

# **Taku River Tlingits v. Redfern**

(Taku River Tlingit First Nation v. Ringstad et al)

## **BC Court of Appeal**

### **Reasons for Judgment - Memo**

**To:** TRTFN  
**From:** Pape & Salter  
**Date:** 2/5/2002  
**Re:** Summary of the Reasons for Judgment of the Court of Appeal for British Columbia - appeal by the BC Government and Redfern against the lower court's decision to set aside the Project Approval Certificate for the Tulsequah Chief Mine and road

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#### **TAKU RIVER TLINGITS VICTORIOUS AGAIN!!!**

On January 31<sup>st</sup> 2002 the reasons for judgment of the Court of Appeal for British Columbia were handed down. This is another wonderful victory for the Taku River Tlingits. It affirms the decision of the Supreme Court of British Columbia that set aside the Project Approval Certificate granted to Redfern. It also fully supports one of the major arguments that the Taku River Tlingits put forward – that the government has fiduciary duties towards Aboriginal people when it is making decisions that will affect their way of life or Aboriginal rights.

This decision finally puts an end to the position put forward by the BC Government against First Nations – that the government has no legal obligations until there is a court decision declaring the existence of Aboriginal rights.

#### **A Brief History**

##### **The Environmental Assessment**

Under the BC Environmental Assessment Act ("EAA"), Redfern had to get a Project Approval Certificate before Redfern could proceed with the construction of the Tulsequah Chief mine and road. After a process that lasted almost 3 1/2 years, on

March 19<sup>th</sup> 1998, the BC Ministers granted Redfern a Project Approval Certificate. The environmental assessment process was long because many complex issues had to be examined for the first time. Reports had to be developed and a great deal of evidence had to be gathered. The Taku River Tlingits participated fully throughout the environmental assessment process. But before the reports about impacts to the Taku River Tlingit way of life could be analyzed, the BC government stopped the process and issued the Project Approval Certificate.

### **The BC Supreme Court**

The Taku River Tlingits challenged the decision of the Ministers to issue a Project Approval Certificate for the Tulsequah Chief Mine. The basic issue before the court was the proposal to build a 160 km road from Atlin to the mine site on the Taku River. This road would open up the heartland of the Tlingit territory for the first time and threatened the sustainability of the land-based economic, social and cultural system on which the Taku River Tlingits collectively rely as an Aboriginal people. The Taku River Tlingit concerns were expressed in terms of their sustainability as a people, interference with their Aboriginal rights, including their Aboriginal title and harvesting rights, and the probability that the Project would compromise their treaty negotiations.

The BC Supreme Court took note of the large body of evidence and expert reports filed in the environmental assessment process. All of these supported the concerns of the Taku River Tlingits. The Respondents in the hearing (BC government and Redfern) never brought forward any evidence that challenged the Taku River Tlingits concerns. As a result the judge addressed the issues raised by the Taku River Tlingits in the context that those Taku River Tlingits concerns were not in dispute.

In the end, Judge Kirkpatrick concluded that the Ministers' decision was unreasonable and illegal because the evidence so clearly showed that the Ministers had not taken into account the effect of the mine and road on the sustainability of the Taku River Tlingits.

On June 28<sup>th</sup> 2000, Judge Kirkpatrick set aside the Project Approval Certificate and sent the whole matter back to the Ministers. The judge ordered the Ministers to reconsider the decision to issue the Project Approval Certificate after a revised project report had been prepared that meaningfully addressed the Taku River Tlingit concerns.

### **The Reconsideration Process**

The reconsideration process was commenced. The re-established Project Committee been working steadily and still has not completed the work Judge Kirkpatrick mandated them to do. All during this time Redfern has not been allowed to proceed with construction of the mine or the road.

### **The Court of Appeal**

At a hearing of the Court of Appeal there is usually a panel of 3 judges. In this case the judges were Madam Justice Southin, Madam Justice Huddart and Madam Justice Rowles. The judgment is a split decision – two judges were for the Taku River Tlingits, while one judge was against the Taku River Tlingits. Despite the split decision, the judgment of the court is the decision of the two judges who wrote in favor of the Taku River Tlingits.

