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## TOO MUCH FOR A NATION TO BEAR: QUESTIONS OF SUSTAINABILITY AND CONSULTATION IN ENVIRONMENTAL REVIEWS; THE CASE OF THE TULSEQUAH CHIEF MINE

ANNA J. PUGH<sup>†</sup>

### ABSTRACT

*This case comment questions the neutrality of government environmental assessment reviews in Canada, through an examination of the proposed Tulsequah Chief Mine in Northern BC. The author questions whether a government which openly promotes development can or will ever place sustainability of a region on an equal level with economic gains. In the case of the Tulsequah Chief mine, the Taku River Tlingit First Nation opposes the project on grounds of regional sustainability. The litigation between the Tlingits, the BC Government and the Redfern Mining Corporation has raised issues regarding the fiduciary duty of governments to considering the claims of first peoples as part of the determination of sustainability for a region. Current government policies of ignoring cries for land claim settlements, while supporting incomplete development proposals, run contrary to the recommendations of the 1977 Berger Report of the MacKenzie Valley Pipeline Inquiry. The author compares the costly, negative effects of hasty mine approvals to date, versus the commitment to sustainability demonstrated by settling land claims and working with remote first nations as development partners. The author concludes that communities who will be affected by development must be able to accommodate the changes that development will bring.*

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## DOES CONSULTATION PROVIDE THE POWER TO HALT PROJECT DEVELOPMENT?

Our history has shown, unfortunately all too well, that Canada's Aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of Aboriginal rights and interests.<sup>1</sup>

In March of 2004, the Supreme Court of Canada (scc) will hear arguments by the Province of British Columbia in the matter of the *Taku River Tlingit v. Tulsequah Chief Mine Project*.<sup>2</sup> Through a process initiated by a lengthy environmental review, and extended by even lengthier litigation, the scc will have the opportunity to render a decision on a matter of extreme importance to a First Nation's people prior to the development of a proposed project that stands to have immense impact on their way of life. Given that all too often such issues are considered only after development or policies have already been implemented, the Court is in a unique position to provide a remedy beyond the platitudes that are often the only result of a court's confirmation of Aboriginal rights.

The Supreme Court will review the issue of whether governments have a duty to consult First Nations with respect to environmental assessments in instances where no rights under section 35 of the *Constitution Act* have been established over the region in question, and where no treaties or land claims have been signed.<sup>3</sup> Underlying the issue of consultation is the larger issue of what consultation really means in the context of the Canadian Environmental Assessment (EA) process, and whether the consultation process provides the public, particularly First Nations, any power to halt the development of proposed projects.

The manner in which projects are assessed in British Columbia and other parts of Canada has been improving with respect to the dissemination of information to the public, and possibly through the institution of enhanced controls over the mitigation of adverse impacts resulting from project development. However, at a fundamental level, the assess-

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<sup>1</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49 at para. 64.

<sup>2</sup> *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, [2000] B.C.J. No.1301 (QL), 2000 BCSC 1001; aff'd but varied [2002] B.C.J. No. 155 (QL), 2002 BCCA 59, leave to appeal to S.C.C. requested, [*Taku River (chambers)* and *Taku River (appeal)*], respectively].

<sup>3</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

ment and consultation process continues to be fatally flawed and biased toward industry and development to the detriment of the overall sustainability of the Canadian environment. In allowing for a consultation process that does not seem willing to contemplate the refusal of certification of a proposed project, the neutrality of the assessment process is compromised and the meaning of consultation rings hollow.

Through an examination of the Tulsequah Chief Project, it becomes clear that current federal and provincial environmental assessment processes are driven by the premise that projects *should* be approved, provided that certain conditions are met. Such a premise does not seek to inquire whether a project is appropriate for a region or an ecosystem; rather, it presumes that any and all concerns can be mitigated somewhere down the road. If governments operate the assessment process with this level of deference to the viability of the project, consultation becomes, in effect, a way to identify concerns which may need to be mitigated, but not a way to review whether a project should proceed at all.

The implication of this approach to assessment is that consultations bear more resemblance to disseminations of project information rather than an opportunity to review a project from a perspective that considers sustainability on par with other factors, as is mandated by provincial and federal environmental assessment legislation. Such meaningless consultation undermines the very purpose of an environmental review.

The Tulsequah Chief Mine is a recent, well-documented example of the fundamental error of treating consultation, particularly with respect to regional sustainability, as less weighty than other review standards. If the notion of sustainability is to continue as a hallmark of Canadian environmental assessment processes, governments must view meaningful consultation as an essential part of the review process.

## THE TULSEQUAH CHIEF PROJECT

### 1. Location

The Tulsequah Chief mine site is located in the northwestern corner of British Columbia in the Taku River watershed. The Taku empties into the Pacific Ocean near Juneau, Alaska, approximately sixty-five kilom-

eters (km) south of the mine.<sup>4</sup> The watershed itself covers 18,000 square kilometers. Presently, there are no roads within the entire watershed with the exception of a small segment of the Golden Bear mine road in the southernmost portion of the area.<sup>5</sup> The watershed has been described by many, including both the British Columbia Supreme Court (BCSC) and the British Columbia Court of Appeal (BCCA), as “pristine.”<sup>6</sup>

## 2. History

The mine site itself is situated on a massive sulphide deposit originally discovered in 1927.<sup>7</sup> The site was developed in the early 1950s by Cominco Ltd. (now known as Teck Cominco). Cominco operated the Tulsequah Chief Mine for six years from 1951 to 1957. Gold ore was processed at a rate of approximately 450 tonnes per day. The ore was barged from the mine site to Juneau via the Taku River.<sup>8</sup> The only access to the mine was, and still is, by air or water.

Cominco abandoned the mine in 1957. At that time, reclamation or site remediation were neither required nor expected for mining activities. However, the process used to separate the ore resulted in the creation of tailing sites, from which acid mine drainage (AMD) seeped into the Tulsequah River.<sup>9</sup> Cominco, who still owned the mine property, was issued a pollution abatement order in 1989 when the AMD was discovered. Instead of mitigating the problem as required by the order, Cominco prepared a rehabilitation plan (resulting in a rescission of the order), and shortly thereafter sold the property to Redcorp Ventures Ltd., the parent company of Redfern Resources. Redcorp was then is-

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<sup>4</sup> Tom L. Green, “Evaluating Mining and its Effects on Sustainability: the case of the Tulsequah Chief Mine” (A Report Prepared for the Environmental Mining Council of British Columbia, July 28, 2001) at 4. [Peer-reviewed but unpublished].

<sup>5</sup> *Ibid.*

<sup>6</sup> *Supra* note 2.

<sup>7</sup> C. Sebert & T.J. Barrett, “Stratigraphy, alteration, and mineralization at the Tulsequah Chief massive sulphide deposit, northwestern BC” (excerpt from *Exploration and Mining Geology*, v.5, p.281-308, 1996) online: Ore Systems Consulting <<http://www.oresystems.com/global/tulsequahjourn.html>>.

