Federal Court  Cour fédérale

Date: 20230420

Docket: T-564-22

Citation: 2023 FC 580

Toronto, Ontario, April 20, 2023

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

FORBID ROADS OVER GREEN SPACES, RESCUE LAKE SIMCOE CHARITABLE FOUNDATION CARRYING ON BUSINESS AS RESCUE LAKE SIMCOE COALITION, FEDERATION OF ONTARIO NATURALISTS CARRYING ON BUSINESS AS ONTARIO NATURE, WESTERN CANADA WILDERNESS COMMITTEE, WILDLANDS LEAGUE, EARTHROOTS FUND, AND ENVIRONMENTAL DEFENCE CANADA INC.

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a February 10, 2022 decision [Decision] of the Minister of the Environment and Climate Change [Minister], declining to revisit its prior decision that denied a request to designate the Bradford Bypass highway project [Project] for a federal impact assessment under subsection 9(1) of the *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA]. The Project is a 16.2 km four-lane freeway that the Ontario Ministry of

Transportation [Proponent] proposes to build in southern Ontario. The Decision relates to a subsequent request by the Applicant, Forbid Roads Over Green Spaces [FROGS] (and supported by each of the other Applicants) to designate the same Project.

[2] The issues in dispute concern the Minister's treatment of the further request as a request to reconsider the initial decision that required a material change or new information before the Minister would revisit its earlier finding. The Applicants assert that the Minister has imposed a threshold test that is not grounded in the IAA. They argue that the application of this test renders the Decision unlawful, unreasonable and procedurally unfair and that even if it can be applied, the Decision lacks the requisite transparency, intelligibility and justification to be reasonable.

[3] As set out further below, it is my view that the Minister did not fetter its discretion, nor can the doctrine of legitimate expectations be used to argue that there was procedural unfairness. However, the Decision is inadequate and as such, unreasonable as it fails to provide sufficient transparency and justification for the reason why the Minister did not consider the purported new information raised by FROGS to be sufficient to require a reconsideration of its earlier decision. As such, the application will be allowed in part, and a declaration rendering the Decision unreasonable issued.

I. Background

[4] The Applicants are a group of not-for-profit environmental organizations, each of which have carried out public advocacy campaigns regarding the Project.

[5] In 2002, Ontario conditionally approved the Project following a 1997 study conducted under Ontario's *Environmental Assessment Act* [EAA]. The conditions for approval required the Project to undergo further provincial environmental assessment and the Proponent to carry out additional studies to the satisfaction of provincial regulators.

[6] The conditions of the approval were ultimately not met and as a result, the Project was not built.

[7] In 2019, the IAA came into force, replacing the *Canadian Environmental Assessment Act, 2012* [CEAA]. In the same year, the provincial government revived plans for the Project.

[8] Pursuant to the IAA, the federal government has discretion to protect against adverse environmental effects of physical activities on areas of federal jurisdiction by subjecting those projects to federal impact assessments before they commence. A physical activity may be designated to undergo a federal impact assessment if it is either listed in the *Physical Activities Regulations*, SOR/2019-285 [PAR] promulgated under the IAA, or if the Minister designates the physical activity pursuant to subsection 9(1) of the IAA on the basis of its direct or incidental federal adverse effects or public concerns related to those effects. The Project was not listed under the PAR.

[9] In 2020, the provincial government proposed to exempt the Project from the legislative requirements and the conditions imposed by the 2002 conditional approval, including the requirement to complete a Class Environmental Assessment pursuant to Ontario's EAA.

[10] On February 3, 2021, a coalition of environmental groups, including some of the Applicants, requested that the Minister designate the Project as a physical activity to be subject to federal impact assessment under subsection 9(1) of the IAA [First Request].

[11] The First Request raised the potential that the Project would cause adverse effects on areas of federal jurisdiction and concerns about the adequacy of the provincial environmental assessment process to address those issues.

[12] On May 3, 2021, after receiving a recommendation from the Impact Assessment Agency of Canada [Agency], the Minister refused to designate the Project as requested [Initial Decision].

[13] On October 7, 2021, Ontario promulgated Regulation 697/21: *Bradford Bypass Project* [Regulation]. The Regulation exempted the Project from the requirements of Ontario's EAA provided that the Proponent and the Project complied with the Bradford Bypass Environmental Assessment implemented by the Regulation.

