Court File No. T-1008-20

FEDERAL COURT

BETWEEN:

COALSPUR MINES (OPERATIONS) LTD.

APPLICANT

AND:

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

RESPONDENTS

MEMORANDUM OF FACT AND LAW OF THE APPLICANT COALSPUR MINES (OPERATIONS) LTD.

PART I. OVERVIEW

1. Coalspur Mines (Operations) Ltd. ("**Coalspur**") seeks judicial review of the order (the "**Designation Order**") issued by the Minister of Environment and Climate Change (the "**Minister**") on July 30, 2020 to designate the Vista Coal Underground Test Mine Project (the "**Underground Test Mine**") and the Vista Coal Mine Phase II Expansion Project (the "**Phase II**"), pursuant to s. 9(1) of the *Impact Assessment Act*, SC 2019, c 28, s 1 ("***IAA***"). The legal effect of the Designation Order is to prohibit Coalspur from doing any act or thing in connection with carrying out the Underground Test Mine or Phase II (together, the "**Unrelated Projects**") that may cause certain environmental effects until completion of a federal assessment or determination that one is not required.

2. The Underground Test Mine and Phase II are separate and unrelated coal resource development projects located within Alberta. The former is an underground mine located within already disturbed land on which Coalspur has been operating an open pit coal mine for years. At most, it will increase the area of mining operations by 0.2 percent and have negligible incremental

impacts. In contrast, Phase II is a westward expansion on undisturbed lands that will increase area of mining operations by 42.7 to 49.4 percent. Neither of the Unrelated Projects depends on the other and they are subject to vastly different regulatory, construction and operational timelines.

3. In December 2019, the Minister declined to designate Phase II on the basis that Alberta's regulatory regime, in combination with any federal statutes that may apply, will comprehensively consider any potential environmental impacts. Designation would serve no purpose.

4. Seven months later, the Minister changed his mind. In doing so, the Minister unreasonably and arbitrarily combined Phase II and the Underground Test Mine as if they were a single, connected expansion, designating them on the purported basis of their combined size and potential adverse effects without explaining why it was appropriate to consider them together or how the Underground Test Mine could possibly tip the scales in favour of designation.

5. The Designation Order is unreasonable, for the following reasons.

6. ***First***, the Minister failed to grapple with the central threshold issue of whether the Unrelated Projects should be considered together or separately—an issue on which Coalspur and the parties requesting designation filed detailed submissions. The Minister's silence on this issue is especially problematic in light of: (i) the absence of any factual or legal basis for the Minister to consider the Unrelated Projects together; and (ii) the Minister's unfounded public allegation that Coalspur artificially "split" the Unrelated Projects to avoid federal regulatory oversight.

7. ***Second***, the Minister unreasonably relied on the Underground Test Mine to tip the scales in favour of designating Phase II, which he had reasonably and correctly decided did not warrant designation months earlier. The Minister's change of position is unreasonable and contrary to, among other things: (i) his reasons for declining to designate Phase II; (ii) the Impact Assessment Agency of Canada's ("**Agency**") expert advice; and (iii) the text, context and purpose of the *IAA*, including the constitutional division of powers through which it must be interpreted.

8. The Minister also failed to seek out or consider the views of Indigenous groups that support and will benefit from Phase II and/or the Underground Test Mine. This issue is before this Court in the related Ermineskin Cree Nation judicial review proceeding (T-1014-20).

9. For each of these reasons, the Designation Order must be quashed.

PART II. STATEMENT OF FACTS

A. The Proponent and Phase I Operations

10. The Applicant, Coalspur, is a coal development company that owns and operates the Vista Coal Mine Project ("**Phase I**"). Phase I is an open-pit surface mine, processing plant and associated infrastructure located about 10 kilometres east of Hinton, Alberta. Phase I will produce close to 65 million tonnes of clean coal over its approximately 10-year life. Its area of mining operations is 1,435 hectares.[1]

11. The Alberta Energy Regulator ("**AER**") approved Phase I in February 2014, following a public hearing and an environmental impact assessment ("**EIA**") pursuant to Alberta's regulatory regime.[2] In contrast, the Canadian Environmental Assessment Agency ("**CEA Agency**") decided that a federal environmental assessment was not required for Phase I. However, the Department of Fisheries and Oceans Canada ("**DFO**") and Environment Canada (now, Environment and Climate Change Canada) participated in the AER's assessment process pursuant to the *Canada-Alberta Agreement on Environmental Assessment Cooperation*.[3] The determination to decline to order a federal environmental assessment was made notwithstanding DFO's "uncertainty related to potential for surface water/groundwater interactions to impact fish habitat."[4]

---

[1] Affidavit of R. Simon Stepp made October 30, 2020 ("**Stepp Affidavit**") at para 9 [**Record of the Applicant Coalspur ("CR"), Tab C, p 23**]; Letter dated September 10, 2019 from Coalspur to the Agency: Certified Record ("**Record**") at pp 174 - 175 [**CR, Tab D, pp 751 - 752**]. See also: Area of mining operations, as defined in the *Physical Activities Regulations*, SOR/2019-285, s 1(1) ("***PA Regulations***") [**Tab E5**].

[2] Stepp Affidavit at paras 12 - 13, 15 and 18 [**CR, Tab C, pp 24 – 16**]; Alberta Energy Regulator Decision 2014 ABAER 004: Coalspur Mines (Operations) Ltd., Applications for a Mine Permit Amendment, Coal Processing Plant Approval Amendment, Coal Mine Pit Licence, and Coal Mine Dump Licences, McLeod River Coal Field: Stepp Affidavit, Ex. 13 [**CR, Tab C, pp 179 – 206**]. Alberta's regulatory regime includes comprehensive EIA under the *Environmental Protection and Enhancement Act,* RSA 2000, c E-12, Part 2, Division 1 [**Tab E3**], which is independently administered by the AER pursuant to the *Responsible Energy Development Act,* SA 2012, c R-17.3, ss 1(1)(j) and (s)(i), 2(1) and (2)(c) [**Tab E6**].

[3] Letter dated May 4, 2012 from CEA Agency to Coalspur: Stepp Affidavit, Ex. 15 [**CR, Tab C, pp 210 – 212**]; Record at pp 155-156 [**CR, Tab D, pp 732 – 733**].

[4] Letter dated May 3, 2012 from DFO to Coalspur: Stepp Affidavit, Ex. 15 [**CR, Tab C, p 216].**

B. Phase II

12. In 2018, Coalspur submitted a proposal to the AER to expand its operations westward through Phase II. Phase II (as proposed) will use existing Phase I infrastructure for transportation, processing and disposal. It will produce roughly 4.2 million tonnes of clean coal annually (16,949 daily max)[5] and expand the total area of mining operations by approximately 633.6 hectares.[6] Coalspur proposed to commence construction in January 2022 and operations in April 2022.[7]

13. Pursuant to provincial legislation, Coalspur must submit a formal application and EIA report for Phase II. Coalspur has been preparing these materials since early 2019.[8]

C. The Underground Test Mine

14. In April of 2019, Coalspur submitted a formal application to the AER for the Underground Test Mine, an exploratory underground mine located entirely within the boundaries of existing Phase I permits. Coalspur had intended to commence construction of the Underground Test Mine in 2020.[9] Coalspur resubmitted its formal application to the AER in February of 2020.[10]

---

[5] Stepp Affidavit at para 22 [**CR, Tab C, p 27**]; Letter dated June 18, 2019 from Navigator Environmental & Technical Services, Inc. on behalf of Coalspur ("**Navigator**") to Environmental Assessment Coordinator attaching updated project description table: Stepp Affidavit, Ex. 17 [**CR, Tab C, pp 219 – 223**].

[6] Letter dated May 30, 2019 from Navigator to CEA Agency: Stepp Affidavit, Ex. 26 [**CR, Tab C, pp 305 – 309**], Record at pp 180-185 [**CR, Tab D, pp 757 – 762**].

[7] Stepp Affidavit at para 22 [**CR, Tab C, p 27**]; Letter dated June 18, 2019 from Navigator to Environmental Assessment Coordinator attaching updated project description table: Stepp Affidavit, Ex. 17 [**CR, Tab C, pp 219 – 223**].