<sup>8</sup> *Taku River (chambers)*, *supra* note 2 at 6.

<sup>9</sup> Environmental Mining Council of British Columbia, “Acid-Generating Mining Sites in Canada, 2003” online: Environmental Mining Council of British Columbia <[http://emcbc.mining-watch.org/emcbc/mapping/amd\\_canada.htm](http://emcbc.mining-watch.org/emcbc/mapping/amd_canada.htm)>.

sued a pollution abatement order, but this was deferred in anticipation of a full environmental review of Redcorp's proposal to reopen the mine.<sup>10</sup> Redcorp's proposal included a rehabilitation plan for the historic tailings and AMD.<sup>11</sup>

### 3. Redfern's Plan

As the new owner of the Tulsequah Chief property, Redfern Resources<sup>12</sup> proposes to reopen the mine with substantially higher daily production rates, a longer life-span and increased job opportunities through the construction, production and decommissioning phases of the mine.

Redfern's proposal is to mine approximately 2,500 tonnes of ore concentrate per day.<sup>13</sup> At the time of Cominco's work on the mine, the daily ore mined was closer to 450 tonnes. The substantial increase in tonnage and concern for disruption within the salmon-bearing Taku River makes the transport of ore by barge less feasible and less desirable from the perspective of most of the interested parties. Instead, Redfern proposed to build a single-lane, gravel road between the mine site and Atlin, B.C., a town 160 km north of the mine. The proposal involves restricting the road to mine operations only by use of a twenty-four hour, monitored gate.<sup>14</sup>

From Atlin, the ore trucks will then travel a further eighty km along the Atlin Road, a dirt and gravel road connecting the isolated town with the Alaska Highway in the Yukon Territory. The ore will be transported seventy-five km along the Alaska Highway into the Yukon Territory, and then 160 km on the South Klondike Highway to the port town of

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<sup>10</sup> Green, *supra* note 4 at 5-6.

<sup>11</sup> *Supra* note 2, appeal judgment, Appendix B, Schedule A.

<sup>12</sup> While Redcorp Resources is the parent company who actually purchased the mine property from Cominco, it is junior mining company Redfern Resources who has proposed the project and undergone the environmental assessment process. Therefore, Redfern will be referred to as owner and proponent of the Tulsequah Chief Project within the remainder of this paper.

<sup>13</sup> *Taku River (chambers)*, *supra* note 2 at 2.

<sup>14</sup> See Redfern Project Report, *infra* note 45; Green, *supra* note 4; Lindsay Staples, "Determining the Impact of the Tulsequah Chief Mine Project on the Traditional Land Use of the Taku River First Nation," (A Report prepared for the Environmental Assessment Office, Province of British Columbia, August, 1997) [unpublished].

Skagway, Alaska.<sup>15</sup> Beyond the construction of the 160 km access road, the Atlin Road will also require substantial upgrading involving improvement of the road surface in order to accommodate the weight and frequency of the ore trucks.<sup>16</sup>

#### 4. Quantities and Economics

Redfern Resources predicts that the mine would be redeveloped as a “medium-sized underground operation processing up to 900,000 metric tonnes (1 million tons) of ore per year.”<sup>17</sup> A potential exists for the mine to be expanded and developed further as it deepens and new access routes are created. On top of the life-span of the mine, there would be an additional two years of pre-production development involving the set up of on-site infrastructure and road-building.<sup>18</sup>

An estimated 700,000 person hours of employment would be created annually through the project. This translates into a construction work force of close to 400 during the construction phase, and approximately 200 on-site employees during the operations phase.<sup>19</sup> Redfern anticipates that the available jobs will be filled by workers from Atlin, the Yukon, and elsewhere in British Columbia. The Taku River Tlingit First Nation (TRTFN) may make up ten percent, or twenty jobs, within this workforce.<sup>20</sup> Overall, the Staples Report provided to the British Columbia Environmental Assessment Office suggests that as many as 600 direct, indirect, and induced employment opportunities may be created through the mine. Such estimates are questionable; Green notes that within a project of relatively short time frame such as this, these

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<sup>15</sup> “Exploration in B.C. 1996” (Publication of BC Ministry of Energy and Mines) online: Ministry Programs and Services.

<[http://www.em.gov.bc.ca/Mining/GeolSurv/Publications/expl\\_bc/1996/northWest05.htm](http://www.em.gov.bc.ca/Mining/GeolSurv/Publications/expl_bc/1996/northWest05.htm)>.

<sup>16</sup> This portion of the proposal has caused concerns for Yukoners, as well. See Adam Killick, “Atlin Mine may cost Yukon Big Bucks” *Yukon News* (20 March, 1998). The cost of the upgrading may be in the range of \$14 million.

<sup>17</sup> Statement of Terence E. Chandler, President, CEO and Director, Redfern Resources Limited, (Witness Statement to the US House of Representatives Committee on Resources, May 23, 2000) online: Committee on Resources <<http://resourcescommittee.house.gov/106cong/fullcomm/00may23/chandler.htm>>.

<sup>18</sup> *Ibid.*

<sup>19</sup> Green, *supra* note 4 at 6.

<sup>20</sup> Staples, *supra* note 14.

estimates tend to be higher than what may actually be viable.<sup>21</sup> Particularly where training or skills are required, it is not clear that within the available workforce of the TRTFN, or even within the numbers of unemployed in northern B.C. and the Yukon, such skills already exist. No estimates for training, in terms of time or cost, appear to be included in the employment projections.

The numbers cited by Redfern for employment figures and projected incomes from taxation and indirect business creation are questionable to some extent; however, it is clear that the mine would create a substantial number of jobs and would contribute significantly to the economy of Atlin. What is less clear is whether such a contribution is necessary or desirable for such a remote area where many residents may ascribe less value to profits and monetary gains. There is evidence from public consultation and the current tourism-based industry in the Atlin area that locals may place a higher value on current attributes of the Atlin region, such as social and cultural considerations, sustainability of the region's wilderness, strong fish and animal populations, biological diversity and low human density than on economic considerations. Concerns have been raised in this regard by the TRTFN.

The concerns noted by the TRTFN are not new, and they echo sentiments of other First Nations in northern Canada as far back as 1977 during the Berger Inquiry into the proposed MacKenzie Gas Pipeline:

Any major development that has taken place in the North has been of a rapid nature. Their [white people's] only purpose in coming here is to extract the non-renewable resources, not to the benefit of northerners, but of ...southern Canadians and Americans. [I]t does not leave any permanent jobs for people who make the North their home...they also impose on the northern people their white culture and all its value systems, which leaves nothing to the people who have been living off the land for thousands of years.<sup>22</sup>

Such sentiments are clearly not unique; indeed, they form the crux of the argument for recognizing sustainability as a key factor in the environmental assessment process. But in the thirty-five years since the

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<sup>21</sup> Green, *supra* note 4 at 52.

