Federal Court  Cour fédérale

Date: 20171205

Docket: T-744-14

Citation: 2017 FC 1100

Ottawa, Ontario, December 5, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

TASEKO MINES LIMITED

Applicant

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

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application by Taseko Mines Limited [Taseko] for judicial review of a February 25, 2014 Decision Statement, which communicated the decisions of the Minister of the Environment [Minister] and the Governor in Council [GIC] made pursuant to section 52 of the

Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52 [*CEAA 2012*]. The Minister decided that the New Prosperity Gold-Copper Mine Project was likely to cause significant adverse environmental effects, and the GIC decided that these effects were not justified in the circumstances.

[2] The background to this judicial review is the attempt by Taseko to secure environmental approval of the New Prosperity Gold-Copper Mine [the Project], an open pit gold and copper mine southwest of Williams Lake, British Columbia. The mine site was within the traditional territory of the Tsilhqot'in peoples.

[3] The Project underwent an environmental assessment at the end of which the Review Panel [Panel] charged with the assessment issued its Report. The Report concluded that the seepage of toxic water from the tailings storage facility [TSF] at the mine site would be greater than Taseko estimated. The Panel was also not satisfied with Taseko's proposal to deal with mediation steps after it received project approval.

[4] The above was the genesis of the judicial review in the related file T-1977-13 which is an application for judicial review of the Review Panel Report. The decision on that matter was issued on December 5, 2017.

[5] In the present case, the judicial review concerns allegations of breaches of procedural fairness and jurisdictional errors, as well as a constitutional challenge to sections 5(1)(c), 6 and 7 of the *CEAA 2012*. (Section 7, however, was not strongly advanced.)

[6] In summary, this application for judicial review will be dismissed. At this stage of the process the Applicant was owed some degree of procedural fairness, and this was satisfied in the circumstances. Further, as to the constitutionality of sections 5(1)(c), 6 and 7 of the *CEAA 2012*, the matter need not be decided at this time and on this record and in the alternative, the provisions are constitutional.

[7] Taseko seeks the following relief:

1. An order quashing the Minister's decisions under sub-sections 52(1)(a) and (b) of the *CEAA 2012* that the Project is likely to cause significant adverse environmental effects, and referring those decisions back to the Minister for reconsideration in accordance with the directions of the Court.
2. An order quashing the GIC's decision that the significant adverse environmental effects that the Project is likely to cause are not justified in the circumstances, and referring that decision back to the GIC for reconsideration in accordance with the directions of the Court.
3. A declaration that sections 5(1)(c), 6 and 7 of *CEAA 2012* are *ultra vires* the federal government's legislative powers under section 91 of the *Constitution Act, 1867* and are thus of no force and effect.
4. In the alternative, a declaration that sections 5(1)(c), 6 and 7 of the *CEAA 2012* impair the core of provincial legislative powers under section 92 of the *Constitution Act, 1867* and must be read down or declared inapplicable.
5. Costs of this application.
6. Such further and other relief as this Honourable Court deems just.

II. BACKGROUND

[8] The pertinent legislation is set out below:

Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52

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 :
(a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:	**a)** les changements qui risquent d'être causés aux composantes ci-après de l'environnement qui relèvent de la compétence législative du Parlement :
(i) fish and fish habitat as defined in subsection 2(1) of the *Fisheries Act*,	**(i)** les poissons et leur habitat, au sens du paragraphe 2(1) de la *Loi sur les pêches*,
(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 Birds Convention Act, 1994*, and	**(iii)** les oiseaux migrateurs au sens du paragraphe 2(1) de la *Loi de 1994 sur la convention concernant 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;
(b) a change that may be caused to the environment that would occur	**b)** les changements qui risquent d'être causés à l'environnement, selon le cas

:

(i) on federal lands,

(i) sur le territoire domanial,

(ii) in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or

(ii) dans une province autre que celle dans laquelle la mesure est prise, l'activité est exercée ou le projet désigné ou le projet est réalisé,

(iii) outside Canada; and

(iii) à l'étranger;

(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.

(2) However, if the carrying out of the physical activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function

(2) Toutefois, si l'exercice de l'activité ou la réalisation du projet désigné ou du projet exige l'exercice, par une autorité fédérale, d'attributions qui lui sont conférées sous le

conferred on it under any Act of Parliament other than this Act, the following environmental effects are also to be taken into account:

(a) a change, other than those referred to in paragraphs (1)(a) and (b), that may be caused to the environment and that is directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of the physical activity, the designated project or the project; and

(b) an effect, other than those referred to in paragraph (1)(c), of any change referred to in paragraph (a) on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage, or

(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

…

6 The proponent of a designated project must not do any act or thing in connection

régime d'une loi fédérale autre que la présente loi, les effets environnementaux comprennent en outre :

a) les changements — autres que ceux visés aux alinéas (1)a) et b) — qui risquent d'être causés à l'environnement et qui sont directement liés ou nécessairement accessoires aux attributions que l'autorité fédérale doit exercer pour permettre l'exercice en tout ou en partie de l'activité ou la réalisation en tout ou en partie du projet désigné ou du projet;

b) les répercussions — autres que celles visées à l'alinéa (1)c) — des changements visés à l'alinéa a), selon le cas :

(i) sur les plans sanitaire et socio-économique,

(ii) sur le patrimoine naturel et le patrimoine culturel,

(iii) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.

[…]

6 Le promoteur d'un projet désigné ne peut prendre une mesure se rapportant à la

with the carrying out of the designated project, in whole or in part, if that act or thing may cause an environmental effect referred to in subsection 5(1) unless

réalisation de tout ou partie du projet et pouvant entraîner des effets environnementaux visés au paragraphe 5(1) que si, selon le cas :

(a) the Agency makes a decision under paragraph 10(b) that no environmental assessment of the designated project is required and posts that decision on the Internet site; or

a) l'Agence décide, au titre de l'alinéa 10b), qu'aucune évaluation environnementale du projet n'est requise et affiche sa décision sur le site Internet;

(b) the proponent complies with the conditions included in the decision statement that is issued under subsection 31(3) or section 54 to the proponent with respect to that designated project.

b) le promoteur prend la mesure en conformité avec les conditions qui sont énoncées dans la déclaration qui lui est remise au titre du paragraphe 31(3) ou de l'article 54 relativement au projet.

7 A federal authority must not exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit a designated project to be carried out in whole or in part unless

7 L'autorité fédérale ne peut exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi et qui pourraient permettre la réalisation en tout ou en partie d'un projet désigné que si, selon le cas :

(a) the Agency makes a decision under paragraph 10(b) that no environmental assessment of the designated project is required and posts that decision on the Internet site; or

a) l'Agence décide, au titre de l'alinéa 10b), qu'aucune évaluation environnementale du projet n'est requise et affiche sa décision sur le site Internet;

(b) the decision statement with respect to the designated project that is issued under subsection 31(3) or section 54 to the proponent of the designated project indicates

b) la déclaration remise au promoteur du projet au titre du paragraphe 31(3) ou de l'article 54 relativement au projet donne avis d'une décision portant que la

that the designated project is not likely to cause significant adverse environmental effects or that the significant adverse environmental effects that it is likely to cause are justified in the circumstances.

réalisation du projet n'est pas susceptible d'entraîner des effets environnementaux négatifs importants ou que les effets environnementaux négatifs importants que la réalisation du projet est susceptible d'entraîner sont justifiables dans les circonstances.

…

[…]

47 (1) The Minister, after taking into account the review panel's report with respect to the environmental assessment, must make decisions under subsection 52(1).

47 (1) Après avoir pris en compte le rapport d'évaluation environnementale de la commission, le ministre prend les décisions prévues au paragraphe 52(1).

(2) The Minister may, before making decisions referred to in subsection 52(1), require the proponent of the designated project to collect any information or undertake any studies that, in the opinion of the Minister, are necessary for the Minister to make decisions.

(2) Il peut, avant de les prendre, faire procéder par le promoteur du projet désigné en cause aux études et à la collecte de renseignements qu'il estime nécessaires à la prise des décisions.

…

[…]

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);

a) d'une part, d'entraîner des effets environnementaux visés au paragraphe 5(1) qui

and

(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).

sont négatifs et importants;

b) d'autre part, d'entraîner des effets environnementaux visés au paragraphe 5(2) qui sont négatifs et importants.

(2) If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

(2) S'il décide que la réalisation du projet est susceptible d'entraîner des effets environnementaux visés aux paragraphes 5(1) ou (2) qui sont négatifs et importants, le décideur renvoie au gouverneur en conseil la question de savoir si ces effets sont justifiables dans les circonstances.

(3) If the decision maker is a responsible authority referred to in any of paragraphs 15(a) to (c), the referral to the Governor in Council is made through the Minister responsible before Parliament for the responsible authority.

(3) Si le décideur est une autorité responsable visée à l'un des alinéas 15a) à c), le renvoi se fait par l'entremise du ministre responsable de l'autorité devant le Parlement.

(4) When a matter has been referred to the Governor in Council, the Governor in Council may decide

(a) that the significant adverse environmental effects that the designated project is likely to cause are justified in the circumstances; or

(b) that the significant adverse environmental effects that the designated project is likely to cause are not justified in the circumstances.

(4) Saisi d'une question au titre du paragraphe (2), le gouverneur en conseil peut décider :

a) soit que les effets environnementaux négatifs importants sont justifiables dans les circonstances;

b) soit que ceux-ci ne sont pas justifiables dans les circonstances.

…

54 (1) The decision maker must issue a decision statement to the proponent of a designated project that

(a) informs the proponent of the designated project of the decisions made under paragraphs 52(1)(a) and (b) in relation to the designated project and, if a matter was referred to the Governor in Council, of the decision made under subsection 52(4) in relation to the designated project; and

(b) includes any conditions that are established under section 53 in relation to the designated project and that must be complied with by the proponent.

