Federal Court of Appeal  Cour d'appel fédérale

Date: 20191218

Docket: A-7-18

Citation: 2019 FCA 319

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

BETWEEN:

TASEKO MINES LIMITED

Appellant

and

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

Respondents

and

MINING WATCH CANADA

Intervener

Heard at Vancouver, British Columbia, on January 14, 2019.

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

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellant Taseko Mines Limited (Taseko) appeals from a decision of the Federal Court dated December 5, 2017, which dismissed its application for judicial review of the Final Report issued by the Federal Review Panel (the Panel) on October 31, 2013 (Final Report), where the Panel found that the New Prosperity Gold-Copper Mine Project (the Project) is likely to cause significant adverse environmental effects (*Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1099 [Reasons]). The related appeal (A-6-18) deals with the judicial review of subsequent decisions by the Minister of the Environment (the Minister) and the Governor in Council (GIC).

[2] The appellant argues that the Panel's conclusions are unreasonable and that, in relying on a document provided by Natural Resources Canada (NRCan) without giving it an opportunity to respond, the Panel failed to observe its procedural fairness duty. For the reasons that follow, I find that the Final Report is not amenable to judicial review, and that this appeal should therefore be rejected on this basis. Even if the Final Report had been reviewable, I would still have rejected the appeal.

I. Factual Context

[3] The Project is a $1.5 billion open pit gold and copper mine proposed by Taseko, located approximately 125 km southwest of Williams Lake, British Columbia. It is the successor to another proposed mine, called Prosperity, that was rejected in 2010 under the former *Canadian*

Environmental Assessment Act, S.C. 1992, c. 37 [CEAA, 1992], following a federal environmental assessment.

[4] Under the first version of the project, the waste materials generated by the mining process were to be stored in a tailing storage facility (TSF) set immediately next to the mine. This location presented concerns. Firstly, it would have required the draining of Fish Lake (Teztan Biny), a site of cultural importance for the Tsilhqot'in National Government (TNG) and home of thousands of rainbow trout. Secondly, the subsurface composition and groundwater flow at the site raised a risk that water contaminated by acid rock damage and metal leaching would seep out of the TSF.

[5] The Federal Review Panel tasked with the assessment of Prosperity ultimately found it would result in significant adverse environmental effects, which effects the GIC considered could not be mitigated — in part because that project would completely destroy Fish Lake and Little Fish Lake (Y'anah Biny). This first Panel Report was delivered to the Minister on July 2, 2010, and in November 2010, the Government of Canada rejected the old project, considering that it could not be justified in the circumstances. The GIC nevertheless specified that this did not preclude Taseko from submitting a new project.

[6] Taseko revised its project and submitted the New Prosperity Gold-Copper Mine Project for review in August 2011. By relocating the TSF 2.5 km upstream of the lake, Taseko sought to preserve Fish Lake and portions of its tributaries. Furthermore, Fish Lake would be dammed to prevent it from draining downstream into the open pit mine. To maintain Fish Lake's water

levels in the absence of sufficient naturally occurring inflows, Taseko proposed a recirculation water management scheme which would pump back water into its inlet channels.

[7] On November 7, 2011, the Minister determined that the Project would undergo an assessment under the old CEAA, 1992.

[8] On March 16, 2012, the Canadian Environmental Assessment Agency (the Agency) issued content guidelines for Taseko's Environmental Impact Statement [EIS] concerning the Project's potential impacts. Among other things, those guidelines made it clear that Taseko had to provide an appropriate groundwater flow model for the TSF and descriptions of any proposed seepage control measures.

[9] On May 9, 2012, the Minister appointed a three-member Panel under the former CEAA, 1992, consisting of Dr. Bill Ross, Dr. George Kupfer and Dr. Ron Smyth. The Panel was continued under the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 [CEAA, 2012].

[10] On August 3, 2012, the Panel was issued Amended Terms of Reference consistent with the new CEAA, 2012. The Amended Terms of Reference dictated that the Panel must consider certain factors in its assessment, among them: the environmental effects likely to result from the Project, the significance of these environmental effects, and any mitigating measures the Panel deemed feasible. On September 27, 2012, Taseko submitted its final EIS to the Panel.

[11] On February 20, 2013, the Panel issued its Public Hearing Procedures setting out how the public hearings with respect to the Project would be conducted. Topic-specific hearing sessions provided an opportunity for experts to present the results of their technical review of the potential effects of the Project to the Panel.

[12] From September 2012 to June 2013, the Panel engaged in discussions with governmental departments, aboriginal groups (including TNG), and Taseko about the technical merits and adequacy of the EIS. In the course of this review, NRCan identified what it considered to be deficiencies in the 2D and 3D models used by Taseko to predict seepage from the TSF, as well as concerns over Taseko's proposed mitigation measures.

[13] Experts representing other participants raised similar and additional concerns, citing a lack of detail and uncertainty in Taseko's materials relating to hydrogeological data and proposed mitigation measures, and an underestimation in Taseko's seepage estimates. Due to all of these concerns, the Panel issued two Information Requests on the issue of TSF seepage, directing Taseko to develop a more comprehensive 3D model.

[14] Taseko refused to comply with these Information Requests, taking the position that these issues could be dealt with after the approval had been granted.

[15] On June 14, 2013, NRCan indicated that it was developing a model to assess seepage from the TSF that was similar to the one requested by the Panel, and offered to make the findings

of this study available. The Panel accepted that offer on June 21, 2013 and on July 4, 2013, NRCan provided the Panel with its 3D model.

[16] On June 20, 2013, the Panel decided that the EIS, along with additional information provided by Taseko, were sufficient for the environmental assessment to proceed to public hearings. These hearings commenced on July 22, 2013 and concluded with final oral arguments on August 23, 2013. The technical, topic-specific hearing sessions were held from July 25 to August 1, 2013.

