Federal Court  Cour fédérale

Date: 20220204

Docket: T-481-19

Citation: 2022 FC 102

Ottawa, Ontario, February 4, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MIKISEW CREE FIRST NATION

Applicant

and

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

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mikisew Cree First Nation [Mikisew] applies for judicial review under section 18.1 of the *Federal Courts Act*, RSC, 1985 c F-7, of a decision of the Minister of Environment and Climate Change [Minister] dated February 15, 2019 [Decision]. In the Decision the Minister declined to

designate Canadian Natural Resources Limited's [CNRL] Horizon Oil Sands Mine North Pit Extension Project [Extension Project] as a reviewable project pursuant to subsection 14(2) of the now repealed *Canadian Environmental Assessment Act, 2012*, SC 2012 c 19, s 52 [*Act*].

[2] The Minister relied on the recommendation of the Canadian Environmental Assessment Agency [Agency] in making the Decision.

[3] Under subsection 14(2) of the *Act*, the Minister has discretion to designate a project not otherwise prescribed by the *Regulations Designating Physical Activities*, SOR/2012-147 [*Regulations*], "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." A designation by the Minister triggers a federal environmental assessment.

[4] Mikisew submits that the Minister breached the duty to consult [DTC] in making the Decision and that the Decision is unreasonable.

[5] The Respondents submit that the DTC was not triggered, or in the alternative, the DTC was met, and the Decision is reasonable. The Respondents submit that the Minister has broad discretion when making a decision under the *Act*.

[6] I find that the DTC was not triggered. I further find that the Decision is reasonable. The application for judicial review is dismissed.

II. Background

[7] Mikisew is a successor to one of the Indigenous groups that signed or adhered to Treaty 8. Mikisew's traditional territory is situated in Northeastern Alberta, including lands and waters around Lake Athabasca, the Peace-Athabasca Delta [PAD], and south to and including Fort McMurray and the Clearwater River.

[8] CNRL has an existing Horizon Oil Sands Mine Project [Horizon Mine Project] that is located approximately 70 kilometres north of Fort McMurray, Alberta, within the traditional lands of Mikisew. It was assessed by both Canada and Alberta as part of a Joint Review Panel and was approved by both governments in 2004. Construction began in 2005 and operations started in 2009. The Extension Project and an associated high temperature parafinnic froth treatment project [Froth Treatment Project] were not assessed as part of the original Horizon Oil Sands Project Joint Review Panel in 2004. This application only concerns the Decision not to designate the Extension Project.

[9] The Extension Project contemplates the expansion of the currently undeveloped North Pit by 3448 hectares within the Horizon Mine Project's existing lease boundaries. The Extension Project is not described in the federal *Regulations*, therefore, it was not required to undergo a federal environmental assessment. It is, however, subject to a provincial environmental assessment [Provincial EA] by the Alberta Energy Regulator [AER].

[10] In November 2017, Mikisew received a copy of the proposed Terms of Reference [TOR] for the Environmental Impact Statement [EIS], which were drafted by CNRL. The TOR set the scope for the EIS, which forms the basis of the Provincial EA. Mikisew commissioned Management Strategies Environmental Solutions [MSES] to conduct a technical review of the TOR [TOR Review].

[11] In April 2018, the EIS was filed with the AER. Mikisew also commissioned MSES to conduct a technical review of the EIS [EIS Review].

[12] On July 5, 2018, Mikisew and other Indigenous groups submitted a request to the Minister that she designate the Extension Project for a federal environmental assessment under subsection 14(2) of the *Act*. They expressed concerns about significant adverse environmental effects of the Extension Project on the Athabasca River, Wood Buffalo National Park [WBNP] (part of which is a world heritage site), the PAD, and the cumulative effects on Aboriginal or Treaty rights. They also expressed concerns that the Provincial EA process could not adequately address the Extension Project's potential environmental and cumulative effects. While the Minister also corresponded with these other Indigenous groups, for the purpose of this application, I will refer only to the correspondence between Mikisew and the Minister and/or the Agency.

[13] Under subsection 2(1) of the *Act*, a designated project is defined as one or more physical activities that:

a) are carried out in Canada or on federal lands;

b) are designated by the *Regulations* made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and

c) are linked to the same federal authority as specified in the *Regulations* or that order.

It includes any physical activity that is incidental to those physical activities.

[14] On July 24, 2018, the Agency notified Mikisew that it would be providing advice to the Minister on whether she should designate the Extension Project. The Agency invited Mikisew to provide comments on the potential environmental effects of the Extension Project, or the potential impacts of the Extension Project on Aboriginal or Treaty rights. The Agency requested that Mikisew provide its written views and comments on these issues by August 23, 2018.

[15] On August 23, 2018, Mikisew responded to the Agency by reiterating its concerns about the Extension Project's impact on areas of federal jurisdiction including on fish and fish habitat, its impact on the tributaries around the Athabasca River, its effects on WBNP and the PAD, as well as its impacts on Aboriginal and Treaty rights. On this date, the Agency also provided Mikisew with a copy of CNRL's submissions on whether the Extension Project should be designated.

[16] On August 27, 2018, Mikisew replied to CNRL's submission and specifically took issue with the adequacy of the TOR and the EIS that CNRL had prepared. Mikisew provided the Agency with a copy of its TOR Review, prepared by MSES. Mikisew also indicated that it had provided the AER with its recommendations on how to address its concerns about the TOR but that the AER had rejected those concerns.

[17] In August 2018, Mikisew received a copy of a letter from Parks Canada providing its views on potential environmental impacts of the Extension Project. Relevant portions of the letter are set forth below:

> … The project is located upstream of [WBNP] and the Wood Buffalo National Park World Heritage Site (WBNP WHS), and particularly the Peace Athabasca Delta (PAD).
>
> Potential adverse environmental effects of the two projects, as defined under section 5 of [the *Act*], and related to Parks Canada's mandate and role as the State Party Lead for World Heritage in Canada, include:
>
> - Water quality and quantity impacts with potential effects on Fish and Fish habitat, aquatic species, and migratory birds.
> - Changes to federal lands ([WBNP])
> - Effects on Indigenous current use of lands and resources for traditional purposes.
>
> The PAD is located at the southern edge of WBNP at the confluence of the Peace, Slave, and Athabasca Rivers. The PAD is a vast inland delta, designated as a RAMSAR wetland of international significance. A recent Strategic Environmental Assessment (Independent Environmental Consultants, 2018) of the WBNP WHS highlighted a mixed understanding of PAD water quality and declining Athabasca River water quality. The proposed Project has the potential to contribute to water quality changes in the Athabasca River that may result in additional cumulative impacts on water quality within the PAD.
>
> The PAD is also a critical traditional use area for local Indigenous groups. In December 2014, the Mikisew Cree First Nation (MCFN) petitioned the UNESCO World Heritage Centre (WHC) to have the [WBNP WHS] added to the list of World Heritage in Danger, due to their concerns that the impacts of existing and planned hydroelectric and oil sands projects, climate change, and inadequacies in management frameworks were compromising the World Heritage Values of the WBNP WHS and their ability to continue traditional practices in the area.

