Federal Court of Appeal | Cour d'appel fédérale

Date: 20191218

Docket: A-6-18

Citation: 2019 FCA 320

CORAM: **STRATAS J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

TASEKO MINES LIMITED

Appellant

and

THE MINISTER OF THE ENVIRONMENT AND THE ATTORNEY GENERAL OF CANADA AND THE TSILHQOT'IN NATIONAL GOVERNMENT AND JOEY ALPHONSE, on his own behalf and on behalf of all other members of the Tsilhqot'in Nation

Respondents

Heard at Vancouver, British Columbia, on January 15, 2019.

Judgment delivered at Ottawa, Ontario, on December 18, 2019.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: STRATAS J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Taseko Mines Limited (Taseko) appeals from a decision of the Federal Court (Justice Phelan) dated December 5, 2017, which dismissed its application for judicial review of a

Decision Statement communicating decisions of the Minister of the Environment (the Minister) and of the Governor in Council (GIC) pursuant to section 52 of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 [CEAA, 2012], which determined that its proposed New Prosperity Gold-Copper Mine Project (the Project) is likely to cause significant adverse environmental effects, and that those effects are not justified in this case (*Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100 [Reasons]). The Review Panel Final Report [Final Report] at the basis of these decisions, which is also the subject of an appeal by Taseko, is dealt with in the companion case of A-7-18.

[2] The appellant argues that the application judge erred in not finding that the decisions of the Minister and GIC should be quashed for breaches of procedural fairness and jurisdictional errors. It also asks this Court for a declaration that paragraph 5(1)(*c*) and section 6 of the CEAA, 2012 are inapplicable, insofar as they impair the core of the provincial legislative power under section 92A of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 to develop and manage non-renewable natural resources.

[3] At its core, this case raises the difficult question of the interaction between the constitutionally mandated duty to consult and the common law principles of procedural fairness and natural justice.

[4] For the reasons that follow, I am of the view that this appeal should be dismissed.

I. Facts

[5] The background facts concerning the Project and review process are laid out in detail in my reasons on file A-7-18 and there is no need to repeat them here. As for the events that followed the closing of the Review Panel (the Panel) hearings in August 2013, and which are relevant to the present appeal, they are summarized in great detail by the judge at paragraphs 11 to 44 of the decision below. I shall therefore concern myself with a brief overview of the period following the close of the Panel hearings on August 23, 2013.

[6] Once the Minister of the Environment had referred the Project to the Panel to assess its environmental effects, several distinct phases followed:

1) the preparation by Taseko and review by the Panel of an Environmental Impact Statement;

2) public hearings before the Panel;

3) the submission of a Final Panel Report to the Minister;

4) a ministerial decision regarding whether the Project is likely to cause significant adverse environmental effects, followed by (if necessary) a decision from the GIC regarding whether any such effects were justified in the circumstances; and

5) the issuance of a ministerial "Decision Statement" setting out the respective decisions of the Minister and the GIC.

[7] The Tsilhqot'in Nation has asserted and proven Aboriginal rights on the territory where the proposed gold-copper mine would have operated, and as a result, the Crown has a duty to consult the Nation and reasonably accommodate it. Consequently, the Crown appointed a "Consultation Coordinator" to liaise between the Crown and the Tsilhqot'in National Government (the TNG) in respect of the Project and to prepare a Crown Consultation Report. Indeed, the Crown planned to consult with the Tsilhqot'in throughout the process, and the Canadian Environmental Assessment Agency's (the Agency) Crown Consultation Coordinator made it clear to Taseko that consultations with Indigenous groups were "extensive and ongoing" and that Taseko's official could contact her with any questions (Appeal Book vol. 14, p. 19976).

[8] On October 8, 2013, two meetings took place. These meetings lie at the heart of this appeal. The first meeting was between the TNG's representatives, the Minister and the Agency's President, despite the Agency's advice. It appears that the TNG sought to voice their concerns that Taseko was misrepresenting their views in public statements, and wanted to set the record straight. During the meeting, the Minister "did not speak about any specifics of the project and she did not reveal any opinion or bias or view about the project and whether it ought to go forward or not" (Reasons, at para. 14). The second meeting was between representatives of the TNG and several deputy ministers, who were briefed that they were not to discuss "any issues that [were] currently before the review panel" (Appeal Book vol. 17, p. 22245). The judge also found that Taseko learned of these meetings soon afterward, but made no objection at the time (Reasons, at paras. 15-17).

[9] The Minister does not dispute that she did not personally meet with Taseko, which is not to say that Taseko was unable to make its views known. Justice Phelan found that Taseko wrote directly to the Minister and other ministers (*ibid.*, at paras. 31, 34, 36 and 42), published an opinion piece in a newspaper (*ibid.*, at para. 32), and issued a press release impugning opponents of the Project and setting out arguments about how the Final Report conclusions were wrong and why the Project should be approved (*ibid.*, at paras. 35 and 40). Moreover, it appears that Taseko's representatives had at least one meeting and two calls with federal government officials, including the President of the Agency, Ron Hallman (Appeal Book vol. 17, pp. 22639-22640; Appeal Book vol. 5, p. 6716). In an effort to secure further meetings with other federal officials, Taseko also hired a former chief of the TNG as a consultant. Finally, Taseko organized multiple meetings with then Premier of B.C., Christy Clark, and then B.C. Minister of Energy and Mines, Bill Bennett, and provided them with arguments against the rejection of the Project which they eventually passed along to federal representatives (Reasons, at para. 38; Appeal Book vol. 17, at pp. 22573-22574, 22579-22586, 22588-22602, 22606-22607, 22725-22754, 23257-23258).

[10] The Final Report was released on October 31, 2013. On November 8, 2013, Taseko sent a response submission to the Minister which requested that Taseko be notified of any adverse submissions made to the Minister arising out of its consultations with Indigenous groups outside of the panel process (Appeal Book vol. 14, pp. 19948). Taseko claims that there is no evidence this submission was provided to the Minister. Yet, the judge found that there is such evidence (Reasons, at paras. 62 and 67). Taseko provided further submissions to the Agency on November 15, 2013, which the judge found were forwarded to a member of the Minister's political staff

(*ibid.*, at para. 40). The TNG responded to these submissions on November 21, 2013, and Taseko had a copy of that letter by December 1, 2013 (*ibid.*, at para. 20).

[11] On January 9, 2014, as part of Phase IV consultation and in response to the Agency's request, the TNG provided its submissions on the Final Report to the Agency. These submissions were not provided to Taseko, but the judge found that there was nothing in those submissions that was not previously reflected in the materials before the Panel and provided to the Minister (*ibid.*, at para. 68). On January 16, 2014, the TNG again wrote to the Agency expressing concern about the adequacy of Phase IV consultation.

[12] On January 29, 2014, the Agency sent a memorandum to the Minister requesting her decision under section 52 of CEAA, 2012 regarding whether the Project was likely to cause significant adverse environmental effects [Hallman Memo]. That memo included departmental advice setting out mitigation measures for the Minister's consideration, the TNG's January 9, 2014 submissions, and a solicitor-client privileged memorandum. These were the only documents before the Minister when she made her Decision on January 30, 2014. She concurred with the Agency's recommendation and decided that the Project was likely to cause significant adverse environmental effects (paragraphs 52(1)(*a*) and (*b*) of CEAA, 2012). She therefore referred the matter to the GIC for a subsection 52(4) decision.

[13] In the weeks that followed, both supporters and detractors of the Project lobbied federal representatives and officials. For example, Taseko paid a delegation to speak in favour of the Project, and B.C. ministers apparently spoke to the federal Minister of the Environment. On the

other side, representatives of the TNG met with the Agency's President and some deputy ministers on February 12, 2014 to reiterate their positions. On February 13, 2014, the TNG also wrote to the Agency expressing concerns about Project supporters having access at the ministerial level.