[8] Stepp Affidavit at paras 24-25 [**CR, Tab C, p 27**]; Letter dated December 13, 2018 from AER to Coalspur: Stepp Affidavit, Ex. 18 [**CR, Tab C, pp 224 – 226**].

[9] Stepp Affidavit at paras 37 and 42 [**CR, Tab C, pp 30 and 32**]; Coalspur Vista Test Underground Mine: Joint Application for Amendments to Approvals under the *Environmental Protection and Enhancement Act*, *Water Act*, *Public Lands Act,* and *Coal Conservation Act* ("**Underground Test Mine Application to AER"**): Stepp Affidavit, Ex. 33 [**CR, Tab C, pp 380 – 388**]; Letter dated May 29, 2020 from Coalspur to the Agency: Stepp Affidavit, Ex. 34 [**CR, Tab C, pp 389 – 407**].

[10] Stepp Affidavit at para 42 [**CR, Tab C, p 32**].

15. The Underground Test Mine will increase the production of Phase I coal by approximately 1,200 tonnes per day, for a total of 1.8 million tonnes during its approximately three-years of operation.[11] Additional surface disturbance associated with the Underground Test Mine will be (at most) 2.52 hectares, with the entirety of that area located within Phase I's existing footprint.[12] Accordingly, the Underground Test Mine does not require a provincial EIA. Nor, in Coalspur's view, does the Underground Test Mine require any federal permits to proceed.[13]

D. The Federal Impact Assessment Regime

16. In 2019, Parliament enacted the *IAA*. The *IAA* imposes federal decision-making and comprehensive federal impact assessments over "designated projects".[14] Among other things, the *IAA* requires designated projects to undergo an initial assessment of their impacts, environmental and otherwise,[15] and provides for further federal oversight and approval where appropriate.[16]

17. There are two ways that a proposed "physical activity" may qualify as a designated project.

18. First, the physical activity may fall under one of the enumerated categories within the *Physical Activities Regulations* (the "***PA Regulations***"). For example, coal mine expansions that will increase the area of mining operations by 50 percent or more and have a total coal production capacity of 5,000 tonnes per day or more are a designated project under s. 19(a) of the *PA Regulations* (the "**Coal Expansion Threshold**").[17]

19. Second, the Minister may exercise discretionary authority under s. 9(1) of the *IAA* to "designate" a physical activity not prescribed by the *PA Regulations*. The Minister may exercise

---

[11] Stepp Affidavit at para 37 [**CR, Tab C, p 30**]; Underground Test Mine Application to AER: Stepp Affidavit, Ex. 33 [**CR, Tab C, pp 380 – 388**].

[12] Stepp Affidavit at paras 38 and 41 [**CR, Tab C, pp 30 – 31**]; Letter dated May 29, 2020 from Coalspur to the Agency: Stepp Affidavit, Ex. 34 [**CR, Tab C, pp 389 – 407**].

[13] Stepp Affidavit at para 39 [**CR, Tab C, p 31**]; Letter dated May 29, 2020 from Coalspur to the Agency: Stepp Affidavit, Ex. 34 [**CR, Tab C, pp 389 – 407**].

[14] As defined in *IAA*, s 2 [**Tab E4**].

[15] *IAA*, ss 10(1), 15(1), 16 [**Tab E4**].

[16] See e.g. *IAA*, ss 7, 17, 18(1), 22(1), 25, 31(1), 36, 51, 60(1), 61(1) and 62-65 [**Tab E4**].

[17] *PA Regulations*, Schedule, s 19(a) [**Tab E5**].

this power where, in the Minister's opinion, the physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those same effects warrant the designation. Pursuant to s. 9(4) of the *IAA*, the Minister must provide reasons for a decision regarding a designation request.[18]

20. Designation of a proposed project has a significant impact on the proponent. Among other things, s. 7 of the *IAA* prohibits a proponent from doing anything connected to the designated project that may cause any enumerated environmental, health or socio-economic effects until either: (i) the Agency decides that no impact assessment is required; (ii) the proponent complies with the conditions included in a decision statement (following a federal impact assessment); or, (iii) the Agency permits the activity to occur for one or more enumerated purposes under the *IAA*.[19]

21. The Agency, an expert federal body accountable to the Minister, has broad authority under the *IAA*. In addition to its s. 7 powers, the Agency leads all federal reviews of major resource projects and advises and assists the Minister in exercising ministerial powers and performing ministerial duties and functions under the *IAA*, including exercising delegated authority on behalf of the Minister.[20]

E. The Minister Decided Not to Designate Phase II

22. Between May and August 2019, the Respondents, Keepers of Water, the West Athabasca Bioregional Society and the Keepers of the Athabasca (together, the "**ENGOs**"),[21] along with others interested organizations and individuals,[22] requested the Minister designate Phase II on the

[18] *IAA*, s 9 [**Tab E4**].

[19] *IAA*, ss 7(1), (3) [**Tab E4**].

[20] *IAA*, ss 153-159 [**Tab E4**].

[21] Letter dated May 17, 2019 from Ecojustice to the Minister: Record at pp 63-78 [**CR, Tab D, pp 640 – 655**]; Letter dated July 12, 2019 from Keepers of the Athabasca to the Minister: Record at pp 80-84 [**CR, Tab D, pp 657 – 661**].

[22] Letter dated May 21, 2019 from Alberta Wilderness Association to the Minister: Record at pp 61-62 [**CR, Tab D, pp 638 – 639**]; Email dated August 18, 2019 from Brandon Lyddon to the Minister: Record at p 79 [**CR, Tab D, p 656**]; Email dated May 30, 2019 from Gail Hamilton to the Minister: Record at p 85 [**CR, Tab D, p 662**]; Letter dated as received June 18, 2019 from Adrian Valentin to the Minister: Record at p 86 [**CR, Tab D, p 663**].

basis that it meets the Coal Expansion Threshold or, alternatively, that the Minister exercise his discretion to designate pursuant to s. 9(1) of the *IAA*.

23. Coalspur responded, confirming that Phase II does not meet the area of mining operations component of the Coal Expansion Threshold.[23] Coalspur also described: (i) projected timelines for Phase II; (ii) Phase II activities; (iii) information being collected with respect to First Nations' concerns and potential environmental effects; and (iv) its engagement with First Nations.[24]

24. In its memorandum ("**2019 Agency Memorandum**") and analysis report ("**2019 Agency Analysis**") prepared for the Minister, the Agency recommended the Minister not designate Phase II because, among other things: (i) it does not meet the area of mining operations component of the Coal Expansion Threshold; and (ii) any potential adverse effects to areas of federal jurisdiction will be comprehensively managed through processes provided by existing federal and provincial legislative and regulatory requirements, including the provincial EIA, any authorizations under the federal *Fisheries Act*, RSC 1985, c F-14, and Indigenous consultation requirements.[25]

25. The Minister agreed. Accordingly, on December 20, 2019, the Minister issued his decision not to designate Phase II (the "**Non-Designation Decision**") because "adverse effects within federal jurisdiction, and related concerns, are expected to be appropriately managed by comprehensive legislative mechanisms such as the review of any Application for Authorization

---

[23] Letter dated May 30, 2019 from Navigator to CEA Agency: Stepp Affidavit, Ex. 26 [**CR, Tab C, pp 306 – 309**], Record at p 180 [**CR, Tab D, pp 757 – 762**]; Letter dated September 10, 2019 from Coalspur to the Agency: Stepp Affidavit, Ex. 28 [**CR, Tab C, pp 328 – 339**], Record at pp 174 - 178 [**CR, Tab D, pp 751 - 755**].

[24] Letter dated August 9, 2019 from Coalspur to CEA Agency: Stepp Affidavit, Ex. 27 [**CR, Tab C, pp 310 – 327**], Record at pp 157 - 173 [**CR, Tab D, pp 734 – 750**]; Letter dated September 10, 2019 from Coalspur to the Agency: Stepp Affidavit, Ex. 28 [**CR, Tab C, pp 328 – 339**], Record at pp 174 - 178 [**CR, Tab D, pp 751 - 755**].