[18] On September 20, 2018, Mikisew and other Indigenous groups met with the Agency and other federal departments regarding its designation request and concerns about the Provincial EA. In October 2018, Mikisew provided additional submissions to the Agency on why the Froth Treatment Project should be considered part of the Extension Project and, therefore, also designated for a federal assessment.

[19] On December 20, 2018, the Agency prepared a memorandum [Memo #1] to the Minister synthesizing the Agency's Analysis of Requests to Designate the Extension Project and Froth Treatment Program [Agency Analysis] under the *Act*. Mikisew did not receive a copy of the Agency Analysis until March 14, 2019. In Memo #1, the Agency recommended that the Minister decline to designate the Extension Project.

[20] On January 14, 2019, Mikisew provided the Agency with a copy of its EIS Review, prepared by MSES.

[21] On February 5, 2019, Mikisew wrote the Agency once again requesting that the Froth Treatment Project be designated as part of the Extension Project. Mikisew also summarized the contents of the EIS Review that it had provided earlier. In particular, Mikisew stated that the EIS is an incomplete document that does not address impacts on Aboriginal or Treaty rights.

[22] On February 12, 2019, the Agency submitted a memorandum [Memo #2] to the Minister. Memo #2 purported to provide additional information to the Minister in light of Mikisew's EIS

Review. The Agency maintained that the EIS Review did not change the Agency's recommendation that the Minister decline to designate the Extension Project.

[23] On February 15, 2019, the Minister wrote to Mikisew advising that the Extension Project and the Froth Treatment Project would not be designated under the *Act*.

III. The Decision

[24] The Decision is reproduced in its entirety below:

> Thank you for your letter of July 5, 2018, and communication during your meeting with [Agency] staff on September 20, 2018, requesting that I designate the [Extension Project] and the [Froth Treatment Project], proposed by [CNRL], for environmental assessment under subsection 14(2) of the [*Act*]. As requested, I considered the designation requests for the [Extension Project] and the Froth Treatment Project together.
>
> I appreciate Mikisew Cree First Nation's contributions to the [Agency's] review of the [Extension Project] and Froth Treatment Project designation requests. I understand you expressed concerns regarding the potential for adverse environmental effects on fish and fish habitat, migratory birds, Indigenous health and reserve lands, and traditional use of lands and resources. You also raised concerns about cumulative environmental effects, impacts to Aboriginal or Treaty rights, and the adequacy of the provincial processes to assess impacts to Indigenous Peoples.
>
> I carefully considered your requests to designate these activities, as well as input from Indigenous groups, provincial authorities, [CNRL], and scientific information provided by federal expert departments including Fisheries and Oceans Canada, Environment and Climate Change Canada, Natural Resources Canada, Health Canada, Transport Canada and Parks Canada. I understand that provincial assessment and federal and provincial regulatory mechanisms will be applied to these projects and that there are further efforts ongoing to monitor and address the broader cumulative effects of oil sands developments.

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] or the Froth Treatment Project for environmental assessment under [the *Act*].

I am confident that any potential effects to fish and fish habitat and migratory birds will be addressed through the [Provincial EA] 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.

I encourage you to participate in the ongoing provincial assessment and regulatory processes so that your views can be considered.

With respect to your concerns about the cumulative effects of oil sands development, the Government of Canada, through the Memorandum of Understanding between Alberta and Canada Respecting Environmental Monitoring or Oil Sands Development, is committed to working with Indigenous groups, stakeholders and environmental agencies to provide comprehensive environmental monitoring data and information to improve understanding of the long-term cumulative effects of oil sands development. Under this agreement, Environment and Climate Change Canada has recently invested up to $2 million annually to assist local Indigenous groups to design and implement community-based environmental monitoring projects.

In addition, Parks Canada is leading a collaborative effort with Indigenous communities and provincial and territorial governments to implement an action plan for [WBNP]. The involvement of Indigenous communities helped ensure Indigenous peoples' histories and cultures, as well as the special relationship Indigenous peoples have with traditional lands and waters, are reflected in the action plan.

I appreciate you bringing your concerns to my attention and to continued work with you and your community to advance these important initiatives.

[Emphasis added.]

[25] The Decision was based on the recommendation of the Agency which was, in turn, based on the Agency Analysis. The analysis portion of the Agency Analysis consists of eight pages, including a discussion of the context within which the Extension Project is situated and the views of Indigenous groups, CNRL, and several federal agencies. The Agency Analysis then considers these views and provides its own analysis of effects on fish and fish habitat; migratory birds; federal lands; greenhouse gas emissions; effects on Indigenous health, socio-economic conditions, current use of lands and resources for traditional purposes, physical and cultural heritage, and sites of significance.

IV. Relevant Statutory Provisions

[26] The relevant sections of the *Act* are:

Environmental effects 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 (a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament: (i) fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act*, (ii) aquatic species as defined in subsection 2(1) of the *Species at Risk Act*, (iii) migratory birds as defined in subsection 2(1) of the	**Effets environnementaux** 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) les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement : (i) les poissons et leur habitat, au sens du paragraphe 2(1) de la Loi sur les pêches, (ii) les espèces aquatiques au sens du paragraphe 2(1) de la Loi sur les espèces en péril, (iii) les oiseaux migrateurs au sens du paragraphe 2(1) de la Loi de 1994 sur la convention

Migratory Birds Convention Act, 1994, and
(iv) any other component of the environment that is set out in Schedule 2;
(b) a change that may be caused to the environment that would occur
(i) on federal lands,
(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
(iii) outside Canada; and
(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.

[…]

Designation of physical activity as designated project

14 (1) A designated project that includes a physical activity designated under subsection (2) is subject to an environmental assessment.

Minister's power to designate

concernant les oiseaux migrateurs
(iv) toute autre composante de l'environnement mentionnée à l'annexe 2;
b) les changements qui risquent d'être causés à l'environnement, selon le cas :
(i) sur le territoire domanial,
(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) à l'étranger;
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.
[…]

Activités désignées comme projet désigné

14 (1) Tout projet désigné qui comprend une activité désignée en vertu du paragraphe (2) doit faire l'objet d'une évaluation environnementale.

Pouvoir du ministre de designer

(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.	(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.

V. Issues and Standard of Review

[27] The issues are:

1. Was the DTC triggered and, if so, was it adequately discharged?
2. Was the Decision reasonable?

[28] At paragraphs 82-83 of *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 [*Ermineskin*] Justice Brown set out the applicable standards of review concerning designation decisions that engage the DTC:

> The existence, extent, and content of the duty to consult are legal questions reviewable on the standard of correctness. Whether or not the Minister fulfilled the duty to consult is reviewable on a standard of reasonableness. See *Ehattesaht First Nation v British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849 at para 45 [*Ehattesaht*] citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 61 [*Haida Nation*]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 27 citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 55 [*Vavilov*].
>
> The Respondent Minister agrees, and says the scope of Aboriginal and Treaty rights under section 35 of the *Constitution*, is

> reviewable on the correctness standard (*Vavilov* at para 55). He says the duty to consult flows from the honour of the Crown and is constitutionalized by section 35 (*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations*), 2017 SCC 54 at para 78), and I agree. Therefore, whether a duty to consult exists in any particular case is a question of law reviewed on the standard of correctness (*Yellowknives Dene First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148 at paras 46-47). Whether the consultation provided was sufficient to meet that duty is reviewed on the standard of reasonableness (*Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at paras 24-25).

