Federal Court Cour fédérale

Date: 20250110

Docket: T-1065-23

Citation: 2025 FC 54

Ottawa, Ontario, January 10, 2025

PRESENT: Madam Justice Pallotta

BETWEEN:

GEORGIA STRAIT ALLIANCE
DAVID SUZUKI FOUNDATION,
RAINCOAST CONSERVATION
FOUNDATION AND WESTERN CANADA
WILDERNESS COMMITTEE

Applicants

and

MINISTER OF ENVIRONMENT AND
CLIMATE CHANGE, ATTORNEY
GENERAL OF CANADA, AND
VANCOUVER FRASER PORT
AUTHORITY

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of two decisions, made pursuant to the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*], following an

environmental assessment of Vancouver Fraser Port Authority's (VFPA) proposed project to build and operate a new marine shipping terminal at Roberts Bank, Delta, British Columbia (Project). One decision concluded that the Project's adverse environmental effects are justified in the circumstances, and the other decision established conditions for the Project to proceed. The applicants were granted leave under Rule 302 of the *Federal Courts Rules*, SOR/98-106 to challenge both decisions by way a single application for judicial review.

[2] The Project would be built near two existing marine shipping terminals at Roberts Bank, to provide: (i) a new three-berth marine container terminal; (ii) a widened causeway to accommodate additional road and rail infrastructure; and (iii) an extended tug basin. VFPA states the Project will meet the need for increased shipping container capacity, strengthen national supply chain resilience, and promote Canada's competitiveness and trade capacity.

[3] The issues in this application relate to the Project's effects on southern resident killer whales (whales), a genetically and geographically distinct population of fish-eating killer whales off the coast of British Columbia. Current conditions in the Salish Sea pose imminent threats to the whales' survival, including because of insufficient access to Chinook salmon prey and disturbance by vessels.

[4] The whales are listed as an endangered species under the *Species at Risk Act*, SC 2002, c 29 [*SARA*], which means they face imminent extirpation or extinction. Their critical habitat covers transboundary waters in southern British Columbia, including the southern Strait of Georgia, and is protected from destruction by an order under *SARA*: *Critical Habitat of the Killer*

Whale (Orcinus orca) Northeast Pacific Southern Resident Population Order, SOR/2018-278. The Project's location at Roberts Bank lies within the whales' critical habitat.

[5] As the applicants point out, the Court's review of the decisions turns on the interplay between *CEAA 2012* and *SARA*, and the obligations that *SARA* imposes in an environmental assessment of a project that will affect a *SARA*-listed species. The applicants argue that the challenged decisions are unreasonable because the decision makers failed to meet the obligations imposed on them under *SARA* and/or purported to justify Project effects that contravene *SARA*'s purposes and provisions. The respondents argue that *CEAA 2012* governed the Project's environmental assessment, and while *SARA* imposed additional obligations, it did so for only one of the decision makers and it imposed more limited obligations than the applicants suggest. The respondents argue that both decision makers complied with their respective statutory obligations, and their decisions were reasonable.

[6] For the reasons below, I must dismiss this application. I disagree with the applicants' interpretation of the *SARA* provisions they say constrained the *CEAA 2012* decision makers. I agree with the respondents that the obligations *SARA* imposed on the Project's environmental assessment related to one decision maker, and those obligations were more limited than the applicants suggest. The applicants have not established that either of the decisions at issue was unreasonable, as that term is understood in law, so as to warrant the Court's intervention.

II. **Background**

A. *The parties*

[7] The applicants are federally registered environmental conservation charities who participated in the Project's environmental assessment.

[8] The respondent VFPA is a port authority under the *Canada Marine Act*, SC 1998, c 10. It is responsible for managing the lands and navigable waters that make up the Port of Vancouver.

[9] The decisions in question were made by the Governor in Council and the Minister of Environment and Climate Change.

[10] The Governor in Council acts on the advice of the Prime Minister and Cabinet. For simplicity, these reasons refer to the Governor in Council as Cabinet.

[11] The Minister of Environment and Climate Change (Minister) at the time of the decisions was the Honourable Steven Guilbeault. However, other people fulfilled the Minister's role in the Project's environmental assessment during their appointments as Minister of Environment and Climate Change or as Minister of Environment (the previous title). While I will use the pronouns he/his, the term Minister to refers to the persons responsible for fulfilling this role.

[12] The respondent Attorney General of Canada made submissions in support of Cabinet's and the Minister's decisions. I will refer to the submissions as those of AGC.

B. *The Project's environmental assessment*

[13] The Project's environmental assessment followed a process mandated by *CEAA 2012*. Although *CEAA 2012* was repealed in 2019 and replaced by the *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*], the assessment was completed under *CEAA 2012* as if it had not been repealed: *IAA*, s 183.

[14] The following summary outlines the main stages of the Project's environmental assessment:

- *Screening*: VFPA submitted a description of the Project to the Canadian Environmental Assessment Agency (Agency) in November 2013. The Agency decided that the Project was required to undergo an environmental assessment as a "designated project" under *CEAA 2012* regulations.

- *Start of assessment*: The Agency and Minister commenced the Project's environmental assessment in November 2013. The Agency posted a public notice and engaged in a process to determine the scope of the assessment and set guidelines for VFPA's environmental impact statement. The Agency also determined that the Project would likely affect *SARA*-listed species or their critical habitat, and in accordance with *SARA*'s requirements, it notified the "competent ministers" for the species: *SARA*, s 79.

- *Referral to review panel*: The Minister referred the Project's environmental assessment to an independent review panel (Panel) and established the Panel's terms of reference.

- *Panel's assessment*: The Panel conducted its assessment between May 2016 and March 2020. The Panel held public hearings and, at the completion of the assessment, submitted a report of its conclusions and recommendations to the Minister. Among other things, the Panel's March 27, 2020 report concluded that the Project would cause significant adverse environmental effects on juvenile ocean-type Chinook salmon and on the whales, and that aspects of the Project would result in destruction of the whales' critical habitat protected under *SARA*, due to the Project's impact on salmon prey, underwater noise and disturbance, and the risk of vessel strikes.

- *Post-Panel information requests*: The Minister required additional information for the decision making process (the key decisions are outlined below) and issued an information request to VFPA: *CEAA 2012*, s 47(2). Among other things, the Minister asked for additional information about the Project's impacts, related mitigation measures, and VFPA's offsetting plans, including for salmon and the whales. VFPA's response and the Agency's draft conditions for the Project, which it was considering recommending to the Minister for inclusion in a decision statement, were posted for public comment in the fourth quarter of 2021. In the first half of

2022, comments were submitted by the applicants, government departments, and by VFPA in reply.

- *CEAA 2012 decisions*: The environmental assessment process under *CEAA 2012* required the Minister and Cabinet to make the following key decisions about the Project:

  - First, the Minister was required to decide if the Project would likely cause significant adverse environmental effects, taking into account the implementation of any mitigation measures he considered appropriate: *CEAA 2012*, ss 5, 52(1). After considering the Panel's report and the responses and comments to the information requests, the Minister decided that the Project is likely to cause significant adverse environmental effects within the meaning of subsections 5(1) and 5(2) of *CEAA 2012*. These included effects on Chinook salmon in the region and on the whales.

  - In light of the first decision, the Minister was required to refer the matter to Cabinet for a second decision—whether the Project's environmental effects are justified in the circumstances: *CEAA 2012*, s 52(4). Cabinet's subsection 52(4) decision, set out in its April 19, 2023 Order in Council 2023-0330 (Order in Council), was that the Project's significant adverse environmental effects are justified in the circumstances.

- Since Cabinet decided that the Project’s environmental effects are justified in the circumstances, as a third step *CEAA 2012* required the Minister to establish conditions for the Project and issue a decision statement to inform VFPA of the first and second decisions and the conditions: *CEAA 2012*, ss 53, 54. On April 20, 2023, the Minister issued a section 54 decision statement that communicated the first and second decisions, and established the section 53 conditions for the Project (Decision Statement).

[15] The applicants challenge the second and third decisions made under *CEAA 2012*, namely, Cabinet’s Order in Council and the Minister’s Decision Statement.

C. *The challenged decisions*

[16] The following summarizes the challenged decisions.

[17] The Order in Council provides background information about the Project and the environmental assessment. It notes the Minister’s decision that the Project is likely to cause significant adverse direct and cumulative environmental effects referred to in section 5 of *CEAA 2012* and states that, in accordance with subsection 52(2), the Minister referred the matter to Cabinet for a decision on whether those effects are justified in the circumstances.

[18] Among other things, the Order in Council states that Cabinet was made aware of the Project’s adverse effects on *SARA*-listed species and their critical habitat and that it had

considered the recommendations and conclusions in the Panel's report, the additional information provided by VFPA, and measures being taken by Canada with respect to *SARA*-listed species, including the whales. Cabinet was satisfied "that measures will be taken to avoid or lessen those adverse effects and to monitor them, and that those measures will be taken in a way that is consistent with any applicable recovery strategy and action plan and will be assessed and monitored as well as adaptively managed". The Order in Council also states that Cabinet considered the economic need for the Project, including its contribution to improving supply chain resilience and other local, regional, and national economic benefits, as well as the environmental effects of the Project, the interests of Indigenous Nations, other social, economic, and policy interests, and the broader public interest. Cabinet decided, under subsection 52(4) of *CEAA 2012*, that the significant adverse environmental effects the Project is likely to cause are justified in the circumstances.

[19] The Minister's Decision Statement describes the Project, the environmental assessment, consultations undertaken with Indigenous groups, the environmental effects of the Project, and Cabinet's decision. It sets out 21 categories of conditions with which VFPA must comply during all phases of the Project, including conditions relating to: consultation and annual reporting; air quality and greenhouse gas emissions; marine environment, fish habitat, and marine mammals; terrestrial vegetation, wetlands, and avifauna; use of lands, resources for traditional purposes, and cultural heritage; and monitoring, including Indigenous monitoring and independent environmental monitoring. The Decision Statement explains that nothing in it shall be construed as affecting VFPA's obligations to comply with all applicable legislative or legal requirements, and the conditions do not relieve VFPA from any such obligations.

III. **Overview of the Parties' Positions**

[20] As noted above, the applicants state this case turns on the interplay between *SARA*—central federal legislation enacted to meet international and domestic commitments to address species and biodiversity decline in Canada—and *CEAA 2012*. Even though *CEAA 2012* was repealed, the outcome of this case will remain instructive for environmental assessments under *IAA* because *SARA* interacts with *IAA* in the same way.

[21] The applicants argue that *SARA* protects species at risk in two ways: through positive obligations that require decision makers authorizing new activities to ensure that measures will be taken to minimize harm to the species and their critical habitat, and through negative obligations that prohibit the destruction of critical habitat and activities that would jeopardize the species' survival or potential to recover. Whenever a project that will affect *SARA*-listed species or their critical habitat undergoes a federal environmental assessment, *SARA* imposes requirements over and above those in *CEAA 2012*.

[22] The applicants contend that Cabinet's and the Minister's decisions, which were published in the Order in Council and Decision Statement, constituted a decision to approve the Project under *CEAA 2012*. They contend that *SARA* constrained Cabinet's and the Minister's decision making powers under *CEAA 2012* by imposing positive obligations to ensure that measures will be taken to minimize harm to the whales and their critical habitat, and negative obligations that prohibit the destruction of critical habitat and any activities that would jeopardize the whales' survival or potential to recover.

[23] Specifically, the applicants submit the Order in Council and Decision Statement are unreasonable because Cabinet and the Minister failed to meet *SARA*'s statutory prerequisites, set out in subsections 79(2) and 77(1), that required them to ensure that all feasible protective measures to minimize the Project's effects on the whales and their critical habitat were in place before approving the Project. In addition, the applicants submit the Order in Council was unreasonable because Cabinet purported to justify effects under *CEAA 2012* that would jeopardize the whales' survival and recovery and destroy their critical habitat, contrary to *SARA*'s purposes and provisions in sections 6, 58(1) and 73(3).

[24] AGC argues that the applicants have misinterpreted *CEAA 2012* and *SARA*, and these statutes do not interact in the way the applicants suggest. AGC states that *CEAA 2012* governed the Project's environmental assessment, including the decisions that Cabinet and the Minister were required to make. AGC argues that Cabinet's and the Minister's decisions did not approve, authorize, or permit any activity that would contravene *SARA*. *SARA*'s prohibitions and requirements remain in effect, and VFPA must obtain further authorization before it proceeds with any activity that may contravene *SARA*.

[25] AGC states the *SARA* provisions the applicants rely on did not impose obligations on Cabinet. Only the Minister's role under *CEAA 2012* triggered obligations under *SARA*, specifically under section 79 alone. Furthermore, AGC argues that the applicants misinterpret the *SARA* section 79 obligations; on a proper interpretation, the Minister met the obligations section 79 imposed on him. AGC submits this application for judicial review is flawed because the applicants are asking the Court to impose obligations on Cabinet and the Minister that

Parliament, and *SARA*’s statutory provisions, did not impose on them. They are asking the Court to apply *SARA* provisions to the wrong decision maker, and inviting the Court to predetermine the outcome of unissued authorizations and future permitting decisions that have not yet been made.

