IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canada (Canadian Environmental Assessment Agency) v. Taseko Mines Limited,* 2018 BCSC 1034

Date: 20180622
Docket: S177504
Registry: Vancouver

Between:

Attorney General of Canada

Petitioner

And

Taseko Mines Limited

Respondent

- and -

Docket: S178664
Registry: Vancouver

Between:

Taseko Mines Limited

Petitioner

And

Canadian Environmental Assessment Agency, and The Attorney General of Canada

Respondents

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for The Attorney General of Canada and Canadian Environmental Assessment Agency:	L.D. Lachance N. Wright M. Charles
Counsel for Taseko Mines Limited:	K.M. Stephens J.E. Roos K. Knapp
Place and Dates of Hearing:	Vancouver, B.C. April 23, 24, 25 and May 3, 2018
Place and Date of Judgment:	Vancouver, B.C. June 22, 2018

Table of Contents

Introduction

[1] The following reasons for judgment address two petitions: one filed by the Attorney General of Canada ("Canada") on August 10, 2017, and one filed by Taseko Mines Ltd. ("Taseko") on September 15, 2017.

[2] Canada's petition (action no. S-177504) seeks orders pursuant to the *Canadian Environmental Assessment Act, 2012,* S.C. 2012, c. 19 [*CEAA 2012*] enjoining Taseko from proceeding with certain mining-related work, and authorizing designated persons to enter the work areas (the "Injunction Petition").

[3] Taseko's petition (action no. S-178664) seeks a declaration that the federal *CEAA 2012* does not apply to the work that has been provincially authorized (the "Declaration Petition").

Factual Background

Taseko

[4] Taseko is a British Columbia mining company that has proposed to develop a gold-copper mine approximately 125 kilometres to the southwest of Williams Lake, BC. This project is currently known as the New Prosperity Project ("New Prosperity"). It was previously known as the Prosperity Project ("Prosperity"). The Project is a large undeveloped gold-copper porphyry deposit, which Taseko estimates to contain 11 million ounces of gold and four billion pounds of copper.

[5] Taseko holds a mineral lease and mineral claims (collectively, the "Tenures") duly issued under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, the boundaries of which include the New Prosperity site. New Prosperity (and formerly Prosperity) has been in various stages of exploration and development over the past 20 years.

[6] In January 2010, the Government of BC issued an environmental assessment certificate for the original Prosperity project (the "BC EA Certificate"). The BC EA Certificate expires in January 2020 if work on the project is not "substantially started" by that date, as that term is used in the BC *Environmental Assessment Act*, S.B.C. 2002, c. 43.

Federal environmental assessment of Prosperity and New Prosperity

[7] In 2010, the federal government did not approve Prosperity following a federal environmental assessment conducted pursuant to the previous *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [*CEAA 1992*]. However, the federal government invited Taseko to submit a new design for consideration.

[8] In August 2011, Taseko submitted a revised project description, New Prosperity, which underwent a new environmental assessment conducted by a federal review panel under the current *CEAA 2012.*

[9] On October 31, 2013, the review panel released a report (the "Panel Report") and submitted it to the then federal Minister of Environment. On February 26, 2014, the Minister of Environment issued a decision statement that rejected New Prosperity on the grounds that it was likely to cause significant adverse environmental effects that could not be justified (the "Decision Statement"). The Decision Statement described the "designated project" as entailing the construction, operation and closing of an open pit mine, concentrator facility, and related support infrastructure such as tailings and waste rock areas, construction of road access and a power transmission corridor, and transport of mine concentrates to a load-out facility.

[10] In 2013 and 2014, Taseko initiated two judicial reviews in the Federal Court, challenging both the Panel Report and the Decision Statement. On December 5, 2017, the judicial reviews were dismissed. Taseko has since appealed both decisions to the Federal Court of Appeal.

Provincial mining exploration permits

[11] In or about July 2016, Taseko began preparations for an exploration program (the "Exploration Program") to collect data for permitting under, *inter alia*, the provincial *Mines Act,* R.S.B.C. 1996, c. 293, and for potential redesigns of New Prosperity. Taseko applied under the *Mines Act* for permits, including an amendment

to an existing permit, MX-3-131, and a licence under the *Forest Act*, R.S.B.C. 1996, c. 157 (collectively, the "Notice of Work Application").