<sup>22</sup> Justice Thomas R. Berger, *Northern Frontier Northern Homeland: The Report of the MacKenzie Valley Pipeline Inquiry*, vol. 1.(Minister of Supply and Services Canada, 1977) at 36 [Berger Inquiry].



Berger Inquiry, governments are still unwilling or unable to give such sentiments the consideration they are due.

## THE POSITION OF THE TRTFN

### 1. Background

Historically, the Taku River Tlingit (TRT) were known as the *Takuquan*, one of fourteen Tlingit clans based on the southeastern Alaskan Coast. The TRT are closely associated culturally, geographically and familiarly with Teslin Tlingit and Carcross-Tagish – two Inland Tlingit Nations with communities located predominantly in the Yukon.<sup>23</sup> The Taku River Tlingit First Nation identify a traditional territory which spans much of the northwestern corner of British Columbia, as well as southern portions of the Yukon and parts of southeastern Alaska. Of the approximately 300 Taku River Tlingit people, close to half live within the Atlin area.<sup>24</sup> Many of the TRTFN who do not reside in Atlin live in Whitehorse and still closely identify the Atlin area as being culturally and personally important. Studies indicate that many TRTFN living away from Atlin do so because of economic or social necessity.<sup>25</sup> Examples of this include families with teenaged children moving to Whitehorse so the children can attend high school, or elders who move in order to be closer to medical resources such as continuing care homes and hospital facilities.

As noted by Staples, the relationships between the Inland Tlingit in B.C. and the Yukon have been complicated by the imposition of the B.C.-Yukon border and the subsequent creation of two different systems of governance within which the Inland Tlingit people must now operate. Over the past two decades, differential treatment of First Nations on the border has increased due to the successful efforts of the federal government to recognize land claims and allow for self-governance in the Yukon, while the British Columbia and federal governments have

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<sup>23</sup> Staples, *supra* note 14 at 4.3.

<sup>24</sup> Staples, *supra* note 14 at 4.3.

<sup>25</sup> Staples, *supra* note 14 at 4.3.

<sup>26</sup> Staples, *supra* note 14 at 4.3.

shown reluctance and imposed delays in implementing a land claims and treaty process in the province.<sup>26</sup>

## 2. Traditional Uses of the Region

While the Taku River Tlingit are no longer entirely reliant on hunting, harvesting and gathering, reports and personal testimonies indicate that members of the TRTFN, whether resident or non-resident in Atlin, continue to pursue these traditional activities.<sup>27</sup>

In a study of twenty-two TRTFN households, only three indicated that they did not participate in annual harvesting activities in the Atlin area.<sup>28</sup> Staples characterizes the interplay between the cash economy and harvesting activities in terms of economics as:

[A] sector that can be severed from the bush sector only with great practical and analytical difficulty. To do so diminishes the strategies of mutual aid and social and economic cooperation which tie the two together and which make TRT traditional land use the social and economic bedrock of the TRT economy.<sup>29</sup>

One of the primary resources harvested by the TRTFN is salmon from the Taku River. Such harvesting occurs throughout the summer, beginning with the king (or spring) salmon runs in June and July. The main sock-eye salmon run occurs in July and August. This run provides both subsistence and commercial harvesting to the TRTFN economy.<sup>30</sup> The mine site is located in close proximity to the source waters of the Taku River, creating a potential threat to the largest salmon run north of the Skeena River.<sup>31</sup>

Also of dietary and cultural significance are moose and caribou. While it is noted by Staples that moose comprise the majority of the TRTFN subsistence diet, this belies the historical importance of caribou to the TRTFN and the trans-boundary efforts to recover populations of

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<sup>27</sup> Staples, *supra* note 14 at 4.3.

<sup>28</sup> Staples, *supra* note 14 at 4.3.

<sup>29</sup> Staples, *supra* note 14 at 4.3.

<sup>30</sup> Salmon are a vital part of the TRTFN diet, second in kilogram consumption to moose, at seventy kg per household per year, out of approximately 296 kg per household per year. See e.g. Staples.

<sup>31</sup> Green, *supra* note 4 at 4.

caribou in the Taku River watershed region.<sup>32</sup> The TRTFN and caribou biologists are concerned that the incursion of the Tulsequah Chief road into prime habitat for the caribou may reverse what is seen by many as a fragile, yet thus far successful, process of bringing the herd back to sustainable levels.<sup>33</sup>

### 3. Sustainability and Continuity

It is clear from studies, starting with the Berger Inquiry<sup>34</sup> and leading up to work with the Southern Lakes, Rancheria, Finlayson, Fortymile and Porcupine-Caribou herds in the Yukon, that there is a correlation between road networks and disruption of caribou migration patterns.<sup>35</sup> It is also clear that where roads and development increase access to an area, traditional activities and reliance on land-based food sources drop, to the detriment of the health and economic viability of small, predominantly Native communities.<sup>36</sup>

Such a finding does not suggest that development in First Nations' traditional territories should not occur, but that it should occur with the endorsement of those affected, and at a pace which allows the First Nation to have infrastructure in place to both preserve a way of life for future generations and to benefit from the effects the community will experience. As noted in the Berger report, if development occurs before native claims are settled:

[T]he communities that are already struggling with the negative effects of industrial development will be still further demoralized. To the extent that the process of marginalization – the sense of being made irrelevant in your own land – is a principal cause of social

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<sup>32</sup> The construction of the Alaska Highway in the 1940s led to unprecedented levels of over hunting and massive kills of caribou from the southern Yukon and northern B.C. The Yukon currently has a program underway to restore populations of caribou to the northwestern B.C./ Southern Lakes area of the Yukon. Therefore, while currently not of significance to the TRTFN diet, caribou are considered culturally significant to the TRTFN.

<sup>33</sup> Concerns of the Southern Lakes Caribou Recovery Program in Killick, *supra* note 16.

<sup>34</sup> *Supra* note 22.

<sup>35</sup> See, e.g. Theresa Earle, "Thresholds and Caribou" (*Your Yukon* newsletter, column 322) online: <<http://www.taiga.net/yourYukon/col322.html>>.

<sup>36</sup> *Supra* note 22 at 148 "The Fort Simpson Experience".

pathology, the native people will suffer its effects in ever greater measure.<sup>37</sup>

The chief recommendation of the Berger inquiry was that in order to avoid this social pathology, credence must be given to the concerns raised by First Nations communities with respect to the rate of development and the impacts that it may have.<sup>38</sup> The *Canadian Environmental Assessment Act* purports to provide an avenue for reviewing such concerns through the commitment to sustainability as a key focus of the assessment process. However, time and again, discussions of the impacts a project may have on the sustainability of a region and its people fall short of consideration of sustainability as an equal to economics. As such, the purported neutrality of the assessment process resembles a rubber-stamping procedure in favour of project proponents rather than an unbiased review of all the information at hand.

