Federal Court of Appeal | Cour d'appel fédérale

Date: 20230921

Docket: A-52-22

Citation: 2023 FCA 191

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

MIKISEW CREE FIRST NATION

Appellant

and

CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and CANADIAN NATURAL RESOURCES LIMITED

Respondents

Heard at Vancouver, British Columbia, on March 29, 2023.

Judgment delivered at Ottawa, Ontario, on September 21, 2023.

REASONS FOR JUDGMENT BY: GLEASON J.A.

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

Federal Court of Appeal | Cour d'appel fédérale

Date: 20230921

Docket: A-52-22

Citation: 2023 FCA 191

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

MIKISEW CREE FIRST NATION

Appellant

and

CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and CANADIAN NATURAL RESOURCES LIMITED

Respondents

REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant, the Mikisew Cree Nation, is a successor to the Indigenous groups that adhered to Treaty 8 in 1899. The traditional territory of Mikisew is located in northeastern Alberta and includes the area around Lake Athabasca and the Peace-Athabasca Delta, extending south to Fort McMurray, and the Clearwater River. The Mikisew currently use—and have

traditionally used—the Peace-Athabasca Delta, the Athabasca River, and its tributaries for fishing, harvesting, and other activities that are important to the Mikisew people and their culture.

[2] In the present appeal, the Mikisew appeal from the judgment of the Federal Court in *Mikisew Cree First Nation v. Canadian Environmental Assessment Agency*, 2022 FC 102 (*per* Favel J.). In that judgment, the Federal Court dismissed the Mikisew's judicial review application that sought to set aside a February 15, 2019 decision of the Honourable Catherine McKenna, the then federal Minister of Environment and Climate Change.

[3] In her decision, the Minister declined to designate an extension of the Horizon Oil Sands Mine (the Horizon Mine) owned by the respondent, Canadian Natural Resources Limited (CNRL), as a reviewable project under subsection 14(2) of the now-repealed *Canadian Environmental Assessment Act*, S.C. 2012, c.19, s. 52 [CEAA, 2012].

[4] For the reasons that follow, I would dismiss this appeal, with costs.

I. Overview

[5] It is convenient to commence with a general overview.

[6] The project at issue in this appeal is CNRL's Horizon Oil Sands Mine North Pit Extension Project (the Extension Project). It is not a new project. Rather, it envisages an

extension of an area of mine operations in CNRL's existing Horizon Mine. That Mine is located approximately 70 kilometers north of Fort McMurray, Alberta and is within the traditional territory of the Mikisew. The Horizon Mine was originally approved by both Canada and Alberta in 2004, following a Joint Review Panel Environmental Assessment.

[7] The Extension Project involves a plan to extend the Horizon Mine within its existing lease boundaries by 3448 hectares, equal to a little over 18% of the existing operating area of the Mine. It would extend the operating life of the Mine by approximately seven years. It is contemplated that the Extension Project will use the existing Horizon Mine infrastructure and will not require any new or additional water allocations from the Athabasca River, which are all within the existing licence for the Horizon Mine issued under the Alberta *Water Act*, R.S.A. 2000, c. W-3 [the *Water Act*]. Notwithstanding this, it is expected that the Extension Project will require a new licence under the *Water Act* to divert surface and groundwater from the Calumet River, which represents less than 0.1% of the annual flow of the Athabasca River.

[8] The Extension Project is subject to an environmental assessment by the Alberta Energy Regulator under the Alberta *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12 [the EPEA]. It is not disputed that the Mikisew have the right to participate in that provincial environmental assessment process. Included in the Record before us are filings that the Mikisew made to the Alberta Energy Regulator in the context of the environmental assessment under the Alberta EPEA.

[9] The Extension Project may also require a new authorization under the federal *Fisheries Act*, R.S.C., 1985, c. F-14 [*Fisheries Act*]. This is the only federal approval that is expected to be required in relation to the Extension Project.

[10] The Extension Project was not automatically subject to a federal environmental assessment under CEAA, 2012. However, the Minister could have exercised her discretion to designate the Extension Project under subsection 14(2) of CEAA, 2012, which would have triggered the requirement for a federal assessment under subsection 14(1) of that legislation. Under subsection 14(2) of CEAA, 2012, the Minister possesses broad discretionary authority to require a federal environmental assessment in respect of projects for which a federal assessment was not obligatory, if, in the Minister's opinion, either the carrying out of that physical activity may cause adverse environmental effects or public concerns related to those effects may warrant the designation. Subsection 14(2) of the Act provides:

Minister's power to designate	**Pouvoir du ministre de désigner**
14(2) The Minister may, by order, designate a physical activity that is not prescribed by regulations made under paragraph 84(a) if, in the Minister's opinion, either the carrying out of that physical activity may cause adverse environmental effects or public concerns related to those effects may warrant the designation.	**14(2)** Le ministre peut, par arrêté, désigner toute activité concrète qui n'est pas désignée par règlement pris en vertu de l'alinéa 84a), s'il est d'avis que l'exercice de l'activité peut entraîner des effets environnementaux négatifs ou que les préoccupations du public concernant les effets environnementaux négatifs que l'exercice de l'activité peut entraîner le justifient.

[11] On July 18, 2018, the Mikisew and other Indigenous groups submitted a letter to the Canadian Environmental Assessment Agency (the Agency), requesting that the Agency advise the Minister that she should designate the Extension Project under subsection 14(2). They based their request on their belief that the Extension Project would cause further degradation to the environment and negatively impact their Treaty or Aboriginal rights or claims.

[12] Following receipt of additional submissions from the Mikisew, submissions from CNRL, and advice from the Agency, the Minister decided not to issue the requested designation on February 15, 2019.

[13] The Mikisew commenced a judicial review application in the Federal Court, seeking to set aside the Minister's refusal to designate the Extension Project. The Mikisew argued before the Federal Court, and before this Court, that the Minister breached the duty to consult in reaching her decision and that the decision was unreasonable.

[14] In the judgment under appeal, the Federal Court dismissed the Mikisew's judicial review application. It found that the duty to consult was not triggered and that the Minister's decision was reasonable.

II. Did the Federal Court Err in Deciding that the Duty to Consult was Not Triggered?

[15] I turn first to examine whether the Federal Court erred in concluding that the duty to consult was not triggered by the Minister's refusal to designate the Extension Project pursuant to subsection 14(2) of CEAA, 2012.

A. *General Principles Applicable to the Duty to Consult*

[16] The duty to consult flows from the honour of the Crown and is constitutionalized by section 35 of the *Constitution Act, 1867*: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386 at para. 78 [*Ktunaxa Nation*]. It accordingly follows that determining the existence, extent, and content of the duty to consult involves a question of law, reviewable by this Court for correctness: *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, [2020] 3 F.C.R. 3 at para. 27, leave to appeal to SCC refused, 39111 (2 July 2020) [*Coldwater First Nation*]; *Yellowknives Dene First Nation v. Canada (Aboriginal Affairs and Northern Development)*, 2015 FCA 148, [2015] F.C.J. No 829 (QL) at paras. 46-47; see also *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 55 [*Vavilov*].

[17] This is to be contrasted with the judicial review of the adequacy of any consultation conducted by or on behalf of the Crown. Indeed, whether the duty to consult has been fulfilled or not in a given case is reviewable under the deferential reasonableness standard: *Haida Nation v.*

British Columbia (Minister of Forests), 2004 SCC 7, [2004] 3 S.C.R. 511 at para. 62 [*Haida Nation*]; *Ktunaxa Nation* at para. 82; *Coldwater First Nation* at para. 27.

[18] In the present case, the Federal Court held that the duty to consult was not triggered. This is a determination of law, reviewable for correctness. Thus, I must assess whether the Federal Court was correct in concluding that the duty to consult was not triggered in the case at bar. As will soon become apparent, I agree with the Federal Court's conclusion that the duty to consult was not triggered in this case; however, I do not agree with all of the Federal Court's reasoning that led it to reach that conclusion.

[19] In *Haida Nation*, the Supreme Court held that the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it": at para. 35. The Supreme Court later confirmed that this two part test extends to Treaty rights and claims: see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 55 [*Mikisew Cree*].

