IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Taseko Mines Limited v. Phillips,*
2011 BCSC 1675

Date: 20111202
Docket: S117685
Registry: Vancouver

2011 BCSC 1675 (CanLII)

Between:

Taseko Mines Limited

Plaintiff

And

Emery Phillips, Marie Williams aka Marie William, Marilyn Baptiste, John Doe #1, John Doe #2 and John Doe #3

Defendants

Docket: 114556
Registry: Victoria

Between:

Marilyn Baptiste, on her own behalf and on behalf of all other members of the Xeni Gwet'in First Nation Government and the Tsilhqot'in Nation

Petitioner

And

Her Majesty the Queen in Right of the Province of British Columbia, the Chief Inspector of Mines, the District Manager Resource Operations, Cariboo-Chilcotin, and Taseko Mines Limited

Respondents

Before: The Honourable Mr. Justice Grauer

Oral Reasons for Judgment

Counsel for Taseko Mines Limited:	Joan Young Melanie Harmer
Counsel for Emery Phillips, Marie Williams aka Marie William, and Marilyn Baptiste on her own behalf and on behalf of all other members of the Xeni Gwet'in First Nation Government and the Tsilhqot'in Nation:	Jay Nelson Dominique Nouvet M. Boulton A/S
Counsel for Her Majesty the Queen in Right of the Province of British Columbia, the Chief Inspector of Mines and the District Manager Resource Operations, Cariboo-Chilcotin:	Erin Christie
Place and Date of Hearing:	Vancouver, B.C. November 28 - December 1, 2011
Place and Date of Judgment:	Vancouver, B.C. December 2, 2011

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INTRODUCTION

[1] Taseko Mines Limited, the plaintiff in Vancouver Action No. S117685, and Marilyn Baptiste, a defendant in that action and petitioner in Victoria Action No. 114556, apply for competing interim injunctions, each restraining the other in relation to a program of exploration work in an area of the traditional territory of the Tsilhqot'in Nation.

[2] For a period approaching 20 years, Taseko has pursued the development of a major open pit gold and copper mine in the Cariboo-Chilcotin area of British Columbia, known as the Prosperity Project. The resource is said to be one of Canada's largest known undeveloped gold and copper deposits. To this end, Taseko has acquired various mineral claims and a mining lease, all lawfully granted under the *Mineral Tenure Act*, R.S.B.C., 1996, c. 292.

[3] The proposed Prosperity mine is potentially a billion-dollar project. Should it proceed, its impact on both the economy and the environment will be unquestionably substantial.

[4] This proceeding is not about whether the project should or will proceed.

[5] The location of the proposed mine is in an area over which the Tsilhqot'in Nation assert aboriginal title, and within which they claim aboriginal rights. In *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, the appeal from which has been heard but not decided, the area is described as the "Eastern Trapline Territory". Mr. Justice Vickers concluded that the Tsilhqot'in had failed to prove aboriginal title to the Eastern Trapline Territory, but had established aboriginal rights throughout the area. Among that territory's distinguishing features are Fish Lake (Teztan Biny), Little Fish Lake (Y'anah Biny), and their surrounding area, the Nabas.

[6] In its initial iteration, the Prosperity Project failed to satisfy a Review Panel established by the Federal Minister of the Environment. Among its perceived flaws were the required sacrifice of Fish Lake, Little Fish Lake and the Nabas.

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[7] The review process included public hearings in the Cariboo-Chilcotin area in the spring of 2010, in which the Tsilhqot'in Nation participated. The Panel's Report, described by some as "scathing", was issued on July 2, 2010. The Federal Government's response came on November 2, 2010:

> Taking into consideration the Report of the Panel and the implementation of any mitigation measures that the RAs consider appropriate, and in weighing the socio-economic benefits and potential significant adverse environmental effects, the Government of Canada has determined that the significant adverse environmental effects cannot be justified in the circumstances.
>
> The Government of Canada wishes to see resource projects developed, however, it must balance the economic benefits of projects with responsible resource development. The Government is not opposed to the mining of the Prosperity ore body, however, it cannot justify providing the authorizations that would enable the Project to be carried out as proposed. The Government notes that this decision does not preclude the proponent from submitting a project proposal that includes addressing the factors considered by the panel.