[14] On November 9, 2021, FROGS made a further request to the Minister to designate the Project under subsection 9(1) of the IAA [Further Request].

[15] In the Further Request, FROGS provided evidence of public support for further impact testing of the Project and information about additional adverse effects under federal jurisdiction that the Project might pose.

[16] On December 8, 2021, 63 environmental groups, including the remaining Applicants, wrote a letter to the Minister in support of the Further Request.

[17] On December 9, 2021, FROGS provided additional information to the Minister regarding public concern over the Project.

[18] On February 10, 2022, upon the further recommendation of the Agency, the Minister issued the Decision, in which it characterized the Further Request as a request for reconsideration of the Initial Decision. The Minister declined to revisit the Initial Decision on the basis that there had been "no material changes to the Project".

II. Issues and Standard of Review

[19] As a preliminary issue, the Respondent seeks an amendment to remove the Minister from the style of cause pursuant to rule 303(1)(a) of the *Federal Courts Rules*, SOR/98-106 on the basis that a federal decision-maker is not entitled to defend his or her decision on judicial review except where there is a statutory requirement to do so. It asserts that the Attorney General of Canada, who is already named in the proceeding, is the proper party to be named as Respondent. The Applicants do not oppose this request. Such amendment shall accordingly be granted.

[20] On this application, the Applicants seek a declaration that the Decision is unlawful and unreasonable. They do not seek *certiorari* or *mandamus.* The Initial Decision was not challenged on judicial review and cannot be challenged now directly or indirectly. The issues raised in the

application deal with the process followed by the Minister, not the substance of the Initial Decision.

[21] The following issues are raised by the application:

A. Did the Minister err, or fetter its discretion, by applying a threshold test not found in the IAA?

B. Was the Minister's application of a threshold test procedurally unfair?

C. In the alternative, did the Minister err in its application of the threshold test?

[22] The parties agree that the applicable standard of review for the first and third issues is reasonableness. None of the situations that rebut the presumption of reasonableness review for administrative decisions are present: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17.

[23] Where the Court reviews an administrative decision for reasonableness, its role is to determine whether the decision "is based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision-maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision is reasonable if, when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility (*Vavilov* at paras 85, 91-95, 99-100) and its reasons can be justified by the decision-maker to those to whom the decision applies (*Vavilov* at para 86). Reasonableness is a single standard, with the particular context of a decision constraining what will be reasonable for an administrative decision-maker to decide in a given case: *Vavilov* at para 89.

[24] The second issue is not strictly speaking subject to a standard of review analysis. Rather, questions of procedural fairness ask whether the procedure was fair having regard to all of the circumstances with the ultimate question being whether the applicant knew the case it had to meet and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54, 56; *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at paras 46-47.

III. Analysis

A. *Did the Minister err, or fetter its discretion, by applying a threshold test not found in the IAA?*

[25] In order to address the first issue, the statutory scheme under the IAA must be considered. The IAA's purpose is set out in section 6, and includes, among other objectives, fostering sustainability, establishing a fair, predictable and efficient process for conducting impact assessments, promoting cooperation and coordinated action between federal and provincial governments, and ensuring opportunities are provided for meaningful public participation.

[26] The preamble to the IAA includes express recognition of the importance of public participation in the impact assessment process and of providing the public with access to the reasons on which decisions relating to impact assessments are based:

> Whereas the Government of Canada recognizes the importance of public participation in the impact assessment process, including the planning phase, and is committed to providing Canadians with the opportunity to participate in that process and with the information they need in order to be able to participate in a meaningful way;

> Whereas the Government of Canada recognizes that the public should have access to the reasons on which decisions related to impact assessments are based;

[27] In addition to the list of physical activities under the PAR automatically subject to the IAA, the IAA also includes a safety net (subsection 9(1) of the IAA) that provides a mechanism for the Minister to use its power under the IAA to require that an environmental assessment of a project not identified under the PAR be subject to an environmental assessment. Consistent with the objectives of the IAA of promoting pubic involvement, subsection 9(1) of the IAA provides the Minister with broad discretionary power to designate projects for assessment on its own initiative, or at the request of the public, if "in his or her opinion, either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation".

