Federal Court  Cour fédérale

Date: 20240212

Docket: T-1270-21
T-1367-21
T-1369-21

Citation: 2024 FC 231

Ottawa, Ontario, February 12, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

BENGA MINING LIMITED, PIIKANI NATION AND STONEY NAKODA NATIONS

Applicant

and

THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This decision addresses three consolidated applications for judicial review of two decisions, made under the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19 [*CEAA*

2012], denying the approval of the Grassy Mountain Steelmaking Coal Project [Project]. The decisions were made available to the Applicants and the public on August 6, 2021.

[2] The Applicants, Benga Mining Limited, the Piikani Nation, and the Stoney Nakoda Nations, all support the Project, which they describe as having the potential to represent a billion-dollar investment in Alberta and to employ over 500 local employees over the life of the Project. The Applicants originally commenced separate applications for judicial review in Court file nos. T-1270-21, T-1367-21 and T-1369-21. An Order consolidating the matters was issued on September 29, 2021.

[3] As explained in greater detail below, the applications of the Piikani Nation and the Stoney Nakoda Nations are is allowed, because I find that these Applicants were deprived of procedural fairness due to an unfulfilled representation, made after the issuance of the Report of the Joint Review Panel (as defined later in these Reasons) that they would be consulted before the impugned decisions were made. The application of Benga Mining Limited is dismissed.

II. Background

A. *Parties*

[4] Benga Mining Limited [Benga] is a Canadian resource company based in Alberta and the proponent of the Project. Benga describes its parent company as having spent over $700 million acquiring its interests relating to the Project, including pursuing the necessary provincial and federal approvals and assessments.

[5] The Piikani Nation is one of four First Nations comprising the Blackfoot Confederacy and is a signatory to the Blackfoot Treat of 1877 [Treaty 7]. The Piikani Nation is an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. The Project is located entirely within Treaty 7 lands and within the Piikani Nation's ancestral territory.

[6] Following years of consultations, the Piikani Nation entered into a confidential impact benefit agreement with Benga in July 2016 [Piikani Agreement], formalizing the relationship between Piikani Nation and Benga and intended to compensate the Piikani Nation for the Project's impact, including setting out Benga's environmental commitments and initiatives, as well as Benga's commitment to provide training and employment opportunities, scholarships, and business development opportunities for the Piikani Nation and its members.

[7] The Stoney Nakoda Nations [the Stoney Nakoda] are comprised of three First Nations, the Bearspaw First Nation, the Chiniki First Nation, and the Goodstoney (Wesley) First Nation, and are an Indian Band within the meaning of the *Indian Act*. The three First Nations are signatories to Treaty 7. The Project is located in the traditional lands of the Stoney Nakoda.

[8] Following years of consultations, the Stoney Nakoda and Benga entered into a confidential Relationship Agreement in February 2019 [the Stoney Nakoda Agreement]. The Stoney Nakoda Agreement provided the Stoney Nakoda with economic, social, and cultural benefits including ongoing consultation, employment, commercial opportunities, as well as community development for social and cultural programs, and a partnership as environmental stewards to oversee the Project including the Project's reclamation.

[9] The Respondents to these applications are the Minister of Environment and Climate Change [Minister] and the Attorney General of Canada.

B. *Project and regulatory processes*

[10] Benga proposes to operate and construct an open-pit steelmaking coal mine in the Crowsnest Pass area of southwest Alberta. The Project's maximum production capacity would be 4.5 million tonnes of metallurgical coal per year over a mine life of approximately 23 years, and it is estimated by Benga that it would generate $1.7 billion in royalties and taxes for the provincial and federal governments.

[11] The Project requires both federal and provincial assessments and approvals to proceed. Provincially, the Project required an environmental impact assessment under Alberta's *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [*EPEA*] and approvals under various provincial acts. Federally, the Project required an assessment under *CEAA 2012* and resulting preparation of a report to the Minister. The Minister was then required to decide under subsection 52(1) of *CEAA 2012*, after taking into account any mitigation measures the Minister considered appropriate, whether the Project was likely to cause significant adverse environmental effects. If so, the Minister was required under subsection 52(2) of *CEAA 2012* to refer the matter to the Governor in Council [Cabinet] for a decision under subsection 52(4) whether such effects were justified in the circumstances. Finally, section 54 then required the Minister to issue a decision statement, informing the proponent of the section 52 decisions by the Minister and Cabinet.

[12] In 2018, the Alberta Energy Regulator [AER] and the Minister established a joint federal-provincial review panel [JRP] pursuant to the *Agreement to Establish a Joint Review Panel for the Grassy Mountain Coal Project Between the Minister of Environment, Canada and the Alberta Energy Regulator, Alberta* [JRP Agreement] and its attached Terms of Reference [TOR]. The JRP Agreement and TOR tasked the JRP with discharging federal and provincial environmental assessment responsibilities for the Project and preparing a report.

[13] Prior to the appointment of the JRP, Benga prepared its Environmental Impact Assessment in accordance with provincial and federal requirements. (While this document is called an Environmental Impact Statement in federal terminology, Benga employs the provincial nomenclature of Environmental Impact Assessment [EIA] in its materials, and I adopt that nomenclature for purposes of these Reasons.) Benga submitted its EIA and responded to multiple information requests [IRs] from the AER and the Canadian Environmental Assessment Agency (now called the Impact Assessment Agency) [Agency] and, subsequent to its appointment, from the JRP. On June 25, 2020, the JRP advised Benga that the information that had been provided was sufficient to proceed to the hearing stage of the environmental assessment process [Sufficiency Determination].

[14] The JRP public hearings took place between October 27, 2020 and December 2, 2020. During the hearing, Benga and the other participants including First Nations presented evidence, cross-examined other parties' witnesses, and presented argument. The Piikani Nation and the Stoney Nakoda [First Nation Applicants] were invited to participate in the hearing process.

[15] The Stoney Nakoda participated in the JRP hearing through written submissions and an oral presentation. Through that participation, the Stoney Nakoda advised the JRP that, through the Stoney Nakoda Agreement, Benga had adequately addressed the Stoney Nakoda's project-specific concerns and that the Stoney Nakoda were therefore in support of the Project.

[16] The Piikani Nation did not participate in the hearing. However, it had previously submitted on May 9, 2016, its technical review of the Project, which set out the Piikani Nation's rights and interests related to the Project, as well as a July 7, 2016 update to that technical review. Further, the Piikani Nation advised the JRP by letter dated January 18, 2019, that it had signed the Piikani Agreement to enter into a partnership with Benga and therefore supported the Project.

[17] In this letter, the Piikani Nation explained that its partnership with Benga would allow it to provide employment, training and education to its members, would spur business development opportunities and help build economies on its reserve, and would increase its administration's capacity to provide community programming and support for its members. The Piikani Nation stated that, most importantly, its partnership would ensure it could continue to be stewards of its land by working with Benga on environmental protection and mitigation activities that encompass both traditional and modern methods.

[18] On June 17, 2021, the JRP issued its report, concluding that the Project was likely to cause significant adverse environmental effects not outweighed by the positive economic impacts of the Project [JRP Report or Report]. The JRP had the authority as the AER to make the

decision whether to approve the Project under Benga's provincial applications. In its provincial capacity as the AER, the JRP concluded the project was not in the public interest and denied those applications [Provincial Decision]. Without provincial approval, the Project was unable to proceed. Nevertheless, the federal government was required to proceed with the assessment pursuant to *CEAA 2012*.

[19] On the same day, June 17, 2021, the Agency issued a News Release advising that the Minister had received the JRP Report [News Release]. The News Release also stated that, prior to the Government of Canada's decision on the Project, the Agency would consult with Indigenous groups on the JRP Report. The News Release stated that the Agency would also invite the public and Indigenous groups to comment on potential conditions related to possible mitigation measures and follow-up program requirements that Benga would need to fulfil if the Project was ultimately allowed to proceed. Finally, the Agency stated that the Minister would consider the results of these consultations before issuing a decision statement and any potential legally-binding conditions.

[20] On June 26, 2021, Benga's legal counsel informed the Minister that Benga was considering appealing the Provincial Decision and requested that the Minister hold the issuance of a decision statement in abeyance until such time as Benga advised the Minister that the process under *CEAA 2012* should continue [Abeyance Request]. Benga wrote to the Agency again on July 6, 2021, reiterating the Abeyance Request. Benga received no response to its request.

[21] On July 13, 2021, the Piikani Nation wrote to the Minister in support of Benga's Abeyance Request. This letter referenced the Piikani Agreement and the benefits and opportunities it would provide for the Piikani Nation and its members and expressed concern that, as the AER had denied approval for the Project, such benefits and opportunities may have been lost. This letter also expressed the Piikani Nation's understanding that the Agency would be consulting further with Indigenous groups, prior to a federal decision on the Project, and advised that the Piikani Nation looked forward to actively engaging with the Agency on those consultations.

[22] On July 22, 2021, the Agency issued a final version of a report documenting its consultations with Indigenous communities with respect to the Project, for purposes of informing the Minister of those consultations [Final Consultation Report]. This report stated that the Agency considered the consultation process conducted to date to be reasonable and properly implemented and that affected Indigenous communities were given sufficient opportunity to express their views and share concerns throughout the process. The Agency expressed its opinion that, in the event the outcome of the required federal decisions prevented the Project from proceeding, the Crown had fulfilled its duty to consult. The Agency also expressed its opinion that, if the Minister did not agree with the JRP's findings of significant adverse environmental effects, or if the Cabinet determined that those effects were justified in the circumstances, then further consultation with Indigenous communities would be required.

[23] On August 6, 2021, the Minister issued a decision statement under section 54 of *CEAA 2012*, communicating the decisions of the Minister and Cabinet [Decision Statement]. The

Decision Statement advised that the Minister had determined under section 52(1) of *CEAA 2012* that, after considering the JRP Report and the implementation of mitigation measures the Minister considered appropriate, the Project was likely to cause significant adverse environmental effects referred to in subsection 5(1) and 5(2) of the *CEAA, 2012* [Minister's Decision]. The Decision Statement also advised that Cabinet had decided under section 52(4) of *CEAA 2012* that the significant adverse effects were not justified in the circumstances [the Cabinet Decision] [collectively, the Decisions]. It is these Decisions that are the subject of these applications for judicial review.

III. Decisions under review

[24] The JRP Report, submitted to the Minister under s 43(1)(e) of *CEAA 2012* on June 17, 2021, included a summary of findings and recommendations for the purpose of the federal environmental assessment. While the JRP Report is not itself a decision under review in these applications, it is useful to summarize its conclusions, as a report of this nature may be reviewed to ensure that it was a "report" that the Minister or Cabinet could rely upon for purposes of their decisions (*Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 [*Taseko 1*] at para 45).

[25] In the Executive Summary section of the JRP Report, the JRP found that Benga's conclusion, that the Project was not likely to result in significant adverse effects following mitigation measures, was premised on overly optimistic assumed effectiveness of those measures, which was not supported by the evidence provided. The JRP's conclusions included that the Project was likely to result in significant adverse environmental effects upon surface

water quality, westslope cutthroat trout and their habitat, whitebark pine, rough fescue grasslands, and vegetation species and community biodiversity. The JRP also found that the Project was likely to contribute to significant adverse cumulative environmental effects on westslope cutthroat trout, little brown bats, grizzly bears and whitebark pine.

[26] The JRP Report also explained its conclusion that, in assessing the Project's positive economic impact on the region, Benga did not consider certain risks that could reduce the magnitude of the positive impacts. The JRP found that the Project would result in low to moderate positive economic impacts on the regional economy.

[27] The JRP additionally found that the Project would result in the loss of lands used for traditional activities and that this would affect Indigenous groups who use the Project area. The JRP concluded that the Project would cause significant adverse effects to physical and cultural heritage for three Treaty 7 First Nations (including the Piikani Nation) and that the proposed mitigation measures were not sufficient to fully mitigate those effects, but it noted that all Treaty 7 First Nations had signed agreements with Benga and stated that they had no objection to the Project.