[29] Accordingly, whether the DTC was triggered is reviewable on a standard of correctness while the satisfaction of the DTC is reviewable on a standard of reasonableness.

[30] The merits of the Decision are also reviewable on a standard of reasonableness. A reviewing Court must assess the decision-maker's reasoning process and ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]).

VI. Preliminary Matter – Admissibility of Affidavits

[31] Generally, only the evidentiary record before the administrative decision-maker is admissible before the reviewing court. In this case, Mikisew has filed the following affidavits that were not before the Minister:

1. Melody Lepine, Executive Director of Mikisew's Government and Industry Relations Office;

2. Dan Stuckless, Industry Relations Manager with Mikisew's Government and Industry Relations Office; and
3. Brian Kopach, an ecologist and scientific advisor with MSES.

[32] In *Tseil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*Tseil-Waututh*], at paragraphs 97-98, the Federal Court of Appeal listed three exceptions to the general rule that new evidence is not admissible on judicial review: (1) evidence that provides general background in circumstances where that information might assist in understanding the issues relevant to the judicial review; (2) evidence necessary to bring to the attention of the court procedural defects not found in the evidentiary record of the administrative decision-maker; and (3) evidence to highlight the complete absence of evidence before the administrative decision-maker.

[33] Mikisew concedes that the Kopach affidavit can be struck from the record. The Respondents submit that significant portions of the Lepine and Stuckless affidavits are inadmissible.

[34] CNRL submits that Mikisew wants this Court to step into the shoes of the Minister, exercise her discretionary authority and do so upon different criteria and a different record. CNRL says that allowing these affidavits to stay on the record results in significant prejudice to the Respondent and distorts the facts that were before the Minister when she made the Decision.

[35] The Agency and the Minister [together, Canada] agree with CNRL that Mikisew is asking this Court to reweigh the evidence that was before the Minister. Canada submits that the Lepine and Stuckless affidavits do not fall into any of the exceptions articulated in *Tseil-Waututh* and should not be admissible except to the extent that they go to the DTC.

[36] Mikisew submits that the affidavit evidence is admissible because it provides background information and speaks to the DTC.

[37] I agree that the Lepine and Stuckless affidavits should be admitted only to the extent that they provide background information and information that goes to Mikisew's submissions on the DTC. As such, any exhibits from the Lepine and Stuckless affidavits, to the extent that they relate to the background information supporting the DTC submissions, will be considered. For example, many of the exhibits attached to these affidavits provide background information on the geographical areas Mikisew is alleging will suffer adverse effects, which will interfere with their Treaty rights.

[38] Further, I agree with Mikisew that the Wood Buffalo Action Plan [WBNP Action Plan] and the Memorandum of Understanding Respecting Environmental Monitoring of Oil Sands Development [MOU] are admissible because they were referred to and relied on in the Agency Analysis, and therefore, were arguably before the Minister.

[39] I agree with the Respondents, however, that some of the information in the affidavits constitutes opinion that should be given no weight. In summary, the Lepine and Stuckless

affidavits are not struck in their entirety, but no weight will be afforded to information contained therein that goes to the merits of the Decision. In light of Mikisew's concession that the Kopach affidavit is not being relied on, the Court will not consider it.

VII. Parties' Positions

A. *Was the DTC triggered and, if so, was it satisfied?*

(1) Mikisew's Position

[40] Mikisew submits that the DTC was triggered because the Crown had knowledge of Mikisew's Treaty rights; the Minister made a statutory decision respecting whether or not to designate the Extension Project for a federal assessment; and the Decision had the potential to adversely impact Mikisew's Treaty rights. Accordingly, this satisfies the test articulated in *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*] for triggering the DTC.

[41] Mikisew submits that the Minister breached the DTC even on the low and most basic end of the consultation spectrum. Mikisew submits that the Crown was required to disclose information and discuss issues raised in response before making the Decision (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 43 [*Haida Nation*]). Mikisew submits that Canada breached the DTC because Canada failed to provide Mikisew with information it relied on, failed to provide Mikisew an opportunity to respond to Canada's rationale for rejecting its request, and failed to do anything other than document Mikisew's submissions.

[42] Mikisew submits that the DTC is triggered by a negative decision that does not entail the authorization of physical activities that may interfere with the exercise of section 35 rights. For example, in *Coastal First Nations v British Columbia (Environment),* 2016 BCSC 34 [*Coastal First Nations*], the British Columbia Supreme Court found that British Columbia's decision not to subject a project to a provincial EA in light of First Nations' concerns triggered the DTC (at paras 210-213).

[43] Mikisew submits that the Minister has not satisfied the DTC for four reasons. First, the Minister did not disclose Memo #1 or Memo #2, the two primary documents relied upon to make the Decision. Mikisew also submits that neither of these documents responded to their concerns. Memo # 1 was a synthesis of the Agency's Analysis Report and Memo #2 was an update based on Mikisew's EIS Review. Mikisew says that neither the Analysis Report nor the information collected by the Agency about environmental impacts were disclosed to Mikisew prior to the Decision. Mikisew submits this is a problem because the Agency's recommendation contradicts the information provided by Mikisew and federal departments. Mikisew submits that withholding the information prevented Mikisew from:

a. bringing information to the attention of the Minister that could have informed the decision making process;
b. correcting errors in the Agency Analysis;
c. responding to the Agency Analysis;
d. providing feedback on information that informed the Agency's recommendation to the Minister; and

e. providing feedback on the Agency's recommendation that the Extension Project not be designated for a federal environmental assessment.

[44] Second, Mikisew alleges that the Minister failed to engage in meaningful dialogue with Mikisew with the intent to resolve concerns prior to making the Decision. Mikisew submits that the record shows no consideration of Mikisew's concern about the need for the Decision to ensure Canada's ability to safeguard the WBNP. Mikisew says that there was no dialogue about this issue until Parks Canada made similar submissions and those submissions were rejected. Parks Canada submitted that a federal assessment would help in understanding the potential effects on the WBNP.

[45] Mikisew further submits that the Minister failed to respond to Mikisew's information that the TOR and the EIS did not consider the Project's effects on WBNP as identified by Mikisew and other federal departments.

[46] Finally, Mikisew says the Minister failed to respond to or even grapple with Mikisew's information that the AER excludes consideration of cumulative effects on WBNP and Aboriginal and Treaty rights.