[8] Taseko Mines did just that. The rise in the prices for gold and copper, and the economic outlook, allowed Taseko to develop a viable proposal that eliminated the most significant adverse environmental effects of the original project; in particular, the destruction of Fish Lake. This redesigned proposal, named the "New Prosperity Project", would add $300 million to the projected development cost, but this was justified by the increase in commodity prices. Accordingly, in August of 2011, Taseko submitted a revised comprehensive project description for the New Prosperity Project to the Canadian Environmental Assessment Agency.

[9] Since then, Taseko has obtained two provincial permits that allow it to carry out a program of exploration designed principally to obtain geological information of relevance to the engineering of the new project. Taseko expects that this information will assist in the environmental assessment of the New Prosperity Project, particularly in relation to the environmental impact of the changes that were made to preserve Fish Lake. These two permits were a Notice of Work (NOW) approved by the Senior Inspector of Mines, and an Occupant Licence to Cut and Remove Timber (OLC) approved by the District Manager Resource Operations, Cariboo-Chilcotin.

[10] Taseko's attempts to embark on the program covered by these permits were stymied by the refusal of Marilyn Baptiste to recognize their authority to proceed into what she described as Tsilhqot'in territory. In a blockade that appeared to me to be more moral than physical, but was nonetheless effective, she declined to let Taseko's convoy of trucks and equipment pass. To its credit, Taseko turned its convoy around and left, avoiding any action that might escalate the confrontation.

[11] Marilyn Baptiste is the elected Chief of the Xeni Gwet'in, one of the six bands that constitute the Tsilhqot'in Nation. Within the Tsilhqot'in Nation, the Xeni Gwet'in have a particular responsibility for the stewardship of that portion of Tsilhqot'in traditional territory that includes Fish Lake, Little Fish Lake and the Nabas.

[12] In the circumstances, Taseko applies for an injunction preventing Chief Baptiste and any others with notice of the order from obstructing, impeding or restricting its access to the area where its program of exploration is to be carried out.

[13] The Xeni Gwet'in and the Tsilhqot'in, meanwhile, through Chief Baptiste, had filed a petition seeking judicial review of the decisions to issue the permits required by Taseko to carry out this program. I will refer to them collectively as the petitioners. They seek an injunction preventing Taseko from proceeding with its exploration program until they have had an opportunity to have their application for judicial review heard and determined.

[14] When the Taseko injunction application came before me on November 18, 2011, I adjourned it to this week, and ordered that it be heard together with the petitioners' injunction application. That has now taken place.

[15] For the reasons that follow, I have decided that the petitioners are entitled to the interim injunction they seek, subject to terms to be discussed. In these circumstances, I can find no basis to support the granting of the injunctive relief sought by Taseko Mines.

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BACKGROUND

[16] The bands of the Tsilhqot'in Nation vigorously opposed the original Prosperity Project, and put a great deal of blood, sweat and tears into educating the Federal Review Panel about their concerns, and how the project would impact them. This was an exhausting exercise, and they were dismayed by the project's resurrection as the New Prosperity mine. From their perspective, the revised project did not adequately address the factors considered by the Federal Review Panel, but continued to represent significant adverse environmental effects that remained unjustifiable.

[17] In the circumstances, the Tsilhqot'in National Government, through Chief Baptiste and others, entered into a process of consultation with the Federal Government in the hope of persuading it to reject the New Prosperity Project without the need for holding another environmental assessment with all the expense and effort that that would entail. It was their position that the revised proposal was based on an alternate mine plan that the previous Federal Review Panel had already considered and rejected.

[18] On August 30, 2011, the Canadian Environmental Assessment Agency wrote to the Tsilhqot'in National Government to advise that it had accepted the Project Description for the New Prosperity Gold-Copper Mine Project Proposal. The agency indicated that it had 90 days from August 9, when the proposal was received, within which to determine whether to commence a comprehensive study of the proposed project. That determination was to be made by November 7, 2011. The Agency then discussed meeting with the Tsilhqot'in National Government for information gathering and further discussion of their views.

[19] The parties appear to have had a materially different appreciation of the significance of this process. Taseko, it seems, assumed that all that remained to be determined was by which route the Agency's environmental assessment would proceed. The Tsilhqot'in National Government, on the other hand, understood that the agency would be determining whether to proceed with an environmental

assessment at all, and if so, by what route. In short, unlike Taseko, the Tsilhqot'in understood that the possibility remained that the project would be rejected at that point, without further assessment.

