



[2021] 4 F.C.R. D-9

ABORIGINAL PEOPLES

See also: Environment

Appeals from two Federal Court decisions (2021 FC 758, 2021 FC 759) concerning decision by appellant Minister of Environment and Climate Change (Minister) to issue designation order under *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 (IAA), s. 9(1) with respect to proposed coal mining projects in Alberta — In 2021 FC 758 (corresponding to A-254-21 appeal), Federal Court allowing respondent Ermineskin Cree Nation's (Ermineskin) application for judicial review, setting aside Minister's designation order — In 2021 FC 759 (corresponding to A-261-21 appeal), Federal Court dismissing respondent Coalspur Mines (Operations) Ltd.'s (Coalspur) parallel application for judicial review of Minister's decision on administrative law grounds for mootness — Coalspur, owner, operator of open pit coalmine, seeking to operate other projects, including expansion project (Phase II), located within Treaty 6 lands, Ermineskin traditional territory — Entering into Impact Benefit Agreement with Ermineskin to create mutually beneficial opportunities for community development, infrastructure, business opportunities — IAA allowing federal government to evaluate potential for physical activities to cause adverse environmental effects — Under s. 9(1), Minister can "designate" physical activity to be subject to IAA, deeming it "designated project" — Once project is designated, proponent prohibited from doing any acts or things connected with carrying out projects that may have effects on federal jurisdiction until federal assessment process completed — Upon receiving designation request, Impact Assessment Agency of Canada (Agency) considers request, issues a recommendation to the Minister — Minister designating Phase II for review (first designation order) — Ermineskin's application sought to quash or set aside first designation order on grounds Minister did not meet its duty to consult — Coalspur's application sought to quash or set aside first designation order on ground order unreasonable — Federal Court deciding that Crown failed to meet its duty to consult Ermineskin — Quashing first designation order — Remanding matter to Minister for reconsideration — In light of decision to quash first designation order in 2021 FC 758, Federal Court dismissing Coalspur's application — Agency initiating new consultation process, engaging with Ermineskin, Minister issuing second designation order — Minister also appealing Federal Court's decision (2021 FC 758) with respect to first designation order (A-254-21) — Coalspur appealing Federal Court's decision (2021 FC 759) dismissing its application for judicial review (A-261-21) — In response to issuance of second designation order, respondents each commencing applications for judicial review seeking to set it aside (consolidated applications) — Prothonotary issuing order holding consolidated applications in abeyance until after conclusion of present appeals — In light of second designation order, Coalspur also bringing motion to have A-254-21 appeal – in relation to first designation order – dismissed for mootness — Coalspur arguing, *inter alia*, that because second designation order operating to prevent Coalspur from proceeding with its proposed projects, it does not matter whether this appeal proceeding as appeal having no practical impact — Adding that abusive for Minister to have issued second designation order, that Canada instead should have sought to stay order of Federal Court with respect to first designation order (2021 FC 758) pending disposition of A-254-21 appeal — Whether A-254-21 appeal moot — Two possible outcomes in A-254-21 are for first designation order to either remain quashed or be reinstated — Neither outcome changing whether Phase II designated under IAA because project will remain designated pursuant to second designation order — Canada subsequently consulting with Ermineskin prior to issuing second designation order — Duty to consult no longer live controversy — Consolidated applications

regarding second designation order do not pertain to duty to consult but instead to sufficiency of consultation — This precisely at issue in consolidated applications held in abeyance — Therefore, A-254-21 appeal moot— Considerations of expediency, cost-efficiency not favouring hearing this appeal — However, reasons herein not endorsement of Federal Court’s decision — Coalspur’s motion to strike, dismiss appeal in A-254-21 granted; appeal in A-261-21 dismissed.

CANADA (ENVIRONMENT AND CLIMATE CHANGE) V. ERMINESKIN CREE NATION (A-254-21, A-261-21, 2022 FCA 123, Boivin J.A., reasons for judgment dated July 4, 2022, 16 pp.)