(2) CNRL

[47] CNRL submits that Mikisew's designation request did not trigger the DTC because it did not authorize physical activities or remove government oversight. Therefore, it does not result in any adverse effects that could impact any Aboriginal or Treaty rights. Further, even though the

DTC was not triggered, “thorough engagement” with Mikisew occurred and the process informing the Decision was reasonable.

[48] CNRL makes no submissions on the first part of the *Rio Tinto* framework. With respect to the second step, CNRL submits that absent the designation request, there would be no Crown conduct. Therefore, because Mikisew started the process, administrative law principles apply rather than the DTC.

[49] Regarding the third part of the *Rio Tinto* framework, CNRL submits that the requisite causal connection is not present and the alleged potential impacts are speculative at best. CNRL submits that none of the alleged potential impacts affect Mikisew’s ability to exercise Aboriginal or Treaty rights. Rather, the alleged impacts relate to the extent of the federal government’s involvement in the process. CNRL submits that the purpose of the DTC cannot be to ensure federal involvement and oversight in a project development because this ignores Parliament’s express intent in the *Act* not to require a designation for every project.

[50] CNRL submits that *Coastal First Nations* is distinguishable from the present case in several respects: the project required both mandatory provincial and federal environmental assessments; the Crown conduct was British Columbia’s abdication of its regulatory authority in favour of the federal process; and the adverse effect was the reduction in British Columbia’s ability to ensure that Indigenous interests relating to British Columbia’s environmental assessment process were discharged within the federal process.

[51] CNRL also submits that, alternatively, if the DTC was triggered it was at the low end of the spectrum and was met. Mikisew received notice of the decision being contemplated, adequate information about the Extension Project, copies of submissions made to the Minister, the opportunity to respond to those submissions, the opportunity to meet the Minister in person, careful consideration of Mikisew's submissions, timely notice of the decision, and adequate reasons in writing. CNRL submits that Mikisew raised no concerns with the process being followed until after the Decision was made.

[52] CNRL further submits that *White River First Nation v Yukon Government*, 2013 YKSC 66 [*White River*], cited by Mikisew for the proposition that the Minister ought to have disclosed the Agency Analysis, is distinguishable from the present matter. Specifically, CNRL states that the Court in *White River* found that if a decision-maker is going to reject the recommendation of its consultation office in favour of new evidence, the decision-maker must allow the First Nation to respond to that new evidence. In this case, there was no new information considered and no rejection of a recommendation from the Agency. CNRL submits that the Minister's failure to provide the Agency Analysis does not amount to Mikisew being deprived of having its say.

(3) Canada

[53] Canada acknowledges that it had actual knowledge of Mikisew's Treaty rights pursuant to Treaty 8 but it submits that the Decision does not involve contemplated federal Crown conduct that could affect any of Mikisew's rights. Canada claims that the approval of the Extension Project by the AER is what has the potential to affect Mikisew's rights, but the threshold question of whether a federal assessment should be required does not. Canada submits

that it does not have a DTC in respect of Alberta Crown decisions or conduct that may adversely affect those Aboriginal or Treaty rights. Canada submits that if Mikisew finds the Provincial EA to be inadequate, its remedy lies in challenging those processes.

[54] Canada concedes that "strategic higher-level decisions" can trigger the DTC but states that this is only true where such decisions set the stage for future decisions (*Rio Tinto* at para 44). Mikisew cites cases where preliminary planning decisions attracted the DTC but, unlike the present matter, they all concerned governmental decisions that set the stage for further decisions by the same level of government. Therefore, they are not analogous.

[55] Like CNRL, Canada submits that Mikisew's reliance on *Coastal First Nations* is misplaced. The federal government lacks statutory authority to impose conditions on a project if the federal government declines to designate that project. Canada states that *Coastal First Nations* does not stand for the proposition that Canada's potential inability to impose conditions on CNRL triggers the DTC. Canada agrees with CNRL that *Coastal First Nations* is distinguishable because it concerned the provincial government abdicating legislative authority to impose conditions. Canada says that, in any event, the correctness of *Coastal First Nations* has been questioned in subsequent decisions of the British Columbia courts and it is not binding on this Court.

[56] Canada argues that the asserted potential effects pertain to the AER's potential approval of the Extension Project, which does not involve Canada. Canada says Mikisew's preference for

having federal expert evidence presented in the Provincial EA is irrelevant and so is Mikisew's preference for the rigour of a federal assessment over a provincial assessment.

[57] Alternatively, Canada submits that if the DTC was triggered, the duty was met. It submits that Mikisew was only entitled to notice, disclosure of information, and the discussion of issues (*Haida Nation* at para 43) and there was no obligation to provide Mikisew with a copy of the Agency's two Memos or the Agency Analysis. It says that Mikisew provided its comments and those were considered by the Agency. Canada says the opportunity to provide comments on the analysis of comments is not required. It says Mikisew had a substantive opportunity to provide its position, was aware of the information being considered, and had the opportunity to respond.

[58] Further, Canada submits that Mikisew does not provide any information on how deeper consultation would have changed matters. It contends that Mikisew suggests it would only re-emphasize its concerns.

B. *Is the Decision Reasonable?*

(1) Mikisew

[59] Mikisew submits that the Decision is unreasonable for four reasons.

[60] First, the Decision relies on the TOR, EIS, and the Provincial EA to assess impacts on areas of federal jurisdiction without considering the flaws in those documents and contradictory evidence as raised by Mikisew. According to Mikisew, "the primary pillar" of the Decision is the

Minister's confidence that the TOR, EIS, and Provincial EA process will assess the effects of the Extension Project on areas of federal jurisdiction. Accordingly, the Minister's failure to mention the TOR Review, nominal acknowledgment of the EIS Review, and failure to grapple with Mikisew's concerns with the Provincial EA process "call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128).

[61] Second, the Decision ignores information about the fragile ecological state of WBNP and the PAD found in the Strategic Environmental Assessment [SEA] for the WBNP. The SEA was created in May 2018 for Parks Canada and given to the Minister before the Decision was made. The SEA arose out of the World Heritage Committee's request for Canada to undertake the work to assess the cumulative impacts of all developments on the WBNP World Heritage Site [WBNP WHS]. The World Heritage Committee's request arose out of Mikisew's petition to have WBNP added to the List of World Heritage in Danger. However, the findings of the SEA were not included in the Analysis Report nor the Minister's reasons for the Decision. This oversight renders the Decision unreasonable.

[62] Third, the Decision fails to consider the opinions of Parks Canada and Environment and Climate Change Canada [ECCC], which contradict the Agency's conclusion that adverse environmental effects on WBNP are unlikely. Parks Canada stated that the Project may have adverse effects on WBNP and ECCC indicated that Lake Athabasca, which is linked to the PAD and the WBNP, is experiencing declining water levels. Further, additional water withdrawals may contribute to negative cumulative effects in the region. ECCC also made a number of other

findings related to migratory birds, air quality, and hydrology. The Agency ignored or summarily dismissed this contradictory evidence, which renders the Decision unreasonable.