[26] VFPA adds that the Project’s effects on the whales were a central consideration throughout the environmental assessment, the results of which informed the Minister’s identification of adverse effects and Cabinet’s determination that the effects are justified in the circumstances. VFPA contends the applicants have failed to establish that the Order in Council and Decision Statement are unreasonable. Their arguments are divorced from the legislative framework and boil down to a disagreement about whether the Project should proceed rather than a legal failing of Cabinet or the Minister. According to VFPA, the effect of the applicants’ position is that no project that intersects with the whales’ critical habitat can proceed, and this is contrary to a contextual and purposive reading of *CEAA 2012* and *SARA*. The decision *CEAA 2012* required Cabinet to make was a political, polycentric decision that is entitled to deference, and the Minister’s Decision Statement includes extensive measures directed at protecting the whales with binding conditions that are designed to adapt to future circumstances.

[27] The applicants counter that the effects of *SARA*’s provisions on environmental assessment decisions under *CEAA 2012* should be interpreted robustly, not narrowly, given that *SARA* is remedial legislation enacted to protect at-risk species from extinction. They submit the Order in Council and Decision Statement are decisions of consequence that lift prohibitions under sections 6 and 7 of *CEAA 2012* and, despite the need for additional permits under *SARA*,

they do amount to an approval of the Project. As such, the decision makers were obliged to ensure *SARA* compliance at this initial and vital approval stage under *CEAA 2012*. The critical question of whether the Project as a whole will jeopardize the whales' survival and recovery and destroy their critical habitat should not be left to future permitting processes that will assess the discrete effects of specific Project-related activities after the Project has been approved as a whole.

[28] The applicants ask the Court to consider the applicable legal and factual constraints and decide whether the Minister and Cabinet met their obligations under *SARA*, and whether the interaction between the two statutes left room for Cabinet to reasonably deem the Project's significant adverse effects to be justified.

IV. **Issues and Standard of Review**

[29] The issues for this Court to decide are whether the Order in Council and/or the Decision Statement are unreasonable. The applicants advance two bases in support of their position that both decisions are unreasonable.

[30] First, the applicants submit that Cabinet and the Minister failed to meet their positive obligation to ensure that all feasible measures to protect the whales and their critical habitat were in place, as required by *SARA* subsection 79(2), and Cabinet additionally failed to ensure that all feasible protective measures for the whales' critical habitat would be taken, as required by *SARA* subsection 77(1), before issuing the Order in Council and Decision Statement.

[31] Second, the applicants submit Cabinet purported to justify effects under *CEAA 2012* that would jeopardize the whales' survival and recovery and destroy their critical habitat, contrary to *SARA*'s purposes and provisions as set out in sections 6, 58(1), and 73(3).

[32] The reasonableness standard of review applies to both issues. The Supreme Court of Canada set out the guiding principles for reasonableness review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness review is a deferential but robust form of review that considers whether a decision, including the reasoning process and the outcome, is transparent, intelligible, and justified: *Vavilov* at paras 13, 99.

[33] The applicants state that the Project's approval under *CEAA 2012* embodies two fundamental flaws identified in *Vavilov*: (i) the reasons for the decisions fail to grapple with or even address *SARA*'s requirements, and where they refer to *SARA*'s provisions they merely restate statutory language with peremptory conclusions; and (ii) the decisions are not justified in light of the relevant legal and factual constraints.

[34] The respondents state that the Order in Council and Decision Statement are separate decisions under *CEAA 2012*, and they must be considered separately on judicial review. While the reasonableness standard applies to both decisions, the respondents argue that Cabinet decisions that are based on polycentric considerations and a balancing of individual and public interests are afforded considerable deference: *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 224 at paras 18-19, 44 [*Raincoast*]; *Gitxaala Nation v Canada*,

2016 FCA 187 at paras 152-155 [*Gitxaala*]; *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2023 FCA 191 at paras 119-120 [*Mikisew*].

[35] While the applicants often refer to both decisions together and the respondents stress that they are distinct, the parties agree that the decisions are linked in the sense that Cabinet's subsection 52(4) decision triggered the Minister's obligation to issue the Decision Statement. Consequently, the parties agree that if the Order in Council is set aside as unreasonable, the Decision Statement necessarily falls because the step in the environmental assessment process that led to its issuance will have been removed. However, if the Decision Statement alone is set aside as unreasonable, the Order in Council will not be affected.

V. **Summary of Conclusions**

[36] The applicants' arguments that both decision makers failed to grapple with and/or address *SARA*'s requirements, and that the decisions lack justification in light of the legal constraints of *SARA* and related facts, are premised on their interpretation of the statutory provisions of *SARA* noted above: (i) subsections 79(2) and 77(1) for the decision makers' alleged failure to grapple with the requirements of those subsections and fulfill the obligations they imposed with respect to protective measures for the whales, and (ii) sections 6, 58(1), and 73(3) for Cabinet's failure, in rendering its justification decision, to exercise its discretion within the constraints *SARA* imposed.

[37] While I agree with the applicants that *SARA* imposed additional requirements in respect of the Project's environmental assessment, over those imposed by *CEAA 2012*, in my view the additional requirements derived solely from *SARA* section 79. *SARA* section 79 imposed

obligations on the Minister; any obligations imposed on Cabinet were, at most, indirect. Furthermore, the obligations imposed by *SARA* section 79 were more limited than the applicants suggest, and the applicants have not established that the Minister failed to meet the obligations *SARA* imposed on him.

[38] *SARA* section 79 imposes obligations on every person who is required by or under an Act of Parliament other than *SARA* to ensure that an assessment of a project's environmental effects is conducted. In this case:

- the Agency and Minister were responsible for ensuring the Project's environmental assessment was conducted; therefore, section 79 imposed obligations on them;

- specifically, subsections 79(1) and (2) imposed three obligations related to the Project's environmental assessment: (i) notify the competent minister(s) for the species at risk; (ii) identify the adverse effects on the species at risk and their critical habitat; and (iii) if the Project is carried out, ensure that measures are taken to avoid or lessen those effects and to monitor them; subsection 79(2) specifies that the measures must be taken in a way that is consistent with any applicable recovery strategy and action plans for the species;

- Cabinet was not responsible for ensuring the Project's environmental assessment was conducted; therefore, section 79 did not impose direct obligations on Cabinet;

- to the extent that Cabinet had any obligation arising from *SARA* section 79, at most the obligation was indirect, arising from a need to ensure the information placed before it was not so deficient as to prevent it from making the decision required by subsection 52(4) of *CEAA 2012*;

- in my view, the applicants' interpretation—that subsection 79(2) imposed obligations on Cabinet as well as the Minister, and that the obligations it imposed on both decision makers were to ensure that all feasible protective measures to minimize the Project's effects on the whales and their critical habitat were in place before issuing their respective decisions—is not supported by statutory language or jurisprudence.

[39] *SARA* section 77 imposes obligations on any person or body other than a competent minister who is authorized under an Act of Parliament other than *SARA* 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 a *SARA*-listed species' critical habitat. In this case:

- section 77 did not apply to the Minister because he is a competent minister under *SARA*;

- section 77 did not apply to Cabinet because *CEAA 2012* did not authorize Cabinet to issue or approve a licence, permit, or other authorization authorizing an activity that may result in the destruction of any part of a *SARA*-listed species' critical habitat:

  - *CEAA 2012* authorized Cabinet to decide whether or not the Project's likely significant adverse environmental effects are justified in the circumstances;

  - Cabinet's decision did not authorize any activity that may contravene *SARA*—*SARA*'s provisions continue to apply to the Project;

- in my view, the applicants' interpretation—that the Order in Council constituted the kind of authorization contemplated by section 77 because it lifted the prohibitions under sections 6 and 7 of *CEAA 2012*—is not supported by statutory language or jurisprudence.

[40] The second alleged failure relates to Cabinet's Order in Council specifically, and rests on sections 6, 58(1) and 73(3) of *SARA*. Section 6 sets out *SARA*'s purposes, which include preventing extinction and providing for the recovery of at-risk species. *SARA*'s purposes are furthered through its various provisions, including: (i) section 58, which prohibits the destruction of certain types of critical habitat; and (ii) authorization provisions, such as section 73 (among others), that allow federal decision makers to enter an agreement or issue a permit authorizing certain types of activities that will affect a listed species or their critical habitat, subject to specific preconditions. In this case:

- Cabinet did not purport to justify effects that are contrary to *SARA*'s purposes because the Order in Council did not displace any of *SARA*'s provisions—they remain in effect;

- the Order in Council did not lift the *SARA* section 58 prohibition and does not constitute an agreement or authorization under *SARA* section 73;

- if VFPA applies for authorization under *SARA* section 73, it will have to meet the requirements of that section before any authorization will issue; the Order in Council did not determine the outcome of a future application for section 73 authorization.

[41] The applicants have not established that one or both decisions are fundamentally flawed because the reasons fail to grapple with *SARA*'s requirements, or because the decisions are not justified in light of the relevant legal and factual constraints. The alleged flaws stem from a failure to grapple with statutory obligations that Parliament did not impose on Cabinet or the Minister in their roles under *CEAA 2012*. The decision makers adequately addressed the applicable *SARA* provisions and the Minister reasonably complied with his obligations under *SARA*.

[42] The applicants make compelling policy arguments; however, this Court is bound to apply the policies that Parliament has implemented in its laws: *Raincoast Conservation Foundation v Canada (Attorney General)*, 2019 FCA 259 at para 11. As the Federal Court of Appeal (FCA) has stated, judges must interpret and apply the law made by Parliament neutrally, logically, and dispassionately, without regard for their own policy preferences or those urged by the parties: *Ibid* at paras 11-12. In my view, even on a robust interpretation, the statutory provisions of *SARA* and *CEAA 2012* do not interact in the way the applicants suggest.

VI. **Analysis**

A. *Are the Order in Council and/or Decision Statement unreasonable based on failings related to Cabinet's and/or the Minister's obligations under subsection 79(2) and/or 77(1) of SARA?*

(1) The statutory provisions

[43] The text of *SARA* subsections 77(1), 79(1) and 79(2) is set out below. The text is reproduced from *SARA* as it appeared between August 8, 2019 and August 27, 2019, before *SARA* was amended to refer to *IAA* rather than *CEAA 2012*. The applicants' materials refer to this version of *SARA*.

Agreements and Permits	**Accords et permis**
[…]	[...]
Licences, permits, etc., under other Acts of Parliament	**Permis prévus par une autre loi fédérale**
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	a) que toutes les solutions de rechange susceptibles de minimiser les

impact on the species' critical habitat have been considered and the best solution has been adopted; and

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.

[...]

[…]

Project Review

Notification of Minister

79 (1) Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the *Canadian Environmental Assessment Act, 2012* in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.

Révision des projets

Notification du ministre

79 (1) Toute personne qui est tenue, sous le régime d'une loi fédérale, de veiller à ce qu'il soit procédé à l'évaluation des effets environnementaux d'un projet et toute autorité qui prend une décision au titre des alinéas 67a) ou b) de la Loi canadienne sur l'évaluation environnementale (2012) relativement à un projet notifient sans tarder le projet à tout ministre compétent s'il est susceptible de toucher une espèce sauvage inscrite ou son habitat essentiel.

Required Action	**Réalisations escomptées**
(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.	(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
[…]	[…]

(2) The parties' arguments

[44] As noted above, the applicants submit that *SARA* imposes additional requirements, over those imposed by *CEAA 2012*, when a project is likely to affect species at risk or their critical habitat. While *CEAA 2012* imposes a requirement to establish conditions the proponent must follow, including mitigation measures to eliminate, reduce, or control a project's adverse environmental effects and a follow-up program to monitor the effectiveness of the measures, the applicants contend *SARA* subsections 79(2) and 77(1) further require that <u>all</u> feasible measures to avoid, lessen, or minimize effects on species at risk and their critical habitat be ensured, before *CEAA 2012* approval. They state that the Order in Council together with the Decision Statement (and its conditions) constituted an approval or authorization of the Project under *CEAA 2012*, and subsections 79(2) and 77(1) of *SARA* required Cabinet and the Minister to first ensure that all feasible measures to avoid, lessen, or minimize effects on the whales were in place.

[45] The applicants submit that subsection 79(2) sets a high bar for protective measures. The person required to ensure that a project is assessed under *CEAA 2012* must identify the adverse effects on *SARA*-listed species and, if the project is carried out, must ensure that measures are taken to avoid or lessen and to monitor those effects in a way that is consistent with any applicable recovery strategy and action plan for the species. The applicants say that the FCA, at paragraph 456 of *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*], interpreted *SARA* subsection 79(2) to mean that the person or body conducting an environmental assessment must identify <u>all</u> feasible measures, and must not approve the project until those measures are <u>in place</u>.