## THE ENVIRONMENTAL ASSESSMENT PROCESS

### 1. The Committee

In 1994, Redfern Resources initiated an environmental review under the Mine Development Assessment Process, British Columbia (MDAP).<sup>39</sup> Simultaneously, the project also began the screening process of the *Canadian Environmental Assessment Act* (CEAA).<sup>40</sup> British Columbia passed its *Environmental Assessment Act* (BCEAA) in 1996, which then removed the process from MDAP, and placed the project proposal under the BCEAA.<sup>41</sup>

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<sup>37</sup> *Supra* note 22 at 194.

<sup>38</sup> *Supra* note 22.

<sup>39</sup> Redfern Resources Ltd. "Tulsequah Project" (2003 Environmental Assessment Update) online: Redfern Resources Ltd. – Official Website <<http://www.redfern.bc.ca/projects/tulsequah/permitting.html>>

<sup>40</sup> S.C. 1992, c.37. [CEAA].

<sup>41</sup> S.B.C. 2002, c. 43. At the time of the Environmental Assessment of the Redfern Project Proposal, the Act in Force was the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. However, the certificate approval process under the two acts remains substantially similar. [BCEAA].

Under the BCEAA, a major project such as the Tulsequah Chief Proposal is reviewed in order to receive a Certificate of Project Approval.<sup>42</sup> The federal *Environmental Assessment Act* is subsumed by the BCEAA due to an initiative on the part of the two governments to streamline assessment processes into one large-scale assessment.<sup>43</sup> In the case of the Tulsequah Chief Mine, the British Columbia Environmental Assessment Office (EAO) convened a Project Committee to review the proposed reopening of the mine.

The Committee was established in accordance with section 30(1) of the BCEAA in force at the time. The purpose of the Committee, as noted by Kirkpatrick J., was to provide advice and recommendations to the executive director (at the time, Norm Ringstad) and the Minister of the Environment. Originally, the Committee was intended to review the information provided by Redfern as the project proponent. However, as the environmental review continued onward, it is clear from the records that the Project Committee ultimately played a far larger role in the creation of reports, dissemination of information, and the overall scope and parameters of the proposed project.<sup>44</sup>

## 2. The Reports

Redfern Resources provided its initial project study report in November of 1996.<sup>45</sup> Initially, the TRTFN had agreed in principle to assist the proponent in the compilation of data, including use of maps and imagery,

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<sup>42</sup> *Ibid.* s. 17(3).

<sup>43</sup> CEAA, *supra* note 40, s.54. However, subsequent to the court decisions and ongoing litigation with respect to the Tulsequah Chief Project, the CEAA has been restarted. The Department of Indian and Northern Affairs (DIAND) has stated: “Currently, DFO and DIAND are waiting for a response to deficiencies from the proponent. At this point DFO and DIAND assume the review will be “de-harmonized” with independent decisions by the Federal and Provincial Governments.” (CEAA Level II Projects – Yukon Region, October 2002) online: <[http://www.ainc-inac.gc.ca/yt/ceaa2\\_e.html](http://www.ainc-inac.gc.ca/yt/ceaa2_e.html)>.

<sup>44</sup> See *Taku River (chambers)*, *supra* note 2 at 115. Though the Court declined to find a reasonable apprehension of bias in this process, Kirkpatrick J. did recognize that members of the Project Committee (including employees of the B.C. Government) did engage in improving and submitting mitigation proposals to the rest of the Committee.

<sup>45</sup> This report will be referred to as the Redfern Project Report. The report is no longer made available by the proponent or the B.C. EAO. Therefore, any reference to this report is in the context of references made by the authors of other reports and commentary, as well as the judgments in the B.C. courts.

already completed in anticipation of ongoing land claim negotiations with the British Columbia government. However, the TRTFN entered into this endeavour with clear concerns about the impacts a road could have on their traditional territory and uses of the land, as well as adverse effects on wildlife and fisheries in the region. With that in mind, the TRTFN requested that further studies be undertaken in order to develop a better sense of the magnitude of the impacts the area might experience. Further, the First Nation asked that the project be assessed by the proponent in terms of sustainability of the cultural and economic interests that the TRTFN had in the area.

The TRTFN claim that such an in-depth analysis, though necessary in order to complete a full impact review, was not undertaken by the proponent. When this deficiency was perceived, the TRTFN partially withdrew from the process with the proponent and requested that their position with respect to the Review Committee be upgraded from that of an observer to a Committee member. The TRTFN stated that they were placed in, “an awkward position – we were being asked by the company to support a project for which we had no meaningful understanding of its significance to our people.”<sup>46</sup> In other words, the TRTFN did not receive meaningful consultation by the proponent in its environmental impact assessment, and the First Nation now wanted to fully join the consultation process of the government as well.

Gaining a place on the Committee allowed the TRTFN to have a direct voice. It is worth noting, too, that in placing the TRTFN on the Project Committee, the British Columbia Government implicitly recognized its duty to consult the TRTFN above and beyond the consultations with the proponent. As members of the Project Committee, the TRTFN raised its continuing concern that the Redfern Project Report failed to adequately address its questions and concerns. In response, the EAO also tendered a review with a contractor agreed to by the TRTFN of the social, cultural, economic, and environmental issues.<sup>47</sup> The report that was borne out of this second review process, the Staples Report, appears to align itself much more closely with the issues surrounding the adverse impacts of the mine on sustainability of the region in respect of the TRTFN interests in the traditional and cultural values of the land.

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<sup>46</sup> Staples, *supra* note 14 (introduction).

<sup>47</sup> *Taku River (chambers)*, *supra* note 2 at 59.

It was the position of the TRTFN that, upon completion of the first Staples report but prior to its review, the First Nation was, “sufficiently aware of its design and direction to give it support as meeting the report specifications,” and that they hoped, “readers, in their pursuit of a better and more holistic understanding of the project, will treat [it] as the substantive assessment of impacts to our people.” The TRTFN also expressed hope that, “Redfern too, despite its initial antagonism to this study, will view it as the legitimate expression of concerns that Taku Tlingit people have with respect to the Tulsequah Chief Project.”<sup>48</sup>

Ultimately, however, the TRTFN did not feel that the Staples Report responded to all the concerns they had raised, and the government contracted again to receive an addendum to the Staples Report that thoroughly canvassed the concerns the Tlingit had raised.<sup>49</sup> By the end of the report generating process, the Project Committee had in its possession the Redfern Project Report, an Addendum to this report, the Staples report, the Staples Addendum, and an earlier, initial report prepared before the Project Committee was struck.

