

JOINT FEDERAL/PROVINCIAL ENVIRONMENTAL ASSESSMENT REVIEW

NORTHGATE'S KEMESS NORTH MINE PROJECT

OUTLINE OF MOTION

on behalf of the

GITXSAN HOUSE OF NII KYAP

27 November 2006

TABLE OF CONTENTS

1. Introduction	1
2. Relief Requested.....	1
3. Outline of the Argument in Support of the Relief Requested	1
(a) The Panel's mandate requires it to consider the interests of First Nations in relation to this Project, but the record on these interests is inadequate.....	2
(b) The consultation process with the Crown has not been defined nor implemented	3
(i) <i>Provincial perspective on consultation</i>	3
(ii) <i>Federal perspective on consultation</i>	4
(c) The government agencies who are providing important recommendations and preliminary determinations to the Panel have not taken First Nations interests into account	5
(d) The Gitxsan have been improperly excluded from the consultation process.....	9
4. Concluding Remarks.....	10
APPENDIX 1	11
LIST OF AUTHORITIES	13

1. INTRODUCTION

On 21 October 2006, the Joint Review Panel ("Panel") requested that the Gitxsan House of Nii Kyap ("Gitxsan") file a brief written summary of the Gitxsan's request that the hearing be suspended. This submission outlines the Gitxsan's request and reasons in support of that request. We will elaborate at the oral hearing on 29 October 2006.

2. RELIEF REQUESTED

The Gitxsan hereby request that the Panel:

- (a) suspend the hearing until the following conditions are satisfied:
 - (i) The federal and provincial agencies have consulted with the Gitxsan and other affected First Nations on the preliminary determinations that are being presented in the Environmental Impact Assessment Review ("EIA Review").
 - (ii) The Gitxsan are provided with adequate funding and time to engage expertise to assist the Gitxsan in such consultations and the preparation of their submissions to the government agencies and the Panel on the issues being reviewed in the EIA Review.
- (b) ask the Government of Canada as represented by Minister of Environment and the Province of British Columbia as represented by the Minister of Sustainable Resource Management to extend the timeline for the hearing and for filing the Panel's Report to Ministers to accommodate the suspension of the hearing in (a).

3. OUTLINE OF THE ARGUMENT IN SUPPORT OF THE RELIEF REQUESTED

The Gitxsan submit that this review must be suspended because the Panel will not be able to properly discharge its mandate in the current circumstances, for the following reasons:

- (a) The Panel's mandate requires it to consider the interests of First Nations in relation to this Project, but the record on these interests is inadequate.

- (b) The consultation process with the Crown has not been adequately defined nor implemented, so consultation with First Nations on the substantive issues being reviewed by the Panel has not occurred.
 - (c) The government agencies who are providing important recommendations and preliminary determinations to the Panel have not taken First Nations interests into account.
 - (d) The Gitksan have been improperly excluded from the consultation process and do not have the resources and opportunity to participate effectively in the EIA Review.
- (a) The Panel's mandate requires it to consider the interests of First Nations in relation to this Project, but the record on these interests is inadequate**

The Gitksan understand and accept that the Panel does not have the mandate to determine aboriginal rights in the vicinity of the Project or the adequacy of Crown consultations with First Nations in relation to those rights. The Gitksan's requested relief focuses solely on the Panel's mandate in assessing the Project effects on First Nations interests in relation to the EIA Review.

The Panel's mandate is set out under the *Agreement Concerning the Establishment of a Joint Review Panel for the Kemess North Copper-Gold Mine Project* dated 19 May 2005. Several aspects of the Agreement give prominence to the role of First Nations in the EIA Review:

- 1.0 ... "**First Nations**" means those First Nations who assert aboriginal rights at or near the Project area and include the Takla Lake, Tsay Keh Dene and Kwadacha First Nations, and the Gitksan House of Nii Kyap. ...
- 4.2 All Panel hearings shall be public and shall provide for First Nations' and public participation.
- 8.1 The Agency will administer a participant funding program to facilitate the participation of First Nations and the public in the review of the Project.
- 8.2 The EAO will make funding available, subject to provincial Treasury Board approval, to facilitate the participation of First Nations in the review of the Project.

The *EIA Guidelines* also give prominence to the consideration of the First Nations' interests. In particular, see the excerpts noted in Appendix 1.