[28] The JRP Report includes findings specific to the federal assessment and approval process. In accordance with *CEAA 2012*, the JRP considered potential environmental effects within the legislative authority of Parliament: fish and fish habitat, aquatic species, and migratory bird, as well as the effects of the Project on wildlife species listed under the *Species at Risk Act*, SC 2002, c 29 and their critical habitat. The JRP also assessed the manner in which the

Project may adversely affect asserted or established Aboriginal or Treaty rights as described by Indigenous persons or groups, as well as potential adverse effects that the Project may cause on the health, social, or economic conditions of Indigenous people. The JRP also assessed measures proposed to avoid, mitigate or accommodate adverse environmental effects and adverse effects on Aboriginal and Treaty rights.

[29] In a summary of its findings on matters related to federal jurisdiction, the JRP stated that:

> The project would likely result in significant adverse environmental effects on surface water quality, westslope cutthroat trout and their habitat, and whitebark pine.
>
> For some Indigenous groups, the project would result in adverse effects on their current use of land for traditional purposes and physical and cultural heritage, but the effects would not be significant.
>
> For some Treaty 7 First Nations (Káínai, Piikani, and Siksika) the project would result in significant adverse effects on physical and cultural heritage, but these groups entered into agreements with Benga and withdrew their objections to the project.
>
> Impacts on Aboriginal or treaty rights would be low to moderate for the Treaty 7 First Nations, Métis Nation of Alberta Region 3, and Ktunaxa Nation.

[30] The JRP stated that it was not providing mitigation measures for consideration by the Minister, should the Project proceed. The JRP reasoned that, because it had denied the Project provincial approval in its capacity as the AER, the Project could not proceed.

[31] Pursuant to section 51 of *CEAA 2012*, the Minister was required to take the JRP Report into account and then make a decision under subsection 52(1). Section 52(1) of the *CEAA 2012* states:

Decisions of decision maker	**Décisions du décideur**
52 (1) For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project	52 (1) Pour l'application des articles 27, 36, 47 et 51, le décideur visé à ces articles décide si, compte tenu de l'application des mesures d'atténuation qu'il estime indiquées, la réalisation du projet désigné est susceptible :
(a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and	a) d'une part, d'entraîner des effets environnementaux visés au paragraphe 5(1) qui sont négatifs et importants;
(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).	b) d'autre part, d'entraîner des effets environnementaux visés au paragraphe 5(2) qui sont négatifs et importants.

[32] In a Memorandum to the Minister, which indicates it was drafted on June 30, 2021, the Agency summarized the conclusions in the JRP Report and recommended that the Minister decide that, taking into account the implementation of mitigation measures he considered appropriate, the Project was likely to cause significant adverse environmental effects. This Memorandum also advised the Minister of the Abeyance Request but informed the Minister that the Agency was of the opinion that there would not be any benefit in delaying the Minister's decision under *CEAA 2012*. The Minister endorsed his concurrence upon this Memorandum on July 7, 2021 [Minister's Decision Memorandum].

[33] Section 52(2) of *CEAA 2012* then required the Minister to refer to the Cabinet the matter of whether the significant adverse environmental effects were justified in the circumstances, a

decision that Cabinet was authorized to make under section 52(4) of *CEAA 2012*. In the subsequent Cabinet Decision, set out in an Order in Council dated August 6, 2021 [Order in Council], the Cabinet decided that the significant environmental effects likely to be caused by the Project were not justified in the circumstances.

[34] As previously noted, the Minister also issued on August 6, 2021 the Decision Statement under section 54 of *CEAA 2012*, communicating both the Minister's Decision (that the Project was likely to cause significant adverse environmental effects) and the Cabinet Decision (concluding that those effects were not justified in the circumstances).

IV. Issues

[35] In the interests of avoiding duplication, each of the Applicants has identified and provided submissions on different issues for the Court's determination, but each of the Applicants supports the other Applicants' submissions on all issues raised. Based on the submissions of all the parties, I would articulate the issues as follows:

A. Whether the Minister's Decision is unreasonable;

B. Whether the Cabinet Decision is unreasonable;

C. Whether the Decisions breached the right to procedural fairness of any of the Applicants; and

D. Whether Canada owed the Piikani Nation and the Stoney Nakoda a duty to consult and, if so, whether Canada failed to reasonably consult and accommodate those First Nations before issuing the Decisions, such that the Decisions are unreasonable.

V. Standard of Review

[36] All parties agree (and I concur) that the merits of the Decisions are reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]), while the procedural fairness issues are reviewable on what is sometimes referred to as the standard of correctness. Strictly speaking, no standard of review applies to issues of procedural fairness. Rather, the Court is required to consider whether the procedure followed was fair having regard to all the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[37] The existence, extent, and content of the Crown's duty to consult First Nations are legal questions reviewable on the standard of correctness (*Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 [*Ermineskin*] at para 82-83; *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at para 30; *Yellowknives Dene First Nation v Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148 at paras 46-47). In accordance with the principles explained in *Vavilov* at paragraph 55, the correctness standard applies to these questions because the duty to consult flows from the honour of the Crown and is constitutionalized by s 35 of the Constitution Act, 1982 (see *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*] at para 78).

[38] Whether or not Canada fulfilled the duty to consult is reviewable on a standard of reasonableness (see *Ermineskin* at para 82-83; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 27, citing *Vavilov* at para 55).

VI. Analysis

A. *Whether the Minister's Decision is unreasonable*

[39] Leaving aside for the moment the constitutional arguments of the First Nation Applicants (that the Decisions were unreasonable because Canada failed to reasonably consult and accommodate them), the arguments challenging the reasonableness of the Decisions as a matter of administrative law are advanced by Benga. Benga asserts that the JRP Report demonstrates a number of errors made by the JRP, as a consequence of which it was a materially flawed report and therefore not a report for purposes of *CEAA 2012* upon which the Minister could rely in making the Minister's Decision.

[40] As Benga submits, the JRP Report was a statutory prerequisite to the Minister's Decision (*CEAA 2012*, s 47(1)). As explained in *Taseko 1* at paragraph 45, a decision by the Minister or Cabinet may be set aside if it is based on a materially flawed or materially deficient report, such as one that falls short of legislative standards. In reliance on this principle, Benga raises both procedural fairness concerns, related to the process followed by the JRP before issuing the JRP Report, as well as concerns about the merits of the analysis in the Report. I will consider Benga's procedural fairness concerns later in these Reasons but will presently address Benga's arguments

surrounding the merits of the substantive determinations in the JRP Report. Those determinations are reviewable on the reasonableness standard (*Taseko 1* at paras 47-48).

[41] Benga submits that the JRP Report is flawed because the JRP ignored relevant material evidence, misapprehended the evidence before it, and failed to consider the rules of evidence. I will address each of the examples in the JRP Report upon which Benga relies in advancing this submission. However, before embarking on that analysis, I wish to address a point on which the parties take differing positions surrounding the extent, if any, to which this Court should take into account a decision by the Alberta Court of Appeal in litigation that the Applicants have pursued in an effort to set aside the decision by the AER.

(1) Alberta litigation

[42] As noted earlier in these Reasons, on June 26, 2021, Benga's legal counsel informed the Minister that Benga was considering appealing the Provincial Decision by the AER. Subsequently, Benga and the First Nation Applicants all commenced applications for permission to appeal the Provincial Decision to the Alberta Court of Appeal [ABCA], under section 45(1) of the *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*]. Under section 45(1), a decision of the AER is appealable to the ABCA with the permission of the Court of Appeal, but only on a question of jurisdiction or on a question of law.

[43] On January 28, 2022, the ABCA released its decision (*Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30 [ABCA Decision]), dismissing the applications for

permission to appeal. The Applicants sought leave for appeal to the Supreme Court of Canada [SCC], which was denied.

[44] The Applicants take the position that this Court should not take the reasoning in the ABCA Decision into account in deciding the present applications for judicial review and, indeed, that it would be an error of law for the Court to do so. In support of that position, advanced in Benga's submissions, they note that the ABCA was not conducting a reasonableness review. Rather, it was applying the particular test prescribed by *REDA*, which required consideration of whether the proposed appeal raised questions of law or jurisdiction only. The Applicants also note that the ABCA was considering Alberta law, not federal law, and had a limited record before it, or at least a record different from that which is presently before the Court.

[45] The Applicants also emphasize that the ABCA Decision addressed a leave application, not an appeal on its merits, and rely on the decision of the SCC in *Saatva Capital Corporation v Creston Moly*, 2014 SCR 53 [*Saatva*], which provided the following guidance on the extent to which appeal courts are bound by comments on the merits of an appeal made by leave courts (at para 122):

> 122. With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant

> of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), at para. 32).

[46] In response to the Applicants' reliance on *Saatva,* the Respondents note that the SCC held only that an appellate leave court's comments on the merits of an appeal are not binding on the appeal court, not that such comments cannot be taken into account. The Respondents recognize that the ABCA Decision was decided in a different statutory context and do not suggest that it has rendered any of the issues in the present applications *res judicata* or subject to issue estoppel. However, the Respondents note that some of the arguments the Applicants are advancing in the present applications were also advanced before the ABCA. To the extent the ABCA engaged with the merits of those arguments, as required by the test applicable under section 45(1) of the *REDA* that includes consideration whether the appeal has arguable merit (see ABCA Decision at para 28), the Respondents submit that this Court can treat the ABCA's analysis as instructive.

[47] In my view, it would be inappropriately artificial for this Court to ignore the reasoning in the ABCA Decision as the Applicants suggest. This is particularly so given that, in one respect when considering the First Nation Applicants' procedural fairness arguments later in these Reasons, the outcome of my analysis diverges from that of the ABCA, and I consider it appropriate to note and explain that divergence. However, I remain conscious of the various distinctions between the task and circumstances of the ABCA and those of this Court, as raised by the Applicants. As such, to the extent my Reasons reference the analysis in the ABCA Decision on arguments on which I arrive at similar conclusions, I emphasize now (and therefore

will not necessarily repeat) that I am not relying on that analysis and arrive at my conclusions in these Reasons independent thereof.

[48] Also in relation to the Applicants' litigation in the Alberta courts, I note that the parties have advised that they are pursuing applications for judicial review of the AER's decision in the Alberta Court of King's Bench [ABKB]. I understand that those applications name the AER (and the JRP in its capacity as the AER) and Alberta's Aboriginal Consultation Office as respondents and seek to set aside the AER's decision. As I understand the status of that litigation, the AER brought a motion to dismiss the applications, on the basis that the Applicants' failed appeal under section 45 of *REDA*, combined with a privative clause in section 56 of *REDA*, prevented the Applicants from pursuing judicial review. On December 4, 2023, in an unpublished decision, the ABKB granted the motion and dismissed the applications.

[49] However, counsel have advised that the Applicants have appealed this dismissal to the ABCA. Counsel for the First Nation Applicants have further explained that the applications for judicial review before the ABKB remain as against Alberta's Aboriginal Consultation Office, although they have been placed in abeyance pending the appeal of the dismissal of the applications against the AER.

[50] None of the parties take the position that these applications have any particular significance for the issues before this Court, other than the fact that the Applicants' efforts to challenge the Provincial Decision are not exhausted, which could be relevant to this Court's decision on remedies.

[51] I now turn to Benga's arguments that the JRP Report is flawed because the JRP ignored relevant material evidence, misapprehended the evidence before it, and failed to consider the rules of evidence.

(2) Economic benefits of the Project

[52] In assessing the economic benefits of the Project, the JRP considered the impact of global climate change policies on metallurgical coal demand. This assessment contributed to the JRP's finding that it was likely that Benga had overstated the Project's positive economic impacts. Benga submits that, in reaching this conclusion, the JRP ignored Benga's economic analysis and evidence of continued demand for steelmaking coal and instead relied on a witness (Dr. Joseph, testifying on behalf of the Livingstone Landowners Group) who did not have applicable expertise and whose evidence was based on third-party reports. Benga raises similar concerns about the JRP's reliance on the evidence of other lay witnesses from groups called the Crowsnest Conservation Society and the Eco-Elders for Climate Action. Benga argues that the JRP erred by ignoring Benga's evidence, which was based on experience and expertise, and failing to assess the qualifications and reliability of the evidence of other witnesses.

[53] Benga submits that, in the JRP's treatment of this opinion testimony, it failed to consider the rules of evidence. It argues that, even if not bound by the strict rules of evidence applicable to judicial proceedings, administrative decision-makers are still required to consider the reliability of evidence before them (see, e.g., *Pridgen v University of Calgary*, 2012 ABCA 139 at para 59).

