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FROM / EXPÉDITEUR : Lise Lafrance	**DATE : June 9, 2017**
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SUBJECT / OBJET :

Court File No. / N° du dossier de la Cour: T-1535-16

Between / entre: Marsha Wagner et al v. MECC et al

Enclosed is a true copy of the Judgment and Reasons dated June 9, 2017

BY FAX ONLY

Counsel,
Please find transmitted here a copy of the Judgment and Reasons issued June 9, 2017 in the above-referenced proceedings. Please advise the sender if you wish to receive a certified copy by mail. Regards,

Federal Court Cour fédérale

Date: 20170609

Docket: T-1535-16

Citation: 2017 FC 560

Ottawa, Ontario, June 9, 2017

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

MARSHA WAGNER, DIANE JANE DREWRY. JOHN ROGER ROBINSON, RYAN JOHN ROBINSON, PHILIP COPITHORNE AND ELLEN ROBINSON

Applicants

and

MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND ALBERTA TRANSPORTATION

Respondents

JUDGMENT AND REASONS

[1] In June 2013, unprecedented flooding in Southern Alberta forced more than 56,000 Albertans from their homes. To help reduce the effects of future extreme flood events on infrastructure, water courses, and people in Calgary and downstream communities, the Respondent, Alberta Transportation, is proposing to construct and operate flood mitigation infrastructure on the Elbow River, and on lands adjacent to the Elbow River, approximately

15 km west of Calgary. Upon completion the "Springbank Off-Stream Reservoir Project" (Project) will affect 6,800 acres of land by the construction of a 4,700 metre diversion channel to carry floodwater from the Elbow River to an Off-Stream Storage Reservoir with a storage capacity of some 104,600,000 cubic metres. The Applicants are landowners whose lands are within the area required for the Project, and for some, the lands have been in their families for generations. The Applicants will lose their land if the Project is constructed and operated (Applicants' Record, Vol II, Exhibit L (CTR), p. 023).

[2] As a result, the present Application is directed towards holding the Respondents accountable for their decision-making in bringing the Project to fruition. The primary focus is on the June 23, 2016 decision of the Canadian Environmental Assessment Agency (Agency) with respect to the Applicants' request that a public review panel conduct the necessary environmental assessment of the Project pursuant to s. 38(1) of the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19 (*CEAA 2012* and the *Act*).

[3] Sections 38(1) and (2) of the *Act* are the central focus of the present Application:

Environmental Assessment by a Review Panel **General Rules** **Referral to review panel**	**Évaluation environnementale renvoyée pour examen par une commission** **Règles générales** **Renvoi pour examen par une commission**
38 (1) Subject to subsection (6), within 60 days after the notice of the commencement of the environmental assessment of a designated project is posted on the Internet site, the Minister may, if he or she is of the opinion	**38 (1)** Sous réserve du paragraphe (6), dans les soixante jours suivant l'affichage sur le site Internet de l'avis du début de l'évaluation environnementale d'un projet désigné, le ministre peut, s'il estime qu'il

that it is in the public interest, refer the environmental assessment to a review panel	est dans l'intérêt public que celui-ci fasse l'objet d'un examen par une commission, renvoyer l'évaluation environnementale du projet pour examen par une commission.
Public interest	**Intérêt public**
(2) The Minister's determination regarding whether the referral of the environmental assessment of the designated project to a review panel is in the public interest must include a consideration of the following factors:	(2) Il tient notamment compte des éléments ci-après lorsqu'il détermine si, selon lui, il est dans l'intérêt public qu'un projet désigné fasse l'objet d'un examen par une commission
(a) whether the designated project may cause significant adverse environmental effects;	a) la possibilité que le projet entraîne des effets environnementaux négatifs importants;
(b) public concerns related to the significant adverse environmental effects that the designated project may cause; and	b) les préoccupations du public concernant les effets environnementaux négatifs importants que le projet peut entraîner;
(c) opportunities for cooperation with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project or any part of it	c) la possibilité de coopérer avec toute instance qui exerce des attributions relatives à l'évaluation des effets environnementaux de tout ou partie du projet.
[...]	[...]

[4] At the very least, the provisions express an expectation that the Minister direct his or her mind to whether discretion should be exercised. Conduct in meeting this expectation is at the core of the present Application. In the result, the Minister's discretion was not exercised. The

present Application challenges this result. Counsel for both Respondents argues that the present Application should be dismissed.