(2) When the decision maker has made a decision under paragraphs 52(1)(a) and (b) in relation to the designated project for the purpose of section 47, the decision maker must issue the decision statement no later than 24 months after the day on which the environmental assessment of the designated project was referred to a review panel under section 38.

(3) The decision maker may extend that time limit by any further period – up to a maximum of three months – that is necessary to permit cooperation with any jurisdiction with respect to the

[…]

54 (1) Le décideur fait une déclaration qu'il remet au promoteur du projet désigné dans laquelle :

a) il donne avis des décisions qu'il a prises relativement au projet au titre des alinéas 52(1)a) et b) et, le cas échéant, de la décision que le gouverneur en conseil a prise relativement au projet en vertu du paragraphe 52(4);

b) il énonce toute condition fixée en vertu de l'article 53 relativement au projet que le promoteur est tenu de respecter.

(2) Dans le cas où il a pris les décisions au titre des alinéas 52(1)a) et b) pour l'application de l'article 47, le décideur est tenu de faire la déclaration dans les vingt-quatre mois suivant la date où il a renvoyé, au titre de l'article 38, l'évaluation environnementale du projet pour examen par une commission.

(3) Il peut prolonger ce délai de la période nécessaire pour permettre toute coopération avec une instance à l'égard de l'évaluation environnementale du projet ou pour tenir compte des circonstances particulières

environmental assessment of the designated project or to take into account circumstances that are specific to the project.

du projet. Il ne peut toutefois prolonger le délai de plus de trois mois.

(4) The Governor in Council may, on the recommendation of the Minister, extend the time limit extended under subsection (3).

(4) Le gouverneur en conseil peut, sur la recommandation du ministre, prolonger le délai prolongé en vertu du paragraphe (3).

(5) The Agency must post a notice of any extension granted under subsection (3) or (4) on the Internet site.

(5) L'Agence affiche sur le site Internet un avis de toute prolongation accordée en vertu des paragraphes (3) ou (4) relativement au projet.

(6) If the Agency, the review panel or the Minister, under section 39 or subsection 44(2) or 47(2), respectively, requires the proponent of the designated project to collect information or undertake a study with respect to the designated project, the calculation of the time limit within which the decision maker must issue the decision statement does not include:

(6) Dans le cas où l'Agence, la commission ou le ministre exigent du promoteur, au titre de l'article 39 ou des paragraphes 44(2) ou 47(2), selon le cas, qu'il procède à des études ou à la collecte de renseignements relativement au projet, ne sont pas comprises dans le calcul du délai dont dispose le décideur pour faire la déclaration :

(a) the period that is taken by the proponent, in the opinion of the Agency, to comply with the requirement under section 39;

a) la période prise, de l'avis de l'Agence, par le promoteur pour remplir l'exigence au titre de l'article 39;

(b) the period that is taken by the proponent, in the opinion of the review panel, to comply with the requirement under subsection 44(2); and

b) la période prise, de l'avis de la commission, par le promoteur pour remplir l'exigence au titre du paragraphe 44(2);

(c) the period that is taken by the proponent, in the opinion of the Minister, to comply

c) la période prise, de l'avis du ministre, par le promoteur pour remplir l'exigence au

with the requirement under subsection 47(2).

titre du paragraphe 47(2).

…

[…]

126 (1) Despite subsection 38(6) and subject to subsections (2) to (6), any assessment by a review panel, in respect of a project, commenced under the process established under the former Act before the day on which this Act comes into force is continued under the process established under this Act as if the environmental assessment had been referred by the Minister to a review panel under section 38. The project is considered to be a designated project for the purposes of this Act and Part 3 of the *Jobs, Growth and Long-term Prosperity Act*, and

126 (1) Malgré le paragraphe 38(6) et sous réserve des paragraphes (2) à (6), tout examen par une commission d'un projet commencé sous le régime de l'ancienne loi avant la date d'entrée en vigueur de la présente loi se poursuit sous le régime de la présente loi comme si le ministre avait renvoyé, au titre de l'article 38, l'évaluation environnementale du projet pour examen par une commission; le projet est réputé être un projet désigné pour l'application de la présente loi et de la partie 3 de la *Loi sur l'emploi, la croissance et la prospérité durable* et :

(a) if, before that day, a review panel was established under section 33 of the former Act, in respect of the project, that review panel is considered to have been established — and its members are considered to have been appointed — under subsection 42(1) of this Act;

a) si, avant cette date d'entrée en vigueur, une commission avait été constituée aux termes de l'article 33 de l'ancienne loi relativement au projet, elle est réputée avoir été constituée — et ses membres sont réputés avoir été nommés — aux termes du paragraphe 42(1) de la présente loi;

(b) if, before that day, an agreement or arrangement was entered into under subsection 40(2) of the former Act, in respect of the project, that agreement or arrangement is considered to have been entered into under section 40

b) si, avant cette date, un accord avait été conclu aux termes du paragraphe 40(2) de l'ancienne loi relativement au projet, il est réputé avoir été conclu en vertu de l'article 40 de la présente loi;

of this Act; and

(c) if, before that day, a review panel was established by an agreement or arrangement entered into under subsection 40(2) of the former Act or by document referred to in subsection 40(2.1) of the former Act, in respect of the project, it is considered to have been established by — and its members are considered to have been appointed under — an agreement or arrangement entered into under section 40 of this Act or by document referred to in subsection 41(2) of this Act.	**c)** si, avant cette date, une commission avait été constituée en vertu d'un accord conclu aux termes du paragraphe 40(2) de l'ancienne loi ou du document visé au paragraphe 40(2.1) de l'ancienne loi relativement au projet, elle est réputée avoir été constituée — et ses membres sont réputés avoir été nommés — en vertu d'un accord conclu aux termes de l'article 40 de la présente loi ou du document visé au paragraphe 41(2) de la présente loi.

A. ***Facts***

[9] The background facts concerning the Project, the Panel, and the Report are laid out in *Taseko Mines Limited v Canada (Environment),* 2017 FC 1099 [*Taseko Mines*]. The relevant events in the present case commenced following the close of the Panel hearings on August 23, 2013.

[10] The Project's environmental assessment can be summarized into six steps. As noted in *Taseko Mines*, the environmental issues for the Project transpired under the previous *Canadian Environmental Assessment Act*, SC 1992, c 37, in respect to steps one and two. The remainder transpired under the current *CEAA 2012* legislation.

1. The Minister appointed a Panel;

2. Taseko provided an Environmental Impact Statement [EIS] setting out its position on whether the project would be likely to cause certain environmental effects. The EIS met federal EIS Guidelines, and the Panel set up a public hearing process;

3. The Panel officiated public hearings; hearing expert and lay evidence, cross-examinations and submissions from all interested parties, at its discretion;

4. The Panel submitted its Report to the Minister stating whether it believed the Project was likely to cause any of the listed significant adverse environmental effects, and its rationale, conclusions and recommendations;

5. After taking into account the Report, the Minister determined that the project was likely to cause the listed significant adverse environmental effects, and she referred the matter to the GIC to decide whether those effects were justified in the circumstances;

6. The Minister issued a Decision Statement on February 26, 2014 setting out the decisions.

This judicial review concerns steps five and six of this summary.

(1) Consultation between the Tsilhqot'in National Government and Canada after the Review Panel Hearing

[11] The following outlines aspects of post-hearing contact between the federal government and the Tsilhqot'in National Government [TNG]. A similar factual review in respect of Taseko and the federal government is set out later.

[12] Consultation between the TNG and Canada regarding the Project encompassed both the Panel process and subsequent consultations, which were conducted according to a publicly available 5-stage consultation framework:

> **Phase I**: Initial engagement and consultation on the establishment of a review panel. …
> **Phase II**: Review panel process leading up to public hearings. …
> **Phase III**: Public hearing process. …
> **Phase IV**: Consultation on the review panel report. …
> **Phase V**: Regulatory permitting. …

[13] Following the close of the Project's Panel hearings, representatives of the TNG requested to consult directly with federal officials. On September 30, 2013, the Canadian Environmental Assessment Agency [CEAA] advised against a meeting between the Minister of the Environment and the TNG, stating: "Declining the meeting request will demonstrate that the Canadian Environmental Assessment Agency (the Agency) has confidence that the Panel's report will accurately reflect the views of the participants as expressed in the review process."

[14] Despite the CEAA's advice, on October 8, 2013 the Minister met with five TNG representatives in Ottawa for a period of one hour. During this 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."

[15] Taseko became aware of this meeting almost immediately through photographs posted on Facebook.

[16] On the same day, October 8, 2013, representatives of TNG met with Mr. Hallman, President of the CEAA, and several Deputy Ministers. The TNG representatives then met with other government officials. Taseko learned of these meetings soon afterward, through information posted on websites including Facebook.

[17] Upon becoming aware, Taseko did not object to any of these meetings.

[18] On October 31, 2013, the Report was released. This was the beginning of the Phase IV consultations between the Crown and impacted First Nations.

[19] On November 1, 2013, Ms. Candace Anderson, Consultation Coordinator at the CEAA, forwarded the Report to the TNG, and requested comments on the Report and responses to the following questions:

1. In the report, did the Panel appropriately characterize the concerns raised by the TNG during the review process?
2. Do the recommendations made by the Panel address your concerns?
3. Do you have any outstanding concerns that are not addressed in the Panel's report that require mitigation/accommodation?
4. Are there any additional recommendations that you feel would address these concerns?

[20] On November 21, 2013, the TNG made submissions to the CEAA in response to Taseko's November submissions (discussed under the heading related to Taseko). Taseko had a copy of this letter as of December 1, 2013.

[21] On January 9, 2014, the TNG provided a 59-page submission to the CEAA responding to the Panel Report. These submissions were <u>not</u> provided to Taseko.