[25] Memorandum dated December 5, 2019 from the Agency to the Minister ("**2019 Agency Memorandum**"): Record at pp 50 and 56 [**CR, Tab D, pp 627, 628 and 633**]; Agency, *Analysis Report: Whether to Designate the Coalspur Mines Ltd. Vista coal Mine Phase II Project in Alberta* (December 2019) ("**2019 Agency Analysis"**) at pp 6, 8-11: Stepp Affidavit, Ex. 30 [**CR, Tab C, p 350, 352-355**], Record at pp 95, 97-100 [**CR, Tab D, pp 672, 674-677**].

under the *Fisheries Act* (by DFO), the *Migratory Birds Convention Act* and the provincial environmental assessment and regulatory processes".[26]

F. The Minister's Decision to Reconsider, Combine and Designate

26. In May and June 2020, the ENGOs,[27] Louis Bull Tribe[28] ("**Louis Bull**"), and the Stoney Nakoda Nations[29] ("**Stoney Nakoda**" and, together with the ENGOs and Louis Bull, the "**Requesters**") requested the Minister reconsider his Non-Designation Decision for Phase II on the basis of Coalspur's February 2020 (re-)application to the AER for the Underground Test Mine. The Requesters asked that the Unrelated Projects be considered together as a single "expansion".

27. In June and July 2020, the Minister received hundreds of additional pages of emails and letters from Members of Parliament, members of the public (including lawyers), and non-governmental organizations requesting that Phase II be designated on its own or together with the Underground Test Mine (together, the "**Undisclosed Requests**").[30] Coalspur was not aware of the Undisclosed Requests until the Minister served his certified record in this judicial review.[31]

28. After receiving the ENGOs' and Louis Bull's initial correspondence, the Agency requested information from Coalspur with respect to the Underground Test Mine.[32]

29. By letter dated May 29, 2020, Coalspur responded to the Agency's information requests and the initial submissions of the ENGOs and Louis Bull. Among other things, Coalspur confirmed

---

[26] Non-Designation Decision: Stepp Affidavit, Ex. 31 [**CR, Tab C, pp 374 – 377**], Record at p 60 [**CR, Tab D, p 637**].

[27] Letter dated May 1, 2020 from Ecojustice to the Minister: Stepp Affidavit, Ex. 36 [**CR, Tab C, pp 430 – 494**]; Record at p 121 [**CR, Tab D, pp 698 – 762**].

[28] Letter dated May 1, 2020 from Louis Bull to the Minister: Stepp Affidavit, Ex. 35 [**CR, Tab C, pp 408 – 428**]; Record at pp 200 -219 [**CR, Tab D, pp 777 – 796**].

[29] Letter dated June 30, 2020 from Stoney Nakoda to the Minister: Stepp Affidavit, Ex. 37 [**CR, Tab C, pp 495 – 501**]; Record at pp 220 – 225 [**CR, Tab D, pp 797 – 802**].

[30] Undisclosed Requests: Record at pp 231-240 and 277-331 [**CR, Tab D, pp 808 – 817 and 854 – 908**].

[31] Stepp Affidavit at para 43 [**CR, Tab C, p 32**].

[32] Letter dated May 14, 2020 from the Agency to Coalspur: Stepp Affidavit, Ex. 38 [**CR, Tab C, pp 502 – 506**].

that the Underground Test Mine is independent and disconnected from Phase II, planned for a different location and within an existing mine footprint, and will proceed on a different timeline. Therefore, Coalspur argued that: (i) it would be factually and legally inappropriate to consider the Underground Test Mine and Phase II together; and (ii) neither the Underground Test Mine nor Phase II, alone or in combination, should be designated.[33]

30. The Agency agreed with Coalspur. In its memorandum ("**2020 Agency Memorandum**") and analysis report ("**2020 Agency Analysis**") prepared for the Minister, the Agency recommended that the Minister not designate the Underground Test Mine, alone or in combination with Phase II.[34] The 2020 Agency Memorandum and 2020 Agency Analysis made the following factual determinations and recommendations, among others:

(a) "The surface disturbance of the [Underground Test Mine] is limited and occurs primarily within the previously disturbed footprint of Phase I";[35]

(b) "[T]he Agency's analysis demonstrates that the incremental impacts of the [Underground Test Mine] would be negligible in comparison to those of Phase II given that there is almost no new land disturbance associated with the [Underground Test Mine]";[36]

---

[33] Stepp Affidavit at para 45 [**CR, Tab C, pp 32 – 33**]; Letter dated May 29, 2020 from Coalspur to the Agency: Stepp Affidavit, Ex. 34 [**CR, Tab C, pp 389 – 407**].

[34] Memorandum dated June 30, 2020 from the Agency to the Minister ("**2020 Agency Memorandum**", as defined above): Record at p 1 [**CR, Tab D, p 578**]; Agency, *Analysis Report: Whether to designate the Coalspur Mine Ltd. Vista Coal Underground Mine and Expansion Activities Project in Alberta Pursuant to the Impact Assessment Act* (September 8 [July 30], 2020) ("**2020 Agency Analysis**", as defined above): Record at pp 241 - 273 [**CR, Tab D, pp 818 - 850**], Stepp Affidavit, Ex. 40 [**CR, Tab C, pp 509 – 542**]. The 2020 Agency Analysis attached to Canada's certified record is dated September 2020. This appears to be an error, as the 2020 Agency Analysis posted to the Agency's Registry (Stepp Affidavit, Ex. 40 [**CR, Tab C, pp 509 – 542**]) is properly dated July 2020. The error is not material as the two reports are identical aside from the date on the cover page.

[35] 2020 Agency Memorandum at p 3: Record at p 3 [**CR, Tab D, p 580**]; 2020 Agency Analysis at p 8: Record at p 251 [**CR, Tab D, p 828**].

[36] 2020 Agency Memorandum at p 5: Record at p 5 [**CR, Tab D, p 582**].

(c) "At this time, there is no new information identified through these requests related specifically to the Phase II expansion or material changes in circumstances that would change the Agency's analysis that supported your 2019 decision on requests to designate the Phase II expansion";[37]

(d) "The proponent has indicated that the [Underground Test Mine] is distinct and not dependent on the Phase II expansion … they would likely argue that considering the two projects together could be seen as being unreasonable and arbitrary";[38]

(e) "The incremental impacts are small in comparison to Phase II that you decided not to designate in December 2019, and existing federal and provincial legislative and regulatory mechanisms are expected to manage the potential adverse effects within federal jurisdiction and related Indigenous concerns";[39]

(f) potential adverse effects would be limited through project design, the application of standard mitigation measures and through existing legislative mechanisms; and

(g) adverse effects within federal jurisdiction and related concerns can be appropriately managed through the provincial regulatory process and other existing mechanisms such as the review of any application for authorization under a federal statute.[40]

31. The Minister declined to follow the Agency's recommendation. Instead, on July 30, 2020, he issued the Designation Order, for two reasons (the "**Designation Reasons**"):

(a) considered together, the mining operations of the Underground Test Mine and Phase II are just below the 50 percent threshold and well above the total coal production capacity threshold of 5,000 tonnes per day described in section 19(a) of the *PA Regulations*; and

---

[37] 2020 Agency Memorandum at p 6: Record at p 6 [**CR, Tab D, p 583**].

[38] 2020 Agency Memorandum at p 6: Record at p 6 [**CR, Tab D, p 583**].

[39] 2020 Agency Memorandum at pp 1 and 7: Record at pp 1 and 7 [**CR, Tab D, pp 577 and 584**].

[40] 2020 Agency Analysis at pp 13 - 14: Record at pp 256 - 257 [**CR, Tab D, pp 833 – 834**].

(b) the Underground Test Mine and Phase II may result in adverse effects of greater magnitude than those previously considered.[41]

32. The Designation Reasons do not explain why the Minister decided to consider the Unrelated Projects together. However, in public comments made on the same date, the Minister stated that he was "concerned" that Coalspur had engaged in "project-splitting for the purpose of avoiding a federal assessment". The Minister further stated that "Canadians expect us to look at whether or not we should continue to be exporting thermal coal".[42]

G. The Designation Order Halted the Unrelated Projects

33. The Designation Order triggered the statutory prohibition on any acts or things connected with carrying out the Unrelated Projects that may have effects on federal jurisdiction.[43] As a result, Coalspur cannot move forward with either of the Unrelated Projects without additional federal decision-making under the *IAA*.

