Federal Court  Cour fédérale

Date: 20171205

Docket: T-1977-13

Citation: 2017 FC 1099

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

and

THE MINING ASSOCIATION OF CANADA, THE MINING ASSOCIATION OF BRITISH COLUMBIA, THE MINING SUPPLIERS ASSOCIATION OF BRITISH COLUMBIA, THE ASSOCIATION FOR MINERAL EXPLORATION, BRITISH COLUMBIA, and MININGWATCH CANADA

Interveners

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application for judicial review of a Review Panel Report [respectively Panel and Report] concerning the proposed New Prosperity Gold-Copper Mine that was made pursuant to the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*]. In the this case, the judicial review centers on findings in the Report with respect to water seepage and impact on water quality in Fish Lake (Teztan Biny) and the surrounding area.

[2] The related file T-744-14 is an application for judicial review of subsequent decisions by the Minister of the Environment [Minister] and the Governor in Council [GIC]. The judicial review of those decisions is found in *Taseko Mines Limited v Canada (Environment)*, 2017 FC 1100.

[3] The key dispute is the Panel's conclusion that toxic water seepage will be greater than Taseko Mines Limited [Taseko] estimated. This conclusion ultimately led to decisions not approving the proposed mine.

[4] Taseko seeks the following relief in respect of the Panel and its Report:

> [92] Taseko seeks a declaration that the following findings of the Panel are invalid and are quashed or set aside:
>
> (i) the Panel's determination that Taseko underestimated the volume of tailings pore water seepage leaving the TSF;

> (ii) the Panel's decision to accept NRCan's upper bound estimate as the expected seepage rate from TSF; and
>
> (iii) the Panel's conclusion that the concentration of water quality variables in Fish Lake and Wasp Lake would likely be a significant adverse environmental effect
>
> (the "Impugned Findings").
>
> [93] Taseko also seeks a declaration that the Panel failed to observe principles of procedural fairness in its conduct of the public hearing process related to the environmental assessment of the Project.
>
> [94] Should the declarations sought by Taseko be granted in whole or in part, it follows that the matter must be remitted to the Panel to reconsider the Impugned Findings and remedy the breaches in the Panel's process (as applicable), and to then make new determinations in accordance with the directions provided by this Court.
>
> [Footnotes omitted.]

[5] To set the background, the relevant legislation is outlined below.

> *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52
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> | | |
> |---|---|
> | **43 (1)** A review panel must, in accordance with its terms of reference, | **43 (1)** La commission, conformément à son mandat : |
> | **(a)** conduct an environmental assessment of the designated project; | **a)** procède à l'évaluation environnementale du projet désigné; |
> | **(b)** ensure that the information that it uses when conducting the environmental assessment is made available to the public; | **b)** veille à ce que le public ait accès aux renseignements qu'elle utilise dans le cadre de cette évaluation; |
> | **(c)** hold hearings in a manner that offers any interested | **c)** tient des audiences de façon à donner aux parties |

party an opportunity to participate in the environmental assessment;

intéressées la possibilité de participer à l'évaluation;

(d) prepare a report with respect to the environmental assessment that sets out

d) établit un rapport assorti de sa justification et de ses conclusions et recommandations relativement à l'évaluation, notamment aux mesures d'atténuation et au programme de suivi, et énonçant, sous la forme d'un résumé, les observations reçues du public, notamment des parties intéressées;

(i) the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program, and

(ii) a summary of any comments received from the public, including interested parties;

(e) submit the report with respect to the environmental assessment to the Minister; and

e) présente son rapport d'évaluation environnementale au ministre;

(f) on the Minister's request, clarify any of the conclusions and recommendations set out in its report with respect to the environmental assessment.

f) sur demande de celui-ci, précise l'une ou l'autre des conclusions et recommandations dont son rapport est assorti.

…

[…]

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

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

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

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 of this Act; and

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;

(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

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

or by document referred to in subsection 41(2) of this Act.	paragraphe 41(2) de la présente loi.

II. BACKGROUND FACTS

[6] The New Prosperity Gold-Copper Mine [the Project] is a proposed open pit gold and copper mine in British Columbia, 125 km southwest of Williams Lake (in the traditional territories of the Tsilhqot'in peoples). The $1.5 billion Project is said to provide a number of jobs as well as (allegedly) a $340 million contribution to British Columbia's gross domestic product.

[7] The Project is the successor to another proposed mine, Prosperity, that was rejected by the GIC in 2010 following a federal environmental assessment. The original design of the mine would have necessitated draining the lake Teztan Biny.

[8] In this second Project, Teztan Biny would not be drained because the proposal relocates the tailings storage facility [TSF] and introduces a lake recirculation water management scheme.

[9] On November 7, 2011, the Minister stated that the Project would undergo a federal environmental assessment under the *Canadian Environmental Assessment Act*, SC 1992, c 37 [*CEAA*] (later continued according to the transition provisions of the *CEAA 2012*).

[10] On August 3, 2012, the Panel was issued Amended Terms of Reference that were consistent with the new *CEAA 2012* provisions. The Amended Terms of Reference dictated that the Panel must consider a number of factors in assessing the environmental effects of the proposed project:

a. the environmental effects of the Project including the environmental effects of malfunctions or accidents that may occur in connection with the Project and any cumulative environmental effects that are likely to result from the Project in combination with other projects or activities that have been or will be carried out;

b. the significance of the environmental effects referred to in the above paragraph;

c. comments from the public and Aboriginal groups that are received during the review;

d. measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;

e. the need for the Project and alternatives to the Project;

f. the purpose of the Project;

g. alternative means of carrying out the Project that are technically and economically feasible, and the environmental effects of any such alternative means;

h. the need for, and the requirements of, any follow-up program in respect of the Project; and

i. the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future.

[11] The Panel published Guidelines for the Environmental Impact Statement [EIS] on March 16, 2012.

[12] Taseko submitted an EIS on September 27, 2012, purporting to deal with the deficiencies in the initial Prosperity project proposal.