[22] On January 16, 2014, the TNG wrote to the CEAA to express frustration and concern regarding the adequacy of the Phase IV consultation. This letter referenced an earlier telephone call, during which CEAA representatives had expressed procedural fairness concerns with respect to potential meetings between the TNG and Deputy Ministers. The letter stated:

> Finally, you advised on our phone call that Deputy Ministers could not attend the meeting scheduled for January 23, as we had requested, in part because of concerns about "procedural fairness" while the federal decision is pending. This in itself raises serious concerns about procedural fairness, given media reports that the Proponent and provincial Minister Bennett have had extensive access to federal Ministers after the release of the Panel report, for the avowed purpose of influencing the federal decision.

[23] At this time the TNG also sent letters to several federal Ministers to express "deep concern" about the meetings that they had engaged in with the British Columbia Minister of Energy and Mines, Mr. Bill Bennett.

[24] On January 23, 2014, a meeting took place between representatives of the TNG and the CEAA regarding the Project.

[25] On February 12, 2014, representatives of the TNG met again with Mr. Hallman and the Deputy Ministers. On this same day, the CEAA sent a letter to the TNG that explained the decision making process. The letter indicated that the TNG's concerns were "reflected in the materials provided to the Minister to inform her decisions," but that a copy of the materials provided to the Minister could not be shared with the TNG as this information was confidential.

[26] The next day, the TNG sent a letter to the CEAA expressing concern (based on news reports) about Taseko's access to federal Ministers.

[27] On February 14, 2014, as part of the consultation process, the CEAA provided "potential conditions" for inclusion in a Decision Statement upon which the CEAA asked for TNG's comments in the event that the Project was approved.

[28] On February 21, 2014, the Minister received the Crown Consultation Report.

[29] On February 24, 2014, the Minister received the TNG's submissions in response to the draft conditions sent by the CEAA.

(2) Taseko's Post-Hearing Engagement

[30] On a somewhat parallel track, Taseko was also engaged in contact with federal and other officials after the CEAA hearing. This was not done under any "consultation duty" as the TNG's contact was styled.

[31] On August 29, 2013, and October 3, 2013, Taseko wrote to the Minister regarding the Project. In the second of these letters, Taseko indicated it would be "happy to meet" with the Minister.

[32] On September 1, 2013, the President and CEO of Taseko, Russ Hallbauer, published an opinion piece in the Vancouver Sun, wherein he stated that "[s]ome of the panel testimony,

however, much of it from outside special interests, has unfortunately been designed to misinform and divide." Much of the language from this article was mirrored in the August 29 letter to the Minister.

[33] In October of 2013, a representative of Taseko met with government officials including Mr. Hallman. There was at least one telephone call between Hallman and another Taseko representative in November. In addition, Taseko employed a government relations consultant to assist in securing meetings with officials.

[34] On November 4, 2013, following the Report's October 31 release, counsel for Taseko wrote to the Minister to advise her that Taseko was preparing submissions regarding the Report and that the Minister should not make any determinations under the *CEAA 2012* until receiving those submissions "as a matter of administrative fairness."

[35] On November 5, 2013, Taseko issued a press release wherein it stated that Natural Resources Canada and the Panel had relied on the wrong project design in making determinations on seepage from the TSF.

[36] In keeping with its promise outlined in paragraph 31, on November 8, 2013, Taseko sent a submission to the Minister "regarding her pending decision and responding to the Panel Report, which referenced administrative fairness and requested that Taseko be notified of any adverse submissions made to the Minister arising out of aboriginal consultation." This letter also indicated that the Project had the support of Mr. Ervin Charleyboy, a former TNG chief. Taseko

had paid Mr. Charleyboy's expenses to travel to Ottawa, where he spoke briefly with the Prime Minister outside of Parliament.

[37] Some issue was made at this Court about Taseko's activities, and the identity of Mr. Charleyboy, with a request that he not be named in the Court's decision. Identity is a matter of public record. Whether these activities constituted "lobbying" is not for the Court to decide. It is sufficient to describe them as political/government relations. However, court proceedings are open to the public except in very limited exceptions – this is not one of those exceptions.

[38] Around this time, Taseko engaged in meetings with Minister Bennett. An internal e-mail dated November 8, 2013, indicated the purpose of these meetings: "We need them as allies and as importantly we somehow need Bill [Bennett] and Christy [Clark] to do things that they may not otherwise undertake." Meetings, letters, and a telephone call took place or were exchanged between Taseko and Minister Bennett. In a December 11, 2013 news article, Minister Bennett indicated that he was "going to seek to influence the decision, of course," and that while it would be inappropriate to meet with the statutory decision maker he intended to meet with a number of other federal Ministers.

[39] On November 13, 2013, the CEAA requested that Taseko provide a response to two matters that it had raised concerning the Panel Report. The TNG was also informed of this request.

[40] On November 15, 2013, Taseko provided further submissions in response to the CEAA's request. Taseko then issued a press release on November 18, 2013, in which it publicized these further submissions. The CEAA forwarded this correspondence to a member of the Minister's political staff.

[41] On November 29, 2013, Taseko filed a Notice of Application in T-1977-13 seeking judicial review of the Report.

[42] In January 2014, Taseko sent correspondence to federal Ministers including Minister Joe Oliver, Minister James Moore, and Prime Minister Stephen Harper.

[43] On February 20, 2014, Taseko was provided with a copy of a letter written by Minister Bennett to the Minister of the Environment, which argued that unresolved concerns could be addressed in provincial government approval processes subsequent to approval under the *CEAA 2012*.

B. *Pertinent Decision(s)*

[44] On January 29, 2014, Mr. Hallman sent a memorandum to the Minister [the Hallman Memo]. He recommended that the Minister decide that the Project was likely to cause significant adverse environmental effects pursuant to sections 5(1) and (2) of the *CEAA 2012*. The Hallman Memo included three attachments: a memo on the issue of "Wrong Project Design" (under solicitor-client privilege), a document on mitigation measures, and the January 9, 2014 TNG submissions.

[45] On January 30, 2014, the Minister made her decision under section 52(1) in which she agreed with the CEAA recommendation and decided that the Project was likely to cause significant adverse environmental effects according to sections 52(1)(a) and (b) of the *CEAA 2012* [Minister's Decision].

[46] In February of 2014, the Minister sent a memorandum that included a Ministerial recommendation to the GIC for its decision [GIC Decision].

[47] On February 26, 2014, the Decision Statement was communicated to Taseko. The Decision Statement, pursuant to section 54 of the *CEAA 2012*, contained the Minister's Decision and the GIC's Decision under section 52(4). It did not include reasons. A press release stated: "In making its decision, the federal government considered the report of the independent Review Panel which conducted a rigorous review of the New Prosperity Mine project, and agreed with its conclusions about the environmental impacts of the project."

[48] The CEAA advised Taseko that sections 6 and 5(1) of the *CEAA 2012* prevented Taseko from taking any action that may cause environmental effects.

III. ISSUES

[49] Taseko challenges both the Minister's Decision and the GIC Decision on grounds of breach of procedural fairness and jurisdictional error including the Canadian *Bill of Rights*. It also raises a constitutional challenge to section 5(1)(c) and section 6 of the *CEAA 2012* arguing

that these provisions are, by the doctrine of interjurisdictional immunity, inapplicable to the Project.

[50] While the government Respondents - the Minister and Attorney General [AG] - both see no issue as to a fair process at either decision, they also ask the Court not to decide the jurisdictional issue at this time.

[51] The Respondents TNG and Tsilhquot'in Nation take a slightly different position than the government Respondents. They raise issues as to Taseko's right to be involved in Crown-Aboriginal consultation, fairness and delay in raising fairness concerns as well as what is tantamount to a "clean hands" argument given Taseko's own conduct. They also raise the adequacy of the reasons for the decisions and the alleged hypothetical nature of the constitutional issue.

[52] I find the principal issues are:

1. Was Taseko afforded a fair process during the Minister's decision making process?
2. Was Taseko afforded a fair process during the GIC's decision making process?
3. Did the Minister and the GIC breach the *Bill of Rights*?
4. Are sections 5(1)(c) and 6 of the *CEAA 2012* unconstitutional?

IV. STANDARD OF REVIEW

[53] It is well established and not argued here that the standard of review with respect to procedural fairness is correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Arsenault v Canada (Attorney General)*, 2016 FCA 179, 486 NR 268.

[54] The standard of review for constitutional issues is also correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190.

V. ANALYSIS

A. *Issue 1: Was Taseko afforded a fair process during the Minister's decision making process?*

(1) Procedural Fairness

[55] The parties agree that there was a duty of procedural fairness owed to Taseko in this process. Contrary to Taseko's assertions, the Respondents are not arguing that the duty to consult ousts the duty of fairness owed to a proponent.

[56] However, the parties are sharply divided as to the content of the duty of fairness owed to Taseko at this stage of the process.

[57] The Respondents argue that Taseko was owed a high degree of procedural fairness at the Panel stage and a minimal degree of procedural fairness at the Minister's decision making stage

(Taseko calls this an "asymmetrical process") particularly as it afforded the TNG greater access to decision makers. Taseko argues that it was owed a high degree of procedural fairness at all stages of the process (and, essentially, that it was owed the same process as the TNG – i.e., a symmetrical process).

[58] In my view, Taseko was owed a duty of procedural fairness throughout the whole process, but it was not owed a high degree of procedural fairness at this stage of the environmental review process. When the environmental assessment scheme at issue is understood as a whole, it is clear that the Panel process is the venue through which the parties are to be afforded a high degree of procedural fairness. That process involves oral hearings, the submission of evidence (including expert evidence) by interested persons, cross-examination, fact finding, and a number of other trappings associated with a quasi-judicial process.

[59] The Minister's decision making process, by contrast, did not involve any elements that would indicate that Taseko was owed a high degree of procedural fairness.

[60] I conclude that Taseko was owed a duty of procedural fairness in this environmental approval process but that the degree and type of procedural fairness varies at different stages of the whole process. The "process" encompasses from application through to the GIC decision.

