunnel face during construction. The Board is of the view that both the tunnel and street options are technically feasible, and accepts Trans Mountain's proposal that the streets option be considered as an alternative to the tunnel option.
>
> The Board is not aware of the use of the concrete or grout-filled tunnel installation method for other hydrocarbon pipelines in Canada. The Board is concerned that damage to the pipe or coating may occur during installation of the pipelines or grouting, and that there will be limited accessibility for future maintenance and

> repairs. The Board is also concerned that there may be voids or that cracks could form in the grout. The Board would require Trans Mountain to address these and other matters, including excavation, pipe handing, backfilling, pressure testing, cathodic protection, and leak detection, through the fulfillment of Conditions 26, 27 and 28 on tunnel design, construction, and operation.
>
> The Board would impose Condition 29 regarding the quality and quantity of waste rock from the tunnel and Trans Mountain's plans for its disposal.
>
> The Board would also impose Condition 143 requiring Trans Mountain to conduct baseline inspections, including in-line inspection surveys, of the new delivery pipelines in accordance with the timelines and descriptions set out in the condition. The Board is of the view that these inspections would aid in mitigating any manufacturing and construction related defects, and in establishing re-inspection intervals.

[312] Burnaby has not demonstrated how these reasons are inadequate.

Protection of municipal water sources

[313] While Burnaby enumerated this as an issue on which the Board gave inadequate reasons, Burnaby made no submissions on this point and did not point to any particular section of the Board's reasons said to be deficient. In the absence of submissions on the point, Burnaby has not demonstrated the reasons to be inadequate.

Public interest

[314] Again, while Burnaby enumerated this issue as an issue on which the Board gave inadequate reasons, Burnaby made no submissions on the point.

[315] The Board's finding with respect to public interest is contained in Chapter 2 of the Board's report where, among other things, the Board described the respective benefits and burdens of the Project and then balanced the benefits and burdens in order to conclude that the

Project “is in the present and future public convenience and necessity, and in the Canadian public interest”. In the absence of submissions on the point, Burnaby has not demonstrated the reasons to be inadequate.

(vii) Trans Mountain’s reply evidence

[316] At paragraph 71 of its memorandum of fact and law, Tsleil-Waututh makes the bare assertion that the Board “permitted [Trans Mountain] to file improper reply evidence”. While Tsleil-Waututh referenced in a footnote its motion record filed in response to Trans Mountain’s reply evidence, it did not make any submissions on how the Board erred or how the reply evidence was improper. Nor did Tsleil-Waututh reference the Board’s reasons issued in response to its motion.

[317] Tsleil-Waututh argued before the Board that, rather than testing Tsleil-Waututh’s evidence through Information Requests, Trans Mountain filed extensive new or supplementary evidence in reply. Tsleil-Waututh alleged that the reply evidence was substantially improper in nature. Tsleil-Waututh sought an order striking portions of Trans Mountain’s reply evidence. In the alternative Tsleil-Waututh sought, among other relief, an order allowing it to issue Information Requests to Trans Mountain about its reply evidence and allowing it to file sur-reply evidence.

[318] The Board, in Ruling No. 96, found that Trans Mountain’s reply evidence was not improper. In response to the objections raised before it, the Board found that:

- Trans Mountain's reply evidence was not evidence that Trans Mountain ought to have brought forward as evidence-in-chief in order to meet its onus.
- Trans Mountain's reply evidence was filed in response to new evidence adduced by the interveners.
- Given the large volume of evidence filed by the interveners, the length of Trans Mountain's reply evidence was not a sufficient basis on which to find it to be improper.
- To the extent that portions of the reply evidence repeated evidence already presented, this caused no prejudice to the interveners who had already had an opportunity to test the evidence and respond to it.

[319] The Board allowed Tsleil-Waututh to test the reply evidence through one round of Information Requests. The Board noted that the final argument stage was the appropriate stage for interveners and Trans Mountain to make submissions to the Board about the weight to be given to the evidence.

[320] Tsleil-Waututh has not demonstrated any procedural unfairness arising from the Board's dismissal of its motion to strike portions of Trans Mountain's reply evidence.

(viii) Conclusion on procedural fairness

[321] For all the above reasons the applicants have not demonstrated that the Board breached any duty of procedural fairness.

(b) Did the Board fail to decide certain issues before recommending approval of the Project?

[322] Both Burnaby and Coldwater make submissions on this issue. Additionally, Coldwater, Squamish and Upper Nicola make submissions about the Board's failure to decide certain issues in the context of the Crown's duty to consult. The latter submissions will be considered in the analysis of the adequacy of the Crown's consultation process.

[323] Burnaby's and Coldwater's submissions may be summarized as follows.

[324] Burnaby raises two principal arguments: first, the Board failed to consider and assess the risks and impacts of the Project to Burnaby, instead deferring the collection of information relevant to the risks and impacts and consideration of that information until after the decision of the Governor in Council when Trans Mountain was required to comply with the Board's conditions; and, second, the Board failed to consider alternative means of carrying out the Project and their environmental effects. Instead, contrary to paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012*, the Board failed to require Trans Mountain to include with its application an assessment of the Project's alternatives and failed to require Trans Mountain to provide adequate answers in response to Burnaby's multiple Information Requests about alternatives to the Project.

[325] With respect to the first error, Burnaby asserts that it is a "basic principle of law that a tribunal or a court must weigh and decide conflicting evidence. It cannot defer determinations post-judgment." (Burnaby's memorandum of fact and law, paragraph 142). In breach of this

principle, the Board did not require Trans Mountain to provide further evidence, nor did the Board weigh or decide conflicting evidence. Instead, the Board deferred assessment of critical issues by imposing a series of conditions on Trans Mountain.

[326] With respect to the second error, Burnaby states that Trans Mountain failed to provide evidence about alternative routes and locations for portions of the Project, including the Burnaby Terminal and the Westridge Marine Terminal. Thus, Burnaby says the Board "had no demonstrated basis on the record to decide" about preferred options or to decide that Trans Mountain used "criteria that justify and demonstrate how the proposed option was selected and why it is the preferred option." (Burnaby's memorandum of fact and law, paragraph 133).

[327] Coldwater asserts that contrary to paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012*, the Board failed to look at the West Alternative as an alternative means of carrying out the Project. Briefly stated, the West Alternative is an alternative route for a segment of the new pipeline. The approved route for this segment of the new pipeline passes through the recharge zone of the aquifer that supplies the sole source of drinking water for 90% of the residents of the Coldwater Reserve and crosses two creeks which are the only known, consistent sources of water that feed the aquifer. The West Alternative is said by Coldwater to pose the least apparent danger to the aquifer.

[328] Trans Mountain responds that the Board considered the risks and impacts of the Project to Burnaby and determined that there was sufficient evidence to conclude that the Project can be constructed, operated and maintained in a safe manner. Further, it was reasonable for the Board

to implement conditions requiring Trans Mountain to submit additional information for Board review or approval throughout the life of the Project. This Court's role is not to reweigh evidence considered by the Board.

[329] Trans Mountain notes that the proponent's application and the subsequent Board hearing represent the process by which the Board collects enough information to ensure that a project can be developed safely and that its impacts are mitigated. At the end of the hearing, the Board requires sufficient information to assess the Project's impacts, and whether the Project can be constructed, operated and maintained safely, and to draft terms and conditions to attach to a certificate of public convenience and necessity, should the Governor in Council approve the Project. It follows that the Board did not improperly defer its consideration of Project impacts to the conditions.

[330] To the extent that some applicants suggest that the Board acted contrary to the "precautionary principle" Trans Mountain responds that the precautionary principle must be applied with the corollary principle of "adaptive management". Adaptive management responds to the difficulty, or impossibility, of predicting all of the environmental consequences of a project on the basis of existing knowledge. Adaptive management permits a project with uncertain, yet potentially adverse, environmental impacts to proceed based on mitigation measures and adaptive management techniques designed to identify and deal with unforeseen effects (*Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, 2003 FCA 197, [2003] 4 F.C. 672, at paragraph 24).

[331] With respect to the assessment of alternative means, Trans Mountain notes that it presented evidence that it had conducted a feasibility analysis of alternative locations to the Westridge Marine Terminal and the Burnaby Terminal. Based on technical, economic and environmental considerations Trans Mountain had eliminated these options because of the significantly increased costs and larger environmental impacts associated with these alternatives.

[332] Trans Mountain also argues that it presented evidence to confirm that its routing criteria followed the existing pipeline alignment and other linear facilities wherever possible. Additionally, it presented various routing alternatives to the Board. Trans Mountain's preferred corridor through Burnaby Mountain was developed in response to requests that it consider a trenchless option through Burnaby Mountain (as opposed to routing the new pipeline through residential streets). Further, while it had initially considered the West Alternative route around the Coldwater Reserve, Trans Mountain rejected this alternative because it necessitated two crossings of the Coldwater River and involved geo-technical challenges and greater environmental disturbances.

[333] Based on the evidence before it the Board found that:

- Trans Mountain provided an adequate assessment of technically and economically feasible alternatives, including alternative locations;
- the Burnaby Mountain corridor minimized Project impacts and risks;
- Trans Mountain's route selection process and criteria, and the level of detail it provided for its alternative means assessment, were appropriate; and
- the Board imposed Condition 39 to deal with Coldwater's concerns regarding the aquifer. This condition required Trans Mountain to file with the Board, at least six months prior to commencing construction between two specified points, a

> hydrogeological report relating to Coldwater's aquifer. This report must describe, delineate and characterize a number of things. For example, based on the report's quantification of the risks posed to the groundwater supplies for the Coldwater Reserve, the report must "describe proposed measures to address identified risks, including but not limited to considerations related to routing, project design, operational measures, or monitoring".

[334] Trans Mountain submits that while the applicants disagree with the Board's finding about the range of alternatives, the Board has discretion to determine the range of alternatives it must consider and it is not this Court's role to reweigh the Board's assessment of the facts.

(i) Did the Board fail to assess the risks and impacts posed by the Project to Burnaby?

[335] At paragraphs 278 to 291 I dealt with Burnaby's argument that the Board breached the duty of procedural fairness by deferring and delegating the assessment of important information. This argument covers much of the same ground, except it is not couched in terms of procedural fairness.

[336] The gist of Burnaby's concern is reflected in its argument that "[i]t is a basic principle of law that a tribunal or court must weigh and decide conflicting evidence. It cannot defer determinations post-judgment."

[337] This submission is best considered in concrete terms. The risks the Board is said not to have assessed are the risks posed by the Burnaby Terminal, the tunnel route through Burnaby Mountain, the Westridge Marine Terminal, the lack of available emergency fire response

resources to respond to a fire at the Westridge Marine and Burnaby terminals and, finally, the risk in relation to the evacuation of Simon Fraser University following an incident at the Burnaby Terminal. Illustrative of Burnaby's concerns is its specific and detailed argument with respect to the assessment of the risk associated with the Burnaby Terminal.

[338] With respect to the assessment of the risks associated with the Burnaby Terminal, Burnaby points to the report of its expert, Dr. Ivan Vince, which identified deficiencies or information gaps in Trans Mountain's risk assessment for the Burnaby Terminal. A second report prepared by Burnaby's Deputy Fire Chief identified gaps in Trans Mountain's analysis of fire risks and fire response capability.

[339] Burnaby acknowledges that the Board recognized these gaps and deficiencies. Thus, it found that while Trans Mountain claimed that boil-over events are unlikely, Trans Mountain "did not quantify the risks through a rigorous analysis" and that "a complete assessment of risk requires consideration of the cumulative risk from all tanks at a terminal". Burnaby argues, however, that despite recognizing this deficiency, the Board then failed to require Trans Mountain to provide further information and assessment prior to the issuance of the Board's report. Instead, the Board imposed conditions requiring Trans Mountain to file for the Board's approval a report revising the terminal risk assessments, including the Burnaby Terminal risk assessment, and including consideration of the risks not assessed (Conditions 22 and 129).

[340] Condition 22 specifically required the revised risk assessment to quantify and/or include the following:

a. the effect of any revised spill burn rates;
b. the potential consequences of a boil-over;
c. the potential consequences of flash fires and vapour cloud explosions;
d. the cumulative risk based on the total number of tanks in the terminal, considering all potential events (pool fire, boil-over, flash fire, vapour cloud explosion);
e. the domino (knock-on) effect caused by a release of the contents of one tank on other tanks within the terminals and impoundment area(s), or other tanks in adjacent impoundment areas; and,
f. risk mitigation measures, including ignition source control methods.

[341] The Board required that for those risks that could not be eliminated "Trans Mountain must demonstrate in each risk assessment that mitigation measures will reduce the risks to levels that are As Low As Reasonably Practicable (ALARP) while complying with the Major Industrial Accidents Council of Canada (MIACC) criteria for risk acceptability."

[342] Burnaby concludes its argument on this point by stating that this demonstrates that when the Board completed its report and made its recommendation to the Governor in Council the Board did not have information on the risks enumerated in Condition 22, or information on whether these risks could be mitigated. It follows, Burnaby submits, that the Board failed in its duty to weigh and decide conflicting evidence.

[343] Burnaby advances similar arguments in respect of the other risks described above.

[344] In my view, Burnaby's argument illustrates that the Board did look critically at the competing expert evidence about risk assessment. After weighing the competing expert reports, the Board determined that Burnaby's evidence did reveal gaps and deficiencies in Trans

Mountain's risk assessments. Burnaby's real complaint is not that the Board did not consider and weigh conflicting evidence. Rather, its complaint is that the Board did not then require Trans Mountain to in effect re-do its risk assessment.

[345] However this, in my respectful view, overlooks the Board's project approval process, a process described in detail at paragraphs 285 to 287 above.

[346] This process does not require a proponent to file in its application information about every technical engineering detail. What is required is that by the end of the Board's hearing the Board have sufficient information before it to allow it to form its recommendation to the Governor in Council about whether the project is in the public interest and, if approved, what conditions should attach to the project. Included in the consideration of the public interest is whether the project can be constructed, operated and maintained safely.

[347] This process reflects the technical complexity of projects put before the Board for approval. What was before the Board for consideration was Trans Mountain's study and application for approval of a 150 metre-wide pipeline corridor for the proposed pipeline route. At the hearing stage much of the information filed with the Board about the engineering design was at a conceptual or preliminary level.

[348] Once a project is approved, one of the next steps in the regulatory process is a further hearing for the purpose of confirming the detailed routing of a project. Only after the detailed route is approved by the Board can site-specific engineering information be prepared and filed

with the Board. Similarly, detailed routing information is necessary before things such as a fully detailed emergency response plan acceptable to the Board may be prepared and filed (report, page 7).

[349] The Board describes the approval of a project to be "just one phase" in the Board's lifecycle regulation. Thereafter the Board's public interest determination "relies upon the subsequent execution of detailed design, construction, operation, maintenance and, ultimately, abandonment of a project in compliance with applicable codes, commitments and conditions" (report, page 19).

[350] As stated above, implicit in the Board's imposition of a condition is the Board's expert view that the condition can realistically be complied with, and that compliance with the condition will allow the pipeline to be constructed, operated and maintained in a safe manner. After the Board imposes conditions, mechanisms exist for the Board to assess information filed in response to its conditions and to oversee compliance with its conditions.

[351] Burnaby obviously disagrees with the Board's assessment of risk. However, Burnaby has not shown that the Board's approval process is in any way contrary to the legislative scheme. Nor has it demonstrated that the approval process impermissibly defers determinations post-judgment. Courts cannot determine issues after a final judgment is rendered because of the principle of *functus officio*. While this principle has some application to administrative decision-makers it has less application to the Board whose mandate is ongoing to regulate through a project's entire lifecycle.

(ii) Did the Board fail to consider alternative means of carrying out the Project?

[352] As explained above, Burnaby's concern is that Trans Mountain did not provide sufficient information to allow the Board to conclude that Trans Mountain's assessment of alternatives was adequate. Burnaby says that the Board simply accepted Trans Mountain's unsupported assertion that the alternatives would result in "significantly greater cost, larger footprint and additional environmental effects, as compared to expanding existing facilities" without testing Trans Mountain's assertion. Burnaby argues that evidence is required to support that assertion "so that the evidence may be tested by intervenors and weighed by the Board in determining whether the preferred location is the best environmental alternative and in the public interest." (Burnaby's memorandum of fact and law, paragraph 136).

[353] I begin consideration of Burnaby's submission with the observation that Burnaby's challenge is a challenge to the Board's assessment of the sufficiency of the evidence before it. The Board, as an expert Tribunal, is entitled to significant deference when making such a fact-based assessment.

[354] Moreover, in my respectful view, Burnaby's submission fails to take into account that paragraph 19(1)(*g*) of the *Canadian Environmental Assessment Act, 2012* does not require the Board to have regard to any and all alternative means of carrying out a designated project. The Board is required to consider only those alternative means that are "technically and economically feasible".

[355] While Burnaby relies upon guidance from the Canadian Environmental Assessment Agency as to the steps to be followed in the assessment of alternative means, and also relies upon the guidance set out in the Board's Filing Manual about the filing requirements for the consideration of alternatives, these criteria apply only to the treatment of true alternatives, that is alternatives that are technically and economically feasible.

[356] I now turn to Burnaby's specific concern that the Board simply accepted Trans Mountain's assertion that Project alternatives would result in "significantly greater cost, larger footprint and additional environmental effects, as compared to expanding existing facilities" without testing this assertion. Burnaby argues that the Board was obliged to require that Trans Mountain provide evidence about alternative routes and locations for the Burnaby Terminal and the Westridge Marine Terminal so that the evidence could be tested by it and other interveners.

[357] The impugned quotation comes from Trans Mountain's response to Burnaby's first Information Request (Exhibit H to the affidavit of Derek Corrigan). As previously referred to above at paragraph 269, in addition to Burnaby's Information Requests, the Board also served two Information Requests on Trans Mountain questioning it about alternative marine terminals.

[358] The preamble to the Board's second Information Request referenced Trans Mountain's first response to the Board in which it stated that it had considered potential alternative marine terminal locations based on the feasibility of coincident marine and pipeline access, and screened them based on technical, economic, and environmental considerations. The preamble also referenced Trans Mountain's response that it had ultimately concluded that constructing and

operating a new marine terminal and supporting infrastructure would result in significantly greater cost, a larger footprint and significantly greater environmental effects as compared to the existing facilities. Based on this conclusion Trans Mountain did not continue with a further assessment of alternative termini for the Project.

[359] One of the specific inquiries directed to Trans Mountain by the Board in its second Information Request was:

> Please elaborate on Trans Mountain's rationale for the Westridge Marine Terminal as the preferred alternative, including details to justify Trans Mountain's statement in [Trans Mountain's response to the Board's first Information Request] that constructing and operating a new marine terminal and supporting infrastructure would result in significantly greater cost, a larger footprint, and additional environmental effects, as compared to expanding existing facilities.

[360] In its response to the Board, Trans Mountain began by explaining the consideration it had given the option of a northern terminal. Trans Mountain's assessment ultimately "favoured expansion of the existing system south over a new northern lateral [pipeline] and terminal." This assessment was based on the following considerations. The northern option involved:

- A 250 kilometre longer pipeline with a concomitant 10% to 20% higher project capital cost.
- Greater technical challenges, including routing through high alpine areas of the Coast Mountains, or extensive tunneling to avoid these areas. These technical challenges, while not determined to be insurmountable, resulted in greater uncertainty for both cost and construction schedule.
- Fewer opportunities to benefit from existing operations, infrastructure and relationships. These benefits involved both using the existing Trans Mountain right-of-way, facilities, programs and personnel, and the synergies flowing from other existing infrastructure such as road access, power, and marine infrastructure.

> The inability to benefit from existing operations would increase the footprint and the potential impact of the northern option.

[361] Based on these considerations, Trans Mountain concluded that expansion along the existing Trans Mountain pipeline route was the more favourable option because of the higher costs and the greater uncertainty of both cost and schedule that accompanied the northern option.

[362] Trans Mountain then turned to explain its consideration of the alternative southern terminals. Five southern alternative locations were considered: (i) Howe Sound, which was eliminated because there was no feasible pipeline access west of Hope, it would require a new lateral pipeline from the Kamloops area, it involved extreme terrain and there was limited land available in close proximity for storage facilities; (ii) Vancouver Harbour, which was eliminated because there were no locations with coincident feasible pipeline access and no land for storage facilities; (iii) Sturgeon Bank, which was eliminated because there was no feasible land available in close proximity for storage facilities; (iv) Washington State, which was eliminated because it involved a longer pipeline and complex regulatory issues (including additional permits required by both Washington State and federal authorities); and, (v) Boundary Bay, which was eliminated because of insufficient water depth.

[363] This left for consideration Roberts Bank. Trans Mountain conducted a screening level assessment based on “desktop studies” of technical, economic and environmental considerations for marine access, storage facilities and pipeline routing for a terminal at that location.

[364] After setting out the assumed technical configuration for the Roberts Bank dock, storage and pipeline, Trans Mountain reviewed the engineering and geotechnical considerations. While no unsurmountable engineering or geotechnical issues were identified, Trans Mountain's assessment showed that relative to the Westridge Marine Terminal, the Roberts Bank alternative "required a significantly larger dock structure, a large new footprint for the storage terminal, a longer right of way, and a greater diversion from the existing corridor. The extent and cost of ground improvement necessary for the dock and storage terminal also presented a significant source of uncertainty."

[365] Trans Mountain then reviewed the relevant environmental considerations. Trans Mountain's assessment showed that while both Westridge and Roberts Bank:

> … have unique and important environmental values, based on the setting the environmental conditions at Roberts Bank appeared to be more substantial and uncertain than at Westridge Terminal, particularly given the larger footprint required for the dock and storage terminal. Without effective mitigation accidents or malfunctions at Roberts Bank could result in greater and more immediate consequences for the natural [environment].

[366] Trans Mountain then detailed the salient First Nations' considerations. For the purpose of the screening assessment, Trans Mountain assumed First Nation concerns and interests to be similar to those for the Westridge Terminal and likely to include concerns for impacts on traditional rights, environmental protection, and potential interest in economic opportunities.

[367] Trans Mountain then reviewed the land use considerations, concluding that relative to the Westridge Terminal "the Roberts Bank alternative would result in a greater change in land use both for the storage terminal and the dock structure. As surrounding development is less than that

for Westridge accidents or malfunctions at this location would be expected to affect fewer people."

[368] Trans Mountain's assessment next looked to the estimated cost differences. While operating costs were not quantified for comparison purposes, "given the additional dock and storage terminal required these costs would be higher for the Roberts Bank alternative."

[369] The assessment then looked at marine access considerations. While Roberts Bank offered a shorter and relatively less complex marine transit:

> [T]here is an existing well established marine safety system for vessels calling at Westridge. Although Roberts Bank would allow service to larger vessels which would result in potentially lower transport costs for shippers and lower probability of oil spill accidents larger cargos result in potentially larger spill volumes. While the overall effect on marine spill risk was not determined it is expected that larger cargos would require a greater investment in spill response.

[370] Trans Mountain then set out the conclusions it drew from its assessment. While the Westridge and Roberts Bank terminal alternatives each had positive and negative attributes, especially when viewed from any one perspective, overall Trans Mountain's rationale for the Westridge Marine Terminal as a preferred alternative was based on the expectation that Roberts Bank would result in:

- Significantly greater cost—Trans Mountain estimated a $1.2 billion higher capital cost and assumed higher operating costs for the Roberts Bank alternative.
- A larger footprint and additional environmental effects—Roberts Bank would result in an additional storage terminal with an estimated 100 acres of land required, a larger dock structure with a 7 kilometre trestle, and a 14 kilometre longer pipeline that diverges further from the existing pipeline corridor.

[371] I have set out Trans Mountain's response to the Board at some length because of the importance of this issue to Burnaby. In my view, two points arise from Trans Mountain's response to the Board.

[372] First, its response was not as conclusory as Burnaby's submission might suggest. Second, Trans Mountain's explanation for eliminating a northern alternative and the six, southern alternatives on the ground they were not technically or economically feasible was based on factual and technical considerations well within the expertise of the Board. To illustrate, the Board would have an understanding of the technical challenges posed when routing through high alpine areas. It would also be familiar with considerations such as the expense and environmental impact that accompany the construction of a longer pipeline, away from an existing pipeline corridor, or a new storage facility. The Board would have an appreciation of the need for coincident pipeline access and land for storage facilities and of the efficiencies that flow from things such as the use of existing infrastructure and relationships.

[373] In relevant part, the Board's conclusion on alternative means was:

> The Board finds that Trans Mountain's route selection process, route selection criteria, and level of detail for its alternative means assessment are appropriate. The Board further finds that aligning the majority of the proposed pipeline route alongside, and contiguous to, existing linear disturbances is reasonable, as this would minimize the environmental and socio-economic impacts of the Project.
>
> The Board acknowledges the concern raised by the City of Burnaby that Trans Mountain did not provide an assessment of the risks, impacts and effects of the alternate marine terminal locations at Kitimat, B.C., or Roberts Bank in Delta, B.C. <u>The Board finds that Trans Mountain has provided an adequate assessment, including consideration of technical, socio-economic and environmental effects, of technically and economically feasible alternative marine terminal locations</u>.
>
> (underlining added)

[374] Burnaby has not demonstrated that the Board's finding that Trans Mountain provided an appropriate level of detail in its alternative means assessment was flawed. This was a fact-based assessment well within the Board's area of expertise.