[13] The Panel then engaged in discussions with respect to the technical merits and adequacy of the EIS with "federal departments, the BC Ministry of Energy and Mines ("BC MEM"), aboriginal groups, including the Tsilhqot'in National Government ("TNG"), and Taseko."

[14] Taseko's EIS described features of the proposed TSF and predicted seepage using two computer models: a 3-dimensional model representing the TSF as a horizontal plane, and 2-dimensional model representing the TSF as a vertical plane.

[15] Natural Resources Canada [NRCan] identified significant concerns with the EIS including "deficiencies with both of Taseko's models, the data upon which they were based, Taseko's proposal to rely on adding estimates from both models, and Taseko's proposed mitigation measures."

[16] As a result of these concerns, NRCan recommended the Panel request that Taseko provide a more comprehensive model of 3D numerical groundwater flow, which would address the deficiencies in the models provided in the EIS.

[17] In addition, other participants raised various other concerns with respect to "proposed mitigation measures, lack of hydrogeological data and uncertainty related to the range of till hydraulic conductivities, and significant underestimation in Taseko's seepage estimates."

[18] On February 20, 2013, the Panel released its Public Hearing Procedures, which outlined requirements for the conduct of public hearings and topic-specific hearing sessions.

[19] In a letter dated May 24, 2013, Taseko sought to postpone dealing with the deficiencies. It indicated that differences in technical issues could be dealt with after the Project received approval: "any difference in interpretation of technical data that exists between NRCan and Taseko can be resolved by a specifically focused pump test program, one which Taseko will undertake to refine the pit dewatering system prior to development."

[20] Taseko therefore declined to develop the 3D numerical groundwater flow model requested by the Panel.

[21] On June 14, 2013, NRCan indicated that it was "in the process of developing a numerical groundwater flow model to assess seepage from the base of the tailings storage facility, similar to that requested by the Panel in SIR 12/14(A-a)" and offered to make the findings of this study available to the Panel.

[22] The Panel accepted this offer in a letter dated June 21, 2013. At this time, the Panel also indicated that this information would be made publicly available (online) by way of the project registry.

[23] By June 20, 2013, the Panel found that the environmental assessment could proceed to public hearings. These hearings began on July 22, 2013, and were completed on August 23, 2013, when the final oral arguments took place. The topic-specific, technical hearings took place between July 25, 2013, and August 1, 2013.

[24] On July 4, 2013, NRCan provided the Panel with its 3D numerical model. On July 19, 2013, NRCan provided the Panel with written submissions. In its July 2013 submissions, NRCan stated that "[s]eepage from the TSF was estimated at 8650 m^3/d (100 L/s) which is more than an order of magnitude greater than the proponent's 3D model prediction [of 9 L/s]."

[25] Taseko disputes the accuracy of this seepage estimate characterization.

[26] On August 21, 2013, NRCan submitted a Technical Memorandum that provided "further clarification related to the modeling approaches taken by Taseko and NRCan."

[27] The Panel issued its Report on October 31, 2013. It is the NRCan Technical Memorandum on seepage and the Panel's reliance on these submissions in concluding that the seepage of toxic water from the TSF would be greater than estimated by Taseko that lie at the heart of this judicial review.

[28] In addition to the Applicant Taseko and the Respondent Attorney General of Canada [AG], the Court had the benefit of submissions as Respondents by the Tsilhqot'in National Government [TNG] and Joey Alphonse on his own behalf and on behalf of all members of the Tsilhqot'in Nation. The Mining Association and MiningWatch Canada also appeared, but as intervenors.

[29] The Panel Report is lengthy; however, the impugned findings with respect to seepage are contained within a rather small section of the Report. The majority of the impugned "findings"

and statements are located in a section of the Report titled "5.3.1.2 **Views of Participants**." In this section, the Panel summarized the conclusions and recommendations of NRCan, as well as the conclusions of the independent expert Dr. Leslie Smith.

[30] To put the matter in context, Table 5 of the Report shows a "Comparison of Seepage Estimates taken from the August 21, 2013, Natural Resources Canada Technical Memorandum to the Panel." As this Table is the subject of a great deal of debate, it is reproduced here in full:

	Taseko estimates (based on two different models)	**Natural Resources Canada base case, based on its 3-D model**
Post Closure seepage through bottom of the tailings storage facility	9 L/s (760 m^3/d) From 3-D model	100 L/s (8650 m^3/d)
Main Embankment seepage (towards Fish Lake)	28 L/s (2420 m^3/d) From 2-D model	58 L/s (5087 m^3/d)
South and West Embankment seepage	27 L/s (2333 m^3/d) From 2-D model	29 L/s (2552 m^3/d)
Deep basin seepage (greater than 200 mbgs)	0 L/s (Natural Resources Canada claims Taseko's 2D model precludes this flux component)	20 L/s (1699 m^3/d)

[31] Continuing on its summary of NRCan's conclusions and recommendations, the Panel stated:

> As indicated in the above table, pore water seepage from the tailings storage facility basin was estimated by Natural Resources Canada to be 100 L/s (8 650 m^3/d) which was more than an order of magnitude greater than what it considered to be Taseko's comparative prediction of 9 L/s. The Natural Resources Canada model showed that a further 20 L/s (1 699 m^3/d) of seepage was predicted to flow to the deep groundwater zone beneath the basalt flows that underlie the tailings storage facility. Natural Resources

> Canada claimed that this latter flux was not modeled in the Taseko's 2D approach because an impermeable boundary was assumed at the base of the basalt flows.

[32] This section of the Report went on to summarize the submissions of Dr. Smith, who stated that the framework used by Taseko was developed according to accepted practice; however, "the Natural Resources Canada model has greater flexibility if the tailings storage facility was explicitly included within the model grid."

[33] Dr. Smith explained the differences in seepage estimates between Taseko and NRCan likely arose from differences in the hydraulic conductivity used (that is, tailings, till, shallow bedrock), as well as differences in till layers.