34. Coalspur has invested over $700 million in Phase I and infrastructure required for the Underground Test Mine and Phase II. The Underground Test Mine is expected to require an additional investment of $100 million and create 98 additional full time jobs, and Phase II is expected to require an additional investment of $300 million and create 270 additional full-time jobs.[44] These investments and the economic benefits to Coalspur, communities, and workers have now been postponed indefinitely and may be delayed by several years.[45]

---

[41] Designation Reasons: [**CR, Tab B, pp 16 – 20**], Stepp Affidavit, Ex. 41 [**CR, Tab C, pp 543 – 546**].

[42] Emma Graney, *Ottawa orders federal review of Alberta coal mine expansion* (The Globe and Mail, 30 July 2020): Stepp Affidavit, Ex. 42 [**CR, Tab C, pp 547 – 551**].

[43] *IAA*, s 7 [**Tab E4**].

[44] Stepp Affidavit at para 55 [**CR, Tab C, p 35**].

[45] Stepp Affidavit at paras 55-64 [**CR, Tab C, pp 35 – 37**]; Alberta Energy Regulator, *Estimated Application Processing Timelines* (July 2020): Stepp Affidavit, Ex. 44 [**CR, Tab C, pp 558 – 563**]; Impact Assessment Agency of Canada, *The Impact Assessment Process: Timelines and Outputs*: Stepp Affidavit, Ex. 45 [**CR, Tab C, pp 564 – 565**].

PART III. ISSUES

35. There are three issues in this proceeding:

(a) Did the Minister fail to account for or provide reasons for the central threshold issue of whether the Unrelated Projects should be considered together or separately?

(b) Did the Minister unreasonably rely on the Underground Test Mine—which will, at most, have negligible incremental impacts on matters of federal jurisdiction—to tip the scales in favour of designating Phase II, contrary to:

(i) the CEA Agency's prior decision not to assess Phase I and the Minister's prior decision not to designate Phase II, both of which have the potential for significantly greater incremental impacts;

(ii) the Agency's advice that the Minister should not designate the Underground Test Mine or Phase II, alone or in combination; and

(iii) the text, context and purpose of the *IAA*, considered in light of the constitutional division of powers?

(c) If the answer to (a) or (b) is "yes", what remedy should issue?

PART IV. SUBMISSIONS

A. Standards of Review

36. The applicable standard of review is reasonableness.[46]

37. Reasonableness is a robust form of review.[47] A reasonable decision is one based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker.[48]

38. Where reasons are required (as they were here), they are the primary mechanism by which the Court assesses justification, transparency and intelligibility. It is not enough that the outcome of a decision is justifiable. Rather, where reasons are required, the decision must be justified, by way of the decision-maker's reasons.[49]

39. A decision is unreasonable where, among other things, the decision-maker's reasons are not consistent with the governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision-maker, past practices and decisions and the decision's potential impact on the person(s) to whom it applies. Equally, a decision must be set aside where the reasons do not grapple with an essential element of the issue or central arguments raised by the parties, do not take into account relevant factors and instead consider irrelevant factors, and do not explain a departure from a past decision or established internal authority.[50]

[46] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("***Vavilov***") at paras 17, 23 [**Tab E10**].

[47] *Vavilov* at para 13 [**Tab E10**].

[48] *Vavilov* at paras 85, 99, 101 [**Tab E10**].

[49] *Vavilov* at paras 81, 86-87 [**Tab E10**].

[50] *Vavilov* at paras 96, 98, 103, 106, 108, 112, 126 - 128 and 131 [**Tab E10**]; *Canada (AG) v Honey Fashions Ltd*, 2020 FCA 64 ("***Honey Fashions***") at paras 30-31, 37, 39-40, 46 [**Tab E8**].

B. The Minister Unreasonably Combined the Unrelated Projects

40. Subsection 9(4) of the *IAA* required the Minister to provide reasons for his designation decision.[51] In *Vavilov*, the SCC instructed that "[t]he principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties."[52] Further, where parties have made detailed submissions on such issues and concerns, the decision-maker must address them.[53]

41. Here, the Minister did neither with respect to the central threshold issue of whether the Underground Test Mine and Phase II should be considered together or separately under s. 9 of the *IAA*.

42. In their submissions to the Agency, each of the Requesters: (i) characterized the Unrelated Projects as a single "expansion"; (ii) requested that the Unrelated Projects be considered together; and (iii) asked that the Minister's Phase II decision be reconsidered on this basis.[54]

43. Coalspur responded that the Unrelated Projects should <u>not</u> be considered together because, among other things:

(a) in contrast to Phase II, the Underground Test Mine is contained within the boundaries of Phase I licenses and will not create any new disturbance area;

(b) the Underground Test Mine is an independent project from Phase II, either of the Unrelated Projects may proceed without the other, and they are subject to independent decision-making within Coalspur;

---

[51] *IAA*, s 9(4) [**Tab E4**].

[52] *Vavilov* at para 127 [**Tab E10**].

[53] *Canada Post Corp v Canadian Union of Postal Works*, 2019 SCC 67 at para 60 [**Tab E11**]; *Vavilov* at para 127 [**Tab E10**].

[54] Letter dated May 1, 2020 from Ecojustice to Minister of Environment and Climate Change: Record at pp 121 – 122 [**CR, Tab D, pp 698 -699**]; Letter dated May 1, 2020 from Louis Bull to Minister of Environment and Climate Change and the Agency: Record at pp 200 - 202 [**CR, Tab D, pp 777 – 779**]; Letter from Stoney Nakoda to Minister of Environment and Climate Change and the Agency: Record at pp 220 - 221 [**CR, Tab D, pp 797 – 798**].

(c) the Underground Test Mine and Phase II are subject to very different provincial regulatory requirements and these processes are proceeding on very different timelines;

(d) the Unrelated Projects are proceeding on completely different construction and operational timelines, with the Underground Test Mine planned to commence in 2020 and Phase II planned for years later;

(e) the Agency's *Guide to Preparing an Initial Project Description* does not support combining the Unrelated Projects;

(f) the legal test established in the jurisprudence for considering two projects together is not satisfied in this case; and

(g) reviewing the Unrelated Projects together creates absurd policy implications by encouraging proponents to delay disclosing unrelated projects for fear of arbitrary combination for *IAA* purposes, which will unnecessarily delay economic benefits and early and meaningful consultation with Indigenous communities.[55]

44. The ENGOs replied to a number of these points.[56]

45. Accordingly, the Agency, in its 2020 Agency Memorandum, identified whether the Unrelated Projects should be considered together as a central issue in the proceeding. Indeed, the Agency went so far as to flag it as a matter on which an application for judicial review could be based. Specifically, the Agency noted that:

(a) "[t]he requesters asked the [Agency] to consider the effects of the [Underground Test Mine] in combination with Phase II"[57] and, in contrast,

---

[55] Stepp Affidavit at para 45 [**CR, Tab C, pp 32 – 33**]; Letter dated May 29, 2020 from Coalspur to the Agency at pp 7 – 8: Stepp Affidavit, Ex. 34 [**CR, Tab C, pp 396 – 397**].

[56] Letter dated July 8, 2020 from Ecojustice to the Agency: Record at pp 186 - 199 [**CR, Tab D, pp 763 – 767**].

[57] 2020 Agency Memorandum at p 5: Record at p 5 [**CR, Tab D, p 582**].

(b) "[t]he proponent has indicated that the [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."[58]

46. In his Designation Reasons and Designation Order, the Minister considered the Unrelated Projects together and relied on their combined potential effects, as he understood them, to designate them both. However, he did not explain why he considered the Unrelated Projects together, based on the facts and law. Nor did he explain why he rejected Coalspur's factual and legal arguments—in fact, it is not clear from the Minister's Designation Reasons that he even considered Coalspur's arguments on this critical point. Precisely as the Agency anticipated, Coalspur asks this Court to quash the Designation Order on the basis that considering the Unrelated Projects together was unreasonable and arbitrary.