[63] Finally, the Minister unreasonably relied on irrelevant facts including the MOU and the WBNP Action Plan. The Minister relied on the MOU to address Mikisew's concerns regarding cumulative impacts on traditional and cultural uses and Aboriginal and Treaty rights. However, the MOU contains no information, or measures specific to the Extension Project, and is thus irrelevant to whether a federal environmental assessment would assist in understanding and assessing the Extension Project's effects on areas of federal jurisdiction. Likewise, the WBNP Action Plan is irrelevant because it contains no measures to address potential adverse effects of the Extension Project.

(2) CNRL

[64] CNRL disagrees that the Minister ignored evidence and improperly relied on other documents.

[65] First, failing to reference the TOR Review, the EIS Review, or the SEA in the Minister's reasons does not mean the Minister failed to consider the contents of those documents and does not render the Decision unreasonable. The Applicant has misrepresented the law in this regard. A decision-maker's reasons should not be held against a standard of perfection (*Vavilov* at para 91).

[66] The record clearly demonstrates that Mikisew's concerns were documented (in the Analysis Report, Memo #1, and Memo #2) and communicated to the Minister. In her reasons,

the Minister acknowledged that Mikisew raised concerns about the impacts to Aboriginal and Treaty rights as well as the "adequacy of the provincial process to assess impacts to Indigenous Peoples." Likewise, the Analysis Report and Memo #1 considered Mikisew's concerns and Parks Canada's views about WBNP. The Minister did not ignore this evidence – she simply rejected it and found that provincial measures would be sufficient.

[67] Additionally, it was reasonable for the Minister to rely on the MOU and the WBNP Action Plan. These are both federal initiatives designed to address potential impacts from oil sand development. They are clearly relevant to whether the Minister should exercise her discretion to designate a project under the *Act*.

[68] CNRL also submits that the Minister did not have to find an equivalent process equally as rigorous as the federal environmental assessment process before declining to designate the Extension Project. This is not a requirement of the *Act*. The Minister's statutory obligation was to simply determine whether the carrying out of the physical activity may cause adverse environmental effects or whether public concerns related to those effects may "warrant the designation." The Minister considered this question and based on the facts of the case, reasonably declined to designate the project.

[69] The Decision is supported by the submissions and information before the Minister and the Minister's reasons are justified, transparent, and intelligible.

(3) Canada

[70] Canada directly responds to each of the four issues raised by Mikisew. However, prior to doing so, Canada emphasizes that broad discretion is afforded to the Minister as evidenced by the permissive language in subsection 14(2) of the *Act*. Subsection 14(2) provides that the Minister may designate a project if it is of the opinion that carrying out the activity may cause adverse environmental effects or public concerns related to those effects. Canada argues that it was open to the Minister to decide not to designate a physical activity regardless of her opinion of the pre-requisites. Likewise, the Minister was not required to specifically consider and adjudicate each matter raised by Mikisew in her written reasons (*Vavilov* at para 128). Canada acknowledges that failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the Minister was alert to the matter before it, but says that was not the case here.

[71] Turning to Mikisew's first argument, Canada submits that the Minister was not required to accept or adjudicate Mikisew's criticism of the Provincial EA. Nonetheless, the record demonstrates that the Minister considered Mikisew's criticisms of the Provincial EA. Further, it says that because the EIS Review was not submitted to the Agency until January 14, 2019, after the Agency Analysis was completed, it was not evaluated. The EIS Review need not be mentioned in the Agency Analysis nor the Decision because "such specificity is not required" and those issues can be raised in the Provincial EA. Canada states that the purpose of the Agency Analysis was not to evaluate the EIS Review but to inform a recommendation on whether to designate the Extension Project.

[72] Second, the Agency and the Minister adequately considered the impacts on the WBNP and the PAD. Mikisew's reliance on the SEA is misplaced. It is unreasonable for Mikisew to state that the Minister would be aware of the findings in the SEA even though it was not before her. Additionally, the findings in the SEA are general and not project specific. Overall, it is clear from the record, particularly Memo #2, that the Minister considered the impacts of the Extension Project on the WBPN and the PAD, as well as Mikisew's concerns about the Provincial EA.

[73] Third, the Minister considered Parks Canada and ECCC's submissions regarding the WBNP. Parks Canada identified potential risks but did not determine their likelihood. Therefore, it was reasonable for the Agency to conclude that the Extension Project is unlikely to cause adverse environmental effects to federal lands. Likewise, while ECCC identified additional water withdrawals as a concern in the general region, it did not identify any concerns relating to water quantity at the WBNP specifically.

[74] Finally, the Minister did not consider irrelevant factors. The *Act* does not limit the type of information the Minister is permitted to consider when exercising her discretion to designate a project.

VIII. Analysis

A. *Was the DTC triggered and, if so, was it satisfied?*

(1) Triggering the DTC

[75] The DTC flows from the honour of the Crown and it has both a legal and a constitutional character (*Rio Tinto* at para 32, 34, citing *R v Kapp*, 2008 SCC 41 at para 6). The purpose of the DTC is to protect unproven or established Aboriginal rights "from irreversible harm as the settlement negotiations proceed" (*Rio Tinto* at para 41). In *Rio Tinto*, the Supreme Court of Canada rearticulated the test for triggering the DTC originally set out in *Haida Nation* (at para 31). The DTC will be triggered when:

1. the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right;
2. the Crown is contemplating conduct that may engage the right; and
3. the Crown's decision or action has the potential to adversely affect the claim or right.

[76] The threshold to trigger the DTC, informed by the need to maintain the honour of the Crown, is not high. Notwithstanding this, I ultimately find that the third element of the *Rio Tinto* test is not satisfied for the following reasons.

[77] The first part of the test is met. Canada states in its Memorandum of Fact and Law that "it has actual knowledge of Mikisew's Treaty right pursuant to the provisions of Treaty 8." CNRL makes no submissions with respect to the first part of the test.

[78] The second step of the DTC test turns on whether the decision not to designate the Extension Project is the type of "Crown conduct" necessary to satisfy this part of the test. Put another way, is it positive action on the part of the Crown (to designate a project) or the negative action of the Crown (not to designate a project) that is required?

[79] Canada and CNRL deny that the second part of the test has been met. Canada submits that the impugned conduct would be the potential approval of the Extension Project by the AER and any related provincial regulatory authorizations.

[80] CNRL submits that because the conduct contemplated by the Crown arose from Mikisew's request, it does not fall into the framework of the DTC. Rather, it is a matter of procedural fairness under administrative law principles.

[81] Mikisew submits that the Crown conduct in question is the Minister's decision to designate the project or not. In *Rio Tinto*, the SCC made explicit that "government action is not confined to decisions or conduct which have an immediate impact on lands and resources" and that the DTC extends to "strategic, higher level decisions" (*Rio Tinto* at para 44). Mikisew also relies on *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311 [*Mikisew FCA 2016*], at paragraph 46, where the Federal Court of Appeal gave examples of strategic planning decisions that give rise to the DTC, including: "the decision to designate a project as subject to an environmental assessment" (*Fort Nelson First Nation v British Columbia (Environmental Assessment Office)*, 2015 BCSC 1180 [*Fort Nelson SC*]); and a minister's refusal to recommend, on request of the First Nation, an amendment to a conservancy boundary (*Da'naxda'xw/Awaetlala First Nation v British Columbia (Attorney General)*, 2011 BCSC 620 [*Da'naxda'xw*]).

