



Taku River Tlingit First Nation Goes to the Supreme Court of Canada

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BC takes the Taku River Tlingits to the Supreme Court



On March 24th and 25th 2004 the Supreme Court of Canada will hear the Tlingit case against BC and Redfern. The Taku River Tlingits have waited many years for this case to be finally resolved and welcome the chance to present these important issues at the highest Court in Canada.

The Tlingits have been successful at both the BC Supreme Court and at the Court of Appeal. Both Courts have said, in the strongest possible language, that the Tlingit economy, way of life, and culture are to be protected and respected by the BC government. Both Courts have told BC that it has obligations to the Tlingits and that its approval of Redfern's project was illegal because Tlingit concerns were not addressed. Both Courts have said that the Tlingits don't have to prove their rights in Court before BC has obligations to protect their lands and resources.

Now the Supreme Court of Canada will decide whether they agree.

What will Happen at the Supreme Court

The Supreme Court of Canada is in Ottawa, Ontario. It is a large old stone building on the banks of the Ottawa River in downtown Ottawa, just down the street from the House of Parliament.

The hearing begins at 9:30 in the morning and will continue for two full days. The courtroom will be full of dozens of lawyers from all parts of Canada. Many provinces have intervened in the case and will be allowed to speak to the Court. Other interveners include the Summit of First Nations, the Union of BC Indian Chiefs and many business organizations.

The lawyers for the Tlingits will have exactly one hour to speak to the Court.

The Court has decided to hear the Tlingit case at the same time as the Haida case. This is because the major constitutional issues are similar in both cases.

The Taku River Tlingits are sending a delegation to Ottawa to be present at the oral hearing.

It usually takes the Court 6-7 months to come out with its decision. So we can expect the answer some time in the fall – likely in September or October.



A Brief History of the Case

The Environmental Assessment

Under the BC *Environmental Assessment Act* ("EAA"), Redfern had to get a Project Approval Certificate before it could proceed with the construction of the Tulsequah Chief Mine and road. On March 19th 1998, after a process that lasted almost 3 1/2 years, BC 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 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 28th 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 was not allowed to proceed with construction of the mine or the road.

Quotes from the BC Supreme Court

"The respondents argue that s. 35 of the Constitution Act, 1982 is not engaged until such time as the Tlingits have established the aboriginal rights and title they say would be unjustifiably infringed by the Project.

... The limited extent of the Crown's duty urged by the respondents is, in my view, excessively rigid and confining, especially when considered in light of the Crown's duty to negotiate as defined in Delgamuukw."

*- Kirkpatrick J.
(par. 125-126)*



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 was a split decision – two judges were for the Taku River Tlingits, while one judge was against. Despite the split decision, the judgment of the court is the decision of the two judges (the majority) who wrote in favor of the Taku River Tlingits.

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.

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.

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 and this was exactly what was wrong.

The 2nd Project Approval Certificate

On December 12th 2002, BC issued another Project Approval Certificate to Refern. This 2nd Certificate is virtually identical to the original Certificate. No changes were made to the project that accommodated the Tlingit concerns. This time, though, the Certificate was accompanied by lengthy reasons justifying the Ministers’ decision.

On February 4th 2003, the Tlingits wrote to the Ministers and objected to the issuing of the 2nd Certificate. The letter stated that BC had not met its fiduciary obligations to the Tlingits and that, in the Tlingits’ opinion, the Certificate was unlawful.

Quotes from the Court of Appeal

“The central issue on this appeal is whether ... 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 ... 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.”
- Court of Appeal
[par. 107]

“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.”
- Court of Appeal
[par. 171]

“To accept the Crown’s proposition ... would have the effect of robbing s. 35(1) of much of its constitutional significance.”
- Court of Appeal
[par. 173]

[the Crown’s proposition] “would effectively end any prospect of meaningful negotiation or settlement of Aboriginal land claims.”
- Court of Appeal
- [par. 174]



Amendments to the BC Environmental Assessment Act

On December 30th, 2002, BC amended the BC *Environmental Assessment Act*. The previous Act contained specific provisions that set out a statutory obligation to consult with First Nations where projects were to be undertaken. Under the new Act, environmental decisions are at the discretion of the Minister. All statutory obligations to consult with First Nation are deleted.

Federal Environmental Review Process

The original environmental review process was a joint process in which the federal and provincial governments participated. In June of 2002, the Federal Department of Fisheries and Oceans separated its screening process under the *Canadian Environmental Assessment Act* (CEAA), from the provincial process and is now proceeding separately. A list of requirements has been given to Redfern, which it must satisfy prior to being approved by the Federal government. To date, Redfern has not responded to those requirements and so, while it has provincial approval for the project, it does not have the necessary federal approval. Without that federal approval under CEAA, the Project cannot proceed.

Frequently Asked Questions (FAQs)

Why are the Tlingits in court? Why not just negotiate with Redfern and the Province?

Redfern and the Province have made it very clear - they do not believe they have any obligation to meaningfully address Tlingit concerns in any decisions they make. The TRT began the judicial review of the 1st Project Approval Certificate to force both Redfern and BC to address Tlingit interests, rights and concerns. Every action of Redfern and BC since this project began shows that they will act in the best interests of everyone else, but they will not act in the best interests of the Tlingits. The evidence showed clearly that the road will damage the Tlingit land-based economy within 5 years and that any benefits from the project will be small and short term. The Province has denied its obligations to the Tlingits since day one. In fact, they have acted in defiance of the Court of Appeal decision by issuing the same Certificate again to Redfern. In light of this persistent denial, there is little point in negotiating. **Remember the TRT has been winning at all levels of court** – any negotiation attempt at this point would be for less than can likely be won at court.