I. Statutory Context

[5] The Project is a designated project under the Federal *Regulations Designating Physical Activities* (SOR/2012-147) (*Regulations*). The following is an overview of the statutory context within which the Project has been considered:

> *The Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 ("CEAA 2012") applies to designated projects. Designated projects are physical activities that are either designated under the *Regulations* [...], or in an order made by the Minister of Environment and Climate Change (the "Minister") under subsection s. 14(2) of CEAA 2012. Every designated project is also linked under the *Regulations* or in the Ministerial order, to one of the responsible authorities identified in section 15 of CEAA 2012. The Canadian Environmental Assessment Agency (Agency) is one of these responsible authorities.
>
> For a designated project that is linked under the *Regulations* to the Agency, the first step in the environmental assessment process is for the Agency to decide, upon completion of a 45-day screening, if an environmental assessment of the designated project is required (screening decision). This screening process is set out in sections 8 to 12 of CEAA 2012.
>
> If the Agency decides that an environmental assessment is required, it must post a notice of commencement of an environmental assessment on its Internet site, and then proceed with the conduct of the required environmental assessment.
>
> Within 60 days after the notice of commencement of the environmental assessment of a designated project is posted on the Agency's Internet site, [pursuant to s. 38(1) of CEAA 2012], the Minister may, if she is of the opinion that it is in the public interest, refer the environmental assessment to a review panel. A public interest determination must include a consideration of the factors set out in s. 38(2) of CEAA 2012, being: (a) whether the designated project may cause significant adverse environmental

> effects; (b) public concerns related to any such significant adverse environmental effects; and (c) opportunities for cooperation with other environmental assessment jurisdictions.
>
> (Excerpts from the Affidavit of Ms. Heather Smith, Record of the Respondent (RR), The Minister of Environment and Climate Change, pp. 001-005, paras. 3 to 6)

II. The Environmental Assessment (Assessment) Decision

[6] Since 1994, Ms. Heather Smith, Vice-President of the Operations Sector of the Agency, has been accountable for the delivery of environmental assessments by the Agency. To assist Ms. Smith in reaching a decision on whether an environmental assessment was required with respect to the Project, the Agency's Project Screening Committee (PSC) produced a recommendation dated June 23, 2016, entitled "Memorandum to Vice President: "Environmental Assessment Determination for the Springbank Off-Stream Reservoir Project (Alberta) (For Decision and Signature)" (Memorandum to Vice President). The key passages from the document read as follows:

> Pursuant to section 10 of CEAA 2012, the Agency must determine by June 23, 2016, whether an EA is required for the Project. Should you determine that a federal EA is required, the [Agency] would commence a public comment period on the draft Environmental Impact Statement Guidelines from June 23 to July 23, 2016. Should you determine that a federal EA is not required, the Agency will issue a public notice to that effect on the Canadian Environmental Assessment Registry.
>
> **CONSIDERATIONS**
>
> The potential adverse environmental effects to areas of federal jurisdiction include effects to fish and fish habitat, including Indigenous fisheries, migratory birds, migratory bird habitat and wetlands resulting from the operation of the diversion channel.

Indigenous groups have raised concerns regarding potential effects to:

- rare plants of medicinal and spiritual importance throughout the Project area, and specifically in riparian areas;
- use of the Elbow River for fishing and travel;
- effects to water quality, fish, and fish habitat within and outside of the Project area;
- effects on wildlife (including ungulates and bear), wildlife migration and hunting, within and outside of the Project area; and
- sites of historic, cultural and spiritual importance throughout the Project area.

There has been significant public interest, both in support of and in opposition to the Project. The area of the proposed reservoir is privately owned land used primarily for ranching. The expropriation of this land by the Province of Alberta has not yet been fully negotiated. The community organisation Don't Dam Springbank, in opposition to the Project, has expressed concern with the location and scale of the off-stream reservoir as well as potential adverse effects related to section 5 of CEAA 2012, such as fish and fish habitat, migratory birds and Indigenous Peoples.

The Calgary River Communities Action Group, in support of the Project, has expressed concern with the time required to complete a federal EA in addition to a provincial one with the potential for an emergency flood event in the interim.