47. Combining separate projects for the purpose of environmental or impact assessment legislation is a significant legal issue. It has been litigated in courts across Canada (including this Court) and is constrained by legislation and case law.

48. Under s. 9(1), the Minister has discretion to designate a "physical activity". The term "physical activity" is undefined in the *IAA*; however, the related term "designated project"[59] is defined as:

> 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).

---

[58] 2020 Agency Memorandum at p 6 (emphasis added): Record at p 6 [**CR, Tab D, p 583**].

[59] Under the *IAA*, the terms "physical activity" and "designated project" are presented as alternatives in sections intended to capture the effects of project-related works regardless of whether they have been designated: *IAA*, ss 2 ("direct or incidental effects" and "effects within federal jurisdiction", terms used throughout the *IAA*) [**Tab E4**].

> 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).[60]

49. Once a "physical activity" has been designated under the *IAA*, it becomes a component of a "designated project". However, the definition of "physical activity" must be narrower than the definition of "designated project" because the defined term "designated project" includes: (i) "one or more physical activities"; and (ii) "any physical activity that is incidental to those physical activities". Under the *IAA* and its predecessor, it is "designated projects" that are subject to environmental or impact assessment.

50. Based on the foregoing, the case law interpreting the scope of the federal decision-making power to combine one or more proposed activity for the purpose of a single environmental or impact assessment is highly relevant. This power is found in both the *IAA* and its predecessors.[61]

51. In *MiningWatch Canada v Canada (Fisheries and Oceans)*, the Supreme Court of Canada ("**SCC**") identified the purpose of this provision to be the prevention of "project splitting" whereby a proponent represents part of a project as the whole, or proposes several parts of a project as independent projects, in order to circumvent additional assessment obligations.[62] This is the precise concern that the Minister relied upon in his public comments provided on the same date as the Designation Order.[63]

52. In *Conseil des Innus de Ekuanitshit v Canada*,[64] this Court held that, under a predecessor to the *IAA* (the *Canadian Environmental Assessment Act,* SC 1992, c 37), two projects should be considered together only when they are "connected actions", meaning that: (i) one project is

---

[60] *IAA*, s 2 ("designated project") [**Tab E4**].

[61] *Canadian Environmental Assessment Act*, S.C. 1992, c 37, repealed, 2012, c 19, s 66, ss 15 and 15.1 [**Tab E1**]; *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c 19, s 52, repealed, 2019, c. 28, s. 9 ("***CEAA 2012***"), s 14, repealed, 2019, c. 28, s. 9 [**Tab E2**]; *IAA*, s 9 [**Tab E4**].

[62] *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 ("***MiningWatch***") at para 40 [**Tab E17**].

[63] Emma Graney, *Ottawa orders federal review of Alberta coal mine expansion* (The Globe and Mail, 30 July 2020): Stepp Affidavit, Ex. 42 [**CR, Tab C, pp 547 – 551**].

[64] 2013 FC 418, aff'd 2014 FCA 189, leave to appeal to SCC refused, 2015 CanLII 10578 (SCC) ("***Conseil***") [**Tab E14**].

automatically triggered by the other; (ii) one project cannot proceed without the other; or (iii) both are part of a larger whole and have no independent utility if considered separately.[65]

53. In submissions to the Agency, the ENGOs argued that the "connected actions" test has no application under the *IAA* because it arose out of an *Operational Policy Statement* regarding the former legislation and was intended to cover whether two projects should be considered together in a single assessment, not whether two projects should be federally assessed at all.[66]

54. The Newfoundland and Labrador courts have found otherwise, consistently applying the same "connected action" test to interpret threshold scoping provisions under provincial environmental assessment legislation on the basis that, in the absence of statutory or regulatory direction, the principles in *Conseil* remain "relevant and helpful".[67]

55. The same must be said about the *IAA*, for which there is no applicable operational policy statement (and, in any event, such statement would not be binding on this Court). Indeed, interpreting the definition of "designated project" under the *CEAA 2012*, which is materially identical to the *IAA* definition,[68] courts have applied a similar test to consider project scope.

56. For example, the BC Supreme Court required a sufficiently close "connection" between activities to scope in "incidental" physical activities to the assessment of a "designated project". The Court reasoned that use of the term "incidental" requires "a certain level of proximity as well as possibly causal connection between activities and the designated project."[69] The Federal Court of Appeal has similarly required administrative decision-makers to consider whether proposed

---

[65] *Conseil* at para 57 [**Tab E14**].

[66] Letter dated July 8, 2020 from Ecojustice to the Agency: Record at pp 188 – 190 [**CR, Tab D, pp 765 – 767**].

[67] *Atlantic Salmon Federation (Canada) v Newfoundland (Environment and Climate Change)*, 2017 NLTD(G) 137 at paras 118 - 121, aff'd on other grounds 2018 NLCA 53 [**Tab E7**]; *Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 34 at paras 84 – 98 [**Tab E20**].

[68] *CEAA 2012*, s 2(1) ("designated project") [**Tab E2**].

[69] *Canada (Canadian Environmental Assessment Agency) v Taseko Mines Limited*, 2018 BCSC 1034 ("***Taseko***") at paras 42, 44 and 63 – 66 [**Tab E9**].

activities are subordinate or complementary to a designated project.[70] Surely, if a close "connection" is required to be "incidental" to physical activities that form the "designated project", an even stronger connection is required for different activities to be combined as "one or more physical activities" for the purpose of scoping.

57. Nothing in the *IAA* suggests a departure from its predecessors' requirement that there be a sufficient "connection" between physical activities to consider them in combination for impact assessment purposes. Indeed, the requirement of a sufficient "connection" reinforces the purposes of the *IAA*, including "to establish a fair, predictable and efficient process for conducting impact assessments".[71]

58. Notwithstanding the parties' extensive submissions, the Agency's advice, and the legal constraints imposed by legislation and the courts, the Designation Reasons are silent as to the legal and factual bases on which the Minister decided to consider the Unrelated Projects together. Even if the Minister did not require a sufficient "connection", he failed to explain what alternative standard he applied to reach his decision on this critical issue.

59. This failure alone is sufficient to quash the Designation Order. *Vavilov* confirms that where a decision-maker does not address the rationale for an essential element of the decision, the decision fails to meet the standards of justification, transparency and intelligibility.[72] The SCC explained further that "it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision-maker to those to whom the decision applies."[73]

60. Following *Vavilov*, reviewing courts are no longer able to fill a "fundamental gap" in an administrative decision-maker's reasons with reasons that could have been given.[74] As Lederer J.

---

[70] *Tsleil-Waututh Nation, Canada (Attorney General),* 2018 FCA 153 at paras 391, 393 - 394 and 403 – 404 [**Tab E25**].

[71] *IAA*, s. 6(b.1) [**Tab E4**].

[72] *Vavilov* at para 98 [**Tab E10**]. See also this principle applied in *The Owners, Strata Plan NW 2575 v Booth,* 2020 BCCA 153 at para 27 – 28 [**Tab E24**].

[73] *Vavilov* at para 86 (emphasis in original) [**Tab E10**].

[74] *Vavilov* at paras 96 – 98 [**Tab E10**].

put it: “Only through reasons can the parties know that the issues of concern to them have been the subject of reasoned consideration”[75]

61. The reasons requirement takes on heightened importance where a decision will have severe impact on rights and interests. The reasons must reflect the stakes, including the decision-maker turning their mind to the significance of impacts on the party affected by the decision.[76]

62. In this case, that meant recognizing the significant effect of delay to the Underground Test Mine that would result from designating the Unrelated Projects. Indeed, Coalspur had intended to commence construction of the Underground Test Mine (which does not require a provincial EIA) before the end of 2020, whereas Phase II still must to undergo a lengthy provincial EIA estimated to take 375 business days.[77] As this Court noted in *Conseil*, a decision to combine two projects into one for the purposes of an environmental assessment can waste “a substantial amount of work and cost a significant amount of money.”[78] Here, the delay could be in excess of 4.5 years.[79]

63. At best, the Minister’s failure to provide reasons on the issue suggests that he did not consider it or fettered his discretion based on the fact that the Requesters had strategically combined the Unrelated Projects for the purpose of their designation requests.[80] At worst, the Minister’s true reasons for decision are reflected in his public comment that he designated the Unrelated Projects because of his unfounded belief that Coalspur was engaged in “project-splitting for the purpose of avoiding a federal assessment”.[81] In fact, there was not an iota of evidence before the Minister to support his theory that Coalspur artificially separated the projects for the

[75] *Scarborough Health Network v Canadian Union of Public Employees, Local 5852*, 2020 ONSC 4577 at para 15 [**Tab E21**], citing *Vavilov* at paras 102 and 127 – 128 [**Tab E10**].

[76] *Vavilov* at paras 133 – 134 [**Tab E10**].

[77] Stepp Affidavit at paras 57 – 58 [**CR, Tab C, p 36**]; AER, *Estimated Application Processing Timelines* (July 2020): Stepp Affidavit, Ex. 44 [**CR, Tab C, pp 558 – 563**].

[78] *Conseil* at para 68 [**Tab E14**].

[79] Stepp Affidavit at para 59 [**CR, Tab C, p 36**].

[80] *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 23 – 25 [**Tab 22**]. See also *Vavilov* at para 108 [**Tab E10**].

[81] Emma Graney, *Ottawa orders federal review of Alberta coal mine expansion* (The Globe and Mail, 30 July 2020): Stepp Affidavit, Ex. 42 [**CR, Tab C, pp 547 – 551**].

purpose of avoiding any assessment, federal or otherwise. To the contrary, the Agency advised the Minister that "[p]hased project expansions are commonplace in the mining industry and are dependent on multiple factors including the market value of the resource and demand".[82]

64. The absence of any consideration of this central issue in the Designation Reasons leads to the inevitable conclusion that the Designation Order is unreasonable and must be quashed. Indeed, based on the factual record before him and the applicable legal standards, the only reasonable result was for the Minister to decline to consider the Unrelated Projects together.

C. The Minister Unreasonably Relied on the Underground Test Mine to Reverse His Decision on Phase II

65. Even if it were reasonable for the Minister to consider the Underground Test Mine and Phase II together (which Coalspur denies), it was unreasonable for the Minister to rely on the Underground Test Mine to tip the scales in favour of designating the Unrelated Projects after concluding just seven months earlier that Phase II alone did not warrant designation.

66. It is apparent from the Designation Reasons that the basis of the Designation Order is the combination of the Unrelated Projects for the purpose of the Minister's assessment. Indeed, the Minister's two reasons for designating the Unrelated Projects state that he: (i) "considered [them] together" to assess the closeness to the Coal Expansion Threshold; and (ii) found that "cumulatively, the Projects may result in adverse effects of greater magnitude to those previously considered."[83]

67. In contrast to other sections of the *IAA*,[84] the designation power does not explicitly or implicitly authorize the Minister to reconsider a previous decision. In these circumstances, the doctrine of *functus officio* barred the Minister from reconsidering Phase II absent statutory authority, a clerical error or another narrow basis permitted by governing case law.[85]

---

[82] 2020 Agency Memorandum, p. 6: Record, p. 6 [**CR, Tab D, p 583**].

[83] Designation Reasons [**CR, Tab B, pp 19-20]**.

[84] *IAA*, s 68 [**Tab E4**].

[85] *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 860 - 862, 1989 CanLII 41 [**Tab E13**]; *Gordon v Manitoba (Minister of Conservation),* 2005 MBQB 260 at paras 64 – 76

68. However, the Designation Reasons do not state why the Underground Test Mine specifically causes Phase II to go from not warranting designation, to warranting designation, notwithstanding that: (i) the CEA Agency had already decided that Phase I did not warrant assessment and the Minister had already decided that Phase II did not warrant designation; and, (ii) the Agency recommended against designating the Unrelated Projects and described the Underground Test Mine to the Minister as causing limited surface disturbance that "occurs primarily within the previously disturbed footprint of Phase I" and "negligible" incremental impacts in comparison to Phase II.[86]

69. The absurdity is immediately obvious from a simple comparison of the Unrelated Projects with respect to the two factors the Minister relied upon to designate:

(a) **Area of mining operations and production volumes**: Phase II adds 633.6 hectares, while the Underground Test Mine adds 2.52 hectares (at most). Similarly, Phase II is 16,949 tonnes per day (max), while the Underground Test Mine is 1,200 tonnes per day. In other words, the Minister has illogically relied on the Underground Test Mine's relative area increase of 0.4% and volume increase of 7% as compared to Phase II to change the latter from non-designated to designated.

(b) **Adverse effects**: As stated repeatedly herein, the incremental impacts of the Underground Test Mine are "negligible" compared to Phase II. It is illogical for the Minister to suggest that these negligible incremental impacts cause greater adverse effects than previously considered regarding Phase II.

70. The Minister's decision to designate the Unrelated Projects notwithstanding his previous decisions and Agency advice was illogical, incoherent, unjustified and unreasonable. It was also contrary to the text, context and purpose of the *IAA*, considered in light of the constitutional

---

and 82 – 85 [**Tab E16**]; Donald Brown and John Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2019) (loose-leaf release 2020-4) at 12:6211 [**Tab E27**].

[86] Record at pp 2, 3 and 5 [**CR, Tab D, pp 578, 579 and 581**].

division of powers. Each of these bases, on their own, is sufficient to quash the Designation Order; together, they overwhelmingly establish that the Designation Order cannot stand.

(ii) The Minister Failed to Justify his Departure from the CEA Agency's Phase I Decision, the Non-Designation Decision and Agency Advice

71. The Minister was required to justify his departure from: (i) the CEA Agency's previous decision that Phase I did not warrant federal assessment; (ii) his previous decision to decline to designate Phase II; and (iii) the Agency's advice not to designate the Unrelated Projects.[87] He failed to do so. Instead, the Minister made an illogical and inconsistent decision that was not and cannot be justified through the lens of reasonableness.

72. First, the Minister failed to acknowledge or consider that Phase I was subject to a comprehensive provincial EIA[88] and, on that basis, the CEA Agency determined that no federal assessment was required.[89] This information was before the Minister,[90] but there is no indication that he considered it.

73. While the provincial EIA of Phase I concluded with AER approval in 2014,[91] the EIA report remained relevant to the Minister's Designation Order in 2020. In 2005, the Alberta Court of Appeal found that an environmental assessment completed in 1993 remained relevant to an administrative decision-maker determining whether to require an EIA report for a project under the *EPEA*:

> [The Director] was entitled to consider that after a full EIA and hearing the NRCB granted conditional approval to a development

[87] *Vavilov* at paras 112, 131 [**Tab E10**]; *Honey Fashion* at paras 38 – 40 and 46 [**Tab E8**]; *Wilkinson v Canada (Attorney General),* 2020 FCA 223 at para 54 [**Tab E26**].

[88] See Stepp Affidavit at paras 12 – 18 [**CR, Tab C, pp 24 – 26**].

[89] Letter dated May 4, 2012 from CEA Agency to Coalspur: Stepp Affidavit, Ex. 15 [**CR, Tab C, pp 211 – 212**], Record at pp 155-156 [**CR, Tab D, pp 732 – 733**]; Letter dated May 3, 2012 from DFO to Coalspur: Stepp Affidavit, Ex. 16 [**CR, Tab C, pp 214 – 217**].

[90] Record at pp 155-156 [**CR, Tab D, pp 732 – 733**]; 2019 Agency Analysis at p 3: Record at p 92 [**CR, Tab C, p 669**]; Letter dated August 9, 2019 from Coalspur to CEA Agency: Stepp Affidavit, Ex. 27 [**CR, Tab C, pp 310 – 327**], Record at pp 157 - 173 [**CR, Tab D, pp 734 – 750**].

[91] AER Decision 2014 ABAER 004: Stepp Affidavit, Ex. 13 [**CR, Tab C, pp 179 – 206**].

> similar, if not larger, in scope to that at issue before her. This factor supports the reasonableness of her conclusion.[92]

74. Here, it is indisputable that the potential impacts of Phase I vastly exceed the potential impacts of the Underground Test Mine. The former was a 1,435 hectares greenfield mine project. In contrast, the latter adds, at most, 2.52 hectares of surface disturbance, which is located entirely within Phase I's existing footprint.[93]

75. Similarly, prior to the Non-Designation Decision, the Agency recommended against designating Phase II because its potential adverse effects to areas of federal jurisdiction will be appropriately managed through processes provided by the existing federal and provincial legislative and regulatory requirements.[94] The Minister agreed.[95]

76. Yet, in his Designation Reasons, the Minister failed to explain why the Underground Test Mine tipped the scales in favour of either of his two "reasons" for designating the Unrelated Projects, considered together.

77. Equally, the Minister failed to explain why he changed his mind on the issue of existing mechanisms providing for adequate consultation with Indigenous peoples.[96] What potential effects from a project with "negligible" incremental effects could possibly impact Indigenous consultation?

78. In making the Designation Order, the Minister considered the Agency's 2020 guidance, which is consistent with its 2019 guidance. The 2020 Agency Memorandum recommended against

---

[92] *Castle-Crown Wilderness Coalition v Alberta (Director of Regulatory Assurance Division, Alberta Environment),* 2005 ABCA 283 at para 63 [**Tab E12**].

[93] Stepp Affidavit at paras 9, 38 and 41 [**CR, Tab C, pp 23, 30 – 31**]; Letter dated May 29, 2020 from Coalspur to the Agency: Stepp Affidavit, Ex. 34 [**CR, Tab C, pp 389 – 407**].

[94] 2019 Agency Memorandum at p 7: Record at p 56 [**CR, Tab D, p 633**]; 2019 Agency Analysis at pp 10 -11: Stepp Affidavit, Ex. 30 [**CR, Tab C, pp 354 - 355**], Record at pp 99-100 [**CR, Tab D, pp 676 – 677**].

[95] Non-Designation Decision: Stepp Affidavit, Ex. 31 [**CR, Tab C, pp 374 – 377**], Record at p 60 [**CR, Tab D, p 637**].

[96] Non-Designation Decision: Stepp Affidavit, Ex. 31 [**CR, Tab C, pp 374 – 377**], Record at p 60 [**CR, Tab D, p 637**].

designating the Underground Test Mine because, among other things: (i) the surface disturbance of the Underground Test Mine is limited and primarily within Phase I's disturbed footprint;[97] (ii) the incremental impacts of the Underground Test Mine are "negligible" in comparison to those of Phase II;[98] and (iii) there is no material change in circumstances that would change the Agency's analysis that supported the Non-Designation Decision for Phase II.[99]

79. The 2020 Agency Analysis confirms that the Underground Test Mine will have limited surface disturbance and impact due to its location within Phase I's footprint,[100] and that, like Phase II, its potential adverse effects would be limited through project design, the application of standard mitigation measures and through existing legislative mechanisms.[101] The 2020 Agency Analysis recommended against designating the Underground Test Mine and Phase II, even if combined, because their potential adverse effects will be appropriately managed through the provincial regulatory process and other existing mechanisms.[102]

80. The Minister does not explain why he departed from the Agency. This is particularly troubling and smacks of arbitrariness because the Agency recommended against designation for a precise opposite reason as the Minister relied on to designate the Unrelated Projects. Yet, the Minister did not explain why he disagreed that the Unrelated Projects would be managed through existing processes or what changes to Phase II now warranted designation.

81. The Minister relied on a physical activity (the Underground Test Mine) with "negligible" impacts to tip the scales in favour of designating both it and another physical activity (Phase II), notwithstanding that "there is no new information … or material changes in circumstance[103] from

[97] 2020 Agency Memorandum at p 3: Record at p 3 [**CR, Tab D, p 580**].

[98] 2020 Agency Memorandum at p 5: Record at p 5 [**CR, Tab D, p 582**].

[99] 2020 Agency Memorandum at p 6: Record at p 6 [**CR, Tab D, p 583**].

[100] 2020 Agency Analysis at p 8: Record at p 251 [**CR, Tab D, p 828**].

[101] 2020 Agency Analysis at pp 13 - 14: Record at pp 256 – 257 [**CR, Tab D, pp 833 – 834**].

[102] 2020 Agency Analysis at pp 13 - 14: Record at pp 256 – 257 [**CR, Tab D, pp 833 – 834**].

[103] 2020 Agency Memorandum at p 6: Record at p 6 [**CR, Tab D, p 583**].

the Minister's earlier Non-Designation Decision to justify this decision. On this basis, the Minister's Designation Order was unreasonable and must be quashed.

(iii) The Designation Order is Inconsistent with the Text, Context and Purpose of the IAA, considered in light of the Constitution

82. The Minister's discretion to designate a physical activity must comply "with the rationale and purview of the statutory scheme under which it is adopted".[104] The Minister must also obey the constraints imposed by the *IAA* and the *PA Regulations*,[105] including statutory definitions, principles and formulas that prescribe the Minister's exercise of discretion.[106] In sum, the Minister must exercise his discretion consistent with the text, context and purpose of the *IAA*.[107]

83. The text of the *PA Regulations* includes the Coal Expansion Threshold (increase in area of mining operations by 50 percent or more <u>and</u> a total coal production capacity of 5,000 tonnes per day or more), which if applicable triggers mandatory designation.[108] The Minister relied heavily on the fact that, together, "the area of mining operations for the Projects would be just below the 50 percent threshold … and well above the total coal production capacity threshold".[109]

84. The text of the *PA Regulations* is clear that the legislators' concern for impact assessment purposes is with coal expansions that are material in <u>both</u> area of mining operations increases <u>and</u> coal production capacity. As stated above, the Underground Test Mine does not cause material incremental changes to the assessment of Phase II under either component. Therefore, in addition to being illogical, his Designation Order is inconsistent with the text of the *PA Regulations*.

85. The context of the *IAA* is equally at odds with the Designation Order. Parliament enacted the *IAA* under its purported authority to assess the potential environmental effects of physical activities on matters of federal jurisdiction. This is because the environment is a shared

---

[104] *Vavilov* at para 108 [**Tab E10**].

[105] *Taseko* at para 36 [**Tab E9**]; *MiningWatch* at para 31 [**Tab E17**].

[106] *Vavilov* at para 108 [**Tab E10**].

[107] *Vavilov* at para 118 [**Tab E10**].

[108] *PA Regulations*, Schedule, s 19(a) [**Tab E5**].

[109] Designation Reasons [**CR, Tab B, pp 16 – 20**], Stepp Affidavit, Ex. 41 [**CR, Tab C, pp 543 – 546**].

constitutional authority between provincial and federal governments, which must always be linked to a head of power assigned to that level of government under the *Constitution Act, 1867*.[110]

86. Here, the link to federal jurisdiction is negligible, at best. In its submissions in response to the Designation Requests, Coalspur advised the Agency that the Underground Test Mine: (i) is "not expected to increase the environmental impacts of the Vista Project above those presented and assessed in the [Phase I] EIA"; (ii) does not require any federal approvals; and (iii) does not trigger any Indigenous consultation obligations because it will not cause incremental impacts to any Indigenous group's traditional activities (being located within the boundaries of Phase I permits).[111]

87. In the Designation Reasons, the Minister asserted that three areas of federal jurisdiction were engaged: (i) fish and fish habitat; (ii) species at risk; and (iii) Indigenous peoples.[112] However, the Minister ignored the Agency's findings that the impacts to these areas of federal jurisdiction, if any, would already be managed by existing federal and provincial regulatory requirements.

88. It is inconsistent with the spirit of Canada's constitutional division of powers, and the interpretive and other legal doctrines applied thereunder, for the Minister to trigger a federal veto power over the Underground Test Mine, a project with potential impacts on federal jurisdiction that are negligible and already being managed elsewhere. Indeed, in recent years, the Government of Canada and aligned parties have challenged provincial environmental regulatory regimes that sought to impose a veto power over interprovincial transportation projects.[113] Here, the Minister is purporting to do the same with respect to projects located entirely within the Province of Alberta.