[17] During the Panel proceedings, the Panel heard lay and expert evidence from interested parties, through written and oral submissions and through responses to questions from both the Panel and/or Taseko. The reliability of Taseko's research, assumptions and modelling concerning the permeability of the tailings and the geological material at issue, and the resulting impact on Taseko's seepage estimates was a major concern throughout the discussions. Some experts also identified concerns regarding some of Taseko's water quality analysis.

[18] Of particular relevance for this appeal are the concerns raised by NRCan with respect to seepage leaving the TSF. In written submissions provided to the Panel on July 19, 2013, and during the expert presentations that followed, NRCan reiterated its earlier concerns regarding deficiencies in Taseko's EIS. On July 26, 2013, one of NRCan's experts advised against accepting Taseko's proposal to add the results of its 2D and 3D models to come to a global seepage estimate. The expert asserted that NRCan's estimate of seepage leaving the TSF revealed a difference of an order of magnitude (a factor of 10) compared to Taseko's estimate.

However, the parties dispute whether NRCan's expert later retreated from that position upon being questioned by Taseko and the Panel.

[19] On August 20, 2013, Taseko asked to be afforded "a few days at least" to assess and respond to any additional technical submissions from interested parties that may be accepted by the Panel at that stage. The Panel granted that request on the same day.

[20] On August 21, 2013—the last day of the Public Hearings before final oral submissions—several participants provided such additional technical submissions to the Panel, which were then made available to Taseko. One of those was a Technical Memorandum [TM] by NRCan providing clarifications on the alleged deficiencies of Taseko's two models. Among other things, it sought to respond to Taseko's closing assertion that the results of NRCan's model were "not materially different" from its own.

[21] On August 23, 2013, Taseko was given the opportunity to be the last party to present closing submissions, and it did so through both oral and written submissions. Despite expressing surprise that both Environment Canada and NRCan did not agree with its position on seepage, it did not dispute the contents of the TM or object to its receipt by the Panel. It is also to be noted that between August 28 and 29, 2013, Taseko filed four separate documents with the Panel, responding to a variety of submissions made by other participants.

II. Decision of the Federal Review Panel

[22] On October 31, 2013, the Panel issued its Final Report. It concluded that the Project would result in several significant adverse environmental effects on water quality, fish, and fish habitat in Fish Lake. In addition, it found the Project would impact current use of lands and resources for traditional purposes by certain Aboriginal groups. These conclusions were notably based on three of the Panel's findings: firstly, Taseko had underestimated the volume of tailings pore water seepage leaving the TSF, "resulting in potentially higher loading of contaminants in the receiving environment"; secondly, the impact on water quality caused by the recirculation of water; and thirdly, the uncertainty with respect to Taseko's contingency plan for water treatment.

[23] The Panel summed up its conclusion with respect to water quality in the following two paragraphs of its executive summary:

> The Panel has determined, based on strong evidence submitted by government agencies (both Canada and British Columbia) and other participants, that Taseko underestimated the volume of tailings pore water seepage leaving the tailings storage facility and the impacts on water quality caused by recirculation of water within the Fish Lake (Teztan Biny) and Upper Fish Creek (Teztan Yeqox) system. The Panel has also determined considerable uncertainty remains regarding Taseko's contingency plan for water treatment. Again, this conclusion was based on strong evidence submitted by governments and other participants. The Panel has determined that the proposed target water quality objectives for Fish Lake are not likely achievable and, even with expensive water treatment measures, the protection of Fish Lake water quality is unlikely to succeed in the long term.
>
> Although the seepage mitigation measures proposed by Taseko have the potential to substantially reduce the volume of seepage, the Panel concludes it would not eliminate seepage from entering Fish Lake (Teztan Biny). The Panel concludes the concentration of contaminants of concern in Fish Lake would be considerably larger than Taseko's predictions and that eutrophication of Fish Lake would be a significant problem that is unlikely to be mitigable in the long term.
>
> Final Report, pp. ix-x (Appeal Book vol. 3, pp. 1476-1477)

[24] Taseko applied to the Federal Court for judicial review of the Final Report. It made the case that the Panel had failed to observe principles of procedural fairness by accepting and relying on NRCan's TM without giving it an opportunity to respond. Taseko also argued that the Panel had made unreasonable determinations concerning the expected seepage from the TSF and water quality.

[25] On February 25, 2014, a Decision Statement was released communicating the decisions of the Minister and the GIC under section 52 of the CEAA, 2012. The Minister decided that the Project was likely to cause significant adverse environmental effects, and the GIC found that these effects were not justified. The companion case (A-6-18) deals with these decisions.

III. Decision of the Federal Court

[26] On December 5, 2017, the Federal Court dismissed the application for judicial review.

[27] On the question of procedural fairness, the judge found that Taseko was owed, "and was in fact afforded, a high degree of procedural fairness during the review process" (Reasons, at para. 46). In his view, the Panel did not breach this duty by accepting and relying upon the TM, as firstly, this document did not contain new information (*ibid.*, at paras. 54-57), and secondly, Taseko was given an opportunity to respond after having been provided with a copy of the TM (*ibid.*, at paras. 58-64).

[28] The judge also rejected Taseko's submissions to the effect that the Public Hearing Procedures had been breached by the Panel (*ibid.*, at para. 68). Taseko's decision "not to substantively respond" to the TM, the judge wrote, "is not a breach of any alleged legitimate expectations" (*ibid.*, at para. 72). The judge also expressed doubts as to whether "Taseko faced any prejudice as a result of the purported procedural irregularities it identified" (*ibid.*, at para. 73).

[29] He further held that Taseko was obligated to raise any procedural fairness concerns with the Panel. It could not "hold this complaint in reserve as fuel for a judicial review" (*ibid.*, at para. 74). Not only did Taseko never claim at any time during the review process that the TM constituted new evidence, it also never argued that the failure of NRCan to identify its author was a breach of procedural fairness (*ibid.*, at para. 77).

