

Court File No. T-744-14

**FEDERAL COURT**

**TASEKO MINES LIMITED**

Applicant

AND

**THE MINISTER OF THE ENVIRONMENT and  
THE ATTORNEY GENERAL OF CANADA**

Respondents

APPLICATION UNDER Section 18.1 of the *Federal Courts Act* and Rule 301 of the *Federal Courts Rules*.

**NOTICE OF APPLICATION**

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN  
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

MAR 26 2014  
March \_\_, 2014

Issued by:   
Registry Officer

**MODELISA HENNESSY  
REGISTRY OFFICER  
AGENT DU GREFFE**

Address of local office: \_\_\_\_\_

Courts Administration Service  
P.O. Box 10065, 3<sup>rd</sup> Floor  
701 West Georgia Street  
Vancouver, B.C. V7Y 1B6

**TO:**

British Columbia Regional Office  
Department of Justice Canada  
900 - 840 Howe Street  
Vancouver, British Columbia  
V6Z 2S9

**AND TO:**

The Honourable Leona Aglukkaq  
Minister of the Environment  
Les Terrasses de la Chaudière  
10 Wellington Street, 28th Floor  
Gatineau, Quebec  
K1A 0H3

## APPLICATION

### **Details of the matter in respect of which judicial review is sought:**

This is an application for judicial review in respect of the decisions of the Minister of the Environment (the "Minister") and the Governor in Council concerning the proposal by the Applicant, Taseko Mines Limited ("Taseko"), to construct and operate the New Prosperity Gold-Copper Mine Project (the "New Prosperity Project") communicated in a decision statement dated February 25, 2014 issued by the Minister (the "Decision Statement").

### **The Applicant makes application for:**

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

### **The grounds for the application are:**

1. The New Prosperity Project is a \$1.5 billion conventional open pit gold and copper mine proposed by Taseko, approximately 125 km southwest of Williams Lake, British Columbia. The New Prosperity Project is expected to provide 550 direct jobs, 1280 indirect jobs and an annual contribution of \$340 million to the Province of British Columbia's GDP.
2. The New Prosperity Project is located entirely within the Province of British Columbia. The mineral resources which the New Prosperity Project relates to are owned by the Crown in Right of British Columbia and Taseko holds interests in them in accordance with tenures duly established under the *Mineral Tenure Act* (British Columbia).

3. The New Prosperity Project is subject to regulation under the *Environmental Assessment Act* (British Columbia), the *Mines Act* (British Columbia), the *Environmental Management Act* (British Columbia), and various other provincial laws.
4. Taseko has spent in excess of \$130 million to date developing the New Prosperity Project.
5. A prior version of the New Prosperity Project has already been the subject of an environmental assessment and was approved by the province in 2010.
6. The prior version of the New Prosperity Project was however rejected by the federal government in 2010 principally on the basis that it would have involved the draining of Fish Lake. At the time the federal government invited Taseko to resubmit an alternate project plan. Taseko did so in 2011 and the new project plan, which has added costs of over \$300 million, does not involve the draining of Fish Lake.
7. The environmental assessment certificate issued in 2010 by the province of British Columbia is currently the subject of an amendment application reflecting the new project plan.
8. On November 7, 2011, the then Minister of the Environment, the Honourable Peter Kent, announced that the New Prosperity Project would undergo another federal environmental assessment by way of a Federal Review Panel (the "Panel"). With the coming into force of *CEAA 2012* on July 6, 2012, the Panel assessment proceeded under that statute.
9. The Panel's terms of reference were issued on May 9, 2012 and amended August 3, 2012 following the coming into force of *CEAA 2012* (the "Amended Terms of Reference"). Under the Amended Terms of Reference, the Panel was required to consider, among other things, the environmental effects of the New Prosperity Project and submit a report to the Minister. The definition of environmental effects in the Amended Terms of Reference did not match the definition in *CEAA 2012*.
10. The Panel commenced public hearings on July 22, 2013 and 22 days of hearings were held in various communities. The hearings closed on August 23, 2013.
11. In its submissions before and during the Panel process, Taseko proposed various mitigation measures with respect to potential adverse environmental effects.
12. On October 8, 2013, after the Panel hearings had closed and before the Minister made a decision under section 52 of *CEAA 2012*, the Minister of the Environment, Leona Aglukkaq, met privately with Chief Roger William of

the Xení Gwet'in First Nation which is a member of the Tsilhqot'in National Government (the "TNG"), along with other representatives of the TNG and other parties opposed to the New Prosperity Project. The New Prosperity Project was discussed at that meeting but Taseko was not present.