### **What the Decision Says**

"The central issue on this appeal is whether the chambers judge erred when holding that the Ministers of the Crown were obliged to take into account the constitutional protection afforded Aboriginal rights by s. 35(1) of the Constitution Act, 1982 when deciding whether to issue the Project Approval Certificate prior to the Taku River Tlingits having established any aboriginal rights or title in relation to the area which would be affected by the Tulsequah Chief Mine Project." [para 107]

#### **(1) Aboriginal rights cannot be infringed by activities authorized by the BC Government**

The court stated clearly that the BC government and Redfern were wrong in their argument that the government could authorize activities that could infringe Aboriginal rights. The court said that the activities of the Province that might infringe Aboriginal rights and title are limited by the constitutional provisions with respect to the division of powers and specifically s. 91(24) in the Constitution Act, 1867. Section 91(24) allocates to the federal government the jurisdiction for "Indians and Lands reserved for the Indians". This limits the power of the province to infringe Aboriginal rights and title. [para 151]

#### **(2) The BC Government does owe fiduciary and constitutional duties before there is a court declaration of an Aboriginal right**

The court said that the BC government and Redfern have misinterpreted the decisions of the Supreme Court of Canada since Sparrow. There is a constitutional and fiduciary duty on the BC government even before there is a court declaration of an Aboriginal right.

The court noted that the Constitution Act, 1982 says that Aboriginal rights are "hereby recognized and affirmed" and that this is supposed to protect Aboriginal rights from provincial actions. The reason for the recognition and affirmation in the constitution is not to create Aboriginal rights because these were in existence already under the common law. They also noted that Aboriginal rights can only be regulated or infringed if the government meets the justification test in Sparrow. In the end the court said that the BC government and Redfern's argument that they have no obligation until there is a court finding, was "wholly inconsistent" with the previous decisions of the Supreme Court of Canada.

The Court of Appeal said that the Ministers had to be "mindful of the possibility that their decision might infringe Aboriginal rights" and therefore had to be careful to ensure that the substance of the Taku River Tlingits concerns had been addressed. [para 193]

**In my opinion, nothing ... provides any support for the proposition that Aboriginal rights or title must be established**

in court proceedings before the Crown's duty or obligation to consult arises. [para 171]

To accept the Crown's proposition ... would have the effect of robbing s. 35(1) of much of its constitutional significance. [para 173]

[the Crown's proposition] ... would effectively end any prospect of meaningful negotiation or settlement of Aboriginal land claims. [para 174]

### **(3) The Tlingits can assert Aboriginal rights in a judicial review**

Remember that this case began as a judicial review of the Ministers' decision to grant the Project Approval Certificate. Judicial reviews are based on affidavit evidence. There are no witnesses and the procedure is not the same as a full trial.

The Taku River Tlingits sought to prove their Aboriginal rights by way of affidavit evidence in the judicial review. Judge Kirkpatrick said that proof of Aboriginal rights was too complex for a judicial review and that the proof of those issues would have to go to a full trial. Nevertheless, Judge Kirkpatrick said that the Taku River Tlingits had asserted their rights all along, and therefore the government had the obligation to meaningfully consider them and address the related concerns about Redfern's project.

The Court of Appeal agreed and said that the BC government has both constitutional and fiduciary obligations to address Taku River Tlingit concerns before their Aboriginal rights have been proved in a full trial. The Court of Appeal said that this is particularly so in a case like this, where it is so clear that the way of life and some Aboriginal rights will be affected. In fact, the land use practices and reliance on the land to sustain the Taku River Tlingit was not the subject of any contradictory evidence put forward by the BC government or Redfern. The court was very clear that the Tlingit concerns had not been met or accommodated prior to the issuance of the Project Approval Certificate. The Court of Appeal went so far as to say that if Judge Kirkpatrick had failed to consider the asserted Aboriginal rights, that would have resulted in a serious injustice to the Taku River Tlingits. [para 198]

### **(4) More than consultation is required**

Finally, the Court of Appeal noted that consultation alone does not necessarily satisfy the Crown's constitutional and fiduciary obligations. The majority took note of the fact that the Taku River Tlingits were willing to participate in the environmental review process in an apparent effort to have their needs accommodated. In the end the project was approved without those concerns having been met.

The fact that the Taku River Tlingits were prepared to participate in the process can neither deprive them of the constitutional protection given to Aboriginal rights under s. 35(1) of the Constitution Act, 1982, nor alter the division of

powers between the federal and provincial governments under the Constitution Act, 1867.

### **Next Steps**

The judge ordered the Ministers to reconsider the decision to issue the Project Approval Certificate after "bearing in mind these reasons for judgment ... and the decisions of the Supreme Court of Canada concerning the Crown's constitutional and fiduciary obligations to Aboriginal people in relation to matters that may affect their Aboriginal rights."

The re-established Project Committee and the renewed environmental review process appear to have been ended by this decision.

The BC government and Redfern have 60 days to ask permission to appeal this decision to the Supreme Court of Canada – to April 1<sup>st</sup> 2002.