Federal Court of Appeal | Cour d'appel fédérale

**Date: 20220704**

**Dockets: A-254-21**
**A-261-21**

**Citation: 2022 FCA 123**

**CORAM:** **STRATAS J.A.**
**BOIVIN J.A.**
**DE MONTIGNY J.A.**

**Docket: A-254-21**

**BETWEEN:**

**THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE**
**and THE ATTORNEY GENERAL OF CANADA**

**Appellants**

**and**

**ERMINESKIN CREE NATION and**
**COALSPUR MINES (OPERATIONS) LTD.**

**Respondents**

**Docket: A-261-21**

**AND BETWEEN:**

**COALSPUR MINES (OPERATIONS) LTD.**

**Appellant**

**and**

**THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE,
THE ATTORNEY GENERAL OF CANADA,
LOUIS BULL TRIBE, KEEPERS OF THE WATER SOCIETY, THE WEST ATHABASCA WATERSHED BIOREGIONAL SOCIETY, and STONEY NAKODA NATIONS (BEARSPAW FIRST NATION, CHINIKI FIRST NATION AND WESLEY FIRST NATION)**

**Respondents**

Heard by online videoconference hosted by the registry
on May 17, 2022.
Judgment delivered at Ottawa, Ontario, on July 4, 2022.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

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

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## REASONS FOR JUDGMENT

**BOIVIN J.A.**

I. Overview

[1] These reasons address two appeals (A-254-21 and A-261-21) from two judgments of the Federal Court (*per* Brown J.; the Federal Court Judge), dated July 19, 2021 (respectively, 2021 FC 758 and 2021 FC 759). Both judgments concern a decision of the Minister of Environment and Climate Change (the Minister) to issue a designation order under subsection 9(1) of the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 (the IAA) with respect to proposed coal mining projects in Alberta.

[2] In the first judgment (2021 FC 758; corresponding to the A-254-21 appeal), the Federal Court Judge allowed Ermineskin Cree Nation's (Ermineskin) application for judicial review and set aside the Minister's designation order. The Federal Court Judge found that the Minister had a duty to consult Ermineskin in light of an existing Impact Benefit Agreement between the mining company, Coalspur Mines (Operations) Ltd. (Coalspur), and Ermineskin, and that it had not discharged this duty prior to issuing the designation order.

[3] In the second judgment (2021 FC 759; corresponding to the A-261-21 appeal), the Federal Court Judge dismissed Coalspur's parallel application for judicial review of the Minister's decision on administrative law grounds, finding it had been rendered moot by his decision to grant Ermineskin's application for judicial review in the first judgment.

[4] Keepers of the Water Counsel, Keepers of the Athabasca Watershed Society, and the West Athabasca Watershed Bioregional Society are three community organizations involved in the A-261-21 appeal. Keepers of the Water Counsel and Keepers of the Athabasca Watershed Society were amalgamated earlier this year and are now referred to as the Keepers of the Water Society. At the hearing before our Court, the style of cause was amended to reflect that change and thus the style of cause of this appeal reflects the amalgamation.

[5] For the reasons that follow, both appeals should be dismissed.

## II. Background

### A. The Parties

[6] Ermineskin is an Indian band within the meaning of the *Indian Act*, R.S.C., 1985, c. I-5 and a Treaty 6 signatory. Its traditional territory is known as the Bear Hills or Maskwacheesihk and is approximately 25,000 acres in size (the Traditional Territory). Ermineskin holds and exercises constitutionally protected Aboriginal rights in this Traditional Territory and throughout Treaty 6 territory.

[7] Coalspur owns and operates an open-pit coalmine east of Hinton known as the Vista Coal Mine. It operates an existing Vista Coal Mine Project (Phase I) and is seeking to operate the Vista Coal Underground Mine Project (VUM) and the Vista Coal Mine Phase II Expansion Project (Phase II) (all three together, the Projects). The Projects are located within Treaty 6 lands and within the Traditional Territory.

