resilient LLP

July 27, 2021

VIA RESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Attention: Registrar

Dear Ms. Long,

Re: Enbridge Gas Inc.
2020 Federal Carbon Pricing Program (FCPP) Application
OEB File No.: EB-2019-0247

We are counsel to Anwaatin Inc. (**Anwaatin**) in the above-noted proceeding. The Federal Court of Canada (**FCC**) issued its decision on July 19, 2021 in *Ermineskin Cree Nation v. Canada (Environment and Climate Change*) (attached), affirming that economic rights are recognized pursuant to section 35 of the *Constitution Act, 1982* (the **Constitution**) (the **FCC Decision**).[1] Anwaatin provides this addendum to its submissions in order to ensure that the Board is informed and considers the relevant FCC Decision on the Deferred Issues, particularly as it pertains to Anwaatin's section 35 submissions.[2]

The FCC Decision supports and recognizes economic rights as integral to Aboriginal and Treaty rights, inclusive of such rights associated with reserve lands and on-reserve personal property, as recognized and affirmed through section 35 of the Constitution. The applicant in *Ermineskin*, Ermineskin Cree Nation, an "Indian band" as defined in the *Indian Act*, sought judicial review of an order issued by the Minister of Environment and Climate Change affecting the First Nation's economic rights, alleging adverse impacts on their Aboriginal and Treaty rights and failure of the Minister to uphold the honour of the Crown and satisfy its duty to consult and accommodate. Justice Brown affirmed that economic rights of Indigenous peoples are protected by section 35 of the Constitution, stating:

> "Well-established jurisprudence requires a generous and purposive approach to the constitutionalized doctrine of the honour of the Crown and its corollary, the duty to consult. This flows from relevant and important objectives including reconciliation between Canada and First Nations. The jurisprudence now extends the duty to consult to include economic rights and benefits closely related to and derivate from Aboriginal rights as discussed below. Thus, rights that are closely related to and derivative from Aboriginal

[1] *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758 (CanLII) (*Ermineskin)*.
[2] Submissions of Anwaatin, (7 June 2021), paras. 27-31, in EB-2019-0247, available online at < https://www.rds.oeb.ca/CMWebDrawer/Record/717105/File/document>.

> rights are protected by the duty to consult which of course floes from the constitutionalized doctrine of the honour of the Crown."[3] (emphasis added)

This reinforces the principle that economic rights and benefits are closely related to or derivative of Aboriginal and Treaty rights and are recognized and affirmed pursuant to section 35 of the Constitution.

Justice Brown noted that "economic interests" are taken into account by the courts when they are closely related to or derivative from Aboriginal right or title or an underlying territorial right.[4] This extends to reserve lands as analogous to and equally recognized as Aboriginal rights, Treaty rights, and Aboriginal title.[5] Justice Brown also rejected a narrow and limited interpretation of economic rights, stating:

> "In this case [the Minister] says the economic interests are through an agreement with Coalspur and are distinct from the substance of Aboriginal and Treaty rights and do not relate to the promise of section 35 of the *Constitution Act, 1982* or the principle of the honour of the Crown. I have already considered and rejected this narrow interpretation of Aboriginal and Treaty rights protected by section 35 in respect of economic rights which, as I have found here, are closely related to and are derivative from Aboriginal and Treaty rights."[6]

Anwaatin submits that First Nations' "economic interests" and/or economic rights in and around their reserve lands and on-reserve personal property are therefore expressly protected not only by sections 87 and 89 of the *Indian Act*, but also through the First Nation's Aboriginal and Treaty rights in their reserve lands by virtue of section 35 of the Constitution. Imposing fees, charges, and levies on First Nations' personal property and negatively impacting their economic rights and interests through the FCPP Charge is therefore both expressly prohibited by section 89 of the *Indian Act* and the economic rights implicit in Aboriginal and Treaty rights that are protected by section 35 of the Constitution.

Anwaatin submits that the decision in *Ermineskin* clearly supports its argument (at pages 27 to 31 of its submissions and pages 10 through 11 of its reply submissions) that the application of the FCPP Charge is contrary to section 35 of the Constitution as it diminishes the on-reserve personal property of Indigenous peoples and impairs the establishment and maintenance of reserve lands, and the rights and benefits closely related to or derivative of the Aboriginal and Treaty rights held in connection to reserve lands.

Anwaatin respectfully requests that the Board accept this addendum to Anwaatin's reply submissions and attaches the FCC Decision in order to ensure both a full and complete record on the Deferred Issues and that the Board has been provided with the jurisprudence that is material to the Board's consideration of the Deferred Issues.

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[3] *Ermineskin*, para. 8, and at paras 105, 109-110, and 127. See also *Council of the Innu of Ekuanitshit v. Canada (Fisheries and Oceans)*, 2015 FC 1298 (CanLII);
[4] *Ibid*., para 109-110, citing *Ehattesaht First Nation v. British Columbia (Forests, Lands and Naturak Resource Operations)*, 2024 BCSC 849 (CanLII), paras 59-62; *Da'naxda'xw/Awatlala First Nation v British Columbia Hydro and Power Authority*, 2015 BCSC 16; and *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991.
[5] See Anwaatin Reply Submissions, (19 July 2021), pp. 10-11, in EB-2019-0247, available online at <https://www.rds.oeb.ca/CMWebDrawer/Record/719953/File/document>.
[6] *Ermineskin*, para. 127.

Sincerely,

Lisa (Elisabeth) DeMarco

c. Adam Stiers and Tania Persad, Enbridge Gas Inc.
Larry Sault, Anwaatin Inc.
Don Richardson

Encl.

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended (the **Act**);

AND IN THE MATTER OF an application by Enbridge Gas Inc. (**Enbridge Gas**), for an order or orders for gas distribution rate changes and clearing certain non-commodity deferral and variance accounts related to compliance obligations under the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186. (the **Application**).

EB-2019-0247

ADDENDUM TO SUBMISSIONS

OF

ANWAATIN INC.

July 27, 2021

Federal Court  Cour fédérale

Date: 20210719

Docket: T-1014-20

Citation: 2021 FC 758

Ottawa, Ontario, July 19, 2021

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ERMINESKIN CREE NATION

Applicant

and

THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, THE ATTORNEY GENERAL OF CANADA AND COALSPUR MINES (OPERATIONS) LTD.

Respondents

JUDGMENT AND REASONS

I. Facts

A. *Overview*

[1] Ermineskin Cree Nation [Ermineskin], an Indian band within the meaning of the *Indian Act*, RSC, 1985, c I-5 [*Indian Act*], seeks judicial review of an Order issued by Honourable

Jonathan Wilkinson as Minister of Environment and Climate Change [Minister] dated July 30, 2020 [Designation Order]. The Designation Order designated the proposed Vista Coal Mine Phase II Expansion Project [Phase II], and a proposed limited scale Underground Test Mine [limited Underground Test Mine] added to the Vista Coal Mine [Phase I], which had been approved in 2014. The Designation Order was made under subsection 9(1) of the federal *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].

[2] This application is one of two concerning the Designation Order. The other is brought by Coalspur Mines (Operations) Ltd. [Coalspur]. Coalspur is the proponent of the mines in question, and brings its application in Court file T-1008-20. Both applications request the same relief, namely an Order quashing the Designation Order. Both were argued one after the other on May 19 and 20, 2021. I am quashing the Designation Order in this Ermineskin application Court file T-1014-20. Reasons will be issued shortly in connection with the Coalspur's application in T-1008-20.

[3] In addition to being a band under the *Indian Act*, Ermineskin is also a member of the Four Nations of Maskwacis, which is Alberta's largest Indigenous nation. Ermineskin is a signatory to Treaty 6 to which Canada is also an adherent. Ermineskin's traditional territory is known as the Bear Hills or Maskwacheesihk [Traditional Territory] and is approximately 25,000 acres in size.

[4] Ermineskin holds and exercises Aboriginal and Treaty rights [Aboriginal rights] throughout both the Treaty 6 territory and the Traditional Territory. These rights are recognized, affirmed and protected by section 35 of the *Constitution Act, 1982*. These Aboriginal rights

include, but are not limited to the right to hunt, fish, trap and gather “on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.”

[5] Ermineskin has entered into an Impact Benefit Agreements [2019 IBA] with Coalspur by which Coalspur will provide valuable economic, community and social benefits to Ermineskin. This agreement was entered into after consultation occurred regarding Phase II. Ermineskin has a similar agreement with Coalspur in connection with the ongoing Phase I [2013 IBA]. Both are intended to compensate Ermineskin for potential impacts caused by natural resource development on the ability of Ermineskin members to exercise Aboriginal rights within their Traditional Territory. Phase II also entails a taking up of lands covered by Treaty 6.

[6] Lying at the heart of this Application is Ermineskin’s submission the Designation Order will adversely impact Aboriginal and Treaty rights including economic opportunities created by its contractual relationship with Coalspur pursuant to the 2019 IBA. If it does, the honour of the Crown imposes a duty to consult with Ermineskin on the Minister before making the Designation Order. Ermineskin argues the Designation Order will “delay, lessen, or eliminate Ermineskin’s economic interest” in Phase II and the limited Underground Test Mine. The Respondent Minister rejects this submission. He says (at paragraph 68 of Respondent Minister’s Memorandum) such loss of economic, social and community benefits is not an adverse impact related to an Aboriginal or Treaty right, and does not relate either to Aboriginal title to the land that may be developed, or to the ownership of the coal resource. The only connection is indirect, in relation to a third party, speculative and contingent compensation for potential adverse impacts to the

asserted rights should Phase II and the limited Underground Test Mine go ahead. Therefore, the Minister claims there is no duty to consult Ermineskin.

[7] With respect, I disagree.