(iii) Did the Board fail to look at the West Alternative as an alternative route for the new pipeline?

[375] In its project application, Trans Mountain initially proposed four alternative routes for the new pipeline through the Coldwater River Valley. These were referred to as the Modified Reserve Route, the East Alternative, the Modified East Alternative and the West Alternative. While initially its preferred route was identified to be the East Alternative, Trans Mountain later changed its preferred route to be the Modified East Alternative. Coldwater alleges that at some point early in the process Trans Mountain unilaterally withdrew the West Alternative from consideration without notice to Coldwater. Coldwater also alleges that the East and Modified East Alternatives pose the greatest risk of contaminating the aquifer that supplies drinking water to the Coldwater Reserve, and that the West Alternative is the only route to pose no apparent threat to the aquifer.

[376] Before the Board, Coldwater argued that Trans Mountain did not adequately assess alternative locations for the new pipeline through the Coldwater River Valley. Coldwater requested that the Board require a re-examination of routing options for the Coldwater River Valley before any recommendation on the Project was made.

[377] The Board, in its report, acknowledged Coldwater's concerns at pages 241, 285 and 289.

[378] The Board noted, at page 245, that "the detailed route for the Project has not been finalized, and that this hearing assessed the general route for the Project, the potential environmental and socio-economic effects of the Project, as well as all evidence and commitments made by Trans Mountain regarding the design, construction and safe operation of the pipeline and associated facilities."

[379] At page 290 the Board found that Trans Mountain had not sufficiently shown that there was no potential interaction between the aquifer underlying the Coldwater Reserve and the proposed Project route. Therefore, the Board imposed Condition 39 requiring Trans Mountain to file a hydrogeological study to more precisely determine the potential for interactions and impacts on the aquifer and to assess the need for any additional measures to protect the aquifer, including monitoring measures (Condition 39 was described in greater detail above at paragraph 333).

[380] Coldwater argues that the Board breached its statutory obligation to consider alternative means of carrying out the designated project. Further, this breach cannot be cured at the detailed route hearing because at a detailed route hearing the Board can only consider limited routing options within the approved pipeline corridor. The West Alternative is well outside the approved corridor. Coldwater submits that the Board's only option at the detailed route hearing is to decline to approve the detailed routing and to reject Trans Mountain's Plan, Profile and Book of Reference (PPBoR); Coldwater says this is an option the Board would be unwilling to pursue given the Project's post-approval momentum.

[381] I agree that at a detailed route hearing the Board may only approve, or refuse to approve, a proponent's PPBoR. However, this does not mean that at a detailed route hearing the Board is precluded from considering routes outside of the approved pipeline corridor.

[382] Subsection 36(1) of the *National Energy Board Act* requires the Board "to determine the best possible detailed route of the pipeline and the most appropriate methods and timing of constructing the pipeline." This provision does not limit the Board to considering the best possible detailed route within the approved pipeline corridor. This was recognized by the Board in *Emera Brunswick Pipeline Company Ltd. (Re)*, 2008 LNCNEB 10, at page 30.

[383] Additionally, section 21 of the *National Energy Board Act* permits the Board to review, vary or rescind any decision or order, and in *Emera* the Board recognized, at page 31, that where a proposed route is denied on the basis of evidence of a better route outside of the approved pipeline corridor an application may be made under section 21 to vary the corridor in that location.

[384] It follows that the Board would be able to vary the route of the new pipeline should the hydrogeological study to be filed pursuant to Condition 39 require an alternative route, such as the West Alternative route, in order to avoid risk to the Coldwater aquifer.

[385] As the pipeline route through the Coldwater River Valley remains a live issue, depending on the findings of the hydrogeological report, it follows that Coldwater has not demonstrated that the Board breached its statutory obligation to consider alternative means.

[386] The next error said to vitiate the Board's report is its alleged failure to consider alternatives to the Westridge Marine Terminal.

> (c) Did the Board fail to consider alternatives to the Westridge Marine Terminal?

[387] In my view, this issue was fully canvassed in the course of considering Burnaby's argument that the Board impermissibly failed to decide certain issues for recommended approval of the Project.

> (d) Did the Board err by failing to assess Project-related marine shipping under the *Canadian Environmental Assessment Act, 2012*?

[388] Tsleil-Waututh argues that the Board breached the requirements of the *Canadian Environmental Assessment Act, 2012* by excluding Project-related marine shipping from the definition of the "designated project" which was to be assessed under that Act. In turn, the Governor in Council is said to have unreasonably exercised its discretion when it relied upon the Board's materially flawed report—in effect the Governor in Council did not have a "report" before it and, thus, could not proceed to its decision. Tsleil-Waututh adds that the Board failed to comply with the requirements of subsection 31(1) of the *Canadian Environmental Assessment Act, 2012* by:

i. failing to determine whether the environmental effects of Project-related marine shipping are likely, adverse and significant;
ii. concluding that the Project is not likely to cause significant adverse environmental effects; and,

iii. failing to determine whether the significant adverse environmental effects likely to be caused by Project-related marine shipping can be justified under the circumstances.

[389] The significant adverse effect of particular concern to Tsleil-Waututh are the Project's significant adverse effects upon the endangered Southern resident killer whales and their use by Indigenous peoples.

[390] Tsleil-Waututh's submissions are adopted by Raincoast and Living Oceans. To these submissions they add that the Board's decision to exclude Project-related shipping from the definition of the "designated project" was not a discretionary scoping decision as Trans Mountain argues. Rather, the Board erroneously interpreted the statutory definition of "designated project".

[391] The definition of "designated project" is found in section 2 of the *Canadian Environmental Assessment Act, 2012*: see paragraph 57 above. The parties agree that the issue of whether Project-related marine shipping ought to have been included as part of the defined designated project turns on whether Project-related marine shipping is a "physical activity that is incidental" to the pipeline component of the Project. This is not a pure issue of statutory interpretation. Rather, it is a mixed question of fact and law heavily suffused by evidence.

[392] In response to the submissions of Tsleil-Waututh, Raincoast and Living Oceans, Canada and Trans Mountain make two submissions. First, they submit that the Board reasonably concluded that the increase in marine shipping was not part of the designated project. Second,

and in any event, they argue that the Board conducted an extensive review of marine shipping. Therefore, the question for the Court becomes whether the Board's assessment was substantively adequate, such that the Governor in Council still had a "report" before it such that the Board's assessment could be relied upon. Canada and Trans Mountain answer that question in the affirmative.

[393] Before commencing my analysis, it is important to situate the Board's scoping decision and the exclusion of Project-related shipping from the definition of the Project. The definition of the designated project truly frames the scope of the Board's analysis. Activities included as part of the designated project are assessed under the *Canadian Environmental Assessment Act, 2012* with its prescribed list of factors to be considered. Further, as the Board acknowledged in Chapter 10 of its report, the *Species at Risk Act* imposes additional obligations on the Board when a designated project is likely to affect a listed wildlife species. These obligations are discussed below, commencing at paragraph 442.

[394] This assessment is to be contrasted with the assessment of activities not included in the definition of the designated project. These excluded activities are assessed under the *National Energy Board Act* if the Board is of the opinion that any public interest may be affected by the issuance of a certificate of public convenience and necessity, or by the dismissal of the proponent's application. On this assessment the Board is to have regard to all considerations that "appear to it to be directly related to the pipeline and to be relevant". Parenthetically, to the extent that there is potential for the effects of excluded activities to interact with the

environmental effects of a project, these effects are generally assessed under the cumulative effects portion of the *Canadian Environmental Assessment Act, 2012* environmental assessment.

[395] I begin my analysis with Trans Mountain's application to the Board for a certificate of public convenience and necessity for the Project. In Volume 1 of the application, at pages 1-4, Trans Mountain describes the primary purpose of the Project to be "to provide additional transportation capacity for crude oil from Alberta to markets in the Pacific Rim including BC, Washington State, California and Asia." In Volume 2 of the application, at pages 2-27, Trans Mountain describes the marine shipping activities associated with the Project. Trans Mountain notes that of the 890,000 barrels per day capacity of the expanded system, up to 630,000 barrels per day, or 71%, could be delivered to the Westridge Marine Terminal for shipment by tanker. To place this in perspective, currently in a typical month five tankers are loaded with diluted bitumen at the Westridge Marine Terminal, some of which are the smaller, Panamax tankers. The expanded system would be capable of serving up to 34 of the larger, Aframax tankers per month (with actual demand influenced by market conditions).

[396] This evidence demonstrates that marine shipping is, at the least, an element that accompanies the Project. Canada argues that an element that accompanies a physical activity while not being a major part of the activity is not "incidental" to the physical activity. Canada says that this was what the Board implicitly found.

[397] The difficulty with this submission is that it is difficult to infer that this was indeed the Board's finding, albeit an implicit finding. I say this because in its scoping decision the Board

gave no reasons for its conclusion. In the second paragraph of the decision, under the introductory heading, the Board simply set out its conclusion:

> For the purposes of the environmental assessment under the CEAA 2012, the designated project includes the various components and physical activities as described by Trans Mountain in its 16 December 2013 application submitted to the NEB. The Board has determined that the potential environmental and socio-economic effects of increased marine shipping activities to and from the Westridge Marine Terminal that would result from the designated project, including the potential effects of accidents or malfunctions that may occur, will be considered under the NEB Act (see the NEB's Letter of 10 September 2013 for filing requirements specific to these marine shipping activities). To the extent that there is potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board will consider those effects under the cumulative effects portion of the CEAA 2012 environmental assessment.
>
> (underlining added)

[398] Having defined the designated project not to include the increase in marine shipping, the Board dealt with the Project-related increase in marine shipping activities in Chapter 14 of its report. Consistent with the scoping decision, at the beginning of Chapter 14 the Board stated, at page 323:

> As described in Section 14.2, marine vessel traffic is regulated by government agencies, such as Transport Canada, Port Metro Vancouver, Pacific Pilotage Authority and the Canadian Coast Guard, under a broad and detailed regulatory framework. The Board does not have regulatory oversight of marine vessel traffic, whether or not the vessel traffic relates to the Project. There is an existing regime that oversees marine vessel traffic. The Board's regulatory oversight of the Project, as well as the scope of its assessment of the Project under the *Canadian Environmental Assessment Act* (CEAA 2012), reaches from Edmonton to Burnaby, up to and including the Westridge Marine Terminal (WMT). However, the Board determined that potential environmental and socio-economic effects of Project-related tanker traffic, including the potential effects of accidents or malfunctions that may occur, are relevant to the Board's consideration of the public interest under the NEB Act. Having made this determination, the Board developed a set of Filing Requirements specific to the issue of the potential effects of Project-related marine shipping activities to complement the Filing Manual.

(underlining added, footnotes omitted)

[399] Two points emerge from this passage. The first point is the closest the Board came to explaining its scoping decision was that the Board did not have regulatory oversight over marine vessel traffic. There is no indication that the Board grappled with this important issue.

[400] The issue is important because the Project is intended to bring product to tidewater; 71% of this product could be delivered to the Westridge Marine Terminal for shipment by tanker. Further, as explained below, if Project-related shipping forms part of the designated project additional requirements apply under the *Species at Risk Act*. Finally, Project-related tankers carry the risk of significant, if not catastrophic, adverse environmental and socio-economic effects should a spill occur.

[401] Neither Canada nor Trans Mountain point to any authority to the effect that a responsible authority conducting an environmental assessment under the *Canadian Environmental Assessment Act, 2012* must itself have regulatory oversight over a particular subject matter in order for the responsible authority to be able to define a designated project to include physical activities that are properly incidental to the Project. The effect of the respondents' submission is to impermissibly write the following italicized words into the definition of "designated project": "It includes any physical activity that is incidental to those physical activities *and that is regulated by the responsible authority*."

[402] In addition to being impermissibly restrictive, the Board's view that it was required to have regulatory authority over shipping in order to include shipping as part of the Project is

inconsistent with the purposes of the *Canadian Environmental Assessment Act, 2012* enumerated in subsection 4(1). These purposes include protecting the components of the environment that are within the legislative authority of Parliament and ensuring that designated projects are considered in a careful and precautionary manner to avoid significant adverse environmental effects.

[403] The second point that arises is that the phrase "incidental to" is not defined in the *Canadian Environmental Assessment Act, 2012*. It is not clear that the Board expressly directed its mind to whether Project-related marine shipping was in fact an activity "incidental" to the Project. Had it done so, the Canadian Environmental Assessment Agency's "Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012" provides a set of criteria relevant to the question of whether certain activities should be considered "incidental" to a project. These criteria are:

i. the nature of the proposed activities and whether they are subordinate or complementary to the designated project;
ii. whether the activity is within the care and control of the proponent;
iii. if the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to "direct or influence" the carrying out of the activity;
iv. whether the activity is solely for the benefit of the proponent or is available for other proponents as well; and,
v. the federal and/or provincial regulatory requirements for the activity.

[404] The Board does not advert to, or grapple with, these criteria in its report. Had the Board grappled with these criteria it would have particularly considered whether marine shipping is

subordinate or complementary to the Project and whether Trans Mountain is able to "direct or influence" aspects of tanker operations.

[405] In this regard, Trans Mountain stated in its application, on pages 8A-33 to 8A-34, that while it did not own or operate the vessels calling at the Westridge Marine Terminal, "it is an active member in the maritime community and works with BC maritime agencies to promote best practices and facilitate improvements to ensure the safety and efficiency of tanker traffic in the Salish Sea." Trans Mountain also referenced its Tanker Acceptance Standard whereby it can prevent any tanker not approved by it from loading at the Westridge Marine Terminal.

[406] The Board recognized Trans Mountain's ability to give directions to tanker operators in Conditions 133, 134 and 144 where, among other things, the Board required Trans Mountain to:

- confirm that it had implemented its commitments to enhanced tug escort by prescribing minimum tug capabilities required to escort outbound, laden tankers and by including these minimum capabilities as part of its Tanker Acceptance Standard;
- file an updated Tanker Acceptance Standard and a summary of any revisions made to the Standard; and,
- file annually a report documenting the continued implementation of Trans Mountain's marine shipping-related commitments noted in Condition 133, any instances of non-compliance with Trans Mountain's requirements and the steps taken to correct instances of non-compliance.

[407] To similar effect, as discussed below in more detail, Trans Mountain committed in the TERMPOL review process to require, through its tanker acceptance process, that tankers steer a certain course upon exiting the Juan de Fuca Strait.

[408] Trans Mountain's ability to "direct or influence" tanker operations was a relevant factor for the Board to consider.

[409] The Board's reasons do not well-explain its scoping decision, do not grapple with the relevant criteria and appear to be based on a rationale that is not supported by the statutory scheme. As explained in more detail below, it follows that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that permitted the Governor in Council to make its decision.

[410] It follows that it is necessary to consider the respondents' alternate submission that the assessment the Board conducted was, nevertheless, substantially adequate such that the Governor in Council could rely upon it for the purpose of assessing the public interest and the environmental effects of the Project. To do this I will first consider the deficiencies said to arise from the assessment of Project-related shipping under the *National Energy Board Act*, as opposed to its assessment under the *Canadian Environmental Assessment Act, 2012*. I will then turn to the Board's findings, as set out in its report, in order to determine whether the Board's report was materially deficient or substantially adequate.

(i) The deficiencies said to arise from the Board's assessment of Project-related marine shipping under the *National Energy Board Act*

[411] Had the Project been defined to include Project-related marine shipping, subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* would have required the Board to

consider, and make findings, concerning the factors enumerated in section 19. In the present case, these include:

- the environmental effects of marine shipping, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project, and any cumulative effects likely to result from the designated project in combination with other physical activities that have or will be carried out;
- the significance of these effects;
- mitigation measures that are technically and economically feasible that would mitigate any significant adverse effects of marine shipping; and,
- alternative means of carrying out the designated project that are technically and economically feasible. This would include alternate shipping routes.

[412] I now turn to address the Board's consideration of Project-related shipping.

(ii) The Board's consideration of Project-related marine shipping and its findings

[413] I begin by going back to the Board's statement, quoted above at paragraph 398, that "potential environmental and socio-economic effects of Project-related tanker traffic, including the potential effects of accidents or malfunctions that may occur" were relevant to the Board's consideration of the public interest under the *National Energy Board Act*. In this context, in order to ensure that the Board had sufficient information about those effects, the Board developed the specific filing requirements referred to by the Board in the passage quoted above.

[414] These filing requirements required Trans Mountain to provide a detailed description of the increase in marine shipping activities including: the frequency of passages, passage routing,

speed, and passage transit time; and, the alternatives considered, such as passage routing, frequency of passages and tanker type utilized.

[415] Trans Mountain's assessment of accidents and malfunctions related to the increase in marine shipping was required to include descriptions of matters such as:

- measures to reduce the potential for accidents and malfunctions to occur, including an overview of relevant regulatory regimes;
- credible worst case spill scenarios and smaller spill scenarios;
- the fate and behaviour of any hydrocarbons that may be spilled;
- the potential environmental and socio-economic effects of credible worst case spill scenarios and smaller spill scenarios, taking into account the season-specific behaviour, trajectory, and fate of the hydrocarbon(s) spilled, as well as the range of weather and marine conditions that could prevail during the spill event; and,
- Trans Mountain's preparedness and response planning, including an overview of the relevant regulatory regimes.

[416] Trans Mountain was required to provide information on navigation and safety including:

- an overview of the relevant regulatory regimes and the role of the different organizations involved;
- any additional mitigation measures in compliance with, or exceeding regulatory requirements, proposed by Trans Mountain to further facilitate marine shipping safety; and,
- an explanation of how the regulatory regimes and any additional measures promote the safety of the increase in marine shipping activities.

[417] The filing requirements also required specific information relating to all mitigation measures related to the increase in marine shipping activities.

[418] I now turn to specifically consider Chapter 14 of the Board's report and its consideration of the Project-related increase in marine shipping activities. Because the applicants' primary concern centers on the Project's impact on the Southern resident killer whales and their use, I will focus on the Board's consideration of this endangered species, including spill prevention and the effects of spills. The Board did also consider and make findings about the impact of increased Project-related shipping on air emissions, greenhouse gases, marine and fish habitat, marine birds, socio-economic effects, heritage resources and human health effects.

[419] The Board began by describing the extent of existing, future, and Project-related shipping activities. It then moved to a review of the regulatory framework and some federal improvement initiatives. The Board's report describes how marine shipping is regulated under the *Canada Shipping Act, 2001*, S.C. 2001, c. 26 and administered by Transport Canada, the Canadian Coast Guard and other government departments.

[420] The Board then moved, in Section 14.3, to the assessment of the effects of increased marine shipping, focusing on changes to the environmental and socio-economic setting caused by the routine operation of Project-related marine vessels. It noted that while it assessed the potential environmental and socio-economic factors of increased marine shipping as part of its public interest determination under the *National Energy Board Act*, the Board "followed an approach similar to the environmental assessment conducted under [the *Canadian Environmental Assessment Act, 2012*] … to the extent it was appropriate, to inform the Board's public interest determination."

[421] The Board went on to explain that in order to consider whether the effects of marine shipping were likely to cause significant environmental effects, it considered the existing regulatory scheme in the absence of any specific mitigation measures. This reflected the Board's view that since marine shipping was beyond its regulatory authority, it did not have the ability to impose specific mitigation conditions to address environmental effects of Project-related marine shipping. The Board also explained that it considered any cumulative effects that were likely to arise from Project-related shipping, in combination with environmental effects arising from other current or reasonably foreseeable marine vessel traffic in the area.

[422] Finally, before turning to its assessment of the Project's effects, the Board stated that its assessment had considered:

- adverse impacts of Project-related marine shipping on *Species at Risk Act* (SARA)-listed wildlife species and their critical habitat;
- all reasonable alternatives to Project-related marine shipping that would reduce impact on SARA-listed species' critical habitat; and,
- measures to avoid or lessen any adverse impacts, consistent with applicable recovery strategies or action plans.

[423] The Board then went on to make the following findings and statements with respect to marine mammals generally:

- Underwater noise from Project-related marine vessels would result in sensory disturbances to marine mammals. The disturbance is expected to be long-term as it is likely to occur for the duration of operations of Project-related vessel traffic.
- When assessing the impact of Project-related shipping on specific species, the Board's approach was to consider the temporal and spatial impact, and its reversibility.

- Project-related marine vessels have the potential to strike a marine mammal, which could result in lethal or non-lethal effects. Further, the increase in Project-related marine traffic would contribute to the cumulative risk of marine mammal vessel strikes. The Board acknowledged Trans Mountain's commitment to provide explicit guidance for reporting both marine mammal vessel strikes and mammals in distress to appropriate authorities.
- The Board accepted the evidence of the Department of Fisheries and Oceans and Trans Mountain to the effect that there were no direct mitigation measures that Trans Mountain could apply to reduce or eliminate potential adverse effects from Project-related tankers. It recognized that altering vessel operations, for example by shifting shipping lanes away from marine mammal aggregation areas or reducing marine vessel speed, could be an effective mitigation measure. However, these specific measures were outside of the Board's regulatory authority, and out of Trans Mountain's control. The Board encouraged other regulatory authorities, such as Transport Canada or Fisheries and Oceans Canada to explore initiatives that would aim to reduce the potential effects of marine vessels on marine mammals.
- The Board recognized initiatives currently underway, or proposed, and noted Trans Mountain's commitment to participate in some of these initiatives. The Board imposed Condition 132 requiring Trans Mountain to develop a Marine Mammal Protection Program, and to undertake or support initiatives that focus on understanding and mitigating Project-related effects. Such Protection Program is to be filed prior to the commencement of Project operations.
- The Board explained that Condition 132 was meant to ensure that Trans Mountain fulfilled its commitments to participate in the development of industry-wide shipping practices in conjunction with the appropriate authorities. At the same time, the Board recognized that the Marine Mammal Protection Program offered no assurance that effective mitigation would be developed and implemented to address Project-related effects on marine mammals.
- The Board acknowledged the recommendation of the Department of Fisheries and Oceans that Trans Mountain explore the use of marine mammal on-board

observers on Project-related marine vessels. The Board expressed its agreement and set out its expectation that it would see an initiative of this type incorporated as part of Trans Mountain's Marine Mammal Protection Program.

[424] The Board also acknowledged Trans Mountain's commitment to require Project-related marine vessels to meet any future guidelines or standards for reducing underwater noise from commercial vessels as they come into force.

[425] The Board went on to make the following findings with specific reference to the Southern resident killer whale:

- The Southern resident killer whale population has crossed a threshold where any additional adverse environmental effects would be considered significant. The current level of vessel traffic in the regional study area and the predicted future increase of vessel traffic in that area, even excluding Project-related marine vessels, "have and would increase the pressure on the Southern resident killer whale population."
- The Board expressed its expectation that Project-related marine vessels would represent a maximum of 13.9% of all vessel traffic in the regional study area, excluding the Burrard Inlet, and would decrease over time as the volume of marine vessel movements in the area is anticipated to grow. Therefore, while the effects from Project-related marine vessels would be a small fraction of the total cumulative effects, the Board acknowledged that this increase in marine vessels associated with the Project "would further contribute to cumulative effects that are already jeopardizing the recovery of the Southern resident killer whale. The effects associated with Project-related marine vessels will impact numerous individuals of the Southern resident killer whale population in a habitat identified as critical to the recovery". The Board classified these effects as "high magnitude". Consequently, the Board found that "the operation of Project-related

marine vessels is likely to result in significant adverse effects to the Southern resident killer whale."

- The Board recognized that the "Recovery Strategy for the Northern and Southern Resident Killer Whale" prepared by the Department of Fisheries and Oceans identified vessel noise as "a threat to the acoustic integrity of Southern resident killer whale critical habitat, and that physical and acoustic disturbance from human activities may be key factors causing depletion or preventing recovery of resident killer whale populations."
- The Board noted that the death of a Southern resident killer whale from a Project-related marine vessel collision, despite the low likelihood of such an event, would have population level consequences. The Board acknowledged that Project-related marine vessels would encounter a killer whale relatively often, however, "given the limited number of recorded killer whale marine vessel strikes and the potential avoidance behaviors of killer whales" the Board accepted the evidence of Trans Mountain and the Department of Fisheries and Oceans that the probability of a Project-related marine mammal vessel strike on a Southern resident killer whale was low.
- The Board expressed the view that the recovery of the Southern resident killer whale requires complex, multi-party initiatives, and that the Department of Fisheries and Oceans and other organizations are currently undertaking numerous initiatives to support the recovery of the species, including finalizing an action plan. The Board acknowledged Trans Mountain's commitment to support the objectives and recovery measures identified in the action plan. The draft action plan included a detailed prioritized list of initiatives. The Board expressed its expectation that Trans Mountain would support these initiatives within the Marine Mammal Protection Program. The Board encouraged initiatives, including initiatives of the federal government, to prioritize and implement specific measures to promote recovery of the species.
- Finally, the Board concluded that "the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale."