[28] The IAA also provides for reporting obligations. Under subsection 9(4) of the IAA, the Minister must respond to a request for designation made under subsection 9(1) within 90 days and publish the response online.

[29] If the physical activity is designated, it will undergo an initial assessment of its impacts, and is subject to further federal oversight and approvals where appropriate: *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2022 FCA 123 [*Ermineskin*] at para 14.

[30] Subsection 9(7) of the IAA provides only two limitations on the Minister's discretion to designate physical activities under subsection 9(1), namely if: (a) the carrying out of the physical activity has substantially begun; or (b) a federal authority has exercised a power or performed a

duty or function conferred on it under any Act of Parliament other than the IAA that could permit the physical activity to be carried out, in whole or in part.

[31] In exercising its role, the Minister is supported by the Agency, who may be delegated "any of the powers, duties and functions that the Minister is authorized to exercise or perform under the [IAA]" (subsection 154(1)). The Agency specifically has as one of its objectives to develop policy related to the IAA (subsection 155(h)), and the IAA includes as one of the Agency's powers, issuing guidelines and codes of practice in accordance with these objectives (paragraph 156(2)(c)).

[32] In practice, upon receiving a request from the public, the Agency considers the request based on its policies and guidelines, seeks input from those affected and from government departments with relevant expertise, and provides a recommendation to the Minister as to whether to designate the physical activity in issue: *Ermineskin* at para 15.

[33] Pursuant to paragraph 156(2)(c) of the IAA, the Agency published an external *Operational Guide: Designating a Project under the Impact Assessment Act* [External Guide] posted on its website, describing how to prepare a designation request and the Agency's process for handling such requests. The Agency also has an internal *Operational Guide: Process for Assessing Designation Requests under the Impact Assessment Act* [Internal Guide] that is not available to the public. The Internal Guide is described as a supplement to the External Guide and states that it provides "guidance to Agency staff on key analytical considerations and process

steps to follow when the Agency evaluates whether a proposed project may warrant designation."

[34] The External Guide refers to "a prior response to a designation request" under a list of factors the Agency will consider in forming its recommendation to the Minister. The Internal Guide instructs Agency members considering repeat requests that "[n]o additional analysis [is] required unless relevant information is brought forward in a new request that may change the Agency's recommendation."

[35] In this case, in response to the Further Request, a memo to the Minister [Agency Memo] was prepared. The Agency Memo characterized the Further Request as a request to reconsider the designation of the Project, which was subject to limitations, and could be considered where there was a material change in circumstances or important new information:

> Limitations
>
> In addition to the limitations to designate under subsection 9(7) of the IAA, a request to reconsider the designation of a physical activity for which the Minister (or a former Minister) has previously issued a response that designation is not warranted could be considered where is there is a material change in circumstances or important new information.

[36] The Agency determined that there was no new information or material changes affecting the Project that warranted revisiting the Initial Decision.

[37] In its recommendation, the Agency recommended that the Minister "concur that the correspondence received provides no basis ...to consider again whether the Project warrants designation" and that "for further correspondence asking for a reconsideration of the previous

response that designation of the Project is not warranted, unless there is important new information or material change in circumstances identified when the correspondence is evaluated by the Agency, the Agency will provide a reply to the correspondence that refers to the Minister's existing response."

[38] In the Decision, the Minister stated:

> ...In your letter, you requested reconsideration of the former Minister's response that designation of the Project for impact assessment pursuant to subsection 9(1) of the Impact Assessment Act (IAA) was unwarranted.
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> [...]
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> In May 2021, the former Minister of Environment and Climate Change responded with reasons to a request to designate the Project, and determined that designation was unwarranted. His response was based on information provided by the province and Indigenous groups; the scientific advice provided by federal expert departments; and the federal, provincial, and municipal regulatory mechanisms in place to manage potential adverse environmental effects in areas of federal jurisdiction as defined in the IAA.
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> *Ontario Regulation 697/21* sets the exemption and conditions for the assessment process going forward. I understand that the Proponent will be required to undergo a streamlined provincial assessment process for the Project, informed by consultation with Indigenous communities and interested members of the public, that includes an early works assessment process and preparation of an environmental conditions report and an environmental impact report. I also understand that the Proponent will be required to follow all other relevant legislative requirements, standards, and practices for the Project.
>
> [...]
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> Since there has been no material changes to the Project, there is no basis to revisit the former Minister's determination.