[61] A review of the *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*] factors supports the finding that Taseko was owed a minimal degree of procedural fairness at this stage of the process:

- 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 Co v Canada (Minister of Fisheries and Oceans)*, 2002 FCA 103, 288 NR 237 [*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. As discussed below, and in line with *Pacific Booker Minerals Inc v British Columbia (Minister of the Environment)*, 2013 BCSC 2258, 82 CELR (3d) 195 [*Pacific Booker*], Taseko may have had additional rights if the Minister had decided not to follow the recommendations in the Report - but this is not the circumstance in the instant case.
- 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, indicated by Taseko's investment in the Project, 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" per *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 29, [2001] 2 SCR 281.

[62] Nonetheless, even 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 to 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 submissions, particularly the memorandum on the "wrong project design" claim and the TNG's responses to Taseko's submissions.

[63] Therefore, the Minister went "above and beyond" the procedural fairness requirements in this case. The facts indicate that both Taseko and the TNG were working hard to ensure that their views were considered by the relevant decision makers and they were.

[64] On this matter of advancing the parties' views, both sides viewed the process as less procedurally strict than at the Panel stage. Each adopted the mode of using government relations and political contacts to advance their case – a mode inconsistent with a quasi-judicial process.

[65] Taseko was active in engaging political contacts to advance their cause. This in itself leads to an asymmetrical process. The TNG seems to have been more successful than Taseko at this "politicized" course of action but that forms no basis for concluding that Taseko was denied the level of procedural fairness that the process required.

[66] Taseko's central complaint is 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. This is arguably grounded in the principle of *audi alteram partem*. The events at issue are therefore the October 8, 2013 meeting between the TNG and the Minister, and the Minister's receipt of the January 9, 2014 submissions.

In *Canadian Cable Television Assn v American College Sports Collective of Canada, Inc*, [1991] 3 FC 626 at 639, 81 DLR (4th) 376 (CA) [*Canadian Cable*], MacGuigan JA for the Federal Court of Appeal defined the principle of *audi alteram partem* thus:

> The common law embraces two principles in its concept of natural justice, both usually expressed in Latin phraseology: *audi alteram partem* (hear the other side), which means that **parties must be**

> **made aware of the case being made against them and given an opportunity to answer it**.
>
> [Emphasis added.]

[67] 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.

[68] 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).

[69] In *Pfizer Company Limited v Deputy Minister of National Revenue for Customs and Excise*, [1977] 1 SCR 456 at 463, 68 DLR (3d) 9 [*Pfizer*], relied on by Taseko, the decision maker in question - the Tariff Board - had relied on two publications that had not been put into evidence or even referred to at the hearing. This was found to be improper, and the Supreme Court of Canada [SCC] indicated that the parties ought to have had this information disclosed and been accorded the opportunity to respond. In that case, there was clearly new information before the Tariff Board of which the parties were unaware.

[70] However, the present case is easily distinguished because the TNG did not provide any new information to the Minister of which Taseko was unaware or to which Taseko had not previously had the opportunity to respond. Similarly, *Jada Fishing* indicates that a remedy is not

required where post-Panel "evidence" does not go beyond subject matter of which the parties had prior knowledge and which was not prejudicial (para 17). I concur with that reasoning.

[71] Moreover, Taseko has not identified any prejudice or possibility of prejudice arising from the impugned meeting or the submissions. The jurisprudence indicates that, contrary to Taseko's submissions, 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 (*Canadian Cable* at 650).

[72] Although Taseko relies on *Kane v Board of Governors of University of British Columbia*, [1980] 1 SCR 1105, 110 DLR (3d) 311 [*Kane*], for the proposition that a bare breach of the *audi alteram partem* principle is sufficient to require a remedy, this proposition was fully discussed and debunked in *Canadian Cable* wherein the Court stated at 650:

> 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*.
>
> [Emphasis added.]

[73] The question of the possibility of prejudice is therefore critical, and a breach of the *audi alteram partem* principle without such a possibility of prejudice will not warrant a remedy.

[74] In *Kane*, the SCC did not state that <u>any</u> breach of the *audi alteram partem* principle would justify a remedy, but instead indicated that a possibility of prejudice was required.

Because of Taseko's inability to so much as speculate on prejudice, it relies on this Court to find that any (alleged) breach of the *audi alteram partem* principle will mandate a remedy. Such a general statement of the law runs counter to decisions such as *Kane*, *Pfizer*, *Canadian Cable*, *CEP Union of Canada v Power Engineers*, 2001 BCCA 743, 209 DLR (4th) 208, and *Coldwater Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, 2016 FC 595, [2016] 3 CNLR 1, rev'd on other grounds 2017 FCA 199.

[75] Furthermore, Taseko admits that it knew about the October 8, 2013 meeting shortly after it took place, yet raised no complaints regarding procedural unfairness at that time (despite "internal discussions"). This is contrary to decisions such as *Hennessey v Canada*, 2016 FCA 180, 484 NR 77, which indicates that procedural complaints should be made at the first opportunity.

Since Taseko did not object at the first opportunity, it waived its right to that procedural fairness, and cannot raise this issue now before this Court (*High-Crest Enterprises Limited v Canada*, 2017 FCA 88 at para 102, 2017 DTC 5057).

[76] Moreover, Taseko has not shown any reason for the Court to make an adverse inference against the TNG regarding the information discussed at the October 8, 2013 meeting.

[77] The evidence of Mr. Hallman, who attended the meeting, is that the TNG representatives' "comments about the New Prosperity Project were variations of what they had previously indicated about the project 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".

[78] The TNG did not file further evidence of the content of this meeting because it was satisfied with this account. Taseko seeks to have this Court draw an adverse inference against the TNG, and in doing so conclude that the Facebook postings are admissible and accurately reflect what occurred in the meeting (the Facebook postings stated "[w]e made it very clear that Fish Lake Teztan Biny is not an option, she heard us and understood our stand. She and her Community & Nation have dealt with similar situation with Mining in her area").

[79] Even if this post were accepted as an accurate description of what occurred at the meeting, it is not clear what Taseko stands to gain – this does not represent a departure from the TNG's previous position and the post only indicates that the Minister understood the TNG's position.

[80] In sum, the TNG had already made its position clear before the Panel and there was no new information adduced before the Minister to which Taseko could properly have responded. Therefore, any additional submissions by Taseko at that stage would either be information that ought to have been adduced before the Panel, the submission of which would be improper; or a re-hashing of its position already summarized within the Report – a redundancy.

(2) Duty to Consult – The interaction between the duty of fairness to a proponent and the duty of consultation to First Nations?

[81] The parties appear to agree that engagement between the TNG and the Crown following the Report's release was required as part of the Crown's duty to consult. Even if it was not agreed, I have concluded that such engagement was required.

[82] The consultation framework was publicly available and Taseko was aware that there would be consultation following the release of the Report. Taseko argues that this consultation process should not result in unfairness to the proponent of a project – a proposition with which the Respondents would likely agree. As the TNG admits, there are certain circumstances wherein fairness would require a proponent to be made aware of submissions made by a First Nation in the course of consultation.

[83] The duty of consultation can exist harmoniously with the duty of fairness. The essential issues are - what type of submissions must a proponent be made aware of, and were these present in the instant case?

[84] The issue of the duty of consultation with a decision maker is not a simple matter. It requires a balancing of meaningful consultation with aboriginal peoples against the principle of fairness to each participant – a tension between competing "good principles."

[85] A very similar consultation process was utilized during an environmental assessment under the *CEAA 2012* described in *Prophet River First Nation v Attorney General of Canada*,

2017 FCA 15 at para 16, 408 DLR (4th) 165 [*Prophet River*]. *Prophet River* concerned a judicial review of the GIC's decision that certain significant adverse environmental effects, found by the Minister to exist, were justified in the circumstances. The trial judge had found that the duty to consult was satisfied by the deep consultation between the Crown and First Nations, similar to that which occurred in this case, and that finding was not challenged on appeal (*Prophet River* at para 48).

[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.

[87] This is in line with the decision in *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] 4 FCR 418 [*Gitxaala*], wherein the FCA found that new recommendations arising in the course of consultations ought to be shared with a project proponent, and with the decision in *Pacific Booker* which indicated that recommendations against accepting the positive result of a review panel process ought to be provided to a 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.

[89] Further, *Gitxaala* indicates that post-report consultation ("Phase IV" consultation) is not only appropriate, but may be necessary. In *Gitxaala*, the FCA stated:

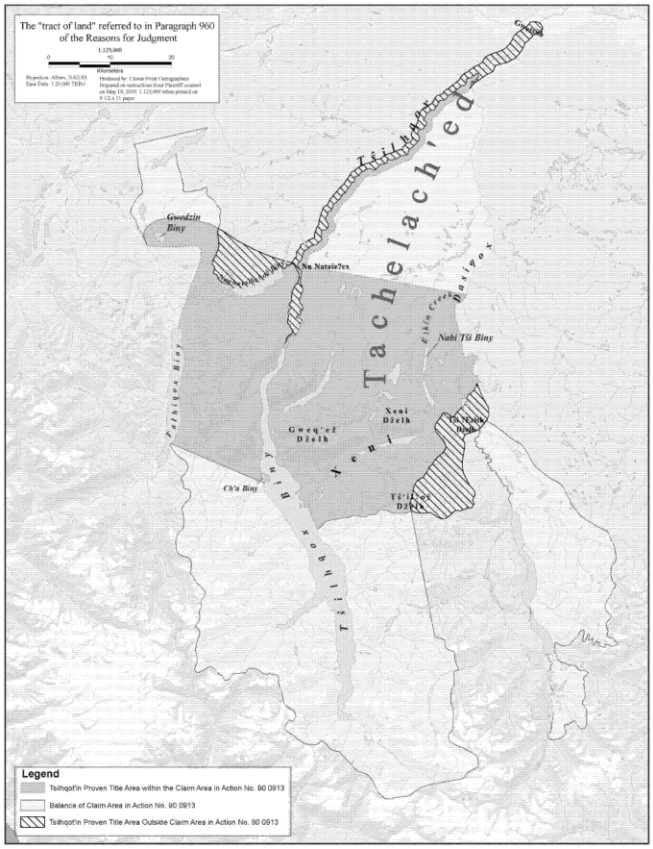
> [279] Based on our view of the totality of the evidence, we are satisfied that Canada failed in **Phase IV to engage, dialogue and grapple with the concerns expressed to it in good faith by all of the applicant/appellant First Nations**. Missing was any indication of an intention to amend or supplement the conditions imposed by the Joint Review Panel, to correct any errors or omissions in its Report, or to provide meaningful feedback in response to the material concerns raised. **Missing was a real and sustained effort to pursue meaningful two-way dialogue**. Missing was someone from Canada's side empowered to do more than take notes, someone able to respond meaningfully at some point.
>
> [Emphasis added.]