[46] The applicants submit that *SARA* subsection 77(1) imposes similar requirements, but it is not specific to environmental assessments. Subsection 77(1) provides that a person or body authorized under a statute other than *SARA* to issue or approve an authorization for an activity that may destroy a *SARA*-listed species' critical habitat may do so only if they have considered the impact on the species' critical habitat and they are of the opinion that all feasible measures will be taken to minimize the impact. While *SARA* subsection 77(1) does not apply to "a competent minister", and therefore did not apply to the Minister in this case, the applicants contend it did apply to Cabinet.

[47] The applicants submit that subsections 79(2) and 77(1) of *SARA* and related jurisprudence constrained Cabinet's otherwise broad discretion to deem significant adverse effects that would harm a *SARA*-listed species "justified in the circumstances" under *CEAA 2012*. According to the applicants, the broad powers conferred by section 52(4) of *CEAA 2012* did not permit Cabinet to

override the specific prerequisites of *SARA* subsections 79(2) and 77(1), and the FCA has overturned an Order in Council when Cabinet disregarded subsection 79(2)'s prerequisites: *Tsleil-Waututh* at paras 456, 468-470.

[48] According to the applicants, the Order in Council and Decision Statement are unreasonable because *SARA* subsections 79(2) and 77(1) imposed specific, mandatory prerequisites that all feasible measures be identified and ensured before Cabinet and the Minister issued their respective decisions under *CEAA 2012*. The decisions lack justification, transparency, and intelligibility because even when they are read in light of the record, they do not make it possible to understand Cabinet's or the Minister's reasoning on the critical point of how they satisfied *SARA* subsections 79(2) and 77(1). Furthermore, the reasoning and the outcomes are not justified because they are untenable in light of the legal constraints of *SARA* and the factual constraints of the evidentiary record, which show that Cabinet and the Minister did not meet the requirements imposed by *SARA* subsections 79(2) and 77(1). Cabinet and the Minister lacked jurisdiction to issue their decisions under *CEAA 2012* without first meeting these requirements.

[49] The applicants contend Cabinet and the Minister failed to meaningfully grapple with their *SARA* obligations, even though this issue was raised as a central argument during the environmental assessment. The Order in Council discusses the whales in a single paragraph that reproduces the statutory language of subsection 79(2) with a peremptory conclusion. It does not explain how Cabinet interpreted subsections 79(2) and 77(1) of *SARA*, does not acknowledge or claim to meet Cabinet's obligations under these subsections to be satisfied that all feasible

measures will be taken, and refers to measures without explaining how the measures would meet *SARA*'s requirements. Similarly, the Decision Statement restates elements of subsection 79(2) and instructs VFPA to fulfill the Project conditions in a manner consistent with any applicable recovery strategy and action plan under *SARA*, without explaining how this is possible.

[50] The applicants contend that Cabinet and the Minister failed to ensure that all feasible protection measures were identified and in place before exercising their respective powers under *CEAA 2012*, as *SARA* required. The Project conditions omit measures that had been recommended or suggested during the environmental assessment—for example, requiring VFPA to install a breach to facilitate salmon migration at one of two locations even if both locations are feasible, and requiring a noise budget for shipping operations but not for terminal operations—and the decision makers relied on initiatives that cannot be considered protective measures because they are not ensured or in place, will not avoid or lessen effects on the whales or minimize impacts on critical habitat, and are inconsistent with the whales' recovery strategy.

[51] The respondents fundamentally disagree with the applicants' interpretation of *SARA*'s requirements.

[52] AGC submits that the only bridge between *SARA* and *CEAA 2012* relates to the Decision Statement, and the Minister's obligations under subsection 79(2) of *SARA*. In this regard, AGC submits the Minister complied with subsection 79(2) by imposing conditions on the Project that will avoid or lessen adverse effects on the whales, should the Project proceed. AGC states that the applicants' interpretation of subsection 79(2) is not based on the language of that section, but

rather, imports language from section 77—that all reasonable alternatives have been considered and all feasible measures will be taken. Even though the applicants concede that section 77 does not apply to the Minister, they improperly ask the Court to impose section 77 obligations on him through their interpretation of subsection 79(2).

[53] AGC argues that sections 77 and 79 of *SARA* have markedly different purposes. Section 79 relates to environmental assessments and it applied to the Decision Statement because the Minister was statutorily required to conduct the Project's environmental assessment. Section 77, which relates to any authorization of an activity that may result in critical habitat destruction, did not apply to the Order in Council or the Decision Statement because the decisions did not authorize such an activity—the decisions did not approve, authorize, or permit any activity that may contravene *SARA* or result in any destruction of critical habitat for listed species. AGC states that *SARA*'s prohibitions and permitting requirements remain in force, including the section 58 prohibition on the destruction of critical habitat and the permitting requirements of sections 73 and 77. If VFPA applies for a license, permit, or other authorization to engage in an activity that may destroy the whales' critical habitat, *SARA*'s permitting provisions will be triggered at that time.

[54] AGC emphasizes that *SARA* section 79 only imposed obligations on the Minister and Agency and did not impose obligations on Cabinet. The Minister and Agency were responsible for the Project's environmental assessment under *CEAA 2012*, and the Minister was given exclusive power to ensure that measures are taken to avoid or lessen the Project's adverse environmental effects. AGC notes that the Minister will retain a supervisory role to ensure that

CEAA 2012 is followed as the Project progresses and he has the power to amend the Project conditions if necessary.

[55] AGC submits there is no jurisprudence that supports an alternative interpretation of subsection 79(2). The applicants' reliance on *Tsleil-Waututh* is misplaced because *Tsleil-Waututh* does not stand for the proposition that *SARA* will always impose obligations on Cabinet in an environmental assessment. According to AGC, the FCA's findings in that case turned on Cabinet's role as the final decision maker under the *National Energy Board Act*, RSC 1985, c N-7 [*NEBA*] and corresponding *CEAA 2012* provisions that are specific to designated projects requiring *NEBA* approval. The legal and factual context of this case differs because Cabinet did not have the same role or powers in the Project's environmental assessment as it did in the assessment of a proposed expansion of the Trans Mountain pipeline (TMX) that was at issue in *Tsleil-Waututh*. Cabinet is not the Project's final decision maker and Cabinet's role in the Project's environmental assessment did not empower it to impose conditions or issue recommendations.

[56] In reply to AGC's statutory interpretation, the applicants contend AGC's argument that *SARA* section 79 only applied to the Minister's Decision Statement, not Cabinet's Order in Council, is faulty because it rests on the following erroneous premises: (i) the Minister and the Agency were the persons identified in *SARA* subsection 79(1) because they were responsible for ensuring that the Project's environmental assessment was conducted (the applicants say it was actually the Panel who was responsible); (ii) the Minister's responsibilities under *CEAA 2012* are aligned with the *SARA* subsection 79(2) actions of identifying adverse effects and ensuring

protective measures are taken (the applicants say this is irrelevant because section 79 is directed at ensuring protective measures are in place, and the decision maker does not have to be the person who identifies, imposes, or enforces the measures); and (iii) *Tsleil-Waututh* is distinguishable because in that case, the National Energy Board and Cabinet were the final decision makers for the TMX pipeline project (the applicants say that in *Tsleil-Waututh*, like this case, the environmental assessment decisions were not the final approvals and further permits were required).

[57] AGC maintains that the challenged decisions only allow the Project to proceed to the next stages and do not shortcut future federal and provincial authorizations that will be required—including under *SARA*. AGC states the applicants fundamentally misconstrue how federal and provincial governments will regulate the Project, including the role the Minister will continue to play as the Project proceeds, and they seek to impose statutory obligations from future regulatory phases on Cabinet's and the Minister's decisions under *CEAA 2012*.

[58] AGC submits both decision makers complied with their respective statutory obligations, and their decisions are reasonable.

[59] AGC submits that Cabinet reasonably exercised its discretion under *CEAA 2012* to decide, in accordance with its subsection 52(4) authority, that the Project's adverse effects are justified in the circumstances. The Order in Council does not undermine *SARA*'s purposes, Cabinet had no obligation to consider or address *SARA*'s provisions, and Cabinet was not required to delve into and make explicit findings about each element leading to its decision.

Despite not having a distinct obligation under *SARA*, AGC submits that Cabinet was aware of the Project's adverse effects on the whales and their critical habitat, and was reasonably assured that measures will be taken to avoid or lessen and to monitor those effects in a way that is consistent with the applicable recovery strategy and plan, to satisfy subsection 79(2) of *SARA*. AGC states the Order in Council and the record demonstrate that Cabinet properly considered information and recommendations about a variety of economic, social, Indigenous, environmental, cultural, and other factors to reach the decision it was required to make under subsection 52(4) of *CEAA 2012*.

[60] Similarly, AGC submits the Minister reached an outcome that was reasonably available to him, and he was not required to make an explicit, granular finding about each element leading to the Decision Statement. As noted above, AGC submits the Minister complied with *SARA* subsection 79(2) by ensuring the Project conditions will avoid or lessen adverse effects on the whales.

[61] VFPA submits that a review of the decisions and the record leaves no doubt that the requirements of subsection 79(2) of *SARA* were fulfilled. It states that the mandatory conditions in the Decision Statement include measures to mitigate the Project's effects on the whales and their critical habitat, with detailed monitoring and follow-up programs, and imposed a requirement that VFPA's actions in meeting the conditions must be consistent with the whales' recovery strategy and action plan under *SARA*. *SARA* section 79(2) does not say that <u>all</u> feasible measures must be <u>in place</u>, and VFPA disputes that *Tsleil-Waututh* interpreted section 79 to require this. To the contrary, VFPA states that section 79 of *SARA* is forward looking in that it

requires the Minister, if the Project is carried out, to ensure that measures are taken to avoid or lessen the effects on the whales and to monitor them.

[62] VFPA submits that *SARA* section 77, which does refer to "all feasible measures", did not apply to the Order in Council or the Decision Statement: (i) section 77 is confined to decision makers who are not a competent minister under *SARA*, and the Minister is a competent minister for the whales; (ii) in *Tsleil-Waututh* the FCA rejected an argument that *SARA* section 77 applied to Cabinet's justification decision for the TMX pipeline project that was at issue (at paragraphs 463-464); and (iii) *SARA* section 77 is triggered when a specific activity, not a project, might result in critical habitat destruction.

[63] In any event, even if *SARA* section 77 did apply, VFPA submits its requirements were fulfilled. The environmental assessment process comprehensively reviewed reasonable alternatives to the Project, and the Decision Statement set out feasible measures that will be taken to minimize impacts on the whales. VFPA notes that, as with *SARA* section 79, section 77 does not require that feasible measures be in place; the language in section 77 is that feasible measures will be taken. VFPA states that sound conservation practice is not a point in time exercise and conditions must be flexible and adapt to the Project as it continues.

[64] VFPA states that while the decisions approved the Project in the sense that they lifted the prohibitions imposed by sections 6 and 7 of *CEAA 2012*, thus allowing other statutory decision makers (such as the Minister of Fisheries) to decide whether to issue permits or authorizations for the Project, VFPA must still obtain such permits and authorizations to move forward with the

Project. This includes authorization under *SARA* section 73, which will only be issued if the Minister of Fisheries is satisfied that the whales' survival or recovery will not be jeopardized.

[65] VFPA notes that *CEAA 2012* triggers Cabinet's involvement for the very reason that a project is likely to cause adverse effects that cannot be mitigated. Cabinet is then called on to weigh the adverse effects with a constellation of other factors, and to decide whether the effects are justified. In this case, Cabinet was not legally or factually constrained to decide that the Project's effects were not justified, and VFPA contends the applicants essentially argue for an interpretation of *SARA* that makes project approval at the environmental assessment stage a near-impossibility when a *SARA*-listed species is affected.

[66] VFPA submits the decisions are reasonable. Cabinet reasonably exercised its discretion under *CEAA 2012* to find the Project's effects are justified in the circumstances, and the Minister reasonably exercised his discretion by issuing a Decision Statement with 370 binding conditions. VFPA argues that the applicants either misstate the record or do not accurately describe the Project conditions, and they have not identified any gaps in the Decision Statement that would provide a basis to conclude that *SARA*'s provisions will be violated. To the contrary, the Order in Council and Decision Statement are consistent with the precautionary principle and they advance *SARA*'s purposes and meet its requirements. The imposed mitigation measures are not unenforceable or vague; rather, they recognize the preliminary and predictive nature of environmental assessments and impose flexible measures that can adapt to the conditions existing at each stage of the Project.