[12] On July 17, 2017, the BC Ministry of Energy and Mines ("MEM") issued an amendment to permit MX-3-131 ("Permit MX-3-131") to Taseko for the New Prosperity Site Investigation Program, dated July 14, 2017. Permit MX-3-131 authorized exploration and reclamation activities, which included the Exploration Program.

Federal response to Permit MX-3-131

[13] In February 2017, MEM provided a copy of Taseko's then pending Notice of Work Application to the Canadian Environmental Assessment Office ("CEAA").

[14] On July 17, 2017 – the day that Permit MX-3-131 was issued to Taseko – the CEAA wrote to Taseko, inquiring whether the work contemplated under the Permit included any act or thing connected to the carrying out of New Prosperity. The CEAA also asked Taseko to provide its views and supporting rationale as to whether any of the activities described in the Notice of Work Application were designated activities as defined under *CEAA 2012* and its associated regulations.

[15] On July 21, 2017, Taseko responded to the CEAA, advising that in its view the contemplated work did not include any act or thing connected to the carrying out of New Prosperity.

[16] On July 28, 2017, Ms. Coverley of the CEAA wrote to Taseko and took the position that the activities proposed in the Notice of Work were contrary to s. 6 of the *CEAA 2012* and therefore those activities would constitute a federal offence (the "Coverley Letter"). Taseko responded by letter, disputing the view that the activities were unlawful.

[17] On August 2, 2017, Mr. Vitou of the CEAA wrote to Taseko, reiterating the position that the activities were contrary to s. 6 of the *CEAA 2012*.

[18] On August 4, 2017, the CEAA asked Taseko to confirm that it would not proceed with the activities authorized under Permit MX-3-131. This correspondence was in the context of a provincial judicial review of the Permit put forward by an Indigenous group and heard in this Court by Mr. Justice Steeves over four days commencing July 31, 2017 (the "Provincial Judicial Review").

[19] On August 9, 2017, Taseko wrote to the CEAA and advised that, in the circumstances, it would not proceed with the Exploration Program.

[20] On August 14, 2017, Mr. Justice Steeves adjourned the provincial judicial review generally.

Canada's Injunction Petition

[21] On August 10, 2017, Canada filed the Injunction Petition in this Court. The petition seeks the following:

1. an order enjoining Taseko from carrying out the work outlined in Permit MX-3-131, in whole or in part; and

2. an order authorising any person designated under subsection 89(1) of the *CEAA 2012* to enter the area of work outlined in Permit MX-3-131, for the purpose of verifying compliance with the order requested in para. 1.

[22] The thrust of Canada's claim is that the activities authorized by Permit MX-3-131 are in connection with the carrying out of a designated project, as defined by *CEAA 2012,* and may cause an environmental effect referred to in s. 5(1). As a result, Canada claims the activities are prohibited and this Court should grant the injunction pursuant to s. 96 of *CEAA 2012*.

Taseko's Declaration Petition

[23] On September 15, 2017, Taseko filed its own petition in this Court, the Declaration Petition. It seeks a declaration that s. 6 of *CEAA 2012* does not apply to the activities that Taseko has been provincially authorized to perform pursuant to Permit MX-3-131 issued under the *Mines Act*.

[24] On February 16, 2018, Canada filed a motion to strike the Declaration Petition on the grounds that it is unnecessary, an abuse of process, or, alternatively, on the basis that this Court lacks jurisdiction to grant the relief sought. On March 1, 2018, Mr. Justice Thompson heard the motion and dismissed it from the bench with reasons to follow.

[25] On March 20, 2018, Taseko filed Constitutional Question Act Notices for both the Injunction Petition and Declaration Petition.

Discussion

[26] From April 23 to 25 and May 3, 2018, I presided over the hearing of both petitions. The hearing of the Injunction Petition proceeded first, followed by the Declaration Petition. I will address the petitions in that order.

A) The Injunction Petition

[27] Section 96 of the *CEAA 2012* gives this Court discretion to issue a statutory injunction upon being satisfied that it appears a person has done, is about to do to, or is likely to do any act constituting an offence under the *Act*:

> **Court's power**
>
> **96 (1)** If, on the Minister's application, it appears to a court of competent jurisdiction that a person has done, is about to do or is likely to do any act constituting or directed toward the commission of an offence under section 99, the court may issue an injunction ordering the person who is named in the application to
>
> **(a)** refrain from doing an act that, in the court's opinion, may constitute or be directed toward the commission of the offence; or
>
> **(b)** do an act that, in the opinion of the court, may prevent the commission of the offence.