[34] Dr. Smith ultimately estimated the TSF seepage to be between 20 L/s and 100 L/s, and in his opinion "the value would be likely towards the upper end of this range."

[35] In the section titled "5.3.1.3 **Panel's Conclusions and Recommendations**," the Panel identified three potential seepage pathways from the TSF, and concluded that seepage of tailings pore water from the TSF was the largest potential source of contaminant loadings that would impact water quality in the area.

[36] The Panel also identified the "fractured basalt intercalated with the glacial till in the valley bottom" as a potential major seepage pathway.

[37] Further, the Panel found that there was a dearth of data: there was a "lack of detailed geotechnical site investigations required to more reliably characterize the foundation of the tailings storage facility, particularly till thickness, variability in the overburden units, the likely existence of preferred pathways through the fractured upper bedrock units, and the nature and extent of the seeps and springs at the toe of the ridge west of the tailings storage facility."

[38] The Panel then summarized Taseko's estimates of solute migration in the absence of mitigation, as well as its predictions of unrecovered seepage after mitigation. It found that despite the substantial heterogeneity of the overburden and shallow bedrock, Taseko had represented all overburden deposits "as one unit and assigned a bulk hydraulic conductivity value." Further, Taseko did not account for spatial variation of particle size of the tailings.

[39] Of particular relevance, the Panel accepted the upper bound estimate put forward by NRCan and found that Taseko had underestimated the rate of seepage from the TSF. The Panel concluded as follows:

> The Panel has determined that Taseko has underestimated the volume of tailings pore water seepage leaving the tailings storage facility and the rate at which the water plume would reach the various lakes and streams downslope of the tailings storage facility, even with the mitigations proposed.
>
> The Panel accepts Natural Resource Canada's upper bound estimate as the expected seepage rate from the tailings storage facility (see Table 5 above).
>
> The Panel concludes that there is strong evidence that the seepage from the tailings storage facility would be significantly higher than estimated by Taseko, resulting in potentially higher loading of contaminants in the receiving environment.

[40] The Panel went on to make a number of recommendations with respect to further monitoring, testing, and collecting data, in the event that the Project proceeded.

III. ISSUES

[41] Each of the parties phrased their issues slightly differently but in the end the issues the Court considers that must be addressed are:

1. Did the Panel fail to observe principles of procedural fairness by accepting and relying upon the Technical Memorandum without giving Taseko a fair opportunity to respond?
2. Was the Panel's determination that Taseko underestimated the volume of tailings pore water seepage leaving the TSF unreasonable?
3. Was the Panel's decision to accept NRCan's upper bound estimate as the expected seepage rate from the TSF unreasonable?
4. Was the Panel's conclusion that the concentration of water quality variables in Fish Lake (Teztan Biny) and Wasp Lake would likely be a significant adverse environmental effect unreasonable?

IV. STANDARD OF REVIEW

[42] Procedural fairness is subject to a correctness standard of review: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339 [*Khosa*].

[43] The Panel findings with respect to seepage and water quality are subject to a reasonableness standard of review. In a decision concerning the old *CEAA*, *Greenpeace Canada v Canada (Attorney General)*, 2014 FC 1124 at para 37, 468 FTR 299, aff'd 2016 FCA 114, the Federal Court of Appeal [FCA] stated: "issues raised by the Applicants which challenge the exercise of discretion or assessment of evidence attract a reasonableness standard of review."

[44] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190, the SCC indicated that a reasonable decision is one that is intelligible, transparent, and justifiable, and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." Reasonableness is a deferential standard, and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Khosa* at para 59).

V. ANALYSIS

A. *Issue 1: Did the Panel fail to observe principles of procedural fairness by accepting and relying upon the Technical Memorandum?*

[45] Taseko argues the following points:

- acceptance of NRCan's Technical Memorandum was late which deprived Taseko's experts of the opportunity to question the author or provide technical submissions;
- the Technical Memorandum contained errors, particularly as to seepage, and these errors were incorporated into the Report;

- the Technical Memorandum went beyond summarizing NRCan's perspective and introduced new evidence in a manner not contemplated by the Public Hearings Procedures;
- Taseko was owed a degree of procedural fairness in accordance with the factors in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 22-27, 174 DLR (4th) 193 [*Baker*];
- Taseko asserts that, given the nature of the decision, the Panel essentially performed a judicial function where procedural fairness interests are heightened, especially as the Report was part of the Minister and GIC's decision making process under section 52 of *CEAA 2012*; and
- the acceptance of the Technical Memorandum breached the duty of fairness owed as new evidence was introduced favourable to one party and to which the other party had no opportunity to respond further. (*CEP Union of Canada v Power Engineers et al*, 2001 BCCA 743, 209 DLR (4th) 208 [*CEP Union*] (sometimes reported as *CEP, Local 76 v British Columbia (Power Engineers & Boiler & Pressure Vessel Safety Appeal Board)*), relied upon where the British Columbia Court of Appeal [BCCA] held that merely restating evidence previously given may breach this principle.)

[46] For the reasons below, Taseko was owed, and was in fact afforded, a high degree of procedural fairness during the review process.

(1) High Degree of Procedural Fairness owed to Taseko

[47] Despite the Respondents' submissions that a party is not promised procedural perfection in any decision making process, it appears that in this case the parties agree that Taseko was owed a high degree of procedural fairness. The major disagreement between the parties is whether the requisite degree of procedural fairness was in fact met.

