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INDIGENOUS PEOPLES

Related subject: Environment

Appeal from Federal Court judgment (2022 FC 102) dismissing appellant's application for judicial review seeking to set aside February 15, 2019 decision of Honourable Catherine McKenna, then federal Minister of Environment and Climate Change — In her decision, Minister declining to designate extension of Horizon Oil Sands Mine (Horizon Mine) owned by respondent, Canadian Natural Resources Limited (CNRL), as reviewable project under now-repealed *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c.19, **s. 52** (CEAA, 2012), s. 14(2) — Appellant, successor to Indigenous groups that adhered to Treaty 8 in 1899 — Traditional territory of appellants located in northeastern Alberta, includes area around Lake Athabasca, Peace-Athabasca Delta — Appellant currently uses, has traditionally used, Peace-Athabasca Delta, Athabasca River, tributaries for fishing, harvesting, other activities — Project at issue in present appeal is CNRL's Horizon Oil Sands Mine North Pit Extension Project (Extension Project), which envisages extension of area of mine operations in CNRL's existing Horizon Mine — Mine within traditional territory of appellant — Extension Project involving plan to extend Horizon Mine within its existing lease boundaries by 3448 hectares, would extend operating life of Mine by approximately seven years — Extension Project subject to environmental assessment by Alberta Energy Regulator under *Alberta Environmental Protection and Enhancement Act*, R.S.A., 2000, c. E-12 (EPEA) — Extension Project was not automatically subject to federal environmental assessment under CEAA, 2012 — However, Minister could have exercised her discretion to designate Extension Project under CEAA, 2012, s. 14(2), which would have triggered requirement for federal assessment under s. 14(1) — On July 18, 2018, appellant, other Indigenous groups submitted letter to Canadian Environmental Assessment Agency (Agency), requesting that Agency advise Minister that she should designate Extension Project under s. 14(2) — Based request on belief that Extension Project would cause further degradation to environment, negatively impact their Treaty or Aboriginal rights or claims — In dismissing appellant's judicial review, Federal Court found that duty to consult was not triggered, that Minister's decision reasonable — Whether Federal Court erred: in deciding that duty to consult was not triggered; in deciding that Minister's decision was reasonable — *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 setting out three-part test for assessing whether duty to consult is triggered in given situation: (1) Crown's knowledge, actual or constructive, of potential Aboriginal claim or right; (2) contemplated Crown conduct; (3) potential that contemplated conduct may adversely affect Aboriginal claim or right — Further to appellant's letter initiating Minister's consideration of possible designation of Extension Project, Agency completed analysis report, provided recommendation to Minister in memorandum — Agency of view that designation not warranted in light of information it received from federal departments, existence of other federal, provincial mechanisms already in place to assess, manage potential adverse effects associated with Extension Project — Minister concurring with advice Agency providing — Contemplated conduct at issue here involved Minister's determination of whether or not to issue designation under CEAA 2012, s. 14(2) — Decision involved consideration by Minister of whether or not to exercise discretionary power afforded to her by statute — In case at bar, Federal Court found that second element was met without analyzing potential impact of Minister's decision — However, second element of test from *Rio Tinto* not met in present case — There was ongoing mandatory provincial environmental assessment in which appellant having right to participate, be consulted — Given this,

Minister's decision under s. 14(2) not having any potential impact on appellant's Aboriginal or Treaty rights or claims — Any impact that might be experienced on such rights or claims would flow from Alberta Energy Regulator's decision to approve or not to approve Extension Project — Thus, Federal Court erring in finding that second element from Rio Tinto test met in present case — Federal Court not erring in concluding that third element of test met; in stating that any impact on appellant's Aboriginal or Treaty rights or claims can flow only from decision to approve Extension Project — There was therefore no causal relationship between claimed impact, Minister's decision — Given nature of decision at issue, Minister not obligated to consult with appellant before deciding on their designation request — Thus, appellant's first ground of appeal failing — Regarding reasonableness of Minister's decision, nowhere did Minister state that she considered likelihood, as opposed to possibility, of any adverse environmental effects — Agency's memoranda or report not decision under review — Use of word "may" twice in CEAA, 2012, s. 14(2) highlighting broad discretion Minister enjoying — In present case, Minister owed large margin of appreciation on her decision — While exercise of Minister's discretion under CEAA, 2012, s. 14(2) not premised on finding of likelihood, does not follow that likelihood could never be considered by Minister in deciding whether project should be designated — Distinction between potential, likely not superficial one in this context — Environmental assessments are evidence-based processes to identify, predict, evaluate likelihood of potential environmental effects of proposed project, respond thereto — When Minister contemplating whether to designate physical activity under s. 14(2), there is no evidence-based processes of comparable depth to identify, predict, evaluate likelihood of potential environmental effects of proposed project — Unfortunate use of term "likelihood" by Agency in its memorandum, report not leading to conclusion that Minister's decision not to designate Extension Project should be set aside in this case — Here, Minister not proceeding on basis of likelihood; decision grounded in existence of other provincial, federal processes — Agency's use of "likelihood" in its memorandum, report having to be read in context — Misuse of term not material error sufficient to taint Minister's decision not to designate Extension Project — Thus, second reasonableness argument appellant advanced insufficient to set Minister's decision aside — In sum, there was no reason to interfere with Minister's decision on basis of appellant's challenges to decision's reasonableness — Appeal dismissed.

MIKISEW CREE FIRST NATION V. CANADA (CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY) (A-52-22, 2023 FCA 191, Gleason J.A., reasons for judgment dated September 21, 2023, 51 pp.)