[28] Canada submits that this provision grants the authority to issue a statutory injunction upon a *bona fide* belief, on a balance of probabilities, that a serious possibility exists that an offence has been committed, or is likely to be committed, or conduct directed toward the commission of an offence has occurred or will likely occur unless an injunction is issued: *Canada v. IPSCO Recycling Inc.*,

2003 FC 1518 at para. 67, cited in *Law Society of Saskatchewan v. Mattison*, 2015 SKQB 323 at para. 33.

[29] Offences are listed in s. 99 of *CEAA 2012*. Subsection 99(1) provides that it is an offence to contravene s. 6 of the *Act.* Section 6 provides that:

> **Proponent**
>
> **6** The proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause an environmental effect referred to in subsection 5(1) unless
>
> **(a)** the Agency makes a decision under paragraph 10(b) that no environmental assessment of the designated project is required and posts that decision on the Internet site; or
>
> **(b)** the proponent complies with the conditions included in the decision statement that is issued under subsection 31(3) or section 54 to the proponent with respect to that designated project.

[30] Subsection 5(1) provides that:

> **Environmental effects**
>
> **5 (1)** For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are
>
> **(a)** a change that may be caused to the following components of the environment that are within the legislative authority of Parliament:
>
> **(i)** fish and fish habitat as defined in subsection 2(1) of the Fisheries Act,
>
> **(ii)** aquatic species as defined in subsection 2(1) of the Species at Risk Act,
>
> **(iii)** migratory birds as defined in subsection 2(1) of the Migratory Birds Convention Act, 1994, and
>
> **(iv)** any other component of the environment that is set out in Schedule 2;
>
> **(b)** a change that may be caused to the environment that would occur
>
> **(i)** on federal lands,
>
> **(ii)** in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or
>
> **(iii)** outside Canada; and
>
> **(c)** with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

> **(i)** health and socio-economic conditions,
>
> **(ii)** physical and cultural heritage,
>
> **(iii)** the current use of lands and resources for traditional purposes, or
>
> **(iv)** any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

[31] Canada submits that carrying out the elements of the Notice of Work Application authorized by Permit MX-3-131 will constitute an offence under s. 99 by contravening s. 6 of *CEAA 2012.* It argues that the provincially authorized work is "in connection with the carrying out of a Designated Project", specifically New Prosperity.

[32] New Prosperity is a "designated project" under *CEAA 2012* by way of the transition provisions in s. 126(1), the definition of "project" in s. 2(1) of the old *CEAA 1992*, and the definition of "designated project" in s. 2(1) of *CEAA 2012*.

[33] Canada's submissions regarding Taseko's proposed activities in the context of *CEAA 2012* raise the following issues:

1) What is the scope of the New Prosperity "designated project" under *CEAA 2012*?

2) Are the proposed activities "any act or thing in connection with the carrying out of the designated project in whole or in part"? and

3) Will or may those activities "cause an environmental effect referred to in subsection 5(1)"?

[34] The modern principle of statutory interpretation requires that the words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[35] Canada refers to *R. v. Alex*, 2017 SCC 37 at paras. 31 and 33 for proposition that plain meaning alone is not determinative.

[36] In interpreting the "entire context" and the "scheme" of a governing statute, both the *Act* and its regulations may operate together and be mutually informing: *MiningWatch Canada v. Canada*, 2010 SCC 2 [*MiningWatch*] at para. 31.

[37] Other elaborations on statutory interpretation submitted by Taseko include the maxim that the failure to follow an established pattern of expression reinforces the position that Parliament must not have intended the same result; that the legislature does not intend to produce absurd consequences; and that every word of a statute must be given meaning, as constructions that leave without effect any part of the language will normally be rejected: see *R v. Multiform Manufacturing Co.,* [1990] 2 S.C.R. 624 at 631; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 692; *Tran v. Canada (Public Safety and Emergency Preparedness),* 2017 SCC 50 at para. 31; *R v. Hinchey*, [1996] 3 S.C.R. 1128 at para. 36; *Ontario v. Canada Pacific Ltd.,* [1995] 2 S.C.R. 1031 at para. 65; and *Communities Economic Development Fund v. Canadian Pickles Corp.,* [1991] 3 S.C.R. 388 at para. 36.