[426] The Board then considered the impact of marine shipping on the traditional use of marine resources by Indigenous communities, finding that:

- There would be disruptions to Indigenous marine vessels and harvesters, and this may disrupt activities or access to specific sites. However, in the Board's view these disruptions would be temporary, occurring only during the period of time when Project-related tanker vessels are in transit. Thus, it was of the view that Indigenous marine vessel users would maintain the ability to continue to harvest marine resources and to access subsistence and cultural sites in the presence of these periodic and short-term disruptions.
- Therefore, the Board found that, with the exception of the effects on the Southern resident killer whale, the magnitude of effects of Project-related marine vessel traffic on traditional marine resource uses, activities and sites would be low.
- Given the low frequency, duration and magnitude of effects associated with potential disruptions, and Trans Mountain's commitments to provide regular updated information on Project-related marine vessel traffic to Indigenous communities, the Board found that adverse effects on traditional marine resource uses, activities and sites were not likely and that, overall, Project-related marine traffic's contribution to overall effects related to changes in traditional marine use patterns was not likely to be significant.
- Project-related marine traffic's contribution to cumulative effects was found to be of low to medium magnitude, and reversible in the long term. The Board therefore found significant adverse cumulative effects associated with Project-related marine vessel traffic on traditional marine resource use was not likely to be significant, with the exception of effects associated with the traditional use of the Southern resident killer whale, which were considered significant.
- Recognizing the cultural importance of the killer whale to certain Indigenous groups, the Board found that "the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Aboriginal use associated with the Southern resident killer whale."

[427] Finally, in Sections 14.4 to 14.6 the Board considered spill prevention. It made the following findings:

- The Board accepted the evidence filed by Trans Mountain regarding marine shipping navigation and safety, including the reports filed as part of the TERMPOL Review Process.
- Although a large spill from a tanker associated with the Project would result in significant adverse environmental and socio-economic effects, such an event is not likely.
- Even with response efforts, any large spill would result in significant adverse environmental and socio-economic effects.
- Trans Mountain, in conjunction with the Western Canada Marine Response Corporation, proposed appropriate measures to respond to potential oil spills from Project-related tankers. These proposed measures exceed regulatory requirements and would result in a response capacity that is double, and a delivery time that is half, that required by the existing planning standards. The Board gave substantial weight to the fact that the TERMPOL Review Committee and the Canadian Coast Guard did not identify any particular concerns with marine spill response planning associated with the Project.
- The environmental effects of a spill from a tanker would be highly dependent on the particular circumstances, such as the amount and the type of product(s) spilled, the location of the spill, the response time, the effectiveness of containment and cleanup, the valued components that were impacted, and the weather and time of year of the spill.
- A small spill, quickly contained, could have adverse effects of low magnitude, whereas a credible worst-case spill could have adverse effects of larger geographic extent and longer duration, and such effects would probably be significant. Moreover, spills could impact key marine habitats such as salt marshes, eelgrass beds and kelp forests, which could, in turn, affect the numerous species that rely upon them. Spills could also affect terrestrial species along the coastline, including SARA-listed terrestrial plant species.

- Although impacts from a credible worst-case spill would probably be adverse and significant, natural recovery of the impacted areas and species would likely return most biological conditions to a state generally similar to pre-spill conditions. Such recovery might be as quick as a year or two for some valued components, or might take as long as a decade or more for others. Valuable environmental values and uses could be lost or diminished in the interim. For some valued components, including certain SARA-species, recovery to pre-spill conditions might not occur.
- Mortality of individuals of SARA-listed species could result in population level impacts and could jeopardize recovery. For example, the impact on a Southern resident killer whale of exposure to an oil spill potentially would be catastrophic.
- There is a very low probability of a credible worst-case event.
- The effects of a credible worst-case spill on the current use of lands, waters and resources for traditional purposes by Indigenous people would likely be adverse and significant. However, the probability of such a worst-case event is very low.

[428] With respect to the Board's reference to the report of the TERMPOL Review Committee, one of the topics dealt with in that report was Project routing. It was noted, in Section 3.2, that the "shipping route to and from Trans Mountain's terminal to the open sea is well-established and used by deep sea tankers as well as other vessel types such as cargo vessels, cruise ships and ferries." Later in the report it was noted that "Aframax class tankers currently use the proposed route, demonstrating that tanker manoeuvrability issues are not a concern."

[429] Notwithstanding, the Review Committee did make one finding with respect to the shipping route. Finding 9 was to the effect that "Trans Mountain's commitment to require via its tanker acceptance process that Project tankers steer a course no more northerly than due West (270°) upon exiting the Juan de Fuca Strait will enhance safety and protection of the marine environment by providing the shortest route out of the Canadian" economic exclusion zone.

[430] Returning to the Board's report, the end result of the Board's assessment of the Project was that, notwithstanding the impacts of the Project upon the Southern resident killer whales and Indigenous cultural uses associated with them, with the implementation of Trans Mountain's environmental protection procedures and mitigation, and the Board's recommended conditions, the Project is not likely to cause significant adverse environmental effects. This was the Board's recommendation under section 29 of the *Canadian Environmental Assessment Act, 2012*.

(iii) Was the Board's assessment of Project-related marine shipping substantially adequate?

[431] I begin with the Board's description of its approach to the assessment of marine shipping. It "followed an approach similar to the environmental assessment conducted under" the *Canadian Environmental Assessment Act, 2012* "to the extent it was appropriate". Consistent with this approach, the Board's filing requirements in respect of marine shipping required Trans Mountain to provide information about mitigation measures and alternatives—factors which subsection 19(1) of the *Canadian Environmental Assessment Act, 2012* require be considered in an environmental assessment.

[432] Bearing in mind that the primary focus of the applicants' concern about the Board's assessment of Project-related marine shipping is the Board's assessment of the adverse effects of the Project on Southern resident killer whales, the previous review of the Board's findings demonstrates that the Board considered the Project's effects on the Southern resident killer whales, including the environmental effects of malfunctions or accidents that might occur, the significance of those effects and the cumulative effects of the Project on efforts to promote

recovery of the species. The Board found the operation of the Project-related tankers was likely to result in significant, adverse effects to the Southern resident killer whale population.

[433] Given the Board's finding that the Project was likely to result in significant adverse effects on the Southern resident killer whale, and its finding that Project-related marine vessel traffic would further contribute to the total cumulative effects (which were determined to be significant), the Board found that the increase in marine vessel traffic associated with the Project is likely to result in significant adverse effects on the traditional Indigenous use associated with the Southern resident killer whale.

[434] The Board then considered mitigation measures through the limited lens of its regulatory authority. It found there were no direct mitigation measures Trans Mountain could apply to reduce or eliminate potential adverse effects from Project-related tankers.

[435] The Board stated that it considered all reasonable alternatives to Project-related marine shipping that would reduce the impact on SARA-listed species' critical habitat. This would include the critical habitat of the Southern resident killer whale. As part of this consideration, the Board directed Information Request No. 2 to Trans Mountain. In material part, Trans Mountain responded that the only known potential mitigation measures relevant to the Salish Sea to reduce the risk of marine mammal vessel strikes would be to alter the shipping lanes in order to avoid sensitive habitat (that is areas where whales aggregate), and to set speed restrictions. Trans Mountain advised that shipping lanes and speed restrictions are set at the discretion of Transport Canada.

[436] Thereafter, the Board issued an Information Request to Transport Canada that, among other things, requested Transport Canada to summarize any initiatives it was currently supporting or undertaking that evaluated potential alternative shipping lanes or vessel speed reductions along the southern coast of British Columbia with the intent of reducing impacts on marine mammals from marine shipping. Transport Canada responded that it was "not currently contemplating alternative shipping lanes or vessel speed restrictions for the purpose of reducing impacts on marine mammals from marine shipping in British Columbia". However, Transport Canada noted it was participating in the Enhancing Cetacean Habitat and Observation Program led by Port Metro Vancouver.

[437] Transport Canada's statement that it had no current intent to make alterations to shipping lanes or to impose vessel speed restrictions would seem to have pre-empted further consideration of routing alternatives by the Board.

[438] This review of the Board's report has shown that the Board in its assessment of Project-related marine shipping considered:

- the effects of Project-related marine shipping on Southern resident killer whales;
- the significance of the effects;
- the cumulative effect of Project-related marine shipping on the recovery of the Southern resident killer whale population;
- the resulting significant, adverse effects on the traditional Indigenous use associated with the Southern resident killer whale;
- mitigation measures within its regulatory authority; and,
- reasonable alternatives to Project-related marine shipping.

[439] Given the Board's approach to the assessment and its findings, the Board's report was adequate for the purpose of informing the Governor in Council about the effects of Project-related marine shipping on the Southern resident killer whales and their use by Indigenous groups. The Board's report adequately informed the Governor in Council of the significance of these effects, the Board's view there were no direct mitigation measures Trans Mountain could apply to reduce potential adverse effects from Project-related tankers, and that there were potential mitigation measures beyond the Board's regulatory authority and so not the subject of proper consideration by the Board or conditions. Perhaps most importantly, the report put the Governor in Council on notice that the Board defined the Project not to include Project-related marine shipping. This decision excluded the effects of Project-related shipping from the definition of the Project as a designated project and allowed the Board to conclude that, as it defined the Project, the Project was not likely to cause significant adverse effects.

[440] The Order in Council and its accompanying Explanatory Note demonstrate that the Governor in Council was fully aware of the manner in which the Board had assessed Project-related marine shipping under the *National Energy Board Act*. The Governor in Council was also fully aware of the effects of Project-related marine shipping identified by the Board and that the operation of Project-related vessels is likely to result in significant adverse effects upon both the Southern resident killer whale and Indigenous cultural uses of this endangered species.

[441] Having found that the Governor in Council understood the Board's approach and resulting conclusions, it remains to consider the reasonableness of the Governor in Council's

reliance on the Board's report to approve the Project. This is considered below, after considering the applicants' submissions with respect to the *Species at Risk Act*.

(e) Did the Board err in its treatment of the *Species at Risk Act*?

[442] The purposes of the *Species at Risk Act* are: to prevent wildlife species from being extirpated or becoming extinct; to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity; and, to manage species of special concern to prevent them from becoming endangered or threatened (section 6).

[443] Important protections are found in section 77 of the Act, which is intended to protect the critical habitat of listed wildlife species, and section 79, which is intended to protect listed wildlife species and their critical habitat from new projects. Listed wildlife species are those species listed in Schedule 1 of the Act, a list of wildlife species at risk. Sections 77 and 79 are set out in the Appendix to these reasons.

[444] Raincoast and Living Oceans argue that as a result of unreasonably defining the designated project not to include Project-related marine shipping, the Board failed to meet the requirement of subsection 79(2) of the *Species at Risk Act*. As a result of this error they say it was unreasonable for the Governor in Council to rely upon the Board's report without first ensuring that the Board had complied with subsection 79(2) of the Act with respect to Southern resident killer whales. They also argue that it was unreasonable for the Governor in Council not to comply with its additional, independent obligations under subsection 77(1) of the *Species at Risk Act*.

[445] I will deal first with the applicability of section 79 of the Act.

(i) Did the Board err by concluding that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related marine shipping?

[446] Section 79 obligates every person required "to ensure that an assessment of the environmental effects of a project is conducted" to:

i. promptly notify the competent minister or ministers if the project "is likely to affect a listed wildlife species or its critical habitat." (subsection 79(1));
ii. identify the adverse effects of the project on the listed wildlife species and its critical habitat (subsection 79(2)); and,
iii. if the project is carried out, ensure that measures are taken "to avoid or lessen those effects and to monitor them." The measures taken must be taken in a way that is consistent with any applicable recovery strategy and action plans (subsection 79(2)).

[447] Subsection 79(3) defines a "project" to mean, among other things, a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*.

[448] The Board acknowledged its obligations under section 79 of the *Species at Risk Act* in the course of its environmental assessment (Chapter 10, page 161). However, because it had not defined the designated project to include Project-related marine shipping, the Board rejected Living Oceans' submission that the Board's obligations under section 79 of the *Species at Risk Act* applied to its consideration of the effects of Project-related marine shipping on the Southern resident killer whale (Chapter 14, page 332). Notwithstanding this conclusion that section 79 did not apply, for reasons that are not explained in its report, the Board did comply with the

obligation under subsection 79(1) to notify the responsible ministers that the Project might affect Southern resident killer whales and their habitat. The Board did this by letter dated April 23, 2014 (a letter sent approximately three weeks after the Board made its scoping decision).

[449] I have found that the Board unjustifiably excluded Project-related marine shipping from the Project's description. It follows that the failure to apply section 79 of the *Species at Risk Act* to its consideration of the effects of Project-related marine shipping on the Southern resident killer whale was also unjustified.

[450] Both Canada and Trans Mountain argue that, nonetheless, the Board substantially complied with its obligations under section 79 of the *Species at Risk Act*. Therefore, as with the issue of Project-related marine shipping, the next question is whether the Board substantially complied with its obligations under section 79.

(ii) Did the Board substantially comply with its obligations under section 79 of the *Species at Risk Act*?

[451] The respondents argue that, in addition to complying with the notification requirement found in subsection 79(1), the Board considered:

- the adverse impacts of marine shipping on listed wildlife species and their critical habitat;
- all reasonable alternatives to marine shipping that would reduce impact on listed species' critical habitat; and
- measures, consistent with the applicable recovery strategies or action plans, to avoid or lessen any adverse impacts of the Project.

[452] Canada and Trans Mountain submit that as a result the Board met its requirements "where possible." (Trans Mountain's memorandum of fact and law, paragraph 120). On this last point, Trans Mountain submits that the Board lacked authority to impose conditions or otherwise ensure that measures were taken to avoid or lessen the effects of marine shipping on species at risk. Thus, while the Board could identify potential mitigation measures, and encourage the appropriate regulatory authorities to take further action, it could not ensure compliance with subsection 79(2) of the *Species at Risk Act*.

[453] Canada and Trans Mountain have accurately summarized the Board's findings that are relevant to its consideration of Project-related shipping in the context of the *Species at Risk Act*. However, I do not accept their submission that the Board's consideration of the Project's impact on the Southern resident killer whale substantially complied with its obligation under section 79 of the *Species at Risk Act*. I reach this conclusion for the following reason.

[454] By defining the Project not to include Project-related marine shipping, the Board failed to consider its obligations under the *Species at Risk Act* when it considered the Project's impact on the Southern resident killer whale. Had it done so, in light of its recommendation that the Project be approved, subsection 79(2) of the *Species at Risk Act* required the Board to ensure, if the Project was carried out, that "measures are taken to avoid or lessen" the Project's effects on the Southern resident killer whale and to monitor those measures.

[455] While I recognize the Board could not regulate shipping, it was nonetheless obliged to consider the consequences at law of its inability to "ensure" that measures were taken to

ameliorate the Project's impact on the Southern resident killer whale. However, the Board gave no consideration in its report to the fact that it recommended approval of the Project without any measures being imposed to avoid or lessen the Project's significant adverse effects upon the Southern resident killer whale.

[456] Because marine shipping was beyond the Board's regulatory authority, it assessed the effects of marine shipping in the absence of mitigation measures and did not recommend any specific mitigation measures. Instead it encouraged other regulatory authorities "to explore any such initiatives" (report, page 349). While the Board lacked authority to regulate marine shipping, the final decision-maker was not so limited. In my view, in order to substantially comply with section 79 of the *Species at Risk Act* the Governor in Council required the Board's exposition of all technically and economically feasible measures that are available to avoid or lessen the Project's effects on the Southern resident killer whale. Armed with this information the Governor in Council would be in a position to see that, if approved, the Project was not approved until all technically and economically feasible mitigation measures within the authority of the federal government were in place. Without this information the Governor in Council lacked the necessary information to make the decision required of it.

[457] The reasonableness of the Governor in Council's reliance on the Board's report is considered below.

[458] For completeness I now turn to the second argument advanced by Raincoast and Living Oceans: it was unreasonable for the Governor in Council to fail to comply with its additional, independent obligations under subsection 77(1) of the *Species at Risk Act*.

(iii) Was the Governor in Council obliged to comply with subsection 77(1) of the *Species at Risk Act*?

[459] Subsection 77(1) applies when any person or body, other than a competent minister, issues or approves "a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species". The person or body may authorize such an activity only if they have consulted with the competent minister, considered the impact on the species' critical habitat and formed the opinion that: (a) all reasonable alternatives to the activity that would reduce the impact on the critical habitat have been considered and the best solution has been adopted; and (b) all feasible mitigation measures will be taken to minimize the impact on the critical habitat.

[460] The Board accepted that:

> … vessel noise is considered a threat to the acoustic integrity of Southern resident killer whale critical habitat, and that physical and acoustic disturbance from human activities may be key factors causing depletion or preventing recovery of resident killer whale populations.
>
> (report, page 350)

[461] It also accepted that the impact of a Southern resident killer whale being exposed to an oil spill "is potentially catastrophic" (report, page 398).

[462] Based on these findings, Raincoast and Living Oceans submit that Project-related shipping "may destroy" critical habitat so that subsection 77(1) was engaged.

[463] I respectfully disagree. The Order in Council directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the expansion project. The Governor in Council did not issue or approve a licence, permit or other authorization that authorized marine shipping.

[464] Further, subsection 77(1.1) of the *Species at Risk Act* provides that subsection 77(1) does not apply to the Board when, as in the present case, it issues a certificate pursuant to an order made by the Governor in Council under subsection 54(1) of the *National Energy Board Act*. I accept Canada's submission that Parliament would not have intended to exempt the Board from the application of subsection 77(1) while at the same time contemplating that the Governor in Council was not exempted and was obliged to comply with subsection 77(1). This is particularly so given the Board's superior expertise in assessing impacts on habitat and mitigation measures. If subsection 77(1) applied, the Board's ability to meet its obligations was superior to that of the Governor in Council.

(f) Conclusion: the Governor in Council erred by relying upon the Board's report as a proper condition precedent to the Governor in Council's decision

[465] Trans Mountain's application was complex, raising challenging issues on matters as diverse as Indigenous rights and concerns, pipeline integrity, the fate and behaviours of spilled hydrocarbons in aquatic environments, emergency prevention, preparedness and response, the

need for the Project and its economic feasibility and the effects of Project-related shipping activities.

[466] The approval process was long and demanding for all participants; after the hearing the Board was left to review tens of thousands of pages of evidence.

[467] Many aspects of the Board's report are not challenged in this proceeding.

[468] This said, I have found that the Board erred by unjustifiably excluding Project-related marine shipping from the Project's definition. While the Board's assessment of Project-related shipping was adequate for the purpose of informing the Governor in Council about the effects of such shipping on the Southern resident killer whale, the Board's report was also sufficient to put the Governor in Council on notice that the Board had unjustifiably excluded Project-related shipping from the Project's definition.

[469] It was this exclusion that permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related marine shipping. This exclusion then permitted the Board to conclude that, notwithstanding its conclusion that the operation of Project-related marine vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project (as defined by the Board) was not likely to cause significant adverse environmental effects. The Board could only reach this conclusion by defining the Project not to include Project-related shipping.

[470] The unjustified exclusion of Project-related marine shipping from the definition of the Project thus resulted in successive deficiencies such that the Board's report was not the kind of "report" that would arm the Governor in Council with the information and assessments it required to make its public interest determination and its decision about environmental effects and their justification. In the language of *Gitxaala* this resulted in a report so deficient that it could not qualify as a "report" within the meaning of the legislation and it was unreasonable for the Governor in Council to rely upon it. The Board's finding that the Project was not likely to cause significant adverse environmental effects was central to its report. The unjustified failure to assess the effects of marine shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed conclusion about the effects of the Project was so critical that the Governor in Council could not functionally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.

[471] I have considered the reference in the Explanatory Note to the Order in Council to the government's commitment to the proposed Action Plan for the Southern resident killer whale and the then recently announced Oceans Protection Plan. These inchoate initiatives, while laudable and to be encouraged, are by themselves insufficient to overcome the material deficiencies in the Board's report because the "report" did not permit the Governor in Council to make an informed decision about the public interest and whether the Project is likely to cause significant adverse environmental effects as the legislation requires.

[472] There remains to consider the issue of the remedy which ought to flow from the unreasonable reliance upon the Board's report. In my view, this is best dealt with following consideration of the adequacy of the Crown's consultation process.

[473] My conclusion that the Board's report was so flawed that it was unreasonable for the Governor in Council to rely upon it arguably makes it unnecessary to deal with the argument advanced on behalf of the Attorney General of British Columbia. It is nonetheless important that it be briefly considered.

3. The challenge of the Attorney General of British Columbia

[474] As explained above at paragraphs 64 and 65, after the Board submits a report to the Governor in Council setting out the Board's recommendation under section 52 of the *National Energy Board Act* about whether a certificate of public convenience and necessity should issue, the Governor in Council may, among other options, by order direct the Board to issue a certificate of public convenience and necessity. Irrespective of the option selected, the Governor in Council's order "must set out the reasons for making the order" (subsection 54(2) of the *National Energy Board Act*). The Attorney General of British Columbia intervened in this proceeding to argue that, in breach of this statutory obligation, the Governor in Council failed to give reasons explaining why the Project is not likely to cause significant adverse environmental effects and why the Project is in the public interest.

[475] The Attorney General also argued in its written memorandum, but not orally, that the Governor in Council failed to consider the "disproportionate impact of Project-related marine

shipping spill risks on the Province of British Columbia". This failure is said to render the Governor in Council's decision unreasonable.

[476] In consequence, the Attorney General of British Columbia supports the request of the applicants that the Governor in Council's Order in Council be set aside.

(a) Did the Governor in Council fail to comply with the obligation to give reasons?

[477] The lynchpin of the Attorney General's argument is his submission that the Governor in Council's reasons must be found "within the four corners of the Order in Council" and nowhere else. Thus, the Attorney General submits that it is impermissible to have regard to the accompanying Explanatory Note or to documents referred to in the Explanatory Note, including the Board's report and the Crown Consultation Report. Read in this fashion, the Order in Council does not explain why the Governor in Council found the Project is not likely to cause any significant adverse environmental effects or was in the public interest.

[478] I respectfully reject the premise of this submission. Subsection 54(2) does not dictate the form the Governor in Council's reasons should take, requiring only that the "order must set out the reasons". Given the legislative nature and the standard format of an Order in Council (generally a series of recitals followed by an order) Orders in Council are not well-suited to the provision of lengthy reasons. In the present case, the two-page Order in Council was accompanied by the 20-page Explanatory Note. They were published together in the Canada Gazette. Given this joint publication, it would, in my view, be unduly formalistic to set aside the

Order in Council on the ground that the reasons found in the attached Explanatory Note were placed in an attachment to the order, and not within the "four square corners" of the order.

[479] Similarly, it would be unduly formalistic not to look to the content of the Board's report that informed the Governor in Council when rendering its decision. The Order in Council specifically referenced the Board's report and the terms and conditions set out in an appendix to the report, and expressly accepted the Board's public interest recommendation. This conclusion that the Order in Council may be read with the Board's report is consistent with this Court's decision in *Gitxaala*, where the Court accepted Canada's submission that the Order in Council should be read together with the findings and recommendations in the report of the joint review panel. This Court read the Order in Council together with the report and other documents in the record and found that the Governor in Council had met its statutory obligation to give reasons.

[480] I therefore find that the Governor in Council also in this case complied with its statutory obligation to give reasons.

(b) Did the Governor in Council fail to consider the impact of Project-related shipping spill risks on the Province of British Columbia?

[481] I disagree that the Governor in Council failed to consider the impact of shipping spill risks. The Explanatory Note shows the Governor in Council considered that:

- The Board found the risk of a major crude oil spill occurring was low (Explanatory Note, page 10).
- The Board imposed conditions relating to accidents and malfunctions (Explanatory Note, page 13).

[482] Under the heading "Government response to what was heard" the Explanatory Note set out the following about the risk of spills:

> Communities are deeply concerned about the risk and impacts that oil spills pose to their land, air, water and communities. In addition to the terms and conditions related to spills identified by the NEB, land-based oil spills are subject to both federal and provincial jurisdiction. Federally regulated pipelines are subject to NEB regulation and oversight, which requires operators to develop comprehensive emergency management programs and collaborate with local responders in the development of these programs. B.C. also recently implemented regulations under the provincial *Environmental Management Act* to strengthen provincial oversight and require industry and government to collaborate in response to spills in B.C.
>
> The Government recently updated its world-leading pipeline safety regime through the *Pipeline Safety Act*, which came into force in June 2016. The Act implements $1 billion in "absolute liability" for companies operating major crude oil pipelines to clarify that operators will be responsible for all costs associated with spills irrespective of fault up to $1 billion; operators remain liable on an unlimited basis beyond this amount when they are negligent or at fault. The Act also requires proponents to carry cash on hand to ensure they are in a position to immediately respond to emergencies.
>
> With respect to ship source spills, the Government recently announced $1.5 billion in new investment in a national Oceans Protection Plan to enhance its world-leading marine safety regime. The Oceans Protection Plan has four main priority areas:
>
> - creating a world-leading marine safety system that improves responsible shipping and protects Canada's waters, including new preventative and response measures;
> - restoring and protecting the marine ecosystems and habitats, using new tools and research;
> - strengthening partnerships and launching co-management practices with Indigenous communities, including building local emergency response capacity; and
> - investing in oil spill cleanup research and methods to ensure that decisions taken in emergencies are evidence-based.
>
> The Plan responds to concerns related to potential marine spills by strengthening the Coast Guard's ability to take command in marine emergencies, toughening

> requirements for industry response to incidents, and by enhancing Indigenous partnerships.