From this information, the EAO, as a member of the Project Committee, compiled a Recommendations Report to submit to the Minister for final determination of the certificate approval. While the Recommendations Report listed the group members, including the TRTFN, the Report itself failed to ever use the term “sustainability” and did not clearly iterate the concerns articulated by both the TRTFN and the government-contracted Staples Report.<sup>50</sup> It further failed to elaborate on the concerns raised by the United States with respect to trans-boundary issues, including the threat by Governor Tony Knowles to refer the proposal to the International Joint Commission.<sup>51</sup> The Project Committee did not meet

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<sup>48</sup> *Supra* note 46.

<sup>49</sup> Lindsay Staples, “Determining the Impact of the Tulsequah Chief Mine Project on the Traditional Land Use of the Taku River Tlingit First Nation,” (A Report Prepared for the Environmental Assessment Office, Province of British Columbia, December, 1997) [unpublished] [Staples Addendum].

<sup>50</sup> Finding of Kirkpatrick J., *Taku River (chambers)*, *supra* note 2 at 58.

<sup>51</sup> Office of the Governor, “Alaskans Meet with Canadians on Tulsequah Chief Mine: Joint Watershed Planning, Protecting the Taku River Fishery on Agenda” (Press Release, Alaska Department of Fish and Game, June 12, 2000) online: Alaska Department of Fish and Game <<http://www.state.ak.us/adfg/geninfo/press/2000/6-12gov.htm>>. Given the concerns with respect to impacts on the salmon fishery, the Alaskan Governor had suggested a referral to the IJC in 1998, when the certificate was issued.

after the submission of the Staples Addendum in December of 1997. On March 2<sup>nd</sup>, 1998 the EAO announced the release of the Recommendations Report for review by the Project Committee, and gave a forty-eight hour time frame for comment. The report was submitted to the Minister on March 4, 1998 with a recommendation that the certificate be approved. The report provided all the prior reports as backgrounders, but did not go into detail with respect to the issues.

### 3. The Issue of the Certificate

It was the position of the TRTFN that while consultation had occurred, the termination of the review process made such consultation incomplete. The TRTFN claimed that submission of a Recommendations Report, which was unrepresentative of the concerns raised through the consultation, rendered the consultation process meaningless. Tony Pearce, who represented the TRTFN at Project Committee meetings, noted this perceived lack of representation in a letter to Norm Ringstad of the EAO:

How can the Project Committee, which has not ever met to deliberate on the results of all the work undertaken by the various subcommittees, complete its job properly when you allow only two days for review of a draft report the contents of which nobody has seen... There are, to my latest count, a number of issues still outstanding that are key to the viability of the project... The precedent being set here for the integrity of subsequent reviews is extremely dangerous. If the Project Committee never meets to discuss the review results and formulate a recommendation, what is the point of having one? How does this meet the stated intentions of the *Environmental Assessment Act*?<sup>52</sup>

The EAO record indicates that there was never a response to this query. In the face of this lack of response, the TRTFN submitted its own recommendations report with a summary of its stance on the issue: “the right recommendation is to reject the proposed project as being premature and too beset with information inadequacies, undetermined but significant environmental risk and naïve optimism about future management capacity. We so recommend.”<sup>53</sup>

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<sup>52</sup> *Taku River (chambers)*, *supra* note 2 at 62.

<sup>53</sup> *Taku River (chambers)*, *supra* note 2 at 63.



That the TRTFN was compelled to enter its own Recommendations Report in order to have its concerns included demonstrates the point at which this consultation process went wrong. The following was noted by the BCSC:

The Tlingits do not argue that the sustainability of the Tlingits is the sole factor to be considered...The Tlingits' point is that it is a factor that could not be ignored in the circumstances of this case. When the Tlingits called for more analysis, it was in the context of their argument that the issue of sustainability was not addressed either expressly, thoroughly, or in an integrated way by the Project Committee or in the Recommendations Report...The Tlingits thus argue that these were circumstances which the Ministers could not ignore.<sup>54</sup>

In its neglect of the issue of sustainability within the Recommendations Report to the Minister, the EAO committed the error discussed in the introduction to this paper: it did not demonstrate, through its actions, that the EAO provides a process that is neutral, nor did it demonstrate a consideration of all factors enumerated under sections 2(a) and (b) of the 1996 *Environmental Assessment Act*, which reads:<sup>55</sup>

2. The purposes of this Act are (a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being, (b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects.

Upon receipt of the Recommendations Report, the Minister issued the Certificate of Project Approval to Redfern Resources within two weeks, with no written reasoning beyond three brief paragraphs.<sup>56</sup> This decision was met with outrage from the TRTFN and many non-Native citizens of Atlin. Concerns were also expressed by the State of Alaska and various environmental groups. The TRTFN then applied to the BCSC for a judicial review of the environmental review process and issue of the Project Approval Certificate, pursuant to the *Judicial Review Procedure Act*.<sup>57</sup>

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<sup>54</sup> *Taku River (chambers)*, *supra* note 2 at 66.

<sup>55</sup> R.S.B.C. 1996, c. 119.

<sup>56</sup> *Taku River (chambers)*, *supra* note 2 at 33.

<sup>57</sup> R.S.B.C. 1996, c.241 Named as respondents in the application were the EAO, the Minister of Environment, Lands and Parks, the Minister of Energy and Mines, the Minister Responsible for Northern Development, and the proponent, Redfern Resources.

## THE LITIGATION

### 1. British Columbia Chambers – Justice Kirkpatrick

The litigation of this matter proceeded first in the form of a Chambers hearing before Justice Kirkpatrick. The ten-day hearing resulted in the Ministers' decision being quashed and the matter being referred back to the Ministers for reconsideration after a revised Project Committee Report was submitted. While this was not the totality of the relief requested by the TRTFN,<sup>58</sup> the judgment did explicitly recognize the failure of the final stages of the Environmental Assessment Process – that of the formalization of the Recommendations Report, absent mention of sustainability and Tlingit perspectives, and the extraordinarily rapid decision of the Ministers upon receipt of the Report.<sup>59</sup> Justice Kirkpatrick stopped short of stating that “the entire process has been compromised or tainted,” but condemned the seemingly low value placed on the concerns of the Tlingit by the Ministers in reaching their decision:

I conclude that it cannot be said that there was no foundation in the evidence for the decision made by the Ministers. It can be said, however, that there was inadequate (and perhaps no) assessment of evidence produced by or on behalf of the Tlingits. In this respect, the decision was unreasonable.<sup>60</sup>

After issuing the chambers judgment of June 28, 2000 quashing the Certificate, Justice Kirkpatrick also issued a judgment of direction on July 27, 2000 ordering that the reconsideration of the Environmental Assessment Report and Recommendations follow specific steps. She ordered that the Project Committee be reconvened and provided with the Court's reasons for decision, and that the Committee re-familiarize themselves with the issues. She further ordered that the Project Committee would meet to, “discuss and meaningfully address the concerns of the Taku River Tlingit First Nation regarding the Tulsequah Chief Mine access road and its impacts.”<sup>61</sup> A revised draft recommendations report was to

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<sup>58</sup> See *Taku River (chambers)*, *supra* note 2 at 13.