[38] As this matter centres on the interpretation of environmental legislation, further principles of interpretation apply. Referring to the decision in *Castonguay Blasting Ltd. v. Ontario (Environment)*, 2013 SCC 52 at paras. 9, 20, Canada submits that environmental legislation should be given a generous interpretation to allow effective response to environmental harm, in keeping with the precautionary principle and the role of environmental assessment as a planning tool: *Friends of the Oldman River Society v. Canada (Minister of Transport*), [1992] 1 S.C.R. 3 at 71.

[39] Lastly, I rely on the Court of Appeal in *Peace Valley Landowner Association v. British Columbia (Environment)*, 2016 BCCA 377 at para. 26 for the overriding principles:

> Environmental legislation is often broadly worded, but there is a real danger that bodies motivated by other agendas (including governments overwhelmed by short-term economic goals) will interpret it narrowly. The courts must not allow environmental legislation to be emasculated through unduly narrow interpretation. That said, *Friends of Davie Bay*, makes the important point that general rules of statutory interpretation apply to environmental statutes. Provisions are interpreted "by reading the words of the provision, in context

> and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute".

1) What is the scope of the New Prosperity "designated project"?

[40] The New Prosperity project is a "designated project" under *CEAA 2012*, as it was a "project" under *CEAA 1992*, which was referred to a Review Panel established under that *Act*. Subsection 126(1) of *CEAA 2012* provides the following transition provision:

> **Completion of assessment by a review panel commenced under former Act**
>
> **126 (1)** Despite subsection 38(6) and subject to subsections (2) to (6), any assessment by a review panel, in respect of a project, commenced under the process established under the former Act before the day on which this Act comes into force is continued under the process established under this Act as if the environmental assessment had been referred by the Minister to a review panel under section 38. The project is considered to be a designated project for the purposes of this Act …

[41] Under *CEAA 1992*, "project" is defined to mean:

> **(a)** in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work, or
>
> **(b)** any proposed physical activity not relating to a physical work that is prescribed or is within a class of physical activities that is prescribed pursuant to regulations made under paragraph 59(b);

[42] Under *CEAA 2012*, "designated project" is defined as:

> **designated project** means one or more physical activities that
>
> **(a)** are carried out in Canada or on federal lands;
>
> **(b)** are designated by regulations made under paragraph 84(a) or designated in an order made by the Minister under subsection 14(2); and
>
> **(c)** are linked to the same federal authority as specified in those regulations or that order.
>
> It includes any physical activity that is incidental to those physical activities.

[43] The Decision Statement describes the New Prosperity designated project in the following language:

> Taseko Mines Limited (the Proponent) proposes to develop the New Prosperity Gold-Copper Mine Project (the Designated Project), 125 kilometres southwest of Williams Lake, British Columbia. The Designated Project would entail constructing, operating and closing an open pit mine and a 70,000 tonne per day concentrator facility with an average annual production of 108 million pounds of copper and 247 thousand ounces of gold production over a 20 year mine life. The Designated Project includes the open pit mine, a concentrator facility, support infrastructure, and associated tailings and waste rock areas, the construction of a 2.8-kilometre access road to the mine site, the construction of a 125-kilometre long power transmission line corridor, and the transport of mine concentrates to an existing concentrate load-out facility near Macalister, British Columbia.
>
> [Emphasis added.]

[44] As a result, the designated project of New Prosperity includes the open pit mine, a concentration facility, support infrastructure, associated tailing and waste rock areas, the access road, the transmission line corridor, the transport of mine concentrates, and any physical activities incidental to those physical activities. This scope is consistent with and supported by the Panel Report dated October 31, 2013.

[45] The key issue is whether the activities authorized by Permit MX-3-131 fall within that scope of New Prosperity, either directly, incidentally or by constituting any act or thing in connection with the carrying out of those activities in whole or in part.

2) Are the activities "any act or thing in connection with the carrying out of the designated project in whole or in part"?

[46] As of September 15, 2017, Taseko held the following provincial permits:

a) June 5, 2017: Road Use Permit For Industrial Use of a Forest Service Road;

b) June 22, 2017: Authorization for Industrial Activity at Fish Lake Recreation Site; and

c) Permit MX-3-131.

[47] Permit MX-3-131 approves the following activities for "exploration and reclamation activities" at mineral/coal tenures 314007, 209325, 314028, 314029, 209326, 516849, 516785, 787863, 314006, 1030098, 1011666, 1011672, 1011668:

- Access Roads, Trails, Heli Pads, Air Strips...;
- Camps, Buildings and Staging Areas;
- Cut Lines;
- Exploration Surface Drilling;
- Mechanical Trenching/Test Pits; and
- Settling Ponds.