[30] Moving on to the substantive issues, the judge found it was reasonable for the Panel to conclude that Taseko had underestimated the volume of tailings pore water seepage leaving the TSF (*ibid.*, at para. 83). Contrary to Taseko's argument that Table 5 of the Final Report ("Comparison of Seepage Estimates taken from the August 21, 2013, Natural Resources Canada Technical Memorandum to the Panel" [Table 5]) is a mischaracterization of Taseko's seepage estimates, the judge found that it only provided a summary of NRCan's position, rather than the Panel's findings (*ibid.*, at para. 85). He further held that the differences identified in this table "actually represente[d] scientific disagreement" between NRCan and Taseko about the models in the EIS, rather than "errors" (*ibid.*, at para. 86). He noted, moreover, that the Panel did not seem to have relied on the comparisons in this table to reach its conclusion (*ibid.*, at para. 90). The

judge therefore rejected Taseko's claim that this finding of underestimation was based on a misapprehension of its TSF seepage estimate, and dismissed what he regarded as "Taseko's attempts to inject ambiguity into the Panel's findings" (*ibid.*, at para. 96).

[31] The next issue addressed by the Court was whether it was reasonable for the Panel to accept NRCan's upper bound estimate as the expected seepage rate from the TSF. The Court found that the Panel's in-depth review of the submissions made by all interested parties provides "more than enough support" for its ultimate conclusions (*ibid.*, at para. 100). As for the Panel's decision to reject Taseko's mitigating measures, the judge held that while the rationale could have been made clearer, the record supports the Panel's conclusion. It was reasonable for the Panel, the judge wrote, to require more than "conceptual and unproven" mitigating measures before the approval of the Project (*ibid.*, at para. 101). In the end, the judge found that there was no indication that the Panel had improperly assessed NRCan's model instead of the actual proposed model; as he stated, "simply preferring one model over the other is not sufficient to establish that the Panel assessed the 'wrong design'" (*ibid.*, at para. 105).

[32] The last issue dealt with by the Court was Taseko's challenge to 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. The Court found that the Panel's reliance on the impugned seepage findings in reaching a conclusion on water quality was reasonable, as the impugned seepage findings themselves were found reasonable (*ibid.*, at para. 115). Furthermore, the judge held that the Panel's water quality findings were supported not only

by NRCan's seepage estimations, but by other expert evidence as well as Taseko's own admission that the water quality would not be in line with the guidelines (*ibid.*, at para. 116).

[33] For all of the above reasons, the Court concluded that the Panel did not breach any procedural fairness principles and that the Panel's factual findings were reasonable.

IV. Issues

[34] The present appeal raises two substantive issues: 1) Did the judge err in holding that the impugned findings of the Panel were reasonable? and 2) Did the judge err in holding that the Panel did not breach its procedural fairness duty?

[35] As a preliminary matter, we must determine whether the Final Report is amenable to judicial review in light of this Court's decisions in *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418, at paragraphs 119-127 [*Gitxaala*], leave to appeal to SCC refused, 37201 (February 9, 2017), and *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2018] 3 CNLR 205, at paragraphs 170-203 [*Trans Mountain*].

V. Analysis

A. *Preliminary Matter: Is the Final Report of the Review Panel amenable to judicial review?*

[36] It is generally accepted that applications for judicial review lie not only with decisions and orders, but can also be brought where the conduct attacked affects "legal rights, impose[s] legal obligations, or cause[s] prejudicial effects" (*Sganos v. Canada (Attorney General)*, 2018 FCA 84, at para. 6; *Air Canada v. Toronto Port Authority et al.*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 29; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194, at paras. 28-29). Based on this principle, this Court has held that reports by the National Energy Board are only recommendations to the GIC and, as they lack any independent legal or practical effect, are thus not reviewable (*Gitxaala* and *Trans Mountain*). For the reasons that follow, I believe that the same reasoning applies here.

[37] At first sight, the holdings in *Gitxaala* and *Trans Mountain* seem to hold true here, since the recommendations made by the Review Panel are not binding on the Minister. Nevertheless, at the hearing, counsel for both sides argued that the legislative scheme at play here is significantly different from the one governing the two previous cases and that these differences warrant a different result. In *Gitxaala*, the impugned report was that of a Joint Review Panel acting under both the *National Energy Board Act*, R.S.C. 1985, c. 19 [NEBA], and the CEAA, 2012; in *Trans Mountain*, the National Energy Board was tasked with assessing the project under both statutes. As a result, the Joint Review Panel in *Gitxaala* and the Board in *Trans Mountain* had dual mandates. The first mandate, pursuant to subsection 52(1) of the NEBA, was to submit

a report to a coordinating Minister, for transmission to the GIC, setting out its recommendation as to whether a certificate approving a pipeline project should be granted and under what conditions, if any. Secondly, because the project under review (the construction of a pipeline) was considered to be a "designated project" within the meaning of the CEAA, 2012, the report was also to include recommendations flowing from the environmental assessment conducted under the Acts (ss. 53(3) of the NEBA and 29(1) of the CEAA, 2012).

[38] Under that legislative scheme, the GIC alone is to determine "whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation" (*Gitxaala*, at para. 124). In fact, although subsection 29(3) of the CEAA, 2012 holds that the report with respect to the environmental assessment is "final and conclusive", it still specifies that this is subject to section 30, which provides that the GIC may refer that report (or a portion thereof) back to the National Energy Board (or the Joint Review Panel in this case) for reconsideration.

[39] Likewise, subsection 52(11) of the NEBA provides that the certificate report is also "final and conclusive", subject to the GIC's reconsideration power under section 53 of the NEBA.

[40] In *Gitxaala*, this Court held that this legislative scheme "shows that for the purposes of review the only meaningful decision-maker is the Governor in Council" (at para. 120). Specifically, it wrote that:

> [121] Before the Governor in Council decides, others assemble information, analyze, assess and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon. In this scheme, no one but the Governor in Council decides anything.

> [122] In particular, the environmental assessment under the [CEAA, 2012] plays no role other than assisting in the development of recommendations submitted to the Governor in Council so it can consider the content of any decision statement and whether, overall, it should direct that a certificate approving the project be issued.
>
> [123] This is a different role–a much attenuated role–from the role played by environmental assessments under other federal decision-making regimes…
>
> [124] Under this legislative scheme, the Governor in Council alone is to determine whether the process of assembling, analyzing, assessing and studying is so deficient that the report submitted does not qualify as a "report" within the meaning of the legislation:
>
> - In the case of the report or portion of the report setting out the environmental assessment, subsection 29(3) of the *Canadian Environmental Assessment Act, 2012* provides that it is "final and conclusive," but this is "[s]ubject to sections 30 and 31." Sections 30 and 31 provide for review of the report by the Governor in Council and, if the Governor in Council so directs, reconsideration and submission of a reconsideration report by the Governor in Council.
>
> - In the case of the report under section 52 of the *National Energy Board Act*, subsection 52(11) of the *National Energy Board Act* provides that it too is "final and conclusive," but this is "[s]ubject to sections 53 and 54." These sections empower the Governor in Council to consider the report and decide what to do with it.
>
> [125] In the matter before us, several parties brought applications for judicial review against the Report of the Joint Review Panel. Within this legislative scheme, those applications for judicial review did not lie. No decisions about legal or practical interests had been made. Under this legislative scheme, as set out above, any deficiency in the Report of the Joint Review Panel was to be considered only by the Governor in Council, not this Court. It follows that these applications for judicial review should be dismissed.

[41] This question arose again in *Trans Mountain*, where the Court reiterated these principles:

> [179] In *Gitxaala*, the Court found that the only action to carry legal consequences was the decision of the [GIC]. The environmental assessment conducted by the Joint Review Panel under the [CEAA, 2012] did not affect legal

> rights or carry legal consequences. Instead, the assessment played "no role other than assisting in the development of recommendations submitted to the Governor in Council" (reasons, paragraph 122). The same could be said of the balance of the report prepared pursuant to the requirements of the [NEBA].
>
> [180] Put another way, on the basis of the legislative scheme enacted by Parliament, the report of the Joint Review Panel constituted a set of recommendations to the Governor in Council that lacked any independent legal or practical effect. It followed that judicial review did not lie from it.

[42] In the case at bar, both the appellant and the governmental respondents (the Minister and the Attorney General of Canada) submit that the legislative scheme at issue in *Gitxaala* and *Trans Mountain* differs on a key aspect from the one applicable here. In those cases, the Court was dealing with a complete code with an effective internal remedy provided by the regime. To the extent that the GIC could refer any of the Joint Review Panel's or the National Energy Board's recommendations back to these authorities for reconsideration, there was a mechanism provided to deal with any perceived deficiencies. In that context, an application for judicial review directed at the report would have been inconsistent with the legislative scheme and would have pre-empted the reviewing function of the GIC. This is to be contrasted, in their view, with the legal framework governing the environmental assessment of the Project, which does not allow for reconsideration by the Joint Review Panel but merely provides for the Minister to ask for "clarification" by the Review Panel of the conclusions and recommendations set out in its report (s. 43(1)(f) of the CEAA, 2012). Each step is therefore segmented and self-contained, and the legal implications of the Final Report are more substantial than if they could otherwise be reviewed at the request of the Minister.

[43] Having duly considered that argument, I feel bound to reject it essentially for the reasons articulated in *Trans Mountain*. The distinction between the two schemes highlighted by the

parties does not change the fact that the Final Report, in itself, affects no legal rights and carries no legal consequences (*Trans Mountain*, at paras. 179-180; *Gitxaala*, at paras. 121-123, 125). Whether or not the Panel can be requested to review its conclusions and recommendations, the Final Report only serves to assist the Minister (or the GIC) in making their decisions. In light of the above-noted precedents and of this Court's holding in *Jada Fishing Co. Ltd. v. Canada*, 2002 FCA 103, 41 Admin L.R. (3d) 281, at paragraph 12, I find that the Final Report is not amenable to judicial review.

[44] A reconsideration power of the type set out at subsection 29(3) of the CEAA, 2012 and section 53 of the NEBA is of no significance when determining whether a report by an advisory body is amenable to judicial review. The explanation given by this Court in *Trans Mountain* as to why the reference to sections 29 to 31 of the CEAA, 2012 in *Gitxaala* was erroneous confirms this. The City of Vancouver had argued that *Gitxaala* was distinguishable because the environmental assessment in that case was established under section 40 of the CEAA, 2012 (pursuant to subsection 126(1) of the same Act), and that the Court was therefore mistaken to refer to sections 30 and 31 of that Act. The Court acknowledged that sections 29 to 31 of the CEAA, 2012 did not apply to the Northern Gateway project, and ought not to be referred to at paragraph 124 of *Gitxaala*. That being said, the Court also found that the error was not material to the analysis of the respective roles of the Joint Review Panel and of the GIC, as the relevant statutory provisions applicable to that project are to the same effect as sections 29 and 31 of the CEAA, 2012. As for section 30 (dealing with reconsideration), which has no equivalent in the statutory scheme applicable to the Northern Gateway project, the Court found that it was of no relevance because it had no application to the environmental assessment under review in

Gitxaala, and also because "more importantly, section 30 played no significant role in the Court's analysis" (*Trans Mountain,* at para. 195). This, in my view, is further confirmation that the power to request a reconsideration from the responsible authority (in the case at bar, the Panel) is not of critical importance for the purpose of deciding whether a report can be challenged by way of judicial review.

[45] This is not to say that such a report is immune from review. In fact, it may be reviewed, albeit only in the course of a judicial review proceeding brought against the Minister's or the GIC's decision, to ensure that it was a "report" that they could rely upon. As the Court stated in *Trans Mountain* at paragraph 201:

> The Court must be satisfied that the decision of the Governor in Council is lawful, reasonable and constitutionally valid. If the decision of the Governor in Council is based upon a materially flawed report the decision may be set aside on that basis. Put another way, under the legislation the Governor in Council can act only if it has a "report" before it; a materially deficient report, such as one that falls short of legislative standards, is not such a report. In this context the Board's report may be reviewed to ensure that it was a "report" that the Governor in Council could rely upon…

[46] Indeed, I note that this is precisely what the judge seems to have done at paragraph 121 of his reasons in the related appeal. I could therefore stop here, and dismiss this application for judicial review on the ground that the Final Report is not justiciable. I will nevertheless deal with the submissions of the appellant, as they could (and should) have been made in the context of its application for judicial review of the subsequent decisions by the Minister and of the GIC.