[20] I accept the parties' assertions as to their respective states of mind. The affidavit evidence before me supports the conclusion that the understanding of the Tsilhqot'in was likely the correct one.

[21] In anticipation of this process, Taseko wrote to the BC Ministry of Energy and Mines on May 11, 2011, stating as follows:

> Please find enclosed a Notice of Work (NOW) application for Taseko's proposed 2011 exploration drilling and test pitting for the Prosperity Gold-Copper Project.
>
> In 2011, we intend to conduct exploration activities to provide information supporting the detailed engineering of the project. The program includes:
>
> - Approximately 59 test pits to inform detailed engineering of new tailings storage facility (TSF) and ore stockpile foundations;
> - 10 geophysical lines along the proposed main, west and south embankments of the TSF;
> - Approximately 8 geotechnical drill holes of approximately 50 to 75 m in depth to inform detailed engineering of the new TSF embankments;
> - Approximately 10 diamond drill holes of up to roughly 250 m in depth within the pit area to collect samples for confirmatory metallurgical work to be performed this winter; and,
> - Approximately 23.5 km of exploration trail required to access exploration sites.

[22] The letter went on to indicate that the total disturbance of the 2011 program was expected to be 13.1 ha, including 12 ha due to clearing timber and brush for exploration trails and geophysical lines. The timber volume was estimated at 1,048 m^3, most of which was attributed to trail clearing. Reclamation of the trails would be accomplished by pulling wood waste back over them to discourage recreational and ATV use, and breaks in the debris would be provided to allow for cattle and horse travel. It was expected that the work would begin August 1, 2011 and would require three months to complete.

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[23] On June 23, 2011, Ms. Bev Wassenaar, Land and Resource Specialist, Resource Authorizations, First Nation Consultation Coordination, Ministry of Forests, Lands and Natural Resource Operations, wrote to Chief Baptiste to advise of the notice of work application, attaching a copy. Ms. Wassenaar acknowledged that the proposed work was within an area of proven aboriginal rights, and advised that she would be the consultation contact for the NOW application, and the related occupant licence to cut. She went on to say:

> To support the consultation process for this distinct and separate exploration phase of the overall revised Project proposal, the province has begun to conduct an initial analysis of the potential impacts of this exploration on known Aboriginal rights and Aboriginal Interests of the Tsilhqot'in Nation in the area of the proposed work. In doing that the province has also proposed some preliminary mitigations in relation to the identified potential impacts from exploration.... The attached initial assessment of potential impacts to known Aboriginal Rights and Interests relates only to the specific activities presented in the NOW application and its related Occupant License to Cut and outlines draft mitigation options and proposed permit conditions for you to consider. Your contribution to the development and refinement of this draft table is being requested.

[24] Ms. Wassenaar went on to request comments in the next 30 days, and indicated a desire to set up a meeting with appropriate representatives from the province, Xeni Gwet'in and Taseko.

[25] A response to this letter came from counsel representing the petitioners addressed to the Minister of Forests, Lands and Natural Resource Operations and copied to Ms. Wassenaar. This letter outlined their opposition to the project as a whole, to the notice of work, and to any other steps being taken to further the development of the mine in an area of "profound cultural importance for the Tsilhqot'in people".

[26] The letter also raised particular objections to proceeding with the consideration of the notice of work at that time. This was said to be premature given that the Federal Government had yet to decide whether to proceed further in the regulatory process. Consequently, it was suggested,

- the NOW's extensive drilling and roadwork with its impact upon Tsilhqot'in established rights, culture and traditional use, should be avoided pending that decision;
- the Tsilhqot'in ought not to be put to the further effort and expense of dealing with the application until it was decided that the project would proceed to further stages of review; and
- the Tsilhqot'in were already involved in a federal consultation process, and had neither the manpower nor the economic resources to deal with a provincial consultation process that may prove to be unnecessary.

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[27] In this letter, and the exchanges of correspondence that succeeded it, three significant areas of disagreement emerged. The first was the issue of prematurity as just discussed. Ms. Wassenaar's response was that the relevant decision-makers were by statute required to consider applications such as this and to make decisions.

[28] The second was the assessment of both the required degree of consultation and the potential impact of the proposed NOW activities on proven aboriginal rights. Ms. Wassenaar assessed the former at the middle range, and the latter as low. The Tsilhqot'in position was that they were entitled to a deep level of consultation in the circumstances, and that the impact upon their aboriginal rights was high.