[48] The MEM's reason for decision dated July 17, 2017 further provide that:

> **Activities**
>
> [Taseko] submitted the Application for an amendment to their *Mines Act* permit MX-3-131 on October 17, 2016. The Application involves a site investigation program consisting of: establishment of a 50 person camp of 11 mobile trailer units; a temporary core shed to store drill core; a base camp staging area; a fuel storage site for up to 10,000 litres of fuel; 20 km of brushed cut lines; construction of 367 test pits; 122 geotechnical drill sites; 48 km of new exploration trails; modification of 28 km of existing access trails; and 7 water intake points.
>
> **Disturbance**
>
> The Application proposes 47.2 ha of total disturbance (16 ha of which is located on previously disturbed and/or reclaimed areas) and cutting of 1084 m3 of timber. The Application proposes construction of exploration trails and creation of small openings for drill sites and test pits dispersed throughout a polygon of approximately 3067 ha in area. The Application disturbance of 47.2 ha would result in a physical disturbance of about 1.5% of that polygon area.
>
> **Term**
>
> The Application is for a 3 year, multi-year, area-based approval to conduct work from January 1, 2017 to December 31, 2019. [Taseko] indicates they wish to conduct the majority of their work within a period of 6 months within the first year, but wish to maintain some flexibility in site locations, and/or conduct some of the work in Years 2 and 3, depending on the findings of their initial site investigation work.

[49] The reasons also list a number of permit conditions to minimize Aboriginal and environmental concerns stemming from the proposed activities.

[50] In his Affidavit #1, dated September 15, 2017, Scott Jones, VP of Engineering for Taseko, describes the nature of the work under the Exploration Program:

> 36. The nature of the work to be undertaken in respect of the Exploration Program related permits described above does not include the construction of a mine or its supporting infrastructure. As explained above, the work is exploratory work that is intended to gather the necessary data and other information required to:
>
> a) confirm the engineering assumptions for the Project;
>
> b) meet further *Mines Act* permit requirements to authorize construction of the Project once all necessary environmental assessment approvals are in place; and
>
> c) inform applications for other necessary approvals and permits (for example, *Environmental Management Act* permit applications) required for construction of the Project.
>
> 37. Completing the work under the Exploration Program is a necessary prerequisite to applying for subsequent permitting that will be necessary for the ultimate development of the New Prosperity project.

[51] At paras. 45-46, Mr. Jones summarizes the activities authorized in the Exploration Permit as follows:

> 45. The Exploration Permit authorizes the work contemplated under the Exploration Program, as detailed in the Notice of Work Application. In brief, the work is comprised of:
>
> a) **Test pits**: Test pits will be excavated to about 5 m depth (unless impeded), with a footprint of approximately 5 m x 6 m, and will be accessible by temporary access trails. Test pit locations have been selected to avoid watercourses, standing water and other environmentally sensitive areas.
>
> b) **Drill holes, monitoring wells, and pumping wells**: The footprint for each drill hole, monitoring well and pumping well will be 20 m x 25 m, with access along temporary access trails. The locations have been selected to avoid watercourses, standing water and other environmentally sensitive areas. Provisions shall be made for sediment control.
>
> c) **Geophysical investigation**: Geophysical investigations will be completed using a variety of techniques, and involves minimal physical disturbance to the land. Access similar to narrow hiking trails will be cleared to allow the geophysical survey crew to walk along each of the investigation lines (clearing will involve clearing brush and fallen trees only; no standing trees will be felled). And,
>
> d) **Camp:** The camp will be located within an existing cut block with existing access, and Taseko plans to establish a water well to minimize or eliminate the need to take water from other locations, reducing the need for any activity in riparian zones.
>
> 46. The Exploration Permit requires, among other things, reclamation of test pits, drill sites, trail roads, and revegetation of all disturbed areas.