[20] In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 [*Rio Tinto*], the Supreme Court elaborated on the test set out in in *Haida Nation*, by setting out a three-part, as opposed to a two-part, test. Since *Rio Tinto*, the test for assessing whether a duty to consult is triggered in a given situation "… can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right;

(2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right": at para. 31.

[21] The Supreme Court went on in *Rio Tinto* to further describe each of the foregoing elements.

[22] The first element, regarding the need to establish the Crown's knowledge of a potential Aboriginal or Treaty claim or right, is not at issue in this appeal and was conceded by Canada before both the Federal Court and this Court. Therefore, no more needs to be said about the first element of the test. The second and third elements of the test for assessing whether a duty to consult arises, on the other hand, are at issue in the case at bar.

[23] In *Rio Tinto*, the Supreme Court held that the second element of the test for assessing whether a duty to consult arises requires "…conduct that may adversely impact on the claim or right in question": at para. 42. The Court continued by stating that the nature of governmental action that gives rise to a duty to consult is "not confined to the exercise of statutory powers" or to "decisions or conduct which have an immediate impact on lands or resources": at paras. 43 and 44. Rather, the duty to consult may extend to "'strategic higher level decisions' that may have an impact on Aboriginal claims and rights": at para. 44, citing Jack Woodward, *Native Law*, vol. 1 (Toronto: Carswell, 1994, loose-leaf updated 2010, release 4) at 5-41 [Woodward].

[24] Turning to the third element of the test for assessing whether a duty to consult arises, the Supreme Court found that "a claimant must show a causal connection between the proposed

government action and a potential for adverse impacts on pending Aboriginal claims or rights": at para. 45. As with the second element of the test, the Supreme Court held that "…. a purposive approach to this element is in order" in light of the purpose of the duty to consult, which "… seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown": at paras 34 and 45. The third element of the test for assessing whether a duty to consult exists, like the second element, may be met where the conduct or decision involves "…high level management decisions or structural changes to the resource's management [that] may … affect Aboriginal claims or rights even if these decisions have 'no immediate impact on lands and resources'": at para. 47, citing Woodward at p. 5-41.

[25] However broad this approach is, though, "[m]ere speculative impacts … will not suffice": at para. 46. Rather, "… there must be 'an appreciable effect on the First Nations' ability to exercise their aboriginal right'. The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice": at para. 46, quoting from *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, leave to appeal to SCC refused, 32142 (15 November 2007).

[26] This Court has held that the time for assessing whether a duty to consult arises is before the governmental decision is made or the conduct in question occurs: *Squamish First Nation v. Canada (Fisheries and Oceans)*, 2019 FCA 216, 308 A.C.W.S. (3d) 676 at para. 50. This makes sense since the procedural right to be consulted cannot depend on whether the ultimate decision

rendered is favourable to the position advocated by the party claiming the existence of a duty to consult.

[27] Consultation obligations extend to both the Crown in right of Canada and in right of a province, with each owing an independent duty to consult in respect of its own contemplated conduct or decisions: *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447 at paras. 50-51, *Haida Nation* at paras. 57-59. Thus, as the respondents, the Canadian Environmental Assessment Agency and the Minister of Environment and Climate Change (collectively, Canada) correctly note at paragraph 58 of their memorandum of fact and law, "the federal Crown is not responsible for ensuring that the provincial Crown meets its independent duty" to consult. This principle has important implications in the case at bar.

B. *Relevant Facts and Statutory Provisions*

[28] I turn next to outline the statutory provisions and facts that are relevant, or alleged to be relevant, to the existence of a duty to consult in the instant case.

[29] As noted, the Extension Project was not subject to mandatory review under CEAA, 2012. Under that legislation, other sorts of projects fell within the definition of a "designated project" and thus were automatically subject to mandatory review. These included larger expansions of oil sands mines, where the proposed expansion would have resulted in an increase in the area of mine operations of 50% or more and a total bitumen production capacity of 10,000 m^3/day or

more: see CEAA, 2012, subsection 2(1) and *Regulations Designating Physical Activities*, SOR/2012-147, section 2 and section 9 of the Schedule.

[30] As also already noted, under subsection 14(2) of CEAA, 2012, the Minister possesses a broad discretionary authority to designate projects, which are not otherwise subject to federal environmental review.

[31] Under section 103 of CEAA, 2012, the Agency was required to advise and assist the Minister in exercising her powers and duties under that Act. The section provides:

103 (1) The Canadian Environmental Assessment Agency is continued and must advise and assist the Minister in exercising the powers and performing the duties and functions conferred on him or her by this Act.	**103 (1)** Est maintenue l'Agence canadienne d'évaluation environnementale chargée de conseiller et d'assister le ministre dans l'exercice des attributions qui lui sont conférées par la présente loi.

[32] The effect of either a discretionary or mandatory designation under CEAA, 2012 is similar, although there are variations in the process, depending on the project being proposed and whether the Minister decides to refer a project to a review panel for environmental assessment. In all circumstances, the responsible authority or other decision-maker tasked with approving a project subject to review is required to assess, among other things, whether the project is "likely to cause significant environmental effects": see CEAA, 2012, subsections 19(1), 31(1), and 52(1).

[33] Turning to the facts in the case at bar, as noted, it was the Mikisew and the other Indigenous groups who initiated the Minister's consideration of the possible designation of the Extension Project through their July 5, 2018 letter to the Agency.

[34] In their letter, they expressed concerns about the potential adverse environmental impacts of the Extension Project on the Athabasca River, Wood Buffalo National Park, the Peace-Athabasca Delta, and their Aboriginal or Treaty rights. They also stated that they had concerns that the Alberta environmental assessment process could not adequately address the negative impacts of the Extension Project. Enclosed with the letter was a 2010 study, commissioned by the Mikisew, entitled "As Long as the Rivers Flow: Athabasca River use, Knowledge and Change" and a 2017 UNESCO World Heritage Committee Mission Report, entitled "Reactive monitoring Mission to Wood Buffalo National Park".

[35] The Agency replied to this letter on July 24, 2018. In its response, the Agency stated that it had concluded that the Extension Project was not subject to a mandatory federal environmental review, based on information provided by CNRL. The Agency further noted that it would be providing advice to the Minister on whether she should designate the project under subsection 14(2) of CEAA, 2012. Included in the letter was an electronic link to the Agency's guidance document entitled "Designating a Project under the Canadian Environmental Assessment Act, 2012" (the Guidance Document). The Guidance Document states that the Agency may solicit the views of other federal government departments in formulating its advice to the Minister on designation requests. In the July 24, 2018, letter, the Agency also invited the Mikisew to provide any further comments that it wished to make to the Agency by August 23, 2018.

[36] The Mikisew took up this request and, by letter dated August 23, 2018, further expanded on their concerns. On the same date, the Agency sent the Mikisew a copy of CNRL's submissions in response to the designation request.

[37] The Mikisew sent a further letter to the Agency, in reply to CNRL's submissions, on August 27, 2018. In that letter, the Mikisew appended a copy of the Terms of Reference (TORs), which is a document that sets out the scope for the Environmental Impact Statement that will ground the provincial environmental assessment being undertaken by the Alberta Energy Regulator. The Mikisew also included its submissions to that Regulator on the TORs, as well as the response it received from the Regulator on these submissions. In its August 27, 2018 letter to the Agency, the Mikisew took the position that the Alberta TORs failed to include several issues that were central to the Mikisew's concerns and expounded on their views as to the inadequacy of the process being undertaken by the Alberta Energy Regulator.

[38] In August 2018, the Mikisew received a copy of a letter from Parks Canada to the Agency in which Parks Canada set out its views on the potential environmental effects of the Extension Project and another project that is not at issue in this appeal. It is unclear who sent the Mikisew a copy of this letter. In its letter, Parks Canada set out its views as to the potential effects of the two projects that related to the mandate of Parks Canada and came within the scope of the matters that could be considered under CEAA, 2012. These potential effects included:

- water quality and quantity impacts with potential effects on fish and fish habitats, aquatic species and migratory birds;
- effects on federal lands, and specifically, Wood Buffalo National Park; and

- effects on Indigenous current use of the lands and resources for traditional purposes.

[39] On September 20, 2018, representatives of the Mikisew and other Indigenous groups met with members of the Agency and representatives of other federal departments, including Environment and Climate Change Canada (ECCC) and Parks Canada. During the meeting, the Mikisew's concerns regarding the Extension Project were further discussed.