[8] Well-established jurisprudence requires a generous and purposive approach to the constitutionalized doctrine of the honour of the Crown and its corollary, the duty to consult. This flows from relevant and important objectives including reconciliation between Canada and First Nations. The jurisprudence now extends the duty to consult to include economic rights and benefits closely related to and derivative from Aboriginal rights as discussed below. Thus, rights that are closely related to and derivative from Aboriginal rights are protected by the duty to consult which of course flows from the constitutionalized doctrine of the honour of the Crown.

[9] In my view, given the uncontroverted evidence in this case, the 2019 IBA negotiated by Ermineskin contains valuable economic rights and benefits that are closely related to and derivative from Aboriginal rights, and as such give rise to the duty to consult. So too does the taking up of land contemplated.

[10] It is not disputed the Minister did not consult with or even give notice to Ermineskin before making the Designation Order. The only Indigenous groups consulted by the Minister were those requesting the Designation Order. In my respectful view, the Minister had a duty to consult Ermineskin, which he completely breached.

[11] Therefore, judicial review will be granted. It will not be necessary to deal with procedural fairness or the reasonableness of the Designation Order.

B. *The mines and negligible impact of the limited Underground Test Mine on Phase II*

[12] Three contiguous coal-mining activities are referred to in this proceeding. All are owned by the Respondent Coalspur:

1. First is the existing Phase I. It was proposed in 2012, approved in 2014, and delivered its first shipment in 2019. It produces approximately 6 million tonnes of coal per year and occupies approximately 1,435 hectares. The approval of Phase I is not in issue in this proceeding. It was provincially approved in early 2014; it was not subject to a federal environmental impact assessment. Federal issues including Aboriginal and Indigenous issues were considered by the provincial Alberta Energy Regulator [AER] with input from federal departments and agencies such as the federal department Fisheries and Oceans Canada in relation to water quality and fish habitat;

2. The second is Phase II, a proposed expansion of Phase I. Phase II would increase maximum production by 4.2 million tonnes per year, and the area of its expansion is approximately 633.6 hectares. Prior to the Designation Order it was undergoing environmental assessments by the AER, as had been the case with Phase I. The AER will consider potential adverse effects on the environment and exercise of Aboriginal and Treaty rights. The Alberta Consultation Office [ACO], a branch of the Government of Alberta responsible for ensuring Alberta's duty to

consult is met, had directed Coalspur to consult with six First Nations – including Ermineskin – regarding Phase II. Coalspur had been engaging with Ermineskin on Phase II since early 2019.The Minister decided *not* to designate Phase II in December 2019, but reversed himself in issuing the Designation Order in July 2020. The Impact Assessment Agency [Agency] recommended against designation in 2019, and again in 2020;

3. The third is a much smaller limited Underground Test Mine. It is located entirely within the footprint of previously approved Phase I. Its new surface disturbance is only 2.52 hectares, or about 0.2% of the surface area of Phase I. Its production volume is limited to approximately 10% of the production of Phase II. Prior to the Designation Order the AER had determined it did not require an additional assessment over and above that conducted and approved in 2014 for Phase I. The Agency considered its impact negligible in relation to Phase II, and recommended against the Designation Order.

[13] I deliberately refer to the limited Underground Test Mine using the word “limited”. The Agency concluded the difference between Phase II without the limited Underground Test Mine, and Phase II with it was “limited” and “negligible”. The Agency found that: “the incremental impacts of the [the Underground Test Mine] would be negligible in comparison with to those of Phase II given that there is almost no new land disturbance…” (Agency Memorandum to Minister, Certified Tribunal Record [CTR] page 5). To emphasize, the Minister had determined Phase II alone did *not* warrant designation in December 2019.

[14] All three mines are located entirely within Treaty 6 lands. They are also entirely within Ermineskin's Traditional Territory. Ermineskin is the third nearest reserve to the Project. Significantly, Stoney Nakoda Nations, one of the groups that requested a Designation Order, is located much further away from the mines than Ermineskin. In addition, some 161 Ermineskin Citizens live at the Mountain Cree/Smallboy Camp, located only 55 km from the mines.

[15] At the time of the Designation Order in July 2020, Phase II was in the process of being assessed by the AER. Ermineskin and other First Nations were involved in that assessment, as were others including provincial and federal departments and agencies.

C. *Impact of delays has already and will delay, lessen, and may eliminate Ermineskin's economic interest in the developments as negotiated under the 2019 IBA*

[16] The Designation Order of July 2020, which is subject to this judicial review, had several immediate effects on the progress of Phase II and the limited Underground Test Mine. First, by operation of the *IAA* the Designation Order brought an immediate statutory halt to all work on both. Otherwise, the intended start dates were 2020 for the limited Underground Test Mine and 2022 for Phase II.

[17] In addition to delays from the date of the Designation Order to date (amounting to almost a year), if Phase II and the limited Underground Test Mine become subject to full federal impact assessments, the undisputed evidence is they could be delayed by four and a half more years or they could be lost entirely. The Minister correctly notes a designation order does not mean an

impact assessment will be conducted and that no decision has yet to be made in that regard. However, the Minister does not specifically dispute all work is on hold.

[18] The Designation Order has already delayed, could delay further and may entirely end the valuable economic, community and social benefits accruing to Ermineskin under the 2019 IBA.

D. *About face from December 2019 to July 2020*

[19] It is important to note the Designation Order constitutes a complete about face by the Minister from the Minister's decision seven months previously. In December 2019, the Minister went through a fairly extensive designation review process and decided *not* to designate Phase II. This process was initiated by requests from certain parties including the Keepers of the Water, Keepers of the Athabasca Watershed Society and the West Athabasca Watershed Bioregional Society. The Agency assisted the Minister in considering the designation request and sought input and assistance from 31 Indigenous groups, and others including federal and provincial agencies.

[20] The Minister agrees Ermineskin was notified of the 2019 designation process and invited to comment. Four Indigenous groups responded and indicated Phase II would adversely affect the exercise of their rights.

[21] It is also undisputed that Coalspur specifically notified the Agency on September 10, 2019 it was "consulting and engaging with" First Nations – including Ermineskin. At that time,

Ermineskin's 2013 IBA with Coalspur had been in place for six years and the 2019 IBA between Coalspur and Ermineskin would be signed a month later in October 2019.

[22] The Agency recommended the Minister not designate Phase II because any potential adverse effects to areas of federal jurisdiction would be comprehensively managed through processes provided by existing federal and provincial regulatory requirements. This was the same process followed leading to provincial approval of Phase 1 in 2014. For example, Fisheries and Oceans Canada would be responsible for conducting consultation with potentially affected Indigenous groups in relation to any authorizations applied for under the *Fisheries Act*, RSC 1985, c F-14 affecting water quality and fish habitat. At the provincial level, the AER's terms of reference for Phase II already required consideration of the rights of Indigenous peoples, and required Coalspur to "describe benefits of the Project including to Indigenous communities and constraints to development including Indigenous traditional land and water use; and include an Indigenous receptor type in the public health assessment."

[23] On December 20, 2019, the Minister determined Phase II did not warrant designation.

E. *Consultation and duty to consult – Ermineskin not consulted – Crown alleges no duty to consult*

[24] In contrast, while Ermineskin was given notice and the opportunity to provide submissions to the Agency and Minister in the December 2019 decision not to designate, Ermineskin was not given notice of nor was it consulted in any way during the process leading to the Designation Order in July 2020.

[25] In fact, in terms of Indigenous and First Nation issues, the 2020 designation process was one-sided. The Agency and Minister decided to and heard only from Indigenous and First Nations seeking the impugned Designation Order.

[26] It is fair to say Ermineskin was frozen out of the process leading to the Designation Order. The Minister agrees neither he nor the Agency consulted with Ermineskin.

[27] This application concerns the duty to consult. It is noteworthy the record contains no evidence either the Agency or the Minister considered whether the Crown's duty to consult was even triggered. Nor is there any evidence the Minister or Agency considered whether the duty to consult was fulfilled.

[28] Simply put there was no consultation in this case. In fact, the Minister's position is that he had no duty to consult with or to accommodate Ermineskin (paragraph 3, Respondent Minister's Memorandum). However, as will be seen, I am unable to accept the Minister's submission.

F. *Agency opposes and advised against designation in 2019 and again in 2020*

[29] The Agency in both its 2019 report and 2019 recommendation to the Minister recommended against designating Phase II. The Minister accepted the Agency's recommendation in December 2019.

[30] In 2019, the Minister determined designation was not warranted because the existing provincial regulatory processes would comprehensively consider and address any adverse effects within federal jurisdiction including any adverse impacts to Aboriginal rights.

[31] In 2020, the Agency again recommended against designating Phase II and the limited Underground Test Mine. The Agency pointedly advised: "[t]he proponent has indicated that the [limited Underground Test Mine] is distinct and not dependent on the Phase II expansion moving forward. Therefore, they would likely argue that considering the two projects together could be seen as being unreasonable or arbitrary." Notwithstanding, the Minister proceeded to unilaterally designate, despite clear advice from the Agency established by the *IAA* to advise Ministers in such matters.

G. *The 2020 designation process*

[32] The second designation process was initiated in 2020 by letters from two other First Nation communities: Louis Bull Tribe and Stoney Nakoda Nations. Letters supporting a reversal were also received from Keepers of the Water Council, Keepers of the Athabasca Watershed Society and The West Athabasca Watershed Bioregional Society [collectively, the Requesting Groups] in and around May 1, 2020. They argued Coalspur's application for AER approval of the limited Underground Test Mine constituted a change in circumstances and asked that Phase II and the limited Underground Test Mine be considered together and that both be designated.