A provincial EA is required for the Project. The Provincial Minister of Environment and Parks expressed concern that a federal EA could delay the Project and asked if the Project could be exempt from undergoing a federal EA, as per section 70 of CEAA 2012, because it is being developed to mitigate a potential emergency. The Agency determined section 70 of CEAA 2012 does not apply to this Project. EA coordination will be undertaken to the greatest extent possible. It is anticipated that an EA by the Agency would likely be completed prior to the completion of the provincial Natural Resource Conservation Board hearings and that an EA by a joint review panel would add at least an additional 12 months to the environmental review process.

ANALYSIS/ASSESSMENT

The PSC met on June 13, 2016, and recommends that a federal EA be undertaken for the Project. The rationale for this recommendation is based on the following considerations:

1) The Project is anticipated to cause adverse environmental effects:

   - on fish and fish habitat;
   - migratory birds; and
   - with respect to Indigenous Peoples.

Referral to Review Panel

With respect to the criteria set out in CEAA 2012 for referral to a review panel, the PSC notes the following:

1) potentially significant adverse environmental effects under section 5 are not anticipated;

2) over 1000 comments have been received, with the majority opposing the project and seeking federal involvement to bring additional oversight, scrutiny, and "independence" to the process; and:

3) the province has requested that a federal EA, if required, be conducted as expediently as possible. If the Project is referred to a federal review panel, the Natural Resources Conservation Board would likely be interested in a Joint Review Panel, which could add an additional 12 months to the EA process.

Based on available information, the PSC has not included a recommendation regarding the referral panel.

RECOMMENDATION

I recommend that a federal EA be required for the Project.

NEXT STEPS

- Should you agree with this recommendation, a Notice of Determination and Notice of Commencement (if applicable) will be posted on the Agency's website on June 23, 2016.

[Emphasis added]

(CTR, pp. 001-004)

[7] By placing a check-mark beside the words, "I concur", and by signing the document, Ms. Smith ordered the Assessment, and, therefore, s. 38 was engaged.

III. The Agency and Decision-Making Pursuant to s. 38

[8] In her affidavit dated November 14, 2016, Ms. Smith describes her actions with respect to the Project:

> 7. Under section 103 of CEAA 2012, the Agency is required to advise and assist the Minister in exercising the powers and performing the duties and functions conferred on her by CEAA 2012. To support the Minister in the exercise of her discretionary authority to refer an environmental assessment of a designated project to a review panel, the Agency has established an internal process for the purposes of notifying and advising the Minister when there is a reasonable basis to refer a project to a review panel under section 38 of CEAA 2012.
>
> 8. As part of the screening process, or upon receipt of a request to refer the environmental assessment of a designated project to a review panel, the Agency reviews any available information associated with the designated project that may substantiate a referral to a review panel. This information is considered by the Agency against the factors set out in subsection 38(2) of CEAA 2012. In its analysis, the Agency focuses on areas under federal jurisdiction, having regard to "environmental effects" as defined in section 5 of CEAA 2012.
>
> 9. Where, in the Agency's opinion, the information available on a designated project suggests that a review panel may be

warranted, the Agency provides the Minister with its recommendation on whether to refer the environmental assessment to a review panel.

10. Where, in the Agency's opinion, the information available does not disclose a reasonable basis to refer an environmental assessment to a review panel, the Agency keeps a record of its analysis, but does not provide any recommendation to the Minister on whether to refer the environmental assessment to a review panel.

11. Environmental assessments by the Agency and by review panels must consider the same factors, identified in subsection 19(1) of CEAA 2012. Both types of environmental assessments are also subject to the same decision making process, set out in sections 52 to 54 of CEAA 2012.

The Springbank Off-Stream Reservoir Project

12. On June 23, 2016 I decided, upon completion of the screening process, that an environmental assessment of the Springbank Off-Stream Reservoir Project ("the Project") was required. On the same day, a notice of commencement of the environmental assessment was posted on the Agency's Internet site. The information I considered in making this decision (the "screening record") is included in the certified record that was served on the parties and transmitted to the Court in response to the Applicants' request under rule 317 of the Federal Courts Rules. The screening record is also attached as attached as [sic] Exhibit L to the affidavit of Ryan John Robinson that was prepared in support of the position of the Applicants.

13. Consistent with the internal process described in paragraphs 7 to 11 of my affidavit, the screening record also included information on whether a referral of the environmental assessment of the Project to a review panel may be in the public interest and therefore warranted. This included information on each of the three factors set out in subsection 38(2) of CEAA 2012, that are described in paragraph 6 of my affidavit.

14. Based on the information available, I was satisfied that the issues identified through the screening process could be addressed effectively through an environmental assessment conducted by the Agency, and that there was no reasonable

> basis to refer the environmental assessment of the Project to a review panel. Accordingly, and in accordance with the established process, the Agency did not provide any recommendation to the Minister on whether to refer the environmental assessment to a review panel.
>
> 15. Following the commencement of the environmental assessment of the Project on June 23, 2016, the Minister received a number of requests to refer the environmental assessment of the Project to a review panel. In my review of these requests against the factors set out in subsection 38(2) of CEAA 2012, I formed the opinion that these requests did not disclose any new information warranting a different determination than the one that had been made based on the information in the screening record, i.e. that there was no reasonable basis to refer the environmental assessment of the Project to a review panel.
>
> (RR, pp. 001-005)
>
> [Emphasis added]

[9] Ms. Smith confirmed that, even though she made no recommendation, it was still open to the Minister to exercise discretion to order a review panel pursuant to s. 38(1) of the *Act*. (Transcript, Applicants' Record, Volume II, (AR), pp. 536 and 537).

[10] By s. 103 of the *Act*, the Minister is responsible for the Agency. During the course of the first day of hearing, Counsel agreed that the Minister was a party to the "Internal Process" applied by Ms. Smith on behalf of the Agency.

IV. Conduct of the Present Application

[11] This element of the present reasons describes how the application of the Internal Process affected the conduct of the present Application.

[12] Because the Agency posted a notice of commencement of the Assessment to the internet site on June 23, 2016, the Minister could have referred the Assessment to a review panel up to

and including August 22, 2016. Because no such notice was posted, the Applicants filed a Notice of Application, dated September 16, 2016, naming the Minister as the decision-maker of a decision not to refer the Project to a review panel because the Applicants reached the conclusion that "it is apparent that the Minister has decided not to refer the Project to a review panel" (paras 8 to 11). The Notice of Application was amended on December 20, 2016 to add further grounds for review.

[13] Thus, at the time of the filing of the present Application, Counsel for the Applicants assumed that the Minister was the decision-maker. However, after understanding that the Agency played a vital role in the Minister not referring the Project to a review panel, in support of the Application, Counsel for the Applicants argued that "the Agency had no jurisdiction to substitute its decision regarding the referral to a review panel for that of the Minister's" (Memorandum of Fact and Law of the Applicants, para. 36 (AM)). In the alternative, Counsel for the Applicants argued that the Agency's decision not to refer the Project's Assessment to a review panel was unreasonable because all of the s. 38 factors were demonstrably present (AM, paras. 29 to 62).

[14] By Memorandum dated February 9, 2017, Counsel for the Respondent Minister replied to the Applicants' argument as follows:

> 31. The Minister exercises her authorities under CEAA 2012 with the assistance and advice of the Agency. She has not delegated her powers of referral under section 38 to the Agency. The Minster retains the discretion to refer a project to a review panel regardless of the Agency's recommendation and regardless of whether the Agency even provides a recommendation.
>
> 32. The Minister, though aware of the project and of requests to refer it to a review panel, also knew through communications from the Agency to her office that the Agency was not making a recommendation that she do so. She did not request further information of the Agency.

33. In deciding whether even to turn her mind to exercising her discretion to refer a project to a review panel, the Minister was entitled to rely on the Agency's recommendation, or lack of recommendation, arising from a consideration of the project against the factors in section 38(2). Given the lack of a recommendation, effectively a recommendation not to refer to a review panel, her not referring the matter to a review panel was reasonably open to her.

The Agency acted within its jurisdiction

34. As such, the Applicants misconstrue the authority of the Agency in their submissions. The Agency's decision not to make a recommendation to the Minister is not a usurpation of the Minister's authority. Instead, it is the result of a reasonable interpretation of its mandate to provide assistance and advice to the Minister pursuant to the provisions of CEAA 2012.

35. In conducting its own review on whether a review panel may be warranted, the Agency is acting according to its mandate to assist the Minister in her role under the Act. In effect, the Agency applies its judgment in order to present only those projects to the Minister which, in the Agency's expert opinion, have a reasonable basis to proceed to a review panel. This is a matter of assistance and advice to the Minister.

36. Effectively, the Applicants are seeking to have the Court require the Agency to place before the Minister an analysis of every designated project for which a federal environmental assessment is required. In this scenario, only then could the Minister exercise her discretion. Aside from being unwieldy, such a process would needlessly limit the Agency's statutory mandate to assist and aid the Minister in her workload. It would also be based on the erroneous premise that the Minister is legally required to make a formal determination under s. 38 for every designated project for which an EA is required. As above, *CEAA, 2012* provides that an EA by the Agency simply continues as such in the absence of a decision to refer.

[Emphasis added] [Citations deleted]

(Memorandum of Fact and Law of the Respondent Minister (RM), paras. 31 to 36)

[15] Thus, Counsel for the Minister argued that, not referring the matter to a review panel was reasonably open to the Minister, and the Agency's advice was not a usurpation of the Minister's authority to so decide.

[16] However, during the first day of hearing of the present Application on April 11, 2017, after an exchange of argument, Counsel for the Applicants and the Minister had to agree that the Minister did not make a decision as asserted by the Applicants' Notice of Application. This conclusion was reached upon inspection in open Court of the October 5, 2016 reply to the Applicants' Rule 318 request for a certified copy of the decision-making material in the Minister's possession:

> I certify that the Minister did not make a decision not to refer the Project to a review panel and, as such, there is no material which would fall within the Applicants' request.
>
> Heather Smith, Vice-President Operation of the Canadian Environmental Assessment Agency agreed with a recommendation of a project screening committee within the Agency that the Project required a federal assessment but which did not contain a recommendation that the matter be referred to a review panel. I certify that all the attached materials following were before Ms. Smith in making her decision.
>
> (Rule 318 Certified Record, October 5, 2016, appending the Memorandum to Vice President and the Project Description)

[17] Counsel for the Minister made the following statement:

> My position is this, sir. Because of the structure of section 38 of CEAA 2012 which makes the matter entirely discretionary, coupled with the fact that the *Act* in section 21 also provides that in default of a decision to refer that the matter proceeds to environmental assessment by the Agency…it is the Attorney General's position on behalf of the Minister that the Minister did not make a decision, it is rather by operation of law that the matter proceeded to environmental assessment by the Agency.
>
> (13:25:50 of the Recording of the Hearing, April 11, 2017)

[18] Accordingly, the hearing of the Application was adjourned to allow Counsel for the Applicants to consider an amendment to the Notice of Application.

[19] In the result, the Notice of Application was further amended as of April 20, 2017 naming the Agency as the decision-maker of a decision to not recommend that the Minister refer the Project to a review panel (Decision). Ms. Smith is identified as the person who made the Decision on or about June 23, 2016 (para. 9). The hearing of the present Application continued on May 5, 2017.

[20] As it turns out, Counsel for the Applicants' arguments that the Agency usurped the Minister's authority advanced prior to the April 20th amendment were still very much alive having named the Agency as the decision-maker; the Agency's decision is the final decision with respect to the referral of the Assessment to a review panel (Applicants' Supplemental Submissions, para. 9). However, the April 20th amendment caused Counsel for the Minister to make a course change. Submissions in a new direction are as follows:

> Amendment to style of cause
>
> 5. The Minister requests that the style of cause be amended to name the Attorney General of Canada in her place.
>
> 6. Following the amendments to the Notice of Application, the alleged decision of the Minister is no longer under review. She is no longer, if she ever was, a party directly affected by this application. Pursuant to the provisions of Rule 303(2), the proper federal respondent is the Attorney General of Canada.
>
> There is no matter subject to judicial review
>
> 7. The provision or non-provision of a recommendation from the Agency to the Minister is not a matter subject to judicial review.

8. Section 18.1 of the *Federal Courts Act* provides that judicial review is available in respect of a decision of a federal board, commission, or other tribunal. The provision of a non-binding recommendation is not a matter which is generally subject to such review.

9. Nonetheless, this Court has recognized that, where a party's rights or interests may be affected by the conduct of an administrative body, such conduct may be subject to judicial review notwithstanding the lack of a formal decision. Additionally, where recommendations are so "inexorably connected" with a final decision affecting rights - generally where a recommendation is the sole basis for the decision- the recommendation may itself be subject to review.

10. Here, however, the Agency's recommendation was not the basis for the project proceeding to review by the Agency. In the absence of a decision by the Minister to exercise her discretion, it was by operation of CEAA, 2012 that the project was subject to review [sic] the Agency instead of by review panel.