[82] Although I ultimately find that the second prong of the test is satisfied, I find that the authorities cited by Mikisew are distinguishable from the present matter. A couple of points need

to be said about *Fort Nelson SC*. First, in that case, the First Nation's request to designate pursuant to the British Columbia legislation and regulations was a new sand and gravel pit by a proponent (and the possible development of other sand and gravel mines). This is distinguishable from the present matter in that the Extension Project is already within the Horizon Mine's existing lease boundaries, therefore it is not new. *Fort Nelson SC* is also distinguishable because it dealt with an agency's interpretation of production thresholds set out in the regulation that could trigger an environmental assessment.

[83] More importantly, *Fort Nelson SC* was overturned by the British Columbia Court of Appeal after the Federal Court of Appeal rendered its decision in *Mikisew FCA 2016*. Therefore, *Fort Nelson SC* is of limited application to the present matter. Specifically, the British Columbia Court of Appeal found that the interpretation of the regulation in question was not a strategic high level decision that could have direct impacts on the First Nation's Treaty rights. The Court found that the relevant "Crown conduct" that may affect the First Nation's Treaty rights was the (possible) approval of the Mines Act permit (*Mines Act*, RSBC 1996, c 293) or other approvals, which would allow the proponent to commence the construction and operation of the project. This is the approval process that attracts the duty to consult (*Fort Nelson First Nation v British Columbia (Environmental Assessment Office)*, 2016 BCCA 500 at para 125, leave to appeal to SCC refused, 37449 (15 June 2017)).

[84] *Da'naxda'xw* was not a case where the Crown proposed a decision or conduct. Rather the Da'naxda'xw First Nation [DFN] requested the Crown to make a specific decision (at para 129). Mikisew presumably relies on this case for similar reasons – Mikisew is the one that initiated the

request to designate the Extension Project. However, I find that the factual considerations at play in *Da'naxda'xw* are much different than the facts in the present matter, rendering most of the principles inapplicable.

[85] In *Da'naxda'xw* the DFN and a power corporation challenged a decision of the Minister of Environment for British Columbia refusing the DFN's proposed changes to the boundaries of a protected area/conservancy. The DFN sought an amendment to the boundary to remove some of the land in order to allow a hydro-electricity project to be assessed in an environmental review process. Because of the area's designation as a protected area/conservancy the hydro-electricity project was not a permitted use within the area. The Minister refused to recommend the proposed boundary amendments, thereby retaining the *status quo*.

[86] The Court disagreed with the province's argument that conduct which contemplates conserving the *status quo* necessarily means that Aboriginal interests will not be adversely affected (at para 130). However, the facts do not support the application of that principle to the present matter. In *Da'naxda'xw* the Court considered the economic interests of the DFN as well as the pattern of consultation over a "fairly extensive period of time", involving several related agreements pertaining to the conservancy, and found that the DTC did not cease when the Minister contemplated a refusal of the DFN's request. The Court found that the effect of the Minister's decision is a certainty that the project will not be realized, resulting in a lost economic opportunity for the DFN (at para 136). Moreover, the decision had the potential to adversely affect the DFN's Aboriginal Title claim by limiting the future uses of the lands and by possibly

impacting the DFN's right to participate in strategic decisions in respect of future users (at para 142). Such considerations are not present here.

[87] Mikisew also relies on *Chartrand v British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 345 at paras 70-71 [*Chartrand*] and *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14 [*Ross River*] for the proposition that the DTC is triggered even when physical activities are not authorized in a decision. *Chartrand* dealt with a removal of lands from a forestry area as well as an approval of a forestry plan within the First Nation's traditional territory. While Mikisew is correct that this case did not authorize any physical activities, it is distinguishable from the present matter because there is no management plan that is being approved nor is there a removal of any lands resulting in a significant change to the governance regime. *Ross River* is also distinguishable because, unlike the present matter, the conduct in question was the divesting of land by the Crown when authorizing a mineral claim.

[88] Other cases relied on by Mikisew are similarly distinguishable. *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354 involved the exclusion of a First Nation from the design and approach to an environmental assessment process of the MacKenzie Gas Pipeline, a project involving a multitude of regulators, authorities, gas producers, and proponents. The Court noted that the Cooperation Plan and other agreements which were negotiated with various groups excluded the First Nation (at paras 23, 42, 44). The parties were in agreement that, given its scope, the construction of the project triggered the DTC (at para 85). This case did not involve a consideration of a designation decision like in the present matter.

[89] Similarly, the Applicant cites *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244 (reversed by *Mikisew FCA 2016*) for the proposition that reduced federal environmental oversight over projects could result in adverse impacts that are consistent with those necessary to engage the DTC (at para 94). This case involved the introduction of omnibus legislation that had an effect on environmental legislation and there was no provincial environmental assessment process similarly engaged, which makes it distinguishable from the present matter.

[90] I am also in agreement with the Respondents that *Coastal First Nations* is distinguishable as set out in their submissions.

[91] The foregoing analysis indicates that the case law cited by Mikisew is distinguishable. However, there is another recent case from our Court that requires consideration before determining whether the second part of the test has been satisfied.

[92] In *Ermineskin,* the Ermineskin First Nation [EFN] was in favour of a coal mine expansion and an underground test mine. The EFN was party to an impact benefit agreement with the proponent which created economic and social benefits to address the "taking up" of lands under Treaty 6 and for the impacts on EFN's Aboriginal and Treaty rights within its traditional territory. In 2019, the Minister consulted the EFN and initially refused to designate the project. In 2020, almost seven months after the decision not to designate, the Minister ordered the designation of the project, but this time EFN was not consulted. Rather, the Minister only consulted the First Nations and advocacy groups requesting the designation order. The EFN

sought judicial review of the 2020 decision and this Court found that the Crown had a DTC the EFN and failed to do so.

[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.]

[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.