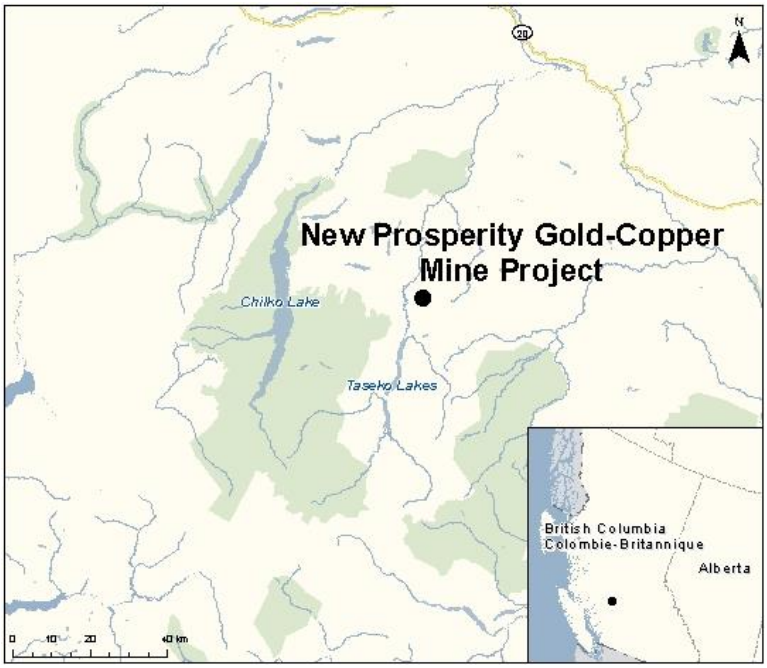
[90] In this case, there is a very strong argument that the requirements of Phase IV consultation as discussed in *Gitxaala* were not satisfied. The Court need not decide that point but it provides a useful context to the exercise of the duty to consult in this case. As the TNG complained, this was not a two-way dialogue; although the Minister and the CEAA appear to have assured the TNG that their concerns would be considered (as evidenced by the "endless summarizing" process), these parties did not give the TNG any indication of their intentions prior to the release of the final decision.

[91] In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 64, [2005] 3 SCR 388, the SCC recognized that the duty to consult may (in a given context) require "both informational and response components." If the Minister had not met with the TNG on October 8, 2013 or received the January 9, 2014 submissions, the TNG would have had a very strong case for overturning any negative decision on the basis of inadequate

consultation. (The TNG would also have had a strong argument along the lines of *Pacific Booker*, as any negative decision would have run counter to the Report's recommendations.)

[92] This litigation concerns a First Nation that has proven aboriginal rights and title to its land. The strength of those rights is an important context for the duty to consult. The land in question is land over which the First Nation has proven aboriginal rights, but is not included in the land over which it has proven title (*Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation*]). This is illustrated in the following images – on the left is the image from the SCC decision, showing the proven title land, and on the right is an image (obtained from Google Maps) showing the location of the Project:





Teztan Biny (Fish Lake) and the Project are in the area covered by the "Balance of Claim in Action No. 90 0913." The decision of the British Columbia Supreme Court governs, wherein Vickers J. found that the Tsilhqot'in Nation had proven aboriginal rights to the land in question (see *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 893-911, 1213-68, [2008] 1 CNLR 112). The First Nation has proven hunting and trapping rights to the immediate area in question (Teztan Biny/Fish Lake).

[93] In *Prophet River*, the FCA indicated that the title rights of the Tsilhqot'in Nation lie at "one end of the spectrum" (the high end of protection) for constitutionally protected indigenous rights as they are "proven rights" (para 36). In the present case, the Panel found that the land at issue (particularly Teztan Biny and the surrounding areas), which would be largely destroyed by the Project (i.e. in terms of water quality), holds a great deal of cultural and spiritual significance for the Tsilhqot'in people.

[94] However, despite its responsibilities with respect to consultation, the consultation that the Crown engaged in with the TNG during Phase IV amounted to, as the TNG complained, requiring the TNG to endlessly summarize its position and ensure that the Report accurately reflected its position. The TNG engaged in this labour-intensive task without receiving any real information in return from the Minister or other relevant officials regarding the decision to be made, at a time when news reports and/or press releases indicated that Taseko had access to decision makers.

[95] In my view, a proponent does not have a right to take part in the consultations between the Crown and a First Nation. However, this is not to say that a proponent may never have a role in consultations.

[96] A proponent may play an active role, for example, in ensuring that a First Nation's concerns are appropriately accommodated. It is an open question as to whether the Crown's heavy reliance on industry and on quasi-judicial panels to satisfy its duties of consultation adequately reflects the principles discussed in *Gitxaala* with respect to "meaningful two-way dialogue"; nonetheless, some "delegation" of the duty to consult has been accepted by the SCC. In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, the SCC stated:

> [53] It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. **However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group**. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. **The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments**. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). **However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated**.
>
> [Emphasis added.]

[97] In *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550, the SCC stated:

> [25] As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119, *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168. The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. **Responsiveness is a key requirement of both consultation and accommodation**. [Emphasis added.]

[98] Finally, in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto*], the SCC considered the duty to consult and the role of tribunals in consultation. Although the review panel in the present case was not a tribunal, this discussion may offer some insight into the delegation of the duty to consult in general. The SCC stated:

> [55] The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.
>
> [56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, **it is open to governments to set up regulatory schemes to address the**

> **procedural requirements of consultation at different stages of the decision−making process with respect to a resource**.
>
> [57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.
>
> [Emphasis added.]

[99] Therefore, although the SCC has accepted some delegation of this duty, the duty to consult remains a duty of the Crown, and if a proponent or other entity (such as, in this case, a review panel) were found not to satisfy the requirements of the duty to consult, this failure would be the Crown's responsibility.

[100] In cases such as this where the relationship between a First Nation and a proponent is "acrimonious," reconciliation may be adversely impacted by a requirement that every interaction between the Crown and a First Nation be provided to a proponent for comment. As noted by the SCC in *Tsilhqot'in Nation* (in the context of land claims disputes), "[t]he governing ethos is not one of competing interests but of reconciliation" (para 17). In *Rio Tinto*, the SCC stated: "The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation" (para 34). This same sentiment ought to apply in the present case.

(3) Brief Comments on Lobbying

[101] As a subtext to this acrimonious relationship, during the course of this Court's hearing, a concern was raised with respect to the "lobbying efforts" made by the parties. This matter was discussed briefly earlier in these Reasons.

[102] "Lobbying" is a term that does not lend itself to academic or governmental consensus. However, the *Lobbying Act*, RSC 1985, c 44 (4th Supp), mandates a person must file a return if that person engages in certain conduct generally considered as "lobbying."

5 (1) An individual shall file with the Commissioner, in the prescribed form and manner, a return setting out the information referred to in subsection (2), if the individual, for payment, on behalf of any person or organization (in this section referred to as the "client"), undertakes to	**5 (1)** Est tenue de fournir au commissaire, en la forme réglementaire, une déclaration contenant les renseignements prévus au paragraphe (2) toute personne (ci-après « lobbyiste-conseil ») qui, moyennant paiement, s'engage, auprès d'un client, d'une personne physique ou morale ou d'une organisation :
(a) communicate with a public office holder in respect of	**a)** à communiquer avec le titulaire d'une charge publique au sujet des mesures suivantes :
(i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,	**(i)** l'élaboration de propositions législatives par le gouvernement fédéral ou par un sénateur ou un député,
(ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before	**(ii)** le dépôt d'un projet de loi ou d'une résolution devant une chambre du Parlement, ou sa modification, son adoption

either House of Parliament,	ou son rejet par celle-ci,
(iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*,	**(iii)** la prise ou la modification de tout règlement au sens du paragraphe 2(1) de la *Loi sur les textes réglementaires*,
(iv) the development or amendment of any policy or program of the Government of Canada,	**(iv)** l'élaboration ou la modification d'orientation ou de programmes fédéraux,
(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or	**(v)** l'octroi de subventions, de contributions ou d'autres avantages financiers par Sa Majesté du chef du Canada ou en son nom,
(vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or	**(vi)** l'octroi de tout contrat par Sa Majesté du chef du Canada ou en son nom;
(b) arrange a meeting between a public office holder and any other person.	**b)** à ménager pour un tiers une entrevue avec le titulaire d'une charge publique.
…	[…]
7 (1) The officer responsible for filing returns for a corporation or organization shall file with the Commissioner, in the prescribed form and manner, a return setting out the information referred to in subsection (3) if	**7 (1)** Est tenu de fournir au commissaire, en la forme réglementaire, une déclaration contenant les renseignements prévus au paragraphe (3) le déclarant d'une personne morale ou d'une organisation si :
(a) the corporation or organization employs one or more individuals any part of whose duties is to communicate with public office holders on behalf of	**a)** d'une part, celle-ci compte au moins un employé dont les fonctions comportent la communication, au nom de l'employeur ou, si celui-ci est une personne morale, au nom

the employer or, if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary, in respect of

d'une filiale de l'employeur ou d'une personne morale dont celui-ci est une filiale, avec le titulaire d'une charge publique, au sujet des mesures suivantes :

(i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,

(i) l'élaboration de propositions législatives par le gouvernement fédéral ou par un sénateur ou un député,

(ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,

(ii) le dépôt d'un projet de loi ou d'une résolution devant une chambre du Parlement, ou sa modification, son adoption ou son rejet par celle-ci,

(iii) the making or amendment of any regulation as defined in subsection 2(1) of the *Statutory Instruments Act*,

(iii) la prise ou la modification de tout règlement au sens du paragraphe 2(1) de la *Loi sur les textes réglementaires*,

(iv) the development or amendment of any policy or program of the Government of Canada, or

(iv) l'élaboration ou la modification d'orientation ou de programmes fédéraux,

(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada; and

(v) l'octroi de subventions, de contributions ou d'autres avantages financiers par Sa Majesté du chef du Canada ou en son nom;

(b) those duties constitute a significant part of the duties of one employee or would constitute a significant part of the duties of one employee if they were performed by only one employee.

b) d'autre part, les fonctions visées à l'alinéa a) constituent une partie importante de celles d'un seul employé ou constitueraient une partie importante des fonctions d'un employé si elles étaient

exercées par un seul employé.

[103] During the hearing, Taseko clarified its position was that no "lobbying" had occurred. A review of the lobbyist registries indicates that there are no registered lobbyists acting on behalf of Taseko. Nonetheless, a number of individuals in this case were attempting to communicate with public office holders or organize meetings with public office holders. One such individual, Mr. Charleyboy, was in fact paid to attempt to influence public office holders and to hold meetings with them – but he did not file a return pursuant to the legislation.

[104] However, it is unclear from the evidence whether Taseko ought to have filed a return pursuant to section 7(1) of the *Lobbying Act*, as the evidence has not been put forward to establish that "those duties constitute a significant part of the duties of one employee or would constitute a significant part of the duties of one employee if they were performed by only one employee."

[105] Following the close of the Panel process, Taseko and the TNG both attempted to ensure that their viewpoints were heard and understood by the ultimate decision makers. The parties both believed that the other had greater access to decision makers and neither party was concerned with the potential procedural fairness rights of the other.

[106] The TNG submits that Taseko's efforts to lobby or advocate for its position disentitle it to relief, even if the Court should find that meetings and submissions to federal government officials are inappropriate in all cases if not disclosed for comment: "Taseko is complaining

today that the TNG had unfair access to government decision-makers, when Taseko was doing all it could to influence the government's decision through private communications and lobbying."

[107] Therefore, in the TNG's view, Taseko does not have "clean hands" and the Court has the discretion to refuse relief. It is unnecessary to decide this matter of clean hands but it does illustrate that in terms of the overall process, both parties had their methods of access, direct and indirect, to the Minister.

[108] The assessment of procedural fairness is made more difficult in the absence of any formal process before the Minister. In a quasi-judicial context, the hidden approaches to the decision maker and staff would be abhorrent; in a public policy development context perhaps less so.

[109] As to this first issue, Taseko was afforded a fair process before the Minister given the factors discussed earlier, including but not limited to: the nature of the communication at issue, the expectations and conduct of the parties, the absence of new issues or evidence raised by the TNG before the Minister, and the obligation to consult the First Nation.

B. ***Issue 2: Was Taseko afforded a fair process during the Governor in Council's decision making process?***

[110] Taseko submits that the GIC owed a duty of procedural fairness to Taseko and that it was breached in this case. Consistent with Justice O'Reilly's decision in *Hospitality House Refugee Ministry Inc v Canada (Attorney General)*, 2013 FC 543, 433 FTR 118 [*Hospitality House*]:

> [18] Generally speaking, the duty of fairness does not apply to legislative activities, such as the promulgation of Orders in Council (*Attorney General of Canada v Inuit Tapirisat et al*, [1980] 2 SCR 735). **While certain decisions of the Governor in Council will attract a duty of fairness, the scope of any such duty depends on a number of factors, including the subject matter of the decision, the consequences for those affected by it, and the number of people involved** (at pp 755-758).
>
> [Emphasis added.]

[111] Furthermore, Taseko says that the GIC breached their duty of procedural fairness "by failing to provide Taseko with the TNG Submissions made to the Minister, the Consultation Report, and comments on the Minister's draft conditions."

[112] Taseko further argues that the GIC's decision was invalid because it was made without jurisdiction.

[113] Lastly, Taseko contends that the decisions of both the Minister and the GIC breached the duty to give reasons, which is required under the duty of fairness in certain circumstances. Taseko also contends that although it had the right to know why the GIC did not find the adverse environmental effects to be justified, the Decision Statement did not provide reasons.

(1) Procedural Fairness

[114] In *Attorney General of Canada v Inuit Tapirisat of Canada*, [1980] 2 SCR 735, 115 DLR (3d) 1 [*Inuit Tapirisat*], the SCC indicated that the duty of fairness does not generally apply to legislative activities, but noted that "the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review" (at 748). If, for example, a

condition precedent to the exercise of that power was not observed, then the Court may declare the exercise of that power a nullity.

[115] In *Hospitality House*, O'Reilly J. indicated that the scope of any duty of fairness before the GIC would depend on factors such as the subject matter of the decision, the number of people involved, and the consequences for people impacted by the decision. In that case, Justice O'Reilly found that an Order restricting governmental health care coverage of 1,940 privately sponsored refugees did not place a duty to consult with the applicants on the GIC, given the "modest" amounts of money and relatively few people involved. Further, he noted that consultations with sponsors had taken place, in the form of a conference with sponsorship agreement holders.

[116] Although the Minister argued that it is questionable whether a duty of procedural fairness will ever attach to the GIC's decision making process, in my view the jurisprudence (such as that cited by Taseko) does not support such a broad statement. Rather, the case law indicates that it may be possible for the duty of procedural fairness to attach to the GIC, but that such circumstances will be rare.

[117] In the present case, no duty of procedural fairness attached to the GIC. The importance and finality of the decision alone cannot justify imposing the sort of procedural fairness requirements that Taseko seeks. In *Prophet River*, the Federal Court of Appeal stated the GIC's decisions "are the result of a highly discretionary, policy-based and fact driven process" (para 30). Jurisprudence such as *Inuit Tapirasit* and *Canada (Attorney General) v Canadian*

Wheat Board, 2009 FCA 214, [2010] 3 FCR 374, indicates that the GIC is generally free to exercise its power without Court interference provided that there is no absence of good faith and statutory preconditions have been met. Taseko has not argued that the GIC's decision was made in bad faith or statutory preconditions not met.

[118] Further, even if the GIC did owe Taseko a duty of fairness, the content of such a duty would be minimal (for similar reasons as those discussed above with respect to the Minister) and it was satisfied in this case.

[119] The legislation does not contemplate submissions to the GIC. Furthermore, the legislation indicates that the proponent is not informed of the Minister's decision on significant adverse effects until the Decision Statement is released – this indicates that not only would the proponent not have the opportunity to make submissions to the GIC, but the proponent would not even be aware that the GIC is deliberating. Moreover, the Panel Report adequately canvassed the issue of justification.

[120] Finally, Taseko had no right to the materials it claims. These are a confidence of the Queen's Privy Council pursuant to sections 39(2)(a) and 39(2)(c) of the *Canada Evidence Act*, RSC, 1985, c C-5.

(2) Jurisdiction

[121] The GIC had jurisdiction to make this decision. As noted above, the 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* (*Conseil des Innus de Ekuanitshit v Canada (Procureur général)*, 2013 FC 418, 431 FTR 219).

(3) Duty to Give Reasons

[122] Lastly, there was no duty on the Minister or the GIC to give reasons in this case. As discussed in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the duty of fairness does not require reasons to be given in all cases. Further, if such a duty existed, the "reasons" were adequate.

[123] The legislation does not contemplate reasons by either the Minister or the GIC. As noted by the Respondents, the legislation simply indicates that the proponent should be informed of the decision. This is reasonable given that the Minister and GIC were essentially adopting the Panel process and its Report.

[124] The materials that were before the Minister and the GIC, including the Report, must be accepted, by inference, as constituting the reasons in this case. As the SCC explained in *Baker* at para 44: "individuals are entitled to fair procedures and open decision making, but… in the administrative context, this transparency may take place in various ways."

[125] In addition, the press release may be used to indicate whether the Minister and the GIC relied on the Report in making their decisions. As Manson J. stated in *Peace Valley Landowner Assn v Canada (Attorney General)*, 2015 FC 1027, 97 CELR (3d):

> [64] Moreover, I do not consider the Order in Council to be exhaustive in indicating what was considered by the GIC. **The entire Record should be reviewed to determine if the decision was unreasonable, and should be read together in the context of the evidence and the process to serve the purpose of showing whether the result falls within a range of reasonable, possible outcomes** (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14, 15, 18). In addition, **the press release issued by the Minister, after the Order in Council was released, on the same day, October 14, 2014, can be accepted and acknowledged as an indication of the considerations of the GIC**. Despite having been released after the decision was made, this contemporaneous release at the very least is informative and indicative of the consideration of economic issues and concerns[.]
>
> [Emphasis added.]

[126] The press release clearly indicated that the federal government had reviewed the Report and agreed with its conclusions as to environmental impacts. This reinforces the conclusion that the Report is the basis for the decision of the Minister and the GIC. There is no evidence to the contrary.