[48] A review of the *Baker* factors indicates that Taseko was indeed owed a high degree of procedural fairness during the Panel process:

a) **Nature of the decision:** the Panel process was geared towards making findings of fact, and was designed so that all of the parties could put forward evidence and test the evidence adduced in a quasi-judicial manner (including, for example, cross-examination of experts). While the Public Hearing Procedures note that the Panel will not be "bound by the strict rules of procedure and evidence applicable to judicial proceedings" that does not, *per se*, lessen the degree of procedural fairness.

b) **Nature of the statutory scheme:** there is no formal appeal mechanism to challenge the Report (however, judicial review is available).

c) **Importance of the decision:** although this is not the final decision in the process (the Minister and the GIC made further decisions), it is undeniably crucial in terms of providing the facts and information that the Minister and the GIC require to make their determinations. (Indeed, in this case, the decisions of the Minister and the GIC were consistent with the conclusions of the Report.)

d) **Legitimate expectations:** the Public Hearing Procedures clearly laid out, in a fairly detailed manner, how the Panel process would proceed. The Public Hearing Procedures specifically state that the process should be "fair and orderly." However, the Panel had the power to and did in fact deviate from these Procedures at times.

e) **Procedural choices made by the decision maker:** as noted above, the Panel had the power to deviate from its own procedures (and it did so). Sometimes this was to Taseko's benefit (i.e. allowing Taseko "a few extra days" to respond to late submissions), and sometimes it was not. Deference should be given to a decision maker's choice of process (*Baker* at para 27).

[49] *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 [*Mavi*], cited by the Minister/AG, is not particularly dispositive. *Mavi* indicated that a balance must be struck between the cost of a "fair" process and the public interest in the government acting (and being perceived to be acting) fairly. In this case, with strong public interests on either side (economic and environmental interests, for example), the pendulum would seem to weigh heavily in favour of ensuring fairness. Furthermore, this process was likely quite expensive, and the Respondents have not provided any evidence that additional procedural fairness measures would have been prohibitively expensive.

(2) *Audi Alteram Partem*

[50] In *Canadian Cable Television Assn v American College Sports Collective of Canada, Inc*, [1991] 3 FC 626 at 639, 81 DLR (4th) 376 (CA), MacGuigan J.A. 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.]

[51] Although the Minister/AG cite *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 57, [2007] 1 SCR 350 [*Charkaoui*] for the proposition that the "right to know the case to be met is not absolute," I do not find that decision to be particularly persuasive in this context.

[52] *Charkaoui* was decided in the context of national security concerns; indeed, shortly after the Supreme Court of Canada [SCC] made the statement cited by the Minister/AG, McLachlin CJC stated that "the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual" (at para 58). This case does not present any similar circumstances that would warrant infringement of the *audi alteram partem* principle.

[53] Taseko's position is that the submission of the Technical Memorandum breaches this principle, and its argument is based on two contentions: (1) that the Technical Memorandum was

new evidence favouring NRCan's position; and (2) that Taseko did not have an adequate opportunity to respond to this evidence.

[54] Both of Taseko's premises are flawed. The Technical Memorandum did not contain new information; rather, this document summarized the information that had already been presented to the Panel, and to Taseko, in NRCan's written and oral submissions. Therefore, Taseko already knew the case that it had to meet before the submission of the Technical Memorandum, and the case it had to meet did not change following the submission of the Technical Memorandum.

[55] Taseko's argument that this was "new information" is premised on the contention that Dr. Desbarats had, during cross-examination, abandoned the "order of magnitude position." However, the "order of magnitude" comparison was only used when referencing the difference between the two 3D models, and the "factor of two" acknowledgement before the Panel was made with reference to Taseko's 2D model.

[56] Furthermore, this statement by Dr. Desbarats was preceded by comments regarding the deficiencies of the 2D model and the statement that it was "difficult to compare the two." As stated by the Minister/AG, "NRCan's expert merely acknowledged the math that "if" one was to include the 2D results in the comparison – which he never accepted should be done – then Taseko still would have underestimated seepage by a factor of two (2)."

[57] Therefore, the Technical Memorandum did not contain new information, and it did not constitute a departure from NRCan's previously stated position.

[58] Further, *CEP Union* (relied upon by Taseko) is distinguishable from this case. In *CEP Union*, the BCCA found that the acceptance of written submissions that merely reiterated evidence already given in oral submissions may breach the *audi alteram partem* principle. However, in that case, only one of the parties was given the opportunity to provide written submissions, and the opposing party was not provided with a copy of these submissions (despite their request). The outcome in *CEP Union* turned on the fact that only one party was given the opportunity to provide written submissions. The BCCA stated:

> [14] This takes me to the nub of this case. Is there here a breach of the *audi alteram partem* rule? It appears to me that the learned Chambers judge considered that there was not such a breach on the basis that the written submissions merely restated information that either the Director or Pacifica Paper had expressed aloud in the hearing. With respect, I do not agree. The opportunity to present information and argument in written form is valuable to a party. The opportunity after oral hearing, to reorganize and restate a submission cannot be considered of no import, else to poach upon a line from Browning, "What is writing for?"

[59] This case is therefore distinguishable because Taseko had the opportunity to provide final written submissions. Taseko was also provided with a copy of NRCan's submissions and given an opportunity to respond.

[60] The impugned language of "clarification" does not indicate that the Technical Memorandum contained new information. As put forward by Taseko at the hearing, it believed that it and NRCan had reached some sort of agreement on seepage (that is, that the estimates were within a factor of two); NRCan's Technical Memorandum simply clarified its position that there was no such agreement. As noted by the Minister/AG, this "clarification" language indicated that NRCan wished to convey that its position was unchanged following cross-

examination and Taseko's arguments. Taseko had already responded to the information in the Technical Memorandum and had cross-examined the relevant expert during the course of the review process. As noted below, Taseko recognized during its final submissions that there was no convergence between its own views and those of NRCan.

[61] Finally, even if the Technical Memorandum was found to contain new information, Taseko's second premise is flawed because it had the opportunity to respond to this information. Taseko had sought and received permission to provide responses to any late-in-the-day technical submissions. It chose to provide such responses to several documents, but not to the Technical Memorandum.

[62] Moreover, Taseko's final Closing Submission explicitly states that Taseko was aware that there was no convergence of views between Taseko and NRCan on seepage. Taseko stated:

> In any Tailings Storage Facility ("**TSF**") some seepage is normal – in fact it is an integral part of the design of a TSF. While we had thought there was a convergence of views on seepage predications between Natural Resources Canada ("**NRCan**") and Environment Canada on these issues during the hearing we have recently – somewhat surprisingly – seen those agencies say they remain of different views.
>
> [Bold emphasis in original; Underline emphasis added]

[63] In my view, this indicates that Taseko was aware of the Technical Memorandum's content; it also undercuts Taseko's position at the hearing that it believed there was an agreement between Taseko and NRCan that the difference in seepage estimates was within a factor of two.