B. *Substantive Issues*

(1) Did the judge err in holding that the impugned findings of the Panel were reasonable?

[47] When reviewing a determination made on judicial review, an appellate court must step into the shoes of the lower court and focus on the administrative decision itself. The question for this Court is therefore whether the application judge identified the appropriate standard of review and applied it correctly (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-46; *Canada (Attorney General) v. PSAC*, 2015 FCA 273, [2016] 3 F.C.R. 33, at para. 14; *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31, [2006] 3 F.C.R. 610, at para. 14; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, at para. 247; *Ontario Power Generation Inc. v. Greenpeace Canada*, 2015 FCA 186, 388 D.L.R. (4th) 685, at para. 33). In this case, I agree with the parties that the application judge identified the correct standards of review: reasonableness when considering the Panel's findings with respect to seepage and water quality, and correctness when deciding whether the Panel has failed to observe principles of procedural fairness in accepting the Technical Memorandum.

[48] With respect to the substantive determinations of the Panel, it is well established that decision-makers' interpretations of their home statute, with which they have a particular familiarity, call for deference (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 22; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para.

34). Thus, as long as the decision demonstrates "justification, transparency and intelligibility" and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", it should be regarded as reasonable (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47 [*Dunsmuir*]).

[49] As for questions of procedural fairness, this Court has consistently held that they are reviewable under the standard of correctness (*Del Vecchio v. Canada (Attorney General)*, 2018 FCA 168, at paras. 3-4; *Kwan v. Amex Bank of Canada*, 2018 FCA 189, at para. 11; *Gupta v. Canada (Attorney General)*, 2017 FCA 211, at paras. 28-29; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at para. 79). While there are exceptions to this rule, such as when the judge makes original findings of fact (*Apotex Inc. v. Canada (Health)*, 2018 FCA 147, 157 C.P.R. (4th) 289, at paras. 57-58), they do not apply in this case.

(a) *Table 5 and Seepage Estimates*

[50] Much of the appellant's argument with respect to the Panel's alleged misapprehension of the expected seepage rate from the TSF focused on the use it made of the comparative summary of seepage estimates prepared by NRCan and reproduced at Table 5 of the Final Report at page 60:

Table 5. Comparison of Seepage Estimates taken from the August 21, 2013, Natural Resources Canada Technical Memorandum to the Panel

	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^3d)
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)	O L/s (Natural Resources Canada claims Taseko's 2D model precludes this flux component)	20 L/s (1699 m^3/d)

[51] The appellant claims that Table 5 is not a "coherent matrix" as it compares apples to oranges, to the extent that the first row, in particular, is Taseko's estimate (9 L/s) for post closure seepage through the bottom of the TSF, whereas NRCan's estimate (100 L/s) is for the total seepage leaving the TSF (the numbers do not add up to 100 because they include the natural flow of groundwater). Taseko also claims that Table 5 does not accurately reflect its own estimate of basin seepage-deep groundwater of 15 L/s (as opposed to 0 L/s) in the bottom row. This brings Taseko's total estimate to 70 L/s, compared to NRCan's 100 L/s. Contrary to the judge's finding, Taseko submits that the Panel misapprehended the evidence and relied on the erroneous comparison provided by NRCan in Table 5 to conclude that there is "strong evidence that the seepage from the tailings storage facility would be significantly higher than estimated by Taseko" (Final Report, p. 64; Appeal Book vol. 3, p. 1543).

[52] The appellant has not convinced me that the Panel's rejection of its estimate was unreasonable. First of all, as pointed out by the respondents Minister and Attorney General, the Panel relied on a number of factors when rejecting Taseko's estimates; not just on Table 5.

Indeed, the record before the Panel shows that NRCan and various experts provided reliable evidence explaining the limitations and unreliability of Taseko's two-dimensional model to calculate an overall seepage estimate. Yet, Taseko does not dispute the importance of those factors on the accuracy of seepage estimates, nor the Panel's finding that Taseko's model failed to account for them.

[53] Furthermore, Taseko twice declined the Panel's requests for a more comprehensive 3D model, opting to forge ahead on the basis of its own model. Consequently, the Panel was left to accept NRCan's offer to create the type of 3D modelling that it had sought from Taseko. The Panel was permitted to consider this in its assessment of Taseko's and NRCan's estimates.

[54] With respect to Table 5 itself, the following points can be made. First, as the judge rightly mentioned at paragraph 81 of his reasons, the Panel correctly stated the appellant's total seepage estimate (70 L/s) at Table 3 of the Final Report (Appeal Book vol. 3, p. 1535), reproduced under the heading "Proponent's Assessment" (Appeal Book vol. 3, p. 1531). Table 3 summarizes Taseko's overall seepage recovery estimates with mitigation as follows:

Table 3. Overall seepage recovery estimates

	Total Seepage (L/s)	**Recovered Seepage (L/s) (Mitigation)**	**Unrecovered Seepage (L/s)**
Main Embankment	28.1	18.3 (Embankment depressurization wells) 4.9 (Interception wells) 3.6 (Pump-back wells) 26.8	2.40
South Embankment	23.9	19.8 (Embankment depressurization wells and	4.5

		Interception wells)	
West Embankment	3.0	2.5 (Embankment depressurization wells	0.68
Basin Seepage-Deep Groundwater	15.0		13.5
TOTAL (% of total)	70.0 (100%)	=49.0 (70%)	=21.0 (30%)

[55] The second column of Table 3, which ends with a total estimate of 70 L/s, shows the Panel understood the appellant had estimated its total TSF seepage by summing the results of its two models. Other comments in this section also show the Panel understood that, in the appellant's view, its 9 L/s estimate only concerned "post-closure" seepage rate, not "total" seepage rate (Appeal Book vol. 3, p. 1533). Further, the judge correctly found that at no point in the Final Report did the Panel indicate it thought Taseko's predicted total seepage estimate was only 9 L/s (Reasons, at para. 89).