[40] The Agency completed an analysis report on the request to designate the Extension Project and another project. In its analysis, the Agency stated that it had sought and received input from several Indigenous groups, including the Mikisew, the Alberta Energy Regulator, several federal departments, and Parks Canada. The Agency summarized the input that it received from various parties and set out the analysis grounding its recommendation that the Minister decline to designate the Extension Project under subsection 14(2) of CEAA, 2012.

[41] The Agency provided its recommendations in a memorandum to the Minister, dated December 15, 2018. In its memorandum, the Agency recognized that the Extension Project might cause environmental effects, but advised the Minister that she should not issue the requested designation. The Agency was of the view that a designation was not warranted in light of the information that it received from federal departments and the existence of other federal and provincial mechanisms already in place to assess and manage the potential adverse effects associated with the Extension Project.

[42] In January 2019, the Mikisew provided the Agency with a technical review of CNRL's Environmental Impact Statement, which CNRL had filed with the Alberta Energy Regulator. This technical review was prepared by a consultant, Management Strategies Environmental Solutions (MSES), on behalf of the Mikisew and another Indigenous group. The technical review took issue with some of the contents of CNRL's Environmental Impact Statement.

[43] On February 5, 2019, the Mikisew again wrote to the Agency about the Extension Project. In their letter, the Mikisew summarized MSES' technical review, which had been forwarded to the Agency in January.

[44] On February 12, 2019, the Agency completed a second memorandum to the Minister, advising that the additional information it had received subsequent to the date of its first memorandum did not change its recommendation to the Minister to decline to designate the Extension Project.

[45] On February 13 and 15, 2019, the Minister signed off on both memoranda from the Agency, concurring with the advice of the Agency that she decline to issue the requested designation. On February 15, 2019, the Minister wrote to the Mikisew, advising them of her decision to decline their designation request, setting out brief reasons for her decision. More will be said about the Minister's reasons and the contents of the documents before the Minister when she made her decision in the section that follows. For now, the foregoing general review of the process, and of the participation of the Mikisew in that process, provides a sufficient backdrop

for my discussion of the correctness of the Federal Court's conclusion that the duty to consult was not triggered.

C. *The Decision of the Federal Court*

[46] I turn next to review the reasons of the Federal Court on the consultation issue. The Federal Court found that the first and second elements of the test for the existence of a duty to consult, as set out in *Rio Tinto*, were met in the instant case, but that the third element was not.

[47] As concerns the second element, the Federal Court followed the approach reached by another judge of the Federal Court in *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758, aff'd (on other grounds) 2022 FCA 123 [*Ermineskin*] and held that the second element was met because the Minister's consideration of the designation request involved Crown conduct. The Federal Court held as follows at paragraphs 93-94 of its Reasons:

> [93] In finding that the second part of the *Rio Tinto* test was established, Justice Brown stated the following at paragraph 99 of *Ermineskin*:
>
> > I have no hesitation in concluding that the Minister's (i.e., the Crown's) *consideration of a designation order* as occurred in this case constitutes Crown conduct that engages a potential Aboriginal or treaty right and may adversely impact on the claim or right in question. The Respondent Minister concedes the second element
> >
> > [Emphasis added by the Federal Court.]
>
> [94] There is no jurisprudence that specifically states that a decision not to designate constitutes "Crown conduct" that satisfies the second part of the test. That said, I find *Ermineskin* to be the most instructive. The above passage from Ermineskin would appear to stand for the proposition that it is the consideration of a designation order, to be positively or negatively determined in the circumstances of the particular case, that qualifies as Crown conduct. This is consistent with the "generous, purposive approach that must be brought to the

> duty to consult" under the second step of the *Rio Tinto* framework (Rio Tinto at para 43). In the present matter, unlike in *Ermineskin*, Mikisew was the party who made the request to the Minister. However, as in *Ermineskin*, the Minister had to consider whether she should issue a designation order or not. Accordingly, guided by *Ermineskin*, I find that the Minister's consideration of Mikisew's request constitutes Crown conduct, thereby satisfying step two of the test.

[48] In this case, the Federal Court reached a different conclusion from the one drawn in *Ermineskin* with respect to the third element of the test. The Federal Court reasoned that the designation decision would not potentially adversely impact a claim or right of the Mikisew because the Mikisew had the right to participate in the Alberta environmental assessment process. In the Court's view, it was that provincial process which would determine whether the Extension Project should proceed or not. The Federal Court stated as follows, at paragraph 98 of its Reasons:

> [98] Both Respondents make a convincing argument that there is still an opportunity for Mikisew to bring all of the same issues it has asserted in the present proceeding before the AER and in any Provincial EA that may be undertaken. I am unable to find that the Minister's refusal to designate will have potentially adverse impacts on Mikisew's Aboriginal and Treaty rights because it is the AER that examines the Extension Project and any environmental or Aboriginal and Treaty right concerns. Mikisew will be a participant in that process and will have an opportunity to bring its views forward. Accordingly, even taking into account the generous and purposive approach that must be brought to the [duty to consult], I find that the third part of the Rio Tinto framework has not been met.

[49] In reaching its conclusion, the Federal Court distinguished all of the cases relied on by the Mikisew, with the exception of *Ermineskin*, which, as noted, it followed in part: see paras. 82-90. The cases so distinguished by the Federal Court included: *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2015 BCSC 1180, rev'd 2016 BCCA 500, leave to appeal to SCC refused, 37449 (15 June 2017); *Da'naxda'xw/Awaetlala First Nation v.*

British Columbia (Attorney General), 2011 BCSC 620, 202 A.C.W.S. (3d) 642; *Chartrand v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345, 376 B.C.A.C. 54; *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, 223 A.C.W.S. (3d) 740, leave to appeal to SCC refused, 35236 (19 September 2013); *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, aff'd 2008 FCA 20; *Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2014 FC 1244, rev'd 2016 FCA 311, aff'd 2018 SCC 40; *Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34, 85 B.C.L.R. (5th) 360 [*Coastal First Nations*].

D. *Discussion*

[50] With this background in mind, I turn now to the examination of whether the Federal Court erred in its conclusion that the duty to consult was not triggered.

[51] In examining this question, it is essential to correctly characterize the Crown conduct at issue. Here, the contemplated conduct involves the Minister's determination of whether or not to issue a designation under subsection 14(2) of CEAA, 2012. Thus, the decision involves consideration by the Minister of whether or not to exercise a discretionary power afforded to her by statute. The fact that a determination on whether or not to exercise a statutory power was at play, however, is not determinative of whether the duty to consult arises. Rather, it is the potential impact of the conduct that must be assessed.

[52] As noted, the Supreme Court held in *Rio Tinto* that both the second and third elements of the test it set out in that case require consideration of the potential of the decision or conduct to negatively impact Aboriginal or Treaty claims or rights. There is accordingly a degree of overlap between the second and third elements in the test.

[53] The distinction between the two elements is that, under the second element, what is assessed is the general nature of the potential impact of a contemplated decision or conduct on Aboriginal or Treaty claims or rights to determine whether such an impact exists. The third element of the test, on the other hand, focusses on causation and assesses the degree to which the decision or conduct gives rise to non-speculative impacts.

[54] The Saskatchewan Court of Appeal has recently discussed the distinction between the second and third elements of the test from *Rio Tinto* in *George Gordon First Nation v. Saskatchewan*, 2022 SKCA 41, leave to appeal to SCC refused, 40184 (16 March 2023). In that case, the Court held that, under the second element, "… there must be current contemplated Crown conduct or a Crown decision… that may adversely have an impact on the claim or right **at some point in time**": at para. 87 [emphasis added]. As concerns the third element, the Saskatchewan Court of Appeal noted that it requires that:

> … the contemplated conduct or decision … have the potential to adversely affect an Indigenous claim or right in an appreciable manner, and that the 'claimant must show a causal relationship between the proposed government conduct or decision' and the potential for such an effect (at para, 87, quoting from *Rio Tinto* at para. 45).

[55] In the case at bar, the Federal Court found that the second element was met without analyzing the potential impact of the Minister's decision. However, *Rio Tinto* mandates the consideration of the potential impact of the contemplated Crown conduct or decision under both the second and third elements of the test.