[95] As for the third part of the test, both Canada and CNRL deny that a causal connection exists between the impugned conduct and a potential adverse effect on Mikisew's rights. At

paragraph 38 of its Memorandum of Fact and Law, Mikisew asserts that the Decision had the potential to adversely affect Mikisew's Treaty rights in at least five ways:

> 1. a decision not to designate the Project for a federal assessment would result in the federal government lacking statutory authority to impose conditions on the Project that would be protective of WBNP, a core area for the exercise of Mikisew's Treaty rights.
>
> 2. a decision not to designate the Project for a federal assessment would result in the federal government lacking statutory authority to impose conditions on the Project that would be protective of species at risk, such as wood bison and other species at risk that are necessary for the exercise of Mikisew's Treaty rights.
>
> 3. a decision not to designate the Project, in effect, would be determinative of the design and scope of the process for the federal government to discharge its duty to consult Mikisew about the Project. This is because Canada's impact assessment legislation has a bearing on who consults Mikisew and the consultation policy that applies to that engagement.
>
> 4. a decision not to designate the Project would be determinative of the ability of federal agencies and departments, like Parks Canada Agency and [ECCC], to provide expert evidence relating to matters of federal interest (such as Project effects on [WBNP]) that are relevant to evaluating Project impacts on Mikisew's Treaty rights. This is because federal departments have statutory obligations to participate in federal environmental assessments and lack standing to participate in provincial assessments.
>
> 5. a decision not to designate the Project is prejudicial to Mikisew given its experience that federal assessments have a greater level of rigour, independence, and impartiality than assessments in Alberta and the provincial regulatory process is statutorily prohibited from hearing certain types of evidence relating to Project impacts on Mikisew's Treaty rights and from providing opportunities to test evidence that would be otherwise permitted in a federal assessment. For example, the provincial regulator is statutorily prohibited from requiring government witnesses to provide evidence regarding matters such as impacts on Treaty rights and is prohibited from considering gaps in regulatory or planning instruments relating to cumulative impacts.

[96] Mikisew alleges potential adverse effects to its Treaty rights, effects that are acknowledged in the Decision, but which the Minister says will be mitigated by the Provincial EA. The Agency also acknowledges that it "anticipates that the [Extension Project] and the Froth Treatment Project may contribute cumulatively to effects on traditional and cultural uses, and potentially to impacts on Aboriginal or Treaty rights."

[97] As stated by the Supreme Court, "[t]he question is whether there is a claim or right that potentially may be adversely impacted by the current government conduct or decision in question" (*Rio Tinto* at para 49).

[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 DTC, I find that the third part of the *Rio Tinto* framework has not been met.

[99] After reviewing the circumstances of the present matter and the applicable legal principles, I find that the DTC was not triggered. Therefore, it is unnecessary to consider whether the Crown discharged the DTC.

B. *Was the Minister's Decision Reasonable?*

[100] The Decision was reproduced in its entirety at paragraph 24 of these Reasons. It is important to bear in mind that it is the Decision under review and not Memo #1, Memo #2, or the Agency Analysis. Memo #1, Memo #2, and the Agency Analysis may become relevant only if they are so flawed that the Minister could not rely on them in reaching the Decision (*Tsleil-Watuth Nation v Canada*, 2018 FCA 153 at paras 4-5 [*TWN*]).

[101] Mikisew's primary concern is that the TOR and EIS were flawed as evidenced by the TOR Review and the EIS Review, both of which were provided to the Agency. The majority of Mikisew's concerns flow from the premise that the TOR and EIS, taken together, omit critical information or contain flaws and, therefore, form an unreliable basis for the Agency to rely on.

[102] Mikisew also submits that the Agency Analysis failed to grapple with its submission to the Agency that the TOR and the EIS were premised on flawed data, thus calling into question any conclusions drawn from the data. Mikisew states that its concerns were not reflected in the Analysis Report, Memo #2, or the Decision. I find that Mikisew's submissions are simply a disagreement with the Decision and the information supporting the Decision. Mikisew has not pointed to anything in the Agency Analysis, Memo #1, or Memo #2 that reveal flawed information or processes, other than stating its disagreement with the lack of attention paid to its submissions to the Agency. This is unlike the National Energy Board report in *TWN* because the Court found that it contained fundamental flaws. In the present matter, all we have is the TOR

and the EIS and Mikisew's TOR Review and the EIS Review, which point to some conflicting perspectives.

[103] For example, the TOR Review identified that the baseline data for air quality "does not provide enough information as to which air quality contaminants will be included in the analysis" [Emphasis added]. The Agency Analysis relied on CNRL's baseline data to conclude that "there is little potential for any effects on harvested food sources from changes in air quality or water quality" [Emphasis added] (Agency Analysis at 28-29). These statements are not necessarily contradictory with one another. At this stage there is simply no clear information on what the potential effects may be, if any. Similar conclusions were echoed in the SEA, discussed below.

[104] The Agency Analysis reflects the positions of the various Indigenous groups who were consulted, including Mikisew, as well as various federal departments. After considering these positions and the potential adverse environmental effects on areas of federal jurisdiction the Agency Analysis concludes with the following:

> Although there is potential for adverse environmental effects under section 5 of [the *Act*] from the Extension Project and the Froth Treatment Project and Indigenous groups have identified concerns related to those effects, the Agency is of the view that, after considering existing provincial assessment and federal and provincial regulatory mechanisms, neither the adverse environmental effects nor concerns warrant a federal environmental assessment.
>
> The Agency therefore recommends that the [Minister] not exercise her discretionary authority under subsection 14(2) of [the *Act*] to designate the Extension Project and the Froth Treatment Project for federal environmental assessment.
>
> [Emphasis added.]

[105] The above, in my view, illustrates an appreciation of the concerns and positions advanced and weighs those concerns and positions within the Minister's discretion under the *Act*.

[106] After the Analysis Report and Memo #1 were drafted, Mikisew submitted its EIS Review to the Agency. In response to receiving this information, the Agency provided Memo #2 to the Minister. The analysis of the EIS Review contained in Memo #2 is contained in two paragraphs:

> The additional information included detailed analyses of potential effects of the projects to surface and ground water quality and quantity, including in the [PAD]; aquatic ecology; terrestrial environment, including terrain, soils, vegetation, wetlands, reclamation, wildlife, and biodiversity; air quality; human health; traditional and historical resources; socio-economic conditions; Indigenous knowledge; baseline information; and potential impacts to Aboriginal and Treaty rights, including through the taking up of lands.
>
> The Agency has carefully reviewed the submissions and determined that while the additional information provides further detail, the potential effects to the environment and impacts to Aboriginal and Treaty rights identified were already considered in the Agency's original analysis. The additional information does not change the Agency's conclusions and recommendation. As such, it is recommended that you issue your decision as planned. Further details on the submissions and related analysis are available on the project file.
>
> [Emphasis added.]

[107] Mikisew submits that more should have been referenced in the Agency Analysis or in the Decision. I respectfully disagree. Neither the Agency nor the Minister were required to go through both the TOR Review and the EIS Review and point to every contrary finding (*Vavilov* at para 128). This would not be consistent with the broad discretion afforded to the Minister under the *Act*, which is accorded deference on judicial review. Rather, for a decision to be justified and transparent, a decision-maker is merely required to be responsive to a party's

submissions. That is, the "decision maker's reasons [must] meaningfully account for the central issues and concerns raised by the parties" (*Vavilov* at para 127). In the present matter I am satisfied that the Minister's reasons did so.

[108] The Minister received nearly 200 pages of review to the effect that the TOR and EIS were flawed. She was not required to accept those findings if she thought that there was another process that could take those issues into consideration. Just because that evidence was not specifically mentioned in the Decision does not mean the Minister failed to adequately grapple with it. As pointed out above, Memo #1 assessed the position of Mikisew and others, informed by the Agency Analysis, while Memo #2 summarized the additional submissions. Such a summary, brief as it may be, does not necessarily render the Decision unresponsive to Mikisew's concerns since the Decision itself did not need to reference every submission. When viewed holistically, Mikisew's stated concerns about the environment and cumulative effects on Aboriginal and Treaty rights were acknowledged in the Decision. Ultimately, the Minister exercised her discretion and determined that the AER could address these matters.