[67] The applicants counter that the respondents advance inconsistent arguments. On the one hand, they point to the decade-long environmental assessment with vast public participation that led to 370 conditions, much of which related to the Project's effects on the whales, and urge the Court not to disturb the Order in Council based on this comprehensiveness. On the other hand, they downplay the importance of Cabinet's justification decision in view of the regulatory phase to come. The applicants say the respondents minimize the consequences of environmental assessment decisions and limit the responsibilities *SARA* imposes on the persons who make those decisions, interpret *SARA* section 79 as imposing less stringent obligations than *CEAA 2012*, and improperly assert that Cabinet's decision did not approve the Project, relying on the further permits required under *SARA* to argue that it would be premature and usurp the role of future regulatory decision makers to impose *SARA*'s legal constraints on Cabinet and the Minister. According to the applicants, the respondents fail to acknowledge that future regulatory processes will involve discrete, more limited inquiries and leave a legal vacuum for Project effects acting synergistically to jeopardize the whales' recovery and survival.

(3) Consideration of the arguments

[68] Subsections 79(2) and 77(1) of *SARA* provide important protections for species at risk. A central aspect of the first issue on judicial review is whether one or both of these statutory provisions applied to the Minister's and/or Cabinet's decisions, and if so, the specific obligations they imposed on each decision maker.

[69] I agree with the respondents that *CEAA 2012* governed the roles of Cabinet and the Minister in the Project's environmental assessment. *SARA* was only engaged to the extent that its provisions imposed obligations on Cabinet and the Minister in their roles under *CEAA 2012*.

[70] Each of *SARA* sections 77 and 79 impose different obligations, on different statutory actors. While I agree with the applicants that *SARA* imposed additional requirements in the Project's environmental assessment, over those of *CEAA 2012,* in my view the requirements derived solely from *SARA* section 79.

(a) *SARA section 79*

(i) *SARA* section 79 imposed obligations on the Agency and Minister, not Cabinet

[71] As a preliminary point, I note that *SARA* section 79 identifies two statutory actors: every person who is required to ensure that a project's environmental assessment is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of *CEAA 2012*. Only the first applies in this case. No party argued that Cabinet or the Minister was an authority under section 67 of *CEAA 2012*. For the purposes of this judicial review, the applicants state that the reference to section 67 of *CEAA 2012* can be set aside. I agree. It is unnecessary to analyze section 67 of *CEAA 2012* to decide the issues before the Court, and consequently, the *SARA* section 79 analysis focuses on the person(s) responsible for ensuring that the Project's environmental assessment was conducted.

[72] I agree with the respondents that the Agency and Minister were responsible for ensuring the Project's environmental assessment was conducted under *CEAA 2012*. The Agency was the

responsible authority under section 15 of *CEAA 2012* and it performed a number of duties and functions in the Project's environmental assessment. However, the Minister had overall responsibility for ensuring that the Project's environmental assessment was conducted. The Minister was responsible for the Agency, whose role was to assist him in exercising the powers and performing the duties and functions conferred on him by *CEAA 2012*: *CEAA 2012*, ss 103, 104. The Minister's responsibilities therefore encompassed his oversight of the Agency and the additional responsibilities *CEAA 2012* imposed on him. *CEAA 2012* prescribed a key role for the Minister, throughout the Project's environmental assessment. His role under *CEAA 2012* has not ended.

[73] *SARA* section 79 is the only statutory provision under the heading "Project Review" and the only *SARA* provision expressly directed at environmental assessments. It expressly imposed obligations on persons responsible for ensuring the Project's environmental assessment was conducted, and therefore it imposed obligations on the Agency and Minister.

[74] Also, I agree with the respondents that the Minister's (and the Agency's) roles and responsibilities under *CEAA 2012* were aligned with the actions *SARA* section 79 requires the person referred to in that section to take. Section 79 requires the person(s) to: (i) notify the competent minister or ministers in writing if a project is likely to affect a listed wildlife species or its critical habitat; (ii) identify the adverse effects of the project on the species and its critical habitat; and (iii) if the project is carried out, ensure that measures are taken to avoid or lessen those effects and to monitor them. Section 79(2) also specifies that the measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.

[75] In the Project's environmental assessment, the Agency notified the competent ministers. The Minister referred the environmental assessment to the Panel and set the Panel's mandate for conducting an assessment that would identify the Project's adverse effects, including adverse effects on *SARA*-listed species and their critical habitat. The Panel assessed those effects for the whales and other *SARA*-listed species. The Minister was given exclusive power under *CEAA 2012* to impose conditions related to the Project's environmental effects: *CEAA 2012*, s 53. The Minister issued the Decision Statement that included measures directed to avoiding or lessening the Project's effects on at-risk species. Finally, the Minister's role under *CEAA 2012* has not ended and he will retain a supervisory role to ensure *CEAA 2012* is followed as the Project progresses. The Minister has powers of enforcement and the power to amend Project conditions if necessary. The Minister's role and responsibilities in the Project's environmental assessment and his continued supervisory role align with the *SARA* section 79 requirements.

[76] In contrast to the Minister, Cabinet's role in the Project's environmental assessment, while important, was limited and specific. Cabinet's role was triggered when the Minister decided, pursuant to section 52(1) of *CEAA 2012*, that the Project is likely to cause significant adverse environmental effects referred to in subsections 5(1) and 5(2). At that point, section 52(2) required the Minister to refer the matter to Cabinet for a single purpose—Cabinet was required to decide whether those effects are justified in the circumstances. Once Cabinet's section 52(4) decision was made, its role was complete.

[77] Cabinet was not responsible for ensuring the Project's environmental assessment was conducted, and its role under *CEAA 2012* was not aligned with the actions required by *SARA*

section 79. Cabinet was not responsible for notifying the competent ministers for listed species or identifying the Project's adverse effects. Under *CEAA 2012*, the Minister, not Cabinet, was responsible for setting conditions for the Project and he will be responsible for ensuring they will be carried out.

[78] The applicants do not dispute that *SARA* section 79 directly implicates every person responsible for ensuring the Project's environmental assessment was conducted, but they say AGC is wrong that the Minister and Agency were such persons. According to the applicants, the Panel was responsible for the Project's environmental assessment under *CEAA 2012*. In support of this argument, they point out that section 21 of *CEAA 2012* states that section 22, which requires the responsible authority to ensure that an environmental assessment is conducted and a report is prepared, does not apply when the assessment is referred to a review panel. The applicants state that when a review panel is involved, it is the review panel's duty to conduct the assessment in accordance with its terms of reference: *CEAA 2012*, s 43. They contend that section 3.1 of the Panel's terms of reference for the Project confirm that the Panel was mandated to conduct the Project's environmental assessment.

[79] In addition, the applicants contend section 79 is directed at ensuring that measures are in place before a project is approved, and does not require the identified person(s) to have jurisdiction or power to impose project conditions and ensure that the conditions are carried out. They say it is wrong to conclude that section 79 applied to the Minister's Decision Statement, and not Cabinet's Order in Council, based on a premise that the actions required by *SARA* section 79 are aligned with the Minister's responsibilities and powers under *CEAA 2012*.

[80] In my view, the applicants' argument that the Panel was responsible for the Project's environmental assessment does little to advance their position that section 79 imposed obligations on Cabinet. In any event, while the Panel may have assumed some of the responsibilities that otherwise would have fallen to the Agency as the responsible authority, the Minister always retained overall responsibility for ensuring the Project's environmental assessment was conducted. Under *CEAA 2012*, the Minister decides whether to refer an environmental assessment to a review panel, and he is responsible for appointing the review panel's members and establishing its terms of reference: *CEAA 2012*, ss 38(1) and 42(1). The Minister determines the scope of the factors that a review panel will take into account: *CEAA 2012*, s 19(2)(b). The Minister also has powers to terminate a review panel's assessment: *CEAA 2012*, s 49. If the Minister terminates a review panel's assessment, the Agency must complete the assessment in accordance with the Minister's directives: *CEAA 2012*, s 50. In this case, the Panel's terms of reference for the Project confirm that it was the Minister's decision to refer the environmental assessment to the Panel. The Minister set the Panel's composition, the scope of its mandate, and the process that it would follow. The Panel had a duty to fulfill its mandate, but the Minister set the mandate, and the Minister's role under *CEAA 2012* continued after the Panel's role was complete. The Minister clearly retained ultimate responsibility for the Project's environmental assessment at all times.

[81] AGC contends that since *SARA* section 79 itself does not empower the person to impose conditions, this suggests it is directed to persons who are given such powers under another statute—in this case, the powers are given to the Minister under *CEAA 2012*. I agree with the applicants that the Minister's power to impose conditions under *CEAA 2012* is not necessarily

relevant to the interpretation of section 79. In *Tsleil-Waututh*, the FCA found the National Energy Board was the person with obligations under section 79 because it was the responsible authority for ensuring that the environmental assessment under *CEAA 2012* was conducted, even though the Board did not have the authority to impose conditions regarding the TMX project's impact on the whales: *Tsleil-Waututh* at paras 452, 455.

[82] Nonetheless, in my view, AGC is correct that *SARA* section 79 expressly and implicitly imposes responsibilities on the person responsible for ensuring that an environmental assessment of a project takes place under *CEAA 2012*. The fact that *SARA* section 79 requires the person to take actions that are aligned with the Minister's responsibilities supports this interpretation. The actions required by *SARA* section 79 are not aligned with Cabinet's responsibilities under *CEAA 2012* and those actions were taken (and will be taken) outside the limited period when Cabinet was involved in the Project's environmental assessment. Indeed, *SARA* section 79 would have applied even if the Minister had reached the opposite decision under subsection 52(1) of *CEAA 2012* and the matter was never referred to Cabinet. The requirements of section 79 make sense if they are directed to the Minister as the person who was responsible for ensuring that the Project's environmental assessment took place. They do not make sense as requirements Cabinet had to fulfill.

[83] I am not persuaded by the applicants' argument that section 79 imposed mandatory prerequisites about protective measures that applied to the decisions Cabinet and the Minister were required to make under subsections 52(4) and 54(1) of *CEAA 2012*. The language of section 79 does not say so expressly, in contrast to other *SARA* provisions that do impose

mandatory prerequisites. For example, sections 73 and 77 require the person or body to be satisfied of certain preconditions related to protective measures before entering agreements or issuing permits that authorize an activity affecting a listed species or their critical habitat. Section 79 does not employ similar language and does not speak in terms of preconditions or prerequisites that must be satisfied before the person makes a decision or takes other administrative action. Instead, it describes actions the person or body must take—notifying the competent minister, identifying adverse effects, and ensuring that measures are taken to avoid or lessen the effects and to monitor them. In my view, if Parliament had intended *SARA* section 79 to impose statutory prerequisites to the exercise of Cabinet's power to decide whether the Project's adverse effects are justified and the Minister's power to establish Project conditions, it would have stated this expressly or used language similar to section 73.

[84] In summary, I conclude that the Minister and Agency were responsible for ensuring that the Project's environmental assessment was conducted, their roles under *CEAA 2012* were directly implicated by the language of *SARA* section 79, and section 79 imposed direct obligations on them. I will return to this point below, in the analysis of whether the Minister reasonably met his *SARA* section 79 obligations. Cabinet was not responsible for ensuring that the Project's environmental assessment was conducted, its role under *CEAA 2012* was not implicated by the language of *SARA* section 79, and the provision did not impose direct obligations on Cabinet.

(ii) *Tsleil-Waututh* is not inconsistent with this interpretation

[85] Notwithstanding who was responsible for ensuring that the Project's environmental assessment was conducted, the applicants contend that section 79 necessarily imposes corresponding obligations on the decision makers whose environmental assessment decisions are reviewable by this Court—namely, the Minister and Cabinet. Relying on *Tsleil-Waututh*, the applicants state that such decision makers cannot reasonably approve a project that will affect a *SARA*-listed species unless they are satisfied that section 79 measures to avoid or lessen and to monitor the effects on the *SARA*-listed species are in place. The applicants point out that in *Tsleil-Waututh*, the National Energy Board was the authority responsible for ensuring that an environmental assessment was conducted for the TMX project at issue. However, the National Energy Board's report was not subject to judicial review—only Cabinet's decision under *CEAA 2012* was: *Tsleil-Waututh* at paras 4, 202. In considering whether Cabinet's decision should be set aside, the applicants contend the FCA imposed section 79(2) obligations on Cabinet when it held that Cabinet needed to see that, if approved, the TMX project was not approved until all technically and economically feasible mitigation measures within the authority of the federal government were in place (*Tsleil-Waututh* at paragraph 456):

> [456] Because marine shipping was beyond the [National Energy] 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 exposition of all technically and economically feasible measures that are available to avoid or lessen the [TMX] 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.

[86] As noted above, the applicants state that for the Project's environmental assessment, the Panel was the person directly implicated by *SARA* section 79. Even so, they say *Tsleil-Waututh* makes it clear that the Minister and Cabinet also had obligations to ensure compliance with subsection 79(2).