[56] It is my view that the second element of the test from *Rio Tinto* is not met in the present case. Here, there is an ongoing mandatory provincial environmental assessment in which the Mikisew have the right to participate and to be consulted. Given this, the decision of the federal Minister under subsection 14(2) of CEAA, 2012 does not have any potential impact on the Mikisew's Aboriginal or Treaty rights or claims. Any impact that might be experienced on such rights or claims would flow from an approval of the Extension Project, which will be approved—or not—by the Alberta Energy Regulator. In these circumstances, there is no contemplated conduct or decision of the federal Crown capable of affecting the Mikisew's claimed Treaty or Aboriginal rights.

[57] On this point, it must be underscored that it is not the responsibility of the federal Crown to sit in judgment of the Crown in right of Alberta's compliance with the provincial Crown's consultation and accommodation obligations. That is rather a matter for assessment by the Alberta courts. Thus, if, as the Mikisew allege will happen, the Alberta process were to unreasonably fail to adequately discharge Alberta's consultation obligations, that is a matter that could be taken up with the courts in Alberta. I agree with Canada that "the Mikisew position incorrectly characterizes the Minister's [d]ecision as a high level and strategic decision that sets the stage for future provincial decisions or regulatory authorization. The Minister has no role in

the provincial assessment processes applicable to the [Extension] Project": Canada's Memorandum of Fact and Law at para. 68.

[58] In short, the Mikisew cannot require the federal Crown to undertake consultation by making a request under subsection 14(2) of CEAA, 2012, in circumstances where there is an ongoing provincial environmental assessment process that engages the provincial Crown's duty to consult with the Mikisew.

[59] Thus, I conclude that the Federal Court erred in finding that the second element from the test in *Rio Tinto* was met in the case at bar.

[60] That said, I want to add that the foregoing conclusion regarding the lack of impact of the Minister's decision under the second element of the test from *Rio Tinto* may be different if there were a situation involving a project in respect of which a provincial environmental assessment was not required and an optional federal one was available. Determining whether a duty to consult arises and the extent of that duty are context-specific, and the foregoing hypothetical situation involves a materially different context.

[61] Turning to the third element of the test in *Rio Tinto*, I see no error in the Federal Court's conclusion that the third element of the test is not met. I agree with the Federal Court that any impact on the Mikisew's Aboriginal or Treaty rights or claims can flow only from a decision to approve the Extension Project. There is thus no causal relationship between the claimed impact and the Minister's decision.

[62] As was noted by the Saskatchewan Court of Appeal in *Buffalo River Dene Nation v. Saskatchewan (Energy and Resources)*, 2015 SKCA 31, 253 A.C.W.S. (3d) 252 at paragraph 104, "… if adverse impacts are not possible until after a later-in-time, independent decision, then it is that later decision that triggers the duty to consult".

[63] This Court endorsed a similar principle in *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, [2015] F.C.J. No. 4 at paragraph 102, where it stated that " [a]n impact that is, at best, indirect, that may or may not happen at all (such that we cannot estimate any sort of probability), and that can be fully addressed later is one that falls on the speculative side of the line, the side that does not trigger the duty to consult".

[64] As mentioned above, the Mikisew cited several cases to the Federal Court in addition to *Ermineskin* in support of their submissions on the consultation issue. I agree with the basis upon which the Federal Court distinguished these cases, which all involved materially different fact patterns than the facts at issue in the appeal before us.

[65] In terms of the additional cases now cited to this Court by the Mikisew on the consultation issue, the only one that is close to the fact pattern in the case at bar is *Coastal First Nations*. There, the British Columbia Supreme Court held, in *obiter dicta*, or non-binding comment, that the province owed a duty to consult to the First Nation applicants on whether to withdraw from an Equivalency Agreement with the federal government. Under that Agreement, British Columbia forewent its obligation to conduct an environmental assessment of the proposed Northern Gateway pipeline in favour of one conducted by the National Energy Board.

The First Nations requested that the Province consult with them and consider exercising the 30-day termination provision in that Agreement, which would have resulted in a compulsory provincial environmental assessment of the pipeline.

[66] Not only is *Coastal First Nations* not binding upon this Court, but it is also not persuasive given that the British Columbia Court of Appeal has cast doubt upon its principal holdings in *Squamish Nation v. British Columbia (Environment)*, 2019 BCCA 321, 29 B.C.L.R. (6th) 77 at paragraph 9 and *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, aff'd 2020 SCC 1 at paragraph 51. I also believe that the facts in *Coastal First Nations* are distinguishable from those in the case at bar because there has been no abdication by the federal government of a mandatory environmental assessment process in favour of a provincial one. Further, the alleged potential adverse effects on Mikisew's rights that could trigger the duty to consult in this case derive from the Alberta Energy Regulator's potential approval of the Project, not from the Minister's decision. In other words, there is no causal link between the Minister's decision not to designate a project and the potential adverse effects that Mikisew claim. For these reasons, *Coastal First Nations* does not support the conclusion that the Mikisew seek.

[67] Given the nature of the decision at issue in the instant case, I find that there was no obligation for the Minister to have consulted with the Mikisew before deciding on their designation request. Thus, the Federal Court was correct in reaching the same conclusion and the first ground of appeal fails.

III. Did the Federal Court Err in Deciding that the Minister's Decision was Reasonable?

[68] I turn next to the Mikisew's second ground of appeal, which alleges that the Federal Court erred in finding the Minister's decision reasonable. There are two aspects to the Mikisew's argument, both of which are premised on the analysis report prepared by the Agency for the Minister, as opposed to the reasons for the Minister's decision in her February 15, 2019 letter to the Mikisew.

[69] The Mikisew first submit that the Agency's analysis not only misapprehended the relationship between the Wood Buffalo National Park, the Peace-Athabasca Delta, and Lake Athabasca, but also ignored evidence regarding the Extension Project's impacts on these areas. They highlight that, although Parks Canada concluded that the Extension Project may contribute to water quality and quantity changes in the Athabasca River and potential cumulative impacts within the Peace-Athabasca Delta in Wood Buffalo National Park World Heritage Site, the Agency considered the adverse effects unlikely since ECCC did not identify concerns relating to these aspects. The Mikisew say that it is not rational for the Agency to have preferred the opinion of ECCC to that of Parks Canada on an issue relating to federal land and parks. They also argue that this statement was untrue because ECCC did identify such concerns.

[70] Second, they submit that the Agency unreasonably considered whether the Project was likely to cause adverse environmental effects, contrary to CEAA, 2012, and the Agency's own Guidance Document, which encourages the consideration of the potential for such effects, as opposed to their likelihood, when the Minister is considering a designation request.

[71] The latter argument appears not to have been made before the Federal Court, nor was it considered by that Court in the decision under appeal. Neither of the respondents objected to the right of the Mikisew to raise this argument on appeal. As no additional evidence is required to address this argument and the ability of the Mikisew to make their second argument was not raised during the hearing before this Court, I would exercise our discretion to consider it.

[72] In examining these issues, this Court must determine whether the Federal Court selected the correct standard of review and, if so, whether it applied it properly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, [2021] S.C.J. No. 42 at paras. 10-12; *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320, (3d) 288, 32 C.E.L.R. (4th) 18 at para. 21, leave to appeal to SCC refused, 39066 (14 May 2020) [*Taseko Mines #1*]; *Ontario Power Generation Inc. v. Greenpeace Canada*, 2015 FCA 186, 256 A.C.W.S. (3d) 844 at para. 117, leave to appeal to SCC refused, 36711 (28 April 2016).

[73] There is no dispute that the reasonableness standard applies to both of the Mikisew's arguments. There is also nothing to indicate that the presumptive application of that standard should be departed from: *Vavilov* at para. 33. Thus, I must determine whether the Minister's decision in respect of the two arguments raised on appeal was reasonable.

[74] Prior to delving into each of the Mikisew's reasonableness arguments, it is necessary to review the Minister's decision, the material that was before her when she made her decision, and the Reasons of the Federal Court.

A. *The Reasons of the Minister*

[75] As noted, the Minister's reasons for her decision were brief. They are quoted in their entirety in the decision of the Federal Court, so I will not repeat them in their entirety here. I will instead merely highlight their salient points.

