

Federal Court



Cour fédérale

Date: 20140204

Docket: T-1977-13

Toronto, Ontario, February 4, 2014

PRESENT: Madam Prothonotary Milczynski

BETWEEN:

TASEKO MINES LIMITED

Applicant

and

THE MINISTER OF THE ENVIRONMENT
AND
THE ATTORNEY GENERAL OF CANADA

Respondents

ORDER

UPON MOTION dated December 18, 2014 on behalf of the Tsilhqot'in National Government ("TNG") and Joey Alphonse, on his own behalf and on behalf of all other members of the Tsilhqot'in Nation for:

- (a) an order adding the Applicants, or either of them, as Respondents to the judicial review, pursuant to *Federal Courts Rule* 104(1)(b) with directions to amend the Notice of Application accordingly;

- (b) in the alternative, an order adding the Applicants, or either of them, as intervenors in the judicial review, pursuant to *Federal Courts Rule* 109, with rights to raise preliminary objections, bring motions, file evidence and cross-examine on affidavits, make legal submissions, and appeal any and all orders and judgments, or such rights as this Honourable Court deems fit; and
- (c) costs of this motion forthwith and in any event of the cause.

AND UPON reading the motion records filed on behalf of the parties, and hearing the submissions of counsel for the parties at the General Sitings in Vancouver on January 28, 2014;

The within application for judicial review is in respect of the report dated October 31, 2013 ("Report") issued by the Federal Review Panel established by the Minister of the Environment (the "Panel") concerning an environmental assessment of the proposal by Taseko Mines Limited ("Taseko") to construct and operate the New Prosperity Gold-Copper Mine Project (the "Project"). In the Report, the Panel found significant adverse environmental effects were likely in respect of:

- (a) water quality in Fish Lake (Teztan Biny) and Wasp Lake;
- (b) fish and fish habitat in Fish Lake, wetlands and riparian ecosystems; and
- (c) Tsihqot'in current use of lands for traditional purposes, cultural heritage and archaeological/historical resources.

The Panel's Report serves an advisory role. Under the *Canadian Environmental Assessment Act, 2012*, the Minister of the Environment, after taking into account the Panel Report, must decide if the Project is likely to cause significant adverse environmental effects. If so, then the Governor-in-Council must decide whether the Project is justified in the circumstances or, alternatively, is unjustified and should be rejected.

The Report is in fact, the second report concerning the proposed mine. A July 2, 2010 report (the "First Report") issued by a different panel concluded:

...the Project would result in significant adverse environmental effects on fish and fish habitat, on navigation, on the current use of lands and resources for traditional purposes by First Nations and on cultural heritage, and on certain potential or established Aboriginal rights or title.

The First Report confirmed that "much of the Tsilhqot'in population continue to use the Project area for activities such as hunting, fishing, gathering of berries, plants and medicines, as well as for various cultural and spiritual ceremonies and activities." The First Report also described Fish Lake and the surrounding lands (Teztan Biny, Y'anah Biny (Little Fish Lake) and Nabas areas) as "unique and of special significance" to the Tsilhqot'in and that the loss of these lands for current use activities, ceremonies, teaching, and cultural and spiritual practices would be irreversible, of high magnitude and have a long-term effect on the Tsilhqot'in. The First Report said that it could not even recommend any measures that would mitigate these significant adverse effects given the substantial value of this area to the Tsilhqot'in.

On November 2, 2010, the Federal Government rejected the Project, accepting the First Report's conclusions, and also stating that "this decision does not preclude the proponent from submitting a project proposal that includes addressing the factors considered by the panel".

Taseko subsequently did apply to the Canadian Environmental Assessment Agency with a revised proposal, asserting that the revised Project would preserve Fish Lake (Teztan Biny) by relocating the tailings storage 2.5 km facility upstream and re-circulating the lake water in a closed system. The Project would still require the destruction of Yanah Biny (Little Fish Lake) and much of Nabas.

The second environmental review and Panel Report which is the subject of the within application was thus conducted, to assess whether the revised proposal addressed the environmental effects identified in the review of the original project.

As in the first assessment review, the moving parties on this motion the TNG and Tsilhqot'in Communities participated actively in the process. Their submissions provided information on traditional use and cultural heritage, and expert evidence in areas such as geochemistry, hydrology, limnology, aquatic biology, toxicology and environmental toxicology. The TNG participated in a site visit to Fish Lake (Teztan Biny) and the head of the Taseko River (Dasiqox), which was attended by the Panel, Taseko and other interested parties. At the TNG's request, the Panel received in confidence, a report prepared by experts retained by the TNG and Tsilhqot'in elders, documenting grave and cremation sites in areas that would be affected by the

Project. Finally, the Panel held community hearings in each of the six Tsilhqot'in communities, where opposition to the Project is described as "overwhelming".

The Panel's Report confirmed that the Project, although revised, did not address the significant adverse environmental effects identified by the first panel and report. The (revised) Project would result in "several significant adverse environmental effects, the key ones being effects on water quality in Fish Lake (Teztan Biny), on fish and fish habitat and on current use of lands and resources for traditional purposes by certain Aboriginal groups and on their cultural heritage". The Panel confirmed that these lands were places of unique and special significance for Tsilhqot'in cultural identity and heritage – and the magnitude of the losses that the Tsilhqot'in people would suffer if the Project were to be approved.

The Applicant in the within application for judicial review, Taseko seeks the following relief:

1. A declaration that the following findings of the Panel are invalid and are quashed or set aside:
 - (a) the Panel's determination that Taseko underestimated the volume of tailings pore water seepage leaving the tailings storage facility;
 - (b) the Panel's decision to accept Natural Resources Canada's upper bound estimate as the expected seepage rate from the tailings storage facility;
 - (c) 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; and

2. 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.