[109] Mikisew's submission that the SEA was not specifically referenced in the Decision is correct. However, in the Agency Analysis section titled "Federal Lands", the Agency states that it "understands that the [SEA] of [WBNP WHS] presented to the United Nations World Heritage Committee recommended that environmental effects from projects that may significantly affect the Outstanding Universal Values of [WBNP WHS] should undergo an assessment." The overall recommendation of the SEA is also included in the section titled "Views of Parks Canada Agency."

[110] Moreover, the overall conclusions of the SEA as set out in the Executive Summary, do not affect my finding that the Decision is reasonable:

> The PAD, in particular, is a very complex ecosystem and as a result, there will always be unanswered questions. However, by applying a precautionary principle, a lack of information should not prevent action. Adaptive management solutions must be advanced with the involvement of Indigenous peoples and Indigenous Traditional Knowledge. Furthermore, collaborative approaches involving all parties will be necessary to develop the best possible mitigations and increase the likelihood of success. In particular, collaboration with Indigenous peoples will be important because it is Indigenous peoples who experience the most impacts most directly given their intrinsic connection to the land.
>
> The call for immediate action was repeated throughout the course of developing this SEA, in particular from Indigenous communities who rely on the PAD. While ecological monitoring and ITK have shown that with shifts in flooding, for example, ecosystems can rebound, permanent changes to the delta environment are possible and undesirable. Permanent changes could put at risk the world heritage values of the PAD and its ecological integrity, and would be particularly undesirable for Indigenous people who transfer cultural knowledge and skills to the next generation on the land in the context of carrying out traditional activities. When this knowledge is not passed down, communities risk losing their culture and connections to the land. The more time with lack of access, or changes to the quantity and quality of resources, the higher the risk that this transfer of knowledge is interrupted or prevented.
>
> The recommendations in this report are put forward as considerations for the responsible jurisdictions in the multi-jurisdictional Action Plan that is presently being developed for WBNP.

[111] Canada's submission that the SEA itself was not before the Minister is correct. The Agency Analysis did not discuss the SEA at length but it did summarize the essential contents of the SEA. Neither the SEA nor its specific recommendations and conclusions were specifically referenced in the Decision but it cannot be said that the information in the SEA was not before

the Minister, as it was referred to in the Agency Analysis. Additionally, the findings in the SEA are general and not specific to the Extension Project. As stated in section 7.3.2 of the SEA, "one objective of this SEA was to inform project environmental assessments" and it was completed bearing in mind World Heritage Values. In any event, the recommendations and conclusions of the SEA, forming part of the WBNP Action Plan, will be informative as part of the Provincial EA. The Decision does not have to make reference to every piece of material that formed part of the decision-making process.

[112] ECCC's views are set out on pages 22 and 23 of the Agency Analysis. In my view, it is clear that ECCC's views merely indicate potentials or possibilities:

- The Extension Project may impact the following migratory bird species…
- There is potential for cumulative effects related to habitat loss for migratory birds including species at risk…
- The Extension Project may impact air quality and greenhouse gas emissions… further information is required to determine the extent of these potential effects…
- Potential impacts to water quality from runoff, erosion and sedimentation may occur…
- The Extension Project may affect hydrological conditions of the Calumet River…The Calumet River contributes less than 0.1 percent of the annual flow of the Athabasca River.
- Additional water withdrawal may contribute to negative cumulative effects on the region.
- In regards to the Froth Treatment Project [ECCC] identified no concerns related to migratory birds, species at risk and water quality…the overall effect of the Froth Treatment Project on air quality is unlikely to be significant…

[113] Mikisew submits that the Agency Analysis, at page 26, misrepresents or ignores ECCC's views. I disagree. Page 26 states, "[w]hile Indigenous groups expressed concerns about effects to WBNP WHS, the Agency considers it unlikely that there would be adverse environmental effects on WBNP WHS related to water quality and quantity or migratory bird effects from the Extension Project and the Froth Treatment Project, as [ECCC] did not identify concerns related to these aspects." ECCC's views relate directly to the Extension Project and Froth Treatment

Project 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.

[114] Mikisew also submits that the Agency Analysis ignores Park's Canada's submission. I disagree. An August 2018 letter authored by Parks Canada clearly states that "the Proposed Project has the potential to contribute to water quality changes to the Athabasca River that may result in additional cumulative impacts on water quality within the PAD." This is reflected in the Agency Analysis at page 23. The Agency Analysis also referenced Parks Canada's collaboration with Mikisew and others in the development of the WBNP Action Plan. I do not consider the development of the WBNP Action Plan to be irrelevant. It was referenced in the Agency Analysis and was properly considered in arriving at the Decision.

[115] Likewise, I do not consider the MOU to be an irrelevant consideration. Like the WBNP Action Plan, the MOU was not the basis or main reason the Minister declined to designate the Extension Project. The MOU's purpose is to establish the parties' mutual intentions regarding collaboration and accountability for the design and implementation of an integrated monitoring, evaluation, and reporting system for environmental impacts from oil sands development, which would assist to inform management and regulatory action. I agree with the Respondents that it was reasonable for the Minister to consider this document.

[116] The Decision references that the MOU commits Canada to working with Indigenous groups and that Parks Canada is helping to implement the WBNP Action Plan. However, neither of these initiatives were the basis for the Minister's Decision. Rather, the Minister based her Decision on her understanding that the "provincial assessment and federal and provincial regulatory mechanisms will be applied to these projects." To this end, the Minister declined to designate the Extension and Froth Treatment Project "[a]fter considering existing provincial assessment and provincial regulatory mechanisms to mitigate any potential impacts associated with these projects." The MOU and Park's Canada's involvement in the WBNP Action Plan were additional measures only.

[117] For all of the above reasons, I find that the Decision is reasonable.

IX. Conclusion

[118] The DTC was not triggered.

[119] The Decision does not lack intelligibility, transparency and justification. It is reasonable.

JUDGMENT in T-481-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed. The duty to consult was not triggered. The Decision is reasonable.
2. The Respondents are granted costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-481-19
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:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 3, 2021
JUDGMENT AND REASONS:	FAVEL J.
DATED:	FEBRUARY 4, 2022

APPEARANCES:

Tim Dickson Mark Gustafson	FOR THE APPLICANT
Tamela Coates Michelle Jones	FOR THE RESPONDENTS (CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE)
James Elford	FOR THE RESPONDENT (CANADIAN NATURAL RESOURCES LIMITED)

SOLICITORS OF RECORD:

JFK Law Corporation Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Lawson Lundell LLP Calgary, Alberta and Vancouver, BC	FOR THE RESPONDENTS (CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE)
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT (CANADIAN NATURAL RESOURCES LIMITED)