[39] The Applicants assert that it was unreasonable for the Minister to treat the Further Request as a reconsideration of the Initial Decision that could only be addressed where there was a material change or new information. In doing so, they argue that the Minister imposed a threshold screening test that was based on the Agency Memo and Internal Guide and was not grounded in the IAA, and declined to form an opinion on federal effects and public concern. The Applicants assert that the Minister fettered its discretion under subsection 9(1) of the IAA as a result.

[40] The Respondent acknowledges that it is not a “one and done” situation. Rather, the IAA provides the Minister with a continuing ability to consider designation requests on the same project until the limitations under subsection 9(7) of the IAA are triggered. This accords with the practical reality that availability of information over the course of a project may change as may possible adverse effects. However, it asserts that the IAA prescribes no procedure for the exercise of the Minister’s discretion to determine whether to reconsider a past decision.

[41] I agree that the IAA is silent on how the Minister is to exercise its discretion relating to the handling of subsequent requests on the same project and reconsideration of a past decision. The IAA speaks specifically to Parliament’s intention to have the Agency advise and assist the Minister in fulfilling its obligations under the IAA. This is the purpose behind subsections 154(1) and 155(h) of the IAA. As stated earlier, the IAA includes as one of the Agency’s powers, issuing guidelines and codes of practice (paragraph 156(2)(c)) to meet the Agency’s objectives.

[42] The Applicants do not challenge the Internal Guide. Indeed, in oral argument, the Applicants conceded that the Agency could make guidelines to create internal efficiencies and that it may not be necessary in all cases to complete a separate opinion for a new request on the same project. The Agency could use a report prepared for a first request under subsection 9(1) as a starting point for a subsequent request under subsection 9(1). The Applicants assert, however, that what happened here is that the notion of material change was elevated and became a bar on the Minister's discretion under subsection 9(1).

[43] The Applicants contend that this interpretation in effect elevated the Initial Decision from a relevant legitimate consideration to a limitation on the Minister's exercise of discretion. They contend that circumscribing the scope of discretion is fettering on the Minister's ability to exercise its authority and make a decision as per subsection 9(1).

[44] It is uncontested that policy and guidelines are not law and are non-binding. Legislation cannot be amended through guidelines and guidelines must be consistent with governing statute: *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 [*Alexion*] at para 38. An administrative policy cannot cut down the discretion given to a decision-maker (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paragraph 60):

> [60] However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy...An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

[45] The failure to exercise discretion to reconsider a decision because of policy was discussed in *Thelwell v Canada (Attorney General)*, 2016 FC 1304 [*Thelwell*] at paragraphs 22-24. In that case, the Court found a failure to recognize the existence of the discretion to reconsider to be a reviewable error:

> [22] The November 30, 2015 decision refers to the contents of the September 11, 2015 decision, culminating in a reference to Ms. Thelwell having been advised "…that passport Program decisions are considered final and that you could challenge the decision by filing an application for judicial review before the Federal Court of Canada within thirty days of the date of the decision." This language, and the concepts captured therein, is quite close to the language in the departmental policy. As such, I find that the policy influenced the inclusion of the language about finality and the availability of judicial review in both the September 11, 2015 and November 30, 2015 decisions. In itself, that is of course not problematic.
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> [23] However, quite significantly, the next paragraph in the November 30, 2015 decision begins with the word "therefore" and states that the result of the previous decision stands. The reference to finality in the policy language itself may well have been intended to refer to the availability of Federal Court judicial review resulting from a final decision. However, in the November 30, 2015 decision, the use of the word "therefore" before the statement that the previous decision stands suggests, as argued by Ms. Thelwell, that CIC declined to reconsider its previous decision because it interpreted the reference to finality in its policy as precluding such reconsideration.
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> [24] I therefore find that CIC did improperly fetter its discretion in reaching its decision on Ms. Thelwell's reconsideration request, thereby committing a reviewable error. In the alternative, even if the decision was not a product of reliance on departmental policy, the wording of the decision still demonstrates a causal link between CIC's statement as to the finality of its previous decision and its conclusion that such decision stands. I consider this to demonstrate a failure to recognize the existence of the discretion to reconsider and therefore a reviewable error of the sort recognized in *Kurukkal*.