[54] I accept that administrative proceedings are not an evidentiary free-for-all. Rather, as identified in section 22 of its TOR, the JRP hearing was to be conducted in accordance with the *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013. However, as the Respondents submit, those rules do not prescribe a particular approach to the assessment of opinion evidence, and Benga has not identified any particular provision of those rules that it argues was contravened.

[55] The relevant portion of the JRP's analysis is found at paragraphs 2858 to 2868 of its Report. The JRP references Benga's evidence and that of Mr. Campbell of the Coal Association of Canada, who predicted future high demand for steel-making coal. The JRP also references the evidence of the Crowsnest Conservation Society and the Eco-Elders for Climate Action, surrounding alternative steelmaking technologies, and then that of Dr. Joseph. His evidence included submission of two scenarios from the International Energy Agency's annual World Energy Outlook that, depending on various potential scenarios, suggested a future decline in global production of steelmaking coal. Benga argued that the scenarios spoke to production rather than demand, and Dr. Joseph responded that it was reasonable to think that demand would accompany production. The JRP ultimately described the information provided by Dr. Joseph as an independent outlook that such a decline in production and demand for metallurgical coal could be possible.

[56] In relation to the concerns raised by Dr. Joseph about declining production and demand, the JRP considered Benga's argument that those scenarios spoke to production rather than demand and that, if only production and not demand decreased, this would result in higher prices

for steel-making coal. However, the JRP concluded that a decline in demand would be a reasonable expectation if the steel industry was successful in developing new technologies to reduce its greenhouse gas emissions.

[57] Benga submits that the JRP's analysis is illogical, because basic economics dictates that production (or supply) and demand are factors that influence price, not that there is a relationship between supply and demand. However, this argument asks the Court to re-weigh the evidence before the JRP in a manner that is not appropriate on judicial review.

[58] It is clear from the evidentiary references in the JRP Report that Benga's evidence was not ignored, and the JRP's treatment of the evidence and resulting analysis is intelligible as required by *Vavilov* (at para 99). Moreover, even if fault could be found with the JRP's treatment of Dr. Joseph's evidence or that of the other witnesses to which Benga refers, that evidence forms only a portion of the JRP's reasoning in support of its finding that Benga had overstated the positive economic impacts of the Project. The Report also analyses the potential for negative economic impacts on the tourism and recreational sectors and the potential for coal quality from the Project to decline in later years of mine life, reducing market prices and government revenues (see paras 2835-2857).

[59] I find that this portion of the JRP's analysis withstands reasonableness review under the principles prescribed by *Vavilov* and, applying the language of *Taseko 1*, that Benga's arguments surrounding this analysis do not render the JRP Report a materially flawed or deficient report.

[60] Before leaving these arguments, I note that it appears that similar submissions were rejected by the ABCA, which held at paragraph 65 to 66 that Benga's arguments amounted to assertions that the JRP should have accepted or preferred Benga's evidence.

(3) Surface water quality and effects on westslope cutthroat trout

[61] Benga advances similar arguments surrounding the JRP's assessment of surface water quality and effects on westslope cutthroat trout [WSCT], topics within federal jurisdiction. Benga submits that the JRP improperly relied on lay evidence and unfounded opinion, lacking any scientific support, instead of Benga's expert and science-based evidence.

[62] Benga explains that it conducted fish inventory surveys from 2014 to 2016, employing a suite of standard protocols including active capture and direct visual observation in order to characterize fish species composition, distribution and abundance in mark-capture assessment techniques, and that it continued to conduct annual fish surveys between 2016 and 2020. However, it submits that, instead of reviewing and relying on this evidence, the JRP accepted the evidence of the personal catch rate of a local fisherman, without assessing the fisherman's qualifications or providing reasons why that evidence was reliable or more persuasive than that of Benga.

[63] This portion of the JRP Report (at paras 1177-1194), which addresses whether a particular waterway (Gold Creek) is a critical habitat for WSCT and the size and trends in WSCT populations, clearly references Benga's surveys including its mark-capture assessment. As such, it is not possible to conclude that the JRP did not review Benga's evidence. In expressing its

concerns about WSCT populations and Benga's proposed mitigation measures to avoid significant adverse effects on that species, the JRP stated the importance of having accurate population estimates and trends. The JRP disagreed with Benga's characterization of a particular waterway as not being good habitat for WSCT, relying upon a number of evidentiary sources in arriving at that conclusion. It also expressed concern about the reliability of Benga's data, including based on Benga's own acknowledgement of the difficulty in obtaining an accurate population estimate.

[64] Included among the evidence that the JRP reviewed in the course of this analysis was that of a local fly fisherman who provided his personal catch rates and noted a dramatic decline following a 2015 pollution event. However, this evidence, based on the fisherman's personal observations, was only one of a number of sources (including the Canadian Parks and Wilderness Society [CPAWS], the Coalition of the Alberta Wilderness Association and the Grassy Mountain Group [Coalition], and the Department of Fisheries and Oceans [DFO]) from which the JRP developed its concern about water quality effects on WSCT populations. I find no basis to conclude that this portion of the JRP's analysis is unreasonable or that it renders the JRP Report materially deficient.

[65] As the Respondents note, Benga raised before the ABCA its concern that the JRP had improperly relied on anecdotal information from a local fly fisherman in considering Gold Creek as a critical habitat for WSCT. The ABCA Decision at paragraphs 72 to 73 found that Benga's argument represented selective reading of the Provincial Decision (*i.e.*, the JRP Report), which also described the position advanced by the CPAWS, the Coalition, and DFO. The ABCA found

nothing in the Provincial Decision indicating that the JRP unreasonably relied upon the fly fisherman's evidence, particularly since his concern echoed that of other hearing participants.

(4) Mitigation measures

[66] More broadly, Benga argues that the JRP Report is materially deficient and the subsequent Decisions are unreasonable, because the JRP and the Minister ignored the statutory requirement to assess mitigation measures.

[67] As Benga submits, subsection 43(1)(d)(i) of *CEAA 2012* requires that a review panel, in accordance with its terms of reference, prepare a report with respect to the environmental assessment that sets out the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program. Also, in making the decision under section 52(1) as to whether a project is likely to cause significant adverse environmental effects, the decision-maker (in the present case, the Minister) must take into account the implementation of any mitigation measures that the decision-maker considers appropriate.

[68] In advancing this argument, Benga relies significantly on a statement by the JRP, in the section of its Report setting out its "Federal Findings and Recommendations," that it was not providing mitigation measures for consideration by the Minister, should the Project proceed (at para 3066). The JRP states that, in its capacity as the AER, it denied Benga's provincial applications and, without approval of the provincial applications, the Project cannot proceed. Benga emphasizes the need to give consideration to factors that are mandated by a statute (see, e.g., *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186 at paras 125, 126,

130) and argues that the JRP's failure to consider mitigation measures renders its Report materially deficient.

[69] I agree with Benga's position that the fact the Project was not receiving provincial approval did not affect the JRP's statutory mandate under CEAA 2012. The JRP was required to consider mitigation measures. However, I am not convinced that the fact that the JRP did not provide an express list of mitigation measures in its Federal Findings and Recommendations section necessarily rendered its Report materially deficient, such that the Minister was unable to rely on it. As the Respondents submit, there are numerous portions of the Report in which the JRP assessed mitigation measures proposed by Benga and others (see, e.g., paras 399-407, 409, 415, 887, 903-904, 952, 977, 1003, 1061, 1088-1090, 1102, 1116, 2214, 2364-2363, 2377-2380, 2388-2389, 2397-2399, 2505-2509, 2523-2524, 2531-2535, 2543-2546).

[70] In both the "Executive Summary" (at pp vii-viii) and the "Federal Findings and Recommendations" section of its Report (at para 3062), the JRP concluded that, in some instances, the claimed effectiveness of Benga's proposed mitigation measures was overly optimistic and not supported by the evidence provided.

[71] It is significant that this point was captured in the Minister's Decision Memorandum from the Agency to the Minister, which sought the Minister's section 52(1) decision. The Agency described the situation as follows:

> The Panel Report describes in detail the proposed mitigation measures with respect to the adverse environmental effects referred to in subsections 5(1) and 5(2) discussed above. In its Report, the Panel was critical of some of the Proponent's proposed mitigation

> measures, finding that, in some instance, the Proponent made overly optimistic assumptions regarding the sufficiency or effectiveness of its proposed mitigation measures. Normally a Panel Report sets out a specific set out [sic] mitigation measures for you to consider. While the Panel did not do so in this case given the Project may not proceed under provincial legislation, the Panel thoroughly examined each of the Proponent's proposed mitigation measures and, in light of this analysis, made its conclusions on whether Project was likely to cause significant adverse environmental effects.

[72] At the conclusion of the Minister's Decision Memorandum, the Agency recommended that the Minister decide that, taking into account the implementation of mitigation measures the Minister considered appropriate, the Project was likely to cause significant adverse environmental effects referred to in subsections 5(1) and 5(2) of *CEAA 2021*. The Minister endorsed his concurrence with, and signed, the Minister's Decision Memorandum.

[73] As previously noted, in making the decision under section 52(1), as to whether the Project was likely to cause significant adverse environmental effects, the Minister was required to take into account the implementation of any mitigation measures that he considered appropriate. I agree with the Respondents' position that the record supports a conclusion that the Minister agreed with the Agency's analysis in the Minister's Decision Memorandum and was satisfied that the level of analysis of mitigation measures contained in the JRP Report was sufficient for him to make the required section 52(1) decision. The record before the Court demonstrates intelligible reasoning and supports a conclusion that the Minister's approach to mitigation measures, in making the Minister's Decision, was reasonable.

[74] Benga advances a related argument that, even if the Minister did consider mitigation measures, the Minister's Decision is still unreasonable, because the record does not disclose what mitigation measures were considered. Benga acknowledges that *CEAA 2012* does not contemplate the Minister providing reasons for a section 52(1) decision (see *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100 [*Taseko FC*] at para 123, aff'd *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320 [*Taseko 2*]), but argues that such reasons are required in a circumstance where the Minister has not adopted the JRP Report. However, as explained above, I read the record as demonstrating that the Minister did adopt the JRP Report including its approach to mitigation measures. I therefore find no reviewable error arising from this argument.

B. *Whether the Cabinet Decision is unreasonable*

[75] Benga's submissions that the Cabinet Decision is unreasonable are largely the same as those advanced in challenging the Minister's Decision, *i.e.*, that the Cabinet erred in relying on a flawed JRP Report or flawed decision by the Minister. As I have rejected those arguments above, they cannot undermine the reasonableness of the Cabinet Decision.

[76] However, at the hearing of these applications for judicial review, Benga raised an additional argument in oral submissions, which had not been identified in its Memorandum of Fact and Law, related to an inconsistency in the record leading to the Cabinet Decision, as to whether the Minister's Decision was based on a finding that the Project is likely to cause significant adverse environmental effects on the little brown bat. Other than a concern raised by the Respondents during Benga's reply submissions, the Respondents did not object to this

argument. As such, subject to certain concerns about points first raised in reply (which I will explain below), I am prepared to adjudicate this argument.

[77] Benga points out that the Order in Council, which captures the Cabinet Decision, includes among several recitals the following paragraph:

> Whereas, on July 7, 2021, after having considered the joint review panel's report and having taken into consideration the implementation of mitigation measures that the Minister of the Environment considered appropriate, the Minister decided that the project is likely to cause significant adverse environmental effects on surface water quality, westslope cutthroat trout and their habitat, little brown bat, whitebark pine and the current use of lands and resources for traditional purposes and physical and cultural heritage of the Káínai, Piikani and Siksika First Nations;
>
> (my emphasis)

[78] Noting the reference to little brown bat in this paragraph of the Order in Council, Benga draws the Court's attention to the absence of a similar reference in a Memorandum from the Agency to the Minister, dated June 30, 2021, which sought the Minister's approval on a draft decision statement to be issued under section 52(4) of *CEAA 2012* [Decision Statement Memorandum]. The draft decision statement (like the Decision Statement as issued) does not set out a list of the particular elements of the environment on which the Minister found the Project would likely have significant adverse effects. However, the Decision Statement Memorandum includes a description of the Minister's Decision under section 52(1) that includes a list of elements of the environment upon which the Minister found the Project is likely to cause significant adverse effects. That list does not include the little brown bat.