[76] In her reasons, the Minister stated that, in making her decision, she carefully considered the input from Indigenous groups, provincial authorities, CNRL, and scientific information provided by federal departments, including Fisheries and Oceans Canada, ECCC, Natural Resources Canada, Health Canada, Transport Canada, and Parks Canada. She continued by noting that a provincial environmental assessment, as well as federal and provincial regulatory mechanisms, would apply to the Extension Project.

[77] Her primary reasons for declining to exercise her discretion to designate the Extension Project are set out in the following two paragraphs on page 2 of the letter, which provided as follows:

> In making a determination on whether to designate these projects, I considered whether the projects may cause adverse environmental effects or whether concerns regarding those effects warrant designation. After also considering existing provincial assessment and federal and provincial regulatory mechanisms to mitigate any potential impacts associated with these projects, I have decided not to designate the [Extension Project] … for environmental assessment under [CEAA, 2012].
>
> I am confident that any potential effects to fish and fish habitat and migratory birds will be addressed through the [Provincial Environmental Assessment] under Alberta's *Environmental Protection and Enhancement Act*, and federal and provincial regulatory requirements pursuant to the federal *Fisheries Act*, *Migratory Birds Convention Act, 1994*, and the existing Alberta *Water Act*

> approval for the Horizon Oil Sands Mine. I would also note that no air quality effects are predicted beyond 1 kilometre outside the lease boundary.

[78] The Minister concluded her decision not to designate the Extension Project with some general remarks. She encouraged the Mikisew to participate in the environmental assessment being conducted by the Alberta Energy Regulator. She also highlighted ongoing monitoring efforts outside environmental assessment processes that focussed on the cumulative effects of oil sands projects and the development of an action plan for Wood Buffalo National Park in which the Mikisew were participating, along with Parks Canada.

[79] Notably, the Minister stated nowhere in her reasons that she considered the likelihood, as opposed to the possibility of, any adverse environmental effects.

B. *The Materials that were Before the Minister*

[80] The Minister had the following materials before her when she made her decision: the two memoranda from the Agency, its analysis report, the July 5, 2018, letter to the Agency from the Mikisew and three other Indigenous groups, as well as similar correspondence from other Indigenous groups. Only the Mikisew's submissions, the first memorandum and the Agency's analysis report are relevant to the issues raised on appeal.

[81] I have already reviewed what was said in the Mikisew's July 5, 2018 letter in the previous section of these Reasons, dealing with consultation.

[82] In its first memo, the Agency set out its reasons for recommending that the Minister decline the Mikisew's designation request, stating in the final paragraph of the summary of its recommendations:

> After considering expert information from federal departments and considering existing provincial environmental assessment and federal and provincial regulatory mechanisms, the Agency recommends that you do not designate either the Extension Project … as the concerns do not warrant a federal environmental assessment.

[83] This is the essence of the Agency's reasons for its recommendation that the potential adverse effects associated with the Extension Project did not warrant federal designation. In the pages that follow in the first memorandum, the Agency provided more detail for its recommendation and summarized the context, the relevant decision-making framework, the information received by the Agency, and its analysis.

[84] In terms of context, the Agency noted that the Extension Project is subject to a provincial environmental assessment under Alberta's EPEA and will require approvals under Alberta's *Oil Sands Conservation Act*, *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, *Water Act*, and *Public Lands Act*, RSA 2000, c P-40. The Agency also noted that Fisheries and Oceans Canada may require adjustments to an authorization for the mine issued in 2004 under the *Fisheries Act* if it determines that the Extension Project is likely to result in serious harm to fish and fish habitat that is not covered by the existing authorization, but that no other federal approvals were required.

[85] In the analysis section, the Agency noted that several departments and Parks Canada had identified potential adverse environmental impacts. The effects relevant to the Mikisew's arguments on appeal were stated to be as follows:

- ECCC identified potential impacts from the Extension Project on migratory birds and species at risk, air quality, water quality and hydrology; and
- Parks Canada noted that the Extension Project may have the potential to contribute to water quantity changes in the Athabasca River that may result in additional cumulative impacts on the quantity of water in the Peace-Athabasca Delta in Wood Buffalo National Park World Heritage Site. These, in turn, may adversely impact the exercise of rights for Indigenous groups that utilize the Athabasca River and the Peace-Athabasca Delta.

[86] In terms of the reasons for its recommendation, the Agency noted that there "…may be potential for adverse environmental effects from the Extension Project…within areas of federal jurisdiction defined in section 5 of CEAA, 2012…and there are public (Indigenous) concerns related to those effects".

[87] In three places in the memorandum, the Agency stated that such adverse environmental effects were unlikely to occur as a result of the Extension Project.

[88] With respect to fish and fish habitat, the Agency wrote:

> In the Agency's view, adverse environmental effects to fish and fish habitat are unlikely to occur from [another project that is not at issue in this appeal], while the Extension Project **may cause** adverse environmental effects to fish and fish habitat. The Agency **considered the existing federal and provincial regulatory mechanisms which may apply** (including the Fisheries Act). **After considering that information, the Agency is of the view that the carrying out of physical activities related to the Extension Project is unlikely to cause adverse environmental effects to fish and fish habitat.** Therefore, those effects or concerns related to those effects do not warrant designation under subsection 14(2) of CEAA 2012.
>
> (at p.4 of the memo)
>
> [Emphasis added]

[89] With respect to adverse environmental effects to migratory birds, the Agency wrote:

> … there **may be** adverse environmental effects to migratory birds, including species at risk, from the Extension Project. **The Agency considered the existing provincial and federal regulatory mechanisms** which may apply (including the *Migratory Birds Convention Act*, 1994), **and the spatially and temporally limited effects to migratory bird habitat**. **After considering that information**, the Agency is of the view that the carrying out of physical activities related to the Extension Project … is **unlikely to cause adverse environmental effects to migratory birds**. Therefore, those effects or concerns do not warrant designation under subsection 14(2) of CEAA 2012.
>
> (at pp.4-5 of the memo)
>
> [Emphasis added]

[90] With respect to the concerns raised by Indigenous people, the Agency noted, with respect to those coming within paragraph 5(1)(c) of CEAA, 2012, that:

> In the Agency's view, **there may be adverse environmental effects** from the Extension Project …. **to Indigenous Peoples as described in paragraph 5(l)(c) of CEAA 2012. Considering the provincial Terms of Reference for the**

> **Extension Project's ongoing environmental assessment, other federal and provincial regulatory mechanisms**, and that predicted air quality effects from the [other project that is not at issue in this appeal] are limited to within 1 kilometre outside the lease boundary, **the Agency is of the view that the carrying out of physical activities related to the Extension Project and Froth Treatment Project is unlikely to cause adverse environmental effects to Indigenous Peoples**. Therefore, those effects or concerns related to those effects do not warrant designation under subsection 14(2) of CEAA 2012.
>
> (at p. 5 of the memo)
>
> [Emphasis added]

[91] The use of the wording "unlikely to cause" in these passages is rooted in the fact that a provincial assessment and other federal regulatory processes would identify, assess, and possibly mitigate such effects. The potential for impacts, when discussed without reference to such processes, on the other hand, was described by the use of the word "may".

[92] Turning to the Agency's analysis report, the Agency analyzed in greater detail the inputs received from various federal Departments, Parks Canada, the Alberta Energy Regulator, CNRL and various Indigenous groups. The Agency noted that neither Parks Canada nor ECCC took any position on whether the Minister should exercise her discretion and designate the Extension project under subsection 14(2) of CEAA, 2012. The report also repeats, and to a certain extent, expands upon the same reasons found in the Agency's first memorandum to the Minister.

[93] With respect to the water quality and quantity changes in the Athabasca River and potential cumulative impacts within the Peace-Athabasca Delta, the Agency discussed the concerns of Indigenous groups, stating:

> Indigenous groups are concerned about the potential adverse cumulative impacts of the Extension Project and the Froth Treatment Project on Wood Buffalo National Park World Heritage Site, the Outstanding Universal Value of the Park, and the Peace Athabasca Delta, as these areas are important traditional land use areas. Indigenous groups referenced findings from the World Heritage Committee/International Union for the Conservation of Nature Reactive Monitoring Report and highlighted the potential impact from flow reductions associated with the extra withdrawal of water from the Athabasca River. Quoting the Report, Indigenous groups argue that "each subsequent even marginal change in the hydrology could have potentially magnified effects on the ecology of an already impacted system."
>
> [at p. 16 of the report]

[94] The Agency also summarized the input from Parks Canada and ECCC on the issue.