---

[110] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 64 – 68, 1992 CanLII 110 [**Tab E15**]; *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 ("***Pipeline Reference***"), at para 12, aff'd 2020 SCC 1 [**Tab E19**].

[111] Letter dated May 29, 2020 from Coalspur to the Agency: Stepp Affidavit, Ex. 34 at pp 2 and 4 - 6 [**CR, Tab C, pp 391, 393 – 395**].

[112] Designation Reasons [**CR, Tab B, pp 16 – 20**], Stepp Affidavit, Ex. 41 [**CR, Tab C, pp 543 – 546**].

[113] *Pipeline Reference* at paras 1-3, 68, 88-91, 97, 101 [**Tab E19**].

89. Regardless of whether ss. 7 and 9 of the *IAA* are constitutionally valid or applicable (which will be determined by the Court of Appeal of Alberta in the ongoing reference proceeding[114]), the Minister's failure to consider the division of powers was unreasonable. Indeed, as described below, harmonization and avoidance of duplication and conflict between federal and provincial environmental and impact assessment is a fundamental purpose of the *IAA*.

90. Finally, the Designation Reasons are clear that the Minister did not consider the purposes of the *IAA*.

91. The *IAA*'s purpose clause identifies the following purposes, among others: (i) to establish a fair, predictable, timely and efficient process for conducting impact assessments; (ii) to promote cooperation and coordinated action between federal and provincial governments — while respecting the legislative competence of each; and, (iii) to promote communication and cooperation with Indigenous peoples.[115]

92. The Designation Order and Designation Reasons are inconsistent with these purposes, for at least three reasons.

93. First, they do not promote a fair, predictable, timely and efficient process because they fail to justify or explain the Minister's departure from his Non-Designation Decision (issued seven months prior) and prohibit the Unrelated Projects from proceeding absent additional federal decision-making.

94. Second, they do not promote cooperation and coordination between federal and provincial governments because they fail to explain how additional federal assessment under the *IAA* would add to or fill any gaps in the provincial regulatory regime or any federal authorizations that Canada believes apply. The fact is it will not do so; it will only cause delay to the Unrelated Projects (possibly, years of delay).

95. Third, the Designation Reasons state that a central reason for the Designation Order is a concern that potential effects of the Underground Test Mine and Phase II, combined, might

---

[114] *Reference re Impact Assessment Act*, Docket 1901-0276-AC.

[115] *IAA*, s 6(1)(b.1), (e), (f) [**Tab E4**].

adversely affect Indigenous peoples.[116] However, the Minister fails to consider the impacts that a delay to the Unrelated Projects will have on Indigenous groups that have entered into impact benefit agreements relating to Phase II,[117] and who stand to be negatively impacted by the Designation Order.

96. In other words, the Minister selectively considered concerns by Indigenous groups that are located in different Treaty territories (Stoney Nakoda) or with reserve lands hundreds of kilometres away from the Underground Test Mine (Louis Bull),[118] while paying no attention to or consulting more proximate groups that support the Underground Test Mine.

97. The Minister's certified record in this judicial review demonstrates that the Minister did not complete any type of assessment whatsoever to determine if and how Indigenous people might be affected by the Underground Test Mine, Phase II or the Minister's issuance of the Designation Order.

98. The Minister's Designation Order and Designation Reasons are incompatible with the text, context and purpose of the *IAA* and cannot stand.

---

[116] Designation Reasons [**CR, Tab B, pp 16 – 20**], Stepp Affidavit, Ex. 41 [**CR, Tab C, pp 543 – 546**].

[117] Stepp Affidavit at para 63 [**CR, Tab C, p 37**].

[118] Letter dated May 29, 2020 from Coalspur to the Agency: Stepp Affidavit, Ex. 34 [**CR, Tab C, pp 394 – 395**]. The letter, at p. 5, incorrectly reverses the Treaty to which Stoney Nakoda is a party and the Treaty lands on which the Underground Test Mine is situated. Stoney Nakoda is a party to Treaty 7; the Underground Test Mine is situated on Treaty 6 lands.

PART V. ORDERS SOUGHT

99. The Minister's discretion to designate a project under s. 9(1) of the *IAA* is binary. The only available options are to designate or decline to designate. Based on the Agency's analyses, the Minister's Non-Designation Decision, and the lack of any material change in circumstances to justify the Minister's exercise of discretion, the only reasonable outcome of a reconsideration is to decline to designate the Underground Test Mine and Phase II (considered separate or apart). In such a case where the facts and law can lead to only one reasonable result and the decision-maker failed to conclude with that result, this Court ought to quash the decision and substitute its own, rather than remitting the matter for redetermination.[119]

100. Additionally, in deciding whether to remit a decision for reconsideration, this Court should consider concerns for delay and the efficient use of public resources. In the interest of avoiding an "endless merry-go-round of judicial review and subsequent reconsiderations",[120] Coalspur asks this Court to grant an order: (i) quashing the Designation Order; (ii) directing the Minister to issue an order declining to designate the Underground Test Mine and/or Phase II; and (iii) granting Coalspur the costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Calgary, Alberta, on February 4, 2021.

Martin Ignasiak / Sean Sutherland / Coleman Brinker
Osler, Hoskin & Harcourt LLP
Counsel for the Applicant

---

[119] *Vavilov* at para 142 [**Tab E10**]; *Telus Communications Inc v Telecommunications Workers Union*, 2014 ABCA 199 at paras 34 – 39 [**Tab E23**]; *Nation Rise Wind Farm Limited Partnership v Minister of the Environment, Conservation and Parks,* 2020 ONSC 2984 at paras 156 – 163 [**Tab E18**].

[120] *Vavilov* at para 142 [**Tab E10**].

PART VI. LIST OF AUTHORITIES

Statutes and Regulations

Tab	Statute/Regulation
1	*Canadian Environmental Assessment Act*, S.C. 1992, c. 37, repealed, 2012, c. 19, s. 66
2	*Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, repealed, 2019, c. 28, s. 9
3	*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12
4	*Impact Assessment Act,* S.C. 2019, c. 28, s. 1
5	*Physical Activities Regulations*, S.O.R./2019-285
6	*Responsible Energy Development Act*, S.A. 2012, c. R-17.3

Case Law

Tab	Case
7	*Atlantic Salmon Federation (Canada) v Newfoundland (Environment and Climate Change),* 2017 NLTD(G) 137, aff'd on other grounds 2018 NLCA 53
8	*Canada (Attorney General) v Honey Fashions Ltd*, 2020 FCA 64
9	*Canada (Canadian Environmental Assessment Agency) v Taseko Mines Limited*, 2018 BCSC 1034
10	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
11	*Canada Post Corp v Canadian Union of Postal Works*, 2019 SCC 67
12	*Castle-Crown Wilderness Coalition v Alberta (Director of Regulatory Assurance Division, Alberta Environment)*, 2005 ABCA 283
13	*Chandler v Alberta Association of Architects*, [1989] 2 S.C.R. 848, 1989 CanLII 41
14	*Conseil des Innus de Ekuanitshit v Canada*, 2013 FC 418, aff'd 2014 FCA, leave to appeal to SCC refused, 2015 CanLII 10578 (SCC)
15	*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 1992 CanLII 110
16	*Gordon v Manitoba (Minister of Conservation)*, 2005 MBQB 260
17	*MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2
18	*Nation Rise Wind Farm Limited Partnership v Minister of the Environment, Conservation and Parks*, 2020 ONSC 2984
19	*Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, aff'd 2020 SCC 1

20	*Salmonid Association of Eastern Newfoundland v Her Majesty the Queen in Right of Newfoundland and Labrador*, 2020 NLSC 34
21	*Scarborough Health Network v Canadian Union of Public Employees, Local 5852*, 2020 ONSC 4577
22	*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299
23	*Telus Communications Inc v Telecommunications Workers Union*, 2014 ABCA 199
24	*The Owners, Strata Plan NW 2575 v Booth,* 2020 BCCA 153
25	*Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153
26	*Wilkinson v Canada (Attorney General)*, 2020 FCA 223

Other Sources

27	Donald Brown and John Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2019) (loose-leaf release 2020-4) at 12:6211