[64] In summary, I can find no breach of the *audi alteram partem* rule.

(3) Legitimate Expectations

[65] The general rule of "legitimate expectations" provides that the content of the duty of procedural fairness will be impacted if an individual is found to have a legitimate expectation in the procedure to be followed or the outcome of a decision. However, this is a procedural right, not a substantive one (*Baker* at para 26). Of relevance to this case is the quote, "[i]f the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness" (*Baker* at para 26).

[66] Taseko suggests that its legitimate expectations may have been breached in two ways: (1) the Panel did not follow the Public Hearing Procedures, and (2) Taseko had an expectation that it would be able to respond to new evidence (in the Technical Memorandum) which was not satisfied.

[67] In *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para 29, [2001] 2 SCR 281, the SCC stated that "[t]he doctrine of legitimate expectations, on the other hand, looks to the *conduct* of the public authority in the exercise of that power… including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified." In this case, although the Public Hearing Procedures were clear, they were not unambiguous nor were they unqualified. In my view, Taseko did not have any legitimate expectations that the Public Hearing Procedures would be followed in every instance rigidly because the Panel had broad discretion to deviate from its own Public Hearing Procedures. In addition, the Panel explicitly told all of the parties that it would be accepting

closing submissions up until a certain date, and that following this date, Taseko would have a few days to respond to any technical submissions. The Panel thus outlined the procedures that it intended to follow, and did precisely that - it followed them.

[68] Taseko has not shown that these Public Hearing Procedures were not met in this case. Taseko identified two provisions in particular that it claims were breached, as noted above:

> 2.7 If a participant files an expert report as part of its submission, then that participant must arrange to have the expert available to answer questions as part of the hearing when the submission is presented…
>
> 2.18 Closing remarks must not be used to present new information but should summarize the Interested Party's perspective on the hearing record and recommendations to the Panel.

[69] The Technical Memorandum does not breach either of these provisions. First, Dr. Desbarats was available for cross-examination on NRCan's Report. Second, the Technical Memorandum did not present new information. Taseko did not request further cross-examination of Dr. Desbarats, and given the fact that he had previously been cross-examined on the same information, it is not clear what this would have accomplished. The Procedures do not provide for further cross-examination following closing submissions.

[70] As to the second point, Taseko did have a legitimate expectation that it would have the opportunity to respond to any final technical submissions. The Panel clearly, unambiguously, and repeatedly affirmed that Taseko would have the opportunity to do so. However, these expectations were satisfied in this case as discussed above in relation to *audi alteram partem*.

[71] Taseko had the opportunity to respond to the Technical Memorandum in its closing submissions and in additional written submissions. As noted above, Taseko had sought and received permission to have "a few days" to respond to submissions concerning technical or specialized knowledge, and it referenced NRCan's position (that there was no convergence of the parties' views on seepage) in its final written submissions to the Panel.

[72] Taseko's decision not to substantively respond to the Technical Memorandum is not a breach of any alleged legitimate expectations.

[73] Finally, as noted by the Minister/AG, the Court may choose not to intervene if there is a lack of prejudice (*Omer v Canada (Citizenship and Immigration)*, 2015 FC 494 at para 9). In this case, it is not clear that Taseko faced any prejudice as a result of the purported procedural irregularities it identified.

(4) Failure to Object

[74] If Taseko was concerned that any of the closing submissions or memoranda breached procedural fairness, it had the obligation to raise these concerns with the Panel. As in *Geza v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, [2006] 4 FCR 377, and *Hennessy v Canada*, 2016 FCA 180, 484 NR 77, it is not open to Taseko to hold this complaint in reserve as fuel for a judicial review.

[75] In this instance, Taseko did object to the late submissions in general. Before the Panel, Taseko's representative stated:

> So my suggestion would be, **number 1, that we put a stop to these late submissions**, particularly those by persons having expertise or specialized knowledge that should be cut off, and **we need to have a few days at least to be able to assess those and respond**.
>
> And I don't mind having the opportunity to do that after final argument, if that is acceptable to the Panel. But we do definitely need an opportunity to put an end to it.
>
> As well, **we're not going to have an opportunity to ask Mr. McCrory any questions**, which is also part of unfairness in the process. We won't have an opportunity to challenge his material.
>
> [Emphasis added]

The Panel responded thus:

> And just before we go to the next speaker, I indicated to Mr. Gustafson this morning that I would attempt to respond to his request this afternoon, and we are **comfortable affording you several days of time from the receipt of any new technical documents to respond to us** and - - yeah.
>
> With that as our plan, that will possibly, probably entail an extension past the closing remarks for any response by you to new technical documents received.
>
> [Emphasis added]

[76] Taseko received what it asked for. It asked for "a few days" to deal with technical submissions if the Panel accepted such submissions, and this concern was dealt with promptly and appropriately by the Panel.

[77] The obligation to raise concerns is relevant to Taseko's claim that the Technical Memorandum contained new evidence. Taseko did not, at that time, claim that the reception of the Technical Memorandum was unfair because it constituted new evidence. In addition, Taseko

did not at any point inquire as to the authorship of the Technical Memorandum or indicate that failing to identify the individual author was a breach of procedural fairness.

(5) Industry Interveners

[78] In my view, it would be inappropriate to impose any sort of rules of general application on review panels (as proposed by the Industry Interveners) given the need for procedural flexibility and deference to chosen procedures (and the broad discretion with respect to procedure conferred by the *CEAA 2012*). What constitutes a reasonable opportunity to be heard may vary according to the particular circumstances of each review panel.

[79] In conclusion, the Panel did not fail to observe principles of procedural fairness by accepting and relying upon the Technical Memorandum.