To discharge its mandate properly, the Panel must have an adequate record on First Nations interests. While First Nations have participated in this EIA Review to some extent, that participation has been constrained by inadequate resources and deficient consultation process available to the First Nations. The consequence is that the Panel will have an incomplete and superficial record of First Nations interests that will not allow the Panel to report properly on those interests.

The Gitksan note that the Panel has raised the concern about the importance of adequate participation by First Nations several times.¹ In its letter dated 19 October 2006 to Chief Rena Benson, the Panel listed the categories of information that it was seeking. The information is substantial and requires considerable resources to collect. The Gitksan have participated in the EIA Review to the extent they are able using their own resources, but have not had adequate resources to complete this task.

Given the importance of traditional use information in relation to establishing Gitksan aboriginal rights, the Gitksan do not want to provide this information in half-measure.

(b) The consultation process with the Crown has not been defined nor implemented

Neither Canada nor the Province have consulted with the Gitksan and other First Nations on the substantive issues being reviewed in this hearing. No process has yet been established to allow for such consultation. As a result, the record being developed on the Project effects on First Nations interests is seriously deficient.

(i) Provincial perspective on consultation

The letter from the Environmental Assessment Office ("EAO") dated 20 November 2006 to the Panel describes the EAO's perspective on First Nations' consultations. Several points from this letter are important to note about the Provincial perspective:

¹ See for example, Panel letters dated 2 September 2005, and 26 July 2006 (Registry no. 226)

- The EAO explains that the adequacy of consultation between the Province and First Nations is beyond the Panel's mandate as determined by its Terms of Reference. The EAO refers to the Panel letter to Chief John French dated 27 February 2006.

Under its terms of reference, the Panel is expected to use the information and analysis provided in the proponent's EIA document, and the comments submitted by First Nations and other parties, to reach its own conclusions on the potential for the project to have adverse effects on First Nations interests. If information on First Nation interests, including traditional uses of land and resources, is not provided to the panel process by First Nations themselves, the Panel will use whatever information is available to it from other sources, and will document this in its report, so that Ministers are aware that the reporting is not based on direct First Nations input.

The Panel will not undertake an evaluation of First Nations' strength of claim or make conclusions with respect to potential infringements on aboriginal rights and title. These matters are the responsibility of the federal and provincial governments, which will be making decision [sic] about whether or not, or under what circumstances or conditions, to permit to (sic) project to proceed. However, the Panel's report will provide an overview of the traditional use information which it has had the opportunity to consider, and the basis of that information, will report the Panel's conclusions on the potential effects of the project on First Nations. The intent is that this information will play a key role in informing government's decision-making. [underlining added]

- The EAO explains further that:
 - the information provided by the First Nations in the panel process, along with the Panel's recommendations, will be just part of the information used by the Province to meet its consultation obligations.
 - the EAO has committed to consult with First Nations about the Panel's recommendations and establish a separate process to do so. It was the intention and desire of the Province that this process would be underway prior to the commencement of the Panel hearings.

(ii) *Federal perspective on consultation*

The letter from the Department of Fisheries and Oceans ("DFO") dated 21 November 2006 sets out DFO's view of how consultation will occur. The key points are as follows:

- DFO is prepared to consult with the First Nations, but has not done so yet.
- The Federal and Provincial Crowns have been working with the Tse Keh Nay to develop a consultation process for this project.
- DFO is of the view that meetings with the Tse Keh Nay and the Gitksan would be most effective if all of the relevant federal and provincial ministries could attend.
- DFO intends to complete its consultations with First Nations before any federal decision is made.

(c) The government agencies who are providing important recommendations and preliminary determinations to the Panel have not taken First Nations interests into account

Consultation after the Panel Report is issued on a government-to-government basis before decisions are made is necessary, but not sufficient to fulfill the Crown's obligation to consult First Nations. The separate government-to-government consultation with First Nations serve a different purpose than the EIA Review of First Nations' interests. The separate consultation aims to reconcile government decisions with the rights of First Nations

The EIA Review gathers information on First Nations interests as they relate to the Project effects. The focus is not on a determination of rights but on the effects on First Nations and their unique interests. The EIA Review is important for First Nations for several reasons:

- It is a key step in the decision-making process. The Panel's report is a public document that records the recommendations to the Minister's. It has considerable weight in shaping the subsequent government decisions. The opportunity to revisit the technical issues in the post EIA Review consultations will be limited, if at all.
- The EIA Review is the only time that the Project is reviewed in a comprehensive manner. Subsequent decisions by government agencies are usually considered through the lens of a single-purpose mandate – for example, DFO's mandate is fisheries. When DFO makes its final decision under the *Fisheries Act*, it does not take into account all social, environmental and economic aspects of the loss of Duncan Lake and its unique ecology. DFO simply does not have the mandate or expertise to do so. This point was illustrated by the serious "non-fish" concerns about the Project presented

by Environment Canada on 23 November. Neither DFO nor Environment Canada have yet consulted with First Nations. Nor, did Environment Canada have input into DFO's finding that the Project can satisfy DFO's "no net loss" principle for fish habitat. The EIA Review is the only place these elements can be drawn together.

- Many important preliminary decisions and opinions are formed by the agencies during the EIA review. These decisions and opinions are difficult to reverse after the fact. Moreover, Northgate will act in reliance on these decisions and opinions. Research work will be undertaken or terminated. Trying to follow up on issues raised by First Nations in a subsequent process will be difficult. An illustration of this point is the decision-making sequence for designating a fish-bearing lake as tailings ponds under the federal *Metal Mining Effluent Regulations* ("MMER"). Designating Duncan Lake as a tailings pond will have dramatic consequences. During the questioning of the Environment Canada representatives in Smithers, the Environment Canada representatives explained that the EIA Review is the primary review for making a determination under MMER on Duncan Lake.² First Nations consultation in a subsequent phase of decision-making is inadequate.
- If First Nations perspectives are not taken into account by the agencies in making these preliminary decisions and opinions, then their underlying analysis is deficient.

During the government agency presentations to the Panel in Prince George and in Smithers, various government agencies confirmed that they had not consulted with First Nations in the preparation of the findings and recommendations to the Panel.³ The Panel need not assess the adequacy of this approach on consultation, but rather consider whether the EIA Review record is adequate without this First Nations' input.

The case law on consultation supports the principle that First Nations must be consulted in the preliminary and strategic determinations in relation to the review of this Project. Preliminary determinations by government agencies are important to the consultation process.

² See November 23 Transcript (afternoon session), pages 6 to 15.

³ For example: DFO (November 22 Transcript, page 1604-1609); Environment Canada (November 23 Transcript (afternoon session), pages 55 to 56).

This point has been established in the recent *Squamish* case, which involved the review of ski resort development proposal.

The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions. Once important preliminary decisions have been made and relied upon by the proponent and others, there is a clear momentum to allow a project. This case illustrates the importance of early consultations being an essential part of meaningful consultation.⁴

Madam Justice Koenigsberg elaborated on the importance of early involvement in consultation at the early stages of the decision-making process to preserve the trust in the process:

Thus, I find that there has been a breach of the government's fiduciary duty to the Squamish Nation in failing to consult with the Squamish Nation. The result, at least in part, appears to be a loss of trust in the good faith of the decision makers in relation to decisions already made with regard to the Ski Hill proposals and those still to be made. This loss of trust has made any consultation more difficult to make meaningful. The appropriate remedy, in addition to the declaration that such is the case, is that, in relation to all of the decisions having been made without consultation, consultation must include consideration of the issues as if those decisions had not already been made.⁵

More recently, the *Dene Tha'* decision confirmed the importance of consultation early in the EIA Review process at the strategic level. In that case, a Joint Review Panel was reviewing the environmental effects of the Mackenzie Gas Project. The JRP had a similar mandate as the Panel's in relation to determining aboriginal rights:

The JRP has a broad mandate to consider a wide range of environmental effects, including adverse impact on First Nations activities and can make factual, but not legal determinations, regarding Aboriginal rights. The JRP has no mandate to engage in consultation. Furthermore, it cannot determine the existence of contested Aboriginal rights.⁶

In the *Dene Tha'* case, the court cited the principle in the *Haida*⁷ case that the duty of consultation arises early at the time when strategic planning decisions are being made:

⁴ *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)* (2004), 34 B.C.L.R. (4th) 280, (B.C.S.C.), at paras. 74-75.

⁵ *Squamish*, *supra* note 3, at para. 95.

⁶ *Dene Tha' First Nation v. Canada (Minister of Environment)*, [2006] F.C.J. No. 384, 2006 FC 307, at para. 53.