[483] While the Attorney General of British Columbia disagrees with the Governor in Council's assessment of the risk of a major spill from Project-related shipping, there is no merit to the submission that the Governor in Council failed to consider the risk of spills posed by Project-related shipping.

[484] I now turn to consider the adequacy of the consultation process.

D. Should the decision of the Governor in Council be set aside on the ground that Canada failed to consult adequately with the Indigenous applicants?

1. The applicable legal principles

[485] Before commencing the analysis, it is helpful to discuss briefly the principles that have emerged from the jurisprudence which has considered the scope and content of the duty to consult. As explained in the opening paragraphs of these reasons, the applicable principles are not in dispute; what is in dispute is whether, on the facts of this case (which are largely agreed), Canada fulfilled its constitutional duty to consult.

[486] The duty to consult is grounded in the honour of the Crown and the protection provided for "existing aboriginal and treaty rights" in subsection 35(1) of the *Constitution Act, 1982*. The duties of consultation and, if required, accommodation form part of the process of reconciliation and fair dealing (*Haida Nation*, paragraph 32).

[487] The duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title (*Haida Nation,* paragraph 35). The duty reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of a specific project.

[488] The extent or content of the duty of consultation is fact specific. The depth or richness of the required consultation increases with the strength of the *prima facie* Indigenous claim and the seriousness of the potentially adverse effect upon the claimed right or title (*Haida Nation*, paragraph 39; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, paragraph 36).

[489] When the claim to title is weak, the Indigenous interest is limited or the potential infringement is minor, the duty of consultation lies at the low end of the consultation spectrum. In such a case, the Crown may be required only to give notice of the contemplated conduct, disclose relevant information and discuss any issues raised in response to the notice (*Haida Nation*, paragraph 43). When a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to Indigenous peoples, and the risk of non-compensable damage is high, the duty of consultation lies at the high end of the spectrum. While the precise requirements will vary with the circumstances, a deep consultative process might entail: the opportunity to make submissions; formal participation in the decision-making process; and, the provision of written reasons to show that Indigenous concerns were considered and how those concerns were factored into the decision (*Haida Nation*, paragraph 44).

[490] Parliament may choose to delegate procedural aspects of the duty to consult to a tribunal.

[491] The Supreme Court has found the Board to possess both the procedural powers necessary to implement consultation and the remedial powers to accommodate, where necessary, affected Indigenous claims and Indigenous and treaty rights. The Board's process can, therefore, be relied on by the Crown to fulfil, in whole or in part, the Crown's duty to consult (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, paragraph 34).

[492] As referenced above at paragraph 284, the Supreme Court has described the Board as having considerable institutional expertise both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Indigenous or treaty rights substantially overlap with the project's potential environmental impact, the Board "is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available" (*Clyde River*, paragraph 33).

[493] When the Crown relies on a regulatory or environmental assessment process to fulfil the duty to consult, such reliance is not delegation of the Crown's ultimate responsibility to ensure consultation is adequate. Rather, it is a means by which the Crown can be satisfied that Indigenous concerns have been heard and, where appropriate, accommodated (*Haida Nation*, paragraph 53).

[494] The consultation process does not dictate a particular substantive outcome. Thus, the consultation process does not give Indigenous groups a veto over what can be done with land pending final proof of their claim. What is required is a process of balancing interests—a process of give and take. Nor does consultation equate to a duty to agree; rather, what is required is a commitment to a meaningful process of consultation (*Haida Nation*, paragraphs 42, 48 and 62).

[495] Good faith consultation may reveal a duty to accommodate. Where there is a strong *prima facie* case establishing the claim and the consequence of proposed conduct may adversely affect the claim in a significant way, the honour of the Crown may require steps to avoid irreparable harm or to minimize the effects of infringement (*Haida Nation*, paragraph 47).

[496] Good faith is required on both sides in the consultative process: "The common thread on the Crown's part must be 'the intention of substantially addressing [Aboriginal] concerns' as they are raised […] through a meaningful process of consultation" (*Haida Nation*, paragraph 42). The "controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake" (*Haida Nation*, paragraph 45).

[497] At the same time, Indigenous claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached (*Haida Nation*, paragraph 42).

[498] In the present case, much turns on what constitutes a meaningful process of consultation.

[499] Meaningful consultation is not intended simply to allow Indigenous peoples "to blow off steam" before the Crown proceeds to do what it always intended to do. Consultation is meaningless when it excludes from the outset any form of accommodation (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, paragraph 54).

[500] The duty is not fulfilled by simply providing a process for exchanging and discussing information. There must be a substantive dimension to the duty. Consultation is talking together for mutual understanding (*Clyde River*, paragraph 49).

[501] As the Supreme Court observed in *Haida Nation* at paragraph 46, meaningful consultation is not just a process of exchanging information. Meaningful consultation "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." Where deep consultation is required, a dialogue must ensue that leads to a demonstrably serious consideration of accommodation. This serious consideration may be demonstrated in the Crown's consultation-related duty to provide written reasons for the Crown's decision.

[502] Where, as in this case, the Crown must balance multiple interests, a safeguard requiring the Crown to explain in written reasons the impacts of Indigenous concerns on decision-making

becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of impacts on Indigenous rights (*Gitxaala*, paragraph 315).

[503] Further, the Crown is obliged to inform itself of the impact the proposed project will have on an affected First Nation, and, if appropriate in the circumstances, communicate its findings to the First Nation and attempt to substantially address the concerns of the First Nation (*Mikisew Cree First Nation*, paragraph 55).

[504] Consultation must focus on rights. In *Clyde River*, the Board had concluded that significant environmental effects to marine mammals were not likely and effects on traditional resource use could be addressed through mitigation measures. The Supreme Court held that the Board's inquiry was misdirected for the purpose of consultation. The Board was required to focus on the Inuit's treaty rights; the "consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*" (emphasis in original) (*Clyde River*, paragraph 45). Mitigation measures must provide a reasonable assurance that constitutionally protected rights were considered as rights in themselves—not just as an afterthought to the assessment of environmental concerns (*Clyde River*, paragraph 51).

[505] When consulting on a project's potential impacts the Crown must consider existing limitations on Indigenous rights. Therefore, the cumulative effects and historical context may inform the scope of the duty to consult (*Chippewas of the Thames*, paragraph 42).

[506] Two final points. First, where the Crown knows, or ought to know, that its conduct may adversely affect the Indigenous right or title of more than one First Nation, each First Nation is entitled to consultation based upon the unique facts and circumstances pertinent to it (*Gitxaala*, paragraph 236).

[507] Second, it is important to understand that the public interest and the duty to consult do not operate in conflict. As a constitutional imperative, the duty to consult gives rise to a special public interest that supersedes other concerns commonly considered by tribunals tasked with assessing the public interest. In the case of the Board, a project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*Clyde River*, paragraph 40).

2. The standard to which Canada is to be held in fulfilling the duty

[508] As briefly explained above at paragraph 226, Canada is not to be held to a standard of perfection in fulfilling its duty to consult. The Supreme Court of Canada has expressed this concept as follows:

> Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in … information and consultation the concept of reasonableness must come into play. … So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> (*Haida Nation*, paragraph 62)
>
> (underlining added)

[509] As in *Gitxaala*, in this case "the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ." (*Gitxaala*, paragraph 182).

[510] Against this legal framework, I turn to the design and execution of Canada's four-phase consultation process. This process began in May 2013 with the filing of the Project description and ended in November 2016 with the decision of the Governor in Council to approve the Project and direct the issuance of a certificate of public convenience and necessity.

3. Application of the legal principles to the evidence

[511] The Indigenous applicants express a myriad of concerns and asserted deficiencies with respect to the consultation process. Broadly speaking, they challenge both the design of the process and the execution of the process.

[512] I will deal first with the asserted deficiencies in the design of the process selected and followed by Canada, and then consider the asserted deficiencies in the execution of the process.

(a) Was the consultation process deficient because of the design of the process selected and followed by Canada?

[513] Generally speaking, the most salient concerns expressed with respect to the design of the consultation process are the assertions that:

i. The consultation framework was unilaterally imposed.
ii. The National Energy Board process is inadequate for fulfilling consultation obligations.
iii. Insufficient funding was provided.
iv. The process allowed the Project to be approved when essential information was lacking.

[514] Each assertion will be considered in turn.

(i) The consultation framework was unilaterally imposed

[515] There was no substantive consultation with the Indigenous applicants about the four-phase consultation process.

[516] However, as Canada argues, the Crown possesses a discretion about how it structures a consultation process and how it meets its consultation obligations (*Gitxaala*, paragraph 203, citing *Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)*, 2013 ABCA 443, 566 A.R. 259, at paragraph 39). What is required is a process that allows Canada to make reasonable efforts to inform and consult (*Haida Nation*, at paragraph 62).

[517] Canada's four-phase consultation process is described above at paragraphs 72 through 75. While I deal below with the asserted frailties of the Board's hearing process in this particular case, the Supreme Court has recently re-affirmed that the Crown may rely on a regulatory agency to fulfil the Crown's duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Chippewas of the Thames*,

paragraph 32). In the present case, no applicant asserts that the National Energy Board lacked any necessary statutory power so as to be able to fulfil in part the Crown's duty to consult. It follows that Canada could rely upon a consultation process which relied in part on the Board's hearing process, so long as Canada remained mindful of its constitutional obligation to ensure before approving the Project that consultation was adequate.

[518] Canada implemented a five-phase consultation framework for the review of the Northern Gateway Project. In *Gitxaala*, this Court found that the framework was reasonable (*Gitxaala*, paragraph 8). When the two consultation frameworks are compared there is little to distinguish them. An additional first phase was required in the Northern Gateway framework simply because the project was reviewed by a joint review panel, not the Board.

[519] Given Canada's discretion as to how the consultation process is structured and the similarity of this consultation process to that previously found by this Court to be reasonable, I am satisfied that Canada did not act in breach of the duty to consult by selecting the four-phase consultation process it adopted.

(ii) The Board's process is said to be inadequate for fulfilling consultation obligations

[520] A number of deficiencies are asserted with respect to the Board's process and its adequacy for fulfilling, to the extent possible, consultation obligations. The asserted deficiencies include:

- The Board's decision not to allow cross-examination of Trans Mountain's evidence.

- The Board's treatment of oral traditional evidence.
- The Board's timeframe which is said not to have provided sufficient time for affected Indigenous groups to inform themselves of the complexity of the Project and to participate with knowledge of the issues and impacts on them.
- The Board's failure to consult with affected Indigenous groups about any of the decisions the Board made prior to or during the hearing, including the list of issues for the hearing, the panel members who would hear the application, the design of the regulatory review and the environmental assessment, the decision-making process and the report and its recommendations.
- The failure of the Board's process to provide the required dialogue and consultation directly with Canada in circumstances where it is said that consultation in Phase III would be too little, too late.

[521] It is convenient to deal with the first four deficiencies together as the Board's choice of procedures, its decision-making process and its ultimate decision flow from its powers as a regulator under the *National Energy Board Act* and the *Canadian Environmental Assessment Act, 2012*.

[522] As explained above, the Supreme Court has found that meaningful Crown consultation can be carried out wholly or in part through a regulatory process (*Chippewas of the Thames*, paragraph 32). Prior to this decision, concern had been expressed about the tension said to result if a tribunal such as the Board were required both to carry out consultation on behalf of the Crown and then adjudicate on the adequacy of the consultation. The Supreme Court responded that such concern is addressed by observing that while it is the Crown that owes the constitutional duty to consult, agencies such as the Board are required to make legal decisions that comply with the Constitution. The Supreme Court went on to explain, at paragraph 34, that:

> When the [Board] is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution.
>
> (underlining added)

[523] Applying these principles to the submissions before this Court, and bearing in mind that at this point I am only addressing submissions with respect to the adequacy of the design of the consultation process, the Board was required to provide a process that was impartial and fair and in accordance with its statutory framework and the Constitution.

[524] As explained above, section 8 of the *National Energy Board Act* authorizes the Board to make rules about the conduct of hearings before it, and the Board's rules allow the Board to determine whether public hearings held before it are oral or written. Section 52 of the *National Energy Board Act* requires the Board to render its report to the Minister within strict timelines. It follows that the Board could decide not to allow oral cross-examination, could determine how oral traditional evidence would be received and could schedule the hearing to comply with section 52 of the *National Energy Board Act* so long as, at the end of the hearing, it was satisfied that it had exercised its responsibilities in a manner that was fair and impartial and consistent with its governing legislation and section 35 of the *Constitution Act, 1982*.

[525] Similarly, the Board was authorized as a neutral arbitrator to make the decisions required of it under the legislation, including decisions about which issues would be decided during the hearing, the composition of the hearing panel and the content of its ultimate report. So long as these decisions were made in a manner that was fair and impartial, and in accordance with the

legislative scheme and subsection 35(1) of the *Constitution Act, 1982* they too were validly made. The Indigenous applicants have not shown that any additional dialogue or process was required between the Board and the Indigenous applicants in order for the Board's decision to be constitutionally sound.

[526] Put another way, when the Board's process is relied on in whole or in part to fulfil the obligation to consult, the regulatory hearing process does not change and the Board's role as neutral arbitrator does not change. What changes is that the Board's process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not satisfied.

[527] I now consider the last deficiency said to make the Board's process inadequate for fulfilling even in part the duty to consult: the failure of the Board's process to provide the required consultation directly with Canada.

[528] The Indigenous applicants do not point to any jurisprudence to support their submission that Canada was required to dialogue directly with them during the Board's hearing process (that is, during Phase II) and I believe this submission may be dealt with briefly.

[529] As stated above, meaningful Crown consultation can be carried out wholly through a regulatory process so long as where the regulatory process relied upon by the Crown does not achieve adequate consultation or accommodation, the Crown takes further steps to meet its duty

to consult by, for example, filling any gaps in consultation on a case-by-case basis (*Clyde River*, paragraph 22).

[530] In the present case, Phase III was designed in effect to fill the gaps left by the Phase II regulatory process—Phase III was to focus on outstanding concerns about the Project-related impacts upon potential or established Indigenous or treaty rights and on any incremental accommodation measures that Canada should address. Leaving aside the question of whether Phase III adequately addressed gaps in the consultation process, a point dealt with below, the Indigenous applicants have not shown that the consultation process required Canada's direct involvement in the regulatory process.

[531] For all of these reasons, I am satisfied that the Board's process was adequate for fulfilling its consultation obligations.

[532] The next concern with respect to the design of the consultation process is that it is said that insufficient participant funding was provided.

(iii) The funding provided is said to have been inadequate

[533] Two Indigenous applicants raise the issue of inadequate funding: Squamish and SSN.

[534] Squamish sought participant funding of $293,350 to participate in the Board process but was granted only $44,270, plus travel costs for one person to attend the hearing. Canada later provided $26,000 to Squamish to participate in consultation following the close of the Board

hearing record. The Squamish appendix to the Crown Consultation Report notes that the British Columbia Environmental Assessment Office also offered Squamish $5,000 in capacity funding to participate in consultations.

[535] Chief Campbell of the Squamish Nation provided evidence that the funding provided to Squamish was not adequate for Squamish to obtain experts to review and respond to the 8 volume, 15,000 page, highly technical Project application. Nor, in his view, was the funding adequate for Squamish to undertake a comprehensive assessment of the impacts of the Project on Squamish rights and title. He notes that Squamish's limited budget is fully subscribed to meet the needs of its members and that the sole purpose of Squamish's involvement in the hearing and consultation process was "defensive: to protect our rights and title."

[536] SSN requested in excess of $300,000 for legal fees, expert fees, travel costs, meeting attendance costs and information collecting costs. It received $36,920 in participant funding, plus travel for two representatives to attend the hearing. Canada later offered $39,000 to SSN to participate in consultation following the close of the Board hearing record. The British Columbia Environmental Assessment Office also offered some capacity funding.

[537] SSN states that Canada knew that SSN requested funding in largest part to complete a traditional land and resource use study. It states that Canada knew that such studies had been completed for other Indigenous groups in relation to the Project, but that neither Canada nor the proponent had undertaken such a study for SSN.

[538] I accept that the level of participant funding provided constrained participation in the process before the National Energy Board by the Squamish and the SSN. However, as Canada submits, it is difficult to see the level of participant funding as being problematic in a systematic fashion when only two applicants address this issue.

[539] In *Gitxaala*, this Court rejected the submission that inadequate funding had been provided for participation before the joint review panel and in the consultation process. The Court noted, at paragraph 210, that the evidence filed in support of the submissions did:

> … not explain how the amounts sought were calculated, or detail any financial resources available to the First Nations outside of that provided by Canada. As such, the evidence fails to demonstrate that the funding available was so inadequate as to render the consultation process unreasonable.

[540] Much the same can be said of the evidence filed on this application. While SSN did append its request for participant funding as Exhibit D to the affidavit of its affiant Jeanette Jules, at the time this application was submitted SSN had not determined which expert or experts would be hired, it could not advise as to how many hours the expert(s) would likely bill or what the expert(s)' hourly rate(s) would be. The information provided was simply that it was expected that $80,000 was required to prepare a traditional land use study and that an additional $30,000 was required as the approximate cost of a wildlife study. No information was provided by either applicant about financial resources available to it.

[541] The evidence has not demonstrated that the level of participant funding was so inadequate as to render the entire consultation process unreasonable.

(iv) The process allowed the Project to be approved when essential information was lacking

[542] The final deficiency asserted with respect to the structure of the consultation process relates to the nature of the Board's process for approving projects. A number of Indigenous applicants argue that Canada's reliance upon the Board's hearing process was unreasonable in circumstances where potential impacts to title and rights remained unknown because studies of those potential impacts, and of the measures proposed in the Board's report to mitigate potential impacts, were left to a later date after the Governor in Council approved the Project. It is argued that without identification of all of the impacts of the Project Canada cannot rely on the Board's assessment of impacts to fulfil the duty to consult.

[543] Commencing at paragraph 286 above, I describe in some detail the Board's approval process in the context of the submission of the City of Burnaby that the Board's approval process was procedurally unfair because of what Burnaby characterized to be the deferral and delegation of the assessment of important information.

[544] Beginning at paragraph 322 above, I deal with the submissions of the City of Burnaby and Coldwater that the Governor in Council erred in determining that the Board's report qualified as a report because the Board did not decide certain issues before recommending approval of the Project. Consideration of the concerns advanced by Coldwater with respect to the Board's failure to deal with the West Alternative begins at paragraph 375 above. At paragraphs 384 and 385, I conclude that the pipeline route through the Coldwater River Valley remains a live issue.

[545] This places in context concerns raised by Coldwater and other applicants about the reasonableness of Canada's reliance on a process that left important issues unresolved at the time the Governor in Council approved the Project.

[546] In my view, this concern is addressed by the Supreme Court's analysis in the companion cases of *Clyde River* and *Chippewas of the Thames* where the Supreme Court explained that the Board's approval process may itself trigger the duty to consult where that process may result in adverse impacts upon Indigenous and treaty rights (*Clyde River*, paragraphs 25 to 29; *Chippewas of the Thames*, paragraphs 29 to 31).

[547] Examined in the context of Coldwater's concerns about the West Alternative and the protection of Coldwater's aquifer, this means that the Board's decision about the detailed pipeline routing in the vicinity of the Coldwater Reserve will trigger the duty to consult because Canada will have knowledge, real or constructive, of the potential impact of that decision upon Coldwater's aquifer located beneath the Coldwater Reserve. Once the duty is triggered, the Board may only make its decision if it informs itself of the impacts to the aquifer and takes the rights and interests of Coldwater into consideration before making its final decisions about pipeline routing and compliance with Condition 39 (*Chippewas of the Thames*, paragraph 48). Canada will remain responsible to ensure that the Board's decision upholds the honour of the Crown (*Clyde River*, paragraph 22). This is, I believe, a full answer to the concern that the consultation framework was deficient because certain decisions remain to be made after the Governor in Council approved the Project.

(v) Conclusion on the adequacy of the process selected and followed by Canada

[548] In *Clyde River* and *Chippewas of the Thames* the Supreme Court provided helpful guidance about the indicia of a reasonable consultation process. Applying those indicia:

- The Indigenous applicants were given early notice of the Project, the Board's hearing process, the framework of the consultation process and Canada's intention to rely on the National Energy Board process, to the extent possible, to discharge Canada's duty to consult.
- Participant funding was provided to the Indigenous applicants both by the Board and Canada (and the provincial Crown as well).
- The Board's process permitted Indigenous applicants to provide written evidence and oral traditional evidence, to question both Trans Mountain and the federal government interveners through Information Requests and to make written and oral closing submissions.
- The regulatory framework permitted the Board to impose conditions upon Trans Mountain that were capable of mitigating risks posed by the Project to the rights and title of the Indigenous applicants.
- After the Board's hearing record closed and prior to the decision by the Governor in Council, Canada provided a further consultation phase, Phase III, designed to enable Canada to deal with concerns not addressed by the hearing, the Board's proposed conditions and Trans Mountain's commitments.
- Canada understood, and advised the Indigenous applicants, that if Indigenous groups identified outstanding concerns in Phase III there were a number of options available to Canada. These included asking the National Energy Board to reconsider its recommendations and conditions, undertaking further consultations prior to issuing additional permits or authorizations and the use of existing or new policy and program measures to address outstanding concerns.

[549] I am satisfied that the consultation framework selected by Canada was reasonable. It was sufficient, if properly implemented, to enable Canada to make reasonable efforts to inform itself and consult. Put another way, this process, if reasonably implemented, could have resulted in mutual understanding on the core issues and a demonstrably serious consideration of accommodation.

(b) Was the consultation process deficient because of Canada's execution of the process?

[550] Canada argues that the consultation process allowed for deep consultation both in form and in substance. In particular it notes that:

- The Indigenous applicants were given early notice of the proposed Project, the Board hearing process and the consultation process, as well as Canada's intention to rely on the Board's process, to the extent possible, to discharge Canada's duty to consult.
- The Board required that Trans Mountain extensively consult before filing its application so as to attempt to address potential impacts by way of project modifications and design.
- Participant funding was provided to the Indigenous applicants by both Canada and the Board.
- The Indigenous applicants were afforded the opportunity before the Board to provide oral traditional and written evidence, to ask questions of Trans Mountain and the Federal interveners, and to make both written and oral submissions. The Board's report formulated conditions to mitigate, avoid or otherwise address impacts on Indigenous groups, and explained how Indigenous concerns were considered and addressed.
- Canada ordered an extension of the legislative timeframe for the Governor in Council's decision and met and corresponded with the Indigenous applicants to

discuss concerns that may not have been adequately addressed by the Board and to work together to identify potential accommodation measures.

- Canada developed the Crown Consultation Report to inform government decision-makers and sought feedback from the Indigenous applicants on two draft versions of the Crown Consultation Report.
- Canada reviewed upstream greenhouse gas emission estimates for the Project, struck a Ministerial Panel to seek public input and held a workshop in Kamloops.
- Canada developed additional accommodation measures including an Indigenous Advisory and Monitoring Committee, the Oceans Protection Plan and the Action Plan for the Recovery of the Southern Resident Killer Whale.
- Canada gave written reasons for conditionally approving the Project that showed how Indigenous concerns were considered and addressed.

[551] While in *Gitxaala* this Court found that the consultation process followed for the Northern Gateway project fell well short of the mark, Canada submits that the flaws identified by the Court in *Gitxaala* were remedied and not repeated. Specific measures were taken to remedy the flaws found in the earlier consultation. Thus:

i. Canada extended the consultation process by four months to allow deeper consultation with potentially affected Indigenous groups, greater public engagement and an assessment of the greenhouse gas emissions associated with the Project.

ii. The Order in Council expressly stated that the Governor in Council was "satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated". Reasons for this conclusion were given in the Explanatory Note.

iii. Canada shared its preliminary strength of claim assessments in August 2016 to allow Indigenous groups to comment on the assessments. Canada's ultimate assessments were set out in the Crown Consultation Report.

iv. Canada's officials met and dialogued with Indigenous groups. As well, several Ministers met with Indigenous groups. While the Governor in Council accepted the report of the National Energy Board, in addition to the Board's conditions the Crown Consultation Report contained a commitment to design, fund and implement an Indigenous Advisory and Monitoring Committee for the Project and the Explanatory Note referenced two new initiatives: the Economic Pathways Partnership and the Oceans Protection Plan.

v. In order to ensure that the Governor in Council received accurate information, two drafts of the Crown Consultation Report were distributed for comment and Indigenous groups were invited to provide their own submissions to the Governor in Council.

vi. The consultation was based on the unique facts and circumstances applicable to each Indigenous group. The Crown Consultation Report contained a detailed appendix for each potentially affected Indigenous group that dealt with: background information; a preliminary strength of claim assessment; a summary of the group's involvement in the Board and Crown Consultation process; a summary of the group's interests and concerns; accommodation proposals; the group's response to the Board's report; the potential impacts of the Project on the group's Indigenous interests; and the Crown's conclusions.

