

Action No: 11 4556
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**MARILYN BAPTISTE on her own behalf and on behalf of all other members
of the Xenigwet'in First Nations Government and the Tsilhqot'in Nation**

APPLICANTS

AND:

**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**

RESPONDENTS

AND:

TASEKO MINES LIMITED

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO:

Her Majesty the Queen in Right of the Province Of British Columbia
PO Box 9055 STN PROV GOVT
Victoria, BC V8W 9E2

Chief Inspector of Mines
Ministry of Energy and Mines
PO Box 9320 Stn Prov Govt
Victoria BC V8W9N3

District Manager Resource Operations, Cariboo-Chilcotin
Ministry of Forests, Lands and Natural Resource Operations
200-640 Boreland Street
Williams Lake, BC V2G 4T1

Taseko Mines Limited
300 - 905 West Pender Street
Vancouver, BC V6C 1L6

This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to this petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s)

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The Address of the registry is:	850 Burdett Avenue Victoria, BC V8W 1B4
(2)	The ADDRESS FOR SERVICE of the Petitioner(s) is: Fax number address for service is: Email address for service is:	Jay Nelson c/o Woodward & Company Barristers & Solicitors 2 nd Floor, 844 Courtney Street Victoria, BC V8W 1C4 Telephone: 250-383-2356 250-380-6560 jnelson@woodwardandcompany.com
(3)	The name and office address of the petitioner's(s') lawyer is:	Same as above

CLAIM OF THE PETITIONERS

Part 1: ORDERS SOUGHT

1. A declaration that the Crown breached its duty to consult and/or accommodate the Xeni Gwet'in and the Tsilhqot'in in respect of its decision on or about September 29, 2011 to approve the Notice of Work application by Taseko Mines Limited (the "**NOW Approval**");
2. A declaration that the Crown breached its duty to consult and/or accommodate the Xeni Gwet'in and the Tsilhqot'in in respect of its decision on or about October 31, 2011 to approve the Occupant Licence to Cut application by Taseko Mines Limited (the "**OLTC Approval**");
3. An order quashing the Approvals, or either of them;
4. Alternatively, an order suspending the Approvals, or either of them, until the Crown has fully discharged its consultation and accommodation obligations to the Xeni Gwet'in and the Tsilhqot'in in respect of the applications for the 2011 NOW and OLTC (the "**Applications**");
5. An order that the Crown must engage in further and meaningful consultation with the Xeni Gwet'in and the Tsilhqot'in about the Applications;
6. An order that the Crown provide adequate funding for the Tsilhqot'in to meaningfully consult about the Applications;
7. An order that the Crown must propose reasonable accommodation to the Tsilhqot'in based on further consultation with the Tsilhqot'in;
8. An order granting leave to the parties to return to this Honourable Court for further direction in the event of any impasse in the consultation and accommodation process;
9. An order for costs;

10. Permanent, interim and/or interlocutory injunctive relief; and
11. Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

The Applicants

1. The Xení Gwet'in First Nations Government (the "**Xení Gwet'in**") is a body of Indians, for whose use and benefit in common reserve lands have been set apart, and who constitute a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5.
2. The Plaintiff Chief Marilyn Baptiste brings this Petition on her own behalf and, as a representative, on behalf of all other members of the Xení Gwet'in and all other members of the Tsilhqot'in Nation. Marilyn Baptiste is the elected Chief of the Xení Gwet'in. She is a member of the Xení Gwet'in and a member of the Tsilhqot'in Nation.
3. The Tsilhqot'in Nation was a distinct Aboriginal group before and at the time of contact with Europeans and upon the Crown's assertion of sovereignty over the lands at issue in these proceedings.
4. The Tsilhqot'in Nation as it exists today is the continuation of, and successor to, the Tsilhqot'in Nation as it existed at the time of contact and upon the Crown's assertion of sovereignty and, as such, the Tsilhqot'in Nation as it exists today continues to hold the Aboriginal rights of the Tsilhqot'in Nation.
5. The Xení Gwet'in is a sub-group of the Tsilhqot'in Nation. Its members hold Aboriginal rights as members of the Tsilhqot'in Nation. The Xení Gwet'in have special responsibilities under Tsilhqot'in law as "caretakers" of a portion of Tsilhqot'in territory that includes Teztan Biny (Fish Lake), Y'anah Biny (Little Fish Lake) and Nabas (the surrounding area).
6. Members of the Tsilhqot'in Nation, including the Xení Gwet'in, hold proven Aboriginal hunting and trapping rights throughout the area that includes Teztan Biny, Y'anah and Nabas, as established by the decision in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700. In that