[87] The applicants submit that the failure in *Tsleil-Waututh* was a collective failure of two bodies: the National Energy Board refused to accept that it had responsibilities under section 79 and failed to recommend measures for the whales, and Cabinet proceeded on the assumption that section 79 did not apply and approved the TMX project without ensuring measures were in place. They submit there was a similar collective failure on the part of the Minister and Cabinet in this case: the Minister failed to identify all feasible measures to protect the whales, and despite this failure, Cabinet made the justification decision anyway, and the Minister issued the Decision Statement anyway. In the same way as the National Energy Board and Cabinet in *Tsleil-Waututh*, the applicants contend the Minister and Cabinet in this case had to be satisfied that protective measures for the whales were in place and would be taken before issuing their decisions that approved the Project.

[88] I disagree with the applicants' interpretation of the FCA's findings at paragraph 456 of *Tsleil-Waututh*. When those findings are read in context, they do not support the applicants' arguments that the FCA imposed section 79(2) obligations on Cabinet. In my view, the

circumstances of *Tsleil-Waututh* are distinguishable from the present case. In the Project's environmental assessment, the Minister and Cabinet did not commit the errors that the National Energy Board and Cabinet committed in the context of the TMX project's assessment.

[89] It is important to recognize that the Minister's and Cabinet's statutory obligations in the Project's environmental assessment, dictated by *CEAA 2012*, differed from the National Energy Board's and Cabinet's statutory obligations in the TMX project assessment. The TMX project was subject to a "hybrid" assessment under *CEAA 2012* and *NEBA*, and the environmental aspect of that assessment was governed by specific *CEAA 2012* provisions for projects that require *NEBA* approval. The National Energy Board was responsible for conducting the environmental assessment under *CEAA 2012* and it was required to provide a report to Cabinet with recommendations. Paragraph 31(1)(a) of *CEAA 2012* then tasked Cabinet with deciding, based on the Board's recommendations, whether the TMX pipeline expansion project was likely to cause significant adverse environmental effects, taking into account the implementation of any mitigation measures specified in the Board's report, and if so, whether those effects could be justified in the circumstances.

[90] The National Energy Board recommended that Cabinet approve the TMX project based in part on its finding that the TMX pipeline expansion would <u>not</u> likely cause significant adverse environmental effects. Cabinet accepted the Board's recommendation, deciding that the TMX project would not likely cause significant adverse environmental effects.

[91] The National Energy Board's critical error related to its obligations under *CEAA 2012* and *SARA* section 79. The National Energy Board had concluded that *SARA* section 79 did not apply to its consideration of the effects of project-related marine shipping on the whales because it had defined the TMX project to exclude marine shipping. Therefore, while marine shipping would cause significant adverse effects on southern resident killer whales, the Board found that the TMX project (as the Board had defined it) was not likely to cause significant adverse environmental effects. The FCA held that the National Energy Board had unjustifiably restricted the definition of the TMX project; consequently, its failure to apply *SARA* section 79 was similarly unjustified: *Tsleil-Waututh* at para 449. The FCA pointed out that, had the Board defined the TMX project to include project-related marine shipping, section 19 of *CEAA 2012* would have required it to consider and make findings on technically and economically feasible mitigation measures that would mitigate any significant adverse effects of marine shipping on the whales: *Tsleil-Waututh* at para 411. Instead, the Board limited its assessment of mitigation measures to those that fell within its regulatory authority. The Board concluded that there were no mitigation measures the proponent Trans Mountain could apply, and while the Board recognized that there were potential mitigation measures for project-related marine shipping, it merely encouraged other regulatory authorities to "explore any such initiatives". The measures had not been properly considered by the Board itself, or incorporated as conditions for the TMX project, on the basis that they were beyond the Board's authority: *Tsleil-Waututh* at para 439.

[92] The FCA went on to consider whether, despite the National Energy Board's own finding that *SARA* section 79 did not apply to its assessment of the TMX project's environmental effects, the Board "substantially complied" with its obligations under *SARA* section 79 by meeting the

requirements "where possible", in view of the limits of its authority. The FCA found the Board did not. The Board had assessed the effects of marine shipping in the absence of mitigation measures and did not recommend any specific mitigation measures. The FCA found the Board had failed to consider the consequences of its inability to ensure that measures were taken to ameliorate the TMX project's effects on the whales, and gave no consideration to the fact that it recommended that Cabinet should approve the project without any measures being imposed to avoid or lessen the project's significant adverse effects on the whales: *Tsleil-Waututh* at para 455.

[93] The National Energy Board's critical error resulted in successive deficiencies in the TMX project assessment: the Board's report was not the kind of report that would arm Cabinet with the information and assessments Cabinet required to make its decisions about the environmental effects of the project and whether those effects could be justified; the report did not qualify as a "report" within the meaning of the legislation and it was unreasonable for Cabinet to rely on it; the flaws were so critical that Cabinet could not functionally make the kind of assessment that the legislation required: *Tsleil-Waututh* at paras 465-473.

[94] The FCA noted that Cabinet was required to consider any deficiency in the report submitted to it, and that section 53 of *NEBA* gave Cabinet the power to refer the National Energy Board's recommendation or any of the terms and conditions in its report back to the Board for reconsideration: *Tsleil-Waututh* at paras 64, 201. Cabinet understood the National Energy Board's approach and resulting conclusions, and it had erred by relying on the Board's report as

a proper condition precedent to its decision: *Tsleil-Waututh* at paras 441, 465-473. The FCA remitted the matter for Cabinet's reconsideration.

[95] After Cabinet approved the TMX expansion project for the second time, a number of applicants sought leave to challenge the decision: *Raincoast* at para 1. The FCA denied leave to challenge the environmental assessment aspects of the decision, and stated (*Raincoast*, at paragraphs 41-44, exactly as written):

> [41] Recall what this Court decided in *Tsleil-Waututh Nation* (at paragraph 201): this Court found a "[material] deficien[cy]" in the National Energy Board's work such that its report to the Governor in Council was not an admissible "report" under section 54. This meant that the Governor in Council lacked a necessary legal prerequisite to decide under section 54. The "[material] deficien[cy]" in that case was major and glaring: the National Energy Board failed to examine the issue of project-related marine shipping as part of the project.
>
> [42] Since this Court's decision in *Tsleil-Waututh Nation*, the National Energy Board addressed this material deficiency by providing a comprehensive, detail-laden, 678-page report to the Governor in Council that considered the issue of project-related marine shipping and related issues and suggested measures for mitigating effects. The Governor in Council considered the new report, as is evident from the Order in Council it issued.
>
> [43] Many of the applicants submit that the new report is so flawed that the Governor in Council still lacks the necessary legal prerequisite of a "report" under section 54. This submission cannot possibly succeed based on the degree of examination and study of the issue of project-related marine shipping and related environmental issues in the new report.
>
> [44] Under section 54, the Governor in Council had to consider whether the project should be approved and, if necessary, on what conditions. Based on the evidence the applicants have filed and the applicable law, it is impossible for the applicants to overcome the considerable deference the Court must afford to the Governor in Council as it considers the new report, in all its detail and technicality, and as it makes this sort of public interest decision: see paragraphs 16(b) and 18–19, above. Its decision involved a

> weighing and balancing of the project's benefits against its detriments, drawing upon broad considerations of economics, science, the environment, the public interest, and other considerations of a policy nature, all of which lie outside of the ken of this Court: *Gitxaala Nation*, at paragraph 148, citing *Canada v. Kabul Farms Inc.*, 2016 FCA 143, 13 Admin. L.R. (6th) 11, at paragraph 25. The law forces this Court to afford significant deference—according to the cases, the "widest margin of appreciation" [*Gitxaala Nation*, at paragraph 155]—to the Governor in Council and the outcome it has reached based on this weighing and balancing. The applicants' case for substantive unreasonableness on environmental issues and the issues arising under environmental legislation is no stronger than that which this Court dismissed in *Gitxaala Nation* and *Tsleil-Waututh Nation*.

[96] In the environmental assessment of the Project at issue in this case, Cabinet played a different role than it did in the TMX project assessment—including because it was not tasked with deciding if the Project is likely to cause significant adverse environmental effects, taking mitigation measures into account. Also, the National Energy Board's and Cabinet's errors in *Tsleil-Waututh* were significant errors of a different nature than the errors Cabinet and the Minister are alleged to have made in the Project's environmental assessment under *CEAA 2012*. The National Energy Board had so failed in its obligations to scope and assess the TMX project that its report to Cabinet did not qualify as a "report" under *NEBA* and *CEAA 2012*. The Board's flawed conclusions about the TMX project's environmental effects were so critical that Cabinet could not functionally make the kind of assessment about the TMX project's environmental effects and the public interest that Cabinet was required to make.

[97] In the previous section, I explained why, reading *SARA* section 79 coherently with *CEAA 2012*, Cabinet's role in the Project's environmental assessment did not trigger obligations to comply with *SARA* section 79. In my view, the FCA's reasons in *Tsleil-Waututh* do not mandate

a different interpretation. As I read the reasons in *Tsleil-Waututh*, the FCA did not say that *SARA* section 79 constrains Cabinet's discretion to make a justification decision under section 52(4) of *CEAA 2012*, or imposes mandatory prerequisites on Cabinet's power to make that decision.

[98] Paragraph 456, which the applicants rely on, is in the section of *Tsleil-Waututh* that addresses whether the National Energy Board had substantially complied with its obligations under *SARA* section 79 despite the Board's own finding that section 79 did not apply. The FCA was not addressing whether Cabinet met its obligations under *SARA* in this section. The question of Cabinet's obligations under *SARA* was addressed in a different section of the reasons (paragraphs 459 to 464), and that section was limited to whether *SARA* subsection 77(1) imposed obligations on Cabinet (the FCA concluded that it did not). Therefore, while the placement of the words "substantially comply" in paragraph 456 may seem to suggest that the FCA was referring to Cabinet, when the words are read in the context of the section in which they appear and the decision as a whole, in my view the FCA was referring to what the Board needed to do to comply with its obligations under *SARA* section 79.

[99] The error Cabinet made in *Tsleil-Waututh* was to rely on the National Energy Board's seriously flawed report. The Board's report did not include an exposition of all technically and economically feasible mitigation measures as required by *CEAA 2012* and, contrary to the Board's obligations under *SARA* section 79, the report did not address mitigation measures for the whales. Consequently, Cabinet was not armed with the information it needed to decide whether the TMX pipeline expansion project was likely to cause significant adverse

environmental effects, taking into account the implementation of any mitigation measures specified in the Board's report.

[100] If I have misunderstood paragraph 456 of *Tsleil-Waututh*, and the FCA was saying that *SARA* section 79 imposed an obligation on Cabinet to comply with that section before making its decision under *CEAA 2012*, in my view the obligation was an indirect one that related to whether Cabinet had the necessary information to make the decision *CEAA 2012* required of it.

[101] In this case, the applicants do not raise a similar error regarding the information that was before Cabinet. They do not argue that the Panel failed to prepare a report with an exposition of all technically and economically feasible measures available to avoid or lessen the Project's effects on the whales, or that the Minister erred in deciding that the Project would have significant adverse effects, or that Cabinet was functionally unable decide whether or not the Project's significant adverse effects are justified because it did not have a proper "report" or because the information before it was otherwise so deficient as to prevent it from making the section 52(4) justification decision required under *CEAA 2012*.

[102] As I have noted above, Cabinet played an expanded role in the TMX project assessment that went beyond a justification decision, and this is a point of distinction. In the TMX assessment, Cabinet was also tasked with deciding whether the TMX project would likely cause significant adverse environmental effects taking mitigation measures into account. Cabinet knew how the Board had approached the issue of project-related marine shipping on *SARA*-listed species without addressing mitigation measures, and it had statutory powers to ask the Board to

reconsider aspects of the report. If Cabinet in this case had a similar obligation to ensure it had the information necessary to make a justification decision under *CEAA 2012*, I find the applicants have not established that Cabinet failed to meet this obligation. The applicants have not established that the information before Cabinet was so materially deficient that Cabinet was unable to make the justification decision required under section 52(4) of *CEAA 2012*.

[103] Unlike the National Energy Board in *Tsleil-Waututh*, the Minister in this case acknowledged his *SARA* section 79 obligations in the Project's environmental assessment. The Project's effects on the whales were assessed and mitigation measures aimed at mitigating the Project's effects on the whales were addressed. The Minister, not Cabinet, was tasked with deciding whether the Project would have significant adverse environmental effects: based on the Panel's report and the information provided in the post-Panel phase, he concluded that the Project would have such effects, including on the whales.