[46] The Applicants assert that the language used in the decision in *Thelwell* mirrors the Decision where the Minister states that "[s]ince there has been no material changes to the Project, there is no basis to revisit the former Minister's determination" [emphasis added]. They assert that this language makes clear that the Minister did not exercise its discretion and make any decision on the Further Request on the basis that there were no "material changes to the Project".

[47] I agree that the language of the Decision indicates that no new decision was made; however, it does not, in my view, suggest that there was no analysis or consideration made of the Further Request or that the Minister did not form an opinion on the new designation request.

[48] The Applicants' argument assumes that a new substantive decision is required every time a request is made. However, there is no such requirement stated in the IAA. Indeed, the Applicants conceded in argument that there may be instances where a new decision is not warranted.

[49] As argued by the Respondent, this is different from a situation where the Minister said that it had already decided whether to designate and therefore it would not decide again. Here, the Agency did conduct an analysis of the Further Request and the Minister turned its mind to whether it presented material changes to warrant a change to the decision made before, but found that it had not.

[50] The Respondent characterizes the Decision as administrative. It asserts that the only determination that had to be made was whether the Minister should reconsider the Initial Decision. It contends that the Decision is clear that the conditions necessary for reconsideration were not made out because there was no material change.

[51] This is not a situation where the Minister turned its back on its duties or where negligence or bad faith have been demonstrated: *Distribution Canada Inc v MNR (CA)*, [1993] 2 FC 26 (FCA) at para 30.

[52] As stated in *Maple Lodge Farms v Government of Canada*, [1982] 2 SCR 2 at pp 8-9:

> The courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[53] I do not agree that the statutory purposes of public participation and transparency impose an obligation on the Minister to formulate a new opinion on whether to designate a project every time a subsequent request is made under subsection 9(1) for the same Project. Indeed, even at the time of the First Request there were numerous interest groups that submitted requests to the Minister. The Minister bundled the requests and considered them as a single request, providing identical responses to the interested parties. It follows in my view that where the Minister considers a subsequent request to raise the same issues and circumstances as an initial request that there is no requirement to prepare a new opinion; rather, the same opinion would still apply.

[54] Similarly, there were no new reporting obligations under subsection 9(4) invoked once it was determined that there were no material changes and that the Initial Decision still applied.

[55] While the Applicants may take issue with the content of the Decision, in my view this is a separate issue from whether the Minister fettered its discretion. Rather, as discussed further below, this relates to the reasonableness of the Decision itself and whether it provides sufficient transparency, intelligibility and justification. In my view, the Decision is not unreasonable or unlawful because of a fettering of discretion.

B. *Was the Decision procedurally unfair?*

[56] I am similarly not persuaded by the Applicants' arguments of procedural unfairness. The Applicants assert that the Decision was procedurally unfair as they had no notice of the threshold test because it was not disclosed in the External Guide. They contend that as such, they could not participate meaningfully and did not know the case they had to meet.

[57] The Applicants concede that as the IAA grants the Minister broad discretionary power, the procedural fairness owed falls at the low end of the spectrum. They acknowledge that the public is not owed procedural safeguards, or a specific choice of procedure, particularly as the IAA does not dictate process, and that there is no quasi-judicial context at play. Their sole argument is that they had a legitimate expectation that the Further Request would be dealt with under subsection 9(1) of the IAA, and that the Minister would form an opinion on the request because of the statutory scheme.

[58] The doctrine of legitimate expectations takes into consideration the promises or regular practices of administrative decision-makers; however, it does not create substantive rights: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26. The representations must be clear, unambiguous and unqualified to give rise to legitimate expectations: *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 68.

[59] In this case, as set out above, there was no clear, unambiguous and unqualified procedure established by the IAA or the External Guide as to how the Minister would respond to a subsequent request, or whether a new decision would be given. I agree with the Respondent, it was open for the Agency and the Minister to decide on procedure and it was within the Minister's discretion to determine whether the Further Request warranted a new decision.

[60] At the time of the Further Request, the list of factors that were stated in the External Guide that the Agency would consider included "a response to a prior request to designate the project" whether rendered by the IAA or under the CEAA.