11. In any event, the result that the environmental assessment will be conducted by the Agency and not by a review panel does not affect the Applicants' rights and is thus not reviewable. It simply determines the procedure by which the assessment will proceed. If the Applicants' rights and interests may be affected at all by the federal assessment process, they would be affected only after the Minister (and potentially) the Governor in Council make decisions on the project following the receipt of an environmental assessment report. This situation is not one where serious harm to the Applicants' rights may be affected by the Agency's not making a recommendation to the Minister.

[Emphasis added] [Citations deleted]

(Additional Submissions of the Respondent Minister of Environment and Climate Change, paras. 5 to 11)

V. Did the Agency Make the Decision?

[21] Counsel for the Applicants argues that, rather than providing a recommendation, Ms. Smith decided pursuant to a "federal grant of authority", being the internal process itself, to

effectively reject the Applicants' request for a review panel. Counsel for the Minister argues that Ms. Smith's conduct of not providing any recommendation to the Minister is not a decision and is not justiciable. In favour of the Applicants, I find that Counsel for the Minister's argument fails on the evidence on the record of the present Application.

[22] I find that the following excerpts from the examination of Ms. Smith on her affidavit provide a fair insight into the practical application of the internal process (Transcript, AR, pages as noted):

> Q: The Agency exercised discretion with respect to referring information with respect to a decision to her?
>
> A: The Agency decided not to recommend that she exercise her discretion.
>
> Q: Right.
>
> A: Yeah.
>
> Q: So your view, then, is the Agency makes the determination as to whether the Minister, in fact, does exercise discretion under Section 38?
>
> A: Not exclusively. Because there are instances where the Minister would be aware of a project and may, of her own initiative, say that she wants to see the project assessed by a review panel. (pages 536 and 537)
>
> Q: Okay. And we know, in fact, in this case, the Minister did not exercise any discretionary authority; correct?
>
> A: And -- and we did not ask her to.
>
> Q: Right. And you formed the view that Section 38 did not require her to form an opinion as to whether a review panel was required?
>
> A: Yes. But my understanding of Section 38 is that it is a discretionary authority, but that she does not have to turn her mind to whether she's going to use it for every project.
>
> Q: She can delegate that discretion to the Agency in your view; correct?

A: In my view, yes.

Q: Okay. And that's what happened in this case?

A: And that's what happened in this case.

Q: Okay. And that's pursuant to an internal process; correct?

A: Yes.

Q And that's the internal process that's referenced in paragraph 7 of your affidavit?

A: Yes. (pages 537 and 538) [Emphasis added]

Q: Just so I can confirm, my understanding is correct that there's no formal document that you're aware of that delegates the authority of the Minister under Section 38(2); is that correct?

A: That, I can absolutely say there is no formal delegation document because she has not delegated the exercise of her discretion. That's why, if we think that it's warranted, we ask her to decide . We're talking -- almost talking about a negative where we're forming an opinion about whether it's warranted to ask her to exercise her discretion.

Q: Right . She doesn' t get the opportunity to exercise her discretion unless you in your discretion decide that she should get that opportunity?

A: No, that's not correct. As I mentioned earlier, sometimes a Minister, for their own reasons, will indicate to the Agency that they want a project assessed by a review panel, and there's regular dialogue back and forth between the Minister's Office and the Agency about projects.

Q: So with respect to SR1 [the Project], the Minister didn't get a chance to exercise her discretion under Section 38 because you exercised your discretion to decide that she shouldn't; is that correct?

A: We thought that it wasn't warranted. All right. So my statement was correct?

A: That we

Q: She - -

> A: -- decided that she shouldn't. I would say we determined that it wasn't warranted.
>
> Q: Right. You determined that the Minister's exercise of discretion under Section 38 was not warranted?
>
> A: That's right. (pages 539 and 540) [Emphasis added]
>
> Q: Well, then let me ask it this way: Is it you who decided that -- with respect to SR1, that the Minister should not have the opportunity to exercise her discretion, or was it Mr. Hallman who decided, with respect to SR1, that the Minister should not have the opportunity to exercise her discretion?
>
> A: It was -- it was me who decided that the nature of this project and the potential impacts of the project didn't warrant seeking a decision from the Minister about a referral to the review panel. (page 542)
>
> [Emphasis added]

[23] In addition, the following two pieces of evidence are important to understanding what took place in the decision-making process. In an email dated July 28, 2016 from an official in the Minister's office to Ms. Smith regarding the Project, the following question was asked: "is it safe to assume that it will not go to a Panel?" Ms. Smith's reply on the same date was: "your assumption is correct. The Agency will not be recommending a referral to a review panel" (Response to Undertaking 3, (AR), p. 658 and 657 respectively). As set out in paragraph 14 of the present reasons, Counsel for the Minister confirmed that, with respect to referring the Project to a review panel, the Minister knew that the Agency was not making such a recommendation and did not request further information from the Agency.