[79] Based on this inconsistency, Benga submits that the above-quoted recital in the Order in Council contains an error in its reference to bats and that the Cabinet Decision was therefore premised on an inaccurate understanding of the basis for the Minister's Decision. As I understand the argument, Benga submits that the Minister did not decide that the Project was likely to have a significant adverse environmental impact related to bats and that, if Cabinet had understood this, it might have arrived at a different conclusion as to whether the effects likely to be caused by the Project were justified in the circumstances.

[80] In responding to this argument at the oral hearing, the Respondents referred the Court to the JRP Report, which includes analysis of impacts on little brown bat, as well as the Minister's Decision Memorandum from the Agency to the Minister, which summarized the conclusions in the JRP Report (including related to impacts on little brown bat) in recommending that the Minister decide that the Project is likely to cause significant adverse environmental effects. The Respondents therefore take the position that the little brown bat figured in the Minister's Decision and the reference thereto in the recital in the Order in Council is accurate.

[81] In reply, Benga maintained its position that the Decision Statement Memorandum represents the best evidence of the details of the Minister's Decision and that, based on the inconsistency with the description of the Minister's Decision in the relevant recital in the Order in Council, the Cabinet Decision is unreasonable.

[82] However, Benga also raised a new argument in reply surrounding the interpretation of provisions of *CEAA 2012*. Benga argued that the JRP Report did not conclude that the Project

would have significant adverse environmental effects upon little brown bat, only that the Project, in combination with other projects and activities that have been and will be carried out, are likely to contribute to an existing significant adverse cumulative effect on little brown bat. Benga noted that subsection 19(1)(a) of *CEAA 2012* requires an environmental assessment of a project to take into account the environmental effects of the project, including any cumulative environmental effects that are likely to result from the project in combination with other physical activities that have been or will be carried out. However, Benga argued that this requirement is intended to develop a database of cumulative effects and that cumulative effects do not figure in decision-making under section 52 of *CEAA 2012*.

[83] The Respondents' counsel objected to this argument, as Benga was raising it for the first time in reply. In response to that objection, Benga's counsel confirmed that Benga was not arguing that the Decisions were unreasonable on the basis that they improperly considered cumulative effects. Rather, Benga raised the point related to the role of cumulative effects under *CEAA 2012* in support of its position that, consistent with the absence of any reference to little brown bat in the Decision Statement Memorandum, the Minister's Decision did not take little brown bat into account and the Cabinet Decision was therefore unreasonable because it relied on an inaccurate understanding by the Cabinet of the Minister's Decision.

[84] I accept that there is an inconsistency in the record as to whether the little brown bat figured in the Minister's determination that the Project was likely to cause significant adverse environmental effects. In addressing the parties' divergent positions as to the reasons underlying the Minister's Decisions, I will not make findings on the operation of the provisions of *CEAA*

2012 in relation to cumulative effects, as the Respondents had no opportunity to engage with that issue. Rather, I base my decision on the relative significance of the documents under consideration.

[85] The relevant recital in the Order in Council describes the Minister's Decision as having been made on July 7, 2021. That date corresponds with the date on which the record indicates the Minister signed the Minister's Decision Memorandum and endorsed his concurrence therewith. Moreover, it is apparent from the content of the Minister's Decision Memorandum that its purpose was to seek the Minister's decision under subsection 52(1) of *CEAA 2012* and to provide the Minister with a summary of information to support that decision.

[86] In contrast, it is apparent from the content of the Decision Statement Memorandum that its purpose was to seek the approval of the decision statement to be issued under subsection 52(4) of *CEAA 2012*. It was common ground among the parties at the hearing of these applications that the decision statement does not itself represent an administrative decision. Rather, the role of the decision statement is to communicate decisions already made under subsections 52(1) and 52(3). Also, as previously noted, the Decision Statement in this matter, which was ultimately issued by the Minister on August 6, 2021, did not set out a list of the environmental elements that the Minister had found the Project likely to significantly adversely affect.

[87] Against that backdrop, considering the roles of the respective documents, it follows that the Minister's Decision Memorandum is more relevant to the Minister's Decision than is the

Decision Statement Memorandum and therefore represents the better reference to inform an understanding of the reasons for the Minister's Decision. I therefore prefer the Respondents' position that little brown bat figured in the Minister's Decision and that the Cabinet Decision is not unreasonable for taking that into account. As previously noted, to the extent there might be an argument that the JRP's findings related to little brown bat were in the nature of cumulative effects and not properly the basis of decisions made section 52, that argument is not properly before the Court.

C. *Whether the Decisions breached the right to procedural fairness of any of the Applicants*

[88] I now turn to the Applicants' procedural fairness arguments. Benga advances a number of procedural fairness arguments related to the JRP's process and Report, as well as an argument relating to events between the issuance of the Report and the Minister's Decision when Benga made its Abeyance Request. The First Nation Applicants also raise several procedural fairness arguments, advanced by the Stoney Nakoda on behalf of it and the Piikani Nation, including a position that, following the issuance of the JRP Report, they were entitled to an opportunity to make further submissions before the Minister made his decision.

[89] I will address Benga's arguments first. Its arguments related to the JRP's process and Report all share a common premise, that requirements of procedural fairness, informed by the doctrine of legitimate expectations, obliged the JRP to advise Benga of concerns it had as to the insufficiency of Benga's evidence in certain areas, before relying on those concerns in its Report.

[90] As Benga correctly submits, where there is a legitimate expectation that a certain procedure will be followed in administrative decision-making, then that procedure must be followed as a matter of fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] at para 26). A legitimate expectation arises if a decision-maker through its conduct, including established practices, or representations that can be characterized as clear, unambiguous and unqualified, establishes that a particular procedure will be followed in the decision-making process (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 [*Agraira*] at paras 94-95).

[91] In invoking these principles, Benga relies on the Guidelines for the Preparation of an Environmental Impact Statement related to the Project, issued by the Agency on July 6, 2015 [Guidelines]. The Guidelines identify the nature, scope and extent of information required for the preparation of Benga's EIA, incorporate considerations from *CEAA 2012*, and include instructions to provide information relevant to areas of federal jurisdiction.

[92] Benga also references the JRP's TOR, as approved by the Minister under sections 40 and 42 of *CEAA 2012*. In particular, the TOR provide that if the JRP decides that the proponent's EIA, including supplemental information on the public registry, is not sufficient to allow a joint review that complies with the TOR and to proceed to the public hearing stage of the process, it shall request additional information to be provided by the proponent. Further, both the TOR and *CEAA 2012* itself afford the JRP broad powers to obtain such information from the proponent and others.

[93] Benga submitted its original EIA to the Agency on November 10, 2015 and provided an updated EIA on August 12, 2016. Prior to the JRP's appointment on July 9, 2018, Benga received and responded to five packages of IRs from the Agency and two packages of IRs from the AER. Following its appointment, the JRP sent Benga an additional six packages of IRs between March and November 2019, to which Benga responded. In response to all IRs, Benga submitted twelve addenda, providing additional information supplementing that in its EIA.

[94] Against that backdrop, Benga relies on the Sufficiency Determination made by the JRP on June 25, 2020. In the Sufficiency Determination the JRP advised Benga that, after reviewing Benga's EIA report and addenda for the Project, it had determined that: (i) information on the public registry was sufficient to proceed to the public hearing in accordance with the TOR; (ii) the information provided by Benga met the information requirements outlined in the Guidelines; and (iii) the JRP would issue the notice of hearing in the coming days.

[95] Benga submits that the combination of *CEAA 2012*, the Guidelines, and the TOR represent a clear, unambiguous and unqualified statement of the administrative process the JRP would follow in gathering information, giving rise to legitimate expectations by Benga that the JRP would not depart from that process. It argues that it was entitled to rely on the Sufficiency Determination and that it was therefore deprived of procedural fairness when the JRP, without seeking further information from Benga, subsequently found in the JRP Report that Benga had provided incomplete or insufficient information. Benga raises a number of examples of this concern.

(1) Critical habitat for WSCT

[96] The JRP Report's conclusions included a finding that the Project is likely to have significant adverse environmental effects on WSCT and their aquatic habitat (at para 3041). The reasoning underlying this conclusion included a finding that Benga had not adequately assessed the amount of critical habitat that the Project would affect, in accordance with DFO's 2019 Recovery Strategy - Action Plan [2019 Recovery Plan], which was important to fully assess the potential impacts of the Project (at para 3040). As explained in the Report, the 2019 Recovery Plan was an update released in 2019, while review of the Project was underway, which included a revised definition of critical habitat for WSCT that included a certain scope of riparian and aquatic habitat (at para 1208).

[97] Benga emphasizes that DFO did not request that Benga update its plans as they relate to WSCT critical habitat. Although the JRP acknowledged that DFO had not requested such an update, the JRP nevertheless found Benga's assessment of critical habitat to be inadequate, a conclusion that Benga submits was procedurally unfair. Benga also notes that section 6.3.3 of the Guidelines directs it to assess the environmental effects of the Project based on valued components including the direct and indirect impacts to existing Recovery Strategy and Action Plans.

[98] As a broad submission on Benga's procedural fairness arguments, the Respondents disagree with Benga's submission that the combination of *CEAA 2012*, the Guidelines, the TOR, and the Sufficiency Determination give rise to legitimate expectations as Benga asserts. I agree

with the Respondents' position. These communications cannot be characterized as representing a clear, unambiguous and unqualified statement that the JRP would not assess aspects of Benga's evidence as insufficient to support determinations by the JRP that were favourable to Benga.

[99] In relation to Benga's argument surrounding the 2019 Recovery Plan in particular, I do not regard the use of the term "existing" in section 6.3.3 of the Guidelines as clearly and unambiguously precluding the application of the 2019 Recovery Plan once developed during the course of the environmental assessment process.

[100] More broadly, I accept that the TOR required the JRP to assess whether Benga's submissions were sufficient to allow a joint review and to proceed to the public hearing stage of its process and that, if the JRP concluded that the information provided was not sufficient, the JRP was obliged to request additional information from Benga. I further accept that *CEAA 2012* afforded the JRP the powers to obtain such information. However, this cannot be read as a commitment, let alone a clear, unambiguous and unqualified one, that in the absence of further requests, the JRP would find Benga's evidence sufficient to support favourable findings. Rather, the evidentiary sufficiency contemplated by the provisions of the TOR on which Benga relies is that which is necessary for the JRP's process to move to the next stage, the conduct of public hearings. Indeed, the Sufficiency Determination says exactly that.

[101] I note that Benga raised this argument in its application for permission to appeal under *REDA* and that the ABCA dismissed the argument for reasons similar to the reasons above (see

ABCA Decision at paras 32 to 54). However, I also recognize that the ABCA was addressing a different legislative scheme and therefore a somewhat different record.

[102] For the reasons expressed above, I find no duty of procedural fairness arising from Benga's broad legitimate expectations arguments in relation to its example of the critical habitat for WSCT and the 2019 Recovery Plan. For the same reasons, I arrive at the same conclusion in relation to Benga's other examples that I will address below. As such, I will not repeat this analysis for each example. However, in my view, independent of Benga's invocation of the doctrine of legitimate expectations, it is necessary for the Court to assess whether any of these examples otherwise demonstrates a denial of procedural fairness, as a result of Benga being deprived of the opportunity to know the case it had to meet and to respond to that case.

[103] In relation to the critical habitat for WSCT, the Report's analysis is found at paragraphs 1204-1215. The JRP explains that DFO stated at the public hearing that, under the 2019 Recovery Plan, critical habitat for WSCT within the local study area now included additional geography. DFO therefore expressed concern that authorizing the destruction of critical habitat in a particular watershed would require robust scientific evidence that such destruction would not jeopardize the survival and recovery of WSCT. DFO stated at the hearing that Benga had not characterized the full extent of critical habitat losses to the Project to reflect the updated 2019 Recovery Plan and suggested that such an update was required to fully understand the impacts on WSCT habitat and to assess proposed mitigation and offsetting measures.