⁷ *Haida Nation v. British Columbia (Ministry of Forests)* [2004] 3 S.C.R. 511; see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550; (2004) 245 D.L.R. (4th) 193, (S.C.C.).

The precise moment when the duty to consult was triggered is not always clear. In *Haida*, the Court found that the decision to issue a Tree Farm License (T.F.L) gave rise to a duty to consult. A T.F.L. is a license that does not itself authorize timber harvesting, but requires an additional cutting permit. The Court held that the “T.F.L. decision reflects the strategic planning for utilization of the resource” and that “[d]ecisions made during strategic planning may have potentially serious impacts on Aboriginal right and title”. [Emphasis added. See *Haida* paragraph 76]⁸

The Court noted the impact on the Dene Tha’ participation in the JRP Review as follows;

By depriving the Dene Tha’ of the opportunity to be a participant at the outset, concerns specific to the Dene Tha’ were not incorporated into the environmental and regulatory process. Among the concerns cited by the Dene Tha’, two stand out: its concern over the enforceability of the federal review process’ conclusions vis à vis the Alberta portion of the pipeline (the “Connecting Facilities” to be operated and owned by Nova Gas Transmission Limited) and the absence of funding to be able to engage in meaningful consultation.⁹

In the *Mikisew Cree* case, the Supreme Court of Canada also stressed the need for early and direct consultation with First Nations:

64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the “taking up” limitation, I believe the Crown’s duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that

⁸ *Dene Tha’*, *supra* note 6, at para. 106.

⁹ *Dene Tha’*, *supra* note 6, at para. 114.

they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

65 It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.¹⁰

In the current EIA Review, the consultation has yet to "get off the ground". The immediate implication for the Panel is that the record on First Nations interests - a central component of the Panel's review mandate - is fundamentally inadequate.

(d) The Gitksan have been improperly excluded from the consultation process

The Gitksan have tried to participate in these proceedings to date, but have not had adequate resources to do so effectively. The Gitksan have filed numerous submissions leading up to this hearing, but many have been defending the Gitksan right to have a say on this Project. The recent letters from the EAO and the DFO are a recent change in position that now recognize that the Gitksan have standing to be consulted.

In March 2006, the Gitksan met with the Panel to outline what the Gitksan required to participate in the Panel review. The Gitksan's letter dated 30 March 2006 outlines the areas of particular interest, comments on the EIA Review process, and a budget for participation. The Panel forwarded that letter to the federal and provincial agencies. Since that time, the Gitksan have not been provided funding. Instead, CEAA and the EAO have indicated that consultation would be with the Tse Keh Nay.

This exclusion from the consultation process has seriously prejudiced the Gitksan's ability to participate in this EIA Review.

¹⁰ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 143 A.C.W.S. (3d) 957; [2006] 1 C.N.L.R. 78 (S.C.C.). at para. 64 and 65.

The Gitksan have also written to the Premier, the Minister of Energy, Mines and Petroleum Resources, and the Minister of Economic Development expressing concerns and seeking answers.¹¹ The Gitksan were referred back to the EIA Review.

4. CONCLUDING REMARKS

The Panel's mandate has been set by the responsible federal and provincial ministers. Accordingly, the Panel has no authority to amend the mandate or timelines for the hearing or the Panel's report unilaterally. The Gitksan have framed the relief requested of the Panel with these restrictions in mind.

The Gitksan will concurrently file a copy of this notice with the federal Minister of Environment and the provincial Minister of Sustainable Resource Management, with a request that the Panel's mandate be extended as requested.

All of which is respectfully submitted of behalf of the Gitksan House of Nii Kyap by counsel.

Original signed by

David Bursey
Bull, Housser and Tupper

¹¹ See Chief Rena Benson letters: dated 18 May 2006 to the Premier; dated 13 June 2006 to the Minister of Energy, Mines and Petroleum Resources; and dated 13 June 2006 to Ministry of Economic Development.

APPENDIX 1**Excerpts from
GUIDELINES FOR THE PREPARATION OF THE ENVIRONMENTAL IMPACT
ASSESSMENT FOR THE KEMESS NORTH COPPER-GOLD MINE PROJECT****August 29, 2005**

3.0 General Instructions ... The EIA will explain and justify methods used to predict potential adverse effects of the Project on each valued environmental component (VEC), which includes biophysical and socio-economic components. VECs may be selected based on ecological or socio-economic value. ... In describing the methodology, the EIA will explain how scientific, engineering, aboriginal traditional knowledge and local or community knowledge was used to reach conclusions. ...