#### (1) Summary of the Projects

i. Phase I: this phase received provincial approval in 2014. It did not require any federal approval so did not invoke the IAA. The approval of Phase I is not at issue in this proceeding.

ii. VUM: an exploratory underground mine that is to be located within the boundaries of existing Phase I permits and licenses. Until the Minister's decision to designate it, this project did not require any additional assessment above the provincial approvals conducted in 2014 for Phase I.

iii. Phase II: a proposed expansion of Phase I. It will expand the footprint of Phase I westwards, increasing the volume of coal production and using existing Phase I infrastructure.

[8] The Minister is a decision-maker with various powers under the IAA. The Minister issued a decision to designate Phase II and the VUM pursuant to subsection 9(1) of the IAA. The Minister, together with the Attorney General of Canada (collectively, Canada), are the appellants in the A-254-21 appeal.

[9] Louis Bull Tribe and the Stoney Nakoda Nations (Bearspaw First Nation, Chiniki First Nation and Wesley First Nation) are Indigenous groups who also submitted a request to the Minister to designate Phase II and the VUM projects for impact assessment. Canada, Keepers of the Water Society and West Athabasca Watershed Bioregional Society, Louis Bull Tribe and the Stoney Nakoda Nations are the respondents in the A-261-21 appeal.

## B. The Impact Benefit Agreement

[10] In 2013, Coalspur entered into an Impact Benefit Agreement (IBA) with Ermineskin regarding Phase I (2013 IBA). An IBA is an agreement between a project proponent and an Indigenous community for the purpose of sharing in the benefits of a project, mitigating and accommodating impacts on Aboriginal and treaty rights, and allowing for the realization of economic interests and opportunities derivative of Aboriginal and treaty rights. The 2013 IBA created “mutually beneficial opportunities for community development, infrastructure, and business opportunities…ensured Ermineskin’s participation in ongoing environmental monitoring of Coalspur’s operations” and “formalized the relationship” between Ermineskin and Coalspur (Appeal Book, Wildcat Affidavit I, Tab 7, p. 1257).

[11] In early 2019, Coalspur began engaging with Ermineskin with respect to its proposed Phase II. In October 2019, the two parties entered into an updated IBA that covered both the existing Phase I and the proposed projects (2019 IBA).

[12] The contents of the IBAs are confidential and neither IBA was entered into evidence.

(1) The Designation Process

[13] The IAA, along with the *Physical Activities Regulations*, S.O.R./2019-285, create a comprehensive regime where the federal government evaluates the potential for physical activities to cause adverse environmental effects. As with other impact assessment regimes, the IAA is meant to reconcile a "proponent's development desires with environmental protection and preservation" (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.LR. (4th) 1, at para. 71).

[14] Under subsection 9(1) of the IAA, the Minister can "designate" a physical activity to be subject to the IAA, deeming it a "designated project". A designated project undergoes an initial assessment of its impacts, environmental and otherwise, and is subject to further federal oversight and approval where appropriate. Once a project is designated, the proponent is prohibited from doing any acts or things connected with carrying out the projects that may have effects on federal jurisdiction until the federal assessment process is completed (IAA, s. 7).

[15] Requests for the Minister to designate a physical activity can be made by an Indigenous nation, a non-governmental organization, a federal authority, another jurisdiction or any member of the public. Upon receiving a designation request, the Impact Assessment Agency of Canada (the Agency) first considers the request, seeks input from those affected including "potentially affected Indigenous groups" and various governmental departments with relevant expertise. The Agency then issues a recommendation to the Minister, which is "informed by science, Indigenous and community knowledge, input from the proponent, and consultations with other jurisdictions, as applicable" (Appeal Book, Tab 6, pp. 1208-1209, 1215-1216; IAA, ss. 9(2), 9(3)).

[16] Between May and August 2019, a number of environmental groups requested that the Minister designate Phase II. The Agency sought information from 31 Indigenous groups with respect to the request. Ermineskin was one of these groups. The Agency requested that the Minister not designate Phase II. In accordance with the Agency's recommendation, in December 2019, the Minister refused the request to designate Phase II for review under the IAA (Non-Designation Decision).