[95] More specifically, the Agency noted that Parks Canada advised that the Extension Project:

> ….may have the potential to contribute to water quality and quantity changes in the Athabasca River that may result in additional cumulative impacts on both water quality and quantity within the Peace Athabasca Delta in Wood Buffalo National Park World Heritage Site [and thus] … may have potential adverse environmental effects, as defined under section 5 of CEAA 2012, related to the water quality and quantity in the Peace Athabasca Delta.
>
> [at p. 23 of the report]

[96] It highlighted somewhat similar concerns from ECCC, stating:

> [ECCC] indicated that potential impacts to water quality from runoff, erosion, and sedimentation may occur as the Extension Project is in close proximity to the Athabasca River. Environment and Climate Change Canada noted that the Extension Project may affect the hydrological conditions of the Calumet River. Three diversion channels are proposed as part of the Extension Project within the Calumet River watershed and a portion of the Extension Project infrastructure would occupy 19 percent of the Calumet River watershed, potentially causing a decrease in the flow from the Calumet River into to the Athabasca River. The Calumet River contributes less than 0.1 percent of the annual flow of the Athabasca River. Environment and Climate Change Canada noted declining water levels in Lake Athabasca (receiving waterbody of the Athabasca River) between 1956 and 2011, and that additional water withdrawal may contribute to negative cumulative effects on the region.
>
> [at pp. 22-23 of the report]

[97] The Agency's assessment of the concerns regarding the water quality and quantity changes in the Athabasca River and potential cumulative impacts within the Peace-Athabasca Delta were among many of the potential effects that the Agency addressed in its first memo, none of the others of which are contested in this appeal. On this issue, the Agency noted that impacts on fish and fish habitat would be addressed by Fisheries and Oceans Canada, who indicated that it would engage with Indigenous groups as required in its review process.

[98] The Agency also noted that the TORs for the Alberta environmental assessment process before the Alberta Energy Regulator directed CNRL to "…describe traditional land use areas and specific sites, the availability of traditional resources, Indigenous views on reclamation, and traditional ecological knowledge; to determine the impacts of the Project on traditional, medicinal and cultural purposes; and to identify possible mitigation strategies": at p. 28 of the

report. This requirement in the TORs played a significant role in the Agency's analysis and its recommendation that designation was not warranted.

[99] While it is true, as the Mikisew allege, that the Agency did state, at one point in its report, that ECCC expressed no concerns about certain aspects of potential impacts for Wood Buffalo National Park, the Agency's comments must be read in context, which involves a discussion of that World Heritage Site and not hydrology. The comments appear in the section of its analysis entitled "Federal Lands". The paragraph in the report in which the impugned comment appeared stated in full:

> The Agency understands that the Strategic Environmental Assessment of Wood Buffalo National Park World Heritage Site presented to the United Nations World Heritage Committee recommended that environmental effects from projects that may significantly affect the Outstanding Universal Values of Wood Buffalo National Park World Heritage Site should undergo an assessment. While Indigenous groups expressed concerns about effects to Wood Buffalo National Park World Heritage Site, the Agency considers it unlikely that there would be adverse environmental effects on Wood Buffalo National Park World Heritage Site related to water quality and quantity or migratory bird effects from the Extension Project and the Froth Treatment Project, as Environment and Climate Change Canada did not identify concerns related to these aspects.

[100] As in the first memo, there are several places in the Agency's report where it used the terminology "not likely to cause adverse environmental effects". Although I will discuss my reservations about the Agency's use of this language below, it is clear that, when read in context, these comments are like those made in the Agency's first memorandum and are rooted in the fact that a provincial assessment and other federal regulatory processes would identify, assess, and possibly mitigate such effects. The potential for impacts, on the other hand, when discussed

without reference to such processes, was most often described by use of the word “may” in the report.

C. *Reasons of the Federal Court*

[101] As noted, the Federal Court did not address the impact of the “likelihood” language used in the Agency’s memorandum and report. That argument does not appear to have been made before it.

[102] The Federal Court did consider the arguments now made by the Mikisew regarding the reasonableness of the Agency’s treatment of the concerns about water quality and quantity within the Peace-Athabasca Delta in Wood Buffalo National Park World Heritage Site in its report. These arguments were but one of several challenges that the Mikisew made to the Federal Court concerning the reasonableness of the Agency’s report.

[103] The Federal Court dismissed these arguments and found, at paragraphs 112-114, that:

- ECCC’s views indicated the possibility or potential of such adverse impacts;
- the Agency did not ignore Parks Canada’s submissions; and
- the Agency did not misrepresent or ignore ECCC’s views.

[104] On the final point, the Federal Court stated, at paragraph 113, that:

> ECCC’s views relate directly to the Extension Project and [the other project not at issue in this appeal] and it clearly expressed its views that there is potential for

> cumulative impacts. The passage Mikisew highlights refers to the broader WBNP WHS area which does not appear to be the area to which ECCC was commenting on, at least based on the summary contained in the Agency Analysis.

D. *Analysis*

[105] I turn now to consider the Mikisew's two reasonableness arguments.

[106] In discussing these arguments, it is critical to bear in mind that the decision under review in this appeal is the Minister's decision not to designate the Extension Project, for which she gave reasons, and not the Agency's memoranda or report: *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153, [2018] F.C.J. No. 876 at paras. 4-5, leave to appeal to SCC refused, 38379 (2 May 2019) [*Tsleil-Waututh*].

[107] This Court has repeatedly held that such reports, produced by responsible authorities under CEAA, 2012, for consideration by the Minister or the Governor in Council (GIC), are not justiciable on their own because they affect no legal rights and carry no legal consequences: see *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 319, 313 A.C.W.S. (3d) 312 at para. 43, leave to appeal to SCC refused, 39066 (14 May 2020) [*Taseko Mines #2*] citing *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418, leave to appeal to SCC refused, 37201 (9 February 2017) at paras. 121-123, 125 [*Gitxaala Nation*] and *Tsleil-Waututh* at paras. 179-180.

[108] That said, such reports are not entirely shielded from consideration in the judicial review of a subsequent decision made by the GIC or the Minister, where that decision relies on the report at issue: *Taseko Mines #2* at para. 45. In the context of a report issued by the National

Energy Board (NEB) to the GIC, prior to the GIC's decision to issue a certificate of public convenience and necessity in respect of the Trans Mountain pipeline extension, this Court held in *Tsleil-Waututh* at paragraph 201:

> The Court must be satisfied that the decision of the Governor in Council is lawful, reasonable and constitutionally valid. If the decision of the Governor in Council is **based upon a materially flawed report** the decision may be set aside on that basis. Put another way, **under the legislation the Governor in Council can act only if it has a "report" before it; a materially deficient report, such as one that falls short of legislative standards, is not such a report.** In this context the Board's report may be reviewed to ensure that it was a "report" that the Governor in Council could rely upon. The report is not immune from review by this Court and the Supreme Court.
>
> [Emphasis added]

[109] Thus, the test to be applied to the report at issue in that case was whether the report was materially flawed. While the scope of what constitutes a material flaw remains relatively undefined, one example, as identified in *Tsleil-Waututh,* is a report that falls short of legislative standards.