<sup>59</sup> *Taku River (chambers)*, *supra* note 2 at 37.

<sup>60</sup> *Supra* note 2 at 85.

<sup>61</sup> *Taku River (appeal)*, *supra* note 2 at 8.

be developed and circulated for comment, followed by a final report (also to be circulated for comment), and finally the revised recommendations report would be referred to the Ministers for decision.

## **2. British Columbia Court of Appeal – Justice Rowles (Justice Southin in Dissent)**

After the Chambers decision was handed down on June 28, 2000, a full two years after the provision of the initial Project Certificate, the British Columbia EAO and the proponent Redfern appealed the decision to the BCCA in September 2001.<sup>62</sup> In the interim between the Chambers decision and the hearing at the BCCA, the parties agreed not to act on the order of Justice Kirkpatrick and await the outcome of the appeal.<sup>63</sup>

On appeal, the Court held two to one in favour of upholding the quashing of the Certificate. In dissent, Justice Southin embarks on a long discussion of why, in her opinion, the Court below was in error in finding the decision of the Ministers was made unreasonably. However, much of her justification for such a stance is derived through analogizing the First Nation to a municipality. As a point of administrative law, Justice Southin states:

[I]t is right to consider these issues as if the objector was not Aboriginal but was a ‘municipality in the vicinity’...who objected to this mine and all its works on the ground that, in the opinion of the inhabitants, the economic benefits from a mine were less than the economic benefits from a nascent tourism industry which would not flourish, in their opinion, if the wilderness were invaded by monstrous trucks transporting ore to Atlin.<sup>64</sup>

Such a foundation for the substantive reasoning relating to the main issue on appeal and cross-appeal (whether as a point of administrative law the Supreme Court erred in its determination of the powers and duties of ministers under the BCEAA) is fundamentally flawed. Justice Southin removed the constitutional issues (the obligation to consult First Nations under section 35) from the key underlying issue of whether the consultation, as it was done and then reported to the Ministers in the form of

<sup>62</sup> The TRTFN cross-appealed on this decision.

<sup>63</sup> *Taku River (appeal)*, *supra* note 2 at 8.

<sup>64</sup> *Supra* note 2 at 16.

the Recommendations Report, was in keeping with the objectives and requirements for a neutral, clear process under the BCEAA. Ultimately, Justice Southin opines that the actions of the British Columbia Government cannot be construed as bias or a lack of neutrality:

[W]hat happened in early 1998 bears a very different construction [from issuing a decision in a way that was not open, neutral or accountable]. This process had gone on and on at very considerable expense. It was clear that nothing short of changing the route of the road from the mine to Atlin would satisfy the Tlingit. They had made their points. The majority did not accept them. The executive director and the chairman of the committee had a duty...to bring the matter to an end and put the issue before the Ministers for their determination.<sup>65</sup>

This reasoning neglects to recognize the point the TRTFN had made from the outset: it is not that development within their region is unacceptable *per se*, but that without devoting the resources to developing a land use plan, settling land claims, acquiring baseline population data for species in the area, and for researching the potential scope of impact, rather than merely deferring to concepts of mitigation down the road, the British Columbia Government was not in fact exercising an open, neutral and accountable process that gave equal weight to sustainability and economics considerations. The fact that Justice Southin's rationale harks back to the issue of economics for Redfern further emphasizes that the bias toward economic factors is pervasive throughout Canadian policy and judicial treatment of Aboriginal concerns.

Justice Southin also takes a perspective on the constitutional issue of section 35 rights that does not appear to fully consider the scope of what those rights may entail. While willing to concede that the TRTFN have *some sort* of rights in northwestern British Columbia, this concession stops short of recognizing those rights as having any supremacy or effect on the outcome of ministerial decisions on environmental assessments. Nor is Justice Southin prepared to consider whether the existence of section 35 requires governments to actively pursue resolution of those rights prior to or concurrent with allowing substantial development within the areas at issue.

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<sup>65</sup> *Supra* note 2 at 77.

Ultimately, Justice Southin appears to liken section 35 rights to a right to voice an opinion, stating, “the right to be heard, whether in this or any other process, and no matter how great the issue, is not a right to victory.”<sup>66</sup> Such comments only serve to illuminate the need for a clearer concept of meaningful consultation. If the combined effect of the BCEAA, CEEA and section 35 is to provide nothing more than an ability to present objections to development proposals, sustainability objectives are unlikely to be met and duties to consult resemble a one-sided process of information dissemination. There are, and always will be, some projects which should be approved, but likewise, there are those which should be rejected or delayed until more is known. If rejection or delay is beyond the contemplation of government agencies, the neutrality of the review process is compromised for the parties who participate in the process in good faith, expecting that their concerns will be addressed.

The majority decision at the BCCA took a more holistic approach to the Tulsequah Chief dispute, framing the issue as whether Justice Kirkpatrick erred in holding that the Ministers of the Crown were obliged to take into account the constitutional protection afforded to Aboriginal rights by section 35 when determining whether to issue the Project Approval Certificate prior to the Tlingits having established any Aboriginal rights or title in relation to the area of the Tulsequah Chief Mine Project.<sup>67</sup> Justice Rowles held that the obligation to consider Aboriginal rights under section 35 existed for the Crown under a legislative scheme such as the BCEAA and CEEA, even where no such rights have been established by a First Nation. It is this issue, framed in this way, which is now before the Supreme Court of Canada.

The Appeal Court accepted the argument that where all experts within an assessment process have recognized that there is reliance by a First Nation on a system of land use, “merely identifying the problem is insufficient to meet the requirements of the EAA in that it does not address solutions to the problem.”<sup>68</sup> Specifically, the Court stated that Aboriginal rights may not be infringed by Crown-sanctioned activities,<sup>69</sup> and that arguments in which the constitutional or fiduciary obligation to

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<sup>66</sup> *Supra* note 2 at 100.

<sup>67</sup> *Supra* note 2 at 107.

<sup>68</sup> *Supra* note 2 at 132.