[24] It is agreed between Counsel for the Applicants and the Minister that, with respect to s. 104(1) of the *Act*, there was no formal delegation of authority from the Minister to the Agency. Nevertheless, I find that a two-part inference can be drawn on the evidence just quoted: on a

balance of probabilities, the Internal Process was approved by the Minister, and the Internal Process constitutes an informal delegation of authority by the Minister to the Agency to decide whether discretion should be exercised pursuant to s. 38(1), contingent on the Minister's overriding authority (see: para. 9 above). As a result, I agree with Counsel for the Applicants' argument that Ms. Smith acted on the Minister's authority to make that decision with respect to the Project.

[25] Thus, in the present scenario, because Ms. Smith decided that the evidence did not disclose a reasonable basis to refer the Assessment to a review panel, the Agency did not provide any recommendation to the Minister and the 60-day default period was allowed to pass.

VI. Is the Decision Reasonable?

[26] The standard of review is expressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 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.

[27] There are two reasons to decide that the Agency's decision is unreasonable.

A. ***The Internal Process is not transparent and intelligible decision-making***

[28] I find that, the abject confusion caused by the Agency's decision-making with respect to s. 38 as described in Section IV of the present reasons, is conclusive proof that the Internal Process offends the requirements of transparency and intelligibility.

[29] For this reason, I find that Ms. Smith's decision to not refer the Assessment to a review panel is unreasonable.

B. ***The Decision does not include a consideration of "public concerns"***

[30] In the course of the first day of the hearing of the present Application, Counsel for the Applicants argued that the Minister's decision should be set aside because it neglects the Applicants' request for a public hearing. The argument strongly emphasised that an important component of the public interest is to be provided with an opportunity to be heard in the course of an independent hearing involving the presentation and questioning of evidence of environmental effects from different perspectives arising from the development of the Project. Counsel for the Applicants was speaking on behalf of the Applicants in making the argument, but also as an advocate on behalf of the Tsuut'ina Nation; the Chief and members of the Tsuut'ina Nation were present at the hearing. I note that, on the issue of environmental effects, s. 5(1) of the *Act* provides that specific consideration be given to the concerns of Aboriginal Peoples:

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 legislative authority of Parliament:	**a)** les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement :
[...]	[...]
(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 fin 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.

[31] The point made by Counsel for the Applicants is that the Applicants and the Tsuut'ina People will be directly affected should the Project proceed, and have professional and personal concerns and evidence to offer a review panel of the significant environmental effects that will

be caused. I also note that in a letter from the Chief of the Tsuut'ina Nation to the Agency, dated May 30, 2016, the following request was made:

> We urge the Agency to confirm that a federal panel review is required for this proposed Project. We would be happy to meet with you to discuss our concerns in more detail. (AR, pp. 653-654).

[32] Therefore, a reference to a review panel is of ultimate importance to the Applicants and the Tsuut'ina People. This fact places the quality of Ms. Smith's decision-making with respect to "public concerns" squarely in issue.

[33] No reasons for Ms. Smith's Decision to not refer the Assessment to a review panel exist on the Tribunal Record. However, in her affidavit filed subsequent to the Decision being made, Ms. Smith states that "there was no reasonable basis to refer the environmental assessment of the Project to a review panel". I find that the clearest reason provided by Ms. Smith for arriving at the Decision is stated in the following exchange during the examination on her affidavit:

> Q. ...Because the Minister never got the opportunity to make that discretionary decision; correct?
>
> A Well, the Minister was aware of the project and did not give any indication or signal that she was interested in exercising her discretion, and our technical analysis didn't point to any factors where we would say to the Minister, Minister, you really need to consider referring this project to a review panel in this case because...
>
> Q So does the Agency, then, rely on sort of opaque overtures from the Minister to determine whether or not she will have the opportunity to exercise her discretion?
>
> A No, we don't rely on opaque signals from the Minister. She relies on us to do analysis and provide her with advice and recommendations.
>
> [Emphasis added](Transcript, AR, page 558)

[34] The "technical analysis" to which Ms. Smith refers is the statements in the Memorandum to Vice President under the heading "Referral to Review Panel" quoted above, and again here for convenience:

> *Referral to Review Panel*
>
> With respect to the criteria set out in CEAA 2012 for referral to a review panel, the PSC notes the following:
>
> 1) potentially significant adverse environmental effects under section 5 are not anticipated;
>
> 2) over 1000 comments have been received, with the majority opposing the project and seeking federal involvement to bring additional oversight, scrutiny, and "independence" to the process; and:
>
> 3) the province has requested that a federal EA, if required, be conducted as expediently as possible. If the Project is referred to a federal review panel, the Natural Resources Conservation Board would likely be interested in a Joint Review Panel, which could add an additional 12 months to the EA process.
>
> Based on available information, the PSC has not included a recommendation regarding the referral panel.
>
> [Emphasis added]

[35] The "criteria" referred to are the three factors stated in s. 38(2) of the *Act* under the heading "public interest": significant adverse environmental effects; public concerns related to significant adverse environmental effects; and opportunities for cooperation in relation to an assessment of environmental effects.

[36] With respect to the three factors, the decision-making requirement in reaching a determination pursuant to s. 38(1) is clear:

> The Minister's determination regarding whether the referral of the environmental assessment of the designated project to a review

> panel is in the public interest must include a consideration of the following factors...

[37] I find it is fair to say that the wording of the first and third "notes" in the *Referral to Review Panel* recommend away from referring the Assessment to a review panel, whereas no clear direction is provided with respect to the second point. The final statement in the *Referral to Review Panel* is a recommendation to the effect that no referral to a review panel should be made.

[38] As indicated in the quotation at paragraph 33 above, despite the striking evidence of more than a thousand expressions of concern about the Project, Ms. Smith formed the opinion that the technical analysis "didn't point to any factors" warranting a referral of the Assessment to a review panel.

[39] In paragraphs 12 and 13 of her affidavit, Ms. Smith states that she considered the "screening record" in reaching the Decision. The screening record does not include the thousand comments that had been received; nevertheless, Ms. Smith was aware of that fact because the statement is made in the Memorandum to Vice President to which she concurred in approving the Assessment. But, apart from stating the opinions that "there was no reasonable basis to refer the environmental assessment of the Project to a review panel" and the technical analysis "didn't point to any factors", I find that the Decision is devoid of expression about the evidence of "public concerns".

[40] Since Ms. Smith did not provide any explanation as to the evidentiary basis of the opinions expressed, I find that Ms. Smith decided against a referral to a review panel without including a consideration of the factor of "public concerns" as required by s. 38(2)(b) of the *Act*.

As a result, I find that the Decision was reached in breach of s. 38(2)(b) of the *Act*, and is, therefore, unreasonable.

VII. Result

[41] I decline to amend the Style of Cause of the present Application to name the Attorney General as Respondent in place of the Minister as requested by Counsel for the Minister because the Agency's decision was provided on the authority of the Minister, and, as such, the Minister remains responsible.

[42] If successful, against objection by Counsel for the Respondents, Counsel for the Applicants requests a directed verdict as an outcome to the present Application (see: *Lu v Canada (Citizenship and Immigration)*, 2016 FC 175). I find that I am unable to accede to this request. Is not for me to decide the outcome; it is for the Minister to decide on a redetermination.

JUDGMENT IN T-1535-16

THIS COURT'S JUDGMENT is that:

1. The Agency's decision of June 23, 2016, with respect to s. 38 of the *Act* as found on the evidence in the present reasons, is set aside.

2. The matter is referred back for redetermination on the following direction:

The Minister is to personally decide the redetermination.

The issue of costs to be awarded will be determined on further argument from Counsel.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1535-16
STYLE OF CAUSE:	MARSHA WAGNER, DIANE JANE DREWRY. JOHN ROGER ROBINSON, RYAN JOHN ROBINSON, PHILIP COPITHORNE AND ELLEN ROBINSON v MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND ALBERTA TRANSPORTATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	APRIL 11, 2017
PLACE AND DATE OF CONTINUATION OF HEARING	HELD VIA VIDEOCONFERENCE ON MAY 5, 2017 FROM TORONTO, ONTARIO, CALGARY, ALBERTA AND EDMONTON, ALBERTA
JUDGMENT AND REASONS:	CAMPBELL J.
DATED:	JUNE 9, 2017

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Ronald M. Kruhlak, Q.C., Stuart W. Chambers	FOR THE RESPONDENT ALBERTA TRANSPORTATION

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