[17] However, a year later, in May and June 2020, the Minister received requests from environmental groups and two Indigenous groups, Louis Bull Tribe and Stoney Nakoda Nations, requesting that the Minister reconsider its Non-Designation Decision based on Coalspur's February 2020 reapplication to the Alberta Energy Regulator (AER) of the VUM. These groups argued that Coalspur's application for AER approval of the VUM constituted a change in

circumstances and asked that Phase II and the VUM be considered together and that both be designated.

[18] Once again, the Agency recommended that the Minister not designate Phase II, alone or in combination with the VUM. The Agency did not seek out the views of any Indigenous groups, except the two Indigenous requesters, in coming to its conclusions. More particularly, Ermineskin was not provided with the opportunity to have any input in the Agency's findings.

[19] On July 30, 2020, despite the Agency's recommendation not to designate, the Minister designated Phase II and the VUM (the First Designation Order). The Minister did not give notice to or hear from Ermineskin before making its decision.

[20] Both Ermineskin and Coalspur sought judicial review of this First Designation Order. Ermineskin brought an application for judicial review seeking to quash or set aside the First Designation Order on the grounds that the Minister did not meet its duty to consult, pursuant to section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Constitution Act, 1982*), and that the decision to issue the First Designation Order was procedurally unfair and unreasonable (2021 FC 758). Coalspur also brought an application for judicial review seeking to quash or set aside the First Designation Order on the ground that it was unreasonable (2021 FC 759).

## C. Summary of the Federal Court Judge's decisions in 2021 FC 758 and 2021 FC 759

[21] The Federal Court Judge granted the 2021 FC 758 application, setting aside the First Designation Order and remanding the matter for reconsideration by the Minister. He concluded that the Minister owed a duty to consult Ermineskin when considering the designation requests and that the Minister breached its duty because there had been no consultation at all.

[22] In his decision, the Federal Court Judge referred to the leading authorities concerning the honour of the Crown and the duty to consult under section 35 of the *Constitution Act, 1982* (2021 FC 758 Reasons at paras. 90-93, citing *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (*Rio Tinto*); *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (*Haida*), *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R.(4th) 385). He noted that the honour of the Crown "must be understood generously in order to reflect the underlying realities from which it stems" (*Haida* at para. 17) and that a "generous, purposive approach" to the duty to consult is required (*Rio Tinto* at para. 43).

[23] The Federal Court Judge then set out the three required elements to trigger the duty to consult: (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right, (2) the existence of contemplated Crown conduct, and (3) there is potential for that contemplated conduct to adversely affect an Aboriginal claim or right (2021 FC 758 Reasons at para. 94; citing *Rio Tinto* at para. 31; *Haida Nation* at para. 35).

[24] The Federal Court Judge concluded that the first element was satisfied, as there was a treaty right involved, and that the Crown always has notice of treaties to which it is a party (2021 FC 758 Reasons at para. 95). The second element was satisfied as the Minister's consideration of a designation order constituted Crown conduct (2021 FC 758 Reasons at para. 99). With respect to the third element, the Federal Court Judge disagreed with Canada's argument that the First Designation Order did not have the potential to adversely affect an Aboriginal right, finding this proposed interpretation to be too narrow (2021 FC 758 Reasons at para. 104).

[25] In his analysis, the Federal Court Judge first concluded that there was a duty to consult because the projects "are "taking up" of lands under Treaty 6 and have the potential to adversely impact Ermineskin's hunting, trapping, fishing, and gathering rights" (2021 FC 758 Reasons at para. 101). He added that although not every "taking up" of land automatically triggers the duty to consult, on the basis of the evidence on record, it was triggered in this case (2021 FC 758 Reasons at para. 101, citing *Athabasca Chipewyan First Nation v. Alberta*, 2019 ABCA 401, 94 Alta. L.R. (6th) 279 at paras. 57-61).

[26] The Federal Court Judge also found that the 2019 IBA created an economic interest that engaged the duty to consult (2021 FC 758 Reasons at para. 105). He observed that the First Designation Order prohibited Coalspur from doing any act or thing relating to Phase II and the VUM and pushed back the start dates for both projects (2021 FC 758 Reasons at paras. 76, 77). The First Designation Order therefore adversely impacted the "the economic, community and other benefits accruing to Ermineskin under the 2019 IBA" (2021 FC 758 Reasons at para. 77).