<sup>69</sup> *Supra* note 2 at 143-152.

consult only arises on the determination of Aboriginal rights, “is wholly inconsistent” with *Sparrow* and *Van der Peet*.<sup>70</sup>

There were also arguments raised by the Crown with respect to the severance of the issue of the assertion of section 35 rights by the TRTFN. The Crown proposed that as the TRTFN had agreed to the severance of the determination of their land claim from the issue of the Tulsequah Project, there was no foundation on which the Chambers Judge could have considered the assertion of Aboriginal rights with respect to the consultations and duties on the Crown throughout the Tulsequah Chief Environmental Review. The Court noted that in this respect, the holding of the SCC in *R. v. Sparrow* provides some guidance:

Section 35(1) suggests that while regulation affecting Aboriginal rights is not precluded, such regulation must be enacted according to a valid objective...By giving Aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that Aboriginal rights are affected...The extent of legislative or regulatory impact on an existing Aboriginal right may be scrutinized so as to ensure recognition and affirmation.<sup>71</sup>

The question, as Justice Rowles saw it, was not whether the Chambers Judge should have considered the assertion of Aboriginal rights, but whether the concerns raised by the TRTFN had been addressed in substance with respect to the timing and scope of development of Redfern’s mineral rights.<sup>72</sup> Further, Justice Rowles found that the reasoning of the lower Court was clear and was supported by both the facts and jurisprudence.

Ultimately, the British Columbia Court of Appeal recognized that “the Tlingits were willing to participate in [the EA process] in an apparent effort to have their needs accommodated, but...the Certificate...was issued without their concerns having been met.”<sup>73</sup> Thus, the BCCA upheld the lower Court’s ruling, though the Court dispensed with the requirement to refer the Recommendations Report back to the Project Committee.

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<sup>70</sup> *Supra* note 2 at 161.

<sup>71</sup> *Supra* note 2 at 171.

<sup>72</sup> *Supra* note 2 at 190.

<sup>73</sup> *Supra* note 2 at 202.

Upon receipt of the Court of Appeal ruling, the British Columbia Government appealed the ruling to the Supreme Court of Canada on the issue of the duty to consult prior to determination of the existence of Aboriginal or treaty rights for a First Nation. The matter is set for hearing in March of 2004. However, the question, as framed by the Crown, only partially addresses the concerns likely to be raised at that hearing on cross-appeal by the TRTFN. What needs to be established, concurrently with a judgment on the obligation to consult, is what meaningful consultation truly means.

## VI. THE COST OF MINING AND THE COST OF OBLIGATIONS

### 1. Environmental Legacies: What is Past is Not Yet Over

In the assessment that took place in respect of the Tulsequah Chief Mine, neither the concerns regarding the road nor the initial assertion of Aboriginal rights were rebutted by the proponent or the government. Rather, the government and the proponent appeared to take these concerns under advisement; and yet they did not act upon them. While it is reasonable that there are instances where concerns may not be sufficient to refuse certification to a project, in the case at hand there were obvious gaps in the information on which decisions were based.<sup>74</sup> The Court recognized that members of the Project Committee assisted in developing mitigation measures for potential impacts.<sup>75</sup> Instances such as these do not reflect a process that is inherently neutral, but instead a process which, as an end goal, will certify a project to go ahead. Added to this balance shift in favour of the proponent was the Recommendations Report itself, wherein the EAO suggested that key issues such as wildlife impacts, decommissioning of the road, habitat depletion and regional land use planning were all potential adverse effects for which mitigation measures could be thoroughly developed at a later date.

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<sup>74</sup> See comment at note 43. See also Herb Klassen, Major Projects Review Unit, DFO: Letter to Terry Chandler, President, Redfern Resources (Subject: Unresolved Issues Regarding Proposed Tulsequah Chief Project, 18 June 2002) online: <<http://www.riverswithoutborders.org/DFOletterREDCORP/DFOredfernletter.pdf>>.

<sup>75</sup> *Supra* note 44.

The shortsightedness of such a recommendation is evidenced by numerous other mining developments where the concern for having clear mitigation measures are overlooked due to the pressures exerted on governments to create a “friendly climate” for development.<sup>76</sup> Ultimately, the rush to mine may result in incredible costs to the jurisdiction that permits the development to go through. The Yukon Territory is struggling with several such examples: the Anvil Range Mine at Faro currently has a clean-up bill of over one hundred million dollars; and the cost of the Cantung Mine on the North West Territories-Yukon border may also become a public burden in the near future. In the North West Territories, the Giant Mine near Yellowknife may cost anywhere between seventy and nine hundred million dollars, depending on the difficulty in managing the arsenic contamination.<sup>77</sup> These sites were developed at a time when mine controls were fewer; yet all were also allowed to continue operations without remediation once the extent of the contamination was revealed.

A more recent example of a lack of government foresight, in the context of CEAA, is the B.Y.G. Mt. Nansen Mine near Carmacks, Yukon.<sup>78</sup> Poised to spill cyanide tailings water into feeder streams of the Yukon River, a primary source of water for much of the territory and one of North America’s major salmon bearing rivers, the B.Y.G. site, abandoned in 1999 when the company went into receivership, has cost the federal and territorial governments one point eight to two point two million dollars annually in interim remediation costs. The final clean up of the site is estimated at over six million dollars, which will be borne by Canadian taxpayers.<sup>79</sup> At the time when the mine was developed it

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<sup>76</sup> MiningWatch Canada, “Taxpayers to pay for massive clean-up at northern mines” (Article and Backgrounder, 2 September 1999) online: Canadian Arctic Resources Committee <<http://www.carc.org/whatsnew/cleanup.htm>>.

<sup>77</sup> *Ibid.*

<sup>78</sup> *R. v. B.Y.G. Natural Resources Inc.*, [1999] Y.J. No. 34 at 23 (QL) (The corporation was given the maximum penalty of \$200,000 – a far cry from the actual cost of remediation. Lilles, Terr. Ct. J. noted that the corporation’s actions, “demonstrate[d] an attitude consistent with ‘raping and pillaging’ the resources of the Yukon”).

<sup>79</sup> Yukon Ministry of Energy, Mines and Resources, “Type II Mines Sites Under the Devolution Transfer Agreement,” (Backgrounder, 15 July 2003) online: Government of Yukon, <<http://www.emr.gov.yk.ca/Mining/Type2/PDF/backgrounder.pdf>>.



was billed as crucial to the continuance of mining in the territory.<sup>80</sup> It stands now as an example of poor planning, unreasonable deference to proponent assessments, and a lack of accountability throughout all phases of the project.

## **2. Voisey's Bay and the Mackenzie Valley Pipeline: Timing and Sustainability**

In contrast to projects such as B.Y.G. and the British Columbia Government's handling of the Tulsequah Chief case, there are Canadian examples of meaningful consultation such as Voisey's Bay in Labrador and the Mackenzie Valley pipeline project in the Northwest Territories. Both these projects were proposed several years ago, at times when First Nations in the respective regions were not prepared, had not completed land claims, and held concerns about the sustainability of the region if the project went ahead. While the specific facts of each proposal differed, the message sent by the Innu of Labrador and the Dene of the MacKenzie Valley was, on first consultation, that they were opposed to the project without more information and stability for their nations.