[104] The JRP Report also explains that, in its final argument before the JRP, Benga rejected DFO's assertion that it should have used the 2019 Recovery Plan and updated its assessment, noting that IRs prepared by DFO did not request such an update. However, the Report notes that Benga stated through the review process that it was aware of the importance of WSCT and their critical habitat and notes that Benga had performed estimates of Project impacts upon critical habitat. The JRP therefore concluded that Benga was fully aware of the consequences of the updated 2019 Recovery Plan. The JRP also explained that, given Benga's awareness of the expanded definition of critical habitat in the 2019 Recovery Plan, it would have been helpful if Benga had updated its calculations to take such expansion into account.

[105] This demonstrates that Benga was aware of the 2019 Recovery Plan, its potential implications for the JRP's assessment of the Project, and DFO's position that Benga should have updated its own assessment. Indeed, Benga spoke to this latter point directly in its submissions to the JRP. Benga was alerted to the potential relevance of the 2019 Recovery Plan, and I find no basis to conclude that Benga was deprived of an opportunity to address it. I therefore find no breach of procedural fairness arising from this example.

(2) Rainbow trout as proxy for WSCT

[106] The JRP Report captures Benga's explanation that it would be challenging to sample tissue from WSCT, to obtain baseline data and subsequent monitoring data, because of the protected status of that species. Benga therefore suggested employing rainbow trout as a proxy or surrogate species. However, the Report observed that Benga did not assess the feasibility of using rainbow trout as a surrogate, and the JRP concluded that it did not have confidence that

Benga's risk assessment models produced sufficiently conservative estimates of the risk of significant adverse environmental effects on WSCT. This portion of the JRP's analysis is found in paragraphs 1069 and 1077 of its Report.

[107] Benga argues that the only time the JRP requested this type of information was during the oral portion of the hearing, when it inquired qualitatively how analogous different species of fish were to WSCT. Benga submits that it was therefore procedurally unfair for the JRP to make the above finding without first seeking further information from Benga, as Benga had no way of knowing that this information was of interest to the JRP.

[108] I agree with the Respondents that, as demonstrated by the JRP Report, it was Benga that suggested using rainbow trout as a surrogate for WSCT. Moreover, as is evident from Benga's argument, the JRP's questioning during the hearing inquired as to whether the two species were analogous. Again, I cannot conclude that Benga was unaware of the potential relevance of this point.

[109] I also agree with the Respondents' submission that the portion of the JRP Report upon which Benga relies forms part of a larger section in which the JRP explains its lack of confidence in Benga's conclusion that the Project would be of negligible risk to WSCT. This section identifies a number of concerns giving rise to the JRP's conclusion (at paras 1062-1081). As the Respondents submit, this further detracts from Benga's argument that the Report was materially deficient based on procedural unfairness in relying on the lack of information about the comparison between rainbow trout and WSCT.

(3) Groundwater surface modelling

[110] In its assessment of the Project's potential effects on groundwater quantity, flow and quality (commencing at para 615 of the Report), the JRP considered various aspects of Benga's modelling. The Report's conclusions included a finding that, to gain confidence in the prediction of effects, a comprehensive understanding of groundwater-surface water interactions was required and that the use of an integrated groundwater-surface water model may have been more appropriate than the model that Benga employed (at paras 663 and 812).

[111] Benga's Vice President, External Relations, Mr. Gary Houston, who served as the chair for Benga's witness panels before the JRP, swore an affidavit in support of Benga's application for judicial review. Mr. Houston deposes that, based on his participation and role in advancing the Project in the regulatory process, it was his understanding that the JRP never asked Benga to use an integrated groundwater-surface water model.

[112] However, when questioned at the hearing of this application as to how the point surrounding an integrated groundwater-surface water model surfaced in the regulatory process, Benga's counsel advised that this point had been raised by DFO or perhaps another participant in the course of the JRP hearings. Again, in my view, this precludes a finding that it was procedurally unfair for the JRP to rely on this point. Also, the fact that the absence of an integrated groundwater-surface water model was only one of several reasons that the JRP's Report expressed for its lack of confidence in Benga's predictions further detracts from Benga's position that this procedural fairness argument renders the Report materially deficient.

(4) Feasibility of groundwater recovery wells

[113] Mr. Houston also references the concern expressed in the JRP Report (at para 725) that one of Benga's proposed mitigation measures, the installation of groundwater recovery wells down-gradient of the external waste rock dump, was subject to uncertainties regarding the wells' technical and economic feasibility and effectiveness. Mr. Houston deposes that Benga was never asked to demonstrate such feasibility and effectiveness.

[114] Again, Benga's counsel advised at the hearing of this application that this topic was raised by one of the participants in the hearings before the JRP. I therefore find no basis to conclude that the hearing process was procedurally unfair.

(5) Methodology and models to verify economic benefits

[115] In assessing the Project's potential economic effects, the JRP Report describes Benga's use of a standard economic impact analysis based on a widely-used macroeconomic input-output model, employed to simulate both direct and indirect effects (at para 2788). In arriving at its conclusion that the Project would have positive but low to moderate economic impacts, the JRP expressed concern that some potential downside risks to Benga's economic projections were not adequately considered, as well as concern about potential negative spillover effects in other important regional economic sectors. The Report explains that these issues might have been captured if Benga had conducted an economic assessment to evaluate the Project's net benefits (at para 2818). Benga submits that it could not have known that the JRP would have wanted a net, rather than gross, assessment.

[116] Consistent with Benga's counsel's explanation at the hearing of this application, the Report identifies that Dr. Joseph submitted an expert review of Benga's economic analysis, which raised concern that the analysis assessed only gross impacts of the Project and did not offer insights into its net benefits (at para 2809). This review appears to have been the source of the JRP's concern, it was raised in the course of the hearing, and I therefore find no procedural unfairness in the JRP having relied on this concern without having expressly asked Benga to submit evidence to address it.

(6) Abeyance request

[117] Benga's final procedural fairness argument is unrelated to the Sufficiency Determination or the JRP hearing process itself. Benga raises an argument relating to events following the issuance of the JRP Report, when Benga made its Abeyance Request.

[118] As noted earlier in these Reasons, the JRP issued its Report on June 17, 2021, and on June 26, 2021, Benga's legal counsel informed the Minister that Benga was considering appealing the Provincial Decision and requested that the Minister hold the issuance of a decision statement in abeyance until such time as Benga advised the Minister that the process under *CEAA 2012* should continue. Benga wrote to the Agency again on July 6, 2021, reiterating the Abeyance Request.

[119] Benga did not receive a response to the Abeyance Request. It argues that the Minister's decision to issue the Decision Statement, without responding to, acknowledging, or providing reasons for refusing the Abeyance Request, affected the legal rights and interests of Benga and

Indigenous groups by prematurely concluding the federal decision-making process. On that basis, Benga submits that the Minister owed it a duty of procedural fairness with respect to the Abeyance Request, which duty Benga argues the Minister breached.

[120] In support of its position that ignoring a request for a time extension without justification is a breach of procedural fairness, Benga relies on authorities of this Court decided in the context of immigration proceedings. Benga refers the Court to the following conclusion in *Venkata v Canada (Citizenship and Immigration)*, 2017 FC 423 [*Venkata*] at paragraph 75:

> 75. …. All we know is that the Visa Officer ignored the request for an extension of time, but we are left to speculate as to why he did so. Without a justifiable reason for ignoring the request, I think we have to conclude that a breach of procedural fairness has occurred in this case. The Visa Officer ignored the request for an extension of time without notifying the Applicant and then rendered a decision. There is no indication that he did this for the reasons put forward by the Respondent in this application. He might have made the mistake of assuming that the Applicant had already submitted the documentation he wanted to submit: "some documents have already been received."

[121] The Respondents argue that *Venkata* is distinguishable, in part because it involved circumstances in which an immigration officer had advised a permanent residence applicant of concerns with his evidence related to his ability to establish himself economically in Canada. Although the applicant requested an extension of time to provide responsive evidence, the officer rejected the application without responding to the extension request (see paras 5, 6, 64).

[122] I agree that this is a distinguishing feature. In *Venkata*, the lack of a response to the extension request resulted in the relevant decision being made without the applicant having an opportunity to respond to the concern the officer had raised. This is similar to the reasoning in

Goodman v Canada (Public Safety and Emergency Preparedness), 2019 FC 1569 [*Goodman*], another authority that Benga references. In *Goodman*, a pre-removal risk assessment officer was advised by the applicant that he wanted to make further submissions in support of the requested relief, and the Court held that fairness demanded the officer advise the applicant that he intended to proceed to a decision and then to afford an opportunity to make up-to-date submissions about risk (see paras 62-63). In the case at hand, there was no suggestion by Benga that its Abeyance Request was made with a view to providing the Minister with additional submissions relevant to his decision.

[123] In relying on *Venkata* at paragraph 75, Benga emphasizes in particular the Court's concern that procedural fairness had been breached because the record revealed no reasons for the visa officer's decision not to respond to the extension request, such that the Court was left to speculate in this regard. For similar reasons, this Court allowed the application in *Naeem v Canada (Citizenship and Immigration)*, 2016 FC 1073, another case on which Benga relies, in that the decision of the immigration officer in that matter made no mention of the applicant's request that the decision be deferred. In the absence of reasons, it was impossible to infer from the record that the officer considered and made a decision on the request or to identify the reasons why any such decision may have been made in the circumstances. The officer's failure to make a decision represented denial of procedural fairness (see para 24).

[124] However, in the case at hand, the record supports an inference that the Abeyance Request was considered and rejected. Earlier in these Reasons, I accepted the Respondents' position as to the role of the Minister's Decision Memorandum in informing an understanding of the reasons

for the Minister's Decision. In the Minister's Decision Memorandum, the Agency informed the Minister of the Abeyance Request and conveyed the Agency's opinion that there would not be any benefit in delaying the Minister's decision under *CEAA 2012*. The Minister endorsed his concurrence with the Minister's Decision Memorandum, which I read as demonstrating that the Minister considered Benga's request but rejected it, for the reasons given by the Agency.

[125] I therefore find no breach of procedural fairness associated with the Minister's treatment of the Abeyance Request.

(7) Failure to provide reasons

[126] I now turn to the procedural fairness arguments advanced by the First Nation Applicants. I will begin with their argument that no reasons were provided as to how the Decisions were reached and what was actually considered by the Minister or Cabinet, particularly with respect to mitigation measures. The First Nation Applicants note that the Decision Statement does not include any content that can be characterized as reasons. Similarly, they argue that, while the Order in Counsel contains five recitals and states the Cabinet Decision, it does not contain any detailed reasoning, particularly with respect to mitigation measures. The First Nation Applicants also argue that the JRP Report does not indicate whether or how the JRP considered the mitigation and accommodation measures in the Piikani Agreement and the Stoney Nakoda Agreement [together, the Impact Benefit Agreements].

[127] The First Nation Applicants argue that this absence of reasons represents a breach of procedural fairness.

[128] I accept the principles invoked by the First Nation Applicants. While reasons typically figure in the review of the reasonableness of an administrative decision by employing the principles explained in *Vavilov*, a complete absence of reasons in circumstances where they are required can represent a breach of procedural fairness, because there is nothing for the Court to review (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 22).

[129] Before addressing the First Nation Applicants' argument, I note that their procedural fairness submissions, advanced on their behalf by the Stoney Nakoda, included attention to the non-exhaustive list of factors identified by the SCC in *Baker* (at paras 23-28) as assisting in identifying the scope and content of procedural fairness required in a given matter. I will turn shortly to those submissions, as well as the Respondents' submissions in response.

[130] However, it is not necessary for the Court to engage in an analysis of the *Baker* factors, or other applicable jurisprudence, to consider whether the Minister or the Cabinet were obliged to provide reasons for their respective Decisions, as I agree with the Respondents' position that the record before the Court does convey such reasons. As the Respondents argue, the jurisprudence is clear that a panel report like that of the JRP should be read as forming part of the reasons for the Decisions (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh Nation*] at para 479; *Taseko FC* at paras 123-124).

[131] Consistent with this jurisprudence, I have explained earlier in these Reasons my conclusion that the JRP Report, as well as the Minister's Decision Memorandum, inform an

understanding of the reasons for the Minister's Decision. While there is no record before the Court as to the material that was before Cabinet when it made its Decision, I agree with the Respondents' submission that it is consistent with the jurisprudence, and with the Order in Council's references to the JRP and its Report as contributing to the preceding Minister's Decision, that the JRP Report should also be regarded as informing an understanding of the reasons for the Cabinet Decision.