What happens if the Tlingits lose? Will that affect Tlingit's Aboriginal rights and title?

No. Win or lose, **the Aboriginal rights and title of the Tlingits are not before this court.** There will be no finding that determines whether or not those exist. So, the Tlingits Aboriginal rights and title are not at risk by going to the Supreme Court of Canada.

If the Tlingits win, will Redfern still build the mine and the road?

The mine and the road could then only be constructed in a way that does not damage the TRT. The Province and Redfern would have to work with the Tlingits and only build when satisfied that it can be done in a way that is in the Tlingits' best interests. If it cannot be built that way, it cannot be done.

Will the TRT win?

There are no guarantees anywhere in life – this is especially so at court. However, the TRT goes to the highest court in Canada with the best possible case. The Tlingits have won at both levels of court so far. Remember too that the Supreme Court of Canada has already made many judgments that have found in favor of Aboriginal peoples and they have always reminded government that it has obligations it must fulfill.



Will this court case affect the Tlingit treaty negotiations?

The Tlingits have argued at all levels of court that the road Redfern wants to build will negatively affect Tlingit treaty negotiations. A big part of any treaty negotiation is to gain control over lands and resources. Government decisions that authorize mining and forestry leases or the construction of new roads give away Aboriginal lands and resources without their participation or consent. *One of the big reasons the Tlingits went to court was to preserve Tlingit lands and resources for the treaty negotiations.* So, if TRT wins at court they can go back to the treaty table with new authority to assert Tlingit Aboriginal rights and title.

Why are the Tlingits so concerned about the road anyway?

The road goes right through the Tlingit's most sacred places and main harvesting areas. Roads are known to have long term affects on fish and wildlife. This is because they bring in many new harvesters – some will be from Whitehorse but others will come from places far away. Because of this, the experts say that the caribou and moose in and around Atlin, and in the primary Tlingit harvesting areas, will be mostly gone within 5 years after the road goes through. The road will also act as a magnet for other development – forestry and other mining. While others – multinational corporations – may benefit from the road, it seems likely that the Tlingits will benefit very little, if at all. Jobs will go to outsiders, local businesses will benefit only short-term, and spin-off industries will not likely come to Atlin. The Tlingits will however, be left with the environmental results, fewer fish and wildlife, and no say in how the lands and resources will be developed. This is why the TRT is so concerned about the road. It seems harmless, but it brings big change without Tlingit input.

What is the Haida case? Why is Haida being heard at the same time?

Both the Tlingit and the Haida cases deal with the same big issue – what is the obligation of the Crown (and corporations) to Aboriginal people prior to an Aboriginal right being determined by the courts. The Crown says its obligations to Aboriginal people are the same as to everyone else and that it has no special constitutional or fiduciary duties until a Court finds that an Aboriginal right exists. Both the Tlingits and the Haida say the Crown is wrong. In both cases, the BC Court of Appeal said the Crown was wrong too. So, because the big issues are the same, the Supreme Court of Canada put the cases together for the hearing.

Are other First Nations supporting the TRT at the Supreme Court of Canada?

Yes, the First Nation Summit, the Union of BC Indian Chiefs and the Doig River First Nation have all intervened in support of our case.

Who is against the TRT?

The governments of Canada, BC, Quebec, Alberta and the Business Council of BC. The Business Council of BC includes the BC Chamber of Commerce, the BC and Yukon Chamber of Mines, the Mining Association of BC, and the Council of forest Industries.

Will the TRT case affect other First Nations? If so, how?

Yes. *The issue of whether the government has obligations to Aboriginal people prior to a court finding is a very important issue and will affect all Aboriginal people in Canada.* If the government has no obligations, then all Aboriginal people in Canada will have to go to court to establish their rights. The TRT doesn't believe that anyone can afford this enormous litigation agenda. The Tlingits also believe it is wrong in law. Aboriginal peoples have rights and title that are recognized and affirmed in s. 35 of the *Constitution Act, 1982*. That has to mean something – even without a court finding.



BC issued Redfern a 2nd Certificate even after the Court of Appeal? What is happening with that?

Redfern is saying that this case has no effect on their Project Approval Certificate. They say they are proceeding with the project. However, Redfern does not have approval from the federal process (CEAA). They cannot do any real work until the CEAA process is completed. However, even without CEAA approval, the BC Court of Appeal said that Redfern and BC are wrong. The courts say Redfern and BC have to meaningfully consider and deal with Tlingit interests that stand to be negatively affected by the project. Issuing a 2nd Certificate that is virtually identical to the first – without consultation with TRT and without changing anything to look after TRT interests cannot be right.

What has happened to the CEAA process?

The federal environmental assessment process under the federal act - CEAA - is continuing. The federal government separated its process from the provincial one. Since then, the federal government has issued a lengthy list of requests to Redfern. To date Redfern has not responded. The CEAA officials have told TRT that they will be invited to participate in the review of Redfern's response.

After the Supreme Court of Canada decision, what will TRT do about the 2nd Certificate issued to Redfern?

The case before the Supreme Court is about the 1st Project Approval Certificate. After the Supreme Court hands down its decision (likely in the fall of 2004), the TRT will be in a position to make a decision about what to do legally about the 2nd Certificate.

About this Guide

This plain language guide to the Tlingits' case at the Supreme Court of Canada has been prepared by the law firm of Pape & Salter. It is not intended as a statement of the legal positions of the Tlingits and should not be used in place of legal advice. This guide is intended only to set out the issues that confront the Taku River Tlingits at this important time. The Guide attempts to anticipate questions and to reflect the ongoing discussions in the TRT community.

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