> Specifically, as part of the Exploration Program Taseko will perform the following reclamation work:
>
> a) **Test pits** the test pits will be backfilled, the surface smoothed to match the previous terrain using topsoil salvaged from excavation, and soil disturbances seeded with approved forestry mix.
>
> b) **Drill holes, monitoring wells, and pumping wells:** the access trails to these wells will be temporary. The locations of the holes and wells have been carefully selected to avoid environmentally sensitive areas. After the holes and wells have been drilled, they will be capped (unless exempted by the Inspector of Mines) or instrumentation will be installed for long-term monitoring. Soil disturbance will be reseeded with approved forestry mix.
>
> c) **Geophysical investigations:** the access will be equivalent to narrow hiking trails, with no standing trees to be felled.
>
> d) **Camp:** all structures will be mobile units and impermanent. All waste, sewage and grey water produced will be transported offsite. At the end of the exploration activities, all materials and infrastructure will be removed from the camp, sheds, staging and storage areas, and all soil will be de-compacted and seeded with approved forestry seed mix.
>
> e) Any bridges will be small temporary structures. And,
>
> f) Any access trails will be reclaimed by pulling back any sidecast material, re-contouring as required, covering with topsoil and woody debris and seeding with approved forestry mix.

[52] Canada and Taseko disagree as to the nature of the activities contemplated by Permit MX-3-131. Canada submits that the activities are not truly exploratory, but instead detailed design work for New Prosperity – a project that has already been rejected through the federal environmental assessment process. Canada highlights several documents and affidavits in support of this claim. These include:

- The Notice of Work Application, dated October 17, 2016, which explicitly states “New Prosperity Project” beside the heading “Project”;

- Affidavit #1 of Scott Jones sworn September 15, 2017, in which he refers to the New Prosperity Project in relation to exploration, design, and redesign work; and

- Affidavits of John McManus, CEO of Taseko, sworn July 27, 2017 and February 14, 2018, in which he deposes among other things that “[t]he data

and other information gathered from the Exploration Program will assist Taseko in the identification, consideration, evaluation or development of any potential new or revised designs for the mine should Taseko consider such changes to be necessary."

- The Notice of Work Application, which shows substantial overlap of geographical footprint between Permit MX-3-131 activities and New Prosperity.

[53] Canada takes issue with the strategy employed by Taseko in conducting work for redesigns of a project already rejected through the federal assessment process. Canada contends that Taseko is motivated by the pending expiration of the BC EA Certificate and that the activities authorized by Permit MX-3-131 are necessary for Taseko to obtain a provincial mine-operating permit to allow New Prosperity to be "substantially started" before the expiry of the BC EA Certificate. Canada points to communications and responses given by Taseko during the 2013 federal assessment process, in which Taseko stated that the geological data it had gathered up to that point was sufficient for the preliminary design of certain features of New Prosperity. Counsel alleges that Taseko represented to the federal review panel in 2013 that the "detailed design" stage of mine development would be purely to confirm estimates and predictions if the environmental assessment was approved.

[54] Counsel for Canada also submits that when it comes to the detailed design stage of a project, "the Rubicon is the environmental assessment" process, and that once the assessment is completed, there is no going back to the design stage if the proponent did not receive approval. In Canada's view, the correct approach is to develop a "new proposal" instead of "redesigning of the old one", and then proceed with an environmental assessment for that proposal. Canada asserts that Taseko is, in reality, merely seeking a mulligan of the original decision.

[55] Canada submits that this framework and lifecycle for environmental assessment process is well known in "this development world". Whether or not that

is accurate, I must still assess the *CEAA 2012* according to the principles of statutory interpretation enunciated earlier.

[56] Taseko submits that the activities authorized by Permit MX3-131 do not fall within the New Prosperity designated project. Taseko contends that the descriptions of the activities authorized in Permit MX 3-131 are plainly different from those described in the Decision Statement, which explicitly states that "[t]he Designated Project would entail constructing, operating and closing an open pit mine".

[57] Canada submits (in its response to the Declaration Petition) that the word "construction" may be interpreted to include a series of events, which include securing approvals which are dedicated to and prerequisite for the actual physical step of construction, citing *Hamilton-Wentworth (Regional Municipality) v. Canada*, 2001 FCT 381, aff'd 2001 FCA 347 [*Hamilton-Wentworth*].

[58] The decision in *Hamilton-Wentworth* is distinguishable to the case at hand in that it was based upon a grandfathering provision of the now-repealed *CEAA 1992.* That provision paired the word "construction" with the word "initiated": "Where the construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984, this Act shall not apply" (emphasis added). Such wording, or wording to that effect, is not present in the *CEAA 2012* provisions relevant to our case.

[59] Although it would be inappropriate to solely rely on regulations to interpret a provision of the governing legislation, see *MiningWatch* at para. 31, I note that s. 2 of the *Regulations Designating Physical Activities,* S.O.R/2012-147 [*Regulations*], provides that:

> **Designated activities — designated projects**
>
> **2** The physical activities that are set out in the schedule are designated for the purposes of paragraph (b) of the definition ***designated project*** in subsection 2(1) of the *Canadian Environmental Assessment Act, 2012*.

[60] Section 16 of the schedule to the *Regulations* [*Reg. Schedule*] provides that:

> **16** The construction, operation, decommissioning and abandonment of a new
>
> **(a)** metal mine, other than a rare earth element mine or gold mine, with an ore production capacity of 3 000 t/day or more;
>
> **(b)** metal mill with an ore input capacity of 4 000 t/day or more;
>
> **(c)** rare earth element mine or gold mine, other than a placer mine, with an ore production capacity of 600 t/day or more;
>
> **(d)** coal mine with a coal production capacity of 3 000 t/day or more;
>
> **(e)** diamond mine with an ore production capacity of 3 000 t/day or more;
>
> **(f)** apatite mine with an ore production capacity of 3 000 t/day or more; or
>
> **(g)** stone quarry or sand or gravel pit, with a production capacity of 3 500 000 t/year or more.

[61] Taseko highlights that the enumerated physical activities applicable to new mines in s. 16 can be contrasted with those for offshore exploratory wells listed in ss. 10 and 40 of the *Reg. Schedule*. The activities for the offshore exploratory wells include “drilling, testing, and abandonment”. The absence of the words “drilling” and ”testing” in s. 16 for new mines supports an interpretation that these activities are not included as relevant physical activities for new-mine designated projects. Taseko submits that when read together, these provisions are consistent with an interpretation that the relevant physical activities with respect to new mines are the “construction, operation, decommissioning and abandonment”.

[62] I am satisfied that the term “construction”, should not be construed so broadly as to contain all series of approvals prerequisite to the actual building of the key components or the mine. In my view, the activities authorized by Permit MX-3-131 do not have a sufficient nexus to fall directly within that term.

[63] Next, I must determine whether the activities are “incidental to” the New Prosperity designated project, as provided by the definition of “designated project” in *CEAA 2012*, s. 2(1).

[64] Canada submits that the activities are incidental to the construction and completion of New Prosperity and thus fall within the designated project pursuant to s. 2(1). It contends that the purpose of the exploratory work should be considered,

and highlights that proposed activities within the same geographical footprint of the New Prosperity project supports a finding the activities are prohibited by s. 6.

[65] The word “incidental” has been judicially construed to mean “occurring or liable to occur in fortuitous or subordinate conjunction with something else”: *Sindaco (Re)*, 2003 BCSC 1396 at para. 17; *KP Pacific Holdings Ltd. v. Guardian Insurance Co. of* Canada, 2001 BCCA 469 at para. 8, rev’d on other grounds, 2003 SCC 25 at para. 14. The *Shorter Oxford English Dictionary* defines that word as “liable to happen”, “naturally attaching to”, “occurring as something causal or of secondary importance”, and “following upon as a subsequent circumstance”. Upon considering these definitions and the scheme and context of *CEAA 2012*, I am not persuaded that the word “incidental” in s. 6 should be interpreted to include all physical activities that are in subordinate conjunction with and or consequent upon the “construction, operation, decommissioning and abandonment” of the mine.

[66] The above definitions, read within the scheme of *CEAA 2012*, support that “incidental” requires a certain level of proximity as well as possibly causal connection between activities and the designated project. In my view, the activities described in Permit MX-3-131 do not have a sufficient relationship to the actual construction, operation, decommissioning or abandonment of the New Prosperity project. At this stage, I am unable to conclude that the authorized activities are “incidental” to the designated project, as that word can be construed in s. 2(1).

[67] Canada also submits that the activities fall within the language of s. 6 of *CEAA*, which uses the phrases “in connection with … in whole or in part”. Canada contends that the combined effect of the s. 6 wording is broad enough to capture Permit MX-3-131 activities. In support of this argument, Canada notes that the activities will affect the environment, and some of these activities are necessary in order for Taseko to obtain provincial construction and operation permits for New Prosperity itself. Moreover, Canada submits that the language “in whole or in part” supports a broad meaning.