[110] The statutory context in *Tsleil-Waututh, Gitxaala Nation,* and *Taseko Mines #2* required the NEB to issue a report that considered the environmental effects enshrined in section 5 of CEAA, 2012. That section provides:

Environmental effects	**Effets environnementaux**
5 (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are	**5 (1)** Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un

projet désigné ou d’un projet sont les suivants :

(a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:

a) les changements qui risquent d’être causés aux composantes ci-après de l’environnement qui relèvent de la compétence législative du Parlement :

(i) fish and fish habitat as defined in subsection 2(1) of the Fisheries Act,

(i) les poissons et leur habitat, au sens du paragraphe 2(1) de la Loi sur les pêches,

(ii) aquatic species as defined in subsection 2(1) of the Species at Risk Act,

(ii) les espèces aquatiques au sens du paragraphe 2(1) de la Loi sur les espèces en péril,

(iii) migratory birds as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and

(iii) les oiseaux migrateurs au sens du paragraphe 2(1) de la Loi de 1994 sur la convention concernant les oiseaux migrateurs,

(iv) any other component of the environment that is set out in Schedule 2;

(iv) toute autre composante de l’environnement mentionnée à l’annexe 2;

(b) a change that may be caused to the environment that would occur

b) les changements qui risquent d’être causés à l’environnement, selon le cas:

(i) on federal lands,

(i) sur le territoire domanial,

(ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or

(ii) dans une province autre que celle dans laquelle la mesure est prise, l’activité est exercée ou le projet désigné ou le projet est réalisé,

(iii) outside Canada; and

(iii) à l’étranger;

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes, or

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

c) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas:

(i) en matière sanitaire et socio-économique,

(ii) sur le patrimoine naturel et le patrimoine culturel,

(iii) sur l'usage courant de terres et de ressources à des fins traditionnelles,

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

Exercise of power or performance of duty or function by federal authority

(2) However, if the carrying out of the physical activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:

(a) a change, other than those referred to in paragraphs (1)(a) and (b), that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or

Exercice d'attributions par une autorité fédérale

(2) Toutefois, si l'exercice de l'activité ou la réalisation du projet désigné ou du projet exige l'exercice, par une autorité fédérale, d'attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi, les effets environnementaux comprennent en outre :

a) les changements — autres que ceux visés aux alinéas (1)a) et b) — qui risquent d'être causés à l'environnement et qui sont directement liés ou nécessairement accessoires aux attributions que l'autorité

function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and	fédérale doit exercer pour permettre l'exercice en tout ou en partie de l'activité ou la réalisation en tout ou en partie du projet désigné ou du projet;
(b) an effect, other than those referred to in paragraph (1)(c), of any change referred to in paragraph (a) on	**b)** les répercussions — autres que celles visées à l'alinéa (1)c) — des changements visés à l'alinéa a), selon le cas:
(i) health and socio-economic conditions,	**(i)** sur les plans sanitaire et socio-économique,
(ii) physical and cultural heritage, or	**(ii)** sur le patrimoine naturel et le patrimoine culturel,
(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.	**(iii)** sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

[111] By contrast, the required contents of a report delivered by the Agency to the Minister in respect of a request that the Minister exercise her authority under subsection 14(2) of CEAA, 2012, to designate was not governed by any statutory criteria, other than section 103. As noted, that section required the Agency to simply assist and advise the Minister in exercising her powers under CEAA, 2012.

[112] Subsection 14(2) of CEAA, 2012 is similarly entirely open-ended. The subsection provides a broad discretion to the Minister in deciding whether to designate a physical activity that is not prescribed by regulations made under paragraph 84(a) of the Act. It is useful to recall what the subsection said. It provides:

Minister's power to designate	**Pouvoir du ministre de désigner**
14(2) The Minister may, by order, designate a physical activity that is not prescribed by regulations made under paragraph 84(a) if, in the Minister's opinion, either the carrying out of that physical activity may cause adverse environmental effects or public concerns related to those effects may warrant the designation.	**14(2)** Le ministre peut, par arrêté, désigner toute activité concrète qui n'est pas désignée par règlement pris en vertu de l'alinéa 84a), s'il est d'avis que l'exercice de l'activité peut entraîner des effets environnementaux négatifs ou que les préoccupations du public concernant les effets environnementaux négatifs que l'exercice de l'activité peut entraîner le justifient.

[113] The use of the word "may" twice in that subsection highlights just how broad the discretion is that the Minister enjoys under that subsection. The Minister has the discretion to issue a designation—or not—in all circumstances, including where the Minister believes there might be adverse environmental impacts from a project. As I will further elaborate on below, this breadth of discretion is an important contextual factor in review of the reasonableness of the Minister's decision not to designate the Extension Project.

[114] In *Vavilov*, the Supreme Court of Canada held that the statutory provisions applicable to a particular decision are an important factor in considering the reasonableness of the decision. The majority noted at paragraph 108 of *Vavilov* that, "… the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision". It continued by stating, "[t]he statutory scheme … informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for [the decision-maker] to fetter that discretion": at para. 108, citing to *Delta Air Lines Inc. v. Lukács*,

2018 SCC 2, [2018] 1 S.C.R. 6 at para. 18. In paragraph 110 of *Vavilov*, the majority made the following comments that are particularly relevant to the case at bar:

> Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, **where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language.** Other language will fall in the middle of this spectrum. **All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made**. What matters is **whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting**.
>
> [Emphasis added]

[115] In other words, administrative decisions are easier or harder to set aside depending on their legislative context that may liberate or constrain a particular decision maker: *Vavilov* at paras. 88–90; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, aff'd 2022 SCC 30 at para. 24 [*Entertainment Software FCA*].

[116] Administrative decision-makers are less constrained where they act under broad statutory wording that is capable of an array of meanings: *Vavilov* at para. 110; *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82, [2019] 3 F.C.R. 81 at para. 33; *Canada*

(Attorney General) v. Boogaard, 2015 FCA 150, [2015] F.C.J. No. 775 (QL) at para. 42, leave to appeal to SCC refused, 36621 (7 April 2016) [*Boogaard*]; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245, [2015] 4 F.C.R. 75 at para. 69 [*Forest Ethics*]. Administrative decision-makers are similarly less constrained by provisions that vest them with a broad scope of discretion: *Vavilov* at para. 108; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810.

[117] Thus, the broad discretion afforded to the Minister under subsection 14(2) of CEAA, 2012, and the absence of any statutory or regulatory recipe prescribing the parameters of the advice the Agency was required to give the Minister in respect of a designation request, are important factors to keep in mind when considering the reasonableness of a ministerial decision under subsection 14(2) of CEAA, 2012.

[118] Further, decisions that can be considered executive in nature—because they involve public interest determinations based on wide considerations of policy and public interest, assessed on "polycentric, subjective or indistinct criteria and shaped by the administrative decision makers' view of economics, cultural considerations and the broader public interest"—are very much unconstrained: *Vavilov* at para. 110; *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224, [2020] 1 F.C.R. 362 at paras. 18–19, leave to appeal to SCC refused, 38892 (5 March 2020) [*Raincoast Conservation Foundation*]; *Canadian National Railway Company v. Emerson Milling Inc*., 2017 FCA 79, [2018] 2 F.C.R. 573

[*Emerson Milling*] at paras. 72–73; *Gitxaala Nation* at para. 150; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paras. 30 and 31.

[119] These principles were recently applied by this Court in *Raincoast Conservation Foundation*, which is somewhat analogous to the case at bar. There, the applicants argued that a GIC decision to approve the Trans Mountain Pipeline project was unreasonable and that the Crown did not adequately consult with Indigenous peoples and First Nations on the approval. Stratas J.A., writing about reasonableness review in this context, found that the GIC should be given the "widest margin of appreciation" over its decision since it is equipped with the expertise to consider and weigh the competing economic, cultural, environmental, and broader public interest concerns at play in relation to the approval of a given project: paras. 18-19, citing *Gitxaala Nation* at paras. 142-143, 150, 155; *Tsleil-Waututh* at para. 206.

[120] Indeed, this Court has repeatedly held that "[when] decisions made by administrative decision makers lie more within the expertise and experience of the executive rather than the courts, courts must afford administrative decision makers a greater margin of appreciation": *Gitxaala Nation* at para. 147, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117, [2015] F.C.J. No. 549 at para. 21; *Boogaard* at para. 62; *Forest Ethics* at para. 82; see also guidance in *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, [2016] 1 F.C.R. 446 at para. 136, leave to appeal to SCC refused, 36471 (29 October 2015).

[121] In this case, in light of the foregoing, the Minister is owed a similarly large margin of appreciation on her decision not to designate the Extension Project in light of the policy and

public interest considerations that the Minister is entitled to consider in making her determination: *Vavilov* at para. 110.

[122] I turn now more specifically to the first of the Mikisew's reasonableness arguments and find that they provide no basis for setting aside the Minister's decision not to designate the Extension Project.