[29] This dispute arose in part from the third area: Ms. Wassenaar limited her assessment to the specific activities presented in the NOW and the OLC, contrary to the Tsilhqot'in position that the assessment should take into account the cumulative effect of this exploration program on top of previous programs, together with the potential impact of the full mining operation towards which this program was a step. Both positions find some support in the case law.

[30] On September 22, 2011, Ms. Wassenaar wrote to the Tsilhqot'in National Government:

> As stated, Statutory Decision-Makers are required to consider all relevant information provided to them including points you made requesting deferral of the NOW decision until after the CEAA (Canadian Environmental Assessment Agency) decision. In addition to the timing of the CEAA decision, the decision-maker will also need to balance factors such as the restrictive timing window Taseko Mines Limited (TML) will have with regard to their ability to be able to conduct exploration activity in the fall of 2011. As I indicated previously, my summary and recommendations on this will be provided to the decision makers September 29, 2011. A decision by each of the Statutory Decision-Makers will follow. The decision-makers can choose to approve or refuse to issue the authorizations based in part on the information included in my report. If the Decision-Maker concludes that further consultation or information is needed prior to making a decision, then these further steps would occur.

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[31] Ms. Wassenaar went on to reiterate an offer to meet, and advised that any additional comments received prior to September 29, 2011, would be reflected in her recommendations to the decision-makers.

[32] At 5:43 PM on September 29, 2011, Mr. J. P. Laplante, Mining, Oil and Gas Manager for the Tsilhqot'in National Government, sent an e-mail in response to Ms. Wassenaar's letter and a subsequent voicemail requesting a meeting. The e-mail reiterated its opposition to "the continued fragmentation and impacts to this sensitive area from the proposed exploration program", and confirmed the Tsilhqot'in's interest in meeting with the statutory decision-makers prior to any permits being issued. The position was restated that no permits should be issued until meaningful consultation and accommodation occurs, including a meeting with the Minister, and responses to various requests that were previously made.

[33] On September 29, 2011, the Inspector of Mines issued a *Mines Act*, R.S.B.C. 1996, c. 293, permit authorizing the activities detailed in the notice of work. The Tsilhqot'in were advised of this on October 4, 2011.

[34] On October 7, 2011, Chief Baptiste and other representatives of the Tsilhqot'in National Government and its bands met with Mike Pedersen, the Ministry of Forests decision-maker with respect to the Occupant Licence to Cut Timber. Mr. Pedersen had not yet rendered his decision. Mr. Pedersen had not reviewed the relevant documentation, in order to keep an open mind. As a result, he was unable

to answer questions concerning what support there was for the need to do some or all of the work at that time. He noted that his responsibility was limited to the cutting permit; the justification for the trails would be dealt with through the Ministry of Mines.

[35] The Occupant Licence to Cut Timber was approved and issued on October 12, 2011.

[36] On October 13, 2011, the Tsilhqot'in National Government wrote to Taseko concerning the proposed 2011 exploration program and the approval of the NOW application, stating:

> TNG has still not received any rationale for the decision. At this stage, TNG considers the authorization to be in breach of the Crown's duties of consultation, and an unjustified infringement of its aboriginal rights, and accordingly unconstitutional and unlawful. We advise you not commence any activities on the basis of such an authorization. We further advise that any reliance placed by [Taseko] on such an authorization is at the company's risk, as TNG is presently reviewing its options for response, including legal challenge.

[37] On November 7, 2011, the Canadian Environmental Assessment Agency issued its decision that the New Prosperity Project would be referred to a Review Panel for assessment. The project accordingly remained alive.

[38] The Ministry of Energy, Mines and Petroleum Resources' reasons for its September 29 decision approving the exploration program (the rationale referred to in the Tsilhqot'in letter of October 13) were set out in a letter dated October 10, 2011. On the evidence, however, that letter was signed on November 4, mailed on November 7, and reviewed at the Tsilhqot'in office following the long weekend on November 14, 2011, after the events on the ground that led to Taseko's application had begun to unfold.

[39] In the meantime, the petition for judicial review had been filed on November 10, 2011, and the petitioners' application for an interim injunction was filed on November 14, the same date as the filing of Taseko's Notice of Civil Claim.