[552] I acknowledge significant improvements in the consultation process. To illustrate, in *Gitxaala* this Court noted, among other matters, that:

- requests for extensions of time were ignored (reasons, paragraphs 247 and 250);
- inaccurate information was put before the Governor in Council (reasons, paragraphs 255-262);
- requests for information went unanswered (reasons, paragraphs 272, 275-278);
- Canada did not disclose its assessment of the strength of the Indigenous parties' claim to rights or title or its assessment of the Project's impacts (reasons, paragraphs 288-309); and,

- Canada acknowledged that the consultation on some issues fell well short of the mark (reasons, paragraph 254).

[553] Without doubt, the consultation process for this project was generally well-organized, less rushed (except in the final stage of Phase III) and there is no reasonable complaint that information within Canada's possession was withheld or that requests for information went unanswered.

[554] Ministers of the Crown were available and engaged in respectful conversations and correspondence with representatives of a number of the Indigenous applicants.

[555] Additional participant funding was offered to each of the applicants to support participation in discussions with the Crown consultation team following the release of the Board's report and recommendations. The British Columbia Environmental Assessment Office also offered consultation funding.

[556] The Crown Consultation Report provided detailed information about Canada's approach to consultation, Indigenous applicants' concerns and Canada's conclusions. An individualized appendix was prepared for each Indigenous group (as described above at paragraph 551(vi)).

[557] However, for the reasons developed below, Canada's execution of Phase III of the consultation process was unacceptably flawed and fell short of the standard prescribed by the jurisprudence of the Supreme Court. As such, the consultation process fell short of the required mark for reasonable consultation.

[558] To summarize my reasons for this conclusion, Canada was required to do more than receive and understand the concerns of the Indigenous applicants. Canada was required to engage in a considered, meaningful two-way dialogue. Canada's ability to do so was constrained by the manner in which its representatives on the Crown consultation team implemented their mandate. For the most part, Canada's representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.

[559] On the whole, the record does not disclose responsive, considered and meaningful dialogue coming back from Canada in response to the concerns expressed by the Indigenous applicants. While there are some examples of responsiveness to concerns, these limited examples are not sufficient to overcome the overall lack of response. The Supreme Court's jurisprudence repeatedly emphasizes that dialogue must take place and must be a two-way exchange. The Crown is required to do more than to receive and document concerns and complaints. As this Court wrote in *Gitxaala*, at paragraph 265, speaking of the limited mandate of Canada's representatives:

> When the role of Canada's representatives is seen in this light, it is of no surprise that a number of concerns raised by Aboriginal groups—in our view, concerns very central to their legitimate interests—were left unconsidered and undiscussed. This fell well short of the conduct necessary to meet the duty to consult.

[560] Further, Phase III was to focus on two questions: outstanding concerns about Project-related impacts and any required incremental accommodation measures. Canada's ability to consult and dialogue on these issues was constrained by two further limitations: first, Canada's unwillingness to depart from the Board's findings and recommended conditions so as to

genuinely understand the concerns of the Indigenous applicants and then consider and respond to those concerns in a genuine and adequate way; second, Canada's erroneous view that it was unable to impose additional conditions on Trans Mountain.

[561] Together these three factors led to a consultation process that fell short of the mark and was, as a result, unreasonable. Canada then exacerbated the situation by its late disclosure of its view that the Project did not have a high level of impact on the established and asserted rights of the Indigenous applicants—a disclosure made two weeks before they were required to submit their final response to the consultation process and less than a month before the Governor in Council approved the Project.

[562] I begin the analysis by underscoring the need for meaningful two-way dialogue in the context of this Project and then move to describe in more detail the three significant impediments to meaningful consultation: the Crown consultation team's implementation of their mandate essentially as note-takers, Canada's reluctance to consider any departure from the Board's findings and recommended conditions, and Canada's erroneous view that it lacked the ability to impose additional conditions on Trans Mountain. I then discuss Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants. Finally, I review instances that show that as a result of these impediments the opportunity for meaningful dialogue was frustrated.

[563] The jurisprudence of the Supreme Court on the duty to consult is clear. The Indigenous applicants were entitled to a dialogue that demonstrated that Canada not only heard but also gave

serious consideration to the specific and real concerns the Indigenous applicants put to Canada, gave serious consideration to proposed accommodation measures, and explained how the concerns of the Indigenous applicants impacted Canada's decision to approve the Project. The instances below show how Canada fell short of its obligations.

(i) The need for meaningful two-way dialogue

[564] As a matter of well-established law, meaningful dialogue is a prerequisite for reasonable consultation. As explained above at paragraphs 499 to 501, meaningful consultation is not simply a process of exchanging information. Where, as in this case, deep consultation is required, a dialogue must ensue and the dialogue should lead to a demonstrably serious consideration of accommodation. The Crown must be prepared to make changes to its proposed actions based on information and insight obtained through consultation.

[565] The need for meaningful dialogue exists and operates in a factual context. Here, Phase III was a critically important part of the consultation framework. This was so for a number of reasons.

[566] First, Phase III was the first opportunity for the Indigenous applicants to dialogue directly with Canada about matters of substance, not process.

[567] Second, the Board's report did not deal with all of the subjects on which consultation was required. For example, the Board did not make any determinations about the nature and scope of asserted or established Indigenous rights, including title rights. Nor did the Board consider the

scope of the Crown's duty to consult or whether the duty was fulfilled. Nor did Trans Mountain in its application, or the Board in its report, assess how the residual effects of the Project, or the Project itself, could adversely impact traditional governance systems and claims to Aboriginal title (Crown Consultation Report, sections 1.4, 4.3.4 and 4.3.5). Canada was obliged to consult on these issues.

[568] Third, neither Trans Mountain nor the Board assessed the Project's impacts on a specific basis for each affected Indigenous group. Rather, Trans Mountain assessed the effects related to Project construction and operations (including potential accidents and malfunctions) that might impact biophysical resources and socio-economic components within the Project area, and the Indigenous uses, practices and activities associated with those resources. This approach was accepted by the Board (Board report, pages 51 to 52).

[569] Finally, Phase III began in earnest with the release of the Board's report and finalized conditions. This report contained findings of great importance to the applicants because the Board's findings led Canada to conclude that the Project had only a minor-to-moderate impact on the Indigenous applicants. As a matter of law, this conclusion directly affected both the depth of consultation required and the need for accommodation measures. The following two examples illustrate the importance of the Board's findings to the Indigenous applicants.

[570] The first example concerns the assessment of the Project's potential impact on freshwater fishing. The Board found that the proposed watercourse crossings designs, mitigation measures, reclamation activities and post-construction monitoring were appropriate and that they would

effectively reduce the extent of effects on fish and fish habitat. Watercourse crossings would be required to comply with federal and provincial laws and regulations and would require permits under the British Columbia *Water Sustainability Act*, S.B.C. 2014, c. 15. The Board agreed with Trans Mountain's self-assessment of the potential for serious harm in that the majority of proposed watercourse crossings would not constitute serious harm to fish for the purposes of the *Fisheries Act*, R.S.C. 1985, c. F-14 (Board report, pages 183 and 185).

[571] The Stó:lō have a constitutionally protected right to fish on the Fraser River, a right affirmed by the Supreme Court of Canada. In the Stó:lō appendix to the Crown Consultation Report, Canada concluded that Project construction and routine maintenance during operation would be expected to result in a minor-to-moderate impact on the Stó:lō's freshwater fishing and marine fishing and harvesting activities (Stó:lō appendix, pages 26 and 27). This assessment flowed directly from the Board's conclusion that Project-related activities could result in low-to-moderate magnitude effects on freshwater and marine fish and fish habitat and the Board's conclusion that its conditions, if the Project was approved, would either directly or indirectly avoid or reduce potential environmental effects on fishing activities (Stó:lō appendix, pages 24 and 25).

[572] The second example relates to the ability of Indigenous groups to use the lands, waters and resources for traditional purposes. The Board found that this ability would be temporarily impacted by construction and routine maintenance activities, and that some opportunities for certain activities, such as harvesting or accessing sites or areas of traditional land resource use, would be temporarily interrupted. The Board was of the view that these impacts would be short-

term, as they would be limited to brief periods during construction and routine maintenance, and that these effects would be largely confined to the Project footprint for the pipeline, associated facilities and the on-shore portion of the Westridge Marine Terminal site. The Board found these effects would be reversible in the short to long term, and low in magnitude (Board report, page 279). The Board also found that:

- Project-related pipeline, facility and Westridge Marine Terminal construction and operation, and marine shipping activities were likely to have low-to-moderate magnitude environmental effects on terrestrial, aquatic and marine species harvested by Indigenous groups as a whole (Board report, pages 204, 221 to 224 and 362);
- Construction of the Westridge Marine Terminal, the pipeline and associated facilities were likely to cause short-term temporary disruptions to Indigenous community members accessing traditional hunting, trapping and plant gathering sites (Board report, page 279); and,
- Project-related marine shipping activities were likely to cause temporary disruptions to activities or access to sites during the period of time Project-related tankers were in transit (Board report, page 362).

[573] Based on these findings, Canada concluded that the impact of Project construction and operation and Project-related marine shipping activities on Tsleil-Waututh's and Squamish's hunting, trapping and plant gathering activity would be negligible-to-minor. The Project's impact on these activities was assessed to be minor for the Stó:lō and SSN, and minor-to-moderate for Coldwater and Upper Nicola.

[574] The critical importance of the Board's findings to the Indigenous applicants mandated meaningful dialogue about those findings. I now turn to consider Canada's execution of Phase III of the consultation process, commencing with the mandate of the Crown consultation team.

(ii) The implementation of the mandate of the Crown consultation team

[575] While Canada submits that the members of the Crown consultation team were not mere note-takers, the preponderance of the evidence is to the effect that the members of the Crown consultation team acted on the basis that, for the most part, their role was that of note-takers who were to accurately report the concerns of the Indigenous applicants to the decision-makers.

[576] My review of the evidence begins with the explanation of the team's mandate found in the Crown Consultation Report. I then move to the evidence of the interactions between the Crown consultation team and the Indigenous applicants during the consultation process.

[577] First, a word of explanation about the source of the evidence cited below. Unless otherwise noted, the evidence comes from meeting notes prepared by Canada. It was Canada's practice to prepare meeting notes following each consultation meeting, to send the draft notes to the affected Indigenous group for comment, and then to revise the notes based on the comments received before distributing a final version. The parties did not take issue with the accuracy of meeting notes. As shown below, where there was any disagreement on what had been said, the minutes set out each party's view of what had been said.

a. The Crown Consultation Report

[578] Section 3.3.4 of the Crown Consultation Report dealt with Phase III of the consultation process. Under the subheading "Post-NEB Hearing Phase Consultation" the report stated:

> … The mandate of the Crown consultation team was to listen, understand, engage and report to senior officials, Aboriginal group perspectives. The Minister of Natural Resources and other Ministers were provided a summary of these meetings.

b. The experience of Tsleil-Waututh

[579] At a meeting held on April 5, 2016, Erin O'Gorman of Natural Resources Canada "highlighted her mandate to listen and understand [Tsleil-Waututh's] perspective on how consultations should be structured, and move this information for decision. No mandate to defend the current approach."

[580] In the course of the introductions and opening remarks at a meeting held September 15, 2016, "Canada stressed that the Crown's ultimate goal is to understand the position and concerns of the [Tsleil-Waututh] on the proposed Trans Mountain Expansion project."

[581] At a meeting held on October 20, 2016, Canada's representatives advised that "[o]ur intention is to provide a report to cabinet and include all first Nations consulted, we are open to having [Tsleil-Waututh] input review and representation in that report, together with mitigation and accommodation measures." In response, a representative of Tsleil-Waututh "indicated he did not want consultations and a report of concerns to [Governor in Council]: that has occurred and

does not work." The response of the federal representatives to this was that "it was sufficient to convey information to the [Governor in Council] depending on how it's done."

c. The experience of Squamish

[582] On October 6, 2016, the Major Projects Management Office and the British Columbia Environmental Assessment Office jointly wrote to Squamish in response to a letter from Squamish setting out its views on the outstanding deficiencies in the Board review process and requesting a review of the consultation approach the Crown was taking to inform forthcoming federal and provincial decisions in respect of the Project. Under the heading "Procedural Concerns" Squamish was advised:

> The Crown Consultation Team's objective has always been to work with Squamish and other Aboriginal groups to put forward the best information possible to decision makers within the available regulatory timeframe, via this Consultation and Accommodation Report. Comments and input provided by Squamish will help the Crown Consultation Team to accurately convey Squamish's interests, concerns, and any specific proposals.
>
> The Crown is now focused on validating the key substantive concerns of Squamish, and has requested feedback on an initial draft report so that the Crown can include draft conclusions in a subsequent revision that will include the Crown's assessment of the seriousness of potential impacts from the Project on Aboriginal Interests, specific to each Aboriginal group.
>
> …
>
> At this stage in the process, following a four month extension of the federal legislated time limit, for a decision on the Project (required by December 19, 2016), we continue to want to ensure that Squamish's substantive concerns with respect to the Project, [Board] report (including recommended terms and conditions), and related proposals for mitigation or accommodation are accurately and comprehensively documented in the Consultation and Accommodation Report.
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> (underlining added)

[583] At the only consultation meeting held with Squamish, Canada's consultation lead referenced the ethics the team abided by during each meeting with Indigenous groups: "honesty, truth, pursuing the rightful path and ensuring that accurate and objective, representative information is put before decision-makers."

[584] He later reiterated that "[i]t is the Crown's duty to ensure that accurate information on these outstanding issues is provided to decision-makers, including how Squamish perceives the project and any outstanding issues."

d. The experience of Coldwater

[585] At a meeting held with Coldwater on March 31, 2016, prior to the start of Phase III, the head of the Crown consultation team explained that:

> … the work of the Crown consultation team, to develop a draft report that helps document the potential impacts of the project on [Coldwater] rights and interests, will be the vehicle through which the Crown documents potentially outstanding issues and accommodation proposals. It may appear as though the Crown is relying solely on the [Board] process, however it is not. It is leading its own consultation activities and will be overlaying a separate analytical framework (i.e. the impacts-on-rights lens).

[586] At a meeting on May 4, 2016, discussing, among other things, the effect of the Project on Coldwater's aquifer the Crown consultation team advised:

> For specifics such as detailed routing, it is the [Board] which decides those. <u>The responsibility that the Crown consultation team has is to make sure these issues are reflected in the Crown consultation report, so they can be considered by decision makers</u>.
>
> (underlining added)

After Coldwater expressed its strong preference for the West Alternative Canada's representatives responded that:

> [t]his issue is one which is very detailed, and will need to be recorded carefully and accurately in the Crown consultation Report. The Crown consultation report can highlight that project routing is a central issue for Coldwater.
>
> (underlining added)

[587] At a consultation meeting held on October 7, 2016, again in the context of discussions about Coldwater's aquifer, one of Canada's representatives:

> … acknowledged that the aquifer hasn't been fully explored, but explained that the [Board] process has analysed the Project and that the Crown will not be taking an independent analysis beyond that. This is because the [Board] is a quasi-judicial tribunal with significant technical expertise. The Crown (federally and provincially) will not undertake an independent analysis of potential corridor routes. That said, the Crown will take Coldwater's concerns back to decision makers.
>
> …
>
> Coldwater asked what the point of consultation was if all that was coming from the Crown was a summary report to the [Governor in Council].
>
> (underlining added)

[588] In the later stages of the meeting during a discussion headed "Overview of Decision Making", Coldwater stated that based on the discussion with the Crown to date it did not seem likely that there would be a re-analysis of the West Alternative or any of the additional analysis Coldwater had asked for. Canada's representatives responded that:

> [The Crown's] position is that the detailed route hearing process and Condition 39 provide avenues to consider alternative routes, however the Crown is not currently considering alternative routes because the [Board] concluded that the applied for pipeline corridor is satisfactory. The Crown will ensure that Coldwater's concerns about the route are provided to the Cabinet, it will then be

> up to Cabinet to decide if those concerns warrant reconsideration of the current route.
>
> (underlining added)

e. The experience of Stó:lō

[589] An email sent from the Major Projects Management Office following an April 13, 2016, consultation meeting advised that:

> The Crown consultation team for [the Trans Mountain expansion] and the forthcoming Ministerial Representative (or Panel) will hear views on the project and whether there are any outstanding issues not addressed in the [Board's] final report and conditions or [Environment Canada's] assessment of upstream greenhouse gas emissions. This will provide another avenue for participants to provide their views on the upstream [greenhouse gas] assessment for [Trans Mountain expansion]. Any comments will be received and given consideration by the Government of Canada.
>
> (underlining added)

[590] On May 12, 2016, the Stó:lō wrote to the Minister of Natural Resources, the Honourable James Carr. It wrote about the Crown Consultation Report that:

> … we understood [Canada's representative] Mr. Neil to say that the federal decision-maker will be the Governor-in-Council and that [Natural Resources Canada], further to this Crown consultation, will not make recommendations with respect to this project. Instead, its report to the Governor-in-Council will be a summary of what it heard during its consultations with aboriginal peoples with some commentary. We further understood Mr. Whiteside [another federal representative] to say that the Governor-in-Council cannot, based on Crown consultations, add or make changes to the Terms and Conditions of the project as set out by the [Board]. If we have misunderstood these representations, we would appreciate being informed in writing. If we have not misunderstood these representations, we believe that [Natural Resources Canada] is misinterpreting its constitutional obligations and the authority of federal decision-makers.
>
> (underlining added)

[591] The Stó:lō went on to observe that "[a] high level of consultation means more than simply gathering information on aboriginal interests, cross checking those with the Terms and Conditions of the project and reporting those findings to the federal decision-maker." And that "[a] simple 'what we heard' report is inadequate to this task and the Governor-in-Council must be aware of its obligation to either reject or make changes to the project to protect and preserve the aboriginal rights, title and interests of the Stó:lō Collective."

[592] The Minister responded on July 15, 2016. The Minister agreed that addressing concerns required more than gathering and reporting information from consultation sessions and advised that if the Stó:lō Collective identified concerns that had not been fully addressed by the Board's terms and conditions consultation would "include efforts to preserve the Aboriginal rights in question." The Minister encouraged the Stó:lō Collective "to work with the Crown consultation team so that the Stó:lō Collective's interests are fully understood and articulated in the Crown Consultation and Accommodation Report" (underlining added). The Minister added that "[a]ny accommodation measures or proposals raised during Crown consultations will be included in this report and will inform the Government's decision on [the Project]."

f. The experience of Upper Nicola

[593] At a meeting held on March 31, 2016, after Chief McLeod expressed his desire for Upper Nicola's "intentions to be heard by decision makers, and asked that all of the information shared today be relayed to Minister Carr", Canada's representatives responded that "senior decision makers are very involved in this project and the Crown consultation team would be relaying the outcomes and the meeting records from the meeting today up the line." Canada's Crown

consultation lead noted that "wherever possible he would like to integrate some of the Indigenous words Chief McLeod spoke about into the Crown consultation report as a mechanism to relay the important messages which the Chief is talking about."

[594] At a meeting on May 3, 2016, immediately prior to the release of the Board's report and recommendations, Canada's consultation lead "reiterated the current mandate for the Crown consultation team, which is to listen, learn, understand, and to report up to senior decision makers" (underlining added). Upper Nicola's legal counsel responded that "the old consultation paradigm, where the Crown's officials meets with Aboriginal groups to hear from them their perspectives and then to report this information to decision makers, is no longer valid."

[595] Towards the end of the meeting, in response to a question about a recent media story which claimed that the Prime Minister had instructed his staff to develop a strategy for approving Trans Mountain, a senior advisor to Indigenous and Northern Affairs Canada advised that he had "received no instructions from his department that would change his obligation as a public servant to ensure that he does all he can to remain objective and impartial and to ensure that the views of Aboriginal groups are appropriately and accurately relayed to decision makers." The Crown consultation lead added that the "Crown consultation team has no view on the project. Its job is to support decision makers with accurate information" (underlining added).

g. The experience of SSN

[596] In an email of July 7, 2015, sent prior to the release of the Board's draft conditions, SSN was advised by the Major Projects Management Office that the Federal "Crown's consultation

will focus on an exchange of information and dialogue on two key documents", the Board's draft conditions and the draft Crown Consultation Report. With respect to the Crown Consultation Report, the email advised that the focus would be to determine "whether the Crown has adequately described the Aboriginal group's participation in the process, the substantive issues they have raised and the status of those issues (including Aboriginal groups' views on any outstanding concerns and residual issues arising from Phase III)" (underlining added).

[597] In a later email of June 17, 2016, SSN were informed that:

> The objective of the Crown consultation team moving forward is to consult collaboratively in an effort to reach consensus on outstanding issues and related impacts on constitutionally protected Aboriginal and treaty rights, as well as options for accommodating any impacts on rights that may need to be considered as part of the decision-making process. The status of these discussions will be documented in a Consultation and Accommodation Report that will help inform future decisions on the proposed project and any accompanying rationale for the government's decisions.
>
> (underlining added)

h. Conclusion on the mandate of the Crown consultation team

[598] As this review of the evidence shows, members of the Crown consultation team advised the Indigenous applicants on a number of occasions throughout the consultation process that they were there to listen and to understand the applicants' concerns, to record those concerns accurately in the Crown Consultation Report, and to pass the report to the Governor in Council. The meeting notes show the Crown consultation team acted in accordance with this role when discussing the Project, its impact on the Indigenous applicants and their concerns about the Project. The meeting notes show little or no meaningful responses from the Crown consultation team to the concerns of the Indigenous applicants. Instead, too often Canada's response was to

acknowledge the concerns and to provide assurance the concerns would be communicated to the decision-makers.

[599] As this Court explained in *Gitxaala* at paragraph 279, Canada was required to engage, dialogue and grapple with the concerns expressed to it in good faith by the Indigenous groups impacted by the Project. Meaningful dialogue required someone representing Canada empowered to do more than take notes—someone able to respond meaningfully to the applicants' concerns at some point in time.

[600] The exchanges with the applicants demonstrate that this was missing from the consultation process. The exchanges show little to facilitate consultation and show how the Phase III consultation fell short of the mark.

[601] The consultation process fell short of the required mark at least in part because the consultation team's implementation of its mandate precluded the meaningful, two-way dialogue which was both promised by Canada and required by the principles underpinning the duty to consult.

(iii) Canada's reluctance to depart from the Board's findings and recommended conditions and genuinely engage the concerns of the Indigenous applicants

[602] During Phase III each Indigenous applicant expressed concerns about the suitability of the Board's regulatory review and environmental assessment. These concerns were summarized and reported in the appendix to the Crown Consultation Report maintained for each Indigenous

applicant (Tsleil-Waututh appendix, pages 7-8; Squamish appendix, page 4; Coldwater appendix, pages 4-5; Stó:lō appendix, pages 12-14; Upper Nicola appendix, pages 5-6; SSN appendix, page 4). These concerns related to both the Board's hearing process and its findings and recommended conditions. The concerns expressed by the Indigenous applicants included:

- The exclusion of Project-related shipping from the definition of the "designated project" which was to be assessed under the *Canadian Environmental Assessment Act, 2012*.
- The inability to cross-examine Trans Mountain's witnesses, coupled with what were viewed to be inadequate responses by Trans Mountain to Information Requests.
- The Board's recommended terms and conditions were said to be deficient for a number of reasons, including their lack of specificity and their failure to impose additional conditions (for example, a condition that sacred sites be protected).
- The Board's findings were generic, thus negatively impacting Indigenous groups' ability to assess the potential impact of the Project on their title and rights.
- The Board's legislated timelines were extremely restrictive and afforded insufficient time to review the Project application and to participate meaningfully in the review process.
- The Board hearing process was an inappropriate forum for assessing impacts to Indigenous rights, and the Board's methods and conclusions regarding the significance and duration of the Project's impacts on Indigenous rights were flawed.

[603] However, missing from both the Crown Consultation Report and the individual appendices is any substantive and meaningful response to these concerns. Nor does a review of the correspondence exchanged in Phase III disclose sufficient meaningful response to, or dialogue about, the various concerns raised by the Indigenous applicants. Indeed, a review of the record of the consultation process discloses that Canada displayed a closed-mindedness when

concerns were expressed about the Board's report and was reluctant to depart from the findings and recommendations of the Board. With rare exceptions Canada did not dialogue meaningfully with the Indigenous applicants about their concerns about the Board's review. Instead, Canada's representatives were focused on transmitting concerns of the Indigenous applicants to the decision-makers, and nothing more. Canada was obliged to do more than passively hear and receive the real concerns of the Indigenous applicants.

