

ENVIRONMENT

Appeal from Federal Court (F.C.) decision (2017 FC 1100) dismissing application for judicial review of Decision Statement communicating decisions of respondent Minister of the Environment (Minister), Governor in Council (GIC) pursuant to *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19 (CEAA 2012), s. 52 determining that appellant's New Prosperity Gold-Copper Mine Project (Project) likely to cause significant adverse environmental effects, that those effects not justified — Review Panel Final Report (Final Report) at basis of these decisions — Case raising difficult question of interaction between constitutionally mandated duty to consult, common law principles of procedural fairness, natural justice — Crown appointing "Consultation Coordinator" to liaise between Crown, respondent Tsilhqot'in National Government (TNG) in respect of Project, to prepare Crown Consultation Report — Meetings involving TNG lying at heart of appeal — At first meeting, TNG seeking to voice its concerns that appellant misrepresenting their views in public statements, wanting to set record straight — Second meeting held between TNG, deputy ministers who were briefed not to discuss any issues currently before review panel — F.C. finding that appellant learning of these meetings soon afterward but making no objection at time — Finding that appellant writing directly to Minister, publishing opinion piece, issuing press release impugning opponents of Project, setting out arguments about how Final Report conclusions wrong, why Project should be approved — Appellant requesting notification by Minister of adverse submissions arising out of consultations with Indigenous groups outside of panel process — TNG providing submissions on Final Report to Canadian Environmental Assessment Agency (Agency) as part of Phase IV consultation — These submissions not provided to appellant — Agency later sending memorandum to Minister requesting her decision under CEAA, 2012, s. 52 — Minister provided with Crown Consultation Report including TNG's views as to why Project not justified to proceed at GIC decision stage — Consultation Report not provided to appellant — Minister releasing her Decision Statement — In underlying application for judicial review, appellant arguing decisions of Minister, GIC should be quashed for breaches of procedural fairness, jurisdictional errors, asking F.C. for declaration that CEAA, 2012, ss. 5(1)(c), 6 unconstitutional — F.C. finding, *inter alia*, Minister owing appellant only "minimal" degree of procedural fairness — Rejecting appellant's claim that it should have been informed of any submissions received by Minister in opposition to Project — Rejecting allegations of unfairness with respect to GIC's decision on basis that no duty attached to it — Not dealing with constitutional questions — Issues whether decisions by Minister, GIC to be quashed for breaches of procedural fairness jurisdictional error; whether CEAA, 2012, ss. 5(1)(c), 6 inapplicable to Project because of doctrine of interjurisdictional immunity — F.C. not erring in finding that minimal duty of fairness satisfied in this case — Determination of whether procedural fairness met in any given case always context specific — Guiding principle that person affected should be afforded means to present case fully, fairly, have a decision made in fair, impartial, open process, taking into consideration statutory, institutional, social setting of that decision — Duty to consult with, accommodate Indigenous groups part and parcel of social context — Importance of Minister's decision, adversarial nature of process not calling for more than "minimal" degree of procedural fairness — Minister's task in present case essentially to form opinion based on Final Report — Far from situation in which determinations having to be made to reach decision resembling judicial decision making — Other factors identified in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 supporting lower degree of procedural fairness towards appellant at this stage of process — No breach of appellant's right to procedural fairness demonstrated — *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105, 31 N.R. 214 cannot be used in support of idea that mere apprehension of breach of procedural fairness sufficiently justifying intervention — F.C. applying correct approach when stating that "a party must show that a possibility of prejudice arose from such a meeting or submission in order to constitute

a breach of the *audi alteram partem* principle” — Appellant failing to demonstrate significant, relevant information presented to Minister of which it did not have prior knowledge — TNG saying nothing new or different during meetings from positions it took publicly, before Panel — Appellant knew of case made against it, given opportunity to respond — F.C. right to conclude that no duty of procedural fairness attached to GIC process — CEEA, 2012 not contemplating right to make direct submissions to GIC— Would be contrary to language, structure of statutory regime, as well as very nature of GIC decision-making process to impose one — Decisions of Minister, GIC not to be quashed for jurisdictional error — Court not intervening herein regarding constitutional questions — Interjurisdictional immunity not preferred method for resolving constitutional disputes, appearing to be at odds with cooperative federalism — Appeal dismissed.

TASEKO MINES LIMITED V. CANADA (ENVIRONMENT) (A-6-18, 2019 FCA 320, de Montigny J.A., reasons for judgment dated December 18, 2019, 45 pp.)