[56] The application judge was also right to conclude that Table 5 is really nothing but a summary of NRCan's position (*ibid.*, at para. 85). The fact that this table is found within a section of the Final Report entitled "Views of Participants" makes this quite clear (Appeal Book vol. 3, p. 1535). It is also interesting to note the comment made by the Panel below Table 5, that "…pore water seepage from the [TSF] basin was estimated by [NRCan] to be 100 L/s…which was more than an order of magnitude greater than <u>what it considered to be Taseko's comparative prediction of 9 L/s</u>" [emphasis added] (Appeal Book vol. 3, p. 1539). The underlined part of the previous quote highlights the fact that the Panel is merely recording NRCan's position. The same is true of the title of this table, which talks of a comparison "taken from" NRCan's Technical Memorandum. In my view, this makes it very hard to accept the appellant's claim that this table

reflects the Panel's findings. And as the judge rightly notes at paragraph 92 of his reasons, neither did the Panel indicate that it considered the comparisons in Table 5 to reflect the position of Taseko.

[57] The appellant also failed to persuade me that Table 5 misrepresents its own estimates. Rather, it accurately summarizes what it purports to, that is NRCan's position on the matter. Throughout the process, NRCan consistently rejected the suggestion that a reliable seepage estimate could be obtained by adding the results of the appellant's two models. In its view, these models were incompatible, and summing their results would inevitably lead to double counting (Appeal Book vol. 15, pp. 15517-15519, 15332-15335, 15348-15351, 15450-15454, 15628). As a result, NRCan consistently advised that each Taseko model could only be compared independently against various results from NRCan's 3D model. Consistent with this approach, when inserting numbers into column 2 of Table 5, the Panel was clear in indicating from which of the two Taseko models the number was derived, based on the Technical Memorandum.

[58] As a result, I am of the view that this Court should not accept the appellant's invitation to revisit the conclusions of the Panel with respect to TSF water seepage. As the judge noted, the Panel was a specialized body of experts making a series of technical assessments and was in the best position to determine the validity of competing evidence in reaching its conclusions (Reasons, at paras. 84, 91). The Panel was concerned with Taseko's methodology of combining 2D and 3D model estimates, which methodology failed to account in its underlying data for several important variables, thus leading to underestimation of seepage rates:

> In reaching its conclusions on seepage from the tailings storage facility, the Panel considered the following factors to be particularly relevant:
>
> …
>
> 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.
>
> …
>
> The substantial heterogeneity of the overburden and of the shallow bedrock, particularly with respect to the intercalated basalt and glaciofluvial and glaciolacusterine deposits in the glacial till across the tailings storage facility and site. Despite this heterogeneity Taseko represented all overburden deposits (till, unconsolidated sediments, basalt) as one unit and assigned a bulk hydraulic conductivity value of 4×10^{-6} cm/s.
>
> Taseko's assignment of a single hydraulic conductivity of 10^{-8} m/s value for tailings does not recognize the spatial variation of particle size that will develop when the tailings are deposited in the tailings storage facility
>
> (Appeal Book vol. 3, pp. 1542-1543)

[59] Considering the importance of these deficiencies, amply supported by expert evidence, and the fact that Taseko did not challenge the reasonableness of any of these key factors as the basis for rejecting Taseko's estimates, I cannot but agree with the judge that the Panel's conclusions and recommendations are immune from judicial review.

[60] Lastly, I disagree that the judge substituted his reasoning for that of the Panel when he wrote that even if the comparison between Taseko's 70 L/s and NRCan's 100 L/s had been accepted, the conclusion of the Panel would still hold (Reasons, at para. 93). The Minister argues that the judge was addressing the appellant's assertion that the Panel could only have arrived at its conclusion by accepting NRCan's erroneous comparison from Table 5. I find this explanation

credible. The judge simply rejected the appellant's broad inference, noting that another plausible explanation may well have been that, even accepting Taseko's comparison, a difference of 30 L/s remains significant.

(b) *Reliance on NRCan's Upper Bound Estimate*

[61] The appellant asserts that the judge was wrong to find the Panel's decision to accept NRCan's upper bound estimate reasonable. This estimate was based on NRCan's model, which failed to take into account mitigation measures, seepage through the embankments and till layer augmentation in the proposed TSF design. Reliance on this model, the appellant says, led the Panel to incorrectly compare its post-mitigation seepage estimate with NRCan's pre-mitigation one.

[62] I agree with counsel for the respondents that this Court should not reweigh the evidence and reach new determinations on complex technical matters that were canvassed before the Panel. The Federal Court rejected the exact same argument below, and I agree that there was nothing unreasonable in the Panel's decision to prefer NRCan's 3D model to the appellant's two models, based on the deficiencies it saw in the latter and the independent expert's suggestion that NRCan's results be accepted (Appeal Book vol. 3, p. 1541). As noted by the judge, this conclusion was not reached "in the face of uncontradicted evidence" (Reasons, at para. 111).

[63] In my view, the appellant is wrong to argue that the Panel's adoption of NRCan's model led it to make an inappropriate comparison between the appellant's post-mitigation seepage

estimates and NRCan's pre-mitigation seepage estimates. Nowhere in the Panel's analysis is there any comparison made between these figures.

[64] The appellant's underlying argument in this regard—that the Panel did not take its mitigation measures into account—does not withstand scrutiny. As rightly noted by the judge, "when the Report is considered as a whole it is clear that the Panel considered the seepage mitigation measures put forward by Taseko" (*ibid.*, at para. 110). This reading of the Final Report (showing that the Panel did take into account the appellant's mitigation measures in its analysis and made its comparison accordingly) is reinforced by the very wording of its conclusion on the issue: "Taseko has underestimated the volume of tailings pore water seepage leaving the [TSF] …even with the mitigations proposed" [emphasis added] (Appeal Book vol. 3, p. 1543).