[61] The External Guide did not guarantee that an applicant would receive a new decision and as noted earlier, the Applicants have conceded that not every request warrants a new decision.

[62] After the Further Request was made, the External Guide was updated to reflect the procedure adopted in the Internal Guide, and includes a header relating to “Repeat requests”. The update states:

> Repeat requests
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> Where a project has already been the subject of a designation request and the Minister has provided a negative response, correspondence containing a new designation request for the same proposed project will be considered where the Minister is not precluded from designating the project under subsection 9(7) and the correspondence demonstrates a new basis for consideration.
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> For example, a new basis for consideration may consist of important new information regarding potential adverse effects of the project within federal jurisdiction or adverse direct or incidental effects, or a material change in circumstances, such as important project design changes.

[63] The Applicants assert that the procedure for considering their Further Request lacked transparency. They assert that in the context of the IAA where transparency has been identified as an important objective, such practices should not be condoned. They note the importance of transparency and accountability in government decision-making: *Appleby-Ostroff v Canada (Attorney General)*, 2011 FCA 84 at para 38; *Lempiala Sand v HMQ*, 2022 ONSC 248 at para 93.

[64] However, I do not consider there to be a lack of transparency in this context, where the Minister maintains wide discretionary power. Where the legislation is silent, an administrative decision-maker has discretion to reconsider a decision; however, there is no general obligation to grant reconsideration, even where new evidence is submitted: *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at paras 4-5; *Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44 at paras 52, 57.

[65] I agree with the Respondent that the Applicants are reading-in rights where such rights do not exist.

[66] Further, the Applicants have not explained how their request would have been different had they been aware of the procedure adopted by the Minister.

[67] In my view, the argument seems to be more about the substance of the Decision and the Minister's refusal to designate the Project, rather than the procedure adopted by the Minister. There is no reviewable error on the basis of procedural fairness.

C. *In the alternative, did the Minister err in its application of the threshold test?*

[68] However, there is, in my view, a reviewable error based on the inadequacy of the Minister's reasons. Reviewing courts must be able to discern a reasoned explanation for an administrator's decision: *Alexion* at para 7. An administrator falls short where there is a "fundamental gap" in reasoning, a "fail[ure] to reveal a rational chain of analysis" or it is "[im]possible to understand the decision maker's reasoning on a critical point" such that there isn't really any reasoning at all: *Alexion* at para 12; *Vavilov* at paras 103-104.

[69] In the Further Request, FROGS provided purported new information on three issues: asserted cumulative adverse effects related to impacts on fish and fish habitat and greenhouse gas emissions; material changes the Regulation made to the provincial scheme and the ability to address public concern and adverse effects; and an alleged increase in public concern regarding adverse effects within federal jurisdiction.

[70] However, the Minister provides only two comments on the Further Request. First, the Minister indicates that under the Regulation "the Proponent will be required to undergo a streamlined provincial assessment process for the Project, informed by consultation with Indigenous communities and interested members of the public, that includes an early works assessment process and preparation of an environmental conditions report and an environmental impact report" and that the Proponent "will be required to follow all other relevant legislative requirements, standards, and practices for the Project". Second, the Minister notes that "Environment and Climate Change Canada has confirmed that there is no critical habitat for Red-Headed Woodpecker within the proposed footprint of the Project".

[71] None of the central arguments are specifically referenced in the Decision, nor is there any explanation given as to why the Minister did not consider the information provided in association with these issues to warrant a further decision under subsection 9(1) of the IAA.

[72] While the Agency Memo references cumulative effects, the Agency's internal analysis states that the Agency did not conduct a substantive review of this further submission, as it was of the view that "cumulative effects is not a factor that is taken into account in designation of a physical activity under sections 9(1) or 9(2) of the Act".

[73] The Respondent asserts that this approach is consistent with section 22 of the IAA, which it contends provides that cumulative effects cannot be considered until the project has been designated for impact assessment.

[74] The Applicants assert that this approach conflicts with the External Guide which identifies cumulative effects as a relevant factor for consideration in connection with a designation request, is inconsistent with the approach taken in connection with the Initial Decision which considered certain adverse cumulative effects and noted the insufficiency in the information provided, and is inconsistent with the statutory scheme of the IAA which encourages the assessment of cumulative effects of physical activities (paragraph 6(1)(m) of the IAA).