C. ***Issue 3: Did the Minister and the GIC breach the* Bill of Rights?**

[127] Taseko submits that the denial of procedural fairness in the making of the decisions of the Minister and the GIC constituted a breach of the *Canadian Bill of Rights*, SC 1960, c 44 [*Bill of Rights*]. Section 2(e) states:

2 Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to	**2** Toute loi du Canada, à moins qu'une loi du Parlement du Canada ne déclare expressément qu'elle s'appliquera nonobstant la *Déclaration canadienne des droits*, doit s'interpréter et s'appliquer de manière à ne

authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to	pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou des libertés reconnus et déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transgression, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme
…	[…]
(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;	**e)** privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;

[128] Taseko developed this argument further during oral submissions. Counsel acknowledged that the *Bill of Rights* only applies if there is a hearing – that is, if there is a hearing, it must be fair. In the instant case, Taseko submits that there was a hearing before the Minister: the Minister injected herself personally into the process when she heard from the TNG at the October 8, 2013 meeting.

[129] Taseko submits that the decisions of the Minister and the GIC "greatly impacted" the economic and practical interests of Taseko.

[130] The *Bill of Rights* only applies if there was a hearing – it does not apply so as to create a free-standing right to a hearing where the law does not otherwise create such a right. In *Authorson v Canada (Attorney General)*, 2003 SCC 39, [2003] 2 SCR 40, the SCC stated:

> [59] However, s. 2(*e*) applies **only to guarantee the fundamental justice of proceedings before any tribunal or administrative body that determines individual rights and obligations**. That this is the case becomes more obvious by examining the other guarantees of s. 2, which confer:
>
> (i) protections against arbitrary detention and cruel and unusual punishment;
>
> (ii) upon arrest, the right to information about charges laid, the right to counsel and the right to *habeas corpus*;
>
> (iii) evidentiary rights and rights against self-incrimination;
>
> (iv) the presumption of innocence;
>
> (v) the right to an impartial tribunal;
>
> (vi) the right to reasonable bail; and
>
> (vii) the right to an interpreter in proceedings.
>
> All of these protections are legal rights applicable in the context of, or prior to, a **hearing before a court or tribunal**.
>
> [60] The French version of s. 2(*e*) makes this distinction clearer. A fair hearing is translated as "*une audition impartiale de sa cause*". According to *Le Grand Robert de la langue française*, (2nd ed. 2001), the term "*cause*" means "*[a]ffaire, procès qui se plaide*". This definition confirms the legalistic nature of the "fair hearing".
>
> [61] Section 2(*e*) of the *Bill of Rights* does not impose upon Parliament the duty to provide a hearing before the enactment of legislation. **Its protections are operative only in the application of law to individual circumstances in a proceeding before a court, tribunal or similar body**.
>
> [Emphasis added.]

[131] Similarly, in *Amaratunga v Northwest Atlantic Fisheries Organization*, 2013 SCC 66 at para 61, [2013] 3 SCR 866, the SCC stated that s. 2(e) "provides for a fair hearing if and when a

hearing is held." In *Kazemi (Estate) v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176, the SCC stated:

> [116] I agree with the Attorney General of Canada that the challenge based on s. 2(*e*) of the *Bill of Rights* should be dismissed on the basis that s. 2(*e*) does not create a self-standing right to a fair hearing where the law does not otherwise allow for an adjudicative process. Instead, s. 2(*e*) guarantees fairness in the context of a hearing before a Canadian court or a tribunal.

[132] In my view, the *Bill of Rights* does not apply to the processes before the Minister and the GIC. The Minister and the GIC are not a "court, tribunal or similar body" nor were they performing functions similar to courts, tribunals or similar bodies. These were not adjudicative processes, and no "hearing" was held or was required to be held within the meaning of s. 2(e).

[133] Taseko appears to argue that the October 8, 2013 meeting constituted a "hearing" such that the process before the Minister constituted an adjudicative process, and Taseko was therefore entitled to a fair process. Taseko has not provided any support for its position that a meeting in the context of consultation constitutes a "hearing" within the meaning of the *Bill of Rights* and, in my view, such a conclusion would not be in line with the jurisprudence indicating that the *Bill of Rights* confers procedural guarantees before a tribunal, court, or similar body.

[134] Further, even if this meeting did constitute a "hearing," in my view there was no breach of the principles of fundamental justice for the reasons given, above, with respect to the *audi alteram partem* principle (Taseko's argument concerning the *Bill of Rights* essentially appears to be an extension of Taseko's position with respect to the *audi alteram partem* principle).

[135] As I have concluded that the process did not breach this principle and the process was otherwise procedurally fair, in my view Taseko's arguments with respect to the *Bill of Rights* must fail.

D. ***Issue 4: Are sections 5(1)(c) and 6 of the* CEAA 2012 *unconstitutional?***

[136] Taseko submits that sections 5(1)(c) and 6 of the *CEAA 2012* are of no force and effect because they are *ultra vires* Parliament. A law is *ultra vires* the legislative competence of Parliament if it falls within a provincial head of power in "pith and substance" (*Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 28, [2015] 1 SCR 693). In determining the pith and substance of a law, the Court should consider the purpose and effects of the law, which includes the legal ramifications of the language used and the practical consequences of the law (*Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at para 36, [2016] 1 SCR 467 [*Rogers*]).

[137] In the present case, Taseko characterizes the impugned provisions thus:

> The purpose of ss 5(1)(c) and 6 appears to be to protect aboriginal peoples, and places of significance to aboriginal peoples, from the effects of environmental change attributable to economic development. The immediate legal effect is to require a proponent to obtain federal approval before doing anything that might cause an environmental change that might affect aboriginal peoples or a place of significance to aboriginal peoples. A practical effect is to render inoperative, by the doctrine of paramountcy, any approvals that have been granted to a proponent by provincial authorities pursuant to provincial legislation, even where the provincial Crown met its duty to consult with aboriginal peoples before approval was granted.
>
> The pith and substance of ss 5(1)(c) and 6 is therefore to require federal approval, and to render inoperative any provincial

> approval, for a project that may have any effect on aboriginal peoples.

[138] In the alternative, Taseko submits that the Court should apply the doctrine of interjurisdictional immunity, which operates to protect the "core" of a given head of power from encroachment. Although this doctrine is usually reserved for circumstances covered by precedent, and it has never successfully been invoked to protect a provincial head of power, Taseko nonetheless submits that the doctrine is mutual in respect of both federal or provincial heads.

[139] The first matter is whether it is unnecessary to determine the constitutionality of the impugned provisions to resolve this judicial review. The environmental review assessment in this case was not commenced under the impugned legislation (in fact, this review was commenced under the old *CEAA*). Furthermore, 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) – therefore, the factual matrix of this case does not lend itself to a robust analysis of the constitutionality of these provisions.

[140] Generally speaking, constitutional issues should not be decided unless doing so is necessary on the facts of the case: in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, 124 DLR (4th) 129, the SCC stated that "[t]he policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen" (at 112).

[141] The Respondent Minister/AG accurately described the situation as:

> … [t]he constitutionality of a hypothetical environmental assessment that might theoretically be commenced with respect to a designated project exclusively to consider s. 5(1)(c) effects, should only be determined if this fact situation ever arises. Only in that way will the case contain a factual matrix that would be comprehensive enough to examine how all other provisions of *CEAA 2012* – including, for example, the basis upon which the project became a "designated project" and the evaluation of the scope of discretion provided from by s. 10 of the Act for the Agency to determine if an environmental assessment is needed – could operate to limit the reach of the legislation.

[142] In the present case, that prejudice would clearly include, at the very least, the striking down of *CEAA 2012* provisions which purport to take into account the interests of aboriginal peoples (i.e., health and socio-economic conditions, physical and cultural heritage, use of lands for traditional purposes, and things of significance) which may be impacted by environmental effects of certain projects or activities subject to environmental assessments. The potential repercussions of this action are not clear at this point.

[143] I conclude that there is not the factual matrix or analysis necessary to make a constitutional pronouncement. If Taseko was of the view that the legislation and hence the Project Review was constitutionally infirm, it should have raised it at the outset of the process.

[144] If the Court were required to decide the constitutional issue, I would find the legislation to be *intra vires*.

[145] The determination of the *vires* of the provisions is a two-step process. In *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 13, [2004] 3 SCR 698, the SCC stated: "It is trite law

that legislative authority under the *Constitution Act, 1867* is assessed by way of a two-step process: (1) characterization of the "pith and substance" or dominant characteristic of the law; and (2) concomitant assignment to one of the heads of power enumerated in ss. 91 and 92 of that Act."

[146] As to the pith and substance, in *Kitkatla Band v British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31, [2002] 2 SCR 146, the SCC described the pith and substance analysis as follows:

> [53] A pith and substance analysis looks at both (1) the purpose of the legislation as well as (2) its effect. First, to determine the purpose of the legislation, the Court may look at both intrinsic evidence, such as purpose clauses, or extrinsic evidence, such as Hansard or the minutes of parliamentary committees.
>
> [54] Second, in looking at the effect of the legislation, the Court may consider both its legal effect and its practical effect. In other words, the Court looks to see, first, what effect flows directly from the provisions of the statute itself; then, second, what "side" effects flow from the application of the statute which are not direct effects of the provisions of the statute itself: see *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at pp. 482-83. Iacobucci J. provided some examples of how this would work in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 23:
>
> > The effects of the legislation may also be relevant to the validity of the legislation in so far as they reveal its pith and substance. For example, in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, the Court struck down a municipal by-law that prohibited leafleting because it had been applied so as to suppress the religious views of Jehovah's Witnesses. Similarly, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, the Privy Council struck down a law imposing a tax on banks because the effects of the tax were so severe that the true purpose of the law could only be in relation to banking, not taxation. However, merely

incidental effects will not disturb the constitutionality of an otherwise *intra vires* law.

