

**Taku River Tlingit First Nation v. Tulsequah Chief
Mine Project**

[2002] C.C.S. No. 8743

[2002] B.C.J. No. 155

2002 BCCA 59

Vancouver Registry Nos. CA027488, CA027500

**British Columbia Court of Appeal
Southin, Rowles and Huddart JJ.A.**

January 31, 2002

(208 paras.)

Indians, Inuit and Metis — Aboriginal rights — Infringement — Lands — Protection of Indian lands — Application of provincial laws — Pollution control — Environmental legislation, interpretation — Constitutional law — Federal jurisdiction — Indians and lands reserved for Indians — Administrative law — Judicial review — Governmental action.

Appeal by Redfern Resources Ltd., the Minister of Energy, Mines and Petroleum Resources, and the Minister of Environment, Lands and Parks from an order quashing a Project Approval Certificate issued under the Environmental Assessment Act. Redfern proposed to reopen the Tulsequah Chief Mine. As a consequence, it proposed to build an access road to the mine. The road would have traversed a portion of the traditional territory of the respondent Taku River Tlingit First Nation. The area was not covered by a treaty, but was the subject of treaty negotiations between the Tlingits and the governments of Canada and British Columbia. The Ministers of the Provincial Crown issued a Project Approval Certificate to Redfern. The Tlingits applied for judicial review, and stated nine grounds for the relief claimed. The appellants succeeded in having some of the grounds severed on the basis that they raised complex issues of fact and law which were not suitable for summary determination. The application for judicial review was allowed. The chambers judge determined that the Ministers should have been mindful of the possibility that their decision might infringe aboriginal rights. The Project Approval Certificate was quashed. The chambers judge directed that the matter be referred back to the Ministers for reconsideration after a revised project committee report, meaningfully addressing the Tlingits' concerns, had been delivered to the Ministers. The appellants argued that aboriginal rights may be infringed by Crown-sanctioned activities, that in the absence of establishing aboriginal rights or title, the Crown did not owe the Tlingits any constitutional or fiduciary duty of consultation, and that the chambers judge ought not to have considered the severed aboriginal rights issues.

HELD: Appeal dismissed. The propositions that there was no duty of consultation and that aboriginal rights could be infringed by Crown-sanctioned activities were based on misinterpretations of various cases from the Supreme Court of Canada. A serious injustice to the Tlingits might have resulted if the chambers judge had not considered aboriginal rights issues. The undisputed facts provided an ample foundation for the analysis leading to the

conclusion that the Ministers should have been mindful of aboriginal rights. The decision of the Ministers had to reflect both the division of powers and the Crown's fiduciary obligations to aboriginals. The order remitting the matter to a project committee was set aside, and the matter was simply remitted to the Ministers for reconsideration.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 52(11)(d).

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 24(2), 33.

Constitution Act, 1867, ss. 91(24), 92, 92A.

Constitution Act, 1982, s. 35.

Environmental Assessment Act, R.S.B.C. 1996, c. 119, ss. 2, 9, 9(2)(c), 10, 16, 21, 22, 23, 24, 26, 29, 30, 30(1)(b) (i), 68, 69, 70, 80, 82, 93(3), 93(4), 93(5).

Finance (1909-1910) Act, 1910 (10 Edw. 7, c. 8).

Fisheries Act.

Indian Act, R.S.C. 1985, c. I-5.

Judicial Review Procedure Act, S.B.C. 1976, c. 25.

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, ss. 2(2), 5, 16(1).

Mine Development Assessment Act, S.B.C. 1990, c. 55.

QL Update: 20020527

d/qljxb