case, the British Columbia Supreme Court also recognized that the Tsilhqot'in have fished and gathered throughout this area since before contact with Europeans.

7. For generations, the Tsilhqot'in have engaged in a number of other cultural, spiritual and ceremonial activities at Teztan Biny, Y'anah and Nabas and they assert Aboriginal rights to maintain such activities.

Crown Respondents

8. The Respondent, Her Majesty the Queen in Right of the Province of British Columbia ("**British Columbia**"), asserts ownership of the lands and resources in the area at issue in this Petition pursuant to s. 109 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3, and is ultimately responsible for discharging the Crown's duty to consult with, and accommodate, the Xenigwet'in and the Tsilhqot'in Nation.

9. The Respondent, Chief Inspector of Mines, is the provincial official at the Ministry of Energy and Mines responsible for issuing the 2011 Notice of Work approval (the "**NOW Approval**") pursuant to s. 10 of the *Mines Act*, R.S.B.C. 1996, c. 293, one of the two Crown approvals at issue in this Petition.

10. The Respondent, District Manager Resource Operations, Cariboo-Chilcotin (the "**District Manager**"), is the provincial official responsible for issuing the 2011 Occupant Licence to Cut (the "**OLTC Approval**") pursuant to s. 47.4 of the *Forest Act*, R.S.B.C. 1996, c. 157, the second approval at issue in this Petition.

11. In this Petition, the NOW Approval and OLTC Approval are jointly referred to as the "**Approvals.**"

Respondent Taseko Mines Limited

12. The Respondent Taseko Mines Limited ("**TML**") is a provincially incorporated company (Incorporation Number BC0069082) with its registered office at 1500 Royal Centre, 1055 West Georgia St., P.O. Box 11117, Vancouver, BC, V6E 4N7, Canada. TML is the proponent of the proposed Prosperity Gold-Copper Mine Project (the "**Project**"), including the revised proposal

submitted to the Federal Government in 2011 (the “**Revised Project**”). TML sought and obtained the Approvals.

The Project

13. The Project - and the Revised Project - would involve the construction of an open-pit gold and copper mine that would be located approximately 125 km southwest of Williams Lake, British Columbia, in Tsilhqot’in traditional territory.

14. The Tsilhqot’in know the lands and waters in the proposed Project area as “Teztan Biny” (Fish Lake), “Y’annah Biny” (Little Fish Lake) and “Nabas” (the surrounding area). TML’s original Project application called for Teztan Biny to be completely drained and filled with waste rock. Y’annah Biny and Nabas would be inundated and destroyed to create the Tailings Storage Facility for the Project.

15. The Project underwent separate provincial and federal environmental assessments in 2009-2010, as approvals from both levels of government were required.

16. The provincial EA concluded in December 2009 with a recommendation by the British Columbia Environmental Assessment Office (the “**BCEAO**”) that the Project be approved. The BCEAO made this recommendation before the federal review panel conducting the federal environmental assessment (the “**Federal Panel**”) had even commenced its public hearings. The BCEAO concluded that the Project would have no significant adverse impacts on Tsilhqot’in hunting and trapping activities and only “minimal” impacts on Tsilhqot’in Aboriginal fishing rights.