[65] In any case, when read as a whole, the Final Report makes clear that the Panel fully understood what the appellant considered to be appropriate comparators with respect to post-mitigation seepage estimates. In another section of the Final Report, the Panel summarized the evidence of TNG's expert, Dr. Freed. Assuming that the mitigation measures proposed by Taseko worked, Dr. Freed applied Taseko's mitigation ratio to NRCan's pre-mitigation seepage estimate and calculated that Taseko's post-mitigation estimate would be 11.8 L/s. While unsure of the effectiveness of the proposed mitigation measures, the Panel still adopted this estimate of 11.8 L/s, and found it was "significantly higher" than the 2.4 L/s predicted by the appellant.

[66] In other words, even assuming that the appellant's mitigation measures worked and recovered 80% of the seepage predicted by NRCan (which assumption NRCan strongly disputes) the resulting post-mitigation seepage estimate would still be five times higher than the estimate of the appellant (*ibid.*, p. 1564). This is precisely what the judge concluded, and rightly so, at paragraph 102 of his reasons.

[67] In any event, the Panel would have been justified to refuse to make the comparison in terms of post-mitigation seepage estimates, considering the serious concerns of the various participants regarding Taseko's proposed mitigation measures (*ibid.*, pp. 1536, 1539, 1541-1542). The Amended Terms of Reference only required the Panel to identify in its report the mitigation measures it recommends (*ibid.*, p. 1746). As noted by the Panel, there remained "significant uncertainty" with respect to the appellant's "ability to limit and collect tailings storage facility seepage and to effectively and economically treat water to maintain water quality in Fish Lake" (*ibid.*, p. 1564).

[68] As for the other alleged inconsistencies between NRCan's model and the TSF actually proposed by Taseko (till thickness, embankment seepage and calibration), I adopt the submissions of the Minister and Attorney General in their memoranda of fact and law. The findings of the Panel in these respects were well within its expertise, were supported by expert evidence, and were all within the realm of reasonable outcomes. The Panel was not bound to accept Taseko's remediation proposals, which were often based on debatable assumptions. Once again, it is not the role of this Court (nor, for that matter, of the Federal Court) to act as an "academy of science". The Panel was a specialized body of experts making a series of technical

assessments and was in the best position to determine the validity of competing evidence in reaching its conclusions.

(c) *Concentration of Water Quality Variables*

[69] The appellant asserts that the Panel's conclusion with respect to the Project's impact on water quality is unreasonable, because it is based on its erroneous TSF seepage findings. As for the judge's determination that the Panel would have reached this conclusion even without the TSF seepage findings on the basis of additional evidence, the appellant says it impermissibly supplants the Panel's reasons as the Panel itself found that seepage and water quality are inextricably linked.

[70] Having found the Panel's TSF seepage findings to be reasonable for the reasons set out above, I would reject the appellant's submission that the Panel erred in relying on these very findings in concluding that the Project would have significant adverse impact on water quality.

[71] In any event, I agree with the application judge that the Panel's determination in this regard was supported by additional evidence, such as the appellant's own admission that the Project would cause water quality in Fish Lake to be in violation of the guidelines for the protection of aquatic life (*ibid.*, pp. 1552, 1564-1565). As explicitly noted by the Panel:

> …Taseko predicted water quality [in Teztan Biny] would exceed the provincial and federal water quality guidelines for several variables; aluminum, cadmium, iron, selenium, silver, mercury and thallium exceed the federal guideline for the

> protection of aquatic life; and that aluminum, boron, and cadmium would exceed the provincial guidelines during and after mine operation.

[72] It is clear from this excerpt that the Panel relied on the appellant's own estimate that water variables would exceed the guidelines. As the judge pointed out at paragraph 116 of his reasons, this in no way supplants the Panel's analysis.

[73] The Panel's determination was also based on its finding that the water recirculation process itself could affect water quality (*ibid.*, p. 1552), and on the many concerns raised with respect to the appellant's water treatment mitigation measures (*ibid.*, pp. 1563-1564). It bears reproducing here some of the Panel's findings in this regard:

> There was uncertainty regarding how long recirculation of water in Fish Lake would be required but would likely be required in the long-term, potentially in perpetuity.
>
> Water quality variables were predicted to exceed many of the provincial and federal water quality guidelines in Fish Like and adjacent water bodies.
>
> There was uncertainty regarding the water quality modelling methodology and no documentation had been made available by Taseko that provided a detailed description of the mass balance water quality model for Fish Lake.
>
> …
>
> The Panel agrees that the active management technologies proposed by Taseko to control dissolved metals, dissolved oxygen and nutrient levels in Fish Lake are unproven at the scale proposed.
>
> The Panel agrees that treatment would be needed to treat water quality in Fish Lake indefinitely.
>
> …
>
> [T]he Panel finds that the proposed membrane water treatment, sulphide reduction and ion exchange water treatment technologies were not widely used in mining applications and none were currently used at mines in British Columbia.

[74] Of course, these water quality predictions were modelled in the absence of mitigation measures. Yet the Panel was also unable to accept Taseko's submission that the water treatment options proposed would effectively mitigate the adverse effects of the Project on Fish Lake (Teztan Biny) water quality, as they were "unlikely to work effectively in the long-term" (*ibid.*, p. 1566).

[75] Based on the foregoing, I find that the Panel's reasoning concerning water quality meets the requirements of "justification, transparency and intelligibility", and "falls within a range of possible, acceptable outcomes…defensible in respect of the facts and law" (*Dunsmuir*, at para. 47).

(2) Did the judge err in holding that the Panel did not breach its procedural fairness duty?

[76] The appellant claims it was prejudiced by the Panel's late acceptance of NRCan's TM as new expert evidence. It argues that the TM contained new information with respect to NRCan's seepage estimate, and that it never had an adequate opportunity to respond. The appellant also claims that, as it did not know the Panel would treat the TM as expert evidence before the Final Report was issued, it could not have raised this issue earlier.