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DISCUSSION

1. <u>The Petitioners' Application</u>

[40] I propose to assess the petitioners' application for an injunction first. This is because if they are entitled to the relief they seek, being an order restraining Taseko from proceeding with the program covered by the permits at issue in the application for judicial review, then the basis for Taseko's application arguably disappears. Conversely, if they are not entitled to injunctive relief, then Taseko's application could be considered in a more discrete context.

a. *The Test*

[41] In British Columbia, the test for interlocutory injunctions is the two-part test established in *A.G. British Columbia v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 345 (C.A.), aff'd [1991] 1 S.C.R. 62, and described in *Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.) at 101:

> The two-pronged test is this: "first, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction."

See also *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*, 2005 BCCA 5 and *Canadian Forest Products Inc. v. Sam*, 2011 BCSC 676.

[42] The threshold for the first part, whether there is a fair question to be tried, is relatively low and does not require the applicant to prove a strong *prima facie* case: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para. 49.

[43] Weighing the balance of convenience as required by the second part will, of course, include a consideration of irreparable harm, and the question of who will suffer the greater harm from the granting or refusal of the interlocutory injunction pending a determination on the merits: *RJR-MacDonald Inc.* at para. 62.

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b. *Is there a fair question to be tried?*

[44] The question to be tried is whether, in its conduct of the process that led to granting the NOW and OLC approvals, the Crown breached its duties of consultation owed to the Xeni Gwet'in and Tsilhqot'in Nation.

[45] That such duties were owed is beyond doubt. That the Crown in fact engaged in a process of consultation and accommodation is also beyond doubt. The question is whether it did so sufficiently in the circumstances.

[46] The petitioners point out that this is a case in which both the entitlement to aboriginal rights and the importance of the lands in question to the Xeni Gwet'in and Tsilhqot'in Nation have been established and recognized, through both the *Tsilhqot'in Nation* decision and the previous environmental assessment process. They argue that, in all of the circumstances, the scope of the duty required here was deep consultation, as discussed in *Haida Nation v. British Columbia (Ministry of Forests)*, [2004] 3 S.C.R. 511. They assert further that the Crown fell short of its consultation obligations in a number of ways including: rushing to approval without any need to do so and imposing arbitrary deadlines; limiting its consideration of potential impacts to the 2011 program in isolation from the cumulative impact of years of exploration work, and the future impact of a full mining operation; failing to consider cultural impacts including impact on the exercise of aboriginal rights, as opposed to the environment alone; carrying out its perceived duties of consultation on the basis of an erroneous assessment of the scope of those duties; failure to provide necessary information; and failure to provide timely notice of its reasons.

[47] The Crown and Taseko submit that even though the threshold for this test is low, the petitioners fail to cross it. They argue that the Crown was correct to focus on the effect of the work to be performed in this particular program, relying on *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650. They contend that given the limited nature of this work, the required scope of consultation fell at the lower end of the *Haida* spectrum. They assert that the permits, having validly issued, must be assumed lawful until proven otherwise,

relying on *Moulton Contracting Ltd. v. British Columbia*, 2011 BCCA 311, 20 B.C.L.R. (5th) 35. They maintain that the petitioners could have started their challenge much sooner, and, most importantly, failed in their own obligation to participate in the consultation process in a meaningful way. Instead, they held fast to their opposition to anything that might advance the mine, and waited until Taseko had vested rights before raising their challenge.

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[48] I am satisfied that the petitioners have established that there is a fair question to be tried. I am unable to conclude on the evidence before me (which was not the entire consultation record) that the Xeni Gwet'in and Tsilhqot'in Nation failed in their own consultation obligations, particularly given their limited resources and all with which they were having to contend. Moreover, this is not the place to determine whether the Crown's focus on the work to be performed was appropriate, as suggested in *Rio Tinto*, or whether the circumstances are such that *Rio Tinto* should be distinguished, as our Court of Appeal concluded was the case in *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247. Questions such as the appropriate focus, and the scope of consultation required, must be determined at the hearing of the petition for judicial review. For my part, I have no difficulty in concluding that the petitioners have established a serious case to be tried. The first part of the test, then, has been met.

c. *Does the balance of convenience favour an injunction?*

[49] Taseko and the Crown argue that the balance of convenience strongly favours the denial of the petitioners' application for injunctive relief, and, it follows, the granting of an injunction to Taseko.