17. In contrast, the Federal Panel issued its report on July 2, 2010 (the “**Panel Report**”), concluding that the Project would result in significant adverse environmental effects on fish and fish habitat, grizzly bears, on navigation, on the current use of lands and resources for traditional purposes by the Tsilhqot’in and on Tsilhqot’in cultural heritage, and on proven and asserted Tsilhqot’in Aboriginal rights.

18. The Panel Report noted that “much of the Tsilhqot’in population continue to use the Project area for activities such as hunting, fishing, gathering of berries, plants and medicines, as well as for various cultural and spiritual ceremonies and activities”.

19. The Panel Report described “the deep ancestral connection that the Tsilhqot’in had to Teztan Biny (Fish Lake), Y’anah Biny (Little Fish Lake), and to Nabas”. It described these areas as “unique and of special significance to the Tsilhqot’in” and concluded that “the loss of the Teztan Biny (Fish Lake) and Nabas areas for current use activities, ceremonies, teaching, and cultural and spiritual practices would be irreversible, of high magnitude and have a long-term effect on the Tsilhqot’in”. The Panel said that it could not even “recommend any measures that would mitigate the[se] significant adverse effects”, given the “substantial value” of this area to the Tsilhqot’in.

20. The Federal Government accepted the conclusions of the Panel Report and rejected the Project on November 2, 2010.

The Revised Project

21. About three months later, TML applied to the Federal Government for approval of the Revised Project. TML claims that the Revised Project would preserve Teztan Biny. TML acknowledges that the Revised Project would still permanently destroy Y’anah Biny and Nabas.

22. The Revised Project is based on an alternative mine plan that TML and the Federal Panel had already considered and rejected during the Federal Panel’s review of the original Project, because this alternative would likely lead to contamination of Teztan Biny in any event and result in even greater long-term environmental risk.

23. The Federal Panel had also concluded that, even if this mine plan could preserve Teztan Biny, the proximity of the open pit and associated mining facilities to Teztan Biny would eliminate the value of this area to the Tsilhqot’in. It also noted that any expansion of the mine would encroach on Teztan Biny and result in its certain destruction.

The Approvals

24. The Respondent Chief Inspector of Mines granted the NOW Approval on or about September 29, 2011. The NOW Approval authorizes TML to conduct exploratory work throughout the Teztan Biny, Y'anah Biny and Nabas areas. Specifically, the NOW Approval authorizes the construction of 59 test pits, geotechnical and diamond drilling, and the construction of 23.5 km of new trails (4-6m wide), among other work.

25. The District Manager granted the OLTC Approval on October 31, 2011. The OLTC Approval authorizes TML to clear 1048 m³ of timber to facilitate the work under the NOW Approval.

26. The work authorized under the Approvals is collectively referred to in this Petition as the **“Exploratory Work”**.

Potential Impact of Exploratory Work on Tsilhqot'in

27. The Approvals authorize the Exploratory Work in an area of particular cultural importance for the Xení Gwet'in and the Tsilhqot'in Nation generally. It is an area used by much of the Tsilhqot'in population for hunting, trapping, fishing, gathering, as well as spiritual and ceremonial activities. It is a special part of Tsilhqot'in territory in that it is relatively intact but also quite accessible, particularly for elders and children, and one that supports the range of traditional activities noted above.

28. Many Tsilhqot'in members today were born and raised at Nabas, and they continue to use the area regularly. One of these members is presently re-establishing her family homestead at Nabas, on the shore of Y'anah Biny. Teztan Biny, Y'anah Biny, Nabas and the surrounding area are highly valued by the Tsilhqot'in as a cultural school, a place for social gatherings, a “grocery store” for country foods, and as a place for ceremony.

29. The Exploratory Work will have a number of adverse effects on asserted, established and proven Tsilhqot'in Aboriginal rights.

30. The Exploratory Work will further fragment habitat and disturb wildlife, driving some wildlife from the area. It will also increase access and hunting by non-Tsilhqot'in. Diminished wildlife and increased hunting pressures will adversely affect the ability of the Tsilhqot'in to exercise their Aboriginal hunting and trapping rights in this preferred area.