[604] The evidence on this point comes largely from Tsleil-Waututh and Coldwater.

[605] I begin with the evidence of the Director of Tsleil-Waututh's Treaty, Lands and Resources Department, Ernie George. He affirmed that at a meeting held with representatives of Canada on October 21, 2016, to discuss Tsleil-Waututh's view that the Board's process was flawed such that the Governor in Council could not rely on its report and recommendations:

> 81. Canada expressed that it was extremely reluctant to discuss the fundamental flaws that [Tsleil-Waututh] alleged were present in relation to the [Board] process, and even prior to the meeting suggested that we might simply need to "agree to disagree" on all of those issues. In our view Canada had already determined that it was not willing to take any steps to address the issues that [Tsleil-Waututh] identified and submitted constituted deficiencies in the [Board] process, despite having the power to do so under CEAA and NEBA and itself stating that this was a realistic option at its disposal.
>
> (underlining added)

[606] Mr. George was not cross-examined on his affidavit.

[607] Canada's reluctance was firmly expressed a few days later at a meeting held on October 27, 2016. Mr. George affirmed:

> 101. [Tsleil-Waututh] raised its concern that although the [Board] reached similar conclusions as [Tsleil-Waututh] that oil spills in Burrard Inlet would cause significant adverse environmental effects, it disagreed with Drs. Gunton and Broadbent's conclusions as to the likelihood of spills occurring. [Tsleil-Waututh] then asked Canada whether it agreed with those conclusions. Canada was unable to respond because it did not bring its risk experts to the meeting. [Tsleil-Waututh] rearticulated its view that such risks were far too high.
>
> 102. At this point, despite the critical importance of this issue, Canada advised [Tsleil-Waututh] that it was unwilling to revisit the [Board's] conclusions and would instead wholly rely on the [Board's] report on this issue. We stated that we did not accept Canada's position, that further engagement on this subject was required, and that we would be willing to bring our experts to a subsequent meeting to consider any new material or new technology that Canada might identify.
>
> (underlining added)

[608] This evidence is consistent with the meeting notes prepared by Canada which reflect that Canada's representatives "indicated that government would rely on the [Board's] report". The notes then record that Tsleil-Waututh's representatives inquired "if the [Government of Canada] was going to rely on the [Board's] report, there was an openness to discuss matters related to gaps in the [Board's] report and what had been ignored." In response, "Canada acknowledged [Tsleil-Waututh's] views on the [Board] process, and indicated that it could neither agree or disagree: both [Tsleil-Waututh] and [Canada] had been intervenors and neither could know how the [Board] panel weighed information provided to it."

[609] Coldwater provided similar evidence relating to its efforts to consult with Canada about the Project's impacts on its aquifer at meetings held on May 4, 2016 and October 7, 2016.

[610] On May 4, 2016, representatives of Coldwater expressed their view that the West Alternative was a much better pipeline route that addressed issues the Board had not addressed

adequately. As set out above, Canada's representatives responded that for "specifics such as detailed routing, it is the [Board] which decides those" and added that "[t]he responsibility that the Crown consultation team has is to make sure these issues are reflected in the Crown consultation report, so they can be considered by decision makers."

[611] Canada again expressed the view that the Board's findings were not to be revisited in the Crown consultation process at the meeting of October 7, 2016. In response to a question about the West Alternative, Canada's representatives advised that in the Phase III consultation process it was not for Canada to consider the West Alternative as an alternate measure to mitigate or accommodate Coldwater's concerns. The meeting notes state:

> The Crown replied that the [Board] concluded that the current route is acceptable; however the Panel imposed a condition requiring the Proponent to further study the interaction between the proposed pipeline and the aquifer. Tim Gardiner acknowledged that the aquifer hasn't been fully explored, but explained that the [Board] process has analyzed the Project and that the Crown will not be taking an independent analysis beyond that. This is because the [Board] is a quasi-judicial tribunal with significant technical expertise, the Crown (federally and provincially) will not undertake an independent analysis of potential corridor routes. That said, the Crown will take Coldwater's concerns back to decision makers.
>
> (underlining added)

[612] Canada went on to express its confidence in Board Condition 39 and the detailed route hearing process.

[613] Later, in response to Coldwater's concern that the Board never considered the West Alternative, the meeting notes show that Canada's representatives:

> … acknowledged Coldwater's concerns, and explained that when the West Alternative was no longer in the [Board's] consideration, the Crown was not able

> to question that. [Mr. Whiteside] acknowledged that from Coldwater's perspective this leaves a huge gap. Mr. Whiteside went on to explain that the Proponent's removal of the West Alternative "is not the Crown's responsibility. We are confined to the [Board] report."
>
> (underlining added)

[614] Finally, in the course of an overview of decision-making held at the end of the October 7, 2016 meeting, Canada advised it was not considering alternative routes "because the [Board] concluded that the applied for pipeline corridor is satisfactory." Canada added that "[t]he Crown will ensure that Coldwater's concerns about the route are provided to the Cabinet, [and] it will then be up to Cabinet to decide if those concerns warrant reconsideration of the current route."

[615] As this Court had already explained in *Gitxaala,* at paragraph 274, Canada's position that it was confined to the Board's findings is wrong. As in *Gitxaala*, Phase III presented an opportunity, among other things, to discuss and address errors, omissions and the adequacy of the recommendations in the Board's report on issues that vitally concerned the Indigenous applicants. The consequence of Canada's erroneous position was to seriously limit Canada's ability to consult meaningfully on issues such as the Project's impact on each applicant and possible accommodation measures.

[616] Other meeting notes do not record that Canada expressed its reluctance to depart from the Board's findings in the same terms to other Indigenous applicants. However, there is nothing inconsistent with this position in the notes of the consultation with the other applicants.

[617] For example, in a letter sent to Squamish by the Major Projects Management Office on July 14, 2015, it was explained that the intent of Phase III was:

> … not to repeat or duplicate the [Board] review process, but to identify, consider and potentially address any outstanding concerns that have been raised by Aboriginal groups (i.e. concerns that, in the opinion of the Aboriginal group, have not been addressed through the [Board] review process).

[618] Later, Squamish met with the Crown consultation team on September 11, 2015, to discuss the consultation process. At this meeting Squamish raised concerns about, among other things, the adequacy of Canada's consultation process. In a follow-up letter counsel for Squamish provided more detail about the "Squamish Process"—a proposed process to enable consideration of the Project's impact upon Squamish's interests. The process included having community concerns inform the scope of the assessment with the goal of having these concerns substantively addressed by conditions placed on the Project proponent.

[619] Canada responded by letter dated November 26, 2015, in which it reiterated its position that:

> … there are good reasons for the Crown to rely on the [Board's] review of the Project to inform the consultation process. This approach ensures rigour in the assessment of the potential adverse effects of the Project on a broad range of issues including the environment, health and socio-economic conditions, as well as Aboriginal interests.

[620] The letter went on to advise that:

> Information from a formal community level or third-party review process can be integrated into and considered through the [Board] review process if submitted as evidence. For the Trans Mountain Expansion Project, the appropriate time to have done so would have been prior to the evidence filing deadline in May 2015.

[621] Canada went on to express its confidence that the list of issues, scope of assessment and scope of factors examined by the Board would inform a meaningful dialogue between it and Squamish.

[622] In other words, Canada was constrained by the Board's review of the Project. Canada required that evidence of any assessment or review process be first put before the Board, and any dialogue had to be informed by the Board's findings.

[623] A similar example is found in the Crown's consultation with Upper Nicola. At the consultation meeting held on September 22, 2016, Upper Nicola expressed its concern with the Board's economic analysis. The Director General of the Major Projects Management Office responded that "as a rule, the [Governor in Council] is deferential to the [Board's] assessment, but they are at liberty to consider other information sources when making their decision and may reach a different conclusion than the [Board]." The Senior Advisor from Indigenous and Northern Affairs Canada added that "the preponderance of detail in the [Board] report weighs heavy on Ministers' minds."

[624] No dialogue ensued about the legitimacy of Upper Nicola's concern about the Board's economic analysis, although Canada acknowledged "a strong view 'out there' that runs contrary to the [Board's] determination."

[625] Matters were left that if Upper Nicola could provide more information about what it said was an incorrect characterization of the economic rationale and Indigenous interests, this information would be put before the Ministers.

[626] Put another way, Canada was relying on the Board's findings. If Upper Nicola could produce information contradicting the Board that would be put before the Governor in Council; it would not be the subject of dialogue between Upper Nicola and Canada's representatives. Canada did not grapple with Upper Nicola's concerns, did not discuss with Upper Nicola whether the Board should be asked to reconsider its conclusion about the economics of the Project and did not explain why Upper Nicola's concern was found to lack sufficient merit to require Canada to address it meaningfully.

[627] As explained above at paragraph 491, Canada can rely on the Board's process to fulfil, in whole or in part, the Crown's duty to consult. However, reliance on the Board's process does not allow Canada to rely unwaveringly upon the Board's findings and recommended conditions. When real concerns were raised about the hearing process or the Board's findings and recommended conditions, Canada was required to dialogue meaningfully about those concerns.

[628] The Board is not immune from error and many of its recommendations were just that—proffered but not binding options for Canada to consider open-mindedly, assisted by its dialogue with the Indigenous applicants. Phase III of the consultation process afforded Canada the opportunity, and the responsibility, to dialogue about the asserted flaws in the Board's process and recommendations. This it failed to do.

(iv) Canada's erroneous view that the Governor in Council could not impose additional conditions on the proponent

[629] Canada began and ended Phase III of the consultation process operating on the basis that it could not impose additional conditions on the proponent. This was wrong and limited the scope of necessary consultation.

[630] Thus, on May 25, 2015, towards the end of Phase II, the Major Projects Management Office wrote to Indigenous groups to provide additional information on the scope and timing of Phase III consultation. If Indigenous groups identified outstanding concerns after the Board issued its report, the letter described the options available to Canada as follows:

> The Governor in Council has the option of asking the [National Energy Board] to reconsider its recommendation and conditions. Federal and provincial governments could undertake additional consultations prior to issuing additional permits and/or authorizations. Finally, federal and provincial governments can also use existing or new policy and program measures to address outstanding concerns.

[631] Canada expressed the position that these were the available options throughout the consultation process (see, for example, the meeting notes of the consultation meeting held on March 31, 2016, with Coldwater).

[632] Missing was the option of the Governor in Council imposing additional conditions on Trans Mountain.

[633] At a meeting held on April 13, 2016, after Canada's representatives expressed the view that the Crown could not add additional conditions, the Stó:lō's then counsel expressed the

contrary view. She asked that Canada's representatives verify with their Ministers whether Canada could attach additional conditions. By letter dated November 28, 2016 (the day before the Project was approved), Canada, joined by the British Columbia Environmental Assessment Office, advised that "the Governor in Council cannot impose its own conditions directly on the proponent as part of its decision" on the certificate of public convenience and necessity.

[634] This was incorrect. In *Gitxaala*, at paragraphs 163 to 168, this Court explained that when considering whether Canada has fulfilled its duty to consult, the Governor in Council necessarily has the power to impose conditions on any certificate of public convenience and necessity it directs the National Energy Board to issue.

[635] In the oral argument of these applications Canada acknowledged this power to exist, albeit characterizing it to be a power unknown to exist prior to this Court's judgment in *Gitxaala*.

[636] Accepting that the power had not been explained by this Court prior to its judgment in *Gitxaala*, that judgment issued on June 23, 2016, five months before Canada wrote to the Stó:lō advising that the Governor in Council lacked such a power and five months before the Governor in Council approved the Project. The record does not contain any explanation as to why Canada did not correct its position after the *Gitxaala* decision.

[637] The consequence of Canada's erroneous position that the Governor in Council lacked the ability to impose additional conditions on Trans Mountain seriously and inexplicably limited Canada's ability to consult meaningfully on accommodation measures.

(v) Canada's late disclosure of its assessment of the Project's impact on the Indigenous applicants

[638] As explained above at paragraph 488, the depth of the required consultation increases with the seriousness of the potentially adverse effect upon the claimed title or right. Canada's assessment of the Project's effect on each Indigenous applicant was therefore a critical aspect of the consultation process.

[639] Canada ultimately assessed the Project not to have a high level of impact on the exercise of the Indigenous applicants' "Aboriginal Interests" (a term defined in the Crown Consultation Report to include "asserted or established Aboriginal rights, including title and treaty rights."). The Project was assessed to have a minor impact on the exercise of the Aboriginal Interests of Squamish and SSN, a minor-to-moderate impact on the Aboriginal Interests of Coldwater and Stó:lō and a moderate impact on the Aboriginal Interests of Tsleil-Waututh and Upper Nicola.

[640] This important assessment was not communicated to the Indigenous applicants until the first week of November 2016, when the second draft of the Crown Consultation Report was provided (the first draft contained placeholder paragraphs in lieu of an assessment of the Project's impact). Coldwater, Upper Nicola and SSN received the second draft of the Crown Consultation Report on November 1, 2016, Squamish and Stó:lō on November 3, 2016 and Tsleil-Waututh on November 4, 2016. Each was given two weeks to respond to the draft Crown Consultation Report.

[641] By this point in time Squamish, Coldwater, Stó:lō and SSN had concluded their consultation meetings with Canada and no further meetings were held.

[642] Tsleil-Waututh did have further meetings with Canada, but these meetings were for the specific purposes of discussing greenhouse gases, the economic need for the Project and the Oceans Protection Plan.

[643] Upper Nicola did have a consultation meeting with Canada on November 16, 2016, at which time it asked for an extension of time to respond to the second draft of the Crown Consultation Report. In response, Upper Nicola received a two-day extension until November 18, 2016, to provide its comments to Canada. Canada's representatives explained that "Cabinet typically requires material one month ahead of a decision deadline to enable time to receive and review the report, translate etc. and that we've already reduced this down to enable a second round of comments."

[644] Importantly, Canada's Crown consultation lead acknowledged that other groups had asked for more time and the request had been "communicated to senior management and the Minister loud and clear." Canada's consultation lead went on to recognize that the time provided to review the second draft "may be too short for some to contribute detailed comments". There is no evidence that Canada considered granting the requested extension so that the Indigenous groups could provide detailed, thoughtful comments on the second draft of the Crown Consultation Report, particularly on Canada's assessment of the Project's impact. Nor does the record shed any light on why Canada did not consider granting the requested extension. The

statutory deadline for Cabinet's decision was December 19, 2016, and the Indigenous applicants had been informed of this.

[645] Ultimately, the Governor in Council approved the Project on November 29, 2016.

[646] The consequence of Canada's late communication of its assessment of the Project's impact was mitigated to a degree by the fact that from the outset it had acknowledged, and continues to acknowledge, that it was obliged to consult with the Indigenous applicants at the deeper end of the consultation spectrum. Thus, the assessment of the required depth of consultation was not affected by Canada's late advice that the Project, in its view, did not have a high level of impact on the claimed rights and title of the Indigenous applicants.

[647] This said, without doubt Canada's view of the Project's impact influenced its assessment of both the reasonableness of its consultation efforts and the extent that the Board's recommended conditions mitigated the Project's potential adverse effects and accommodated the Indigenous applicants' claimed rights and title. For this reason, the late delivery of Canada's assessment of the Project's impact until after all but one consultation meeting had been held contributed to the unreasonableness of the consultation process.

[648] I now turn to review instances that illustrate Canada's failure to dialogue meaningfully with the Indigenous applicants.

(vi) Canada's failure to dialogue meaningfully

a. The experience of Tsleil-Waututh

[649] Tsleil-Waututh had conducted its own assessment of the Project's impact on Burrard Inlet and on Tsleil-Waututh's title, rights and interests and traditional knowledge. This assessment, based on the findings of six independent experts and the traditional knowledge of Tsleil-Waututh members, concluded, among other things that:

- The likelihood of oil spills in Burrard Inlet would increase if the Project is implemented, and because spilled oil cannot be cleaned up completely, the consequences in such circumstances would be dire for sensitive sites, habitat and species, and in turn for the Tsleil-Waututh's subsistence economy, cultural activities and contemporary economy.
- Any delay in spilled oil cleanup response would decrease significantly the total volume of oil which could be cleaned up, and in turn increase the negative effects and consequences of a spill.
- The direct effects of marine shipping are likely to add to the effects and consequences of spilled oil, which in turn will further amplify the negative effects of the Project on Tsleil-Waututh's title, rights and interests.
- Tsleil-Waututh could not accept the increased risks, effects and consequences of even another small incident like the 2007 spill at the Westridge Marine Terminal or the 2015 MV Marathassa oil spill, let alone a worst-case spill.

[650] In the view of Tsleil-Waututh, the Board erred by excluding Project-related shipping from the Project's definition. Tsleil-Waututh was also of the view that the Board's conditions did not address their concerns about marine shipping. For example, Tsleil-Waututh noted that very few of the Board's conditions set out desired outcomes. Rather, they prescribed a means to secure an unspecified outcome.

[651] At the consultation meeting of October 27, 2016, Canada's representatives repeatedly acknowledged Tsleil-Waututh's view that the Board's conditions were not sufficiently robust, that Project-related shipping ought to have been assessed under the *Canadian Environmental Assessment Act, 2012* and that the Board's failure to do so resulted in the further failure to impose conditions on marine shipping.

[652] However, when the discussion turned to how to address Tsleil-Waututh's concerns, federal representatives noted that "proposals to strengthen marine shipping management, including nation to nation relationships, would take time to develop and strengthen." They went on to express optimism:

> … that progress toward a higher standard of care could occur over the next few years with First Nations, at a nation to nation level, particularly on spill response and emergency preparedness capacities. As baseline capacities increased, risks would be reduced.

[653] This generic and vague response that concerns could be addressed in the future, outside the scope of the Project and its approval, was Canada's only response. Canada did not suggest any concrete measures, such as additional conditions, to accommodate Tsleil-Waututh's concerns about marine shipping.

[654] Nor did Canada propose any accommodation measures at the meeting of October 28, 2016. At this meeting, Tsleil-Waututh sought further discussion about the Project's definition because, in its view, this issue had to be resolved if the Project was to be sent back to the Board for reconsideration. Canada's representatives responded that this was a matter for consideration

by the Governor in Council and "it was understood that the scope of the [Board's] review would be litigated."

[655] Nor did Canada respond meaningfully to Tsleil-Waututh's concerns in the Crown Consultation Report or in the Tsleil-Waututh appendix.

[656] The appendix, after detailing Tsleil-Waututh's concerns responded as follows:

> Sections 4.2.6 and 5.2 of this Report provide an overview of how the Crown has considered accommodation and mitigation measures to address outstanding issues identified by Aboriginal groups. Accommodations proposed by Tsleil-Waututh that the Crown has not responded to directly via letter will be otherwise actively considered by decision-makers weighing Project costs and benefits with the impacts on Aboriginal Interests.
>
> (underlining added)

[657] Section 4.2.6 of the Crown Consultation Report referred to the proposed Indigenous Advisory and Monitoring Committee and to recognition of the historical impacts of the existing Trans Mountain pipeline. The nascent nature of the Indigenous Advisory and Monitoring Committee is shown by the listing of possible roles the committee "could" play.

[658] Section 5.2 of the Crown Consultation Report dealt with Canada's assessment of the adequacy of consultation. It contains no response to Tsleil-Waututh's specific concerns that the Board's conditions were not sufficiently robust, that Project-related shipping ought to have been assessed under the *Canadian Environmental Assessment Act, 2012*, and that the Board's failure to do this resulted in the further failure to impose conditions on marine shipping. Section 5.2 did

provide Canada's limited response to concerns about the appropriateness of the Board's review process:

> With respect to perceived inadequacies in the [Board] review process, the Crown notes the Government's commitment to modernize the [Board] and to restore public trust in federal environmental assessment processes. The Crown further notes that consultations on these processes have been launched and will include the engagement of Indigenous groups. Overall, however, Government, through its Interim Strategy, indicated that no project proponent would be sent back to the beginning, which mean [*sic*] that project [*sic*] currently undergoing regulatory review would continue to do so within the current framework.

[659] Canada has not pointed to any correspondence in which it meaningfully addressed Tsleil-Waututh's concern that the Board's conditions were not sufficiently robust and that Project-related shipping should not have been excluded from the Project's definition.

[660] Tsleil-Waututh raised valid concerns that touched directly on its asserted title and rights. While Canada strove to understand those concerns accurately, it failed to respond to them in a meaningful way and did not appear to give any consideration to reasonable mitigation or accommodation measures, or to returning the issue of Project-related shipping to the Board for reconsideration.

[661] While Canada moved to implement the Indigenous Advisory and Monitoring Committee and the Oceans Protection Plan, these laudable initiatives were ill-defined due to the fact that each was in its early planning stage. As such, these initiatives could not accommodate or mitigate any concerns at the time the Project was approved, and this record does not allow consideration of whether, as those initiatives evolved, they became something that could meaningfully address real concerns.

b. The experience of Squamish

[662] At the one consultation meeting held in Phase III with Squamish on October 18, 2016, Squamish took the position throughout the meeting that it had insufficient information about the Project's impact on Squamish to make a decision on the Project or to discuss mitigation measures. Reference was made to a lack of information about the fate and behaviour of diluted bitumen if spilled in a marine environment. Squamish also expressed the view that the Governor in Council was equally unable to make a decision on the Project because of research and information gaps about diluted bitumen.

[663] Canada responded:

> The Crown recognized that there are uncertainties and information gaps which factor into the project decision. Most decisions are not made with perfect certainty. For instance, fate and behaviour of diluted bitumen in the marine environment has been identified as an information gap. The Crown is happy to discuss the level of uncertainty but is unsure how the [Governor in Council] will weigh these issues, such as whether they will decide that uncertainties are acceptable for the project to move forward. It should be noted that the [Governor in Council] can send the [Board] recommendation and any terms and conditions back to the [Board] for reconsideration.
>
> (underlining added)

[664] The meeting notes do not reflect that any discussion ensued about the fate and behaviour of diluted bitumen in water. This is not surprising because the Crown consultation team had effectively told Squamish that any discussion would not factor into the Governor in Council's deliberation and ultimate decision.

[665] In a letter dated the day before the Project was approved, Canada and the British Columbia Environmental Assessment Office wrote jointly to Squamish responding to issues raised by Squamish. With respect to diluted bitumen the letter stated:

> Squamish Nation has identified concerns relating to potential spills as well as the fate and behaviour of diluted bitumen. The [Board's] Onshore Pipeline Regulations (OPR) requires a company to develop and implement management and protection programs in order to anticipate, prevent, mitigate and respond to conditions that may adversely affect the safety and security of the general public, the environment, property and, company's personnel and pipelines. A company must follow the legal requirements identified in the *National Energy Board Act* and its associated regulations, other relevant standards, and any conditions contained within the applicable Project certificates or orders.

[666] This generic response is not a meaningful response to Squamish's concern that too little was known about how diluted bitumen would behave if spilled and that this uncertainty made it premature to approve the Project.

[667] The letter went on to review Board conditions, planned government initiatives (such as the Area Response Planning Initiative, Transport Canada's commitment to engage with British Columbia First Nations on issues related to marine safety and the Oceans Protection Program). The letter also referenced research that the Government of Canada was conducting on the behaviour and potential impacts of a diluted bitumen spill in a marine environment. While laudable initiatives, they too did not respond meaningfully to Squamish's concern that more needed to be known before the Project was approved.

[668] There is nothing in Canada's response to show that Squamish's concern about diluted bitumen was given real consideration or weight, and nothing to show any consideration was given to any meaningful and tangible accommodation or mitigation measures.

c. The experience of Coldwater

[669] Coldwater's concerns about the Project's impact on its aquifer were described above at paragraphs 609-610 in the context of Canada's unwillingness to depart from the Board's findings and recommended conditions.

[670] As explained at paragraph 610, when, during the consultation process, Coldwater suggested an alternate route for the pipeline that in its view posed less risk to its drinking water, Canada advised that it is the Board that decides pipeline routing, and the role of the Crown consultation team was to make sure the issue of an alternate route was reflected in the Crown Consultation Report so that it could be considered by the decision-makers.

[671] Later during the May 4, 2016 meeting, in response to a question from Coldwater about a detailed route hearing, Brian Nesbitt, a contractor made available to answer questions about the Board, responded:

> Brian explained that the Governor in Council would approve the approved, detailed route, but that if someone doesn't agree with that route they can intervene, say a detailed route hearing is required, and propose an alternative route. He stated that the burden of proof is essentially flipped and the landowner has the onus to show that the best route is somewhere other than the approved route.
>
> Brian provided an overview of the Detailed Route Approval Process (DRAP). Alternative routes, even outside the approved ROW corridor, can be proposed. In those cases it falls to the intervening party to make the case for why that route is the best one. In Brian's experience, these arguments have been made in past hearings and sometimes they are successful. He provided the example of a pipeline going through a wooded area where inner city kids would go. If an alternative route is identified in the detailed route hearing, the proponent has to apply for a variance. This might require Governor in Council decisions, depending on how the CPCN is worded. Brian emphasized that the burden of establishing a better route lies with the landowner.