Among the grounds set out in the notice of application, Taseko points to the manner in which the Panel administered the site visit to Fish Lake (Teztan Biny) and the manner in which it received in-camera evidence and submissions (such as the confidential report regarding Tsilhqot'in grave and cremation sites). Taseko also takes issue with the expert evidence relied upon by the Panel, including the models used to estimate seepage rates.

Noteworthy in the notice of application is that Taseko does not seek to set aside the Panel's findings and send the matter back for further assessment (with or without direction from the Court). Taseko seeks to have the Report proceed to the Minister for consideration in a form, should Taseko succeed, that the moving parties state, would be minus key findings, and thus in a diminished or altered state. As such, the moving parties submit that if not on this judicial review, there would be no opportunity for them to participate to represent the interests of the Tsilhqot'in people – interests that the Panel found to be of key concern and which were the subject of the finding that they would be significantly and adversely affected by the Project should it proceed to be developed. Accordingly they seek to be added as named respondents, or as intervenors with full rights of participation. At the hearing of the motion it was confirmed by the moving parties, and accepted by Taseko that the TNG and Chief Alphonse were seeking to be added as a single entity (not two separate ones) so as to not raise issues, if any, about their acting in a representative capacity for all the members of the Tsilhqot'in communities.

In the proceedings before the Panel, the TNG was granted “interested party” status, and in that capacity made numerous submissions to the Panel, filed evidence and cross-examined a number of witnesses. Chief Alphonse did not hold “interested party” status, but did make presentations to the Panel, as a representative of the TNG and during a community session. There were 75 other parties that were granted “interested party” status, but little more about any of them has been highlighted in the motion material. While Taseko submits it might be an open issue, I am nonetheless satisfied that had the Panel’s report been favourable to the Project, some or perhaps all of these “interested parties” would have had standing to bring an application for judicial review on reviewable grounds – as has been done in a number of cases (see: *Grand Riverkeeper, Labrador Inc.*, *Sierra Club of Canada and Nunatukavut Community Council Inc.* 2012 FC 1520; *Union of Nova Scotia Indians v. Canada (Attorney General)*, [1997] 1 FC 325; and more recently the applications commenced by various parties (registered participants) in relation to the Report issued December 19, 2013 by the Joint Review Panel established by the National Energy Board and Minister of Environment recommending approval of the Northern Gateway Pipeline Project, with conditions – Court Files T-270-14, T-273-14, T-274-14, T-278-14 and T-285-14).

Rule 303 of the *Federal Courts Rules* provides that an applicant for judicial review shall name as a respondent, every person who is “directly affected” by the order sought in the judicial review application. Rule 104(1)(b) of the *Rules* provides the Court with the ability to order that a person be joined as a respondent if they ought to have been joined as a party under Rule 202, or if their presence is necessary to ensure that all matters in dispute in the proceeding may be effectively and completely determined. What it means to be “directly affected” is discussed in

League for Human Rights of B'Nai Brith Canada v. R., 2010 FCA 307, where the Court of Appeal held that a party has a “direct interest” when its legal rights are affected, legal obligations are imposed upon it, or it is prejudicially affected in some direct way. (see also: *Forest Ethics Advocacy Association v. National Energy Board* 2013 FCA 236).

Taseko also relies upon *Forest Ethics* to argue that the moving parties (like Valero in *Forest Ethics*) have only an indirect or consequential interest and that any potential to be “directly affected” is contingent upon the Minister’s recommendation that the Project be approved. I do not agree; the moving parties’ interests are not derivative, particularly in light of the fact that Taseko seeks to overturn key findings based on the fact and expert evidence received by the Panel relating to the Project’s impact on Fish Lake (Teztan Biny) and Nabas, and consequently on the Tsilhqot’in people and their rights and interests – and Taseko seeks to overturn these findings without referring the matter back to the same or new/different panel (where “interested parties” such as the moving parties would have a full opportunity to participate) but have the Report proceed to the Minister following the judicial review. If Taseko is successful on this review in obtaining the relief it seeks, the TNG and Tsilhqot’in communities would have no recourse but to wait for the Minister’s determination of whether to recommend the Project, based on the record before the Minister.

Taseko also impugns the procedural fairness of the hearing, in camera session and site visit process that was proposed by the moving parties and adopted by the Panel. Who better than the moving parties to explain their import and significance in the within judicial review?

Accordingly, I am satisfied that the moving parties are "directly affected" within the meaning of Rule 303 of the *Federal Courts Rules* or are persons whose presence is necessary to ensure that all matters in dispute may be effectively and completely determined within the meaning of Rule 104(1)(b) and that they should be added as a single respondent to the proceeding. I am mindful in doing so that there were some 75 other "interested parties" who appeared before the Panel, but to the extent any further persons seek to be added as respondent or intervenor, each such application will need to be determined on its merits.

THIS COURT ORDERS that:

1. The moving parties, the Tsilhqot'in National Government and Joey Alphonse, on his own behalf and on behalf of all other members of the Tsilhqot'in Nation are added as a Respondent to the within application for judicial review.

2. In the event the parties cannot agree on the costs of this motion, each may file written submissions, no longer than three pages in length, within ten days of the date of this Order.

"Martha Milczynski"

Prothonotary

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the _____

day of FEB 4 - 2014 A.D. 20____

Dated this _____ day of FEB 4 - 2014 20____

MARY SANSOIE
 MARY SANSOIE
 REGISTRY