[27] The Federal Court Judge considered that these "economic, community and other benefits" encompassed in the 2019 IBA are "closely related and thus derivative" from Aboriginal and treaty rights (2021 FC 758 Reasons at paras. 105, 107). He further found uncontroverted evidence that the 2019 IBA was intended to compensate for Coalspur's taking up of Ermineskin's land for Phase II and the VUM and for the loss of its Aboriginal and treaty rights, and that the 2019 IBA does not negate such rights (2021 FC 758 Reasons at paras. 73, 105). As a result, the Minister had a duty to consult Ermineskin before issuing the First Designation Order.

[28] The Federal Court Judge decided that, as there was no consultation whatsoever, the Crown had failed to meet its duty to consult Ermineskin. As a result, the Federal Court Judge quashed the First Designation Order and remanded the matter to the Minister for reconsideration. Having found that a duty to consult was owed, the Federal Court Judge declined to make determinations with respect to procedural fairness and reasonableness (2021 FC 758 Reasons at paras. 130-131).

[29] In light of his decision to quash the First Designation Order in 2021 FC 758, the Federal Court Judge dismissed Coalspur's application for judicial review in 2021 FC 759.

## D. Second Designation Order

[30] On August 3, 2021, following the Federal Court's judgment setting aside the First Designation Order and remanding the matter for reconsideration by the Minister, the Agency

initiated a new consultation process in respect of the decision to designate Phase II and the VUM. This time, during the reconsideration process, the Agency engaged with Ermineskin.

[31] Following this reconsideration process, on September 29, 2021, the Minister issued a new designation order under the IAA, re-designating the same two projects under subsection 9(1) of the IAA (the Second Designation Order). On the same day that the Minister issued the Second Designation Order, the Minister also appealed the Federal Court's decision (2021 FC 758) with respect to the First Designation Order (A-254-21).

[32] For its part, also on September 29, 2021, Coalspur appealed the Federal Court's decision (2021 FC 759) dismissing its application for judicial review (A-261-21).

[33] In response to the issuance of the Second Designation Order by the Minister, Coalspur, Ermineskin Cree Nation and Whitefish (Goodfish) Lake First Nation #128 each commenced applications for judicial review before the Federal Court, seeking to set it aside (Ermineskin Cree Nation, Whitefish (Goodfish) Lake First Nation #128 and Coalspur Mines (Operations) Ltd., No. T-1654-21). These applications were consolidated before the Federal Court (the Consolidated Applications).

[34] On January 12, 2022, Prothonotary Ring issued an order holding the Consolidated Applications in abeyance until after the conclusion of the A-254-21 and A-261-21 appeals before this Court. On the same date, this Court ordered that the A-254-21 and A-261-21 appeals proceed on an expedited basis.

E. Coalspur's motion to strike A-254-21 for mootness

[35] In light of the Second Designation Order, Coalspur also brought a motion to this Court to have the A-254-21 appeal – in relation to the First Designation Order – dismissed for mootness. Coalspur argues that because the Second Designation Order operates to prevent it from proceeding with its proposed projects, it does not matter whether this appeal proceeds, as it has no practical impact. If the A-254-21 appeal is successful, it will restore the First Designation Order, which will result in duplicative designation orders. If the A-254-21 appeal is unsuccessful, the First Designation Order will remain quashed, but the projects will still be designated under the IAA due to the Second Designation Order. Coalspur adds that it was abusive for the Minister to have issued the Second Designation Order and says that Canada instead ought to have sought to stay the order of the Federal Court with respect to the First Designation Order (2021 FC 758) pending the disposition of this appeal (A-254-21).

[36] Relying on Coalspur's submissions, Ermineskin agrees that this Court should dismiss the A-254-21 appeal for mootness, as reversing the Federal Court's decision would not serve any purpose.

[37] If this Court were to dismiss the A-254-21 appeal, Coalspur says it will consent to an order dismissing or discontinuing its A-261-21 appeal (Coalspur Written Representations on Motion at para. 3). The respondents in the A-261-21 appeal make no comment regarding the mootness of the A-254-21 appeal.