[68] I am not persuaded by Canada's submissions on the construing of s. 6. Although the phrase "in connection with" is indeed broad, it is qualified in my view by the phrase "carrying out". The phrase to "carry out" has been defined by the *Shorter Oxford English Dictionary* as "perform, conduct to completion, put into practice".

[69] I agree with the submission of Taseko that s. 6 connotes the putting into operation or executing the "construction, operation, decommissioning and abandonment" of a mine (or other physical activity incidental thereto as properly construed). In my view, this places a limit on the scope of activities that may trigger the *CEAA 2012.*

[70] I do not assert that preliminary activities prior to the actual construction of a mine will never fall within the ambit of s. 6, however, the wording of s. 6 requires some limits in order to harmoniously fit with the scheme of the *Act*. In my view, the activities authorized by Permit MX-3-131 amount to preliminary investigation, exploration and associated reclamation work, and fall outside the limits of putting the mine into construction or operation in whole or in part.

[71] In reaching this conclusion, I have considered certain principles of statutory interpretation that are applicable in the context of constitutional federalism. Although most notably applied in the context of federal paramountcy, I quote the following principle from *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at para. 69:

> Courts must not forget the fundamental rule of constitutional interpretation: "… [w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes": *Canadian Western Bank*, at para. 75, citing *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356.

[72] This has been employed as a principle of statutory interpretation in the application of the 'regulated conduct defence' as stated by Iacobucci J., for the Court, in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 76-77:

> 76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356:
>
> > When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.
>
> Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.
>
> 77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. …
>
> [Emphasis added.]

[73] In the case at hand, s. 92A of the *Constitution Act, 1867* provides in part that:

> **92A.** (1) In each province, the legislature may exclusively make laws in relation to
>
> > (*a*) exploration for non-renewable natural resources in the province;
> >
> > (*b*) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
> >
> > (*c*) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.
>
> …
>
> Authority of Parliament
>
> (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

[74] Pursuant to the constitutional head of power in s. 92A, the BC legislature has enacted the *Mines Act*, which applies to "all mines during exploration, development, construction, production, closure, reclamation and abandonment (emphasis added)":

s. 2. The *Mines Act*'s definition of "mine" includes "all activities including exploratory drilling, excavation, processing, concentrating, waste disposal and site reclamation". The definition of "mining activity" includes "the exploration and development of a mineral, a placer mineral, coal, sand, gravel or rock". Permit MX-3-131 was issued pursuant to statutory powers granted under the *Mines Act*.

[75] An overly broad interpretation of *CEAA 2012* would result in that federal statute catching an undue amount of provincial mining exploration activity that could constitute offences under s. 99 of *CEAA 2012.* Such an outcome would result in impractical consequences for the provincial scheme and would be particularly out of step with one of the purposes of *CEAA 2012*: "to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments": at s. 4(1)(c).

[76] Canada submits that the legislative purpose in s. 4(1)(a), "to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project", supports a broader interpretation than what Taseko asserts. In my view, as "designated project" is incorporated within the provision, this purpose of the *Act* does not weigh heavily on my interpretation of the scope of "designated project".

[77] In summary, I find that the activities authorized by Permit MX-3-131 are not within the scope of *CEAA 2012, s.* 6. Therefore, it does not appear to me that Taseko has done or is about to do any act constituting or directed toward the commission of an offence under s. 99. I decline to grant the relief sought pursuant to s. 96. The Injunction Petition is dismissed.

3) Will or may it cause an environmental effect in s. 5(1)?

[78] As a result of the above determination, I need not address this issue.

B) The Declaration Petition

[79] Recently in *Ewert v. Canada*, 2018 SCC 30 at para. 83, the majority made the following comment with respect to declaratory relief:

> [83] A declaration is a discretionary remedy. Like other discretionary remedies, declaratory relief should normally be declined where there exists an adequate alternative statutory mechanism to resolve the dispute or to protect the rights in question: see D. J. M. Brown and J. M. Evans with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at topic 1:7330.

[80] Canada submits that the relief sought by Taseko pursuant to the Declaration Petition is beyond the jurisdiction of this Court. However, Canada does not dispute the jurisdiction of this Court in the Injunction Petition above, and conceded in argument that if I determined that the activities were outside the scope of *CEAA 2012*, s. 6, the Declaration Petition would be moot.

[81] I agree with Canada's submission on this point. My determination with respect to the Injunction Petition has settled the issues in dispute.

[82] The matter of costs of both petitions can be spoken to if requested by the parties.

"The Honourable Madam Justice Forth"