4.6 Land Use Context ... The EIA will also identify the claimed traditional territories of the First Nations in the vicinity of the proposed Project, and briefly summarize available information on the First Nations interests in and use of, the area potentially affected by Project development ...;

5.1 First Nations Consultation The EIA will describe consultation undertaken with First Nations that are likely to be affected by the Project, especially those with claimed traditional territory in the vicinity of the Project. This description will include a summary of the history of the Proponent's relationship with First Nations with respect to the existing Kemess Mine, as well as the proposed Project. The EIA will describe the objectives of First Nations consultation, the methods used, issues raised during these consultations and the way in which the Proponent has addressed these issues, using a concordance table.

8.13 Traditional Uses The EIA will identify historic and current uses of land and resources in the Project area by aboriginal people. Traditional uses will be subject to First Nations governance structures, and may include hunting, fishing, gathering, travel on traditional routes, trapping, harvesting, collection of medicinal plants, use of sacred sites and any other traditional use. First Nations will have their own views on VECs, and First Nations objectives for water and watersheds, wildlife, fish, etc. may support traditional use activities in the Project's zone of influence. Information on these matters should be provided by First Nations, or, if First Nations do not provide this information, then available information from other sources should be used, and efforts undertaken by the Proponent to obtain this information should be identified.

8.15 Demographics and Economy The EIA will describe population and community distribution and trends in the surrounding area, including a description of the proximity of the Project to affected communities. The EIA will describe regional economic conditions and economic conditions in surrounding communities. The EIA will describe the existing workforce at the Kemess mine. Information will be provided on the available labour supply and rates of employment for the region and surrounding communities.

First Nations communities are located within the zone of influence of the Project. To the extent that such information is available, either from First Nations or other sources, the EIA should

describe the demographic, social and economic attributes of these communities, covering such topics as:

- a. population size and demographics;
- b. economic activity;
- c. employment levels, working conditions and income;
- d. education;
- e. health issues; and
- f. cultural attributes.

The EIA will review what factors currently inhibit or foster the flow of economic and other benefits from the existing Kemess mine to First Nations communities.

9.10 Traditional Uses Based on information provided by First Nations, or, if First Nations do not provide this information, then available information from other sources, the EIA will identify potential effects on traditional uses of land and resources by aboriginal people. The EIA will consider effects on hunting, fishing, trapping and other traditional uses of the land (e.g. collection of medicinal plants, use of sacred sites, etc.), as well as related effects on lifestyle, culture and quality of life of First Nations and measures to avoid or mitigate effects on traditional uses - see also section 9.12.

9.12 Demographics and Economy The EIA will identify anticipated effects of the Project on local demographics and economy. The EIA will predict the positive and negative effects (with rationale) of the Project on the local, regional and Canadian economy and discuss how any negative effects will be avoided or mitigated.

The economic evaluation will address benefits such as investment, regional income, tax revenues, skills training and direct and spin-off employment, and costs such as any increase in demand for government services (health, education, police, social services, regulation, etc.), use of public infrastructure, etc. The economic implications of mine closure for the local/regional economy and government services and infrastructure will also be discussed.

To the extent that existing information is available to form the basis for impact assessment, the EIA will evaluate the potential impacts of the Project, both negative and positive, on First Nations communities located within the zone of influence of the Project, including measures to avoid or mitigate adverse effects. The EIA will assess the potential demographic, social and economic effects on these communities, covering such topics as:

- a. population size and demographics;
- b. economic activity;
- c. employment levels, working conditions, skills training and income;
- d. education;
- e. health issues;
- f. community stability; and
- g. cultural attributes.

The EIA will review what factors may inhibit or foster the flow of economic and other benefits to First Nations communities.

LIST OF AUTHORITIES

Dene Tha' First Nation v. Canada (Minister of Environment), [2006] F.C.J. No. 384, 2006 FC 307

Haida Nation v. British Columbia (Ministry of Forests) [2004] 3 S.C.R. 511

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 143 A.C.W.S. (3d) 957; [2006] 1 C.N.L.R. 78 (S.C.C.)

Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management) (2004) 34 B.C.L.R. (4th) 280, (B.C.S.C.)

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) [2004] 3 S.C.R. 550; (2004) 245 D.L.R. (4th) 193, (S.C.C.)