## III. Analysis

### A. Whether the A-254-21 appeal is moot

[38] A moot case is one which will not have the effect of resolving a live controversy which will or may affect the rights of the parties to the litigation (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231 (*Borowski*)). In this case, the two possible outcomes in A-254-21 are for the First Designation Order to either remain quashed or be reinstated. Neither outcome will change whether Phase II and the VUM are designated under the IAA because these projects will remain designated pursuant to the Second Designation Order.

[39] Further, and most importantly, regardless of whether the Federal Court Judge was correct in concluding that the duty to consult was triggered in this case, Canada subsequently did consult with Ermineskin prior to issuing the Second Designation Order. Canada had the option to apply to stay the order of the Federal Court pending the disposition of this appeal but chose to consult with Ermineskin, thereby complying with the Federal Court's decision. Although it was open to Canada to elect to comply with the Federal Court decision, the consequence of this decision is that whether or not Canada owed Ermineskin a duty to consult is no longer a live controversy.

[40] Indeed, Canada has now exercised this duty and the Consolidated Applications regarding the Second Designation Order do not pertain to the duty to consult but instead to its sufficiency. Hence, given that the Minister has consulted with Ermineskin, the only remaining live

controversy pertains to the sufficiency of consultation. This is precisely what is at issue in the Consolidated Applications currently held in abeyance before the Federal Court.

[41] Therefore, I am of the view that the A-254-21 appeal is moot. Having taken into account all of the *Borowski* factors, I am not satisfied that this Court should exercise its discretion to hear the application despite its mootness. Among other things, considerations of expediency and cost-efficiency do not favour this appeal being heard, as hearing this appeal on the merits will delay the progression of the Consolidated Applications (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 140). To decide this case would be a waste of judicial resources and impermissible law-making in the abstract, as the issues have become academic (*Borowski*). The recent decision by this Court in *Canadian Union of Public Employees (Air Canada Component) v. Air Canada*, 2021 FCA 67, [2021] F.C.J. No. 286 (Q.L.) is apposite:

> [14] The mootness issue assumes greater significance following *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. There, the Supreme Court underscored that courts must consider expediency and cost-efficiency when considering applications for judicial review and should not grant remedies when they serve no useful purpose: at para. 140, citing *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 55.

[42] However, despite having found that the A-254-21 appeal is moot, these reasons should in no way be understood as an endorsement of the Federal Court Judge's decision.

[43] Coalspur asserts that if the A-254-21 appeal is dismissed for mootness, it will consent to discontinuing the A-261-21 appeal or to having it dismissed on a without costs basis (Appellant Coalspur's A-261-21 Memorandum of Fact and Law at para. 3). Canada agrees with Coalspur

that if the A-254-21 appeal is dismissed, the A-261-21 appeal becomes moot (Respondent Canada's A-261-21 Memorandum of Fact and Law at paras. 2, 24). The remaining respondents in the A-261-21 appeal have each argued that the A-261-21 appeal is moot (Respondent Louis Bull Tribe's A-261-21 Memorandum of Fact and Law at para. 1; Respondent Keepers of the Water Society and West Athabasca Watershed Bioregional Society's A-261-21 Memorandum of Fact and Law at para. 4). All parties therefore agree that the A-261-21 appeal should be dismissed and that it need not be addressed.

[44] I would allow Coalspur's motion to strike, dismiss the appeal in A-254-21 for mootness, with costs, and dismiss the appeal in A-261-21, without costs.

"Richard Boivin"
J.A.

"I agree.
David Stratas J.A."

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

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | **A-254-21** |
| **STYLE OF CAUSE:** | THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND, THE ATTORNEY GENERAL OF CANADA v. ERMINESKIN CREE NATION AND, COALSPUR MINES (OPERATIONS) LTD. |
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| **PLACE OF HEARING:** | BY ONLINE VIDEOCONFERENCE |
| **DATE OF HEARING:** | MAY 17, 2022 |
| **REASONS FOR JUDGMENT BY:** | BOIVIN J.A. |
| **CONCURRED IN BY:** | STRATAS J.A.<br>DE MONTIGNY J.A. |
| **DATED:** | JULY 4, 2022 |

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