[147] With respect to the purpose of the legislation, this is laid out thus in the *CEAA 2012*:

4 (1) The purposes of this Act are	**4 (1)** La présente loi a pour objet :
(a) to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project;	**a)** de protéger les composantes de l'environnement qui relèvent de la compétence législative du Parlement contre tous effets environnementaux négatifs importants d'un projet désigné;
(b) to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;	**b)** de veiller à ce que les projets désignés dont la réalisation exige l'exercice, par une autorité fédérale, d'attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi soient étudiés avec soin et prudence afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants;
(c) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments;	**c)** de promouvoir la collaboration des gouvernements fédéral et provinciaux et la coordination de leurs activités en matière d'évaluation environnementale;
(d) to promote communication and cooperation with aboriginal peoples with respect to environmental assessments;	**d)** de promouvoir la communication et la collaboration avec les peuples autochtones en matière d'évaluation

	environnementale;
(e) to ensure that opportunities are provided for meaningful public participation during an environmental assessment;	**e)** de veiller à ce que le public ait la possibilité de participer de façon significative à l'évaluation environnementale;
(f) to ensure that an environmental assessment is completed in a timely manner;	**f)** de veiller à ce que l'évaluation environnementale soit menée à terme en temps opportun;
(g) to ensure that projects, as defined in section 66, that are to be carried out on federal lands, or those that are outside Canada and that are to be carried out or financially supported by a federal authority, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;	**g)** de veiller à ce que soient étudiés avec soin et prudence, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants, les projets au sens de l'article 66 qui sont réalisés sur un territoire domanial, qu'une autorité fédérale réalise à l'étranger ou pour lesquels elle accorde une aide financière en vue de leur réalisation à l'étranger;
(h) to encourage federal authorities to take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy; and	**h)** d'inciter les autorités fédérales à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie;
(i) to encourage the study of the cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments.	**i)** d'encourager l'étude des effets cumulatifs d'activités concrètes dans une région et la prise en compte des résultats de cette étude dans le cadre des évaluations environnementales.
(2) The Government of Canada, the Minister, the Agency, federal authorities and responsible authorities, in the	**(2)** Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence, les autorités

administration of this Act, must exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.	fédérales et les autorités responsables doivent exercer leurs pouvoirs de manière à protéger l'environnement et la santé humaine et à appliquer le principe de précaution.
(Court's underlining)	(La Cour souligne)

[148] In *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244, rev'd 2016 FCA 311, leave to appeal to SCC granted, 37441 (18 May 2017), Hughes J. considered this legislation and stated:

> [94] … The new *Act* only requires an environmental assessment if a project is on a list of designated projects, known as the *Regulations Designating Physical Activities*, SOR/2012-147.
>
> …
>
> [96] … while section 5(1) of the *Canadian Environmental Assessment Act, 2012* does narrow the scope of environmental effects to consider, 5(1)(c) exists to ensure that such a narrowing does not occur in relation to Aboriginal peoples and, in this case, the Mikisew.

[149] In *Gitxaala*, the FCA stated:

> [109] Environmental assessments are to include assessments of the matters set out in sections 5 and 19 of the *Canadian Environmental Assessment Act, 2012*. For present purposes, we need only offer a general summary of these matters. They include changes caused to the air, land or sea and the lifeforms that inhabit those areas. They also include consideration of matters specific to the Project and its specific effects on the environment and lifeforms who inhabit it. And they include the effects upon Aboriginal peoples' health and socio-economic conditions, physical and cultural heritage, the use of lands and resources for traditional purposes, and any structures, sites or things that are of historical, archaeological, palaeontological, or architectural significance.

[150] The purpose clause of the *CEAA 2012* speaks to the promotion of communication and cooperation with aboriginal people, and the clear language of s. 5(1)(c) addresses effects on health and socio-economic conditions, physical and cultural heritage, use of lands and resources for traditional purposes, and structures, sites, or things of significance of changes that may be caused to the environment. In my view, the language of "communication and cooperation" speaks to the recognition by the legislature that the environmental assessment process is designed to satisfy the Crown's duty to consult with impacted First Nations, and the language of s. 5(1)(c) draws out those potential impacts to be considered.

[151] Taseko does not acknowledge that the environmental assessment scheme in this legislation explicitly states that it applies only to projects that are within federal jurisdiction (for example, projects that are "designated projects" according to the *Regulations Designating Physical Activities*, SOR/2012-147). In this, Taseko has erred. In my view, the effect of the impugned provisions is to prevent a proponent of a designated project (per s. 6) from taking any actions which would cause environmental effects with respect to aboriginal peoples as listed in s. 5(1)(c).

[152] In my view, the pith and substance of the impugned provisions comes within the federal Parliament's power to legislate for "Indians, and Lands Reserved for the Indians" in s. 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

[153] The Court cannot accept Taseko's invitation to recognize a limit to the federal power to legislate on this matter such that "it confers jurisdiction on Parliament only to respond to

substantial risks of harm to interests unique to aboriginal peoples." Indigenous people have many of the same interests (religious, socio-economic, environmental, etc.) as non-indigenous people, and these interests are often uniquely at risk in ways that the interests of non-indigenous people are not. As noted by the Minister/AG, the power in section 91(24) is a specific power, and it would be inappropriate to modify this power for the protection of a general power (such as the provincial power over local works and undertakings, for example).

[154] Given that the constitutional invalidity of the provisions of the *CEAA 2012* is not immediately obvious and that a resolution of the constitutional principles at play require a sound and focused factual basis, it was imprudent to launch more fully into the type of constitutional determination Taseko now raises.

[155] As to the interjurisdictional immunity, in *Rogers*, the Supreme Court of Canada laid out the doctrine of interjurisdictional immunity as follows:

> [59] The doctrine of interjurisdictional immunity protects the "core" of a legislative head of power from being impaired by a government at the other level: *COPA*, at para. 26. Its application involves two steps. The first is to determine whether a statute enacted or measure adopted by a government at one level trenches on the "core" of a power of the other level of government. If it does, the second step is to determine whether the effect of the statute or measure on the protected power is sufficiently serious to trigger the application of the doctrine: *COPA*, at para. 27.

[156] As argued by the Respondents Minister/AG, the recognition of interjurisdictional immunity in this case would "logically" extend to any local project that a federal law prevented from moving forward. This would privilege the provincial powers in a manner not contemplated by the Constitution and it would violate the principle of cooperative federalism.

[157] In my view, neither of the steps described in *Rogers* are met: the legislation does not trench on a "core" of provincial power and, if it does, the effect is not sufficiently serious so as to trigger the doctrine of interjurisdictional immunity and Taseko has not provided any evidence as to this type of effect.

[158] The doctrine of interjurisdictional immunity was discussed in-depth in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134, wherein the SCC stated:

> [61] Recent jurisprudence has tended to confine the doctrine of interjurisdictional immunity. … but rather remains "in a form constrained by principle and precedent".
>
> [62] … the doctrine of interjurisdictional immunity is in tension with the dominant approach that permits concurrent federal and provincial legislation with respect to a matter, provided the legislation is directed at a legitimate federal or provincial aspect, as the case may be. …
>
> [63] … the doctrine is in tension with the emergent practice of cooperative federalism, which increasingly features interlocking federal and provincial legislative schemes. …
>
> [64] … the doctrine of interjurisdictional immunity may overshoot the federal or provincial power in which it is grounded and create legislative "no go" zones where neither level of government regulates.

[159] The *CEAA 2012* is a cooperative scheme: the purpose clause states that the legislation is meant to "promote cooperation and coordinated action between federal and provincial governments." This is a clear recognition that, although this is a federal assessment, the scheme involves areas of concurrent jurisdiction such as environmental protection.

[160] In my view, a project of such magnitude as the one considered in the present case will likely have impacts on areas of both provincial and federal responsibility. The doctrine of interjurisdictional immunity, something of a “last resort” in constitutional law, is generally reserved for circumstances covered by precedent, and has not yet been found to cover a provincial head of power – therefore, in my view, an application of this doctrine in this case would be a serious departure from previous jurisprudence.

[161] Therefore, for the reasons already given, this Court should not embark on a consideration of this doctrine without a proper constitutional factual basis.

VI. CONCLUSION

[162] The Court concluded, for all the reasons given, that Taseko was afforded a fair process during the decision making process of the Minister and the GIC.

[163] The environmental assessment scheme as a whole indicates that a proponent’s opportunity to make its case and to be afforded a high degree of procedural fairness is before the Panel.

[164] Taseko was owed a minimal degree of procedural fairness before the Minister and this was satisfied. It is less clear whether a right of procedural fairness arises in this type of decision making process by the GIC but to the extent it does, it is very minimal and was satisfied.

[165] Taseko's procedural fairness complaint is grounded in the asymmetry between the treatment of Taseko and that of TNG. However, procedural fairness does not always require symmetry and there are circumstances in which fairness necessitates a degree of asymmetry. The Crown's duty to consult First Nations is one such circumstance.

[166] Taseko was owed a duty of procedural fairness during the course of the environmental assessment process; but it was not entitled to an identical process as the consultation process accorded to the TNG.

[167] As to Taseko's rights under the *Bill of Rights*, firstly, the process before the Minister and the GIC was not the adjudicative process contemplated by the *Bill of Rights* and secondly, for the reasons given, the process was procedurally fair.

[168] As to the constitutionality of ss. 5(1)(c) and 6, the provisions appear to be *intra vires*. An analysis of this constitutional issue on these facts is not necessary and if it were, there must be a full and better constitutional record. The framework and groundwork had to be established at first instance; alternatively, the legislation is at least presumptively constitutional.

[169] As to interjurisdictional immunity, Taseko seeks a radical conclusion which deviates significantly from the jurisprudence. For the same reasons of insufficiency of a proper record, the Court should not decide this point.

[170] Therefore, this judicial review is dismissed with costs to both Respondents. The parties may file written representations as to the level of costs to be awarded by January 31, 2018.

JUDGMENT in T-744-14

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to both Respondents. The parties are to file written representations as to the level of costs to be awarded by January 31, 2018.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-744-14
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
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APPEARANCES:

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