(underlining added)

[672] A senior advisor for Indigenous and Northern Affairs Canada then agreed that Coldwater would require a very significant variance, a departure of about 10 kilometres from the approved pipeline right-of-way.

[673] Counsel for Coldwater, Melinda Skeels, then replied:

> Melinda stated that it does not sound reasonable to expect Coldwater to mount the kind of evidence needed to make the case for that alternative. In her view, this issue needs to be addressed before a certificate is issued. It cannot wait until after.
>
> Melinda stated that it did not seem like a detailed route hearing is a realistic option that would assist in addressing Coldwater's routing concerns.
>
> > *Coldwater's recollection is that:* Joseph, Tim and Ross were in general agreement, particularly given the significance of the variance and the fact that the onus would be shifted to Coldwater.
> >
> > *The Crown's position is that:* The Crown officials would neither have agreed with or disagreed with the above statement.

[674] The senior advisor for Indigenous and Northern Affairs Canada responded:

> … reflecting this concern in the Crown Consultation Report is one way to have it before decision makers prior to a decision on the certificate. He said that the routing issue goes to the heart of the CPCN and that the Crown may need to send the Project back to the [Board] to address this.

[675] As explained at paragraph 587 above, Coldwater's request for an analysis of the pipeline route was revisited at the October 7, 2016, consultation meeting. Canada acknowledged that the aquifer had not been fully explored, but expressed confidence in the Board's Condition 39.

[676] In response:

> Coldwater expressed its concern that, given the momentum behind the project following a [Governor in Council] approval, it will take a major adverse finding in the Condition 39 report for the West Alternative to become viable. They argued that their aquifer concerns would not be sufficiently mitigated by moving the pipeline within the 150m approved route corridor as part of a detailed route hearing, because the West Alternative was well outside that recommended corridor. Coldwater asked if an approved route corridor had ever been changed because of a report released following a GIC approval.
>
> The [Board] asserted that detailed route hearings in the past had led to routes being changed for various reasons; however he (Brian Nesbitt) was personally unaware of a route being moved outside an approved corridor. However, it is possible if the situation warrants.
>
> …
>
> The Crown replied that Condition 39 was put in place because the Board felt that evidence did not provide enough certainty about the impact of the Project on Coldwater's aquifer. That knowledge gap will have to be addressed, to the [Board's] satisfaction, prior to construction commencing. The Crown appreciates that the Condition does not provide certainty about the possibility of changing the pipeline corridor; however the presence of the Condition indicates that the [Board] is not satisfied with the information currently available.
>
> (underlining added)

[677] In the Crown Consultation Report Canada acknowledged that a pipeline spill associated with the Project could result in minor to serious impacts to Coldwater's Aboriginal Interests:

> The Crown acknowledges the numerous factors that would influence the severity and types of effects associated with a pipeline spill, and that an impacts determination that relates the consequences of a spill to specific impacts on Aboriginal Interests has a high degree of uncertainty. The Crown acknowledges that Coldwater relies primarily on an aquifer crossed by the Project for their drinking water, as well as subsistence foods and natural resources, and are at greater risk for adverse effects from an oil spill. To address the concerns raised by Coldwater during the post-[Board] Crown consultation period, [Environmental Assessment Office] proposes a condition that would require, in addition to [Board] Condition 39, characterization of the aquifer recharge and discharge sources and aquifer confinement, and include an assessment of the vulnerability of the aquifer.

(underlining added, footnote omitted)

[678] Throughout the consultation process, Canada worked to understand Coldwater's concerns, and the British Columbia Environmental Assessment Office imposed a condition requiring a second hydrogeological report for approval by it. However, missing from Canada's consultation was any attempt to explore how Coldwater's concerns could be addressed. Also missing was any demonstrably serious consideration of accommodation—a failure likely flowing from Canada's erroneous position that it was unable to impose additional conditions on the proponent.

[679] Canada acknowledged that the Project would be located within an area of Coldwater's traditional territory where Coldwater was assessed to have a strong *prima facie* claim to Aboriginal title. In circumstances where Coldwater would bear the burden of establishing a better route for the pipeline, and where the advice given to Coldwater by the Board's technical expert was that he was personally unaware of a route being moved out of the approved pipeline corridor, Canada placed its reliance on Condition 39, and so advised Coldwater. However, as Canada acknowledged, this condition carried no certainty about the pipeline route. Nor did the condition provide any certainty as to how the Board would assess the risk to the aquifer.

[680] At the end of the consultation process, and at the time the Project was approved, Canada failed to meaningfully engage with Coldwater, and to discuss and explore options to deal with the real concern about the sole source of drinking water for its Reserve.

d. The experience of Stó:lō

[681] As part of the Stó:lō's effort to engage with the Crown on the Project, Stó:lō prepared a detailed technical submission referred to as the "Integrated Cultural Assessment for the Proposed Trans Mountain Expansion Project", also referred to as "ICA". A copy of the ICA was filed with the Board.

[682] The ICA was based on surveys, interviews, meetings and workshops held with over 200 community members from approximately 11 Stó:lō bands. The ICA concluded that the Project posed a significant risk to the unique Indigenous way of life of the Stó:lō, threatening the cultural integrity and survival of core relationships at the heart of the Stó:lō worldview, identity, health and well-being. The ICA also contained 89 recommendations which, if implemented by Trans Mountain or the Crown, were believed by Stó:lō to mitigate the Project's adverse effects on Stó:lō.

[683] To illustrate the nature of the recommendations, section 17.2 of the ICA deals with recommendations to mitigate the Project's impact on fisheries. Section 17.2.1 deals with Management and Planning in the context of fisheries mitigation. The recommended Management and Planning mitigation measures are:

> 17.2.1 Management and Planning
>
> 5. Stó:lō Fishing representatives will participate in the development and review of Fisheries Management Plans and water course crossing EPPs before construction and mitigation plans are finalized.
>
> 6. Stó:lō representatives will provide input on proposed locations for Hydrostatic test water withdrawal and release.

> 7. [The proponent] will consult with Stó:lō representatives to develop the Emergency Response Plans in the study area.
>
> 8. Stó:lō representatives will consult with community members to determine appropriate restoration plans for water crossings including bank armouring, seed mixes or replanting requirements.
>
> 9. Stó:lō fishing representatives must be notified if isolation methods will not work and [the proponent] is considering another crossing method.
>
> 10. Stó:lō representatives must be notified as soon as a spill or leak, of any size, is detected.
>
> 11. During water quality monitoring program, anything that fails to meet or exceed established guidelines will be reported to a Stó:lō Fisheries Representative within 12 hours.

[684] These measures are specific, brief and generally measured and reasonable. If implemented they would provide more detail to the Board's generic conditions on consultation and require timely notification to the Stó:lō of events that may adversely impact their interests.

[685] During the Board's Information Request process, the Stó:lō pressed Trans Mountain to respond to their 89 recommendations but Trans Mountain did not provide a substantive response. Instead, Trans Mountain provided a general commitment to work with Stó:lō to develop a mutually-acceptable plan for implementation.

[686] The Board did not adopt any of the specific 89 recommendations made by the Stó:lō in its terms and conditions.

[687] At a meeting held with the Crown consultation team on April 13, 2016, before the release of the Board's report, the Stó:lō provided an overview of the development of the ICA and

expressed many concerns, including their dissatisfaction with their engagement with Trans Mountain.

[688] The Stó:lō representative stated that, among other things, Trans Mountain was directed by the Board to include Indigenous knowledge in Project planning, but did not. By way of example, the Stó:lō explained that the Fraser River is a tidal (at least up to Harrison River), meandering river, with a wandering gravel bed that is hydrologically connected to many wetlands and waterways crossed by the Project. A map of historical waterways was provided in the ICA, along with a table listing local and traditional knowledge of waterways crossed by the Project. None of this information was considered in Trans Mountain's technical reports. In Stó:lō's view, Trans Mountain's assumptions and maps about the Fraser River were wrong and did not include their traditional knowledge. A year after the ICA was provided to Trans Mountain the Stó:lō met with Trans Mountain's fisheries manager who had never seen the ICA or any of the technical information contained in it.

[689] Additionally, Stó:lō provided details about deficiencies identified in Trans Mountain's evidence filed with the Board about Stó:lō title, rights, interests and Project impacts. For example, Trans Mountain's evidence was to the effect that the Stó:lō had no traditional plant harvesting areas within the Project area. However, the ICA identified and mapped several plant gathering sites within the proposed pipeline corridor. Another example of a deficiency was Trans Mountain's evidence that there were no habitation sites in the Project area; however, the ICA mapped three habitation sites within the proposed pipeline corridor and two habitation sites located within 50 metres of the pipeline corridor.

[690] At a later consultation meeting held September 23, 2016, the Stó:lō reiterated that a key concern was their view that the Board's process had failed to hold the proponent accountable for integrating Stó:lō's traditional use information into the assessment of the Project. The draft Crown Consultation Report overlooked evidence filed by Stó:lō about their traditional land use. Instead, the report repeated oversights in Trans Mountain's evidence presented to the Board. For example, Stó:lō noted the Crown was wrong to state that "[n]o plant gathering sites were identified within the proposed pipeline corridor". The Stó:lō had explained this at the April 13, 2016 meeting.

[691] The Stó:lō Collective was not confident that Trans Mountain would follow through on commitments to include local Indigenous people or traditional knowledge in the development of the Project unless the Board's terms and conditions required Trans Mountain to regularly engage Stó:lō communities in a meaningful way.

[692] Canada's representatives confirmed that the Stó:lō Collective was looking for stronger conditions, more community-specific commitments and more accountability placed on Trans Mountain so that conditions proposed by Stó:lō became regulatory requirements.

[693] The Crown consultation team met with Stó:lō once after the release of the Board's report, on September 23, 2016.

[694] During this meeting the "Collective noted with great concern that the [Board] report came out May 19th, that the [Governor in Council's] decision is due Dec. 19th, and that the

Crown was just meeting now (Sept. 23) to consult on the [Board] report with so many potential gaps left to discuss and seek to resolve with tight timelines to do so".

[695] At this meeting the Crown consultation team presented slides summarizing the Board's conclusions. The Stó:lō noted their disagreement with the following findings of the Board:

> - "Ability of Aboriginal groups to use the lands, waters and resources for traditional purposes would be ***temporarily impacted***" by construction and routine maintenance activities, and that some opportunities for certain activities such as harvesting or accessing sites or areas of [Traditional Land and Resource Use] will be ***temporary interrupted***.";
>
> - "Project's contribution to potential broader cultural impacts related to access and use of natural resources is ***not significant***."; and,
>
> - "Impacts would be ***short term, limited to brief periods*** during construction and routine maintenance, ***largely confined to the Project footprint*** for the pipeline… Effects would be ***reversible in the short to long term, and low in magnitude***."
>
> (emphasis in original)

[696] The Stó:lō pointed to the potential permanent impact of the Project on sites of critical cultural importance to Stó:lō and the Project's impacts related to access and use of natural resources.

[697] With respect to sites of critical cultural importance, the Stó:lō explained that none of the information contained in their ICA influenced the design of the Project or was included in the Project alignment sheets. The failure to include information about cultural sites on the Project alignment sheets meant that various geographic features known to Stó:lō and the proponent were not being factored into Project effects, or avoidance or mitigation efforts. In response to questions, Stó:lō confirmed that even though Trans Mountain was well aware of Stó:lō sites of

importance, as detailed in the ICA, Trans Mountain had not recognized them on the right-of-way corridor maps. Stó:lō believed this afforded the sites no protection if the Project was approved.

[698] With respect to Lightning Rock, a culturally significant spiritual and burial site, the Stó:lō noted that Trans Mountain planned to put a staging area in proximity to the site which, in the view of the Stó:lō, would obliterate the site. The Board had imposed Condition 77 relating to Lightning Rock. This condition required Trans Mountain to file a report outlining the conclusions of a site assessment for Lightning Rock, including reporting on consultation with the Stó:lō Collective. However, Stó:lō Cultural Heritage experts had not been able to meet with Trans Mountain to participate in Lightning Rock management plans since September 2015. This was a source of great frustration.

[699] The Stó:lō suggested that the Board's conditions should specifically list the Indigenous groups Trans Mountain was required to deal with instead of the generic "potentially affected Aboriginal groups" referenced in the Board's current conditions.

[700] The Stó:lō also requested that they be involved in selecting the Aboriginal monitors working within their territory as contemplated by the Board's conditions. For example, Condition 98 required Trans Mountain to file a plan describing participation by "Aboriginal groups" in monitoring construction of the Project. Stó:lō wanted to ensure these monitors were sufficiently knowledgeable about issues of importance to the Stó:lō.

[701] The September 23, 2016, meeting notes do not indicate any response or meaningful dialogue on the part of the Crown consultation team in response to any of Stó:lō's concerns and suggestions.

[702] Interestingly, at the November 16, 2016, consultation meeting with Upper Nicola, the last of the consultation meetings and the only consultation meeting held after Canada provided the second draft of the Crown Consultation Report setting out Canada's assessment of the Project's impacts, the Crown consultation lead explained:

> … "potentially affected Aboriginal groups" has been noted by many Aboriginal groups as too vague in the recommended conditions, and this phrase is repeated throughout the 157 conditions. Makes reference to how the Crown's consultation and accommodation report does address specific Aboriginal groups. Discussed another point on the [Board] condition for "Aboriginal monitors"—where communities would not [*sic*] want locally knowledgeable Aboriginal people to fulfil this role and not someone from farther afield.

[703] Notwithstanding apparently widespread concern about the Board's generic use of the phrase "potentially affected Aboriginal groups" and the need for locally-selected Indigenous monitors, and despite Canada's ability to add new conditions that would impose the desired specificity, Canada failed to meaningfully consider such accommodation.

[704] Canada and the British Columbia Environmental Assessment Office purported to respond to two of Stó:lō's concerns in their letter of November 28, 2016, to the Stó:lō: the concerns about Traditional Ecological Knowledge and sites of cultural importance.

[705] The Crown "acknowledges the Stó:lō Collective's view that the [Board] and the proponent overlooked traditional knowledge within the development of the [Board] conditions

and Project design." The Crown discusses these issues in Sections III and IV of the Stó:lō Collective appendix (pages 13, 29 and 30 respectively).

[706] I deal with the Stó:lō appendix beginning at paragraph 712 below. As explained below, the Stó:lō appendix does not deal meaningfully with the concerns about Traditional Ecological Knowledge and sites of cultural importance.

[707] The Crown made two more points independent of the Stó:lō Collective appendix. First, it expressed its understanding that the Stó:lō could trigger a detailed route hearing. Second, it encouraged the Stó:lō Collective to continue discussions with the proponent.

[708] In connection with the detailed route hearing, the Crown advised that "[w]ithin the scope of such a hearing exists the potential for the right-of-way to move locations." There are three points to make about this response. First, as explained above at paragraphs 380 to 384, at a detailed route hearing the right of way may only move within the approved pipeline corridor, otherwise an application must be made to vary the pipeline corridor; second, the onus at a detailed route hearing is on the person requesting the alteration; and, third, Canada failed to consider its ability to impose additional conditions, likely because it was operating under the erroneous view it could not. The ability to trigger a detailed route hearing provided no certainty about how potential adverse effects to areas of significant importance to the Stó:lō would be dealt with. This was not a meaningful response on Canada's part.

[709] As to the Crown's suggestion that the Stó:lō Collective continue its discussions with the proponent, no explanation is given as to why this was believed to be an appropriate response to the concerns of the Stó:lō in light of the information they had provided as to the proponent's unwillingness to deal directly with them on a timely basis, or in some cases, at all.

[710] The November 28, 2016, letter also referenced the four accommodation measures the Stó:lō requested in their two-page submission to the Governor in Council. The first asked for a condition to "outline and identify specifics regarding Trans Mountain's collaboration with and resourcing of the Stó:lō Collective to update construction alignment sheets and EPPs to reflect information provided in the Integrated Cultural Assessment" (March 2014). The Stó:lō were told "The recommendations included in the Stó:lō Collective's two-page submission of November 17, 2016 will be provided directly to federal and provincial decision makers."

[711] Leaving aside the point that the letter was sent the day before the Project was approved, none of this is responsive, meaningful, two-way dialogue that the Supreme Court requires as part of the fulfillment of the duty to consult.

[712] Nor is any meaningful response provided in the Stó:lō appendix to the Crown Consultation Report. This is illustrated by the following two examples. First, while the appendix recites that the Stó:lō Collective recommended 89 actions that would assist Trans Mountain to avoid or mitigate adverse effects on their Aboriginal Interests there is no discussion or indication that Canada seriously considered implementing any of the 89 recommended actions, and no explanation as to why Canada did not consider implementing any Stó:lō specific

recommendation as an accommodation or mitigation measure. Second, while the appendix acknowledges that the Stó:lō provided examples of Traditional Ecological Knowledge which they felt the proponent and the Board ignored in the Project design, environmental assessment and mitigation planning, no analysis or response to the concern is given.

[713] In the portion of the appendix that deals with Canada's assessment of the Project's impacts on the Stó:lō, the Crown relies on the conclusions of the Board to find that the impacts of the Project would be up to minor-to-moderate. Thus, for instance, the appendix repeats the Board's conclusion that if the Project is approved, the Board conditions would either directly or indirectly avoid or reduce potential environmental effects associated with hunting, trapping and gathering. In an attempt to deal with the specific concerns raised by the Stó:lō about the adequacy of the Board's report and its conditions, the appendix recites that:

> … the proponent would implement several mitigation measures to reduce potential effects to species important for the Stó:lō Collective's hunting, trapping, and plant gathering activities. The proponent is committed to minimizing the Project footprint to the maximum extent feasible, and all sensitive resources identified on the Environmental Alignment Sheets and environmental tables within the immediate vicinity of the [right-of-way] will be clearly marked before the start of clearing.

[714] While the second draft of the Crown Consultation Report was revised to reference the plant gathering sites identified by Stó:lō in the ICA and in the April and October consultation meetings, Canada continued to rely upon the Board's findings without explaining, for example, how the Board's finding that "Trans Mountain adequately considered all the information provided on the record by Aboriginal groups regarding their traditional uses and activities." (report, page 278) was reliable in the face of the information contained in the ICA.

[715] Nor does Canada explain the source of its confidence in the proponent's commitments in light of the concerns expressed by the Stó:lō that Trans Mountain had failed to follow through on its existing commitments and that without further conditions Stó:lō feared the proponent would not follow through with its commitments to the Board.

[716] With respect to the Stó:lō's concerns about a Project staging area at Lightning Rock, the appendix noted that Lightning Rock was protected by Board Condition 77 which required the proponent to file with the Board an archaeological and cultural heritage field investigation undertaken to assess the potential impacts of Project construction and operations on the Lightning Rock site. The appendix goes on to note that:

> However, given that this is a sacred site with burial mounds, Stó:lō Collective have noted that any Project routing through this area is inappropriate given the need to preserve the cultural integrity of the site and the surrounding area. For the Stó:lō Collective, the site surrounding Lightning Rock should be a "no go" area for the Project.

[717] However, Stó:lō's position that Lightning Rock should be a "no go" area is left unresolved and uncommented upon by Canada.

[718] Another Stó:lō concern detailed by Canada in the appendix, but unaddressed, is the concern of the Stó:lō Collective that the locations of various other culturally important sites do not appear on Trans Mountain's detailed alignment sheets. Examples of such sites include bathing sites within the 150 metre pipeline right-of-way alignment at Bridal Veil Falls, and an ancient pit house located within the pipeline right-of-way. None of these sites are the subject of any Board condition.

[719] The appendix recites Canada's conclusion on these concerns of the Stó:lō as follows:

> With regards to specific risk concerns raised by the Stó:lō Collective, the proponent would implement several mitigation measures to reduce potential effects on physical and cultural heritage resources important for the Stó:lō Collective's traditional and cultural practices. The proponent has also committed to reduce potential disturbance to community assets and events by implementing several measures that include avoiding important community features and assets during [right-of-way] finalization, narrowing the [right-of-way] in select areas, scheduling construction to avoid important community events where possible, communication of construction schedules and plans with community officials, and other ongoing consultation and engagement with local and Aboriginal governments.

[720] This is not meaningful, two-way dialogue in response to Stó:lō's real and valid concerns about matters of vital importance to the Stó:lō.

[721] Canada adopts a similar approach to its assessment of the Project's impact on freshwater fishing and marine fishing and harvesting at pages 24 to 27 of the Stó:lō appendix.

[722] The section begins by acknowledging the Stó:lō's deeply established connection to fishing and marine harvesting "which are core to Stó:lō cultural activities and tradition, subsistence and economic purposes."

[723] After summarizing each concern raised by the Stó:lō, Canada responds by adopting the Board's conclusions that the Project's impact will be low-to-moderate and that Board conditions will either directly or indirectly avoid or reduce potential environmental effects on fishing activities.

[724] In the course of this review Canada acknowledges the Board's finding that "Project-related activities could result in low to moderate magnitude effects on freshwater and marine fish and fish habitat, surface water and marine water quality." Appendix 12 to the Board report defines a moderate impact to be one that, among other things, noticeably affects the resource involved.

[725] Canada also acknowledges that during the operational life of the Project fishing and harvesting activities directly affected by the construction and operation of the Westridge Marine Terminal would not occur within the expanded water lease boundaries.

[726] Further, impacts on navigation, specifically in eastern Burrard Inlet, would exist for the lifetime of the Project, and would occur on a daily basis. Project-related marine vessels also would cause temporary disruption to the Stó:lō Collective's marine fishing and harvesting activities. These disruptions are said "likely to be temporary when accessing fishing sites in the Burrard Inlet that require crossing shipping lanes, as community members would be able to continue their movements shortly after the tanker passes." This too would occur on a daily basis if the Westridge Marine Terminal were to serve 34 Aframax tankers per month.

[727] Missing however from Canada's consultation analysis is any mention of the Stó:lō's constitutionally protected right to fish, and how that constitutionally protected right was taken into account by Canada. Also missing is any explanation as to how the consultation process affected the Crown's ultimate assessment of the impact of the Project on the Stó:lō. Meaningful

consultation required something more than simply repeating the Board's findings and conditions without grappling with the specific concerns raised by the Stó:lō about those same findings.

e. The experience of Upper Nicola

[728] Throughout the consultation process, Upper Nicola raised the issue of the Project's impact on Upper Nicola's asserted title and rights. The issue was raised at the consultation meetings of March 31, 2016, and May 3, 2016, but no meaningful dialogue took place. Canada's representatives advised at the March meeting that until the Board released its report Canada did not know how the Project could impact the environment and Upper Nicola's interests and so could not "yet extrapolate to how those changes could impact [Upper Nicola's] Aboriginal rights and title interests."

[729] The issue was raised again, after the release of the Board's report, at the consultation meeting of September 22, 2016. Upper Nicola expressed its disagreement with Canada's assertion in the first draft of the Crown Consultation Report that potential impacts on its title claim for the pipeline right-of-way included temporary impacts related to construction, and longer-term impacts associated with Project operation. In Upper Nicola's view, construction did not have a temporary impact on its claim to title. Upper Nicola also stated that Canada had examined the Project's impact on title without considering impacts on governance and management, and concerns related to title, such as land and water issues. The meeting notes do not record any response to these concerns.

[730] Nor did Canada respond meaningfully to Upper Nicola's position that the Project would render 16,000 hectares of land unusable or inaccessible for traditional activities. Upper Nicola viewed this to constitute a significant impact that required accommodation of their rights to stewardship, use and governance of the land and water. Canada's response was to acknowledge a letter sent to the Prime Minister in which numerous Indigenous groups had proposed a mitigation measure to ensure they would have a more active role in monitoring and stewardship of the Project. Canada stated that it saw merit in the proposal and that a response to the letter would be forthcoming.

[731] On November 18, 2016, Upper Nicola wrote to the Crown consultation lead to highlight its key, ongoing concerns with the Project and the consultation process. With respect to title, Upper Nicola wrote:

> There were areas which the Crown has determined that we have a strong prima facie claim to Aboriginal title and rights. The Crown must therefore acknowledge the significant impacts and infringements of the Project to Upper Nicola/Syilx Title and Rights, including the incidents of Aboriginal title which include: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land and adequately accommodate these impacts, concerns and infringements. This has not yet been done.
>
> (underlining added)

[732] Canada and the British Columbia Environmental Assessment Office wrote to Upper Nicola on November 28, 2016, the day before the Project was approved, to respond to the issues raised by Upper Nicola. The only reference to Upper Nicola's asserted title is this brief reference:

> *Impacts and Mitigation:* In response to comments received, the Crown has reviewed its analysis and discussion in the Consultation and Accommodation Report on the direct and indirect impacts of the Project on Syilx (Okanagan) Nation's rights and other interests. In addition, Upper Nicola identified that the study titled "Upper Nicola Band Traditional Use and Occupancy Study for the Kingsvale Transmission Line in Support of the Trans Mountain Expansion Project" (Kingsvale TUOS) had not been specifically referenced in the Syilx (Okanagan) Nation appendix. Upper Nicola resent the Kingsvale TUOS to the Crown on Friday, November 18 and in response to this information, the Crown reviewed the Kingsvale TUOS, summarized the study's findings in Syilx (Okanagan) Nation's appendix, and considered how this information changes the expected impacts of the Project on Syilx (Okanagan) Nation's Aboriginal rights and title. <u>As a result, conclusions were revised upward for Project impacts on Syilx (Okanagan) Nation's freshwater fishing activities, other traditional and cultural activities, as well as potential impacts on Aboriginal title</u>.
>
> (underlining added)

[733] No response was made to the request to acknowledge the Project's impacts and infringement of Upper Nicola's asserted title and rights.