[77] For the reasons that follow, there was no breach of procedural fairness here, as the appellant was given a full and fair opportunity to know the case to meet, and had sufficient notice and reasonable time to respond to the TM.

[78] As the judge rightly pointed out, the parties are in agreement that Taseko was owed a high degree of procedural fairness. That being said, decision-makers remain the masters of their own procedure, and the institutional constraints faced by an administrative tribunal must be taken into account (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, at para. 27; *Iwa v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 323-324, 68 D.L.R. (4th) 524, at p. 554). I agree with the respondent Minister and Attorney General that a case like this risks generating acrimony between the proponent and members of the local community, including potentially affected Indigenous people, and therefore it is of the utmost importance that flexibility in the process be maintained (Memorandum of Fact and Law of the Respondents the Minister of the Environment and the Attorney General of Canada, at para. 69).

[79] Furthermore, I agree with the judge that the impugned TM, far from disclosing new information, only summarized what "had already been presented to the Panel, and to Taseko, in NRCan's written and oral submissions" (Reasons, at para. 54). This document only sought to make clear that despite the appellant's assertions to the contrary, NRCan's position had remained the same throughout the review process and had not changed following Taseko's presentations and cross-examination. This is clear from a comparison between the content of the TM and NRCan's earlier evidence (Appeal Book vol. 15, pp. 15513-15516), which the appellant had the opportunity to (and did) test.

[80] The appellant argues that, insofar as the TM restates NRCan's initial "order of magnitude" comparison (which it says Dr. Desbarats had explicitly abandoned in his testimony

before the Panel) it contains new information. This claim is untenable, as Dr. Desbarats never actually repudiated his comparison in his testimony. On a fair reading of the excerpts provided by the appellant, it is clear that when he referred to a "factor of two", the NRCan expert was only considering what the math would be if different comparisons were preferred to those he himself endorsed. Nowhere in these excerpts does Dr. Desbarats say he supports any of the comparisons proposed by the appellant, nor does he ever retreat from his initial concerns about the order of magnitude difference between the seepage estimates derived from the two competing 3D models. Rather, he reiterates these concerns quite clearly throughout the excerpts quoted by the appellant (Appeal Book vol. 4, pp. 2974, 3053-3054, 3516-3518).

[81] Based on a careful reading of these excerpts, I simply cannot accept the appellant's submission that Dr. Desbarats in any way endorsed the comparisons the appellant put to him during his testimony, or that he set aside his concerns with respect to the methodology of the latter for comparing seepage estimates. Indeed, the Panel expressly noted that it interpreted the contents of the TM to be a clarification of NRCan's position. I thus find that the TM was consistent with NRCan's position throughout the review process, and I agree with the judge that, as such, it did not contain new information.

[82] Be that as it may, it is clear to me that the appellant was given an appropriate opportunity by the Panel to respond to the TM, but that it simply decided against taking this opportunity. On August 20, 2013, the Panel held that the appellant alone would have "several days of time from the receipt of any new technical documents to respond" (Appeal Book vol. 8, p. 6988). The next day, the TM was provided to the appellant in advance of the closing submissions scheduled for

August 23rd (Appeal Book vol. 3, p. 1463). On this date, the appellant explicitly acknowledged the content of the TM in its closing argument (Appeal Book vol. 9, p. 7615). While it also devoted one paragraph of its written submissions to this issue, it only responded to the Environment Canada water quality submissions filed on the same day as the TM (Appeal Book vol. 14, pp. 14370-14372). Likewise, on August 28th and 29th, the appellant filed four additional documents with the Panel in response to submissions by various participants (Appeal Book vol. 17, pp. 18667-18678; Appeal Book vol. 18, pp. 19000-19006; Appeal Book vol. 14, p. 14694; Appeal Book vol. 20, pp. 22029-22030).

[83] In light of the foregoing, the appellant's submission that it did not receive notice of the case it had to meet and was not given an opportunity to respond to the TM, cannot prevail. I therefore adopt the judge's comments at paragraphs 61 to 77 of his reasons.

[84] Finally, Taseko cannot complain that the Panel deviated from its Public Hearing Procedures and therefore breached its legitimate expectation. First of all, Taseko omits to mention that these procedures explicitly state that the Panel will not be bound by the strict rules of court procedure and evidence (ss. 1.10) and will deal with any non-compliance with its procedures as it deems appropriate (ss. 1.11) (Appeal Book vol. 3, p. 1812). While true legitimate expectations may affect what processes are required, an expectation will only meet that threshold if it is based on a decision-maker's clear, unambiguous, and unqualified representation, conduct, or established practice (*Mount Sinai Hospital Center v. Québec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 29).

[85] Moreover, there is nothing in the Public Hearing Procedures suggesting that they are to be read as narrowly as Taseko would like them to be read. These procedures do not support Taseko's purported expectations, nor did they fetter the Panel's discretion to adapt the process to suit the ultimate objectives of the CEAA, 2012 and of natural justice. As a matter of fact, the Panel did depart from its hearing procedures to allow Taseko several days to respond to new technical submissions, even after the close of hearings. The Panel made this order as a direct response to Taseko's expressed concerns about procedural fairness.

[86] Indeed, Taseko did make additional submissions to the Panel after the close of hearings in response to other technical submissions (Appeal Book vol. 18, pp. 19000-19006; Appeal Book vol. 14, p. 14694). However, Taseko chose not to make any complaint about NRCan's TM and did not allege it was inappropriate as containing new evidence. Taseko did not complain that it didn't know the identity of the author, nor that it lacked an opportunity to respond to the TM whether by cross-examination or by leading rebuttal evidence, and was provided ample opportunity to respond in writing.

[87] In light of the foregoing, the Federal Court was correct in dismissing Taseko's arguments of procedural fairness, given they were not raised before the Panel.

VI. Conclusion

[88] For all of the aforementioned reasons, I would dismiss the appeal, with costs.

"Yves de Montigny"
J.A.

"I agree.
David Stratas J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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