[75] In contrast to the decisions in *Sagkeeng First Nation v Canada (Attorney General)*, 2021 FC 344 and *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2022 FC 102, it is not clear from the Decision that the Minister considered cumulative effects and the Agency Memo suggests that it was not considered.

[76] I agree with the Applicants that when viewed in connection with the Initial Decision and External Guide, this fails to reveal a rational chain of analysis. The omission of any mention or justification in the Decision as to how the Minister handled the submission on cumulative effects and why it did not accept this as a material change to the request creates a fundamental gap in the Minister's response.

[77] Similarly, there is no basis to conclude that the Minister considered FROGS' submissions about the impact of the Regulation on the *mechanism* for addressing public concern. In the Further Request, FROGS submitted that the Regulation conferred discretion on the Proponent to determine who to consult instead of continuing to allow the broader public opportunities to

participate under the provincial assessment scheme as indicated in the Initial Decision and the advice given by the Agency with respect to that decision.

[78] While the Agency Memo indicates that the Agency considered concerns relating to the Regulation raised by the Further Request, it does not identify this issue raised by FROGS. In the Decision, the Minister stated only that the "Proponent will be required to undergo a streamlined provincial assessment process for the Project, informed by consultation with Indigenous communities and interested members of the public". I agree with the Applicants that these general comments and the Agency Memo are insufficient to conclude that the Minister grappled with this substantive argument.

[79] The Decision is further complicated by the Minister's statement that "[s]ince there has been no material changes to the Project, there is no basis to revisit the former Minister's determination" [emphasis added]. Such statement, which is inconsistent with the Internal Guide, creates confusion as to whether the Minister more broadly considered whether there was new information or a material change in circumstance, in its threshold for comparison.

[80] The Respondent asserts that the Decision is administrative in nature and accordingly comprehensive reasons are not required: *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422. However, the administrative nature of the decision does not overcome the requirements to demonstrate that the decision-maker grappled with the key issues raised (*Vavilov* at paras 127-128), or to provide a decision that demonstrates transparency, intelligibility and justification.

[81] Further, the context for the Decision must be taken into consideration within its statutory framework. In this case, the statutory objectives of encouraging public participation and transparency reinforce that some greater explanation was required as to why the Further Request was not considered to raise material changes or new information.

[82] While a reviewing court may "connect the dots on the page"; it can only do so "where the line, and the direction they are headed" are provided: *Vavilov* at para 97; *Alexion* at paras 16-17.

[83] The Decision when read alone, or in combination with the record, does not provide sufficient clarity. In my view, the Decision does not meet the threshold for transparency, intelligibility and justification and is unreasonable as a result.

IV. Conclusion

[84] For all of these reasons, I will allow this application for judicial review. As it is my view that the Minister did not fetter its discretion, I will decline to declare the Decision unlawful, but will issue a declaration rendering the Decision unreasonable.

[85] As I consider the matter to be of divided success and to relate to public interest litigation, there shall be no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to remove the Minister of the Environment and Climate Change as a named Respondent.

2. The application for judicial review is allowed in part, and the February 10, 2022 decision of the Minister of the Environment and Climate Change is declared unreasonable for the reasons stated herein.

3. There shall be no order as to costs.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-564-22
STYLE OF CAUSE:	FORBID ROADS OVER GREEN SPACES, RESCUE LAKE SIMCOE CHARITABLE FOUNDATION CARRYING ON BUSINESS AS RESCUE LAKE SIMCOE COALITION, FEDERATION OF ONTARIO NATURALISTS CARRYING ON BUSINESS AS ONTARIO NATURE, WESTERN CANADA WILDERNESS COMMITTEE, WILDLANDS LEAGUE, EARTHROOTS FUND, AND ENVIRONMENTAL DEFENCE CANADA INC. v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	NOVEMBER 2, 2022
JUDGMENT AND REASONS:	FURLANETTO J.
DATED:	APRIL 20, 2023

APPEARANCES:

Lindsay Beck Ian Miron	FOR THE APPLICANTS
Jacqueline Dais-Visca	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

EcoJustice Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS