



[2022] 2 F.C.R. D-26

ENVIRONMENT

Judicial review of decision (Decision) by Minister of the Environment and Climate Change (Minister) declining to revisit February 2022 decision that denied request to designate Bradford Bypass highway project (project) for federal impact assessment under *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 (Act), s. 9(1) — Project 16.2 km four-lane freeway that Ontario Ministry of Transportation (proponent) proposing to build in southern Ontario — Applicants group of not-for-profit environmental organizations — Ontario conditionally approved project in 2002 following 1997 study conducted under Ontario's *Environmental Assessment Act*, R.S.O. 1990, c. E.18 (EAA) — Conditions for approval ultimately not met, project not built — In 2020, provincial government proposed to exempt project from legislative requirements, conditions imposed by 2002 conditional approval — Environmental groups requested that Minister designate project as physical activity subject to federal impact assessment under Act, s. 9(1) — Minister refused to designate project as requested — Regulation promulgated by Ontario exempting project from requirements of Ontario's EAA — Applicants making further request to Minister to designate project under s. 9(1) — Upon recommendation of Impact Assessment Agency of Canada, Minister issued Decision, characterized further request as request for reconsideration of initial decision — Minister declined to revisit initial decision on basis no material changes to project — Applicants asserting unreasonable for Minister to treat further request as reconsideration of initial decision that could only be addressed where there was material change or new information — Arguing that Minister imposed threshold screening test based on Agency memo, internal guide not grounded in Act, declined to form opinion on federal effects, public concern — Whether Minister erred, or fettered discretion, by applying threshold test not found in Act; whether Minister's application of threshold test procedurally unfair; in alternative, whether Minister erred in application of threshold test — Decision not unreasonable or unlawful because of fettering of discretion — Act silent on how Minister to exercise discretion relating to handling of subsequent requests on same project, reconsideration of past decision — Policy, guidelines not law, non-binding — Administrative policy cannot cut down discretion given to decision maker — Language of Decision indicating no new decision made — However, this not suggesting that no analysis or consideration made of further request or that Minister did not form opinion on new designation request — No requirement in Act that new substantive decision required every time request made — Here, Agency conducted analysis of further request, Minister turned its mind to whether it presented material changes to warrant change to decision made before, but found that it had not — Statutory purposes of public participation, transparency not imposing obligation on Minister to formulate new opinion on whether to designate project every time subsequent request made under s. 9(1) for same project — No reviewable error on basis of procedural fairness — As Act granting Minister broad discretionary power, procedural fairness owed falling at low end of spectrum — Open for Agency, Minister to decide on procedure; within Minister's discretion to determine whether further request warranted new decision — However, Decision unreasonable as result of not meeting threshold for transparency, intelligibility, justification — Minister provided only two comments on further request — Omission of any mention or justification in decision as to how Minister handled submission on cumulative effects, why Minister did not accept this as material change to request creating fundamental gap in response — Administrative nature of decision not overcoming requirements to demonstrate that decision maker grappled with key issues raised, or to provide decision that demonstrates transparency, intelligibility, justification — Statutory objectives of encouraging public participation, transparency reinforcing that some greater explanation required — Application allowed.

FORBID ROADS OVER GREEN SPACES V. CANADA (ATTORNEY GENERAL) (T-564-22, 2023 FC 580,
Furlanetto J., reasons for judgment dated April 20, 2023, 25 pp.)