[104] Cabinet had this information before it, and considered it in making the justification decision under section 52(4). The Order in Council states that Cabinet was made aware of the Project's adverse effects on *SARA*-listed species and their critical habitat and that it had considered the recommendations and conclusions in the Panel's report, the additional information provided by VFPA, and measures being taken by Canada with respect to *SARA*-listed species, including the whales. Cabinet expressly acknowledged *SARA* section 79, and the Order in Council states Cabinet was satisfied "that measures will be taken to avoid or lessen those adverse effects and to monitor them, and that those measures will be taken in a way

that is consistent with any applicable recovery strategy and action plan and will be assessed and monitored as well as adaptively managed".

[105] The applicants interpret paragraph 456 of *Tsleil-Waututh* to mean that, in order to meet the requirements of *SARA* section 79, all technically and economically feasible mitigation measures within the authority of the federal government had to be incorporated as concrete conditions of the Decision Statement. In this way, they say *SARA* section 79 constrained the Minister's and Cabinet's discretionary decisions under section 52 of *CEAA 2012* and modified the Minister's obligations under sections 53 and 54, by imposing prerequisites for protective measures. The applicants allege that the challenged decisions fell short of this requirement, including because the Project conditions do not include the full extent of measures that were identified or suggested by the Panel or by representatives of Fisheries and Oceans Canada, and because certain of the conditions are insufficiently enforceable, are not fully defined or are dependent on the results of future investigation, will not work to avoid or lessen effects on the whales, or are inconsistent with the whales' recovery strategy under *SARA*.

[106] In my view, the FCA in *Tsleil-Waututh* did not interpret *SARA* section 79 to impose this type of constraint on Cabinet's or the Minister's discretion under *CEAA 2012*. Again, the National Energy Board's failure to comply with section 79 stemmed from a major and glaring error: the Board recommended approval of the TMX project without any measures being imposed to avoid or lessen the TMX project's effects on the whales, and it instead encouraged other regulatory authorities to "explore any such initiatives". In other words, the Board had no plan whatsoever for mitigation measures to avoid or lessen the TMX project's effects on the

whales. The “legal prerequisite” that Cabinet was lacking was an admissible report from the Board: *Raincoast* at para 41.

[107] Cabinet and the Minister had to act reasonably in carrying out their *CEAA 2012* obligations to decide whether the Project’s adverse effects are justified and establish Project conditions to address the Project’s effects on *SARA*-listed species. However, I do not read *Tsleil-Waututh* to interpret *SARA* section 79 as imposing statutory prerequisites to the exercise of these powers under *CEAA 2012*, or as defining threshold criteria, such as a level of effectiveness, enforceability, or certainty, necessary to qualify as “measures” under *SARA*.

[108] In summary, I find:

- paragraph 456 of *Tsleil-Waututh* must be read in context, as part of the FCA’s reasons for rejecting arguments that the National Energy Board, as the person responsible for ensuring the TMX project was assessed under *CEAA 2012*, had substantially complied with its *SARA* section 79 obligations despite the Board’s own finding that section 79 did not apply to its assessment of the TMX project’s environmental effects; Cabinet was not responsible for ensuring that the TMX project was assessed, and I do not read paragraph 456 as holding that Cabinet was required to comply with *SARA* section 79;

- in *Tsleil-Waututh*, the National Energy Board had failed to comply with its obligations under *CEAA 2012* and *SARA* section 79 to prepare a report with an exposition of all technically and economically feasible measures

available to avoid or lessen the TMX project's effects on the whales; in this case, the applicants do not argue that the Panel failed to prepare a report with an exposition of all technically and economically feasible measures available to avoid or lessen the Project's effects on the whales;

- in *Tsleil-Waututh*, the National Energy Board had so failed in its obligations that its report to Cabinet did not qualify as a "report" under *CEAA 2012*—the Board's flawed conclusions about the TMX project's environmental effects were so critical that Cabinet could not functionally make the kind of assessment about the TMX project's environmental effects and the public interest that *CEAA 2012* required it to make; in this case, the applicants do not argue that Cabinet was functionally unable to decide whether or not the Project's significant adverse effects are justified because it did not have a proper "report" or because the information before it was otherwise so deficient as to prevent it from making a section 52(4) justification decision under *CEAA 2012*;

- the applicants interpret paragraph 456 to mean that, in order to meet the requirements of *SARA* section 79, all technically and economically feasible mitigation measures within the authority of the federal government had to be incorporated as concrete conditions of the Decision Statement; they allege that the challenged decisions fell short of this requirement because the Project conditions do not include the full extent of identified or suggested measures, and because certain conditions are

insufficiently enforceable, are not fully defined or are dependent on future investigation, will not work to avoid or lessen effects on the whales, or are inconsistent with the whales' recovery strategy; in my view, the FCA did not interpret section 79 to constrain the Minister's and Cabinet's discretion in this way.

(b) *SARA section 77*

(i) *SARA* section 77 did not impose obligations on Cabinet

[109] *SARA* section 77 did not impose obligations on the decision makers in the Project's environmental assessment.

[110] As the applicants acknowledge, section 77 did not apply to the Minister because it applies to persons or bodies other than a competent minister, and the Minister falls within the exclusion.

[111] In my view, section 77 also did not apply to Cabinet.

[112] This is not because, as VFPA argues, *SARA* section 77 is only triggered when a specific activity, not a project, might result in critical habitat destruction. VFPA did not point to any authority supporting its argument and I note that *CEAA 2012* defines a designated project as one or more physical activities that are carried out on federal lands, including any incidental physical activities: *CEAA 2012*, s 2.

[113] Rather, *SARA* section 77 did not impose obligations on Cabinet because Cabinet was not a person or body authorized under a federal statute other than *SARA* 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" within the meaning of subsection 77(1). This was not the role *CEAA 2012* prescribed for Cabinet.

[114] Under *CEAA 2012*, Cabinet was tasked with making a decision. Specifically, when the Minister referred the matter to Cabinet, *CEAA 2012* permitted Cabinet to decide (a) that the significant adverse environmental effects that the Project is likely to cause are justified in the circumstances; or (b) that the significant adverse environmental effects that the Project is likely to cause are not justified in the circumstances. Cabinet was not empowered to authorize, and its decision did not have the effect of authorizing, any activity that may contravene *SARA*. *SARA*'s provisions continue to apply to the Project. If VFPA applies for a license, permit, or other authorization to engage in an activity that may destroy the whales' critical habitat, *SARA*'s permitting provisions will be triggered at that time.

[115] As noted above, the applicants contend that the Order in Council and Decision Statement are decisions of consequence that lifted the prohibitions under sections 6 and 7 of *CEAA 2012* and, despite the need for additional permits under *SARA*, they do amount to an approval of the Project.

[116] I do not agree that Cabinet's Order in Council lifted either of the *CEAA 2012* prohibitions. The consequence of Cabinet's decision under *CEAA 2012* was to trigger the

Minister's obligations to establish conditions under section 53 and issue the Decision Statement under section 54.

[117] The Decision Statement did not lift the section 6 prohibition—that prohibition remains in effect and continues to bind VFPA. However, the Decision Statement did lift the section 7 prohibition that operated to prevent a federal authority (VFPA and other federal authorities, such as the Minister of Fisheries) from exercising any power or performing any duty or function conferred by a federal statute other than *CEAA 2012* that could permit the carrying out of the Project, in whole or in part. Now that the section 7 prohibition under *CEAA 2012* has been lifted, VFPA may apply for authorization under *SARA* and the Minister of Fisheries may consider VFPA's application.

[118] While the Decision Statement can be considered an approval under *CEAA 2012*, such an approval did not amount to a licence, permit or other authorization of an activity that may affect the whales' critical habitat, as described in *SARA* section 77. One reason for this, as explained, is that *CEAA 2012* authorized the Minister to issue the Decision Statement and he is a competent minister. Another reason is that a *SARA* section 77 authorization cannot authorize an activity that may affect the whales' critical habitat, because a section 77 authorization does not lift the section58 prohibition that applies when the critical habitat in question is for an aquatic species or is on federal land (including the territorial sea): *SARA*, ss 58(1), 77(2). Therefore, if the Project proceeds, VFPA requires a *SARA* section 73 authorization by a competent minister (or a section 74 authorization having equivalent effect), and VFPA will only be relieved of the section 58 prohibition if it obtains such authorization: *SARA*, s 83(1)(b). While VFPA is now free

to apply for section 73 authorization and the Minister of Fisheries can consider the application, the decisions under *CEAA 2012* did not override or replace any part of that future process. To the contrary, the Decision Statement acknowledges that a *SARA* section 73 authorization may issue in the future and states that it does not affect what may be required of VFPA to comply with all applicable legislative or legal requirements.

[119] This interpretation is also consistent with the position set out in the Government of Canada's publication, "*Addressing Species at Risk Act Considerations Under the Canadian Environmental Assessment Act for Species Under the Responsibility of the Minister responsible for Environment Canada and Parks Canada*". The publication states (at page 52):

> A decision under CEAA that permits a responsible authority to provide federal support for a project does not constitute an authorization to violate the SARA prohibitions which stand on their own and must still be respected. The environmental assessment can mention a proposed approach, but this cannot be substituted for an authorization by the competent minister under SARA.
>
> In addition, the potential significance of an adverse environmental effect under CEAA is not necessarily an indication of whether an activity is prohibited under SARA, nor of whether the activity would meet the pre-conditions for a SARA permit.

(ii) *Tsleil-Waututh* is consistent with this interpretation

[120] Even though *Tsleil-Waututh* involved a different kind of assessment, in my view the FCA's findings in that case are consistent with the interpretation above. The FCA held that Cabinet's decision directing the National Energy Board to issue a certificate of compliance to the proponent did not amount to an authorization under *SARA* subsection 77(1), and Cabinet was not obliged to comply with the requirements of subsection 77(1). The FCA noted that Parliament would not have intended to exempt the National Energy Board from the application of *SARA*

subsection 77(1) while at the same time contemplating that Cabinet was not exempted, particularly given the Board's superior ability to assess impacts on habitat and mitigation measures: *Tsleil-Waututh* at paras 463-464.

[121] The FCA made the point more definitively in *Raincoast* (at paragraph 39):

> [39] …Some applicants submit that the Governor in Council had no jurisdiction to make a decision without ensuring the requirements of the *Species at Risk Act*, S.C. 2002, c. 29 were met. This point is not fairly arguable because this Court specifically rejected it in *Tsleil-Waututh Nation*, at paragraph 464.

[122] In my view, similar reasoning applies here. Parliament would not have intended to exempt the Minister from the application of *SARA* subsection 77(1) while at the same time contemplating that Cabinet was not exempted. In fact, the reasoning has more force in this case, because Cabinet played a more limited role in the Project's environmental assessment than it did in the TMX project assessment.

(c) *Whether the Order in Council and Decision Statement are unreasonable in light of SARA section 77 and 79 requirements and the factual constraints*

[123] The applicants have not established that the Order in Council or Decision Statement are unreasonable in light of the legal constraints of *SARA* sections 77 and 79, and the factual constraints of the record.

[124] To repeat, the applicants' arguments turn on the interplay between *CEAA 2012* and *SARA*, and the obligations that *SARA* sections 77 and 79 imposed in the Project's environmental

assessment. Whether Cabinet and the Minister met the obligations imposed on them depends on the interpretation of the statutory provisions.

[125] I have found that *SARA* sections 77 and 79 did not impose obligations on Cabinet. Cabinet's role in the Project's environmental was limited and specific—to make a decision under section 52(4) of *CEAA 2012* as to whether or not the Project's adverse environmental effects are justified in the circumstances. Section 77 did not apply to Cabinet because *CEAA 2012* did not give Cabinet the power to license, permit or authorize VFPA to conduct any activity that may result in the destruction of any part of the critical habitat of a listed wildlife species, and the Order in Council did not authorize any activity that may contravene *SARA*. Section 79 did not impose obligations on Cabinet because Cabinet was not responsible for ensuring that the Project's environmental assessment was conducted. If Cabinet had an obligation under *SARA* section 79, at most the obligation was indirect, arising from a need to ensure the information placed before it was not so deficient as to prevent it from making the required decision under section 52(4) of *CEAA 2012*.

[126] I have found that *SARA* section 79 imposed obligations on the Minister, but section 77 did not. Section 77 did not apply to the Minister because it specifically excluded him as a competent minister; furthermore, the Minister's Decision Statement is not "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" under *SARA* section 77 and it does not replace or determine the outcome of a future application for *SARA* authorization in respect of the whales.

[127] The *SARA* section 79 requirements were: (i) to notify the competent minister(s) for the species at risk; (ii) to identify the adverse effects on the species at risk and their critical habitat; and (iii) if the Project is carried out, to ensure that measures are taken to avoid or lessen those effects and to monitor them; subsection 79(2) also specifies that the measures must be taken in a way that is consistent with any applicable recovery strategy and action plans for the species.