[33] In connection with the earlier designation consideration, on September 10, 2019, Coalspur had advised the Agency of its consultation with Indigenous groups which specifically

included consulting and engaging with Ermineskin, including its remote community of Mountain Cree/Smallboy Camp where some 161 of its Citizens lived, located some 55 km from Phase II:

> Coalspur has been directed to engage with five First Nation communities, four of which we currently have working agreements with and meet regularly. In addition, Coalspur notes that it has agreements with two additional First Nation groups who we have not been directed to engage with, with whom we meet regularly. Coalspur received an information request from a Metis Settlement and has since responded to their information request and met on two occasions.
>
> The communities Coalspur is consulting and engaging with are: Ermineskin Cree Nation, including their remote community of Mountain Cree, Whitefish Lake First Nation, O'Chiese First Nation and the Aseniwuche Winewak Nation. ….
>
> [Emphasis added]

[34] Despite this recently acquired and in my view highly relevant information known to the Agency, for reasons not in the record, the Agency and Minister decided not to notify or seek any input from Ermineskin or for that matter, from any additional Indigenous groups. In addition, not only did the Requesting Groups initiate the request for reconsideration, they were given the opportunity to reply to Coalspur's responding submissions.

[35] In contrast, the Agency and Minister excluded Ermineskin from the process leading to the Designation Order. I find as a fact Ermineskin was given not an opportunity to have any input and was unable to comment on the submissions of the Requesting Groups or Coalspur's response.

[36] While it is not contested by the Respondent Minister, I also base my findings that Ermineskin was excluded, and that the Agency was aware of potential adverse impact on

Ermineskin's Aboriginal and Treaty rights, on the informative and uncontested affidavit evidence of Ermineskin's Carol Wildcat, its Consultation Director [Wildcat Affidavit I]:

> **Ermineskin not notified of second request and decision to designate**
>
> 27. In mid-August 2020, I was advised by an employee of Coalspur that the Minister issued an order designating the Underground Test Mine and Phase II pursuant to his discretion under the Impact Assessment Act (the "Designation Order"). A draft of the Designation Order is found at page 275 of the Certified Record, and a copy of Designation Order is enclosed as Exhibit H to the Austen Affidavit.
>
> 28. Prior to that date, I was not aware that a new request had been made to designate the Underground Test Mine or to reconsider the decision to designate Phase II. As far as I am aware, neither the Agency nor the Minister notified, provided information to, sought input from, or consulted Ermineskin in respect of the Designation Order.
>
> 29. I have reviewed Ermineskin's records to confirm this.
>
> 30. The Chief of Ermineskin or I typically receive referrals or notification of any statutory decisions to be taken by federal government departments which may have adverse impacts on Ermineskin Aboriginal and Treaty rights. The typical process is that referrals and notifications are emailed directly to the Chief or me ("Referral Email"). If a Referral Email is sent to the Chief, s/he forwards the Referral Email to me to manage the consultation process. The Referral Email typically contains a formal cover letter outlining the referral details as well as a copy of the relevant materials submitted by the project proponent, government agencies, and/or other relevant third parties.
>
> 31. In some cases, federal government departments will send a duplicate of the Referral Email by mail. Any mail received by Ermineskin is sorted by our mail clerk, and any mail related to consultation is provided to me. Any mail which is addressed to the Chief, but related to consultation, is also provided to me.
>
> 32. I have reviewed my emails and records from May 1, 2020 to July 30, 2020 for any federal government referrals related to the designation of the Vista Coal Mine. No referrals were received regarding Phase I, Phase II, or the Underground Test Mine during this period.

> 33. I have also consulted former Chief Craig Makinaw (who was Chief of Ermineskin from October 2017 to October 2020) and my team, Danny Bellerose (Consultation Liaison) and Janice Ermineskin (Consultation Assistant), and to determine if any federal government referrals related to the Vista Coal Mine were received by Ermineskin via email or mail from May 1, 2020 to July 30, 2020 which were not in my records. I am advised by Chief Makinaw, Mr. Bellerose, and Ms. Ermineskin, and do verily believe, that no referrals were received by Ermineskin regarding Phase 1, Phase II, or the Underground Test Mine during this period.
>
> **Agency was aware of the potential impact to Aboriginal and Treaty Rights**
>
> 34. 1 have reviewed the materials related to the Designation Order made available in the Agency's online registry, at: https://iaac-aeic.gc.ca/050/evaluations/proj/80731 and attached to the Austen Affidavit as Exhibits C, D, E, F, and G.
>
> 35. From these materials, I am aware that the Agency made a request for federal expert advice from various federal agencies regarding the "potential impacts to Aboriginal and Treaty Rights" posed by the Underground Test Mine. I am also aware that Coalspur notified the Agency that Ermineskin is one of the Indigenous communities whom Coalspur had been actively engaging with in respect of Phase II.

[37] No party to this proceeding contradicted deponent Ms. Wildcat's evidence as set out above, nor for that matter, any aspect of her evidence. She was not cross-examined. Nor was Rule 229 of the *Federal Courts Rules*, SOR/98-106 concerning production of documents engaged by any party. I have considered and accept the accuracy of her testimony and facts deposed, finding on a balance of probabilities that her evidence is truthful.

H. *Constitutional validity of IAA not before this Court*

[38] This Court is not asked to rule on the constitutional validity of the *IAA* because that issue is before the Alberta Court of Appeal. I therefore make no determination in that regard.

I. *Recent matters arising after the Designation Order*

[39] Two matters arose after the Designation Order.

[40] First, on May 17, 2021, two days before the hearings commenced in these matters, counsel for Coalspur brought to the Court's attention an Order of the Court of Queen's Bench of Alberta dated May 6, 2021 under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA* Order] concerning Coalspur. Paragraph 13 of the *CCAA* Order provides:

> NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY
>
> 13. Until and including July 23, 2021, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

[41] Coalspur is a party to this proceeding, as are the Attorney General of Canada for the Minister and Ermineskin. No party moved for a stay or an adjournment of the hearing of the applications for judicial review brought by Ermineskin or Coalspur. No affidavit or motion was filed seeking any form of order from this Court related to the *CCAA* Order.

[42] There was a request for a case management conference call to review the *CCAA* Order and its repercussions, which I held at the outset of the two-day hearing. The Court canvassed counsel for their positions. In effect, the parties advised that the *CCAA* Order did not impact proceedings in this case or in T-1008-20, except with respect to the possible financial implications of any cost order this Court might make.

[43] Second, on June 11, 2021, well after close of argument in these matters, two media statements were issued by the Government of Canada during its participation in the G7 meetings held in the United Kingdom. Each addressed clarification of the policies of the Government of Canada in terms of thermal coal mines such as those addressed by the Designation Order.

[44] A media release titled *Statement by the Government of Canada on thermal coal mining* states in part:

> The global phase-out of emissions from coal power is the most important initial step towards achieving Paris Agreement goals. To provide greater certainty to investors, the mining sector and Canadians generally, the Government of Canada is today clarifying its position on new thermal coal mines and expansion projects in this country.
>
> The continued mining and use of coal for energy production anywhere in the world is not environmentally sustainable and does not align with the Government of Canada's commitments, both domestically and internationally, with respect to combatting climate change. Accordingly, the Government of Canada considers that any new thermal coal mining projects, or expansions of existing thermal coal mines in Canada, are likely to cause unacceptable environmental effects. This position will inform federal decision making on thermal coal mining projects.
>
> Under the *Impact Assessment Act*, the Minister of Environment and Climate Change or Governor in Council must determine that the effects within federal jurisdiction likely to be caused by a project are in the public interest, if a project is to move forward. This

> decision is informed by whether the project contributes to sustainability, whether it hinders or contributes to Canada's ability to meet its commitments in respect of climate change, and other relevant matters.
>
> This Policy Statement on thermal coal mining will be an important consideration in the Minister's or Governor in Council's determination under the Act, as to whether the effects within federal jurisdiction caused by proposed new thermal coal mines or expansions of existing coal mines are in the public interest of Canadians.
>
> Similarly, this policy statement will inform the Minister's use of the discretionary authority under section 9 of the Act to designate any proposed new thermal coal project or expansion that is not listed in the *Physical Activities Regulations*, and the Minister's opinion, under section 17 of the Act, about whether a designated project would cause unacceptable environmental effects within federal jurisdiction before the commencement of an assessment.
>
> [Emphasis added]

[45] A media statement entitled Government of Canada releases Policy Statement on future thermal coal mining projects and project expansions states in part:

> The best available science and economic analysis calls for countries around the world to address the global challenge that is climate change, and to fully seize the economic opportunities that it presents. For the good of the planet's health, the world is moving off thermal coal for energy production, and Canada is leading the way.
>
> Burning thermal coal, the fuel that powered an industrial revolution in a previous century, is the single largest contributor to climate change and a major source of toxic pollution that harms human health. Since co-founding the Powering Past Coal Alliance in 2017 with the United Kingdom and introducing regulations to accelerate the phase-out of conventional coal-fired electricity, Canada has helped set the pace for domestic and international action in addressing this source of greenhouse gas emissions. Last month Canada, alongside other G7 countries, stressed the need to immediately end international investments in thermal coal power generation projects that emit carbon pollution.

As G7 world leaders gather in the U.K. to combat global challenges, including climate change, and as the next step in Canada's commitment to addressing harmful GHG emissions from coal, the Honorable Jonathan Wilkinson, Minister of Environment and Climate Change, today announced the Government of Canada's public policy statement on new thermal coal mining or expansion projects. The statement indicates that the Government considers that these projects are likely to cause unacceptable environmental effects within federal jurisdiction and are not aligned with Canada's domestic and international climate change commitments. Accordingly, this position will inform federal decision making on thermal coal mining projects.

Today's policy announcement provides clarity and regulatory certainty for industry, investors and Canadians. It represents another critical step in our shared path to a cleaner and more prosperous future, and places Canada among the first G7 countries to adopt such a policy.

In parallel to today's announcement, Minister Wilkinson informed Coalspur Mines Ltd. that the policy announced today applies to the consideration of its proposed thermal coal mine expansions at the Vista Coal Mine near Hinton, Alberta.

Canada's abundant natural resources give this country a competitive advantage we have always used to support jobs and prosperity. In the global race to carbon-neutral economies by 2050, Canada continues to build on its long-term competitive advantage by focusing on environmental sustainability and clean growth while supporting workers and communities.

That is why, for example, Canada's strengthened climate plan—A Healthy Environment and a Healthy Economy—committed $964 million over four years to advance smart renewable energy and grid modernization projects to enable the clean grid and jobs of the future. And that is why, to mitigate the impacts of the domestic phase out of coal-fired electricity, Budgets 2018 and 2019 provided $185 million for skills development, economic diversification, and infrastructure to support coal workers and communities.

The evidence is clear: the continued mining and use of thermal coal for energy production in the world runs counter to what is needed to effectively combat climate change and seize the economic opportunities that it presents. It is in this context that the Government has announced this policy today and will continue to work with Canadians to deliver strong climate action.

[Emphasis added]

[46] Given the context of these announcements and the specific reference to Coalspur's Phase II and limited Underground Test Mine, I sent them to counsel, directing the Court "would like to hear from counsel as to whether these have any impact on my consideration and writing of the judgment in these two judicial reviews."

[47] The parties were unanimous in their responses which were to the effect the two announcements had or should have no impact on my consideration of or writing judgments in these matters.

J. *Statutory scheme for designation*

[48] All jurisdictions in Canada – including both Alberta and Canada – employ environmental impact assessment regimes to evaluate the potential for physical activities to cause significant adverse environmental effects, and 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 SCR 3 at para 71).

[49] In 2019, Parliament enacted the *IAA,* which replaced the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 [*CEAA, 2012*].

[50] The *IAA* imposes federal decision-making and the possibility of a requirement for federal impact assessments on "designated projects" regardless of whether they might also be subject to provincial environmental assessment.

[51] Designation pursuant to the *IAA* applies to physical activities rather than projects. Physical activities do not come within the scope of the *IAA* unless they, on their own or in conjunction with other physical activities, meet the definition of a designated project set out in the *IAA*.

[52] A designated project is defined in the *IAA*:

> **designated project** means one or more physical activities that
>
> > (a) are carried out in Canada or on federal lands; and
> >
> > (b) are designated by regulations made under paragraph 109(b) or designated in an order made by the Minister under subsection 9(1).
>
> It includes any physical activity that is incidental to those physical activities, but it does not include a physical activity designated by regulations made under paragraph 112(1)(a.2).
>
> [Emphasis added]

[53] As a result, there are two ways a physical activity may fall within the definition of a designated project under the *IAA*.

[54] The first is where a physical activity meets a threshold for either its area or its volume of coal production; if it does, it is automatically designated by operation of law. This is set out in

subsection 19(a) of the schedule of the *Physical Activities Regulations*, SOR/2019-285 [*Regulations*]:

> 19 The expansion of an existing mine, mill, quarry or sand or gravel pit in one of the following circumstances:
>
> > (a) in the case of an existing coal mine, if the expansion would result in an increase in the area of mining operations of 50% or more and the total coal production capacity would be 5 000 t/day or more after the expansion.
>
> [Emphasis added]

[55] The second is when the Minister by Order designates an activity under subsection 9(1) of the *IAA;* in which case the Minister must provide reasons per subsection 9(4):

Minister's power to designate	**Pouvoir du ministre de désigner**
9 (1) The Minister may, on request or on his or her own initiative, by order, designate a physical activity that is not prescribed by regulations made under paragraph 109(b) if, in his or her opinion, either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation.	**9 (1)** Le ministre peut par arrêté, sur demande ou de sa propre initiative, désigner toute activité concrète qui n'est pas désignée par règlement pris en vertu de l'alinéa 109b), s'il estime que l'exercice de l'activité peut entraîner des effets relevant d'un domaine de compétence fédérale qui sont négatifs ou des effets directs ou accessoires négatifs, ou que les préoccupations du public concernant ces effets le justifient.
…	…
Minister's response — time limit	**Réponse du ministre — délai**

(4) The Minister must respond, with reasons, to a request referred to in subsection (1) within 90 days after the day on which it is received. The Minister must ensure that his or her response is posted on the Internet site.	**(4)** Le ministre répond, motifs à l'appui, à la demande visée au paragraphe (1) dans les quatre-vingt-dix jours suivant sa réception et, dans un tel cas, il veille à ce que la réponse soit affichée sur le site Internet.
[Emphasis added]	[Je souligne]

[56] Phase II could only be designated by Order of the Minister under subsection 9(1) of the *IAA*.

[57] Phase II did not meet the threshold for statutory designation under subsection 19(a) of the *Regulations* because – while it exceeded the production threshold – it did not meet the minimum area threshold.

K. *Agency and Minister consideration of impact on Indigenous peoples required by Operational Guide and the IAA*

[58] The *IAA's* designation process may be initiated at the request of third parties and is designed to assess a wide range of impacts. This includes impacts on Indigenous peoples such as Ermineskin according to the Agency's *"Operational Guide: Designating a Project under the Impact Assessment Act,"* sanctioned by the Government of Canada and available on Canada's website at: https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/designating-project-impact-assessment-act.html [*Operational Guide*].

[59] The purpose of the *Operational Guide* is set out on its introductory first page:

> **Purpose**
>
> This document describes the process for considering whether to designate a project **not identified** in the *Physical Activities Regulations*, also known as the Project List, under the *Impact Assessment Act* (the Act).
>
> [Emphasis in original]

[60] The *Operational Guide* makes several references to the rights and interests of Indigenous peoples. It declares the Agency will consider, among other things, whether it requires further information from the requester(s), or from federal departments, other jurisdictions and "potentially affected Indigenous groups" to determine whether the physical activity has the potential to cause adverse effects on "the environment that could affect the Indigenous peoples of Canada" or "the health, social or economic conditions of the Indigenous peoples of Canada," and the potential of the physical activity to cause "adverse impacts on the section 35 rights" of Indigenous peoples.

[61] The *IAA* itself creates statutory obligations on the Agency and Minister to consider the interests of Indigenous peoples in several provisions including paragraphs 6(1)(f) and 6(1)(g) and subsection 6(2) setting out the Purposes of the *IAA* itself:

Purposes	**Objet**
6 (1) The purposes of this Act are	**6 (1)** La présente loi a pour objet:
…	…
(f) to promote communication and cooperation with	**f)** de promouvoir la communication et la collaboration avec les

Indigenous peoples of Canada with respect to impact assessments;	peuples autochtones du Canada en ce qui touche les évaluations d'impact;
(g) to ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982, in the course of impact assessments and decision-making under this Act;	**g)** de veiller au respect des droits des peuples autochtones du Canada reconnus et confirmés par l'article 35 de la Loi constitutionnelle de 1982, dans le cadre des évaluations d'impact et de la prise de décisions sous le régime de la présente loi;
…	…
Mandate	**Mission**
(2) The Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that fosters sustainability, respects the Government's commitments with respect to the rights of the Indigenous peoples of Canada and applies the precautionary principle.	**(2)** Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence et les autorités fédérales doivent exercer leurs pouvoirs de manière à favoriser la durabilité, à respecter les engagements du gouvernement à l'égard des droits des peuples autochtones du Canada et à appliquer le principe de précaution.
[Emphasis added]	[Je souligne]

[62] In the normal course, the Agency receives a request, seeks input from those affected including "potentially affected Indigenous groups" and various government departments with relevant expertise and or jurisdiction, and others. It may seek further input from those it has already heard from. The Agency conducts an analysis and prepares both a written report and written recommendations for the Minister.

[63] In this connection, and according to the *Operational Guide*, the Agency's recommendation to the Minister will "consider the potential impacts of the project on the rights of the Indigenous peoples of Canada as recognized and affirmed by section 35 of the *Constitution Act*, *1982*" and will be "informed by science, Indigenous and community knowledge, input from the proponent, and consultations with other jurisdictions, as applicable."

[64] Based on the Agency's report and recommendation to the Minister and submissions from the parties, the Minister considers the designation request and determines whether designation is warranted in light of the potential for adverse direct or incidental effects to areas of federal jurisdiction, or public concerns including rights of the Indigenous peoples such as Ermineskin.

[65] The Minister must provide reasons for his or her decision so that Canadians understand the "science, evidence, and knowledge" on which decision was based (*IAA*, ss 9(1) and 9(4)).

L. *Designation Order halts all work on Phase II and the limited Underground Test Mine*

[66] The designation of an activity by the Minister immediately and by statute prevents a proponent from advancing a project (see subsection 7(1)). This statutory stay of all work continues until the Agency decides a) that no impact assessment is required, or b) the proponent complies with conditions in a decision statement issued following a federal impact assessment, or c) the Agency permits the proponent to do take steps to provide the Agency or a review panel with information considered necessary to conduct an impact assessment (see subsection 7(3)):

Proponent	**Promoteur**
7 (1) Subject to subsection (3), the proponent of a	**7 (1)** Sous réserve du paragraphe (3), le promoteur

designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause any of the following effects:

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

…

(b) a change 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

(iii) outside Canada;

(c) with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on

(i) physical and cultural heritage,

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

(iii) any structure, site or thing that is of historical, archaeological, paleontological or

d'un projet désigné ne peut prendre de mesure qui se rapporte à la réalisation de tout ou partie du projet et qui peut entraîner les effets suivants:

a) des changements aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement:

…

b) des changements à l'environnement, selon le cas:

(i) sur le territoire domanial,

(ii) dans une province autre que celle dans laquelle la mesure est prise,

(iii) à l'étranger;

c) s'agissant des peuples autochtones du Canada, les répercussions au Canada des changements à l'environnement, selon le cas:

(i) au patrimoine naturel et au patrimoine culturel,

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

(iii) à une construction, à un emplacement ou à une chose d'importance sur le plan historique,

architectural significance;	archéologique, paléontologique ou architectural;
(d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; or	**d)** des changements au Canada aux conditions sanitaires, sociales ou économiques des peuples autochtones du Canada;
(e) any change to a health, social or economic matter within the legislative authority of Parliament that is set out in Schedule 3.	**e)** des changements en toute matière sanitaire, sociale ou économique mentionnée à l'annexe 3 qui relèvent de la compétence législative du Parlement.
…	…
Conditions	**Conditions**
(3) The proponent of a designated project may do an act or thing in connection with the carrying out of the designated project, in whole or in part, that may cause any of the effects described in subsection (1) if	**(3)** Le promoteur d'un projet désigné peut prendre une mesure qui se rapporte à la réalisation de tout ou partie du projet et qui peut entraîner les effets prévus au paragraphe (1) dans les cas suivants :
(a) the Agency makes a decision under subsection 16(1) that no impact assessment of the designated project is required and posts that decision on the Internet site;	**a)** l'Agence décide, au titre du paragraphe 16(1), qu'aucune évaluation d'impact du projet n'est requise et affiche sa décision sur le site Internet;
(b) the proponent complies with the conditions included in the decision statement that is issued to the proponent under section 65 with respect to that designated project and	**b)** le promoteur prend la mesure en conformité avec les conditions qui sont énoncées dans la déclaration qui lui est remise au titre de l'article 65 relativement au projet et

is not expired or revoked; or	celle-ci n'est ni expirée ni révoquée;
(c) the Agency permits the proponent to do that act or thing, subject to any conditions that it establishes, for the purpose of providing to the Agency the information or details that it requires in order to prepare for a possible impact assessment of that designated project or for the purpose of providing to the Agency or a review panel the information or studies that it considers necessary for it to conduct the impact assessment of that designated project.	**c)** le promoteur est autorisé par l'Agence à prendre la mesure, sous réserve de toute condition qu'elle fixe, pour qu'il puisse lui fournir les renseignements ou les précisions qu'elle exige dans le cadre de la préparation à une évaluation d'impact éventuelle du projet ou qu'il puisse fournir à l'Agence ou à la commission les études ou les renseignements qu'elle estime nécessaires dans le cadre de l'évaluation d'impact.

M. *The two valuable Impact Benefit Agreements: 2013 IBA and 2019 IBA*

[67] The 2013 IBA was not filed in Court for confidentiality reasons. However, Wildcat Affidavit I deposes the 2013 IBA "formalized the relationship between the parties and created mutually beneficial opportunities for community development, infrastructure, and business opportunities, and ensured Ermineskin's participation in ongoing environmental monitoring of Coalspur's operations."

[68] Wildcat Affidavit I addresses the 2013 IBA and the 2019 IBA:

> 12. In December 2013, Ermineskin entered into an agreement with Coalspur in respect of its coal mine operations ("**2013 IBA**"). The agreement formalized the relationship between the parties and created mutually beneficial opportunities for community development, infrastructure, and business opportunities, and ensured Ermineskin's participation in ongoing environmental

monitoring of Coalspur's operations. A copy of the news release published by the parties is attached as Exhibit A to Affidavit #1 of Joanne Austen, dated October 29, 2020 ("Austen Affidavit").

13. The contents of the 2013 IBA are confidential. At that time, other members of Ermineskin and I were aware that Coalspur may expand the Vista Coal Mine beyond its current footprint.

14. In 2018, Coalspur proposed to expand the Phase I footprint westwards through the Vista Coal Mine Phase II Expansion Project ("**Phase II**"). Phase II will increase the volume of coal production and use existing Phase I infrastructure such as coal processing facilities, primary access roads, and a coal loadout facility. Construction of Phase 11 is proposed to commence in January 2022, with operations projected to commence in April 2022.

15. As far as I am aware, Coalspur has not yet filed an application with the AER for approval of Phase 11. However, Phase II will require a provincial environmental assessment and the Alberta Consultation Office ("**ACO**") has directed Coalspur to consult with Ermineskin and five other First Nations in respect of Phase II. Ermineskin has been actively engaging with Coalspur in respect of Phase 11 since early 2019.

16. In October 2019, Ermineskin entered into an updated agreement with Coalspur in respect of its existing and proposed coal mine operations ("**2019 IBA**"). Similar to the previous agreement, the 2019 IBA formalized the relationship between the parties, created mutually beneficial opportunities, and ensured Ermineskin's participation in ongoing environmental monitoring of Coalspur's operations.

17. Coalspur also proposed an exploratory underground mine located within the boundaries of existing Phase I permits and licenses (the "**Underground Test Mine**"). Coalspur commenced the provincial regulatory process for the Underground Test Mine by filing an application with the AER on April 17, 2019, and resubmitting the application on February 5, 2020. The AER has concluded that no provincial environmental assessment is required for the Underground Test Mine.

18. The existing Vista Coal Mine, the proposed Phase II, and the proposed Underground Test Mine are all located entirely within Treaty 6 lands and within Ermineskin's Traditional Territory. The construction and operation of these projects is a "taking up" of lands under Treaty 6 and has the potential to adversely impact Ermineskin hunting, trapping, fishing, and gathering rights.

> 19. Coalspur has acknowledged the potential for its operations to impact Ermineskin rights, and has regularly engaged with Ermineskin regarding its operations. Coalspur and Ermineskin have maintained a dialogue regarding Ermineskin's traditional activities in the area, our concerns about land use, water, wildlife, etc., and options to mitigate potential impacts. These discussions began during the Phase I environmental assessment and 2013 IBA negotiations, and have continued since that time.
>
> 20. The 2013 IBA and 2019 IBA were intended to compensate Ermineskin for the potential adverse impacts of Coalspur's operations on Ermineskin Aboriginal and Treaty rights, but those agreements do not derogate from Ermineskin's Aboriginal and Treaty rights and do not negate or replace the Crown's duty to consult Ermineskin.
>
> [Emphasis added]

[69] This evidence was not contested or challenged, and as noted already, I accept it as true.

[70] Ms. Wildcat filed a second affidavit before this Court [Wildcat Affidavit II] which among other things states:

> 10. In Affidavit #1, I stated that "Ermineskin is considered to be one of the more economically stable First Nation communities in Canada. Ermineskin has engaged in a pattern of robust consultation and negotiation with proponents in its territory, and revenues generated from economic development on Treaty 6 lands have been used to support community business, retain outside expertise, and to further develop the nation's infrastructure."
>
> 11. These revenues have been generated from, among other things, impact benefit and other agreements with proponents. Such agreements provide financial compensation and other benefits to Ermineskin to compensate for potential impacts caused by natural resource development on the ability of Ermineskin members to exercise Aboriginal rights within their Traditional Territory, including the right to hunt, fish, trap, and harvest.
>
> 12. In entering into such agreements, Ermineskin has balanced its concern for the taking up of lands under Treaty 6 and the adverse impacts of natural resource development on Ermineskin Aboriginal

> rights, with a desire to promote the economic and social well-being of Ermineskin members within the Traditional Territory. These decisions are an exercise of Ermineskin's right of self-determination.
>
> **Impact Benefit Agreements**
>
> 13. In Affidavit #1, I described the 2013 and 2019 impact benefit agreements which Ermineskin entered into with Coalspur in respect of its existing and proposed coal mine operations. The contents of those agreements are confidential.
>
> 14. By virtue of the 2013 IBA and the 2019 IBA, Ermineskin has chosen to support the Vista Coal Mine and the expansions in exchange for sharing in the economic benefits of these projects and, where applicable, minimizing potential adverse impacts. The agreements do not derogate from Ermineskin's Aboriginal and Treaty rights, including the right to participate in ongoing consultation and regulatory processes, and do not negate or replace the Crown's duty to consult Ermineskin.
>
> [Emphasis added]

[71] This evidence was not contested or challenged, and as noted already, I also accept it as true.

[72] Importantly, for the purposes of the duty to consult, Wildcat Affidavit I (at para 18) and Wildcat Affidavit II (at para 12) depose the construction and operation of Phase II and the limited Underground Test Mine are a “taking up” of lands under Treaty 6 and have the potential to adversely impact Ermineskin’s hunting, trapping, fishing, and gathering rights. I accept this as correct.

[73] It is also important for the duty to consult that Wildcat Affidavit I deposes the 2013 IBA and 2019 IBA were intended to compensate Ermineskin for the potential impacts of Coalspur’s

operations on Ermineskin's Aboriginal and Treaty rights: "[t]he 2013 IBA and 2019 IBA were intended to compensate Ermineskin for the potential adverse impacts of Coalspur's operations on Ermineskin Aboriginal and Treaty rights, but those agreements do not derogate from Ermineskin's Aboriginal and Treaty rights and do not negate or replace the Crown's duty to consult." I accept this as correct.

N. *Designation Order – 2020*

[74] On July 30, 2020, a little over seven months after the decision not to designate Phase II on December 19, 2019, the Minister Ordered the Designation of Phase II and the limited Underground Test Mine as requested by the Requesting Groups.

[75] The Designation Order states:

> In my role as the Minister of Environment and Climate Change, between May and July 2020 I received multiple requests to consider the proposed the Vista Underground Mine Project and Vista Coal Mine Phase II Expansion Project together for designation under subsection 9(1) of the Impact Assessment Act (the IAA).
>
> After careful consideration of the information provided by Coalspur Mines (Operations) Ltd., advice from federal authorities, input from provincial ministries, the concerns expressed in the requesters' letters and other public concerns that are known to the Impact Assessment Agency of Canada (the Agency), I have decided that the Vista Underground Mine Project and the Vista Coal Mine Phase II Expansion Project warrant designation pursuant to subsection 9(1) of the IAA.
>
> …
>
> Order Designating Physical Activities
>
> I, the undersigned Minister of Environment, pursuant to subsection 9(1) of the *Impact Assessment Act*, do hereby designate the

physical activities known as the Vista Coal Underground Mine Project, as well as the Vista Coal Mine Phase II (two) Expansion Project, proposed by Coalspur Mine (Operations) Ltd. (Limited)

Signed at Ottawa on July 30, 2020

<Original signed by>

The Honourable Jonathan Wilkinson, P.C., M.P. Minister of Environment

…

Minister's Response

Date: July 30, 2020

Projects:

Coalspur Mine (Operations) Ltd. (Limited) proposes the Vista Coal Underground Mine Project and the Vista Coal Mine Phase II (two) Expansion Project, to expand the existing Vista Coal Mine Phase I (one) Project; an open-pit thermal coal mine. The expansions would be located approximately 10 kilometres east of Hinton, Alberta.