[132] As noted above, the First Nation Applicants argue in particular that the record, including the JRP Report, does not include reasons with respect to mitigation measures, specifically as arising from the Impact Benefit Agreements. They submit that there are no reasons explaining the Minister's analysis of such mitigation measures in determining (as reflected, for instance, in the relevant recital of the Order in Council) that the Project was likely to cause significant adverse environmental impacts on the current use of lands and resources for traditional purposes and physical and cultural heritage of the Kainai, Pikani and Siksika First Nations.

[133] As explained earlier in these Reasons in addressing Benga's argument surrounding mitigation measures, I have found that there are numerous portions of the JRP Report in which the JRP assessed mitigation measures proposed by Benga and others and that the record demonstrates that the Minister's Decision adopted the Report including its approach to mitigation measures.

[134] Moreover, as the Respondents submit, the Report's assessment of mitigation measures included the submissions of the First Nation Applicants on such measures, including with respect

to the effects of the Impact Benefit Agreements to the extent the First Nation Applicants made such information available. The First Nation Applicants acknowledge that they did not make the details of the Impact Benefit Agreements available to the JRP, although they did provide submissions as to the general areas in which the commitments made by Benga under those agreements would benefit their members and communities. As reflected in the Report (at paras 2180 and 2217-2227), the JRP considered it helpful to understand the commitments that Benga had made to First Nations and canvassed them in its analysis.

[135] In the section of the JRP Report addressing Indigenous traditional use of lands and resources, culture and rights, the JRP considered the interests of both the Piikani Nation (at paras 2343-2413) and the Stoney Nakoda (at paras 2485-2546). Those analyses, including the JRP's consideration of mitigation measures, expressly took into account the existence of the Piikani Agreement (see, e.g., paras 2365, 2377, 2397-2398, 2407 and 2411) and the Stoney Nakoda Agreement (see, e.g., paras 2487, 2507, 2516, 2533, and 2540).

[136] As such, this is not a case where the record is devoid of reasons, and there is therefore no breach of procedural fairness in this regard (see *Newfoundland Nurses* at para 22).

(8) Predetermined decision-making

[137] The First Nation Applicants correctly submit that procedural fairness requires a decision to be made free from a reasonable apprehension of bias, by an impartial decision maker (*Baker* at para 45). They also rely on the explanation in *Gitxaala Nation v Canada*, 2016 FCA 187 at

paragraph 199, that bias can be established by showing that a decision-maker's mind was closed, such that representations would be futile.

[138] Invoking these principles, the First Nation Applicants urge the Court to conclude, based on the speed with which the Decisions were made and the record evidencing the decision-making process, that the Decisions were effectively predetermined, relying on the decision of the AER not to approve the Project and "rubberstamping" the Agency's recommendations in the JRP Report.

[139] In terms of timing, the First Nation Applicants rely on the evidence in the record that, following the JRP's June 17, 2021 release of its Report, the Agency prepared three memoranda for the Minister. First, it provided a Memorandum to the Minister, bearing a drafting date of June 18, 2021, summarizing the Report [Report Summary Memorandum]. The First Nation Applicants emphasize that, in the Report Summary Memorandum, the Agency expressed its expectation that, although Indigenous communities with agreements with Benga may express some concerns regarding loss of employment opportunities, those concerns will be overshadowed by a sense of relief that the Project's potential effects would not impact Aboriginal or Treaty rights. The Agency also stated that it did not expect any Indigenous groups to challenge the decision of the AER.

[140] Next, the Agency prepared the Minister's Decision Memorandum and the Decision Statement Memorandum that have been canvassed earlier in these Reasons. These two memoranda both indicate that they were drafted on June 30, 2021. It will be recalled that the

Minister's Decision Memorandum represents the Agency's recommendation as to the Minister's Decision, and the Decision Statement Memorandum represents its recommendation as to the Decision Statement. As previously noted, the Minister endorsed his approval on the Minister's Decision Memorandum on July 7, 2021. The record does not indicate a date that the Minister reviewed or approved the Decision Statement Memorandum.

[141] Against this backdrop, the First Nation Applicants argue that the speed with which the Agency's recommendations were developed and the Decisions made, following release of the JRP Report, demonstrates that the Minister and Cabinet did not actually make their own decisions but rather, under the guise of satisfying their statutory obligations under *CEAA 2012*, actually abdicated their decision-making responsibilities in favour of the JRP (including its role as AER).

[142] In further support of this argument, the First Nation Applicants emphasize, as does Benga, that the Decision Statement Memorandum was apparently prepared by the Agency at the same time (June 30, 2021) as the Minister's Decision Memorandum. Given that the Decision Statement Memorandum is based on the Minister's Decision having been made (and indeed references the decision that the Project was likely to have significant adverse environmental effects), the Applicants submit that this evidences that the Decisions were predetermined before they ever reached the decision-makers.

[143] I find no merit to these submissions. While the time frames involved are not lengthy, it is not possible to infer therefrom that neither the Minister nor Cabinet turned their respective minds

to the record before them and, based thereon, discharged their respective decision-making responsibilities.

[144] Nor do I read anything sinister into the fact that the Decision Statement Memorandum was drafted on the same date as the Minister's Decision Memorandum. The Respondents argue that the coincidence in timing merely represents administrative staff getting ahead in their work, *i.e.*, preparing the Decision Statement Memorandum premised on an assumption that the Minister would accept the recommendation in the Minister's Decision Memorandum. I do not disagree that this is a plausible interpretation of events. However, there is nothing in the record before the Court providing any detail on the preparation of these memoranda. Based on the evidence available, I conclude only that the Applicants have not identified evidence supporting a conclusion that the Minister's Decision was predetermined.

(9) Opportunity to make submissions on Impact Benefit Agreements and mitigation measures

[145] Finally, the First Nation Applicants devote considerable attention to an argument that procedural fairness entitled them to an opportunity to make submissions on the analysis of mitigation measures, including in particular the effect of their Impact Benefit Agreements, before the Decisions were made.

[146] As previously noted, the First Nation Applicants' procedural fairness submissions on this argument invoke the non-exhaustive list of factors identified by the SCC in *Baker* (at paras 23-28) as assisting in identifying the scope and content of procedural fairness required in a given

matter. The Respondents have also provided submissions on these factors. I will review the parties' respective submissions on the *Baker* factors and will then explain my analysis and conclusions as to the procedural fairness required by the application of these factors to the case at hand.

(a) *Nature of the decision being made, process followed, nature of the statutory scheme, and decision-maker's choice of procedures*

[147] In connection with the *Baker* factors that consider the nature of the decision being made, the process followed in making it, the nature of the statutory scheme, and the decision-maker's choice of procedures, the First Nation Applicants emphasize that the JRP is not the relevant decision-maker for purposes of the process under *CEAA 2012*. Rather, the first decision-maker is the Minister under subsection 52(1) and, while subsection 47(1) required the Minister to take the JRP Report into account, subsection 47(2) also empowered the Minister, after receiving the Report and before making his Decision, to obtain additional information that the Minister considered necessary to make his Decision. The First Nation Applicants also rely on the fact that *CEAA 2012* does not afford any right to appeal the Minister's Decision or the subsequent Cabinet Decision.

[148] Further, the First Nation Applicants invoke the decision in *Ermineskin* (appeal dismissed for mootness in *Canada (Environment and Climate Change) v Ermineskin Creek Nation*, 2022 FCA 123), which held that a First Nation's economic interest, including a potential economic interest, is sufficient to trigger Canada's duty to consult, and that an impact benefit agreement is such a potential interest (at para 114).

[149] The First Nation Applicants argue that this jurisprudence, superimposed upon the nature of the decision, the decision-making process, and the statutory scheme, supports a conclusion that as a matter of procedural fairness the Minister should have afforded them an opportunity to provide additional information related to the benefits under their Impact Benefit Agreements that would be lost if the Project were not approved. The First Nation Applicants submit that such information was required for the Minister to be sufficiently informed to appropriately take mitigation measures into account in making the subsection 52(1) decision on the significant adverse environmental effects of the Project.

[150] In relation to the same *Baker* factors, the Respondents rely heavily on the decision in *Taseko 2*. The Federal Court of Appeal held in that case that the Minister's decision-making process was not adversarial in nature and did not resemble judicial decision-making, as the Minister's task was essentially to form an opinion based on the relevant panel report (at para 40). Along with the nature of the statutory scheme, and in particular the exhaustiveness of the panel's process, the fact that only the panel's final report must be made public, and the absence of a statutory provision for unsolicited submissions to be made to the Minister, those factors militated in favour of a minimal duty of fairness (at para 41).

[151] *Taseko 2* also relied on the nature of the legislative scheme to conclude that no duty of procedural fairness attached to the Cabinet's decision-making process, as *CEAA 2012* does not contemplate a right to make direct submissions to the Cabinet, and it would be contrary to the language and structure of the statutory regime, as well as the very nature of Cabinet's decision-making process, to impose such a right (at para 92). This analysis is consistent with the

description in *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15, of the polycentric nature of the Cabinet's decision-making process, focusing on a variety of considerations, seeking to balance a variety of interests, and concerned with both fact and policy (at para 71). Elsewhere, *Taseko 2* refers to a low threshold or minimal duty of procedural fairness owed by the Cabinet (at para 93).

[152] In relation to the decision-maker's choice of procedures, the Respondents also emphasize that *CEAA 2012* requires only that the Minister consider the JRP Report (ss 47(1)) and affords the Minister discretion, not the obligation, to determine if further information from the proponent is necessary (ss 47(2)).

[153] Finally, the Respondents argue that *Ermineskin* is distinguishable from the circumstances of the Decisions, as it involved consideration of the constitutional duty to consult rather than the *Baker* analysis for common law procedural fairness, and it involved a functionally different statutory decision made pursuant to a substantially different process. The Respondents also question whether *Ermineskin* is jurisprudentially sound in having found the constitutional duty to consult was triggered by economic interests afforded to First Nations by impact benefit agreements, and the Respondents urge this Court not to follow that authority.

(b) *Importance of the decision to those affected by it*

[154] In relation to the importance of the Decisions to the First Nation Applicants, they emphasize the recognition in *Ermineskin* of the significance to First Nation communities, particularly those whose traditional territories are in remote locations, of decisions that may

result in lost opportunities to receive economic benefits from natural resource development projects (at paras 112-114). Similarly, the Alberta Court of Appeal has recently commented on the positive benefits of such projects and the importance of supporting Indigenous communities that want to participate in mainstream commercial activities (*AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 at paras 59-68).

[155] In contrast, the Respondents again rely on *Taseko 2*, which reasoned that the importance of the decision in that case was reflected in the extensive process before the review panel, involving oral hearings, the submission of evidence, cross-examination, fact-finding, and other trappings associated with a quasi-judicial process. *Taseko 2* held that the rights of the appellant were comprehensively addressed at that stage of the process, and there is no requirement that each following step take on a quasi-judicial character (at para 36).

[156] The Respondents recognize that the appellant in *Taseko 2* was the project proponent, not an Indigenous community, but submit that such reasoning applies all the more strongly to the First Nation Applicants, whose economic interests in the Project are less direct than those of the proponent.

(c) *Legitimate expectations*

[157] Finally, the First Nation Applicants' arguments rely heavily on the *Baker* factor of legitimate expectations. *Baker* explains that the legitimate expectations of the person challenging an administrative decision may determine what procedures the duty of fairness requires in given circumstances. While this doctrine does not create substantive rights, if legitimate expectations

are found to exist, they will affect the content of the duty of fairness owed to the party affected by the decision. If a party has a legitimate expectation that a certain procedure will be followed, that procedure will be required by the duty of fairness (*Baker* at para 26).

[158] As noted earlier in these Reasons, legitimate expectations arise where a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision. To give rise to legitimate expectations, such representations or conduct must be clear, unambiguous and unqualified (*Agraira* at paras 94-95).

[159] The First Nation Applicants advance two arguments in support of their position that they had legitimate expectations that they would have an opportunity to make submissions after the release of the JRP Report and before the Minister made his Decision. One argument is based on an established practice, and the other on an express representation.