[123] Contrary to what the Mikisew assert, it is evident from the record that the Minister did not misapprehend or ignore Parks Canada's submissions. The Minister's reasons state that she "carefully considered" the input from federal departments and Parks Canada. The Agency's report also summarizes Parks Canada's submissions on the potential for adverse effects. Thus, it is clear to me that both the Agency and the Minister did consider the submissions of Parks Canada.

[124] Moreover, the Minister was not required to accept Parks Canada's views or to prefer them over the views of ECCC. It was within the Minister's broad discretion under subsection 14(2) to find that designation was not warranted, regardless of the views advanced by any party.

[125] The Mikisew also take issue with the Agency's finding that ECCC did not identify adverse effects relating to water quality and quantity or migratory birds, given that the Report acknowledges that ECCC noted that additional water withdrawal may contribute to negative cumulative effects in the region. However, this mischaracterizes the Agency's summary of ECCC's submissions and the Agency's findings.

[126] As noted, the Agency did set out ECCC's position regarding the potential for adverse environmental effects in respect of hydrology on the Calumet and Athabasca Rivers and in the Peace-Athabasca Delta region. The paragraph in the report dealing with the Wood Buffalo National Park World Heritage Site that the Mikisew rely on has to be read in context, which involved a discussion of that World Heritage Site, as opposed to hydrology.

[127] Moreover, even if the Agency confounded to a certain extent the World Heritage Site and the Peace-Athabasca Delta in the manner the Mikisew allege, that would not be a sufficient basis for setting the Minister's decision aside. A judicial review application is not a treasure hunt for error in the reasons of an administrative decision-maker, as the Supreme Court of Canada cautioned in *Vavilov* at paragraph 102.

[128] In addition, the impugned paragraph is not even in the Minister's reasons, but is twice removed from them since it is contained in a report that the Agency prepared for the purposes of advising the Minister in its first memorandum. As already discussed, the decision under review in this appeal is the Minister's decision not to designate the Extension Project—not the report and not the memoranda summarizing it. The report is only reviewable on this appeal insofar as it is materially deficient. In this case, the alleged errors in how the Agency considered Parks Canada's concerns do not meet the high bar of a material deficiency. Accordingly, I do not accept the Mikisew's first reasonableness argument.

[129] I reach the same conclusion on their second reasonableness argument.

[130] While it is true that the likelihood of potential adverse effects is typically assessed through evidence-based environmental assessments conducted under CEAA, 2012, it is my view that the Minister and the Agency may consider the likelihood of adverse environmental impacts in making a designation decision under subsection 14(2) of CEAA, 2012 or in providing advice to the Minister about such a decision.

[131] The possibility for the Agency to consider likelihood was contemplated in the Agency's own Guidance Document, which provided that, in formulating its advice to the Minister, the Agency "…would take into account [among other matters] … whether there is potential for adverse environmental effects within federal jurisdiction, as set out in section 5 of [CEAA, 2012], **and the anticipated nature and extent of those effects**" [emphasis added].

[132] In my view, anticipated nature and extent encompasses the consideration of both the potential for adverse effects, as well as their probability. In this way, the reference to anticipated nature and extent in the Guidance Document, in my view, includes likelihood.

[133] Further, it seems nonsensical to suggest that the Minister would need to be blind to the degree of likelihood of potential adverse effects occurring when assessing whether or not to require an assessment, assuming that the Minister has technical information that indicates as such. While the exercise of the Minister's discretion under subsection 14(2) of CEAA, 2012 is not premised on a finding of likelihood, it does not follow that likelihood could never be considered by the Minister in deciding whether a project should be designated. Were this so, small projects with little actual likely environmental impact would need to be considered on the

same basis as much larger projects, where large likely environmental impacts could be readily anticipated.

[134] Thus, as a matter of principle, I do not believe that the Minister is barred from ever considering the likelihood of adverse impacts under section 14(2) of CEAA, 2012, particularly in view of the broad discretionary authority subsection 14(2) afforded the Minister.

[135] This conclusion, however, is not the end of the matter. If the Minister were to decline to designate a project because there is little likelihood of adverse environmental effects, there must be a reasonable basis for reaching such a conclusion. One could foresee that the Agency might well be in possession of scientific studies or have conducted a recent environmental assessment, in the context of an extension request, that would provide a reasonable basis for reaching a likelihood determination. In this case, however, many of the Agency's conclusions around likeliness do not reference any such studies.

[136] The distinction between potential and likely is not a superficial one in this context. At the heart of this distinction is the fact that environmental assessments are evidence-based processes to identify, predict, and evaluate the likelihood of potential environmental effects of a proposed project, and respond to them: *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)* (C.A.), 2001 CanLII 22029 (FCA), [2001] 2 FC 461 at para. 17; *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463, 242 A.C.W.S. (3d) 842, rev'd (on other grounds) 2015 FCA 186 at paras. 106-107, leave to appeal to SCC refused, 36711 (28 April 2016). The body conducting the environmental assessment is meant to have the expertise, resources

available to it, and the processes in place to conduct that analysis. On the basis of the information received as to the likelihood of particular effects, the Minister or GIC ultimately decides whether or not a project subject to a federal environmental assessment can proceed: see ss. 31, 52, 53 of CEAA, 2012. In this way, environmental assessment is a cornerstone for sustainable development. It is "a planning tool that is now generally regarded as an integral component of sound decision-making": *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, [1992] S.C.J. No. 1 at 71.

[137] When the Minister contemplates whether to designate a physical activity under subsection 14(2) of CEAA, 2012, there is no evidence-based processes of comparable depth to identify, predict, and evaluate the likelihood of potential environmental effects of a proposed project. Given this, the Agency should be cautious with the language and framework that it uses in developing recommendations to the Minister with reference to designation requests. It would be preferable if, in future, the Agency avoided the term "likelihood" in a report made at the designation stage unless it has the requisite scientific evidence to reach a likelihood determination similar to that reached in an assessment process.

[138] That said, the unfortunate use of the term "likelihood" by the Agency in its memorandum and report does not lead me to conclude that the Minister's decision not to designate the Extension Project should be set aside in this case. This is so for two reasons.

[139] First, and most importantly, as her reasons demonstrate, the Minister did not proceed on the basis of likelihood. Instead, her decision was grounded in the existence of other provincial and federal processes, which would manage (or not) the identified adverse impacts.

[140] Second, the Agency's use of "likelihood" in its memorandum and report must be read in context. What I understand the Agency to have meant is that there was no need for a federal assessment in this case because any potential adverse effects would be identified and addressed through other existing processes. While this is a misuse of the term "likelihood" in the context of how that term is used in CEAA, 2012, this misuse does not amount to a material deficiency that would justify invalidating the Minister's decision not to designate in this case. It was open to the Agency to have recommended that the Minister exercise her discretion to decline to designate by reason of the availability of such other processes, and the Agency's use of the term "likelihood" in its recommendations to the Minister does not change this.

[141] Hence, the misuse of the term was not a material error sufficient to taint the Minister's decision not to designate the Extension Project. I thus conclude that the second reasonableness argument advanced by the Mikisew is insufficient to set the Minister's decision aside.

[142] In sum, as concerns reasonableness—in view of the broad nature of the Minister's discretion under subsection 14(2) of CEAA, 2012, the nature of her reasons, and the facts in the case at bar—there is no reason to interfere with the Minister's decision on the basis of the Mikisew's challenges to its reasonableness.

IV. Proposed Disposition

[143] For the foregoing reasons, I would dismiss this appeal, with a single set of costs, payable to the respondents, to be divided equally between them.

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

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-52-22
STYLE OF CAUSE:	MIKISEW CREE FIRST NATION v. CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE and CANADIAN NATURAL RESOURCES LIMITED
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 29, 2023
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	PELLETIER J.A. DE MONTIGNY J.A.
DATED:	SEPTEMBER 21, 2023

APPEARANCES:

Tim Dickson Mae Price	For The Appellant
Robert Drummond James Elford	For The Respondent CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE
Tamela J. Coates, Q.C. Michelle S. Jones	For The Respondent CANADIAN NATURAL RESOURCES LIMITED

SOLICITORS OF RECORD:

JFK Law LLP Vancouver, British Columbia	For The Appellant
Shalene Curtis-Micallef Deputy Attorney General of Canada	For The Respondent CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE
Lawson Lundell LLP Vancouver, British Columbia	For The Respondent CANADIAN NATURAL RESOURCES LIMITED