[50] They point to a number of factors. These include the following submissions:

a) the status quo favours Taseko: it is the holder of permits which must be presumed valid until proven otherwise, and therefore is entitled to go about its lawful business;

b) preventing Taseko from going about its lawful business of itself constitutes irreparable harm;

c) delaying the process of gathering information for the environmental assessment constitutes irreparable harm to Taseko; time is an asset, and the redesign of the project, which would involve an additional expenditure of $300 million, is based on time-sensitive conditions;

d) even if the petitioners can successfully establish that the Crown had breached its duties of consultation, it does not follow that the permits would be quashed.

e) Taseko continues to incur ongoing expense as a result of the delay, and has lost the availability of expertise it had lined up but has been obliged to let go because of this proceeding;

f) there is no prospect of recovering any losses from the Xeni Gwet'in and Tsilhqot'in Nation, thereby once again giving rise to irreparable harm;

g) the petitioners have given no undertaking in damages, disentitling them to an injunction in the circumstances, or at least constituting a significant factor in weighing the balance of convenience;

h) the potential loss of the procedural right of consultation at the appropriate level that might flow from the failure to grant an injunction to the Xeni Gwet'in and Tsilhqot'in Nation does not in law constitute irreparable harm. That harm must arise in relation to their substantive rights;

i) the Xeni Gwet'in and Tsilhqot'in Nation have been unable to demonstrate satisfactorily any harm to their substantive rights (that is, their aboriginal rights) from this particular scope of work, and the

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ultimate development of the mine itself remains far too speculative to be taken into account;

j) the actual harm flowing from the permitted program is minimal, consisting of small drill holes and shallow test pits that will be refilled and recovered, the cutting of timber that is largely pine beetle kill, and the clearing of trails that will be subject to reclamation, all in an area that is no longer pristine, having been subjected to various mining related activities in the past;

k) it is in the public interest that Taseko have available to it all of the best information to submit to the environmental assessment process; and

l) having illegally prevented Taseko from exercising its lawful rights, the petitioners do not come to court with the clean hands required of a party seeking the equitable remedy of injunctive relief, and this should at least be taken into account in assessing the balance of convenience.

[51] I do not propose to deal with each of these points individually. Rather, I will endeavour to explain as best I can why, in my view, the balance of convenience favours the petitioners. I turn first to the question of delay.

[52] I think it clear on the evidence that Taseko indeed pursued its permits with dispatch. It began the application process before it even submitted the New Prosperity Project to the Canadian Environmental Assessment Agency, initially proposing to carry out the work between the beginning of August and the end of October, 2011.

[53] That target could not be achieved. The "timing window" referred to by Ms. Wassenaar in her letter of September 22, 2011, evaporated for reasons that had little to do with the petitioners, who remained mystified as to why there could not be a further delay at least to determine from the environmental assessment agency's pending decision whether there was any point to the exercise. Taseko never took

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the position that it wanted to proceed with the program regardless of whether the project would be accepted for environmental assessment. Yet no reason was ever given by either Taseko or the Crown for proceeding with the timetable the Crown imposed, other than the fact of Taseko's application

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[54] Taseko originally took the position that the Federal Government established a 12-month window for the environmental assessment process so that any delay irreparably harmed its ability to fulfill its obligations within that mandated time. On the evidence, however, this position proved to be incorrect; the 12-month period does not include the time it would take Taseko to respond to information requests, or the time that it would take Taseko to prepare and submit its environmental impact studies.

[55] Taseko then took the position that time is still an asset, and as it is in the business of developing mines, delay in this process constitutes irreparable harm. Yet Taseko has pointed to its efforts over 20 years to bring the Prosperity Project to fruition. One wonders how irreparable a few more months would be? Its new project is based upon long-term forecasts, not short-term market fluctuations. That does not mean that delay is not harmful, and I accept that delay is contrary to Taseko's interests. What does follow is that the delay weighs less heavily in the balance.

[56] I next turn to the question of what harm alleged by the petitioners is relevant. Taseko and the Crown rely on *Sunshine Logging (2004) Ltd. v. Prior*, 2011 BCSC 1044, for the proposition that "the loss of the constitutional right ... to be consulted does not itself amount to irreparable harm" (para.30). Mr. Justice Willcock went on, however, to reflect at paragraph 34 that "it ought not to be said that irreparable harm arises in every case where there is a failure to consult". What he makes clear in paragraph 32 is that while a failure to consult need not without more signify irreparable harm, it nevertheless remains to be weighed in determining the balance of convenience.