13. On October 9, 2013, Chief William and other parties opposed to the New Prosperity Project had similar meetings with five Deputy Ministers: Michael Wernick of Aboriginal Affairs and Northern Development Canada; Bob Hamilton of Environment Canada; Matthew King of Fisheries and Oceans Canada; Louis Levesque of Transport Canada; and Serge Dupont of Natural Resources Canada. He also met with Ron Hallman, the President of the Canadian Environmental Assessment Agency ("CEAA"). Some or all of these individuals were involved in advising the Minister and the Governor in Council in respect of their decisions regarding the New Prosperity Project under *CEAA 2012*.

14. On October 31, 2013, the Panel issued its report regarding the New Prosperity Project (the "Report").

15. In its Report, the Panel concluded significant adverse environmental effects were not likely in respect of approximately 33 areas (provided appropriate mitigation measures were successfully implemented). These included positive findings regarding impacts on human health, migratory birds, salmon and salmon habitat, wildlife, species at risk, navigation, aboriginal tourism opportunities, trapper licences, old forest and grassland ecosystems and air quality.

16. In its Report, the Panel concluded that the New Prosperity Project would have significant adverse environmental effects in respect of:

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

17. On November 4, 2013, counsel for Taseko wrote to the Minister, with copy to CEAA, advising of forthcoming submissions about the Report and potential mitigation measures the Minister should consider when deciding under section 52 of *CEAA 2012* whether the New Prosperity Project was likely to cause significant adverse environmental effects.

18. On November 8, 2013, Taseko wrote to the Minister to address the matters set out above. Among other things, the letter stated:

If or to the extent any of those consultations [between government officials and aboriginal groups] result in the government of Canada being aware of

any information or holding any positions that could adversely affect Taseko's interests, we believe administrative law principles require that we be so advised and afforded an opportunity to make representations before any decisions are made.

19. On November 13, 2013, the Vice-President, Operations of CEAA, Yves Leboeuf, wrote to Taseko and its legal counsel requesting submissions on certain technical matters contained in the Report. The request was filed on CEAA's online registry (the "CEAA Registry").
20. On November 15, 2013, Taseko responded to CEAA's November 13, 2013 request with information that was specifically in response to Mr. Leboeuf's request, as well as with a copy of the November 8, 2013 letter. Taseko's correspondence was not filed on the CEAA Registry.
21. On November 16, 2013, Taseko wrote to Mr. Leboeuf requesting that Taseko's November 8 and 15, 2013 letters be posted to the CEAA Registry. Mr. Leboeuf responded that they would not be posted on the CEAA Registry.
22. The TNG was copied on the November 15, 2013 letter from Taseko to Mr. Leboeuf. On November 21, 2013, the TNG made written submissions to Ron Hallman, the President of CEAA.
23. On February 12, 2014, Chief William, Grand Chief Stewart Phillip of the Union of British Columbia Indian Chiefs (present by phone), and other TNG officials met with Deputy Ministers from CEAA, the Department of Fisheries and Oceans, Environment Canada, Natural Resources Canada, Aboriginal and Northern Development Canada, and Transport Canada. Taseko was not present.
24. On February 13, 2014, Chief Roger William, JP Laplante (TNG Mining, Oil & Gas Manager), Jay Nelson (legal counsel for the TNG), Joe Alphonse (Tribal Chair of the TNG), Shawn Atleo (Assembly of First Nations National Chief), and other representatives of parties that held interested party status before the Panel and were opposed to the New Prosperity Project, met with Dr. Colin Carrie, the Parliamentary Secretary to the Minister of the Environment and a Conservative Member of Parliament. Taseko was not present.
25. The New Prosperity Project was discussed at the meetings described in paragraphs 12, 13, 23 and 24 but Taseko was not advised of the submissions or information presented by or on behalf of the TNG and others in those meetings and was given no opportunity to respond to those submissions or information.
26. The Decision Statement dated February 25, 2014, communicated to Taseko on February 26, 2014, contains the following decisions of the Minister:

In accordance with paragraphs 52(1)(a) and (b) of CEEA 2012, I have decided, after considering the report of the Review Panel on the New Prosperity Gold-Copper Mine Project and the implementation of mitigation measures that I considered appropriate, that the Designated Project:

- is likely to cause significant adverse environmental effects referred to in subsection 5(1) of CEEA 2012; and
- is likely to cause significant adverse environmental effects referred to in subsection 5(2) of CEEA 2012.

27. The Decision Statement does not state what significant adverse effects the Minister found were likely to occur or what mitigation measures the Minister considered. It does not contain any reasons for the foregoing conclusions of the Minister. It does not indicate that she considered Taseko's November 15, 2013 response to Mr. Lebeouf's request on behalf of CEEA regarding technical matters contained in the Report.

28. Taseko had a legitimate expectation that its November 15, 2013 response to Mr. Lebeouf would be considered by the Minister before she made her decision under section 52 of *CEEA 2012*.

29. Taseko also had a legitimate expectation that if third-party representations were made to the Minister or her staff and advisors after the close of the Panel hearings, then the Minister would advise Taseko of those submissions and afford Taseko an opportunity to make response submissions, before making her decision under section 52 of *CEEA 2012*.

30. The Minister's decision must be set aside as the Minister:
- (a) failed to observe principles of natural justice or procedural fairness by:
    - (i) failing to provide reasons for her decision;
    - (ii) failing to consider relevant information including that contained in Taseko's November 15, 2013 correspondence;
    - (iii) meeting, or her Parliamentary Secretary meeting, privately with parties opposed to the New Prosperity Project after the Panel hearings had closed and before the Minister's decision had been rendered, without advising Taseko of those meetings or affording Taseko the opportunity to hear or otherwise be informed of submissions and information presented and without otherwise affording Taseko an opportunity to respond to submissions and information presented in those meetings;



(iv) receiving and considering advice from the President of CEAA and other Deputy Ministers respecting the Minister's decision under section 52(1) of *CEAA 2012* in circumstances where those individuals had, between the close of the Panel hearings but before the Minister's decision, met privately with, and received submissions and information from, parties opposed to the New Prosperity Project; or

(v) denying Taseko its legitimate expectation that:

(A) Taseko's November 15, 2013 response to Mr. Lebeouf's request of November 13, 2013 would be considered by the Minister; or

(B) if third-party representations were made to the Minister or her staff and advisors after the close of the Panel hearings, then the Minister would advise Taseko of those submissions and afford Taseko an opportunity to make response submissions before making her decision under section 52 of *CEAA 2012*; or

(b) acted without jurisdiction by failing to consider relevant factors, including the mitigation measures proposed by Taseko to mitigate any adverse environmental effects of the New Prosperity Project.

31. Pursuant to section 52(2) of *CEAA 2012*, the Minister was, after her decision, required to refer the matter to the Governor in Council to determine whether the significant adverse environmental effects she found were justified in the circumstances.

32. The Decision Statement indicates the following decision of the Governor in Council:

In accordance with paragraph 52(4) of *CEAA 2012*, the Governor in Council decided that the significant adverse environmental effects that the Designated Project is likely to cause are **not justified** in the circumstances. [emphasis in original]

33. The Decision Statement does not contain any reasons for the conclusion of the Governor in Council. It does not contain any indication of what information the Governor in Council considered when making this decision. It does not make any reference to information the Panel may have included in its Report respecting justifiability (pursuant to section 6.4 of the Panel's Amended Terms of Reference).