[160] First, the First Nation Applicants submit that the Agency had an established practice of consulting with Indigenous groups subsequent to the release of a review panel's report. In support of this argument, the First Nation Applicants rely on one of the memoranda from the Agency to the Minister following release of the JRP Report. In the Report Summary Memorandum, the Agency expressed its expectation of a mixed reaction from Indigenous communities to the Report's findings. As noted earlier in these Reasons, the Agency expected that those communities' concerns regarding the loss of employment opportunities would be overshadowed by relief that the Project's potential effects would not impact their Aboriginal or

Treaty rights. In that context, the Report Summary Memorandum stated that Agency officials would be in contact with Indigenous communities in the coming days to discuss their reaction to the Report and next steps.

[161] Following issuance of the Report Summary Memorandum, the Agency issued the Minister's Decision Memorandum, which included the following paragraph under the heading of "Indigenous Consultation":

> Typically, following a submission of an environmental assessment report by a review panel, the Agency consults with Indigenous communities on the report and on draft conditions for a decision statement based on mitigation measures identified through the environmental assessment. The Agency intends to reach out to Indigenous groups shortly and discuss the outcomes of the Panel's Report, including next steps required in the federal decision-making process.

[162] The First Nation Applicants submit that these memoranda evidence a consistent past practice, pursuant to which they developed a legitimate expectation that they would be consulted further before the Minister's Decision was made.

[163] Relying on the Agency's June 17, 2021 News Release, the First Nation Applicants also submit that the Agency made an express representation to this effect. Because of the significance of this document to the procedural fairness arguments, it is helpful to set out the operative portion of its text in full:

> **News Release Grassy Mountain Coal Project - Minister Receives Joint Review Panel Report**
>
> June 17, 2021 – Ottawa – Impact Assessment Agency of Canada

> Today, the Minister of Environment and Climate Change, the Honourable Jonathan Wilkinson, received the report of the Joint Review Panel that conducted the environmental assessment of the proposed Grassy Mountain Coal Project, located in southwest Alberta.
>
> The Minister will consider the Joint Review Panel's report before determining if the project is likely to cause significant adverse environmental effects when mitigation measures are taken into account. If the Minister decides the project is likely to cause significant adverse environmental effects, the decision on whether the effects are justified will be referred to the Governor in Council.
>
> Prior to the Government of Canada's decision on the project, the Impact Assessment Agency of Canada (the Agency) will consult with Indigenous groups on the Joint Review Panel's report. The Agency will also invite the public and Indigenous groups to comment on potential conditions relating to possible mitigation measures and follow-up program requirements the proponent would need to fulfil if the project is ultimately allowed to proceed. The Minister will consider the results of these consultations before issuing a decision statement and any potentially legally-binding conditions.
>
> The Joint Review Panel's report, an executive summary, as well as information about the environmental assessments are available on the Canadian Impact Assessment Registry (Registry reference number 80101).
>
> (my emphasis)

[164] I have highlighted above the particular sentence in the News Release that I understand the First Nation Applicants regard as a representation giving rise to legitimate expectations. The First Nation Applicants also emphasize that the News Release stated that the consultations described therein would be conducted prior to decisions being made in relation to the Project.

[165] The Respondents argue that none of this evidence supports the Applicants' legitimate expectations arguments, as it cannot be characterized as demonstrating either a practice or a

representation with the level of clarity and lack of ambiguity or qualification that the jurisprudence demands. With respect to the News Release, the Respondents submit that the First Nation Applicants' arguments misconstrue the representations contained therein. The Respondents also argue that, even if the News Release did give rise to legitimate expectations, this factor must be considered in combination with the other *Baker* factors that support a conclusion that little to no procedural fairness was required following release of the JRP report. The Respondents take the position that such consideration still does not support a high enough duty of procedural fairness to grant the relief the Applicants request. I will return to the Respondents' arguments in more detail in the next portion of these Reasons.

(d) *Analysis and conclusions*

[166] With the exception of the legitimate expectations factor, I agree with the Respondents that the *Baker* factors favour a minimal duty of procedural fairness associated with the Minister's Decision. The required analysis has been conducted by the Federal Court of Appeal in *Taseko 2* in a statutory and factual context sufficiently similar to the case at hand that there is no basis to depart from that analysis and its conclusions.

[167] I emphasize that such analysis, and my own conclusions in reliance on that authority, do not reflect a finding that the Minister's Decision is not important to the First Nation Applicants. I accept their submissions as to the importance of the Decision, and I disagree with the Respondent's argument that the Decision is less important to the First Nation Applicants than to the proponent because their economic interests are only indirectly affected.

[168] Rather, the conclusion in *Taseko 2*, that the importance of the decision does not favour a high level of procedural fairness in connection with the Minister's decision, turned on the fact that the required level of procedural fairness was achieved through the extensive process before the review panel. As the Federal Court of Appeal recognized, each stage in the decision-making process takes its colour from the context (at para 36).

[169] I need not review the details of the procedural fairness afforded to the participants in the process before the JRP because, as I will explain, those details are not material to the outcome of the procedural fairness analysis. I observe only that, were it not for the particular application of the legitimate expectations factor in the case at hand, I would be able to identify little basis for a conclusion that the First Nation Applicants were not afforded the required procedural fairness in the course of the overall decision-making process.

[170] Indeed, this observation is consistent with the analysis in the ABCA Decision, which considered in significant detail the level of participatory rights afforded to the First Nation Applicants in the process before the JRP (at paras 85-105). Among the arguments advanced in their application seeking permission to appeal was the position that the JRP had an obligation to seek information from the First Nation Applicants about the effect that would result from the JRP's decision not to approve the Project (see para 122). The ABCA concluded that, because the First Nation Applicants were granted full participation rights in the hearing process, there was no arguable merit to the suggestion that the JRP was required to offer them an opportunity to provide further submissions (at para 125).

[171] The ABCA reasoned that, as the decision not to approve the Project was a known possible outcome, this was not a matter where the hearing participants were not aware of the case that had to be met. As participants in the JRP's process, the First Nation Applicants had the right to decide how much or how little to participate and what information each wished to communicate to the JRP. The ABCA therefore found no arguable merit to the suggestion that the JRP had an obligation, once it reached the point in its deliberations that no approval of the Project was a possibility, to return to either of the First Nation Applicants to seek further information (at paras 125-126).

[172] As I read the ABCA Decision, the arguments addressed in that portion of the ABCA's analysis were perhaps grounded more in the honour of the Crown than in common law procedural fairness (see para 122). As described in Stoney Nakoda's submissions in the case at hand, the honour of the Crown is a constitutional principle embedded within section 35 of the *Constitution Act, 1982* (*R v Desautel*, 2021 SCC 17 at paras 29-31), as is the resulting duty to consult (*Ktunaxa Nation* at para 78). I will return shortly to the relationship between the constitutional duty to consult and common law procedural fairness. For present purposes, I note only that the ABCA's reference to whether the JRP hearing participants were aware of the case that had to be met demonstrates that its analysis included consideration of common law principles of procedural fairness.

[173] I find no flaw in that procedural fairness analysis. However, the ABCA was not presented with the particular legitimate expectations arguments advanced in the case at hand, which

arguments arise entirely from aspects of the federal component of the regulatory process. I turn now to those arguments.

[174] With respect to the argument that the Agency had an established practice of consulting with Indigenous groups, between release of a panel's decision and the subsequent decision by the Minister, I agree with the Respondents that the record does not demonstrate in clear, unambiguous and unqualified terms such a practice exists. As the Respondents emphasize, the paragraph of the Minister's Decision Memorandum upon which the First Nation Applicants rely includes the qualifying word "typically" in referring to such a practice.

[175] However, I find considerable merit to the First Nation Applicants' reliance on the representations in the News Release. On its face, the News Release appears to include a clear, ambiguous and unqualified representation that, "[p]rior to the Government of Canada's decision on the project, the [Agency] will consult with Indigenous groups on the Joint Review Panel's report."

[176] The Respondents argue that this representation does not relate to the particular Decisions that are challenged in the case at hand. Relying on the subsequent sentences in the same paragraph of the News Release, the Respondents submit that the commitment to consult with Indigenous groups did not relate to the Minister's Decision under subsection 52(1) of *CEAA* 2012. Rather, the representation applied only in the event the Minister's eventual Decision Statement under section 54 of *CEAA 2012* conveyed approval of the Project on the basis of conditions established under section 53. The Respondents also note that the Decision Statement

is not itself a decision challenged in this application for judicial review. The Respondents take the position that, because the Project was not approved through a Decision Statement with resulting section 53 conditions, the representation in the News Release on which the First Nation Applicants rely has no application.

[177] I find the Respondents' arguments to be based on a strained interpretation of the language of the News Release. First, I note that the sentence containing the relevant representation (highlighted earlier in these Reasons) is immediately preceded by the paragraph explaining that the Minister will consider the JRP Report before determining if the Project is likely to cause significant environmental effects with the benefit of mitigation measures and that, if the Minister decides the Project is likely to cause such effects, the decision on whether the effects are justified will be referred to the Cabinet. When the ensuing sentence states that the Agency will consult Indigenous groups on the Report prior to the Government of Canada's decision on the project, this reads as a clear reference to the decision-making described in the previous paragraph. Nothing in that language suggests that consultation will take place only if the Project is approved and conditions imposed.

[178] Nor do I find the language following the relevant representation to support the Respondents' interpretation. The sentence immediately following that representation, in the same paragraph, states that the Agency will also invite the public and Indigenous groups to comment on potential conditions related to mitigation measures and follow-up program requirements the proponent would need to fulfil if the Project is ultimately allowed to proceed (my emphasis). While that sentence refers to the potential to comment on section 35 conditions, the use of the

word “also” makes it clear that the opportunity to comment on conditions is in addition to the opportunity referenced in the preceding sentence in which the relevant representation is contained. In other words, the representation on which the First Nation Applicants rely is not qualified in the matter the Respondents suggest.

[179] That paragraph concludes with the statement that the Minister will consider the results of these consultations before issuing a decision statement and any potentially legally binding conditions (my emphasis). Again, the use of the word “any” in that sentence undermines the Respondents’ argument that the relevant representation applied only to a circumstance where the Decisions resulted in approval of the Project with the imposition of conditions. Also, to the extent the Respondents are arguing that the First Nation Applicants cannot rely on the relevant representation because it relates only to the section 54 Decision Statement, a decision not challenged in these applications, I find no merit to that position. As noted earlier in these Reasons, I understand all parties to have acknowledged at the hearing of these applications that the Decision Statement issued under section 54 of CEAA 2012 is not itself an administrative decision but rather represents communication of the decisions made by the Minister and Cabinet under section 52.

[180] The Respondents also submit that there is nothing in the language of the News Release supporting the particular participatory opportunity that the First Nation Applicants argue should have been afforded to them. They take the position that they should have been given an opportunity to provide submissions on the outcome of the JRP Report and possible mitigation measures, which submissions would have included specifics of the Impact Benefit Agreements,

to be is considered by the Minister prior to his Decision. The Respondents argue that the representation upon which the First Nation Applicants rely is not expressed in these terms.

[181] I agree that that the News Release does not read as a commitment to consult with the First Nation Applicants specifically on the subject of their Impact Benefit Agreements and how the potential benefits therefrom figure into the analysis of mitigation measures. However, I do not understand the First Nation Applicants to be arguing that the relevant representation should be read in those specific terms. Their position is only that that the News Release communicated a procedural commitment by the Agency to consult with First Nations on the Report before the Decisions were made. They argue that an additional post-Report consultation opportunity, of which they say they were ultimately deprived, could have been use to advance arguments and potentially evidence as to how the mitigatory effects of the economic benefits that would have flowed from the Impact Benefit Agreements favoured approval of the Project.

[182] In my view, the representation in the News Release supports the First Nation Applicants' position that they had a legitimate expectation that they would receive the benefit of further consultation before the Decisions were made.

[183] I also note that on July 13, 2021, Chief Stanley Grier of the Piikani Nation wrote to the Minister and referenced the Piikani Nation's understanding that the Agency would be consulting with Indigenous groups on the Report and would consider the results of those consultations before issuing a Decision Statement on the Project. Chief Grier conveyed that the Piikani Nation was looking forward to actively engaging with the Agency in these consultations. Chief Grier's

letter also referred to the Piikani Agreement, explaining that it provided for benefits to and opportunities for the Piikani Nation and its members if the Project was approved and built, and conveyed the concern that absent such approval those benefits and opportunities would be lost.