[734] In the Upper Nicola appendix, Canada acknowledged that the Project would be located within an area of Syilx Nation's asserted traditional territory where Syilx Nation was assessed to have a strong *prima facie* claim to Aboriginal title and rights. Canada then asserted the Project to have "minor-to-moderate impact on Syilx Nation's asserted Aboriginal title to the proposed Project area." Canada did not address Upper Nicola's governance or title rights in any detail. Canada did refer to section 4.3.5 of the Crown Consultation Report but this section simply reiterates the Board's findings and conditions and the requirement that the proponent continue consultation "with potentially affected Aboriginal groups".

[735] Missing is any explanation as to why moderate impacts to title required no accommodation beyond the environmental mitigation measures recommended by the Board—mitigation measures that were generic and not specific to Upper Nicola.

[736] Throughout Phase III, Upper Nicola had proposed numerous potential mitigation measures and had requested accommodation related to stewardship, use and governance of the water. No response was given as to why Canada rejected this request. This was not meaningful, two-way dialogue or reasonable consultation.

f. The experience of SSN

[737] Canada met with SSN twice during Phase III. At the first meeting, on August 3, 2016, SSN expressed the desire to have consultation go beyond the environmental assessment process which they felt was insufficient to tackle the issues that affected their territory. SSN sought to move forward on a nation to nation basis and wished to formalize a nation to nation consultation protocol using the Project as a starting point for further consultation.

[738] In response, Canada and representatives of British Columbia asked that the SSN be prepared to review a draft memorandum of understanding for consultation about the Project (affidavit of Jeanette Jules, paragraph 70).

[739] The meeting notes reflect that at the first meeting on August 3, 2016, SSN also raised as accommodation or mitigation measures that: the Project conditions be more specific with respect to safety and emergency preparedness response, warning notifications to communities and

opportunities for training; and, that there be provision for both a spillage fee and a revenue tax imposed on the proponent for the benefit of SSN. The meeting notes do not reflect any dialogue or response from Canada to these proposals.

[740] On September 9, 2016, the Crown consultation lead sent a two-page draft memorandum of understanding to the SSN (two pages not including the signature page).

[741] At the second and last meeting on October 6, 2016, the SSN advised that they desired the proponent to submit to a review of the Project by the SSN, but that the proponent was unwilling to undergo another review. The SSN also repeated their desire for the federal and provincial Crowns to allow SSN to impose a resource development tax on proponents whose projects are located in the SSN's traditional territory. In response, the Crown raised the difficulty in implementing the tax and having the Project undergo assessment by the SSN before the mandated decision deadline of December 19, 2016.

[742] At this meeting Canada sought comments on the draft memorandum of understanding. Jeanette Jules, a counsellor with the Kamloops Indian Band swore in an affidavit filed in support of SSN's application for judicial review that:

> At [the October 6, 2016] meeting, the majority of the time was spent on discussing the content of the [memorandum of understanding], that is, what would engagement with the Crowns on the Project look like. We did not spend any time discussing the routing of the pipeline Project at Pipsell or SSN's concerns about the taking up of new land in the Lac du Bois Grasslands Protected area, although I did voice concerns about those issues again at that meeting. At the end of the meeting, the Crowns committed to revising the [memorandum of understanding] and to setting up another meeting to discuss it with us.
>
> (underlining added)

[743] The meeting notes state that toward the end of the meeting SSN expressed the desire to have a terrestrial spill response centre stationed in their reserve. SSN contemplated that funding for the centre should be raised through a per-barrel spillage fee charged on product flowing through the pipeline.

[744] Thereafter, no memorandum of understanding was finalized and no further meetings took place between Canada and the SSN. Ms. Jules swears that:

> I fully expected that between our last meeting with Canada and the Province of BC and the [Governor in Council] decision to approve the Project, we would come to an agreement on the terms of a [memorandum of understanding] and have had meaningful engagement with the Crowns about pipeline routing and SSN's other concerns raised in its final argument.

[745] Ms. Jules was not cross-examined on her affidavit.

[746] In the November 28, 2016, letter sent to the SSN by Canada and the British Columbia Environmental Assessment Office they wrote:

> We also would like to take this opportunity to provide you with additional information or responses to concerns that Stk'emlúps te Secwèpemc Nation has raised with the Crown.
>
> At the October 6, 2016 meeting with SSN, in addition to reiterating SSN's plan on undertaking its own assessment of the project, SSN outlined a proposal for an SSN resource development tax that they charge directly to proponents whose projects are in their traditional territory, and that SSN wants the federal and provincial Crown's to make the jurisdictional room necessary for the tax to be implemented. These proposals have been added to the SSN specific appendix for consideration by decision makers.

[747] This is not a meaningful response to the proposals made by the SSN. The only response made to the resource development tax during the consultation meetings was the difficulty this

would pose to meeting Canada's decision deadline (notwithstanding that SSN had sought consultation on a broader basis than the Project—the Project was contemplated by SSN to be a starting point).

[748] The SSN appendix to the Crown Consultation Report faithfully records SSN's concerns about the review process, noting, in part, that:

> SSN stated that the [Board] hearing process is an inappropriate forum for assessing impacts to their Aboriginal rights. SSN also expressed concern about the [Board] process' legislated timelines and the way these timelines were unilaterally imposed on them. SSN considers this timeline extremely restrictive and does not believe it affords SSN sufficient time to review the application and participate meaningfully in the review process. SSN has stated that their ability to participate in the process is further hampered by a lack of capacity funding from either the [Board] or the Crown. SSN has expressed a view that related regulatory (i.e. permitting) processes are not well-coordinated, which they believe results in an incomplete sharing of potential effects to SSN Interests. They refer to the perceived disconnected process between the proposed Project and proposed Ajax Mine application review. SSN are not satisfied with the current crown engagement model and the lack of addressing SSN's needs for a nation-to-nation dialogue about their concerns and interests, and have proposed that the Crown develop a [memorandum of understanding] to address these issues and provide a framework for the dialogue moving forward.
>
> …
>
> SSN have requested Nation-to-Nation engagement related to the broader issue of land management and decision making within their territory. SSN requested a consultation protocol agreement be developed, starting with a [memorandum of understanding] for Nation-to-Nation consultation, which would take the form of a trilateral agreement between SSN, BC and Canada. SSN recommended a framework of sustainable Crown funding to participate in the [memorandum of understanding] process, leading to a sustainable funding model to support ongoing land use management within SSN's territory.
>
> At the October 6, 2016 meeting, SSN outlined a proposal for an SSN resource development tax that they charge directly to proponents whose projects are in their traditional territory. SSN wants the federal and provincial Crown's [*sic*] to make the jurisdictional room necessary for the tax to be implemented.
>
> (underlining added)

[749] Missing from the appendix is any advice to the Governor in Council that Canada committed to providing a draft memorandum of understanding to SSN and any advice about the status of the memorandum of understanding. Also missing is any indication of what, if any, impact this had on Canada's view of the consultation process.

[750] In the SSN appendix Canada acknowledged that "the Project would be located within an area of Tk'emlúps te Secwe'pemc and Skeetchestn's traditional territory assessed as having a strong *prima facie* claim to Aboriginal title". Canada had also assessed its duty to consult SSN as being at the deeper end of the consultation spectrum.

[751] Notwithstanding, Canada did not provide any meaningful response to SSN's proposed mitigation measures, and conducted no meaningful, two-way dialogue about SSN's concerns documented on pages 3 to 7 of the SSN appendix.

[752] This was not reasonable consultation as required by the jurisprudence of the Supreme Court of Canada.

(vii) Conclusion on Canada's execution of the consultation process

[753] As explained above at paragraphs 513 to 549, the consultation framework selected by Canada was reasonable and sufficient. If Canada properly executed it, Canada would have discharged its duty to consult.

[754] However, based on the totality of the evidence I conclude that Canada failed in Phase III to engage, dialogue meaningfully and grapple with the concerns expressed to it in good faith by the Indigenous applicants so as to explore possible accommodation of these concerns.

[755] Certainly Canada's consultation team worked in good faith and assiduously to understand and document the concerns of the Indigenous applicants and to report those concerns to the Governor in Council in the Crown Consultation Report. That part of the Phase III consultation was reasonable.

[756] However, as the above review shows, missing was a genuine and sustained effort to pursue meaningful, two-way dialogue. Very few responses were provided by Canada's representatives in the consultation meetings. When a response was provided it was brief, and did not further two-way dialogue. Too often the response was that the consultation team would put the concerns before the decision-makers for consideration.

[757] Where responses were provided in writing, either in letters or in the Crown Consultation Report or its appendices, the responses were generic. There was no indication that serious consideration was given to whether any of the Board's findings were unreasonable or wrong. Nor was there any indication that serious consideration was given to amending or supplementing the Board's recommended conditions.

[758] Canada acknowledged it owed a duty of deep consultation to each Indigenous applicant. More was required of Canada.

[759] The inadequacies of the consultation process flowed from the limited execution of the mandate of the Crown consultation team. Missing was someone representing Canada who could engage interactively. Someone with the confidence of Cabinet who could discuss, at least in principle, required accommodation measures, possible flaws in the Board's process, findings and recommendations and how those flaws could be addressed.

[760] The inadequacies of the consultation process also flowed from Canada's unwillingness to meaningfully discuss and consider possible flaws in the Board's findings and recommendations and its erroneous view that it could not supplement or impose additional conditions on Trans Mountain.

[761] These three systemic limitations were then exacerbated by Canada's late disclosure of its assessment that the Project did not have a high level of impact on the exercise of the applicants' "Aboriginal Interests" and its related failure to provide more time to respond so that all Indigenous groups could contribute detailed comments on the second draft of the Crown Consultation Report.

[762] Canada is not to be held to a standard of perfection in fulfilling its duty to consult. However, the flaws discussed above thwarted meaningful, two-way dialogue. The result was an unreasonable consultation process that fell well short of the required mark.

[763] The Project is large and presented genuine challenges to Canada's effort to fulfil its duty to consult. The evaluation of Canada's fulfillment of its duty must take this into account.

However, in largest part the concerns of the Indigenous applicants were quite specific and focussed and thus quite easy to discuss, grapple with and respond to. Had Canada's representatives met with each of the Indigenous applicants immediately following the release of the Board's report, and had Canada's representatives executed a mandate to engage and dialogue meaningfully, Canada could well have fulfilled the duty to consult by the mandated December 19, 2016 deadline.

E. Remedy

[764] In these reasons I have concluded that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that permitted the Governor in Council to make its decision whether to approve the Project. The Board unjustifiably excluded Project-related shipping from the Project's definition.

[765] This exclusion of Project-related shipping from the Project's definition permitted the Board to conclude that section 79 of the *Species at Risk Act* did not apply to its consideration of the effects of Project-related shipping. Having concluded that section 79 did not apply, the Board was then able to conclude that, notwithstanding its conclusion that the operation of Project-related vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project was not likely to cause significant adverse environmental effects.

[766] This finding—that the Project was not likely to cause significant adverse environmental effects—was central to its report. The unjustified failure to assess the effects of Project-related shipping under the *Canadian Environmental Assessment Act, 2012* and the resulting flawed

conclusion about the environmental effects of the Project was critical to the decision of the Governor in Council. With such a flawed report before it, the Governor in Council could not legally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.

[767] I have also concluded that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants.

[768] It follows that Order in Council P.C. 2016-1069 should be quashed, rendering the certificate of public convenience and necessity approving the construction and operation of the Project a nullity. The issue of Project approval should be remitted to the Governor in Council for prompt redetermination.

[769] In that redetermination the Governor in Council must refer the Board's recommendations and its terms and conditions back to the Board, or its successor, for reconsideration. Pursuant to section 53 of the *National Energy Board Act*, the Governor in Council may direct the Board to conduct that reconsideration taking into account any factor specified by the Governor in Council. As well, the Governor in Council may specify a time limit within which the Board shall complete its reconsideration.

[770] Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the *Species at Risk Act* to Project-related shipping, the Board's environmental assessment of the Project in the light of the

Project's definition, the Board's recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012* and any other matter the Governor in Council should consider appropriate.

[771] Further, Canada must re-do its Phase III consultation. Only after that consultation is completed and any accommodation made can the Project be put before the Governor in Council for approval.

[772] As mentioned above, the concerns of the Indigenous applicants, communicated to Canada, are specific and focussed. This means that the dialogue Canada must engage in can also be specific and focussed. This may serve to make the corrected consultation process brief and efficient while ensuring it is meaningful. The end result may be a short delay, but, through possible accommodation the corrected consultation may further the objective of reconciliation with Indigenous peoples.

F. Proposed Disposition

[773] For these reasons I would dismiss the applications for judicial review of the Board's report in Court Dockets A-232-16, A-225-16, A-224-16, A-217-16, A-223-16 and A-218-16.

[774] I would allow the applications for judicial review of the Order in Council P.C. 2016-1069 in Court Dockets A-78-17, A-75-17, A-77-17, A-76-17, A-86-17, A-74-17, A-68-17 and A-84-17, quash the Order in Council and remit the matter to the Governor in Council for prompt redetermination.

[775] The issue of costs is reserved. If the parties are unable to agree on costs they may make submissions in writing, such submissions not to exceed five pages.

[776] Counsel are thanked for the assistance they have provided to the Court.

"Eleanor R. Dawson"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Judith Woods J.A."

APPENDIX

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

52 (1) If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out	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*) 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	*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*) 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.	*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.
(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:	(2) En faisant sa recommandation, l'Office tient compte de tous les facteurs qu'il estime directement liés au pipeline et pertinents, et peut tenir compte de ce qui suit :
(*a*) the availability of oil, gas or any other commodity to the pipeline;	*a*) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;
(*b*) the existence of markets, actual or potential;	*b*) l'existence de marchés, réels ou potentiels;
(*c*) the economic feasibility of the	*c*) la faisabilité économique du

pipeline;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

(*e*) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

(3) If the application relates to a designated project within the meaning of section 2 of the *Canadian Environmental Assessment Act, 2012*, the report must also set out the Board's environmental assessment prepared under that Act in respect of that project.

(4) The report must be submitted to the Minister within the time limit specified by the Chairperson. The specified time limit must be no longer than 15 months after the day on which the applicant has, in the Board's opinion, provided a complete application. The Board shall make the time limit public.

(5) If the Board requires the applicant to provide information or undertake a study with respect to the pipeline and the Board, with the Chairperson's approval, states publicly that this subsection applies, the period that is taken by the applicant to comply with the requirement is not included in the calculation of the time limit.

(6) The Board shall make public the

pipeline;

d) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline;

e) les conséquences sur l'intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande.

(3) Si la demande vise un projet désigné au sens de l'article 2 de la *Loi canadienne sur l'évaluation environnementale (2012)*, le rapport contient aussi l'évaluation environnementale de ce projet établi par l'Office sous le régime de cette loi.

(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.

(5) Si l'Office exige du demandeur, relativement au pipeline, 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 demandeur pour remplir l'exigence n'est pas comprise dans le calcul du délai.

(6) L'Office rend publiques, sans

dates of the beginning and ending of the period referred to in subsection (5) as soon as each of them is known.

délai, la date où commence la période visée au paragraphe (5) et celle où elle se termine.

(7) The Minister may, by order, extend the time limit by a maximum of three months. The Governor in Council may, on the recommendation of the Minister, by order, further extend the time limit by any additional period or periods of time.

(7) 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.

(8) To ensure that the report is prepared and submitted in a timely manner, the Minister may, by order, issue a directive to the Chairperson that requires the Chairperson to

(8) Afin que le rapport soit établi et présenté en temps opportun, le ministre peut, par arrêté, donner au président instruction :

(*a*) specify under subsection (4) a time limit that is the same as the one specified by the Minister in the order;

a) de fixer, en vertu du paragraphe (4), un délai identique à celui indiqué dans l'arrêté;

(*b*) issue a directive under subsection 6(2.1), or take any measure under subsection 6(2.2), that is set out in the order; or

b) de donner, en vertu du paragraphe 6(2.1), les instructions qui figurent dans l'arrêté, ou de prendre, en vertu du paragraphe 6(2.2), les mesures qui figurent dans l'arrêté;

(*c*) issue a directive under subsection 6(2.1) that addresses a matter set out in the order.

c) de donner, en vertu du paragraphe 6(2.1), des instructions portant sur une question précisée dans l'arrêté.

(9) Orders made under subsection (7) are binding on the Board and those made under subsection (8) are binding on the Chairperson.

(9) Les décrets et arrêtés pris en vertu du paragraphe (7) lient l'Office et les arrêtés pris en vertu du paragraphe (8) lient le président.

(10) A copy of each order made under subsection (8) must be published in the *Canada Gazette* within 15 days after it is made.

(10) Une copie de l'arrêté pris en vertu du paragraphe (8) est publiée dans la *Gazette du Canada* dans les quinze jours de sa prise.

(11) Subject to sections 53 and 54, the Board's report is final and conclusive.

(11) Sous réserve des articles 53 et 54, le rapport de l'Office est définitif et sans appel.

53 (1) After the Board has submitted its report under section 52, the

53 (1) Une fois que l'Office a présenté son rapport en vertu de l'article 52, le

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.

gouverneur en conseil peut, par décret, renvoyer la recommandation ou toute condition figurant au rapport à l'Office pour réexamen.

(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.

(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.

…

…

54 (1) After the Board has submitted its report under section 52 or 53, the Governor in Council may, by order,

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*) 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

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*) direct the Board to dismiss the application for a certificate.

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

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

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

(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.

(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.

(4) Every order made under subsection

(4) Les décrets pris en vertu des

(1) or (3) is final and conclusive and is binding on the Board.	paragraphes (1) ou (3) sont définitifs et sans appel et lient l'Office.
(5) The Board shall comply with the order made under subsection (1) within seven days after the day on which it is made.	(5) L'Office est tenu de se conformer au décret pris en vertu du paragraphe (1) dans les sept jours suivant sa prise.
(6) A copy of the order made under subsection (1) must be published in the Canada Gazette within 15 days after it is made.	(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.

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

2(1) designated project means one or more physical activities that	2(1) 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.
…	…
5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are	5 (1) Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un projet désigné ou d'un projet sont les suivants :
(*a*) a change that may be caused to the following components of the environment that are within the	*a*) les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la

legislative authority of Parliament:	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,	(ii) sur le patrimoine naturel et le patrimoine culturel,
(iii) the current use of lands and resources for traditional purposes, or	(iii) sur l'usage courant de terres et de ressources à des fins traditionnelles,

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

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

…

…

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

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

a) les effets environnementaux du projet, y compris ceux causés par les accidents ou défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à celle d'autres activités concrètes, passées ou futures, est susceptible de causer à l'environnement;

(*b*) 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, requires to be taken into account.

j) tout autre élément utile à l'évaluation environnementale dont l'autorité responsable ou, s'il renvoie l'évaluation environnementale pour examen par une commission, le ministre peut exiger la prise en compte.

…

…

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; and

a) sa recommandation quant à la décision pouvant être prise au titre de l'alinéa 31(1)a) relativement au projet, compte tenu de l'application des mesures d'atténuation qu'elle précise dans le rapport;

(*b*) 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.

…

31 (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment or its reconsideration report under section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*

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

(i) is not likely to cause significant adverse environmental effects,

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

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

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

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

(ii) if the decision is referred to in subparagraph (a)(i) or (ii), sets out conditions — which are the implementation of the mitigation

…

31 (1) Une fois que l'autorité responsable à l'égard d'un projet désigné a présenté son rapport d'évaluation environnementale ou son rapport de réexamen en application des articles 29 ou 30, le gouverneur en conseil peut, par décret pris en vertu du paragraphe 54(1) de la *Loi sur l'Office national de l'énergie* :

a) décider, compte tenu de l'application des mesures d'atténuation précisées dans le rapport d'évaluation environnementale ou, s'il y en a un, le rapport de réexamen, que la réalisation du projet, selon le cas :

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

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

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

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

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

(ii) si cette décision est celle visée aux sous-alinéas a)(i) ou (ii), elle énonce les conditions que le promoteur est tenu de respecter relativement au

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.

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.

***Species at Risk Act*, S.C. 2002, c. 29**

77 (1) Despite any other Act of Parliament, any person or body, other than a competent minister, authorized under any Act of Parliament, other than this Act, to issue or approve a licence, a permit or any other authorization that authorizes an activity that may result in the destruction of any part of the critical habitat of a listed wildlife species may enter into, issue, approve or make the authorization only if the person or body has consulted with the competent minister, has considered the impact on the species' critical habitat and is of the opinion that

77 (1) Malgré toute autre loi fédérale, toute personne ou tout organisme, autre qu'un ministre compétent, habilité par une loi fédérale, à l'exception de la présente loi, à délivrer un permis ou une autre autorisation, ou à y donner son agrément, visant la mise à exécution d'une activité susceptible d'entraîner la destruction d'un élément de l'habitat essentiel d'une espèce sauvage inscrite ne peut le faire que s'il a consulté le ministre compétent, s'il a envisagé les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce et s'il estime, à la fois :

(*a*) all reasonable alternatives to the activity that would reduce the impact on the species' critical habitat have been considered and the best solution has been adopted; and

a) que toutes les solutions de rechange susceptibles de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce ont été envisagées, et la meilleure solution retenue;

(*b*) all feasible measures will be taken to minimize the impact of the activity on the species' critical habitat.

b) que toutes les mesures possibles seront prises afin de minimiser les conséquences négatives de l'activité pour l'habitat essentiel de l'espèce.

(1.1) Subsection (1) does not apply to the National Energy Board when it issues a certificate under an order made under subsection 54(1) of the

(1.1) Le paragraphe (1) ne s'applique pas à l'Office national de l'énergie lorsqu'il délivre un certificat conformément à un décret pris en vertu du paragraphe 54(1) de la *Loi*

National Energy Board Act.

(2) For greater certainty, section 58 applies even though a licence, a permit or any other authorization has been issued in accordance with subsection (1).

…

79 (1) Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the *Canadian Environmental Assessment Act, 2012* in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

(2) The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

(3) The following definitions apply in this section.

person includes an association, an organization, a federal authority as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*, and any body that is set out in Schedule 3 to that Act.

sur l'Office national de l'énergie.

(2) Il est entendu que l'article 58 s'applique même si l'autorisation a été délivrée ou l'agrément a été donné en conformité avec le paragraphe (1).

…

79 (1) Toute personne qui est tenue, sous le régime d'une loi fédérale, de veiller à ce qu'il soit procédé à l'évaluation des effets environnementaux d'un projet et toute autorité qui prend une décision au titre des alinéas 67a) ou b) de la *Loi canadienne sur l'évaluation environnementale (2012)* relativement à un projet notifient sans tarder le projet à tout ministre compétent s'il est susceptible de toucher une espèce sauvage inscrite ou son habitat essentiel.

(2) La personne détermine les effets nocifs du projet sur l'espèce et son habitat essentiel et, si le projet est réalisé, veille à ce que des mesures compatibles avec tout programme de rétablissement et tout plan d'action applicable soient prises en vue de les éviter ou de les amoindrir et les surveiller.

(3) Les définitions qui suivent s'appliquent au présent article.

personne S'entend notamment d'une association de personnes, d'une organisation, d'une autorité fédérale au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* et de tout organisme mentionné à l'annexe 3 de

cette loi.

project means	projet
(*a*) a designated project as defined in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012* or a project as defined in section 66 of that Act;	*a*) Projet désigné au sens du paragraphe 2(1) de la *Loi canadienne sur l'évaluation environnementale (2012)* ou projet au sens de l'article 66 de cette loi;
(*b*) a project as defined in subsection 2(1) of the *Yukon Environmental and Socio-economic Assessment Act*; or	*b*) projet de développement au sens du paragraphe 2(1) de la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*;
(*c*) a development as defined in subsection 111(1) of the *Mackenzie Valley Resource Management Act*.	*c*) projet de développement au sens du paragraphe 111(1) de la *Loi sur la gestion des ressources de la vallée du Mackenzie*.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-78-17 (LEAD FILE); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17
STYLE OF CAUSE:	TSLEIL-WAUTUTH NATION et al. v. ATTORNEY GENERAL OF CANADA et al.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 2-5, 10, 12-13, 2017
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. WOODS J.A.
DATED:	AUGUST 30, 2018

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