34. Taseko had a legitimate expectation that if third-party representations were made to the Governor in Council, its members, or staff and advisors after the close of the Panel hearings, then the Governor in Council

would advise Taseko of those submissions and afford Taseko an opportunity to make response submissions, before making its decision under section 52 of *CEAA 2012*.

35. The Governor in Council's decision must be set aside as the Governor in Council:

(a) failed to observe principles of natural justice or procedural fairness by:

(i) failing to provide reasons for its decision;

(ii) one or more of its members holding private discussions with parties opposed to the New Prosperity Project, without involving Taseko and without affording Taseko an opportunity to be informed of the information presented and to make response submissions;

(iii) receiving and considering advice from the President of CEAA and other Deputy Ministers respecting the Governor in Council's decision under section 52(4) of *CEAA 2012* in circumstances where those individuals had, between the close of the Panel's hearings, but before the Governor in Council's decision, met privately with parties opposed to the New Prosperity Project and without affording Taseko an opportunity to be informed of the information presented and to make response submissions; or

(iv) denying Taseko its legitimate expectation that if third-party representations were made to the Governor in Council, its members, or staff and advisors after the close of the Panel hearings, then the Governor in Council would advise Taseko of those submissions and afford Taseko an opportunity to make response submissions, before making its decision under section 52 of *CEAA 2012*; or

(b) acted without jurisdiction by failing to consider relevant factors, including:

(i) the mitigation measures proposed by Taseko to mitigate any adverse environmental effects of the New Prosperity Project; or

(ii) whether the benefits of the New Prosperity Project justified any adverse environmental effects of the New Prosperity Project.

36. Section 5 of *CEAA 2012* exceeds the constitutional competence of Parliament in that it purports to exercise legislative authority in respect of various matters concerning aboriginal peoples where those are not matters pertaining to "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867* or aboriginal rights under section 35 of the *Constitution*

*Act, 1867*, and is overbroad in the extent to which it purports to regulate health and socio-economic conditions, physical and cultural heritage, and any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

37. Section 6 of *CEAA 2012* exceeds the constitutional competence of Parliament in that it purports to exercise legislative authority to prohibit a proponent from doing anything in connection with a designated project in the absence of a federal approval under *CEAA 2012*, in circumstances where that would fundamentally impair the rights and interests of a province in respect of natural resources under sections 92 and 92A of the *Constitution Act, 1867*.

38. Section 7 of *CEAA 2012* exceeds the constitutional competence of Parliament in that it purports to exercise legislative authority to prohibit federal statutory decision-makers from considering regulatory applications in circumstances where the federal government does not have the constitutional authority to prohibit a project from proceeding.

39. Taken together, sections 5 to 7 of *CEAA 2012* go beyond an assessment of environmental effects for the purposes of informing federal decision-making and instead purport to create a stand-alone regulatory structure that enables the federal government to prohibit natural resource projects that it does not otherwise have the constitutional authority to prohibit.

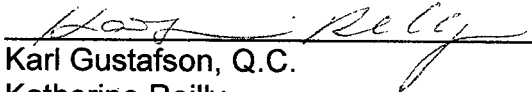
**This application will be supported by the following material:**

1. Such affidavit(s), to be sworn, as may be necessary to bring to the attention of the Court any facts pertaining to this Notice of Application;
2. Material requested pursuant to Rule 317 of the *Federal Courts Rules* and produced to Taseko and to the Court pursuant to Rule 318; and
3. Such further and other materials as counsel for Taseko may advise.

**Pursuant to Rule 317 of the *Federal Courts Rules***, Taseko requests that the Minister and the Governor in Council provide to Taseko and to the Registry of the Federal Court:

- (a) all materials that were considered by the Minister and Governor in Council in reaching their respective decisions under section 52 of *CEAA 2012*; and
- (b) any submissions, maps, meeting notes, handwritten notes, minutes, memorandums, emails and calendar entries related to the meetings referred to in paragraphs 12, 13, 23 and 24 above.

Dated this 26<sup>th</sup> day of March, 2014.

  
Karl Gustafson, Q.C.  
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