[128] As noted above, the Agency notified the competent ministers for the affected *SARA*-listed species. The Minister referred the environmental assessment to the Panel and set the Panel's mandate for conducting the assessment that would identify the Project's adverse effects, including adverse effects on *SARA*-listed species and their critical habitat. The Panel assessed those effects for the whales and other *SARA*-listed species and proposed mitigation measures to be taken if the Project is carried out. The Minister required additional information, including about the Project's impacts, related mitigation measures, and VFPA's offsetting plans for salmon and the whales, and VFPA's response was published for comment. The Agency also published draft conditions for the Project and invited public comment.

[129] The applicants have not challenged compliance with the *SARA* section 79 requirements to notify the competent ministers, and to identify the Project's adverse effects on listed wildlife species and their critical habitat. They do not take issue with the Panel's report, or the Minister's decision under section 52(1) of *CEAA 2012* that the Project would likely cause significant adverse environmental effects, taking into account the implementation of mitigation measures that he considered appropriate.

[130] If the Project is carried out, section 79 requires the Minister to ensure that measures are taken to avoid or lessen and to monitor the Project's effects on the whales and their critical habitat, and further provides that the measures must be taken in a way that is consistent with any applicable recovery strategy and action plans for the species at risk. This is where the applicants say the Minister (and Cabinet) failed. The applicants contend that, despite the decision makers' claims to the contrary, they failed to meet their obligations under *SARA*, and the measures they relied on: (i) did not include all feasible measures; (ii) were not ensured or in place; (iii) will not avoid or lessen the Project's effects on the whales or minimize the effects on the whales' critical habitat; and (iv) are inconsistent with the whales' recovery strategy.

[131] For reasons that substantially agree with the respondents' arguments, I find the Minister reasonably complied with his obligations under *SARA* subsection 79(2). The applicants have not established that the Order in Council or the Decision Statement is unreasonable based on a failure to meet obligations imposed by *SARA* section 79.

[132] Beginning with the Order in Council, I agree with the respondents that Cabinet reasonably exercised its discretion under *CEAA 2012* to decide, in accordance with its subsection 52(4) authority, that the Project's adverse effects are justified in the circumstances. Cabinet was given broad discretion to make the justification decision under *CEAA 2012*.

[133] In making its decision under subsection 52(4) of *CEAA 2012*, Cabinet relied on the information placed before it. The applicants have not established that the information before

Cabinet was so deficient that Cabinet could not reasonably make the decision that *CEAA 2012* required: *Tsleil-Waututh* at para 470.

[134] The Order in Council demonstrates that Cabinet was aware of the Project's significant adverse environmental effects, including adverse effects on the whales and other listed species, and the requirements of subsection 79(2) of *SARA*. The Order in Council demonstrates that Cabinet considered the Project's effects on the whales and proposed mitigation measures as part of its determination of whether the Project's significant adverse environmental effects are justified in the circumstances. It also considered the economic need for the Project, including its contribution to improving supply chain resilience, its potential role in international trade, and the local, regional, and national economic benefits it would create.

[135] As AGC points out, the recitals in the Order in Council refer to the Project's effects on the whales and other *SARA*-listed species, and state that Cabinet was satisfied that measures will be taken to avoid or lessen those effects and to monitor them as required by *SARA* subsection 79(2):

[…]

> Whereas the Governor in Council — having been made aware of the adverse effects of the Project on wildlife species listed in Schedule 1 to the *Species at Risk Act* and their critical habitat and having considered the recommendations and conclusions set out in the review panel report, the additional information provided by VFPA and the measures being taken by Canada with respect to wildlife species listed in Schedule 1 to the *Species at Risk Act*, including the Southern Resident Killer Whale, which measures include those taken under the Oceans Protection Plan and the Whales Initiative to manage the cumulative effects on the Southern Resident Killer Whale and to minimize the impacts of marine shipping on the marine environment and on the use of the marine environment by Indigenous Nations — is satisfied that measures

> will be taken to avoid or lessen those adverse effects and to monitor them, and that those measures will be taken in a way that is consistent with any applicable recovery strategy and action plan and will be assessed and monitored as well as adaptively managed;
>
> […]

[136] Based on the record and the information referred to in the Order in Council, Cabinet could be reasonably assured of *SARA* subsection 79(2) compliance. I note that the Decision Statement includes a general condition that requires VFPA to meet the Project conditions in a way that is consistent with any applicable management plan, recovery strategy, and action plan prepared or established under *SARA*.

[137] As noted by VFPA, the very reason the Minister was required to refer the matter to Cabinet was because he had decided, taking into account the implementation of mitigation measures, that the Project is likely to cause significant adverse environmental effects referred to in section 5 of *CEAA 2012*—if the Minister had instead decided that the Project would not likely cause significant adverse environmental effects with implemented mitigation measures, he could have imposed conditions without involving Cabinet. *CEAA 2012* required the Minister to refer the matter to Cabinet to perform the kind of policy-laden weighing and balancing exercise that considers a project's adverse environmental effects against a constellation of public interest factors. Cabinet's Order in Council reflects the polycentric nature of the decision it was required to make.

[138] Decisions that can be considered executive in nature are very much unconstrained, and Cabinet should be given the widest margin of appreciation: *Gitxaala* at paras 152-155; *Mikisew* at paras 118-119. This is because Cabinet is equipped with the expertise to consider and weigh

the competing economic, cultural, environmental, and broader public interest concerns at play: *Mikisew* at para 119. Such decisions should be afforded a high degree of deference: *Raincoast* at para 19.

[139] Cabinet in this case was tasked with weighing these kinds of competing factors against the Project's adverse environmental effects to make one of two possible decisions set out in section 52(4) of *CEAA 2012*. Cabinet was not required to delve into and make explicit findings about each element leading to its decision, such as by justifying each of the Project's adverse environmental effects. The Order in Council does not undermine *SARA*'s purposes and Cabinet had no obligation to specifically consider and address *SARA*'s provisions or the parties' statutory interpretation arguments, particularly since it did not have a statutory obligation to provide reasons.

[140] Orders in Council are not well-suited to lengthy reasons, and the standard format is generally a series of recitals followed by an order: *Tsleil-Waututh* at para 478. It is possible to discern from the Order in Council and the record that Cabinet performed the required weighing and balancing of the Project's adverse environmental effects in view of policy considerations and the public interest. Given the deference owed to Cabinet and the nature of the decision it was required to make, I find the Order in Council meets the requirements of a reasonable decision.

[141] After Cabinet decided that the Project's likely adverse effects are justified in the circumstances, *CEAA 2012* required the Minister to establish the conditions with which VFPA must comply. Sections 53 and 54 of *CEAA 2012* required the Minister to issue a decision

statement that established conditions related to the identified adverse effects under subsections 5(1) and 5(2) of *CEAA 2012*, should the Project proceed. The Minister was given exclusive power under *CEAA 2012* to impose Project conditions.

[142] Paragraph 53(4) of *CEAA 2012* imposed constraints on the Minister's discretion. The conditions had to implement the mitigation measures the Minister took into account in deciding whether the Project was likely to cause significant adverse effects: *CEAA 2012*, s 53(4)(a). The conditions were also required to include implementation of a follow-up program: *CEAA 2012*, s 53(4)(b).

[143] The applicants say *SARA* subsections 79(2) and 77(1) imposed further constraints by setting a high bar for protective measures. They allege the Project conditions do not meet this high bar because the Project conditions do not include the full extent of measures that were identified or suggested by the Panel or by representatives of Fisheries and Oceans Canada, and because certain of the conditions are insufficiently enforceable, are not fully defined or are dependent on the results of future investigation, will not work to avoid or lessen effects on the whales, or are inconsistent with the whales' recovery strategy under *SARA*. As explained, I do not agree that *SARA* section 77 applies, and I do not read *SARA* section 79, or the FCA's decision in *Tsleil-Waututh*, to constrain the Minister's discretion by imposing mandatory prerequisites for protective measures that he was required to implement as Project conditions.

[144] The Minister must act reasonably, but *CEAA 2012* permits him to exercise discretion in deciding which mitigation measures he considers to be appropriate: *CEAA 2012*, s 52(1). *CEAA*

2012 defines mitigation measures broadly, as measures for the elimination, reduction, or control of the adverse environmental effects of a designated project. Furthermore, as AGC correctly points out, *SARA* does not define "measures", and subsection 79(2) does not specify the measures that must be taken to avoid or lessen and to monitor adverse effects on *SARA*-listed species and their critical habitat. Subsection 79(2) does not set threshold criteria, such as a level of effectiveness, enforceability, or certainty, necessary to qualify as "measures" under *SARA*.

[145] When the Project conditions are considered as a whole, and in context, I agree with the respondents that the Minister acted reasonably by establishing conditions that were informed by the results and recommendations of a comprehensive assessment, and addressed the identified Project effects.

[146] The Minister took into account the Panel's report and the information gathered during post-Panel phase in establishing conditions. The Decision Statement indicates that the Panel conducted its review in a manner that met the requirements of *CEAA 2012*. The record shows that the Panel's consultation process and environmental assessment under *CEAA 2012* was extensive, and the Project's effects on the whales in view of their at-risk status were a central consideration. VFPA's responses to the Minister's post-Panel information requests and the public and government comments provided further information about the Project's impacts, related mitigation measures, and VFPA's offsetting plans, including for salmon and the whales.

[147] The Minister's Decision Statement for the Project addressed the Project's subsection 5(1) and 5(2) effects and imposed Project conditions that fell within the Minister's discretion. It set

out detailed conditions with which VFPA must comply, should the Project proceed, covering 21 categories and spanning approximately 50 pages. The conditions include monitoring, follow-up, and annual reporting, and measures directed at avoiding or lessening the Project's identified adverse effects, including effects on the whales. There are conditions aimed at the key identified threats to the whales of environmental contaminants, the availability of salmon prey, underwater noise disturbance, and the risk of vessel strikes, as well as VFPA's participation in conservation efforts and government initiatives supporting the whales' recovery. As noted above, the Decision Statement imposes a general condition that requires VFPA to ensure that its actions in meeting the Project conditions are taken in a way that is consistent with any applicable recovery strategy and action plans under *SARA* for species at risk.

[148] The conditions are binding on VFPA, and the Minister has powers of enforcement that include penalties and the ability to seek an injunction.

[149] In my view, the Minister was not required to ensure that all identified or contemplated protective measures were "in place" at the time the Decision Statement was released. Conditions that are "ensured" can include future steps and processes that allow for flexibility in addressing the Project's effects on the whales, and recognition of future regulatory requirements with which VFPA must comply. Unlike the National Energy Board in *Tsleil-Waututh*, it is clear from the Decision Statement that the Minister considered and has a plan to address the Project's effects on the whales. Additionally, before VFPA engages in an activity affecting the whales or their critical habitat, it must obtain authorization under *SARA*. That authorization will only issue if VFPA satisfies the Minister of Fisheries that: (a) all reasonable alternatives to the activity that

would reduce the impact on the whales have been considered and the best solution has been adopted; (b) all feasible measures will be taken to minimize the impact of the activity on the whales or its critical habitat; and (c) the activity will not jeopardize the whales' survival or recovery.

[150] I agree with AGC that the Minister reasonably complied with the statutory requirements of *CEAA 2012* and *SARA* by imposing conditions on the Project that are rationally connected to the likely adverse effects on the whales. It is beyond a reviewing court's role to assess how well the conditions will work, and the Court should not become "an academy of science": *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186 at para 126.

[151] As with Cabinet's justification decision, the Minister was not required to make explicit findings about each element leading to its decision regarding the Project conditions. The Minister was required to issue a decision statement to the proponent, VFPA: *CEAA 2012*, s 54(1). The Minister's Decision Statement had to: (a) inform VFPA of the decisions made under section 52 of *CEAA 2012*; and (b) include any conditions established under section 53. The Minister did not have a statutory obligation to provide reasons and in my view, he was not required to address the parties' statutory interpretation arguments. It is possible to discern from the Decision Statement and the record that the Minister set the Project conditions in accordance with his statutory obligations.

[152] The applicants have not established an error in the Decision Statement that would warrant this Court's intervention. Given the deference owed to the Minister and the purpose and nature of his Decision Statement, I find the Decision Statement was reasonable.

B. *Did Cabinet err by justifying adverse effects contrary to SARA's purposes and the requirements of sections 6, 58(1), and 73(3)?*

(1) The statutory provisions

[153] The text of *SARA* section 6 and subsections 58(1) and 73(1) to (3) is set out below. The text is reproduced from *SARA* as it appeared between August 8, 2019 and August 27, 2019.