B. ***Issue 2: Was the Panel's determination that Taseko underestimated the volume of tailings pore water seepage leaving the TSF unreasonable?***

[80] The Panel found that Taseko underestimated the volume of tailings pore water seepage that would leave the TSF. Taseko submits that this finding is unreasonable due to the Panel's misapprehension of Taseko's TSF seepage estimation. In comparing a component of Taseko's TSF seepage estimate with the entire NRCan seepage estimate, Taseko claims "the Panel made an apples-to-oranges comparison that was manifestly unreasonable."

[81] Taseko admits that the Panel correctly stated Taseko's seepage estimates at Table 3 of the Report for a total of 70 L/s of seepage leaving the TSF. However, when summarizing NRCan's

comparison at Table 5 of the Report, Taseko argues that the Panel ignored its own accurate summary of Taseko's estimates. In Table 5, Taseko's estimate of deep basin seepage changes from 15 L/s to 0 L/s.

[82] Taseko also takes issue with comparisons made by NRCan which, along with other errors, led to the Panel's conclusion that Taseko had significantly underestimated seepage from the TSF.

[83] In my view, the Panel's determination (for which deference is owed) that Taseko had underestimated the volume of tailings pore water seepage leaving the TSF, was reasonable.

[84] The Panel was tasked with weighing scientific evidence and making findings of fact thereon, and the Panel had the relevant expertise to do so (the three member panel consisted of Dr. Bill Ross, a professor in the area of environmental design, Dr. George Kupfer, a community consultant, and Dr. Ron Smyth, a geologist). As discussed in *Inverhuron & District Ratepayers' Association v Canada (Minister of the Environment)* (2000), 191 FTR 20 (FCTD), aff'd 2001 FCA 203 [*Inverhuron*], these circumstances are relevant to the reasonableness assessment:

> [71] It is worth noting again that the function of the Court in judicial review is not to act as an "academy of science" or a "legislative upper chamber". In dealing with any of the statutory criteria, the range of factual possibilities is practically unlimited. No matter how many scenarios are considered, it is possible to conceive of one which has not been. The nature of science is such that reasonable people can disagree about relevance and significance. In disposing of these issues, the Court's function is not to assure comprehensiveness but to assess, in a formal rather than substantive sense, whether there has been some consideration of those factors which the **Act** requires the comprehensive study to

> address. If there has been some consideration, it is irrelevant that there could have been further and better consideration.
>
> [Bold emphasis in original; Underline emphasis added]

[85] Taseko argues that Table 5 and the subsequent discussion are a mischaracterization of Taseko's seepage estimates. However, this section of the Report is simply a summary of NRCan's position, and it does not represent any of the Panel's conclusions.

[86] It is important to keep in mind, when reviewing Table 5 and the summary of NRCan's conclusions in the Report, that NRCan had serious concerns with the modelling done by Taseko. Table 5 does not simply repeat the estimates put forward by Taseko (and summarized earlier in the Report). The "errors" cited by Taseko actually represent scientific disagreements with respect to what NRCan believed could reasonably be concluded from the Taseko models, in comparison with the conclusions from its own model.

[87] Therefore, it is inaccurate to say that NRCan made "erroneous comparisons." Explanations were provided for the differences between Taseko's own estimates (in Table 3) and the numbers in NRCan's conclusions (in Table 5), such as that NRCan believed that Taseko's 2D model precluded any conclusions on deep basin seepage (greater than 200 mbgs) (bottom row of Table 5) and that only Taseko's 3D model accounted for seepage through the bottom of the TSF (top row of Table 5).

[88] The "corrected" Table 5 presented in Taseko's Memorandum is therefore misleading and problematic, as it does not accurately represent NRCan's views. NRCan was not bound to accept

Taseko's models or estimates; as noted in *Inverhuron*, "[t]he nature of science is such that reasonable people can disagree about relevance and significance" (para 71).

[89] At no point in the Report does the Panel indicate that it thought Taseko's total seepage estimate was 9 L/s or that it otherwise misunderstood Taseko's seepage estimates. It summarized both Taseko's position and NRCan's position, and it did so accurately.

[90] At the hearing, Taseko invited the Court to conclude that the Panel compared NRCan's estimate of 100 L/s seepage against an erroneous Taseko estimate of 9 L/s total seepage. However, the Panel did not indicate that it relied on the comparisons in Table 5 in reaching its conclusion.

[91] It was open to the Panel to accept the modelling and the estimates put forward by NRCan regardless of how they compared to Taseko's modelling and estimates. Furthermore, NRCan had raised concerns with respect to the accuracy of simply combining Taseko's 2D and 3D model estimates, given the difference in methodologies; for this reason alone, it was open to the Panel to treat Taseko's "combined" estimate of 70 L/s with some suspicion.

[92] The Panel ultimately accepted NRCan's upper bound estimate: "[t]he Panel accepts Natural Resources Canada's upper bound estimate as the expected seepage rate from the tailings storage facility (see Table 5 above)." There is no suggestion that the Panel thought that Table 5 represented Taseko's own estimates.

[93] Moreover, even if the Court accepted that the appropriate comparison was between Taseko's estimate of 70 L/s and NRCan's estimate of 100 L/s, it was open to the Panel to conclude that Taseko had nonetheless significantly underestimated the volume of seepage. No evidence has been put forward by Taseko to show that a difference of a factor of two is insignificant or inconsequential, and it would be inappropriate for the Court to conclude that this is the case.

[94] As discussed during the hearing, this is a difference of 30 L/s more seepage every second of every day for decades – it was open to the Panel to conclude that this was an underestimation of the volume of seepage on Taseko's part. Further, as noted by the TNG, the Panel was not required to base its findings on any particular "scientific threshold," and Taseko failed to identify any such "scientific thresholds" that the Panel's conclusions failed to meet.

[95] In conclusion, by arguing that Table 5 is mistaken, Taseko is essentially attempting to reargue the technical and scientific positions it took before the Panel. The Panel rejected Taseko's conclusions. In my view, it would be inappropriate for this Court to reweigh the evidence and reach a different conclusion.

[96] Furthermore, Taseko's attempts to inject ambiguity into the Panel's findings would require a misreading of the Report in a manner that defies common sense.

C. ***Issue 3: Was the Panel's decision to accept NRCan's upper bound estimate as the expected seepage rate from the TSF unreasonable?***

[97] Taseko submits that the Panel's acceptance of NRCan's upper bound estimate as the expected seepage rate is unreasonable because:

a) it relies directly upon the erroneous conclusion that Taseko severely underestimated TSF seepage; and

b) it accepts NRCan's model even though it is materially different than the actual design of the TSF proposed by Taseko.

[98] In summary, I have concluded that the Panel's decision to accept NRCan's upper bound estimate as the expected seepage rate from the TSF was reasonable. As discussed above (see Issue 2), the Panel's conclusion that Taseko underestimated seepage was reasonable; therefore, its reliance on this conclusion in accepting NRCan's upper bound estimate is reasonable.

[99] The SCC's comments in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], with respect to reasonableness are relevant in this case:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the

> qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. **A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion** (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, **if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met**.
>
> [Emphasis added]

[100] In this case, the Panel's in-depth review of the submissions made by all of the interested parties provides more than enough support for its ultimate conclusions. Even if the Court found that the Panel did not make its rationale for rejecting Taseko's mitigation measures sufficiently clear, in my view the record supports the Panel's conclusions.

[101] Various participants submitted concerns regarding the mitigation measures put forward by Taseko, and Taseko responded by stating that additional studies would be done following the approval of the Project. Given the conceptual and unproven nature of the mitigation measures and this lacklustre response from Taseko, it was open to the Panel to not recommend that these

mitigation measures were reasonable. There was nothing unreasonable in finding that satisfactory mitigation measures should precede project approval rather than follow it.

[102] Furthermore, when Taseko's efficiency ratios were applied to NRCan's pre-recovery seepage estimate, the result was far greater than Taseko's post-recovery seepage estimate (11.8 L/s instead of 2.40 L/s).

[103] With respect to the differences between the proposed TSF and the NRCan model, the evidence indicates that the Panel understood these differences. Further, it is not clear how the purported "wrong design" in NRCan's model prejudiced Taseko.

[104] Taseko submitted that NRCan assumed that no seepage would go through the embankments, and that this was problematic because the fact that there was to be seepage out of the sides was a mitigation function (the embankments filter the water). However, the Panel had found that Taseko had assigned homogenous values to the overburden deposits and the particle size of tailings; therefore, the Panel did not accept that this "mitigation function" would function exactly as described by Taseko.

[105] The other differences identified by Taseko, such as till thickness (which Taseko did not even promise to deliver) and calibration, were also understood by the Panel. There is no indication that the Panel improperly assessed NRCan's model instead of the actual proposed model – simply preferring one model over the other is not sufficient to establish that the Panel assessed the "wrong design."

[106] Further, as noted by the Minister/AG, NRCan's assumption actually benefitted Taseko: if NRCan had modelled seepage through the embankments, this undoubtedly would have increased its total seepage estimate.

[107] Taseko claims that the Panel's failure to address seepage mitigation breaches section 43(1)(d)(i) of the *CEAA 2012* and section 2.2(d) of the Amended Terms of Reference. However, section 19(1)(d) of the *CEAA 2012* indicates that the environmental assessment must take into account "mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project" (emphasis added).

[108] Therefore, if the Panel did not agree that Taseko's proposed mitigation measures were feasible or that they would mitigate the significant adverse effects, it did not need to take these into account. Further, the Amended Terms of Reference indicate that the Panel is only required to identify mitigation measures that it recommends.

[109] It should not be assumed that the Panel breached the statutory requirements. In *Ontario Power Generation Inc v Greenpeace Canada*, 2015 FCA 186, 388 DLR (4th) 685, rev'g 2014 FC 463, leave to appeal to SCC refused, 36711 (28 April 2016), the FCA considered an appeal from a decision of Russell J., wherein Russell J. had concluded that a joint review panel report created under the *CEAA* did not comply with the legislation. The FCA stated:

> [123] In the circumstances, the Panel made no specific finding that it had complied with the consideration requirements in paragraphs 16(1)(*a*) and (*b*) of the Act. However, **it is our view that in conducting the EA and preparing the EA Report, the**

> **Panel must be taken to have implicitly satisfied itself that it was in compliance with those statutory requirements**. In applying the reasonableness standard to this question, we must consider the Panel's decision as a whole, in the context of the underlying record, to determine whether the Panel's implicit conclusion that it had complied with the consideration requirements is reasonable (see *Agraira* at paragraph 53).
>
> [Emphasis added]

[110] Similarly, in this case, when the Report is considered as a whole it is clear that the Panel considered the seepage mitigation measures put forward by Taseko. The Report reviewed Dr. Smith's comments on mitigation measures, which were critical of Taseko's failure to provide detailed information: "the suite of seepage interception measures Taseko had proposed had been evaluated at a conceptual level only."

[111] Further, the Report reviewed the critique by the British Columbia Ministry of Energy, Mines, and Petroleum Resources (i.e., "there remained uncertainties around the ability to limit and collect the expected volume of seepage from the [TSF], and the ability to effectively treat water to maintain water quality in Fish Lake and its tributaries"). Therefore, unlike in the case of *Bow Valley Naturalists Society v Alberta (Minister of Environmental Protection)* (1995), [1996] 2 WWR 749, 177 AR 161 (ABQB), cited by Taseko, the Panel did not reach its conclusions by flying in the face of "uncontradicted evidence."

[112] In addition, the Panel's acceptance of NRCan's upper bound estimate was supported by the evidence of independent expert Dr. Smith, who stated that the total TSF seepage was likely towards the upper end of a range of 20 to 100 L/s. Finally, it must be noted that, contrary to what is implied in Taseko's submissions, interested parties such as NRCan were not required to

"refute" Taseko's analysis – the Panel was not required to assume that Taseko was correct unless shown otherwise.