Decision:

The Minister previously considered the Vista Coal Mine Phase II (two) Expansion Project for designation pursuant to the *Impact Assessment Act*, and on December 20, 2019, determined that the Project did not warrant designation. In light of the reasons provided below, the Minister is reconsidering that decision and has decided to designate the physical activities associated with the Vista Coal Mine Phase II (two) Expansion Project along with the Vista Coal Underground Mine Project.

Reasons:

The Minister of Environment and Climate Change has considered the potential for the Projects to cause adverse effects within federal jurisdiction, adverse direct or incidental effects, public concern related to these effects, as well as adverse impacts on Aboriginal and Treaty rights. The Minister also considered the analysis of the Impact Assessment Agency of Canada.

The Minister has reached the decision that designation of the Projects is warranted for the following reasons:

• Considered together, the area of mining operations for the Projects would be just below the 50 percent threshold, and at 18,683 tonnes per day, well above the total coal production capacity threshold of 5,000 tonnes per day described in Item 19(a) of the *Physical Activities Regulations*;

• The Minister considered his previous decision regarding the Vista Coal Mine Phase II (two) Expansion Project, the new information regarding plans for further expansion of the Vista Coal Mine Phase I (one) Project (the Vista Coal Underground Mine), and additional Indigenous and public concerns received regarding the Projects. The Minister acknowledges that, cumulatively, the Projects may result in adverse effects of greater magnitude to those previously considered. In particular:

  ◦ The Projects may cause adverse direct and cumulative effects to areas of federal jurisdiction (in particular to fish and fish habitat, species at risk, and Indigenous peoples) that may not be mitigated through project design or the application of standard mitigation measures;

  ◦ The concerns expressed by the requesters, Indigenous groups, federal authorities, and members of the public that, cumulatively, the Projects may cause potential adverse effects within federal jurisdiction or adverse direct or incidental effects (such as effects to fish and fish habitat, and Indigenous peoples); and,

  ◦ The Projects may cause adverse impacts on Aboriginal and Treaty rights (such as hunting, fishing and gathering) recognized and affirmed by section 35 of the *Constitution Act, 1982*, and matters related to Indigenous peoples within federal jurisdiction.

O. *Effect of the Designation Order – Delay of economic, social and community benefits under IBA 2019 to date, and ongoing*

[76] The Designation Order had the immediate effect of prohibiting Coalspur from doing any act or thing in connection with carrying out Phase II and the limited Underground Test Mine. This is uncontested and derives from subsection 7(1) of the *IAA*.

[77] The Designation Order therefore pushed back, and continues to push back Coalspur's intended start dates of 2020 for the limited Underground Test Mine, and 2022 for Phase II. The Designation Order was made almost a year ago and by extension, I find on a balance of probabilities that delays in these dates have already occurred by as much as a year, and will further delay the economic, community and other benefits accruing to Ermineskin under the 2019 IBA, assuming Phase II and the limited Underground Test Mine are approved at all, until the activities are approved. If the mining activity is not approved, these valuable economic, community and social benefits will be lost to Ermineskin.

[78] The Respondent Minister submits designation under section 9 of the *IAA* is distinct from the stage of the *IAA* process that determines whether an impact assessment is actually required at all. This is because a designation order does not mean an impact assessment will be conducted, only that a full impact assessment may be ordered. Thus, the Minister argues that delay is not relevant.

[79] I am not persuaded. First, this argument is speculative. There is no evidence in support that construction of the limited Underground Test Mine was started before the end of 2020 as

planned, indeed there is no evidence it has started at all. In addition, there is no evidence the construction of Phase II will commence in January 2022, therefore as I have found, there has been delay which will continue until Phase II and the limited Underground Test Mine are given the green light, and which may be lost if they are turned down.

[80] I consider the fact of delay relevant to the issue of potential adverse impact on Aboriginal and Treaty rights and the duty to consult in this Application for judicial review, as will be seen.

II. Issues

[81] The following issues are to be resolved:

A. Was the Crown's duty to consult triggered by the second designation request and the Designation Order?

B. If so, what was the scope of that duty and was it fulfilled?

C. Did the Minister owe Ermineskin a duty of procedural fairness in respect of the second designation request and the Designation Order?

D. If so, what was the content of that duty and was it fulfilled?

E. Was the Designation Order reasonable?

III. Standards of Review

[82] 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*].

[83] 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).

IV. Analysis

A. *Duty to consult and the honour of the Crown*

[84] I find that Ermineskin has Aboriginal and Treaty rights that are recognized and affirmed by section 35 of the *Constitution Act, 1982*. It is common ground these rights have explicit constitutional protection and, once established, may not be interfered with by any level of government without justification. Such rights include, but are not limited to, the right to hunt,

fish, trap and gather “on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access” (*Sparrow* at para 76).

[85] I also note, as does Ermineskin, that Aboriginal rights are not absolute and the government may justify regulations or actions that infringe upon or deny Aboriginal rights in appropriate circumstances (*Sparrow* at para 62). *Sparrow* is not only a foundational case for the rights of Aboriginal people in Canada, it is a case defining Aboriginal rights in the absence of a Treaty with the First Nation concerned.

[86] In order to safeguard against unjustifiable infringement of Aboriginal rights, I also agree as does the Respondent Minister, that the Crown must consult with and, if appropriate, accommodate the interests of Indigenous communities where contemplated Crown conduct may impinge on an Aboriginal right.

[87] This is driven in part from a desire to bring about reconciliation between Canada and First Nations. The honour of the Crown and the duty to consult encourages reconciliation by better ensuring Aboriginal rights are protected and accommodated. I note our highest Court acknowledges the reality that often Aboriginal peoples are involved in exploiting the resource: hence its statement that the duty to consult “… also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource” which the Supreme Court of Canada made in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 34 [*Rio Tinto*]. This too is part of reconciliation.

[88] I also accept, as the parties agree, the duty to consult is grounded in the honour of the Crown, which reflects the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's Indigenous peoples. The honour of the Crown is understood generously and gives rise to different duties to Aboriginal peoples depending on the circumstances of the potential infringement.

[89] I wish to review a number of leading cases in the jurisprudence concerning the honour of the Crown and the duty to consult before turning to their application in the case at bar.

[90] A leading authority is from the Supreme Court of Canada in *Rio Tinto*:

> [34] Grounded in the honour of the Crown, the duty has both a legal and a constitutional character: *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6. The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.
>
> [35] *Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-35. The duty is *prospective*, fastening on rights yet to be proven.
>
> [36] The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45, and *Taku River Tlingit First Nation v. British*

Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 32.

…

[42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

[43] This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

…

[45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

[46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

[Emphasis added]

[91] See also *Haida Nation*:

> 16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, 1996 CanLII 236 (SCC), [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> 17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.
>
> 18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:
>
> > ... "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.
> >
> > Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best

> interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.
>
> [Emphasis added]

[92] And see *Sparrow*:

> 64 Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.
>
> [Emphasis added]

[93] The duty to consult is ongoing and may be triggered when a decision maker reconsiders an earlier decision in light of new information or submissions (*Rio Tinto* at para 93); that is what happened in this case.

B. *Impact on Ermineskin's economic interests*

[94] In my respectful view, the key issue in this case is whether the duty to consult is triggered by the 2020 designation requests and the process leading to the Designation Order. As noted

already, the duty to consult is triggered when the Crown has knowledge of the potential existence of an Aboriginal right and contemplates conduct that might adversely affect it. The jurisprudence says this duty is triggered when three elements are met: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) the existence of contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right (i.e. a causal relationship) (*Rio Tinto* at para 31 citing *Haida Nation* at para 35):

> [31] The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.
>
> [Emphasis added]

[95] On the first element, the Crown must have real or constructive knowledge of an Aboriginal claim or right to the resource or land to which it attaches. This element is satisfied where, as here, a Treaty right is involved, because the Crown always has notice of treaties to which it is a party (*Rio Tinto* at para 40; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34; *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354 at para 101 [*Dene Tha'*], aff'd 2008 FCA 20).

[96] In addition, Ermineskin corresponded with the Minister to participate or seek information about the provincial and federal assessment process. Further, the Agency was advised by

Coalspur on September 10, 2019 that Coalspur had been directed by the ACO to engage with Ermineskin.

[97] The Respondent Minister agrees the first element is present, as do I. I find the Crown had ample notice of Ermineskin's Aboriginal and Treaty rights when it received the request to reconsider and engaged on its process leading to the 2020 Designation Order.

[98] Second, there must be Crown conduct that engages a potential Aboriginal or Treaty right. What is required is Crown conduct with the potential to adversely impact the Aboriginal claim or right in question. The conduct is not confined to conduct that has an immediate impact on lands, resources, or Aboriginal rights — a potential for adverse impact is sufficient to trigger the duty (*Rio Tinto* at paras 42, 44 citing *Dene Tha'*). The test for this second element is set out in *Rio Tinto*:

> [42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

[99] 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.

[100] There is a disagreement on the third element, which is the "possibility that the Crown conduct may affect the Aboriginal claim or right" requiring the claimant show a "causal

relationship" (*Rio Tinto* at para 45). Adverse impacts extend to any effect that may prejudice an Aboriginal right. Although adverse effects are often physical in nature, the Supreme Court of Canada is clear that adverse effects may extend to high-level policy decisions or changes to resource management, which do not have an immediate impact on lands and resources. "This is because such structural changes to the resources management may set the stage for further decisions that will have a direct adverse impact on land and resources" (*Rio Tinto* para 47). As discussed above, a generous, purposive approach is required (*Rio Tinto* at paras 45-47).

[101] Ermineskin argues, and I refer to Wildcat Affidavit I at para 18 and Wildcat Affidavit II at para 12, that the construction and operation of Phase II and the limited Underground Test Mine are "taking up" of lands under Treaty 6 and have the potential to adversely impact Ermineskin's hunting, trapping, fishing, and gathering rights. I agree, noting as Ermineskin submits that not every "taking up" of land automatically triggers the duty to consult and a contextual analysis will be required to determine if the taking up has, or potentially has, an adverse effect on the Aboriginal or Treaty rights exercised within the area. Here I find it does or potentially has such an adverse effect. Therefore, in my respectful view, the duty to consult is triggered (*Athabasca Chipewyan First Nation v Alberta*, 2019 ABCA 401 at paras 57-61).

[102] In this connection, the Supreme Court of Canada in *Haida Nation* says the honour of the Crown must be understood generously: that nothing less is required. This may also be said of the duty to consult flowing from that same honour of the Crown:

> 16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, 1996

> CanLII 236 (SCC), [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> 17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.
>
> [Emphasis added]

[103] While Canada argues the Designation Order does not have the potential to adversely affect the asserted or established Aboriginal or Treaty rights, Ermineskin submits otherwise. I agree with Ermineskin.

[104] In my view the third element is met because the contemplated Designation Order has the potential to adversely affect an Aboriginal right. In this case, Canada takes an ungenerous approach to the duty to consult; it is too narrow. In my view, the Minister's approach is contrary to the jurisprudence developed under section 35 concerning the duty to consult and the honour of the Crown.

[105] In my respectful view, the third element of the duty to consult is triggered for many reasons. First, jurisprudence says the duty to consult may be engaged when broader economic interests may be adversely impacted. I find that is the case in connection with the 2019 IBA which creates economic interest which I find are closely related to and derivative from the

Aboriginal right. In this case, the evidence is uncontroverted that 2019 IBA is designed "to compensate" Ermineskin for the loss of its Aboriginal and Treaty rights including the taking up of some of its land.

[106] Ermineskin has valuable rights under 2019 IBA and in my view not only may these right be adversely impacted, such adverse impact has already occurred through delay as discussed above. In my respectful view, this situation is analogous to that in *Ehattesaht* at paras 60, 61 and see *Rio Tinto* at para 47:

> 47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, 1999 CanLII 666 (SCC), [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

[107] In summary, the 2019 IBA is an economic interest that I find is closely related to and thus derivative from Aboriginal and Treaty rights. I rely in part on the unchallenged and accepted evidence of Ms. Wildcat, who makes the points in paragraphs 18, 20 and 23 of Wildcat Affidavit I cited above but repeated here for convenience:

> 18. The existing Vista Coal Mine, the proposed Phase II, and the proposed Underground Test Mine are all located entirely within Treaty 6 lands and within Ermineskin's Traditional Territory. <u>The construction and operation of these projects is a "taking up" of lands under Treaty 6 and has the potential to adversely impact Ermineskin hunting, trapping, fishing, and gathering rights</u>.

> …
>
> 20. The 2013 IBA and 2019 IBA were intended to compensate Ermineskin for the potential adverse impacts of Coalspur's operations on Ermineskin Aboriginal and Treaty rights, but those agreements do not derogate from Ermineskin's Aboriginal and Treaty rights and do not negate or replace the Crown's duty to consult Ermineskin.
>
> …
>
> 23. The federal Crown is aware of Ermineskin's asserted Aboriginal and Treaty rights in the area encompassing the Vista Coal Mine, and is aware of Ermineskin's interest in the Vista Coal Mine. Among other things, Ermineskin sought information regarding a possible federal assessment of the mine in 2013. On or about May 23, 2013, the former Canadian Environmental Assessment Agency responded to this request. A copy of this correspondence is attached as Exhibit "B" to my affidavit.
>
> [Emphasis added]

[108] See also *Da'naxda'xw/Awaetlala First Nation v British Columbia Hydro and Power Authority*, 2011 BCSC 620 [*Da'naxda'xw/Awaetlala*] at para 139 where the British Columbia Supreme Court held an economic component to the claim respecting the benefits of the forest resource triggered the duty to consult. That, with respect, is the case here with Ermineskin's claim to land to be occupied by Phase II, in relation to and in compensation for which Ermineskin negotiated the 2019 IBA:

> [139] I accept that in some circumstances, decisions preserving lands or the *status quo* may not have an adverse impact on aboriginal claims. *Tsuu T'ina* is an example of this. However, I do not interpret *Haida Nation* as establishing a duty to consult only for the purpose of preserving land from development. I agree with Mr. Elwood's submission that there was an economic component to the Haida's claim to the lands and forests of their traditional territory, and another aspect of the Crown's conduct in issue was the exclusion of the Haida from the benefits of the forest resource. Proposed conservation measures could have an adverse affect on claimed aboriginal rights and title, as they may limit future uses of

> land. The LRMP process and the government-to-government consultations regarding the Upper Klinaklini area clearly demonstrate this. In my opinion, limiting the duty to consult in the manner suggested by the government is inconsistent with the "generous, purposive approach" to this element of the duty to consult as described in *Rio Tinto* and inconsistent with the goal of achieving reconciliation.
>
> [Emphasis added]

[109] *Council of the Innu of Ekuanitshit v Canada (Fisheries and Oceans)*, 2015 FC 1298 at paras 176-177 is also on point, emphasizing the duty to consult is engaged in relation to broader economic rights, as is the case here with the 2019 IBA, not just in connection with rights to hunt, fish, trap and gather. As noted at para 176, precedents where the Court have taken into account "economic interests" to establish a duty to consult have been established when these interests are closely related to and thus are derivative from an Aboriginal right or title or to an underlying territorial right (*Ehattesaht* at paras 59-62; *Da'naxda'xw/Awaetlala*; *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991 [*Squamish Nation*]). Thus, economic interests in aspects of land claimed and the economic use of land have been acknowledged as situations that may trigger the duty to consult.

[110] In my respectful view, the important and valuable economic and community benefits negotiated in compensation of Aboriginal and Treaty rights, as achieved by Ermineskin in 2019 IBA, are entitled to the protection through the honour of the Crown construed generously and purposefully, and through its concomitant duty to consult, because they are closely related to and derivative from the underlying Aboriginal or Treaty right:

> [176] The Court agrees with the Innu of Ekuanitshit that the duty to consult may exist even when broader economic interests, not only traditional Aboriginal rights, are at stake (*Ehattesaht First*

> *Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849 [*Ehattesaht*] at para 61). The time when Aboriginal activities consisted only in hunting, fishing, trapping and selling artisanal products has passed. Aboriginal peoples' economic reality can no longer be reduced to only those traditional activities.
>
> [177] However, precedents where these economic interests were taken into account to establish a duty to consult were established when these interests were closely related to an Aboriginal right or title or to an underlying territorial right (*Ehattesaht* at paras 59-62; *Da'naxda'xw/Awaetlala First Nation v British Columbia Hydro and Power Authority*, 2015 BCSC 16; *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991). Thus, the economic aspects of land claimed and the economic use of land have been acknowledged as a situation that may trigger the duty to consult. In addition, the federal government's knowledge of the Aboriginal title claimed was generally never at issue in these matters and was admitted. For example, in *Ehattesaht*, an Aboriginal right to a part of the land on Vancouver Island was at issue and the government's conduct resulted in a lost economic opportunity with respect to stumpage fees from a part of this land. The Crown's knowledge about Aboriginal rights to the land involved was acknowledged and the conduct impacted the land and the resources to which the Aboriginal people were claiming an Aboriginal right.
>
> [Emphasis added]

[111] The uncontroverted and accepted evidence before the Court is that Ermineskin has contractual commitments from Coalspur in the 2013 IBA and 2019 IBA. I emphasize these were intended to compensate for Aboriginal and Treaty rights.

[112] It is also important per Wildcat Affidavit II that the 2013 IBA and 2019 IBA are in part a reason for the very considerable success and financial stability of Ermineskin:

> 10. In Affidavit #1, I stated that "Ermineskin is considered to be one of the more economically stable First Nation communities in Canada. Ermineskin has engaged in a pattern of robust consultation and negotiation with proponents in its territory, and revenues

> generated from economic development on Treaty 6 lands have been used to support community business, retain outside expertise, and to further develop the nation's infrastructure."
>
> 11. These revenues have been generated from, among other things, impact benefit and other agreements with proponents. Such agreements provide financial compensation and other benefits to Ermineskin to compensate for potential impacts caused by natural resource development on the ability of Ermineskin members to exercise Aboriginal rights within their Traditional Territory, including the right to hunt, fish, trap, and harvest.
>
> 12. In entering into such agreements, Ermineskin has balanced its concern for the taking up of lands under Treaty 6 and the adverse impacts of natural resource development on Ermineskin Aboriginal rights, with a desire to promote the economic and social well-being of Ermineskin members within the Traditional Territory. These decisions are an exercise of Ermineskin's right of self-determination.
>
> **Impact Benefit Agreements**
>
> 13. In Affidavit #1, I described the 2013 and 2019 impact benefit agreements which Ermineskin entered into with Coalspur in respect of its existing and proposed coal mine operations. The contents of those agreements are confidential.
>
> 14. By virtue of the 2013 IBA and the 2019 IBA, Ermineskin has chosen to support the Vista Coal Mine and the expansions in exchange for sharing in the economic benefits of these projects and, where applicable, minimizing potential adverse impacts. The agreements do not derogate from Ermineskin's Aboriginal and Treaty rights, including the right to participate in ongoing consultation and regulatory processes, and do not negate or replace the Crown's duty to consult Ermineskin.
>
> [Emphasis added]

[113] The Minister says that direct impacts that may or may not happen and that can be fully addressed later in the process fall on the "speculative side" and do not trigger the duty to consult and submit if there was an indirect impact, it would be of the speculative type (footnote 58, para 59, Respondent Minister's Memorandum). I disagree for several reasons.

[114] First, the jurisprudence establishes the contrary: an economic interest is sufficient to trigger the duty to consult and it be a potential economic interest that may or may not materialize in the future: see *Da'naxda'xw/Awaetlala* at para 136 "while the economic benefits the Da'naxda'xw hoped to receive from the Project may or may not have been realized, I do not see the adverse impact as speculative." In my respectful view, the 2019 IBA is such a potential interest. As was the case in *Da'naxda'xw/Awaetlala*, as a result of the Designation Order Ermineskin may "have lost a unique opportunity, which is significant to them, especially considering the remote location of their traditional territories" (*Da'naxda'xw/Awaetlala* at para 136). That is the very situation facing Ermineskin in relation to the 2013 IBA and 2019 IBA.

[115] Second, the Minister seems to disagree with *Rio Tinto's* ruling at para 35, which I consider binding that: "[t]he duty is *prospective*, fastening on rights yet to be proven" [emphasis in original]. With respect, I prefer to follow *Rio Tinto*.

[116] Even if the benefits of 2019 IBA may not have started to flow, that cannot negate 2019 IBA's value to Ermineskin. It also seems to me that the duty to consult regarding the loss of the 2019 IBA also results in value to the Crown in terms of its stated goals in relation to reconciliation. In addition, I find the fact obligations must be delivered in accordance with contractual terms, some of which may occur in the future, in no way diminishes the fact that the 2019 IBA was intended to benefit Ermineskin and its citizens.

[117] I find that the social, economic and community benefits secured under 2019 IBA are threatened with potential adverse impact by the Designation Order. I also find that losses have

already been incurred because the Designation Order was made over a year ago and has already delayed Phase II and the limited Underground Test Mine.

[118] I am unable to find such actual and potential adverse impacts are "speculative" as the Minister claims. With respect, there is nothing in the evidence to support the Minister's allegation the loss of 2019 IBA benefits being causally connected to Crown conduct is speculative. To allege otherwise is to advance the very tenuous argument that all executory contracts are speculative - which is simply not the case. To the contrary, in the absence of any evidence to the contrary, it seems to me this Court must give credit to the value of the 2013 IBA and 2019 IBA negotiated in good faith between this First Nation and this resource developer. I have already the 2013 IBA and 2019 IBA are closely related to and derivative from Aboriginal or Treaty rights; moreover, in my view and the actions of the Crown in making the Designation Order are directly and negatively related to what Ermineskin would receive under the 2013 IBA and 2019 IBA.

[119] To the same effect and by analogy see *Squamish Nation*; the Crown cannot avoid the duty to consult by unilaterally deciding Ermineskin's 2019 IBA is of no worth, or wishing it away. See paras 151-153:

> [151] I do not accept the Respondents' argument that because this OCP limits future development, and therefore preserves the status quo, there is no potential adverse impact on Aboriginal rights or title. The purpose of consultation is to listen to and consider the concerns of the First Nations whose rights and title may be adversely impacted by a decision. <u>The Crown cannot avoid the duty to consult by unilaterally deciding that the land should be conserved in its current state.</u>
>
> [152] I adopt the following reasoning of Fisher J. in *Da'naxda'xw*, in which she considered whether the Crown had a duty to consult

before deciding against an amendment to the boundaries of a conservancy that effectively precluded a development project that the Da'naxda'xw Nation proposed:

> [130] …I disagree with the government that conduct which contemplates conserving the *status quo* necessarily means that Aboriginal interests will not be adversely affected.
>
> …
>
> [139] I accept that in some circumstances, decisions preserving lands or the *status quo* may not have an adverse impact on Aboriginal claims. [*Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137] is an example of this. However, I do not interpret *Haida Nation* as establishing a duty to consult only for the purpose of preserving land from development. I agree with Mr. Elwood's submission that there was an economic component to the Haida's claim to the lands and forests of their traditional territory, and another aspect of the Crown's conduct in issue was the exclusion of the Haida from the benefits of the forest resource. Proposed conservation measures could have an adverse affect on claimed Aboriginal rights and title, as they may limit future uses of land. The LRMP process and the government-to-government consultations regarding the Upper Klinaklini area clearly demonstrate this. In my opinion, limiting the duty to consult in the manner suggested by the government is inconsistent with the "generous, purposive approach" to this element of the duty to consult as described in *Rio Tinto* and inconsistent with the goal of achieving reconciliation.

[153] The Petitioners have demonstrated a causal relationship between the approval of the OCP and a potential for adverse impacts on their pending Aboriginal title claims. As Lamer C.J.C. pointed out in *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 S.C.R. 1010 at para. 166, "lands held pursuant to Aboriginal title have an inescapable economic component" (emphasis in original). The OCP has the potential to restrict the uses to which the Nations can put land they acquire in the future. Such a potential mandates the Province engage in consultation, and if necessary, accommodation.

[Emphasis added]

[120] I share the view that limiting the duty to consult in the manner suggested by the Minister is inconsistent with the "generous, purposive approach" to the duty to consult described in *Rio Tinto* and highlighted above.

[121] Narrowing the duty to consult from that set out in established jurisprudence is also inconsistent with the goal of achieving reconciliation. With respect, it seems to me we are beyond the stage where government officials, even Ministers, may deprecate agreements entered into by First Nations (by describing then as "speculative") and thereby allow the Crown to limit or abrogate completely, as alleged here, the constitutionalized honour of the Crown and its related duty to consult.

[122] The Respondent Minister submits without the Designation Order, the *IAA* would not apply to Phase II and the limited Underground Test Mine, such that the Designation Order is an opportunity for further consideration of the proposed physical activities and serve to prevent any immediate adverse impacts.

[123] This submission is not maintainable for several reasons. First, the several Federal departments and agencies such as Fisheries and Oceans Canada, those responsible for the *Species at Risk Act*, SC 2002, c 29, and others retain their statutory powers to assess and prevent breaches in areas of federal jurisdiction. Likewise, First Nations on either side of this issue retain access to remedies from those entities and the Courts as needed. In addition, this submission is entirely speculative.

[124] More importantly, this argument is a red herring. It does not point away from the duty to consult on potential Aboriginal and Treaty rights. This is an argument, one of many, to be discussed with First Nations in the course of the consultation, which should have, but have not yet taken place.

[125] The Respondent Minister then argues the *IAA* at section 12 incorporates an obligation to consult only once a project is designated whereas section 9 provides no legal requirement to allow the public or any particular group to participate. This argument is completely without merit. I am unable to see anything in section 12 to relieve Canada of its duty to consult which, as the Respondent Minister admits at para 50 of his memorandum, is grounded in the constitutionalized honour of the Crown (*Haida Nation* at para 16) and must take place before the Crown takes steps that might adversely affect Aboriginal or Treaty rights. In my view, the suggested abrogation of a constitutionalized duty to consult would take more than the enactment of section 12 of *IAA*:

Agency's obligation — offer to consult	**Obligation de l'Agence — offre de consulter**
12 For the purpose of preparing for a possible impact assessment of a designated project, the Agency must offer to consult with any jurisdiction that has powers, duties or functions in relation to an assessment of the environmental effects of the designated project and any Indigenous group that may be affected by the carrying out of the designated project.	**12** Afin de préparer l'évaluation d'impact éventuelle d'un projet désigné, l'Agence est tenue d'offrir de consulter toute instance qui a des attributions relatives à l'évaluation des effets environnementaux du projet et tout groupe autochtone qui peut être touché par la réalisation du projet.

[126] This argument also reflects an out dated view of what is embraced by Aboriginal and Treaty rights, a view not supported by the jurisprudence. As noted, the jurisprudence demands not only a generous and purposive approach to the duty to consult and the honour of the Crown underlying it. Moreover, the duty to consult also arises in connection with economic rights concerning the "reality" that often Aboriginal peoples are involved in exploiting the resource: "[i]t also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource" said the Supreme Court of Canada in *Rio Tinto* at para 34.

[127] The Minister asserts the jurisprudence where adverse impacts to economic interests were recognized as engaging the duty to consult, involved economic interests closely related to an Aboriginal right or title. In this case he says the economic interests are through an agreement with Coalspur and are distinct from the substance of Aboriginal and Treaty rights and do not relate to the promise of section 35 of the *Constitution Act, 1982* or the principle of the honour of the Crown. I have already considered and rejected this narrow interpretation of Aboriginal and Treaty rights protected by section 35 in respect of economic rights which, as I have found here, are closely related to and are derivative from Aboriginal and Treaty rights.

[128] Ermineskin says if this Court finds there was a duty to consult, it was not fulfilled in this case because there was no consultation at all. I agree. Ermineskin was not notified the re-designation request was received, and was not informed by the Minister or Agency that the 2019 decision not to designate might be reversed. Ermineskin was not given any opportunity to meaningfully consult with the Agency or the Minister before the Minister made the Designation Order.

[129] Not only was there no consultation at all, but I find Ermineskin was inexplicably frozen out of this very one-sided process. I say one-sided because for whatever reason the Agency and Minister, in relation to Aboriginal and Indigenous input, decided to hear only from Indigenous voices seeking the Designation Order. By contrast, in the case of the 2019 decision not to designate Phase II, the Agency notified 31 Indigenous communities, four of which responded, and their responses were considered by the Agency.

C. *Procedural Fairness*

[130] It is not necessary to determine this aspect of the case given my conclusion that judicial review must be ordered because of the Agency and Minister's breach of the duty to consult grounded in the constitutionalized Honour of the Crown.

D. *Reasonableness*

[131] Ermineskin relies on submissions made by Coalspur in its memorandum of fact and law in T-1008-20. I make no determination on this issue for the same reason I decline to deal with procedural fairness.

V. Conclusion

[132] In my respectful view, for the Reasons set out above, the duty to consult was triggered in this case. The duty to consult was breached because Ermineskin was not given notice of or had the benefit of any consultation whatsoever. Therefore, this application for judicial review will be granted.

VI. Costs

[133] The parties agreed each party should bear their own costs, and I will so order.

JUDGMENT in T-1014-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted, the Designation Order is set aside and this matter is remanded for reconsideration.
2. No costs are awarded to or by any party.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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