[14] On February 21, 2014, the Minister was provided with a Memorandum that included a Crown Consultation Report, with the TNG's submissions in response to the Final Report in attachment. The Consultation Report included the TNG's views as to why the Project was not justified to proceed at the GIC decision stage. The Minister endorsed the recommendation and forwarded it to Cabinet. That Consultation Report was not provided to Taseko, nor were its submissions on justification sought.

[15] On February 26, 2014, the Minister released her Decision Statement. She decided that the Project was likely to cause significant adverse environment effects and the GIC decided that those effects were not justified in the circumstances.

[16] In the underlying application for judicial review, Taseko argued that the decisions of the Minister and GIC should be quashed for breaches of procedural fairness and jurisdictional errors, and asked the court below for a declaration that paragraph 5(1)(c) and section 6 of the CEAA, 2012 were unconstitutional, or in the alternative, that they were inapplicable, insofar as they impair the core of the provincial legislative power under section 92A of the *Constitution Act, 1867*.

II. The impugned decision

[17] On December 5, 2017, the Federal Court dismissed the application for judicial review. It found that the Minister owed Taseko only a "minimal" degree of procedural fairness (*ibid.*, at para. 61) and that even if a higher degree were owed, the record indicated that such a degree was in fact afforded in this case (*ibid.*, at para. 62). In its view, Taseko was aware of the case being made against it and was given an opportunity to answer it (*ibid.*, at para. 67). The Federal Court also rejected Taseko's claim that it should have been informed of any submissions received by the Minister in opposition to the Project, and that it should have been afforded an opportunity to respond prior to the final decision. There are certain circumstances where a proponent should be made aware of submissions made in the course of consultation, for example where the Crown intends to alter its position or make a decision that is contrary to the Final Report due to new concerns raised or new information provided by a First Nation. In the Federal Court's view, this is a "fair, practical and principled rule" that ensures a proper balance between the rights of a project proponent and the importance of the duty to consult (*ibid.*, at paras. 86 and 88). In the case at bar, the Federal Court found that no such new facts or concerns were adduced before the Minister to which Taseko could properly have responded (*ibid.*, at para. 80).

[18] The Federal Court also rejected the allegations of unfairness with respect to the GIC's decision on the basis that no duty attached to it (*ibid.*, at para. 117). It further held that, even if the GIC did owe Taseko a duty of fairness, its content would be "minimal", and it was satisfied here (*ibid.*, at para. 118). The Federal Court also found there were no jurisdictional errors (*ibid.*, at para. 121) and that the reasons given were sufficient (*ibid.*, at para. 122).

[19] Taseko's arguments with respect to the *Canadian Bill of Rights*, S.C. 1960, c. 44 and the unconstitutionality of paragraph 5(1)(*c*) and section 6 of the CEAA, 2012 were likewise unsuccessful. The Federal Court found that the former did not apply to the processes before the Minister and the GIC, insofar as these are not adjudicative processes and no "hearing" was held (*ibid.*, at para. 132). Concerning the constitutional question, the Federal Court held that it was not necessary to deal with it here (*ibid.*, at para. 143). If this issue had to be decided, the Federal Court said, it would have found the provisions to be within the federal Parliament's power to legislate for "Indians, and Lands Reserved for the Indians" in subsection 91(24) of the *Constitution Act, 1867*. Finally, the Federal Court would have rejected the interjurisdictional immunity argument on the ground that this doctrine is generally reserved for circumstances covered by precedent, and has not yet been found to cover a provincial head of power (*ibid.*, at paras. 157, 160).

III. Issues

[20] The present appeal raises four main questions, which can be formulated as follows:

A. Should the decision of the Minister be quashed for breaches of procedural fairness?

B. Should the decision of the GIC be quashed for breaches of procedural fairness?

C. Should the decisions of the Minister and the GIC be quashed for jurisdictional error?

D. Are paragraph 5(1)(*c*) and section 6 of the CEAA, 2012 inapplicable to the Project because of the doctrine of interjurisdictional immunity?

IV. Analysis

[21] On appeal from a decision of the Federal Court sitting in judicial review of a decision of an administrative decision-maker, the applicable standard of appellate review is generally that of *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47. This standard requires this Court to "step into the shoes" of the Federal Court, determine whether it identified the appropriate standard of review and whether it applied this standard correctly.

[22] The parties agree that the judge properly identified the applicable standard of review as being correctness, and rightly so (Reasons, at paras. 53-54). It is trite law that constitutional issues are to be assessed under the correctness standard (*Begum v. Canada (Citizenship and Immigration)* 2018 FCA 181, at para. 36; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 58), and that the same holds true for procedural fairness allegations (*Del Vecchio v. Canada (Attorney General)*, 2018 FCA 168, at paras. 3-4; *Kwan v. Amex Bank of Canada*, 2018 FCA 189, at para. 11; *Gupta v. Canada*, 2017 FCA 211, at paras. 28-29; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 79).

[23] Even when the duty of procedural fairness is at issue, however, the discrete findings of fact originally made by the application judge on the basis of evidence not contained in the

tribunal record are reviewable under the palpable and overriding error standard (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10). This Court recently reiterated this in *Apotex Inc. v. Canada (Health)*, 2018 FCA 147, 157 C.P.R. (4th) 289 [*Apotex*] and *Sturgeon Lake Cree Nation v. Hamelin*, 2018 FCA 131, 424 D.L.R. (4th) 366, which decisions also dealt with issues of procedural fairness. *Henthorne v. British Columbia Ferry*, 2011 BCCA 476, 344 D.L.R. (4th) 292 lends further support to this proposition at paragraph 77.

[24] Before turning to the substantive issues at the core of this appeal, a quick overview of the legislative scheme is in order. The environmental assessment of the designated project was referred to a review panel by the Minister pursuant to the old *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, and then continued under the CEAA, 2012 (ss. 126(1) and 38). Subsection 47(1) of the CEAA, 2012 provides that the Minister, "after taking into account the review panel's report with respect to the environmental assessment, must make decisions under subsection 52(1)". This provision holds, in relevant parts, that:

52.(1) …[T]he decision maker…must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project	**52.**(1) …[L]e décideur…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.

[25] If the Minister decides that the designated project is "likely to cause significant adverse environmental effects", subsection 52(2) provides that it must refer to the GIC "the matter of whether those effects are justified in the circumstances". The GIC can then decide, pursuant to subsection 52(4):

(*a*) that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or	*a*) soit que les effets environnementaux négatifs importants sont justifiables dans les circonstances;
(*b*) that the significant adverse environmental effects that the designated project is likely to cause are not justified in the circumstances.	*b*) soit que ceux-ci ne sont pas justifiables dans les circonstances.

[26] Lastly, subsection 54(1) provides that the Minister must issue a decision statement to the proponent of a project informing it of the decision(s) made under section 52 of the CEAA, 2012.

A. *Should the decision of the Minister be quashed for breaches of procedural fairness?*

(1) Degree of Procedural Fairness Owed

[27] The appellant argues that, considering the importance of the decision and the adversarial nature of the process, it was owed more than a "minimal" degree of procedural fairness by the Minister and that, in any event, it was not even afforded this "minimal" process.

[28] In the seminal case of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*], the Supreme Court, *per* Justice L'Heureux-Dubé, considered in detail the principles relevant to the determination of the content of the duty of procedural fairness. "The fact that a decision is administrative and affects 'the rights, privileges or interests of an individual' is sufficient to trigger the application of the duty of fairness" (*ibid.*, at para. 20). The mere existence of this duty does not, however, "determine what requirements will be applicable in a given set of circumstances" (*ibid.*, at para. 21), rather it is "[a]ll of the circumstances [that] must be considered in order to determine the content of the duty of procedural fairness" (*ibid.*, at para. 21).

[29] Several factors were recognized by the Supreme Court as relevant to determining what is required by the duty of procedural fairness. Underlying these factors:

> ...is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.
>
> *Ibid.*, at para. 22

[30] In other words, a determination of whether procedural fairness was met in any given case has always been context specific. As this Court stated in *Uniboard Surfaces Inc. v. Kronotex Fussboden GmbH and Co. KF*, 2006 FCA 398, [2007] 4 F.C.R. 101 [*Uniboard*], at para. 7:

> The duty of procedural fairness is better described by its objective – which is essentially to ensure that a party is given a meaningful opportunity in a given

> context to present its case fully and fairly – than by the means through which the objective is to be achieved for the simple reason that those means will depend on an appreciation of the context of the particular statute and the rights affected (see *Baker*..., at para. 22). There is no rigid test formula. There is no list of items to be checked out. The duty, to use the words of a former era, is to ensure fair play in action.

[31] The guiding principle, therefore, is that the person affected should be afforded the means to present their case fully and fairly, and have a decision made in a fair, impartial and open process, taking into consideration the statutory, institutional and social setting of that decision. It is clear 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 in a case such as this one. I shall have more to say about that later in my reasons.

[32] The appellant makes the case that two of the *Baker* factors—the importance of the Minister's decision and the adversarial nature of the process—called for more than a "minimal" degree of procedural fairness. For the reasons that follow, I would set aside these arguments.

[33] The judge dealt with this question at paragraphs 50 to 65 of his reasons. Having considered the environmental assessment scheme as a whole, he concluded that "the Panel process is the venue through which the parties are to be afforded a high degree of procedural fairness" (Reasons, at para. 58), and that the Ministerial decision-making process, by contrast, "did not involve any elements" indicating that the same level was owed at this stage (*ibid.*, at para. 59). In reaching his conclusion, the judge reviewed the *Baker* factors in light of the facts (*ibid.*, at para. 61):

> The Minister's decision making process did not resemble judicial decision making (i.e., the process was not established to be adversarial, and the Minister was not required to receive submissions). The Minister was making findings of fact (as argued by Taseko), but these findings were based on the findings in the Report during the stage of the process in which Taseko had been afforded a high degree of procedural fairness. Therefore, as discussed in [*Jada Fishing*], the duty of fairness in this case was not as rigorous as it would have been in an adversarial, judicial, or quasi-judicial process…
>
> Furthermore, the statutory scheme indicates that the proponent would only provide submissions if requested to do so by the Minister (s 47(2)). This indicates that the proponent does not have a right to provide such submissions, and it is entirely at the Minister's discretion whether such submissions are warranted in the circumstances.
>
> The importance of the decision…was reflected in the extensive process provided in front of the Panel. Further, in my view, the importance of the decision does not require that each step of the process take on a quasi-judicial character, particularly when a party's procedural rights have been comprehensively addressed at an earlier stage of the process.
>
> In addition, Taseko's claim that it had legitimate expectations with respect to the Minister's decision making process must be rejected. It was explicitly informed that its own post-Panel submissions would not be posted on the online registry (and that reasoning could easily be extended to cover any other submissions) and the CEAA's silence in response to Taseko's queries does not justify its assumptions with respect to process as silence does not constitute "established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified"…
>
> [References omitted]

[34] Other than referring to its written submissions before the Federal Court in a footnote stating that it does not accept the application judge's conclusion, "particularly having regard to the importance of the decision", and characterizing the latter's finding with respect to the adversarial nature of the process as "plainly incorrect, given the TNG's submissions", the appellant does not engage with either the judge's findings or the *Baker* factors. (Appellant's Memorandum of Fact and Law, at para. 19 [AMFL])

[35] In light of this, the appellant has not convinced me that the judge erred in concluding that it was only owed a "minimal" degree of procedural fairness at this stage of the process.

[36] With respect to the "importance of the decision", the judge was right to say that this "was reflected in the extensive process" before the Panel (Reasons, at para. 61). As noted by the judge, that process involved "oral hearings, the submission of evidence…, cross-examination, fact finding, and a number of other trappings associated with a quasi-judicial process" (*ibid.*, at para. 58). The appellant's rights were "comprehensively addressed" at this stage of the process, and there was no requirement that each following step "take on a quasi-judicial character" (*ibid.*, at para. 61). After all, each stage in the process takes its colour from the context (*Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 53.)

[37] In my view, the reasoning followed by this Court in *Jada Fishing Co. Ltd. v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 103, 288 N.R. 237, [*Jada*] is entirely apposite here. At issue in that case was a legislative scheme whereby the Department of Fisheries and Oceans (DFO) was granting fishing licenses with a quota determining the allowable catch for each licensee. An appeal board was set up to hear appeals from fishers who disagreed with the quota allocated to their licence, which could make non-binding recommendations to the Minister when extenuating circumstances existed. The appellants were complaining that the appeal board had breached the requirements of procedural fairness in allegedly hearing evidence from DFO officials in their absence, without permitting them to respond. Writing on behalf of this Court, Justice Malone agreed with the application judge that there was no indication that DFO officials

had done anything more than providing the appeal board with factual information of which the appellants had prior knowledge, and which did not prejudice them. He wrote at paragraph 16:

> …[T]he appellants were provided an oral hearing before the [appeal board], made submissions orally and in writing, and availed themselves of the opportunity to be represented by counsel. Under these circumstances, it is difficult to discern any procedural unfairness which may have resulted to the appellants. The procedure involved an exercise of discretion by the Minister in a non-adversarial process. While it would be subject to a requirement of fairness, it would not attract the rigorous standard of natural justice required in an adversarial, judicial, or quasi-judicial process. Accordingly, the authorities relied upon by the appellants, including [*Kane*], are of no assistance.

[38] I also agree with the respondent Minister that the appellant's "financial interests do not equate to those involving an individual's freedom, ability to work, or risk of physical harm, where higher levels of fairness and procedural rights have been found to … exist" (Respondent Minister's Memorandum of Fact and Law, at para. 53 [RMMFL]). This is not to say, obviously, that decisions affecting economic rights are inevitably less important than ones affecting individual rights. This idea was expressly rejected by this Court in *Uniboard* at paragraph 27. It is to say, rather, that in this case the appellant has not convinced me that the effect of the Minister's decision on it should attract the same level of procedural fairness as in *Baker* or *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105, 31 N.R. 214, [*Kane*], which dealt respectively with the deportation of a woman with Canadian-born dependent children and the suspension of a faculty member by a university.

[39] In any event, in the present case, this factor is neutralized by the influence of three other factors: the statutory scheme as a whole, the absence of legitimate expectations, and the deference owed to the Minister's procedural choices. These factors are considered below.

[40] As for the appellant's claim that the Ministerial decision-making process was adversarial in nature and fell at the judicial end of the spectrum, I find it to be without merit. As rightly pointed out by the respondent Minister, its task in the present case was essentially to form an opinion, based on the Final Report, "by considering the probabilities that certain societal concerns may materialize, and the significance of such materialization" (RMMFL, at para. 51). We are therefore far from a situation in which "the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making" (*Baker*, at para. 23). That there may be disagreement between proponents and opponents of a project does not change this fact.

[41] As for the other factors identified in *Baker*, I share the judge's opinion that they all support a lower degree of procedural fairness towards the appellant at this stage of the process. For one, the nature of the statutory scheme—specifically, the exhaustiveness of the Review Panel process, the fact that only the Final Report must be made public, and the absence of provision for unsolicited submissions to be made to the Minister—militates in favour of a minimal duty (*ibid.*, at para. 24). Likewise, the absence of legitimate expectations on the part of the appellant with respect to the Minister's conduct (*ibid.*, at para. 26) and the "important weight" that must be given to the choice of procedures made by the decision-maker and its institutional constraints (*ibid.*, at para. 27), support the conclusion of the application judge in this regard.

[42] Throughout their submissions, the appellant made much of the interrelation between the duty to consult and the duty of procedural fairness. In its view, the application judge erred in

failing to integrate the duty to consult into the *audi alteram partem* rule, and in choosing instead to restrict a proponent's right to be made aware of adverse submissions and to respond to these submissions in those limited circumstances where the Crown changes its position as a result. The gist of the judge's finding in this respect is reflected in the following two paragraphs of his reasons:

> [86] In this case, the TNG acknowledged that certain circumstances will require a proponent to be made aware of submissions made in the course of consultation: the TNG suggest that a proponent should be informed if the Crown intends to alter its position or make a decision that is contrary to the Panel Report due to new concerns raised by a First Nation. Similarly, at the hearing, the TNG suggested that the proponent's procedural fairness rights are engaged when the Crown is considering information arising in the course of consultation that is substantially new, that the Crown intends to rely on, and that materially effects the proponent.
>
> …
>
> [88] In my view, this is a fair, practical and principled rule that ensures the rights of project proponents are protected, while also recognizing the importance of the duty to consult.

[43] According to the appellant, this approach is flawed; a proponent should have the right to know and to respond to all adverse information provided during consultations with Indigenous groups except when it can be established that providing such information in a given case would violate the duty to consult. I am inclined to think that Taseko's proposal would trivialize the duty to consult and empty it of its true content. It must be remembered that the duty to consult (and accommodate) is part of a process of reconciliation, which itself flows from rights guaranteed by section 35(1) of the *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32). It could hardly be said that the duty to consult supports and promotes

reconciliation and re-affirms the nation-to-nation relationships with the First Nations if the Crown was equally to consult with the proponent and, for that matter, any other interested parties.

[44] I need not, however, come to any definitive view on that matter as I find that no breach of Taseko's right to procedural fairness has been demonstrated. Not only has Taseko had every opportunity to make its case, but moreover, the Crown made a decision that is entirely compatible with the Panel's findings that the Project would result in significant adverse environmental effects. In those circumstances, I do not think it would be advisable to craft broad general principles for situations that may best be left to a careful calibration of all the relevant facts.

(2) Timeliness of Procedural Fairness Allegations

[45] The appellant takes issue with the application judge's determination (Reasons, at paras. 75, 76) that its procedural fairness allegations could not be raised for the first time on judicial review as they could have been the subject of a timely complaint before the Minister. The fact that it discovered these meetings by way of a Facebook post, says the appellant, does not meet the requirement for waiver that a party be "fully informed of the facts", insofar as what was said at the meetings has only been revealed in the present legal proceedings (AMFL, at para. 60).

[46] In my view, the judge was right to conclude as he did. He relied on *Hennessey v. Canada*, 2016 FCA 180, 484 N.R. 77, in which this Court has made clear that allegations

> [20] …of bias and procedural unfairness in a first-instance forum cannot be raised on appeal or judicial review if they could reasonably have been the subject of timely objection in the first-instance forum…
>
> [21] A party must object when it is aware of a procedural problem in the first-instance forum. It must give the first-instance decision-maker a chance to address the matter before any harm is done, to try to repair any harm or to explain itself. A party, knowing of a procedural problem at first instance, cannot stay still in the weeds and then, once the matter is in the appellate court, pounce.

[47] This is not a question of formal waiver. It is one of whether the alleged procedural violations were raised at the earliest practical opportunity. Such opportunity arises when "the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection" (*Benitez v. Canada*, 2006 FC 461, [2007] 1 F.C.R. 107, at para. 220, aff'd at 2007 FCA 199, [2008] 1 F.C.R. 155, quoted by Justice Stratas in *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 455 N.R. 115, at para. 67 [*Maritime*]).

[48] In this regard, I agree with the respondent Minister that the earliest practical opportunity for the appellant to have complained about the TNG's meeting with the Minister would have been as early as October or November of 2013. Indeed, the judge found as a fact that the appellant knew about these meetings at that time (Reasons, at paras. 15-17; Appeal Book vol. 17, p. 22563). The judge also found that the appellant had a copy of the November 21, 2013 letter from the TNG to the Agency by December 1, 2013 (Reasons, at paras. 20; Appeal Book vol. 17, pp. 22561-62). By that time, the appellant also knew it was not being informed of what was said in these meetings, nor was it offered an opportunity to respond to it. It must have also known, at that moment, that the information provide by the TNG to the Minister would have been "adverse" to it (at least *per* its definition). Yet, it did not object at that time.

[49] I share the respondent Minister's view that the broad request to be "informed" set out by the appellant in a footnote to its November letters (Appeal Book vol. 14, pp. 19948) cannot relieve it of the obligation to protest having not received information about a consultation it was already aware of. Had the appellant objected before the Minister issued its decision, the latter might have been able to assist it. Having failed to object, it must be taken to have been content with the matter (*Maritime*, at para. 68). I thus agree with the judge that it has waived its right to raise the matter at this stage.

[50] That being said, because the appellant was not aware of the TNG's January 9, 2014 letter (Reasons, at para. 21), and because the judge considered its submissions at length, I will do the same.

(3) The *Audi Alteram Partem* Analytical Framework

[51] The appellant claims that the judge erred in law when he conflated what it considers to be the three steps for the analysis of alleged breaches to the *audi alteram partem* rule: (i) whether there is a risk of prejudice, (ii) whether a fair opportunity to respond was given, and (iii) whether relief should be granted. The appellant argues that the first of these steps is concerned solely with whether the impugned material was adverse to its position, and that the issue of whether the information was new or different is only relevant at the second stage of this analysis. In other words, any receipt of evidence, information or submission giving rise to a possibility of prejudice triggers the decision-maker's duty to provide the applicant with a fair opportunity to respond. As for the test for a "possibility of prejudice", the requirement is concerned only with whether the

impugned material was adverse to the applicant's position and could have affected the decision. Applying this test to the case at bar, the appellant submits that both the October meetings and the TNG's January 9, 2014 submission were adverse to Taseko's interests and could have affected the Minister's decision.

[52] In my view, the appellant unnecessarily complicates the issue and segments the analysis. Both parties agree that a "possibility" or "likelihood of prejudice" must be shown for a breach of the *audi alteram partem* rule to apply (*Kane*, p. 1116). Determining whether such a "possibility of prejudice" exists entails looking at whether the impugned information was "prejudicial" to the absent party's position, and whether it was "new" or "different" from what was previously said at the hearing. This is made clear in several decisions of this Court, such as: *Lazarov v. Secretary of State of Canada*, [1973] F.C. 927 (FCA), p. 940, 39 D.L.R. (3d) 738, at p. 750; *Cardinal Insurance Co. v. Canada (Finance)*, 138 D.L.R. (3d) 693, at p. 706, 44 N.R. 428, at p. 445-446 [*Cardinal Insurance*]; *Canadian Cable Television Assn. v. American College Sports Collective of Canada*, [1991] 3 F.C. 626 (FCA), 81 D.L.R. (4th) 376, at para. 38 [*Canadian Cable Television Assn.*]; *Jada*, at para. 17.

[53] The central question is thus whether the information at issue was prejudicial to the appellant and, by extension, whether it was new or different from what was presented at the hearing. It is immaterial whether this question should be asked at the first or at the second stage of what the appellant identifies as being the three steps of the *audi alteram partem* inquiry. Here, the judge found that the information at issue was neither prejudicial nor new or different from what was pleaded. To succeed, the appellant must thus show this finding to be wrong.

[54] In light of the above-quoted case law, I cannot accept the appellant's claim that a breach of procedural fairness will be found every time receipt of an *ex parte* statement is established "unless this Court is satisfied that there was *no possibility* of prejudice" (AMFL, at para. 31). In my view, the appellant's position in this regard amounts to a reversal of the burden of proof. The Supreme Court reminds us that it is the party invoking a breach of the *audi alteram partem* rule to establish an actual breach, "even if it can be difficult to obtain evidence to that effect in certain cases" (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 49 [*Ellis-Don*]).

[55] Contrary to what the appellant seems to suggest, the approach taken by the judge is not inconsistent with *Kane*. In that case, the President of UBC, who had imposed a suspension on a professor for personal use of school material, attended the appeal hearing of that suspension as a member of the Board of Governors. After the closing of the hearing, and in the absence of the professor, he provided further information in response to questions. He did not, however, take part in the deliberations. The Board of Governors' decision to affirm the suspension was challenged on fairness grounds.

[56] After recognizing the "large measure of autonomy" owed to a quasi-judicial decision-maker such as the Board concerning its procedural choices, the Supreme Court stressed that the latter must nonetheless observe natural justice (*Kane* at p. 1112). According to the Court, this entailed the following (*ibid.*, at pp. 1113-1116):

> 4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views"…

> 5. It is a cardinal principle of our law that, unless…empowered to act *ex parte*, an [appellate] authority must not hold private interviews with witnesses…or…hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must… "know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them…"
>
> 6. The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so…In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment… We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

[57] In support of that last statement, the Court cited Lord Denning's decision in *Kanda v. Government of the Federation of Malaya*, [1962] A.C. 322 [*Kanda*], in which the report of an inquiry containing an accusation against Mr. Kanda "as an unscrupulous scoundrel" was available to the decision-maker, but not to him. It is in this context that Lord Denning stated:

> It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough.
>
> Quoted in *Kane*, at p. 1121 (Ritchie, J., dissenting).

[58] It was therefore clear, in the case of *Kanda*, that there existed a possibility of prejudice.

[59] When applying these principles to the facts before it, the Supreme Court in *Kane* found that there had been a breach of the duty of procedural fairness before the Board of Governors. In reaching this conclusion, the Court appears to have relied in part on a statement from a letter to

the effect that the President provided the Board with "necessary facts". Its conclusions are as follows:

> …the Board…found that it needed additional, "necessary" facts before reaching a decision, and the President furnished those facts…
>
> The Board was under an obligation to postpone further consideration of the matter until such time as Dr. Kane might be present and hear the additional facts adduced; at the very least the Board should have made Dr. Kane aware of those facts and afforded him a real and effective opportunity to correct or meet any adverse statement made…The danger against which the courts must be on guard is the possibility that further information could have been put before the Board for its consideration which affected the disposition of the appeal…
>
> *Kane*, at pp. 1116-7.

[60] The Supreme Court's holding in *Kane* was further discussed in *Ellis-Don*. Relying on the last sentence of the above-quoted excerpt of *Kane* (at para. 56 of these reasons), the appellant argued that an apprehension of breach to the *audi alteram partem* rule was sufficient to justify intervention. In response, the Supreme Court made the following comments:

> [T]his excerpt does not have the meaning ascribed to it by the appellant. In *Kane*, the applicant had established an actual breach of the *audi alteram partem* rule: during the deliberations of the Board of Governors of UBC on a disciplinary matter, the President of the University had provided the decision-makers with supplementary facts in the absence of the parties. Dickson J., writing for the majority, simply said that once a breach of the *audi alteram partem* rule had been made out, it was not necessary to prove that this breach had caused an actual prejudice to the litigant, but only the likelihood of it.
>
> In support of its allegation of a breach of the *audi alteram partem* rule, Ellis-Don had to demonstrate an actual breach…The record as such does not indicate any breach of this nature. The only information available is that discussions took place at the full Board meeting and that a change was made on a question of law and policy in the draft decision. This is not sufficient to warrant judicial review.*Ellis-Don*, at paras. 50-51.

[61] Thus, *Kane* cannot be used in support of the idea that a mere apprehension of a breach of procedural fairness is sufficient to justify intervention. *Kane* considered an existing breach; not only was the Board of Governors presented new information (in the sense that the party had not been given an opportunity to address it earlier), but that information was "necessary" for the resulting decision. While it is true that "actual prejudice" need not be shown for a breach to be found, there still needs to be a "possibility" of prejudice on the face of the record. This is particularly true in a case such as this one, where the degree of procedural fairness owed is minimal. The judge therefore applied the correct approach when he stated that "a party must show that a possibility of prejudice arose from such a meeting or submission in order to constitute a breach of the *audi alteram partem* principle" (Reasons, at para. 71).

[62] The jurisprudence of this Court confirms that a prejudicial effect on a party is essential to establish a breach of procedural fairness. In *Canadian Cable Television Assn.*, the appellant complained that the Copyright Board received evidence outside the hearing process. Similarly to the case at bar, the appellant did not argue that the extra-hearing evidence was itself prejudicial but that the possibility it might have been was sufficient to establish a breach. After carefully reviewing the case law on the subject, MacGuigan J.A., writing for the Court, gave short shrift to that argument:

> In my opinion, this review of the case-law indicates the fallacy of the applicant's argument. Contrary to its contention that a court will not inquire into the question of prejudice, all of the authorities which focus on the matter show that the question of the possibility of prejudice is the fundamental issue: *Kane, Consolidated-Bathurst, Cardinal Insurance, Civic Employees Union,* and *Hecla Mining*.
>
> *Canadian Cable Television Assn*, at para. 37. See also: *Toshiba Corp v. Anti-Dumping Tribunal* (1984), 8 Admin. C.R. 173 (FCA); *Schaaf v. Minister of Employment and Immigration*, [1984] 2 F.C. 334 (FCA), at p. 442; *Uniboard*

Surfaces Inc. v. Kronotex Fussboden GmbH & Co., 2006 FCA 398, at paras. 21-22.

[63] To be fair, the appellant is right to point out that the question of the "possibility of prejudice" appears to have been considered in the case law for two distinct purposes: for determining whether there is a breach (*Canadian Cable Television Assn.* at paras. 25-26, 37-40); *Jada*, at para. 17) and for deciding whether a remedy is warranted (*Uniboard*, at paras. 13, 22 and 24). The appellant is also right to say that the judge could have distinguished the two notions more clearly. At paragraph 71 of his reasons, for example, he stated that a possibility of prejudice arising from a meeting or submission must be established to constitute a breach of the *audi alteram partem* principle, whereas at paragraph 73 he opines that a breach of that same principle without the possibility of a prejudice will not warrant a remedy. In fairness to the judge, however, this distinction is not often explicitly spelled out in the case law.

[64] Be that as it may, this lack of clarity was of no consequence. Whether the proof of prejudice is lacking at the breach stage or at the remedy stage matters little. At the end of the day, Taseko had to first demonstrate there was significant and relevant information presented to the Minister of which it did not have prior knowledge. That involves consideration of whether such information was both "fresh" and "prejudicial" to its position, such that it could even potentially change the case it had to meet. In my view, Taseko has failed on both counts.

(4) New information

[65] The appellant recognizes that it cannot be said to have been deprived of a fair opportunity to respond unless the impugned material introduces a possibility of prejudice different from that which it could reasonably have addressed in its submissions. But this "new information rule", as it calls it, will only apply if the impugned information was not made by an adverse party, and was not made before a different decision-maker. What matters, according to the appellant, is not whether the TNG said anything to the Minister that was new or different from what the TNG said to the Panel, but whether the TNG said anything new or different from what was contained in the Final Report. The appellant argues, therefore, that the new information rule cannot save the Minister's decision. Had the judge applied the proper comparison between the impugned October meetings and the TNG's submissions and the yet-to-exist Final Report (not the Panel process), he would necessarily have found that the discussions at the meeting could not have been limited to the contents of the Final Report. By deduction, significant portions of the TNG submissions thus went beyond what was found in the Final Report. I will consider these allegations in turn.

[66] In reaching his conclusion with respect to the October meetings, the application judge made the following findings of fact, notably on the basis of the affidavit evidence before him. During the October 8, 2013 meeting between the Minister and TNG representatives, the former "did not speak about any specifics of the project and she did not reveal any opinion or bias or view about the project and whether it ought to go forward or not" (Reasons, at para. 14). TNG's comments about the project were "variations of what they had previously indicated … in their

public comments, namely, regarding what they characterized as Taseko's failure to develop a relationship with the community, and what they characterized as Taseko's failure to adequately demonstrate that Fish Lake would be protected if the project proceeded" (*ibid.*, at para. 77).

[67] These discrete findings of fact were based on the evidence that was before the judge, as opposed to a review of the challenged administrative decision. To that extent, these findings are reviewable on the *Housen* standard, and the appellant must therefore show that they are vitiated by an overriding and palpable error (*Apotex*, at para. 57, and the case law referenced at this paragraph). In my view, the appellant has not met this burden.

[68] As mentioned above, the appellant argues that the discussions could not have been limited to the contents of the Final Report because it did not yet exist. This argument is without merit. First of all, the appellant's assertion—that this Court should only assess whether new information was conveyed in relation to the contents of the Final Report and not in relation to what was said during the process leading to that Report—is flawed. What the judge found, and properly so, was that the discussions at the meeting were limited to what was presented publicly by the TNG, both before the Panel and otherwise, part of which ultimately found its way into the Report.

[69] I am also unconvinced by the appellant's assertion that the comparison drawn by the judge between what was said before and after the Report was released, is wrong insofar as these representations were made before different decision-makers. Taseko was well aware of the environmental assessment process put in place by the CEAA, 2012 and knew that the different

phases of the process lead to decisions made by the Minister and, ultimately, the GIC. The question at issue is whether the appellant knew the case it had to meet, and whether it was given an opportunity to respond. Whether that opportunity was given during the review process or after is immaterial.

[70] Alternatively, the appellant argues that even if we accept that the proper comparison is between what the TNG said to the Minister at the October meeting and what she would later see in the Final Report, an adverse inference as to what fully transpired should be drawn. In Taseko's view, the judge was wrong to rely on the explanation from the TNG's counsel that it was satisfied with the President of the Canadian Environmental Assessment Agency's account of the meeting, and was wrong to refuse to draw an adverse inference against the TNG regarding the information discussed. This submission should be rejected. The judge was entitled to rely on the President's affidavit itself, which makes clear that the TNG representatives' "comments about the New Prosperity Project were variations of what they had previously indicated" (Reasons, at para. 77). I fail to see how the judge's refusal to draw the negative inference suggested by the appellant amounts to an overriding and palpable error.

[71] In light of the foregoing, I agree with the judge's conclusion that TNG said nothing new or different during the October meetings from the positions it took publicly and before the Panel. As noted by the judge, this Court dealt with a similar situation in *Jada* (discussed above at paragraph 37 of these reasons) and found that providing factual information in the absence of the appellants does not amount to a breach of procedural fairness, if the appellants had prior knowledge of that information and were not prejudiced by such information.

[72] I will now turn to the TNG submissions of January 9, 2014. The appellant argues that, contrary to the judge's determinations in this regard, a great deal of the TNG's written submissions were "new" *vis-à-vis* the Final Report. It notably points to the portions of them impugning its conduct, and to other parts concerning the justifiability of the Project, the prior environmental review process, the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UNGAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 [*UNDRIP*], and the mitigation of archeological effects. The appellant also takes issue with the fact that these written submissions responded to its own November submissions, which it alleges were not before the Minister.

[73] For the reasons that follow, I would also reject these arguments.

[74] Firstly, the appellant is wrong to assert that the TNG's submissions criticizing its conduct ran counter to the Final Report. The Report only stated that "[a] number of participants pointed out that Taseko…was considered a good corporate citizen" (Appeal Book vol. 3, p. 4443). It never said that the TNG was of that view, nor could it have, as the latter made clear throughout the review process that it found Taseko's conduct problematic (see, *e.g.*, Appeal Book vol. 10, pp. 14978-9; Appeal Book vol. 13, pp. 18771-18773). It is also worth pointing out that the Report recorded the TNG's submission that "they had a different vision and different values for these lands that are incompatible with this mining development" (Appeal Book vol. 3, p. 4444), as well as the many requests for information made by the TNG that were left unaddressed by the appellant (*ibid.*, p. 4272). Furthermore, it contained a general statement to the effect that both Taseko and the Indigenous groups described "communication and past experiences of

collaboration attempts between Taseko and the Aboriginal groups in relation with the New Prosperity Project as having been difficult and not successful" (*ibid.*, p. 4444).

[75] Secondly, the representations of both the appellant and the respondent TNG with respect to the justifiability of the Project were also clearly set out in the Final Report (*ibid.*, pp. 4442-4444). While the TNG does say more in its submissions than what was in the Report, the substance of these arguments were still previously made before the Panel (Appeal Book vol. 10, pp. 14974-83), and were thus known to the appellant.

[76] Thirdly, I agree with the respondent TNG that the appellant's concern that the impugned submissions referred to the original project and to the first Review Panel Report is unwarranted. As a matter of fact, the Minister specifically instructed the Panel to consider whether the second design addressed the issues of the first, and encouraged it to make use of the data obtained in the first environmental assessment (Appeal Book vol. 3, p. 4202). These issues were reviewed by and considered in the Final Report itself (*ibid.*, pp. 4236-37). In fact, the Panel explicitly accepted as a "legitimate concern" the fact that "the preferred alternative [means of carrying out the Project] was exactly the same as a mine development plan rejected by Taseko in the previous review" (*ibid.*, p. 4236).

[77] Fourthly, it should be noted that, contrary to the appellant's claim, the Report referred to both the TNG's reliance on the *UNDRIP* (*ibid.*, pp. 4405, 4411), and Taseko's reply to it (*ibid.*, p. 4402).

[78] Fifthly, I am unconvinced by the appellant's submission that the TNG incorrectly noted, in its written submissions, that the Panel found the archeological effects of the Project not to be mitigable. Quite to the contrary, the Report states:

> The Panel has determined that the Project would have adverse effects on the Tsilhqot'in current use of lands and resources for traditional purposes, archeological and historical sites, and cultural heritage and that these adverse effects could not be mitigated and therefore would be significant.
>
> (*ibid.*, p. 4198; emphasis added)

[79] I also cannot accept the appellant's claim that its November letters were not before the Minister. The judge accepted evidence that these letters were before the Minister at the time of the decision (Appeal Book vol. 14, pp. 19769, 19944, 19948, 19958, 19963; Reasons, at paras. 36, 40, 62 and 67) and that, in any event, the Hallman Memo (which the Minister also reviewed) included a 9-page memorandum dealing with the key issue addressed in Taseko's letters (Appeal Book vol. 14, pp. 19769; Appeal Book Vol. 17, p. 23262; Reasons, at para. 62). The appellant has not convinced me that the judge committed an overriding and palpable error in this regard.

[80] Finally, the allegation of unfairness resulting from the fact that the TNG threatened litigation against Canada for the first time in its January 9, 2014 submission is devoid of any merit. Litigation is always an option for an aggrieved party, and both the government and Taseko must have been aware all along that the TNG could eventually resort to the courts if they were unsatisfied with the process, as indeed many Indigenous and non-Indigenous groups have done in the past with respect to designated projects subject to environmental assessment. Indeed, by

that time, Taseko itself had both threatened and then brought litigation against Canada over the Report (Appeal Book vol. 14, at pp. 19215, 19961).

[81] Before concluding on this part of the appellant's argument, a word must be said with respect to its submission that even the reorganization and restatement of a submission should result in a breach of procedural fairness. The appellant relies for that proposition on a decision of the British Columbia Court of Appeal in *Communications, Energy and Paperworkers Union of Canada, Powell River Local 76 v. Power Engineers and Boiler and Pressure Vessel Safety Appeal Board*, 2001 BCCA 743, 209 D.L.R. (4th) 208. In that case, the Court found that the opportunity to reorganize and restate a submission after an oral hearing is significant, and that either all or none of the parties should be given that privilege.

[82] First, I note that this holding does not seem to have been widely followed by appellate courts, and is at odds with decisions rendered by this Court on the matter: see *Cardinal Insurance*, p. 706; *Canadian Cable Television Assn* at para. 38; *Jada*, at para. 17. Moreover, the facts of the two cases can easily be distinguished. The written submissions made by the TNG were not made to the Panel after the hearing and before the release of the Report, but were sent to the Minister after the Report was made public. More importantly, the appellant also made written submissions to the Minister regarding its concerns about the Report, notably by way of its November correspondence (Appeal Book vol. 4, p. 5735 and vol. 14, p. 19963; Reasons, at para. 36 and 40) and January 2014 letter (Appeal Book vol. 17, pp. 22589-90, 22737-38; Reasons, at para. 42). As determined by the judge, these written submissions were before the Minister at the time of its decision (Appeal Book vol. 14, p. 19769, 19944, 19948, 19958;

Reasons, at paras. 36, 40, 62 and 67). The Hallman Memo, also reviewed by the Minister in January 2014, likewise dealt with the key issues addressed in the November correspondence (Appeal Book vol. 14, p. 19769; Appeal Book vol. 17, p. 23262; Reasons, at para. 62).

[83] For all of the foregoing reasons, I must conclude that the appellant knew the case made against it, as well as the substance of the information contained within the TNG's January 9, 2014 letter. I agree with the judge that much of the TNG's submissions merely repeated comments made publicly earlier. In any event, even if this Court were to consider some of this information "new", I would still find, as will be explained below, that the appellant was given a fair opportunity to respond to it.

(5) Opportunity to Respond

[84] The judge found that the appellant was not only aware of the case it had to meet, but that it was also given an opportunity to answer it (Reasons, at paras. 62, 67, 68) :

> [E]ven if Taseko were owed a significant degree of procedural fairness, the record in this case indicated that Taseko was in fact afforded that degree of procedural fairness. Taseko made submissions on the Report in November of 2013, and then provided clarifications of its positions; the evidence indicates that this was forwarded in the Minister's office. The material that was before the Minister (i.e. the Hallman Memo) included discussions of the main contention raised in Taseko's post-Report, particularly the memorandum on the "wrong project design" claim and the TNG's responses to Taseko's submissions.
>
> …
>
> In my view, Taseko was aware of the case being made against it and was given an opportunity to answer it, both before the Panel and by making written submissions to the Minister. The jurisprudence does not support the contention that Taseko had the right to be informed of any and all meetings with the Minister or the TNG's submissions to the Minister.

> Taseko has not identified any information submitted by the TNG to the Minister as being new or different from that which was previously before the Panel (and to which Taseko had the opportunity to respond).
>
> (emphasis in original)

[85] The appellant takes issue with these determinations. Firstly, it argues that, *per* the Rule 318 transmittal, its November 2013 submissions were not before the appellant, and so did not afford it any opportunity to respond. Secondly, it claims that the judge was wrong to conclude on the basis of inadmissible media reports that it had access to federal decision-makers. It also denies having hired a former TNG Chief to support the Project, noting that it only paid the Chief's expenses.

[86] While the appellant is correct that its November letters were not attached to the Rule 318 Certificate, an affidavit by the author of that certificate nonetheless states that the appellant's November letters were forwarded by the Agency to the Minister's office in general, and directly to Mr. Aaron Hynes (the Agency's point-of-contact with the Minister's office on this matter). Moreover, the affidavit clarified that the certificate was intended only to include documents that were both before the decision-maker and not already in Taseko's possession (Appeal Book vol. 14, p. 19768). In addition, the TNG's January 9, 2014 letter, which Taseko concedes was before the Minister, repeatedly cross-referenced Taseko's November letters. Finally, the record also reveals, as noted by the judge, that the appellant sent those letters directly to the Minister, a method it frequently used with apparent satisfaction when contacting her and other ministers. Accordingly, it was not unreasonable for the judge to conclude that these letters were before the Minister.

[87] With respect to the judge's conclusion that the appellant had access to federal decision-makers, I note that, contrary to what the appellant suggests in its memorandum, this conclusion was not only based on media reports, but also on several other pieces of evidence. For example, Mr. McManus' testimony and email chains revealed that the appellant was in close contact with then B.C. Minister of Energy and Mines, Bill Bennett, who travelled to Ottawa to lobby federal decision-makers in favour of the Project (Appeal Book vol. 17, pp. 22573-22599, 22725-22754, 23257-23258; Reasons, at para. 38). The record also shows that the appellant provided provincial officials with a detailed letter from its counsel setting out arguments that could be raised against the rejection of the Project by federal authorities (*ibid.*, pp. 22726-22733). The evidence is also to the effect that Minister Bennett advised the appellant that he had given a letter in support of the Project directly to the federal Minister (*ibid.*, pp. 22595-22599, 22751-22754), that he went to Ottawa to support the Project (*ibid.*, pp. 22600-22602), and that, in doing so, he had in fact met with federal representatives (*ibid.*, p. 22602).

[88] The record also shows that in February of 2014, the appellant paid for a former chief of the TNG, Mr. Charleyboy, to travel to Ottawa to advocate for the Project. At that time, Mr. Charleyboy was paid over $5,000 per month to act as a consultant for the appellant. Mr. Charleyboy was able to have at least one brief, public conversation with the Prime Minister, outside of Parliament (*ibid.*, at pp. 22610-22613, 22629-22634, 22755; Reasons, at para. 36). On this basis, it was not unreasonable for the judge to hold that Mr. Charleyboy was "paid to attempt to influence public office holders and to hold meetings with them" (*ibid.*, at para. 103). The distinction drawn by the appellant between paying him and paying his expenses is, at best, semantic.

[89] For all of the above reasons, the appellant has not convinced me that the judge erred in concluding that it was not only aware of the case it had to meet, but that it was also given an opportunity to answer.

B. *Should the decision of the GIC be quashed for breaches of procedural fairness?*

[90] The appellant argues that the procedural defects impacting the Minister's decision extend to the GIC decision, as the Minister made the initial recommendation, and was a central participant in the decision–making process. It points out that the TNG submission, which is presumed to have been before the GIC, contains claims with respect to justifiability, an issue which it alleges it was not given an opportunity to make submissions about.

[91] The judge rejected these allegations on the basis that no duty of procedural fairness attached to this GIC decision. He further held that, even if the GIC did owe the appellant a duty of fairness, its content would be "minimal", and the duty would be met here; not only does the legislation not contemplate submissions to the GIC, but the materials claimed by the appellant in the present case are also confidence of the Queen's Privy Council.

[92] On the basis of the legislative scheme at issue, the judge was right to conclude that no such duty of procedural fairness attached to the GIC process. The CEAA, 2012 does not contemplate a right to make direct submissions to the GIC. As noted by the respondent Minister, it would be contrary to the language and structure of the statutory regime, as well as the very nature of the GIC decision-making process, to impose one. In this respect, the judge was well

advised to rely on the reasoning of the Supreme Court of Canada in *Attorney General of Canada v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735 pp. 755-756, 115 D.L.R. (3d) 1, that:

> While it is true that a duty to observe procedural fairness, as expressed in the maxim *audi alteram partem*, need not be express…, it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply. It is my view that the supervisory power of s. 64…is vested in members of the Cabinet in order to enable them to respond to the political, economic and social concerns of the moment. Under s. 64 of the Cabinet, as the executive branch of government, was exercising the power delegated by Parliament to determine the appropriate tariffs for the telephone services of Bell Canada. In so doing the Cabinet, unless otherwise directed in the enabling statute, must be free to consult all sources which Parliament itself might consult had it retained this function…

[93] In any event, as noted above, the appellant and its supporters did in fact make written representations to ministers and the Prime Minister justifying the Project, by way of letters sent directly to officials (Reasons, at paras. 31, 34, 36; Appeal Book vol. 17, pp. 22737-22738, 22766-22773). The representations of both the appellant and the respondent TNG with respect to the justifiability of the Project were also clearly set out in the Final Report (Appeal Book vol. 3, pp. 4442-4444).

[94] In light of the low threshold of procedural fairness owed by the GIC to the appellant, I have no doubt that the process at that level was entirely fair. The judge did not err in finding that the minimal duty of fairness was satisfied in this case.

C. *Should the decisions of the Minister and the GIC be quashed for jurisdictional error?*

[95] Relying on their arguments in the A-7-18 case, the appellant argues that the Panel's review process was so deficient that the Report submitted to the Minister and the GIC did not qualify as a "report" within the meaning of the CEAA, 2012. The appellant states that for this reason, the decisions of both the Minister and the GIC were made without jurisdiction.

[96] Having concluded in *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100 that the review process had been fair to the appellant, the judge summarily rejected this claim at paragraph 121:

> The GIC had jurisdiction to make this decision. … [T]he Report complied with the requirements of the *CEAA, 2012* and all relevant factors were considered. The statutory process was followed, there are no indications of bad faith, and the decisions were made in accordance with the purposes of the *CEAA, 2012*…

[97] The reasons set out in A-7-18, equally apply in the case at bar.

D. *Are paragraph 5(1)(c) and section 6 of the CEAA, 2012 inapplicable to the Project because of the doctrine of interjurisdictional immunity?*

[98] In the Federal Court, Taseko argued that paragraph 5(1)(*c*) and section 6 of the CEAA, 2012 are of no force and effect because they are *ultra vires* of Parliament; in the alternative, Taseko claimed that interjurisdictional immunity renders these provisions inapplicable to the Project because they impair the core of provincial legislative jurisdiction over non-renewable natural resources under section 92A of the *Constitution Act, 1867*. Yet in its oral and written

arguments before this Court, the appellant only makes the case that the judge erred in not recognizing that paragraph 5(1)(*c*) and section 6 of the CEAA, 2012 represent a significant intrusion by Parliament into section 92A of the *Constitution Act, 1867* and prevent the provinces from exercising their legislative powers. The appellant thereby seems to have abandoned the allegations made in its Notice of Appeal and Notice of Constitutional Question that these sections are also invalid.

[99] For ease of reference, the text of paragraph 5(1)(*c*) of the CEAA, 2012 bears reproducing:

5.(1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are	**5.**(1) Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un projet désigné ou d'un projet sont les suivants:
…	[…]
(*c*) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on	*c*) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas :
(i) health and socio-economic conditions,	(i) en matière sanitaire et socio-économique,
(ii) physical and cultural heritage,	(ii) sur le patrimoine naturel et le patrimoine culturel,
(iii) the current use of lands and resources for traditional purposes, or	(iii) sur l'usage courant de terres et de ressources à des fins traditionnelles,

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.	(iv) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

[100] Section 6 of the CEAA, 2012 prohibits the proponent of a designated project from carrying out said project if doing so may cause an environmental effect referred to in subsection 5(1), unless the Agency finds that no environmental assessment of the project is required (s. 6(*a*)), or unless it does so in compliance with the conditions included in the decision statement (s. 6(*b*)).

[101] The application judge determined that this question did not need to be addressed in the present case insofar "as the justifiability of the Project was determined according to ss. 5(1)(*a*) and 5(2) of the CEAA, 2012, not just the impugned s. 5(1)(*c*)" (Reasons, at para. 139). Paragraph 5(1)(a) of the CEAA, 2012, which is not challenged by the appellant, is concerned with effects:

5.(1)(*a*) …that may be caused to the following components of the environment that are within the legislative authority of Parliament:	**5.**(1)*a*)…qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement:
(i) fish as defined in section 2 of the *Fisheries Act* and fish habitat as defined in subsection 34(1) of that Act,	(i) les poissons au sens de l'article 2 de la *Loi sur les pêches* et l'habitat du poisson au sens du paragraphe 34(1) de cette loi,
(ii) aquatic species as defined in subsection 2(1) of the *Species at Risk Act*,	(ii) les espèces aquatiques au sens du paragraphe 2(1) de la *Loi sur les espèces en péril*,
(iii) migratory birds as defined in subsection 2(1) of the *Migratory*	(iii) les oiseaux migrateurs au sens du paragraphe 2(1) de a *Loi de 1994 sur la convention concernant*

Birds Convention Act, 1994, and	*les oiseaux migrateurs*,
(iv) Any other component of the environment that is set out in Schedule 2;	(iv) toute autre composante de l'environnement mentionnée à l'annexe 2;

[102] As for subsection 5(2) of the CEAA, 2012, also referred to by the judge, it identifies the further environmental effects to be taken into consideration when the project requires a federal authority to exercise a power "conferred on it under any Act of Parliament other than this Act". The Project at issue notably required permits, approvals, authorizations and/or licences under the *Fisheries Act*, R.S.C., 1985, c. F-14, *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22, and *Explosives Act*, R.S.C., 1985, c. E-17 (see the Final Report, Appeal Book vol. 3, p. 4220).

[103] Thus, because the Project was deemed unjustified under these provisions, which provisions are not challenged, and because the appellant did not raise the constitutional issue at the outset of the process, the judge held that there was an insufficient factual matrix to conduct a robust analysis of the constitutionality of these provisions.

[104] I agree with the respondent Minister that, to the extent the appellant has not offered any argument, nor shown any error committed by the judge in the exercise of his discretionary power to determine the constitutional question, this Court should not intervene. His decision was based on his findings of mixed fact and law. Absent a palpable and overriding error, it is not reviewable.

[105] It is well established that in cases where an issue can be decided on a non-constitutional ground, the course of judicial restraint is to decide the case on this precise ground (see *Philips v.*

Nova Scotia (Commissioner, Public Inquiries Act), [1995] 2 S.C.R. 97, 124 D.L.R. (4th) 129, at paras. 6-9; *MacKay v. Manitoba (Attorney General)*, [1989] 2 S.C.R. 357, at pp. 361-367, 61 D.L.R. (4th) 385). As noted by Peter Hogg, in opting for this alternative, "the dispute between the litigants is resolved, but the impact of a constitutional decision on the powers of the legislative or executive branches of government is avoided" (Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters, 2007) (loose-leaf 2019 supplement), ch. 59 at 59-22). This route is particularly well advised in light of the Supreme Court's caution that interjurisdictional immunity is not the preferred method for resolving constitutional disputes and appears to be at odds with cooperative federalism (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 35, 43, 47, 77 and 78).

V. Conclusion

[106] For all of the above reasons, I would dismiss the appeal, with costs.

"Yves de Montigny"
J.A.

"I agree.
David Stratas J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-6-18
STYLE OF CAUSE:	TASEKO MINES LIMITED v. THE MINISTER OF THE ENVIRONMENT AND THE ATTORNEY GENERAL OF CANADA AND THE TSILHQOT'IN NATIONAL GOVERNMENT AND JOEY ALPHONSE, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE TSILHQOT'IN NATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 15, 2019
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	STRATAS J.A. NEAR J.A.
DATED:	DECEMBER 18, 2019

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