Purposes	**Objet**
6 The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.	6 La présente loi vise à prévenir la disparition — de la planète ou du Canada seulement — des espèces sauvages, à permettre le rétablissement de celles qui, par suite de l'activité humaine, sont devenues des espèces disparues du pays, en voie de disparition ou menacées et à favoriser la gestion des espèces préoccupantes pour éviter qu'elles ne deviennent des espèces en voie de disparition ou menacées.
[…]	[…]
Destruction of critical habitat	**Destruction de l'habitat essentiel**
58 (1) Subject to this section, no person shall destroy any part of the critical habitat of any listed endangered species or of any listed threatened species — or of any listed extirpated species if a recovery strategy has	58 (1) Sous réserve des autres dispositions du présent article, il est interdit de détruire un élément de l'habitat essentiel d'une espèce sauvage inscrite comme espèce en voie de disparition ou menacée — ou comme espèce disparue du

recommended the reintroduction of the species into the wild in Canada — if

pays dont un programme de rétablissement a recommandé la réinsertion à l'état sauvage au Canada :

(a) the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada;

a) si l'habitat essentiel se trouve soit sur le territoire domanial, soit dans la zone économique exclusive ou sur le plateau continental du Canada;

(b) the listed species is an aquatic species; or

b) si l'espèce inscrite est une espèce aquatique;

(c) the listed species is a species of migratory birds protected by the *Migratory Birds Convention Act, 1994*.

c) si l'espèce inscrite est une espèce d'oiseau migrateur protégée par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs*.

[…]

[…]

Powers of competent minister

Pouvoirs du ministre compétent

73 (1) The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.

73 (1) Le ministre compétent peut conclure avec une personne un accord l'autorisant à exercer une activité touchant une espèce sauvage inscrite, tout élément de son habitat essentiel ou la résidence de ses individus, ou lui délivrer un permis à cet effet.

Purpose

Activités visées

(2) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that

(2) Cette activité ne peut faire l'objet de l'accord ou du permis que si le ministre compétent estime qu'il s'agit d'une des activités suivantes :

(a) the activity is scientific research relating to the conservation of the species and conducted by qualified persons;

a) des recherches scientifiques sur la conservation des espèces menées par des personnes compétentes;

(b) the activity benefits the species or is required to enhance its chance of survival in the wild; or	b) une activité qui profite à l'espèce ou qui est nécessaire à l'augmentation des chances de survie de l'espèce à l'état sauvage;
(c) affecting the species is incidental to the carrying out of the activity.	c) une activité qui ne touche l'espèce que de façon incidente.
Pre-conditions	**Conditions préalables**
(3) The agreement may be entered into, or the permit issued, only if the competent minister is of the opinion that	(3) Le ministre compétent ne conclut l'accord ou ne délivre le permis que s'il estime que :
(a) all reasonable alternatives to the activity that would reduce the impact on the species have been considered and the best solution has been adopted;	a) toutes les solutions de rechange susceptibles de minimiser les conséquences négatives de l'activité pour l'espèce ont été envisagées et la meilleure solution retenue;
(b) all feasible measures will be taken to minimize the impact of the activity on the species or its critical habitat or the residences of its individuals; and	b) toutes les mesures possibles seront prises afin de minimiser les conséquences négatives de l'activité pour l'espèce, son habitat essentiel ou la résidence de ses individus;
(c) the activity will not jeopardize the survival or recovery of the species.	c) l'activité ne mettra pas en péril la survie ou le rétablissement de l'espèce.

(2) The parties' arguments

[154] As the second basis for challenging the decisions, the applicants contend the Order in Council is unreasonable because Cabinet purported to justify effects under *CEAA 2012* that will destroy the whales' critical habitat and jeopardize their survival and recovery, contrary to *SARA*'s purposes and the requirements of sections 6, 58(1), and 73(3). While this challenge

relates to the Order in Council specifically, as noted above, if the Order in Council is set aside the Decision Statement would also fall.

[155] The applicants submit it is unreasonable to use the provisions of one statute to frustrate the purposes of another statute, and Cabinet's justification decision impermissibly frustrates *SARA*'s purposes. While *SARA* permits some effects on a listed species, Cabinet cannot reasonably justify effects under *CEAA 2012* that would directly contravene *SARA*'s purposes by permitting destruction of the whales' legally designated critical habitat, which is defined as habitat that is necessary for a species' survival or recovery.

[156] The applicants submit that Cabinet was required to read *CEAA 2012* and *SARA* coherently and ensure that its decision would not undermine *SARA*'s purposes and provisions. *SARA*'s purposes include preventing extinction of at-risk species and providing for their recovery: *SARA*, s 6; *David Suzuki Foundation* 2010 FC 1233 at para 13, aff'd in part 2012 FCA 40. The applicants specifically argue that sections 6, 58(1), and 73(3) of *SARA* constrain Cabinet's broad discretion to deem effects justified under *CEAA 2012*. The constraint flows from two principles of statutory construction: (i) statutes that deal with the same subject matter should be read coherently and consistently; and (ii) interpreting a statute in a way that frustrates the purposes of another is an absurd consequence that should be avoided where possible. International law also acts as a constraint. Moreover, as remedial legislation, *SARA* is entitled to a generous interpretation: *Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52 at para 9.

[157] The applicants argue that the Order in Council is flawed according to *Vavilov* because Cabinet failed to grapple with the central issue of whether the Project's effects on the whales could be justified in view of *SARA*'s constraints. The Order in Council does not mention sections 6, 58(1), or 73(3) of *SARA*, Cabinet failed to provide any rationale supporting its conclusion that significant adverse effects on the whales are justified when the Project will have effects that contravene *SARA*, and the record does not shed light on Cabinet's rationale or show how Cabinet's reasoning process could be intelligible or justified. The applicants contend Cabinet was under a heightened obligation to grapple with the issues and justify its decision due to the significant consequences for the whales: *Western Canada Wilderness Committee v Canada (Environmental and Climate Change)*, 2024 FC 167 at para 136.

[158] Finally, the applicants contend that Cabinet acted contrary to *SARA*, and specifically subsection 58(1) and 73(3), as it could not reasonably deem significant effects that will destroy the whales' critical habitat as "justified" under *CEAA 2012*, and it cannot leave the issue to narrower, future authorization processes under *SARA* that will assess the discrete effects of specific Project-related activities after the Project has been approved as a whole.

[159] The applicants point to three key facts they say are not in dispute, and form part of the context the Court must consider in determining whether Cabinet acted unreasonably: (i) the whales are facing imminent, human-caused threats to their survival and recovery under pre-Project conditions; (ii) the Panel found that the Project's effects, independently or synergistically, would result in significant direct and cumulative effects on the whales; and (iii) the Minister determined that, even after mitigation, the Project is likely to cause direct and

cumulative significant adverse effects on the whales. They say the only conclusion to be drawn from these facts is that the Project will jeopardize the survival of the species, contrary to *SARA*'s core purpose and provisions.

[160] The applicants argue Cabinet's discretion as a subordinate body cannot extend to the point of frustrating *SARA*'s purposes, as a subordinate body must exercise its powers in a way that does not conflict with the provisions of a related statute: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at paras 2, 37-45. This flows from a central proposition that statutes must be interpreted to avoid absurd consequences. Parliament cannot have intended Cabinet's discretion to stretch so far as to permit it to issue a decision that will directly affect the survival of a *SARA*-listed species and frustrate *SARA*'s core purposes.

[161] AGC submits that Cabinet had no obligation to address sections 6, 58(1) or 73 of *SARA*. Section 6 outlines *SARA*'s purpose, and the section 58(1) prohibitions against destroying any part of listed species' critical habitat continue to apply. Section 73 governs a competent minister's discretion to enter an agreement or issue a permit authorizing a person to engage in an activity that affects a listed wildlife species or its critical habitat. Cabinet is not a competent minister and Cabinet did not, and could not, issue a section 73 authorization during the Project's environmental assessment. Section 73 will apply if VFPA applies for the requisite permit in the future.

[162] AGC contends that the Order in Council demonstrates that Cabinet was clearly aware of *SARA*'s provisions, but the decision Cabinet was required to make under subsection 52(4) of *CEAA 2012* simply did not trigger or impact any *SARA* obligation. The Order in Council does not undermine *SARA*'s purpose, displace the prohibition in section 58, or displace the requirement to obtain *SARA* authorization. Indeed, if Cabinet purported to do so, it would usurp the role and obligations of the competent minister to issue or refuse future permits and authorizations under *SARA* or other Acts of Parliament.

[163] VFPA adds that federal authorities such as the Minister of Fisheries may now consider whether to issue permits and authorizations, because the prohibition under section 7 of *CEAA 2012* has been lifted. VFPA will be seeking a *SARA* section 73 authorization, as part of an authorization under the *Fisheries Act*, RSC 1985, c F-14 (in accordance with section 74 of *SARA*) and VFPA will only be relieved of the *SARA* section 58(1) prohibition if it obtains such authorization: *SARA*, s 83(1)(b). The Decision Statement specifically notes that such authorization is still to come.

(3) Consideration of arguments

[164] I agree with the respondents. Sections 6, 58 and 73 of *SARA* did not constrain Cabinet's discretion when making its decision under subsection 52(4) of *CEAA 2012*. Cabinet was not required to address these provisions.

[165] As noted above, the Order in Council does not authorize any activity that would contravene *SARA* or undermine its purposes. The Order in Council does not authorize the

destruction of critical habitat or lift the section 58 prohibition against destroying any part of the whales' critical habitat. I agree with the respondents that Cabinet did not decide or pre-determine the outcome of authorizations under *SARA*'s agreement and permitting provisions, including section 73.

[166] Only a competent minister for the whales may enter into an agreement under *SARA* section 73 or 74. Cabinet is not a competent minister, and the Order in Council did not have the same effect as a permit or agreement under *SARA* section 73. VFPA remains subject to the prohibition in *SARA* section 58 unless it applies for and receives authorization under sections 73 or 74. That authorization will only issue if VFPA satisfies the Minister of Fisheries of the statutory requirements, which include a requirement that the activity will not jeopardize the whales' survival or recovery.

[167] The applicants argue that future permitting processes under *SARA* will be less effective because they will only assess discrete effects of specific Project-related activities, after the Project has been approved as a whole. While I am not convinced that this is an accurate characterization of *SARA*'s agreement and permitting provisions, those are the provisions Parliament chose to enact, and the Court is bound to apply the law.

[168] To conclude on this second basis for challenging the Order in Council, the flaws that the applicants allege Cabinet to have made stem from a failure to grapple with statutory obligations that Parliament did not impose on it. The Order in Council does not frustrate *SARA*'s purposes

under section 6 or displace the prohibitions and requirements of subsections 58(1) or 73(3), and Cabinet was not required to rationalize its decision in light of these provisions.

VII. **Conclusion**

[169] For the reasons above, the applicants have not established that the Order in Council or Decision Statement was unreasonable. Accordingly, I must dismiss this application.

[170] The parties agreed that, if this Court finds an award of costs to be warranted, a reasonable cost award would be: (i) $14,000 in the applicants' favour in the event the application is allowed, and (ii) $14,000 to VFPA and $15,000 to AGC in the event the application is dismissed. However, the applicants argued that, in the event the application is dismissed, it would be more appropriate to have all parties bear their own costs in view of the applicants' participation as public interest litigants without a personal, pecuniary interest.

[171] I agree with the applicants. The parties shall bear their own costs.

[172] At the conclusion of the hearing, the parties were asked to inform the Court of any urgency in receiving the Court's decision or circumstances that would justify an exemption from the requirement to issue precedential decisions in both official languages: *Official Languages Act*, RSC 1985 c 31 (4th Supp), s 20(1)(a.1) [*OLA*]. The parties provided written submissions.

[173] The applicants submit there is urgency that would justify an expedited decision and an exemption under the *OLA*. They argue that prohibitions under *CEAA 2012* were lifted as of April

20, 2023 (when the Minister issued the Decision Statement) and VFPA could be engaging in activities that impact the whales, although the applicants do not detail the activities. The applicants also argue that VFPA could apply for authorization under the *Fisheries Act* and *SARA*, and if granted, such authorization could exempt VFPA from the *SARA* section 58 prohibition.

[174] The respondents submit an expedited decision is not necessary, and they are not aware of circumstances that would bring this decision within an *OLA* exemption. Furthermore, they argue that a *Fisheries Act*/*SARA* authorization is not a reason for urgency. As of the date of the written submissions, VFPA had not submitted an application for *Fisheries Act*/*SARA* authorization, it was expecting to do so “in several months time”, and VFPA explained that the application will be subject to a lengthy review and consultation process that is likely to take more than a year.

[175] Having considered the parties’ submissions, I am not satisfied of a need for an expedited decision. I find that paragraph 20(1)(1.a) of the *OLA* applies. I am not satisfied of a reason that would justify an exemption from the requirement to issue this decision in both official languages.

JUDGMENT IN T-1065-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The parties shall bear their own costs.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1065-23
STYLE OF CAUSE:	GEORGIA STRAIT ALLIANCE, DAVID SUZUKI FOUNDATION, RAINCOAST CONSERVATION FOUNDATION AND WESTERN CANADA WILDERNESS COMMITTEE v MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, ATTORNEY GENERAL OF CANADA, AND, VANCOUVER FRASER PORT AUTHORITY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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