[184] While this is not a required component of the legitimate expectations analysis, and I recognize there is no comparable correspondence from the Stoney Nakoda, Chief Grier's letter demonstrates both reliance on the representation in the News Release and the genuineness of the First Nation Applicants' assertion in these applications that they wished to avail themselves of the offered consultation opportunity to raise concerns about lost economic benefits and opportunities if the Project was not approved. While also not a necessary component of the analysis, I further note that Chief Grier's letter served to bring to the Minister's attention the fact that the Piikani Nation was relying on the opportunity for additional consultation conveyed in the News Release. I appreciate that by the time of the July 13, 2021 letter, the Minister had already endorsed the Minister's Decision Memorandum on July 7, 2021. However, the Decisions were not communicated to the public until the Decision Statement was issued on August 6, 2021.

[185] While the consideration of legitimate expectations is only one of the *Baker* factors, in my view it is the factor that determines the outcome of the analysis of the required scope of procedural farness in this particular matter. In the language of *Agraira* (at para 94), it is the particular face of procedural fairness in this matter. In the absence of the legitimate expectation created by the News Release, the minimal duty of fairness supported by consideration of the other *Baker* factors may have resulted in a procedural fairness analysis and outcome akin to that in the ABCA Decision. However, while (absent legitimate expectation) the duty of procedural

fairness may not have mandated an opportunity to make further submissions once the outcome of the JRP Report was known, I find no basis to conclude that such an opportunity is superfluous. Indeed, the Minister's Decision Memorandum describes it as an opportunity that is typically provided.

[186] In my view, once the News Release gave rise to a legitimate expectation that such procedure would be followed, that procedure was required by the duty of fairness (*Baker* at para 26), and the First Nation Applicants were entitled to take advantage of the opportunity afforded by that procedure, to advance their arguments based on economic opportunities and the Impact Benefit Agreements in an effort to influence the outcome of the Decisions.

[187] I therefore turn to the question whether the First Nation Applicants were afforded the required opportunity. The Final Consultation Report includes a statement that, following release of the Report, the Agency offered to discuss with indigenous communities the report and any final considerations. However, there is little in the record to support a conclusion that consultation of this nature occurred, at least in any meaningful way.

[188] The Piikani Nation's application is supported by an affidavit of Ira Provost, the Manager of the Consultation Office and Manager of Traditional Knowledge Services for the Piikani Nation. Mr. Provost deposes that on July 5, 2021, he received a call from Charles Gauthier of the Agency, inquiring if the Piikani Nation would like to discuss the JRP Report. The record also includes a July 26, 2021 email from Mr. Gauthier to what appear to be Piikani Nation email addresses, referring to a July 5, 2021 message informing them about the JRP Report.

[189] The record also includes a similar July 26, 2021 email from Mr. Gauthier to what appears to be a Stoney Nakoda email address, referring to a July 5, 2021 message informing them about the JRP Report. Indeed, the record includes several similar emails from Mr. Gauthier, also dated July 26, 2021, that appear to be addressed to other First Nations.

[190] The July 5, 2021 communications with First Nations referenced in these emails are the only communications the Respondents reference, in an effort to demonstrate that the consultation opportunity contemplated by the News Release was actually afforded to either of the First Nation Applicants. However, it is not particularly clear if these communications were telephone calls, telephone messages or written communications and, other than being described as messages informing the First Nations about the JRP Report, the record provides no detail as to the contents of the communications. I cannot conclude that this represents a sufficient evidentiary basis to find that the duty of procedural fairness created by the issuance of the News Release was met.

[191] Indeed, the most detail available is that provided by Mr. Provost, who describes the July 5, 2021 communication with the Piikani Nation as a telephone call in which Mr. Gauthier inquired if the Piikani Nation would like to discuss the JRP Report. Of course, Chief Grier advised the Minister in writing on July 13, 2021, that the Piikani Nation had reviewed the JRP Report and was looking forward to actively engaging with the Agency in further consultations. It is therefore difficult to conclude that the procedural fairness obligation was discharged by the July 5, 2021 telephone call.

[192] Also, as the First Nation Applicants submit, following what appears to have been a large number of similar communications to interested First Nations on July 5, 2021, the Minister endorsed the Minister's Decision Memorandum two days later on July 7, 2021. I agree with the First Nation Applicants that this timing detracts from the Respondents' argument that the July 5, 2021 communications afforded a meaningful opportunity for post-Report consultation with the First Nation Applicants or other Indigenous communities.

[193] In conclusion, I find that the First Nation Applicants were not afforded the consultation opportunity that the News Release represented they would receive, and that this deficiency represents a breach of procedural fairness.

D. *Whether Canada owed the Piikani Nation and the Stoney Nakoda a duty to consult and, if so, whether Canada failed to reasonably consult and accommodate those First Nations before issuing the Decisions, such that the Decisions were unreasonable*

[194] Under this issue, the First Nation Applicants again argue that they were entitled to be consulted by Canada following issuance of the JRP Report and before the Decisions were made. In addition to the procedural fairness arguments advanced under common law principles of administrative law, as analysed in the above section of these Reasons, the First Nation Applicants submit that the asserted entitlement flows from the constitutional duty to consult as captured in section 35 of the *Constitution Act, 1982*. Applying the applicable standard of review as canvased earlier in these Reasons, the First Nation Applicants argue that, in the absence of the necessary consultation, and analysis and accommodation by the decision-makers as a result of such consultation, the Decisions are unreasonable.

[195] The parties' arguments on this issue focus significantly on the question of whether the economic interests on which the First Nation Applicants say they should have been consulted following the issuance of the JRP report, including the effects of the Impact Benefit Agreements, represent or are sufficiently related to Aboriginal or Treaty rights that the duty to consult applies. The First Nation Applicants rely in particular on *Ermineskin* to support their position. As previously noted, the Respondents question the jurisprudential value of *Ermineskin*, or at least its application to the facts of this case, and argue that the particular economic interests raised by the First Nation Applicants did not give rise to the duty to consult.

[196] I also note that the parties take differing positions on the relationship between the administrative law principles of procedural fairness and the constitutional duty to consult. The Respondents submit that these principles should be analysed separately and that the Applicants' arguments inappropriately conflate them. The First Nation Applicants disagree, referring the Court to jurisprudential support for its position, including the statement in *Taseko 2* that the need for reconciliation and the duty to consult with and accommodate Indigenous groups is part and parcel of the social context to be considered in delineating the requirements of procedural fairness (at para 31).

[197] The Respondents also argue that, in the event these applications are capable of adjudication through administrative law principles, such that recourse to constitutional issues are unnecessary, the Court should as a matter of judicial restraint decline to adjudicate the constitutional arguments (*Taseko 2* at para 105). The Applicants have not taken a position on this point.

[198] My preceding analysis and adjudication of the First Nation Applicants' procedural fairness arguments are determinative of the outcome of their applications for judicial review. That analysis turned on the common law duty of procedural fairness, as informed by the doctrine of legitimate expectations. It did not require the Court to adjudicate the parties' jurisprudential dispute on whether the economic interests that the First Nation Applicants wish to argue before the decision-makers serve to trigger the constitutional duty to consult, so as to potentially inform the content of the common law duty.

[199] Similarly, I agree with the Respondents that judicial restraint favours the Court declining to address that jurisprudential dispute by adjudicating the First Nation Applicants' alternative, and constitutionally grounded, argument in support of an opportunity for further consultation prior to the Decisions. Such adjudication is best left to future matters in which the same or similar arguments are raised by parties in disputes that require recourse to constitutional principles and are not capable of adjudication on administrative law grounds.

VII. Remedies

[200] As remedies in these applications, the First Nation Applicants seek an order setting aside the Decisions and referring the matter back to the Minister for redetermination following the required consultation.

[201] The Respondents take the position that, in the event the Court were to find a breach of procedural fairness, the Court should issue a declaration to that effect without ordering further

relief. They argue that quashing the Decisions and remitting them for redetermination will have no practical utility, because the Project cannot proceed without provincial approval.

[202] In response to this position, the Applicants emphasize that they are continuing to pursue initiatives in the Courts of Alberta to challenge the Provincial Decision. As such, they argue that they should receive operative relief in the case at hand so that, in the event they are successful in the Alberta litigation, adjudicated deficiencies in the decisions at both levels of government can be addressed.

[203] At the hearing of these applications, the Applicants also made the point that, as a practical matter, parties and their counsel can often work together to plan and schedule steps required to effect the redetermination of a decision in an efficient manner. As I understand this submission, it is possible that such coordination may serve to avoid a situation where the parties put effort into further steps at the federal level before knowing whether the outcome of the Alberta litigation is such that the Provincial Decision will also be revisited.

[204] I accept the Applicants' position on remedies and will therefore issue an order giving effect to the relief they request as a result of the identified breach of procedural fairness. The Minister's Decision will be set aside and the matter referred back to the Minister for redetermination following the required consultation. As the Minister's Decision is a precondition to the Cabinet Decision in the statutory process applicable under *CEAA 2012*, the Cabinet Decision will also be set aside, to be redetermined following redetermination of the Minister's Decision.

[205] In connection with the required process, in my view the comments of the Federal Court of Appeal in *Tsleil-Waututh Nation* are potentially applicable to the case at hand. In that matter, the Court's conclusions included the finding that Canada did not fulfil its duty to consult with and, if necessary, accommodate the Indigenous applicants (see para 767). Noting the specific focus of the Indigenous applicants' concerns, the Court commented that the corrected consultation process may therefore be brief and efficient while still ensuring it was meaningful (at para 772).

[206] I see no reason why the required re-visitation of the federal decision-making process in the case at hand cannot be similarly efficient. That requirement does not involve reconstituting the JRP or revisiting its processes, but rather performing the post-Report consultation contemplated by the News Release. I also trust that, to the extent consistent with the parties' rights and interests, the parties and their counsel will work together to achieve efficiency in the planning and scheduling of the required consultation.

VIII. Costs

[207] At the hearing of these applications, the Court encouraged counsel to communicate with each other with a view to attempting to reach agreement on a recommendation to the Court on quantification of the costs that would flow to the successful party or parties. Counsel subsequently advised that the parties had agreed that, if the Applicants were to succeed, they should each receive from the Respondents costs in the all-inclusive lump sum figure of $9000.00, and that, if the Respondents were to succeed, they should receive from each of the Applicants costs in the all-inclusive lump sum figure of $9000.00.

[208] The outcome of these applications has involved somewhat divided success, in that Benga's arguments have been unsuccessful, but the First Nation Applicants have succeeded in their procedural fairness arguments. In the result, the First Nation Applicants' applications for judicial review will be allowed and Benga's application dismissed. Applying the principles of the parties' costs recommendation to that result, Benga will pay costs of $9000.00 to the Respondents, and the Respondents will pay costs of $9000.00 to each of the Piikani Nation and the Stoney Nakoda.

JUDGMENT IN T-1270-21, T-1367-21, and T-1369-21

THIS COURT'S JUDGMENT is that:

1. The application of the Applicant, Benga Mining Limited, in Court File No. T-1270-21 is dismissed. The Applicant shall pay the Respondents costs in the all-inclusive lump sum amount of $9000.00.

2. The application of the Applicant, the Piikani Nation, in Court File No. T-1367-21 is allowed, the Decisions are set aside, and the matter is remitted for redetermination in accordance with the Court's Reasons. The Respondents shall pay the Applicant costs in the all-inclusive lump sum amount of $9000.00.

3. The application of the Applicant, the Stoney Nakoda Nations, in Court File No. T-1369-21 is allowed, the Decisions are set aside, and the matter is remitted for redetermination in accordance with the Court's Reasons. The Respondents shall pay the Applicant costs in the all-inclusive lump sum amount of $9000.00.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1270-21, T-1367-21, and T-1369-21
STYLE OF CAUSE:	BENGA MINING LIMITED, PIIKANI NATION AND STONEY NAKODA NATIONS v THE MINISTER OF ENVIRONMENT AND CLIMATE CHANGE AND, THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 23, 2024
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	FEBRUARY 12, 2024

APPEARANCES:

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