[57] In my view, it follows from that case and many others that in weighing the balance of convenience, it is proper to take into account the fact that if the injunction does not issue, the petitioners will have lost their asserted right to be consulted at a deep level in relation to the exploration program, and their petition will become moot. Granting the injunction, on the other hand, will not deprive Taseko of the opportunity to obtain the geological and engineering information it requires, except to the extent that their proposed program is properly curtailed by the process of appropriate consultation. If the petitioners are ultimately unsuccessful, and the permits upheld, then Taseko will be behind by a few months, but in the overall scheme of its billion-dollar project , I consider that to be a real but relatively minor inconvenience.

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[58] Like Dillon J. in the *Canada Forest Products* case at para. 75, I consider the words of MacPherson J.A. in *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534, to be apropos the issue we are considering here:

> [46] Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.
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> ...
>
> [48] Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations: see Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56 U.T. Fac. L. Rev. 101.

[59] This leads me to the public interest aspect of the balance of convenience. I fully accept Taseko's submission that it is in the public interest for Taseko to obtain the best available information for the purpose of informing the environmental assessment process. I do not, however, see that interest as being significantly at risk should the petitioners obtain their injunction, for the reasons just discussed.

[60] On the other hand, it is also very much in the public interest to ensure that, in circumstances such as these, reconciliation of the competing interests is achieved through the only process available, being appropriate consultation and accommodation. Those duties, of course, attach to the Crown. Nevertheless, from the perspective of Taseko, that process is a cost and condition of doing business mandated by the historical and constitutional imperatives that are at once the glory and the burden of our nation. Only by upholding the process can reconciliation be promoted; without reconciliation, nothing is accomplished. This interest, in my view, is at risk should the injunction be denied, and weighs heavily in the balance of convenience.

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[61] I observe that the importance of that interest in this case is magnified by the reality that the petitioners and Taseko will be involved for the foreseeable future in an ongoing relationship with the Crown in the middle. In these circumstances, it seems to me that the public interest in ensuring that the process of consultation and accommodation is set on a proper footing is particularly high.

[62] I turn next to the question of actual damage. Beside the fact of delay, Taseko points to the expense to which it has been put in marshalling its contractors and equipment only to have to release them all, without any assurance of ongoing availability, when its access to the work area was denied. We are speaking of thousands, and perhaps tens of thousands of dollars, and I accept that there is little chance of recovering such losses from the petitioners should the petition for judicial review ultimately fail. I further accept that this constitutes irreparable harm. At the same time, it must be viewed in the context of the hundreds of millions of dollars that Taseko is prepared to spend on this project, and by my comments above as to the cost of doing business. Moreover, there is no evidence here of widespread unemployment or damage to the community that would result from the injunction as there was in cases such as *Lax Kw'alaams Indian Band v. British Columbia (Minister of Forests)*, 2004 BCCA 392.

[63] Turning to the potential effect of the program on the aboriginal rights of the petitioners, I bear in mind that the result of a successful challenge by the petitioners is on balance unlikely to eliminate the work altogether, though it may reduce it or effect an improved program of mitigation, or both.

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[64] Taseko submits that much of the harm asserted by the petitioners overstates the actual impact the work will have:

> [61] ...The area in which the work under the Approvals will be conducted is not the pristine environment contemplated in some cases in which interlocutory injunctions have been granted. The work is in an area which is already had various mining related activities take place, and some of the current work is in the same location as previous works.

[65] It seems to me, with respect, that this highlights one of the significant problems raised by the petitioners. Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.

[66] The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished. This is supported by the evidence of Chief Baptiste, Alice William and Sonny Lulua.

[67] In my view, this not only establishes significant irreparable harm to the petitioners' substantive rights, but also emphasizes again the importance of the process discussed above. It also speaks to the *status quo*.

[68] Next, I consider the point that the petitioners are unable to offer any undertaking as to damages. They request relief from the requirement of Rule 10-4(5) of the *Supreme Court Civil Rules*, which provides:

> (5) Unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages.