D. ***Issue 4: Was the Panel's conclusion that the concentration of water quality variables in Fish Lake (Teztan Biny) and Wasp Lake would likely be a significant adverse environmental effect unreasonable?***

[113] Taseko submits that the findings with respect to seepage, discussed above, "permeated" the Report. In a section on the water quality of Fish Lake (Teztan Biny), the Report stated:

> The Panel also notes that the seepage from the tailings storage facility expected by Natural Resources Canada is considerably greater than estimated by Taseko. On balance, the Panel concludes, as did most presenters on this subject, that there would be higher concentrations of water quality contaminants of concern in Fish Lake than modelled by Taseko.
>
> [Emphasis added]

[114] Taseko argues the impugned seepage finding was directly responsible for the Panel's conclusion that the Project would lead to significant adverse environmental effects on the water quality of Fish Lake (Teztan Biny) and Wasp Lake. The water quality finding relies on the unreasonable seepage finding; therefore, it cannot stand and is inconsistent with the requirements under the Amended Terms of Reference.

[115] The Panel's conclusion that the concentration of water quality variables in Fish Lake (Teztan Biny) and Wasp Lake would likely be a significant adverse environmental effect was reasonable. As discussed above, the impugned seepage findings were also reasonable; therefore, the Panel's reliance on these findings in reaching a conclusion on water quality was reasonable.

[116] Furthermore, the water quality findings were supported by additional evidence, including Taseko's own admission that the water quality would not be in line with guidelines for the protection of aquatic life. The likely effectiveness of Taseko's water treatment mitigation measures were questioned by presenters for the TNG ("details on the effectiveness of the treatment were not provided or modelled"), the British Columbia Ministry of Environment ("unproven technology over the long term [and] potentially costly"), and the British Columbia Ministry of Energy, Mines, and Petroleum Resources ("[w]ater treatment for the Project did not provide confirmation that the proposed water quality objectives for Fish Lake (Teztan Biny) were likely to be either technically or financially achievable").

[117] Therefore, it was open to the Panel to reject the "unproven and unprecedented" proposals put forward by Taseko.

[118] The Panel stated:

> Based on the evidence, the Panel finds it is unable to accept Taseko's conclusion that the water treatment options proposed would effectively mitigate the adverse effects of the Project on Fish Lake (Teztan Biny) water quality. The Panel concludes that the proposed recirculation scheme, the adaptive management plan and the water treatment options are unlikely to work effectively in the long-term. On this basis, the Panel concludes the "proof of concept" test proposed by Taseko for the environmental assessment has failed.

[119] The Panel therefore did not rely solely on the impugned seepage findings in reaching its conclusions on water quality.

[120] With respect to the precautionary principle, there does not appear to be any dispute between the parties that the Panel was required to assess the proposal in a precautionary manner. The purpose section of the *CEAA 2012* states:

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 administration of this Act, must exercise their powers in a	**(2)** Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence, les autorités fédérales et les autorités responsables doivent exercer

manner that protects the environment and human health and applies the precautionary principle.	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)

[121] However, there is clearly a conflict between the parties as to what this entails. Taseko's proposal relied on adaptive management; that is, Taseko proposed that environmental risks and mitigation measures could be dealt with during further stages of development. Other parties considered this an inadequate approach, and sought more information on the risks and feasibility of mitigation.

[122] The Panel recognized the possibility of adaptive management, but found that it could not defer important decisions to the next stage of the process. In the Report, the Panel referenced the requirement that it act in a precautionary manner and stated, with respect to water quality in particular:

> Taseko declined to provide some materials requested by the Panel and by other participants (e.g., description of water quality model for Fish Lake). To deal with the resulting uncertainties, the Panel considered various risk management strategies, including adaptive management in some circumstances. **However, when the Panel concluded the potential adverse environmental effects were potentially "significant", it did not agree that deferring decisions on the approach to manage the risk to subsequent regulatory processes is appropriate**. It is necessary at the environmental assessment stage for the Panel to determine if a significant adverse effect is likely and to consider if and how the risk can be managed to acceptable levels.

> If, after reviewing the record of information for the review, the Panel decided that there were serious uncertainties about a potential adverse environmental effect and the ability to manage that effect and the risk of serious or irreversible environmental harm was high, then the Panel adopted a precautionary approach.
>
> [Emphasis added]

[123] It was reasonable for the Panel not to accept Taseko's "vague assurances" that it would engage in adaptive management in order to deal with adverse environmental effects. The Panel sought information on environmental effects and mitigation measures, and Taseko refused to provide this information. It was entirely reasonable, and in line with the Panel's (reasonable) interpretation of the precautionary principle, for the Panel to conclude that the concentration of water quality variables in Fish Lake (Teztan Biny) and Wasp Lake would likely be a significant adverse environmental effect.

[124] Indeed, acceptance of vague adaptive management schemes in circumstances such as these would, in my view, tend to call into question the value of the entire review panel process – if all such decisions could be left to a later stage, then the review panel process would simply be for the sake of appearances.

VI. CONCLUSION

[125] For these reasons, the Court concludes that:

a) The Panel did not breach any procedural fairness / *audi alteram partem* / legitimate expectation principles; and

b) The Panel's factual findings were open for it to make and were reasonable.

[126] Therefore, this judicial review will be dismissed with costs to the Respondents.

JUDGMENT in T-1977-13

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to the Respondents.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1977-13
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 AND THE MINING ASSOCIATION OF CANADA, THE MINING ASSOCIATION OF BRITISH COLUMBIA, THE MINING SUPPLIERS ASSOCIATION OF BRITISH COLUMBIA, THE ASSOCIATION FOR MINERAL EXPLORATION, BRITISH COLUMBIA, and MININGWATCH CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 30 AND 31, 2017; FEBRUARY 1-3, 2017
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DATED:	DECEMBER 5, 2017

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