Such stability was created through the settling of land claims, the institution of self-government, and a place of equality within the process of mine development.<sup>81</sup> With these factors in place, both the MacKenzie Valley Pipeline and the Voisey's Bay Nickel Project are in the initial stages of implementation. While there is, and likely always will be, some opposition to these projects, they are based on concrete research, clear data with respect to wildlife populations, and anticipated impacts with clear plans for the mitigation of these impacts.<sup>82</sup> The two

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<sup>80</sup> The Yukon, as with many jurisdictions dependent on mining, suffered an economic downturn in the 1990s. This is attributable in part to the lesser costs of production in developing nations and a reduction in base metal prices. Companies and supporters of the mining industry also attribute the downturn in exploration to a "hostile" climate for mining, in part due to increased industry regulation and successful lobbying against projects such as the Windy Craggy mine in Northwestern B.C.

<sup>81</sup> See R. Anthony Hodge, "Sustainability and the Proposed Tulsequah Chief Project" (A Background Paper Prepared for the British Columbia Environmental Assessment Office, May 2001) [unpublished] Appendix 1: Green's (1998) Voisey's Bay Sustainability Test. [Hodge].

<sup>82</sup> See e.g. Ben Olsen, M. MacDonald and A. Zimmer, "Co-management of Woodland Caribou in the Sahtu Settlement Area" (Workshop on Research, Traditional Knowledge, Conservation and Cumulative Impacts, Special Publication No. 1, Sahtu Renewable Resources Board, 2001).

projects stand as examples of initiatives which have been accepted by those directly impacted, at a time when the communities and the people involved had a greater capacity to participate in the projects and to absorb the changes the development would bring.<sup>83</sup>

## VII. THE NEED FOR OUR NATION TO COMMIT TO SUSTAINABILITY

In 1977 Thomas Berger proposed a new way to deal with First Nations in the context of development within their traditional territories. He spent months collecting testimonies, often through interpreters, of how the people of the North perceived the impacts of development on their Nations and their way of life. The answers received clearly indicated that many Aboriginal communities were not ready for the changes such development would bring, and there were too many outstanding issues of land and self-government to consider development at that point.

Since Berger undertook the MacKenzie Pipeline Inquiry much has changed, but more has remained the same. The Canadian Constitution has enshrined the rights of Aboriginals, but courts are still attempting to articulate what the scope of those rights may be. Aboriginals in the territories have settled claims with the Canadian Government, and many First Nations communities are now able to act with better certainty with respect to development proposals that may be put forth. Yet, many other First Nations, like the Taku River Tlingit, have yet to have their section 35 rights recognized or have land claims settled with the British Columbia or federal governments. This lack of certainty creates a climate in which issues of sustainability can never be fully addressed, nor can companies hope to provide methods of mitigation that will satisfy the need for certainty that a First Nation may express.

It is possible in the Tulsequah Chief case that the concerns of the Tlingits are capable of being entirely mitigated. However, whether this is the case may never be clear because the Certificate was issued in a manner that breached the elements of good faith necessary to determine what positions all parties brought to the table. Without good faith in the

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<sup>83</sup> Neither of these projects are without concern, but at this stage the potential gains, as viewed through Green's "sustainability lens", may now outweigh those concerns. Hodge, *supra* note 81.

process, parties to a dispute tend to polarize their stances in order to effect the best outcome for their position. In this case, once good faith was no longer present, the TRTFN moved toward litigation of the issue. That litigation is not over, and it would appear that the TRTFN, Redfern, and the B.C. EAO will be unable to resolve the question of sustainability until a court has determined the scope and duty of consultation within this process.

This is unfortunate because the proponent entered into the Environmental Review with what was clearly good faith in the assessment process.<sup>84</sup> While the scope of the project did not meet the sustainability assessment that the Tlingit required to provide their endorsement, the process was not at that point flawed; nor, was it flawed after the EAO contracted a sustainability assessment separate to that of the proponent. The flaw in the assessment process occurred when the collaborative aspects of the Committee were halted, and the recommendations report was submitted—absent discussion of sustainability and absent discussion of the concerns of the TRTFN. This indicated that the government was going through the motions of consultation, but its meaning had been lost. The project *would* go ahead, regardless of opposition. The question of sustainability—of the Tlingits or the region itself, was no longer one that the government wanted answered in relation to the EA for the mine. This did a disservice to the proponent, in that Redfern is now party to the legal battle between the TRTFN and the British Columbia Government in which issues larger than one mine have been raised. It also did a disservice to the TRTFN, in that the question of their land claim has become so closely intertwined with the Redfern Mine that other aspects of their assertion of Aboriginal rights may be lost on grounds other than the strength of their claim. The Canadian public are also ill-served by the legal wrangling, given that they will bear the cost of a decade of assessments and litigation—a cost which could outweigh the profits Canadians would see from the mine.

Currently in Canada we have an Environmental Assessment Process which could, theoretically, provide an excellent analysis of the potential impacts and benefits of a development project. From that analysis, determinations could be made on whether a project ought to go ahead. But this is far from the reality borne out by the experiences of Redfern and

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<sup>84</sup> As noted by Kirkpatrick J. in *Taku River (chambers)*, *supra* note 2.

the Taku River Tlingit. The British Columbia Government, by all appearances, committed to ensure that the development went ahead long before the assessment was completed. Some would say the assessment never was complete, regardless of the position of the B.C. EAO.

With continuing examples of the poor application of principles of sustainability, such as the case of the Tulsequah Chief Mine, it is clear that the attitude of governments must change. It is harmful to industry, groups committed to principles of sustainability, and to the people of Canada to continue to see the CEAA and provincial assessment acts as simply approval processes and not as opportunities to evaluate whether a project really is in the best interests of Canadians. If we continue to approve projects without due consideration of the principles of sustainability, there will be more incidents like the Tulsequah Chief Mine—where the proponent, the government and opponents of the project are locked in a legal battle which may never provide a satisfactory answer to whether this mine should go ahead. Even bleaker is the potential for more situations like Mt. Nansen and the Giant Mine, where the proponents are long gone and the taxpayers bear the burden of cleaning up a disaster which should never have occurred.

There is a clear need for communities that will be affected by development to be able to accommodate the changes that development will bring. Further, development must elevate rather than detract from a community's overall sustainability. These were the findings of the Berger Inquiry, almost three decades ago. Principles of sustainability are now clearly mandated by federal and provincial legislation. Where sustainability is not in evidence, the burden rests on the government to maintain a position of neutrality which was intended to be a part of the assessment process. Without government neutrality, these matters will spend years in court, and uncertainty will continue to reign for industry, communities and First Nations affected by the proposed development. While a position of neutrality may, in some circumstances, require the delay or rejection of a project until questions of sustainability are answered, the cost of taking such a position is one our nation must bear.