[69] That relief is to be provided only under special circumstances, which circumstances include the strength of the respective cases and the balance of convenience: *Delta Municipality v. Nationwide Auctions Inc.* (1979), 100 D.L.R. (3d) 272, [1979] 4 W.W.R. 49 (B.C.S.C.). There is no general exemption to the obligation for aboriginal litigants asserting aboriginal rights and title: *Siska Indian Band v. British Columbia (Minister of Forests)* (1998), 62 B.C.L.R. (3d) 133 (S.C.); *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 345.

[70] I conclude that the circumstances of this case justify an order relieving the petitioners of the obligation to give an undertaking as to damages. Those circumstances are: my assessment of the balance of convenience as outlined above; the importance of ensuring that matters proceed on an appropriate basis between these parties for the foreseeable future; and the relative economic strength of the parties and the relative harm each is likely to suffer. I also take into account the petitioners' letter to Taseko of October 13, 2011, in which they notified Taseko of their position, and advised Taseko not commence any activities under the permits while the Tsilhqot'in National Government considered its options for response.

[71] Finally, I turn to the question of whether the conduct of Chief Baptiste and others in effectively blocking Taseko from exercising its rights under the permits in question should disentitle the petitioners from injunctive relief, or otherwise weigh into the balance of convenience.

[72] The conduct in question is not irrelevant, but on the state of the evidence, I question whether it is appropriate to conclude that the Xeni Gwet'in and the Tsilhqot'in Nation have come to court with unclean hands because of the unlawful action of Chief Baptiste and those who assisted her. In my view, this conduct is more properly to be taken into account in considering Taseko's application, which I do below.

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[73] Taking all these matters into consideration, I conclude that petitioners will suffer greater harm from the refusal of the injunction then will Taseko from the granting of it. Accordingly, the balance of convenience weighs in favour of granting the injunction requested by the petitioners.

d. *Conclusion*

[74] The petitioners have satisfied the test for an interim injunction, and the order will go subject to terms that I will discuss with counsel. The costs of the petitioners' application for an interim injunction will be at the discretion of the judge who hears the judicial review application.

2. <u>Taseko's Application</u>

[75] Given that Taseko is to be enjoined, for the time being, from proceeding with the exploration program that is covered by the two permits that are at issue, I am unable to see any need for injunctive relief for Taseko.

[76] Taseko submitted that it has other reasons for going into the area in question in the ordinary course of its business, and therefore should be protected from any further interference. Taseko has been exercising its rights under its permits, claims and lease over many years. Never before has it encountered difficulty of the sort it encountered here. The evidence does not establish any risk that Taseko will again be impeded in the circumstances that now exist. I therefore see no basis to support the granting of injunctive relief to Taseko at this time. Taseko will of course have leave to renew its application should events justify it doing so.

[77] I am also mindful of the fact that Taseko has acted lawfully throughout and ought not to have been put in a position where it had to seek the injunctive relief set out in its application. In the circumstances, because of the unlawful conduct of Chief Baptiste and the other defendants to Taseko's action, I exercise my discretion in relation to costs to award Taseko the costs of its application payable forthwith in any event of the cause of either proceeding. The hearing of these applications took

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3½ days. I would attribute 1½ days to Taseko's application, and the other 2 days to the petitioners' application.

3. <u>Terms</u>

[78] I will now hear from counsel as to appropriate terms for the interim injunction awarded to the petitioners.

[DISCUSSION WITH COUNSEL]

[79] The terms the order in Victoria Action No. 114556 will be these:

- Taseko Mines Limited and its agents, employees and contractors, are hereby enjoined from undertaking any of the activities authorized by the permit granted by the Inspector of Mines on September 29, 2011, pursuant to Taseko's Notice of Work application, and/or the Occupant Licence to Cut permit granted on October 12, 2011;

- This order will remain in effect for 90 days from the date hereof unless extended upon application by the petitioners upon notice to the respondents, and in any event for no longer than is required for the petitioners' application for judicial review to be heard and determined;

- Upon any application to extend the term of this order beyond 90 days, the petitioners will be required to establish that they are proceeding with the petition in a timely manner and in good faith, but will not otherwise have to re-establish their entitlement to an injunction as outlined in these reasons;

- The Victoria Registry of this Court is directed to schedule the hearing of this petition to take place within 90 days or as soon thereafter as is practicable.

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[80] Finally, as discussed, the parties are encouraged to re-engage in consultation immediately with a view to resolving the differences and competing interests that have been so capably articulated over the last week.

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"GRAUER, J."