31. During the months of Exploratory Work, Tsilhqot'in will avoid using the area for harvesting, ceremonial or spiritual activities. Aside from the fact that certain areas will not be accessible for safety reasons, the noise, human activity and damage to the land will diminish or destroy its value for traditional activities from the Tsilhqot'in perspective. The remoteness and spirituality of the area is part of what makes it a special and preferred place for the exercise of Aboriginal rights.

32. These impacts are compounded by the fact that TML has conducted Exploratory Work in the area over the past several years, most recently pursuant to a 2009 NOW Approval. This raises serious concerns about the combined impact of years of Exploratory Work in a concentrated area of importance to the Xeni Gwet'in and Tsilhqot'in.

33. Finally, the effects of the Exploratory Work are magnified by its ultimate objective, namely helping TML secure approval for the Revised Project. The Exploratory Work will bring the Revised Project, and its very serious implications for Tsilhqot'in culture, Aboriginal rights, and way of life, one step closer to reality. Moreover, commencement of this work will heighten the intense uncertainty for the Tsilhqot'in about the future of these lands and waters. Knowing about or witnessing the Exploratory Work will cause mental, emotional, and spiritual harm for many Tsilhqot'in.

Breach of Consultation and Accommodation for the Approvals

34. Despite the potential impacts of the Exploratory Work on proven, established and asserted Tsilhqot'in Aboriginal rights, and the clear importance of this matter to the Tsilhqot'in and Xeni Gwet'in, the Crown failed to discharge its duties of consultation and accommodation.

In particular:

- a. The Chief Inspector, District Manager and/or their designates (the “**Crown Officials**”) failed or refused to provide information requested by the TNG relevant to the assessment of impacts on Tsilhqot’in Aboriginal rights, notwithstanding that Crown officials had indicated that they were relying on some of this requested information to reach decisions on the Applications;
- b. Despite repeated submissions, the Crown Officials failed or refused to acknowledge the critical cultural significance of the Teztan Biny/Nabas areas to the Xenigwet’in and Tsilhqot’in or the potential impacts of the Exploratory Work on Tsilhqot’in Aboriginal rights and culture;
- c. The Crown Officials failed to assess the full impact of the Applications by refusing to consider the combined impacts of successive years of Exploratory Work in this concentrated area;
- d. The Crown Officials refused to consider the full impacts of the Revised Project on Tsilhqot’in Aboriginal rights when assessing the potential impacts of the Exploratory Work undertaken in support of the Revised Project;
- e. The Crown Officials failed to properly assess or identify the scope of their duties of consultation and accommodation, in part because of the errors listed above;
- f. The Chief Inspector or his designate imposed an arbitrary deadline on consultation;
- g. The Chief Inspector or his designate failed or refused to meet with the TNG before granting the NOW Approval, despite requests for a meeting by the TNG;
- h. Although the District Manager met with Xenigwet’in and TNG representatives, he had not reviewed any of the relevant materials, including the Applications and TNG’s letters and submissions, and as a result this meeting was not meaningful and could not address TNG’s concerns;

- i. The Crown Officials refused to provide any funding to support TNG's review of the technical documents associated with the Applications or consultation with the Crown Officials;
- j. The Crown Officials refused to postpone consultation on the Applications until after the Federal Government decided, on or by November 7, 2011, whether the Federal Government would conduct an environmental assessment for the Revised Project (the purported purpose of the Exploratory Work) or reject the Revised Project outright (which would negate the purported need for the Exploratory Work);
- k. The Chief Inspector did not give timely notice to the Xeni Gwet'in or TNG of his decision granting the NOW Approval; in fact, despite repeated requests, TNG did not receive formal notice or a copy of the NOW Approval for over 2 weeks after it was granted to TML; and
- l. To this day, six weeks after the NOW Approval, neither the Chief Inspector nor the District Manager has provided a rationale for decision to the TNG or Xeni Gwet'in explaining how Aboriginal rights were considered and addressed, despite commitments to do so.

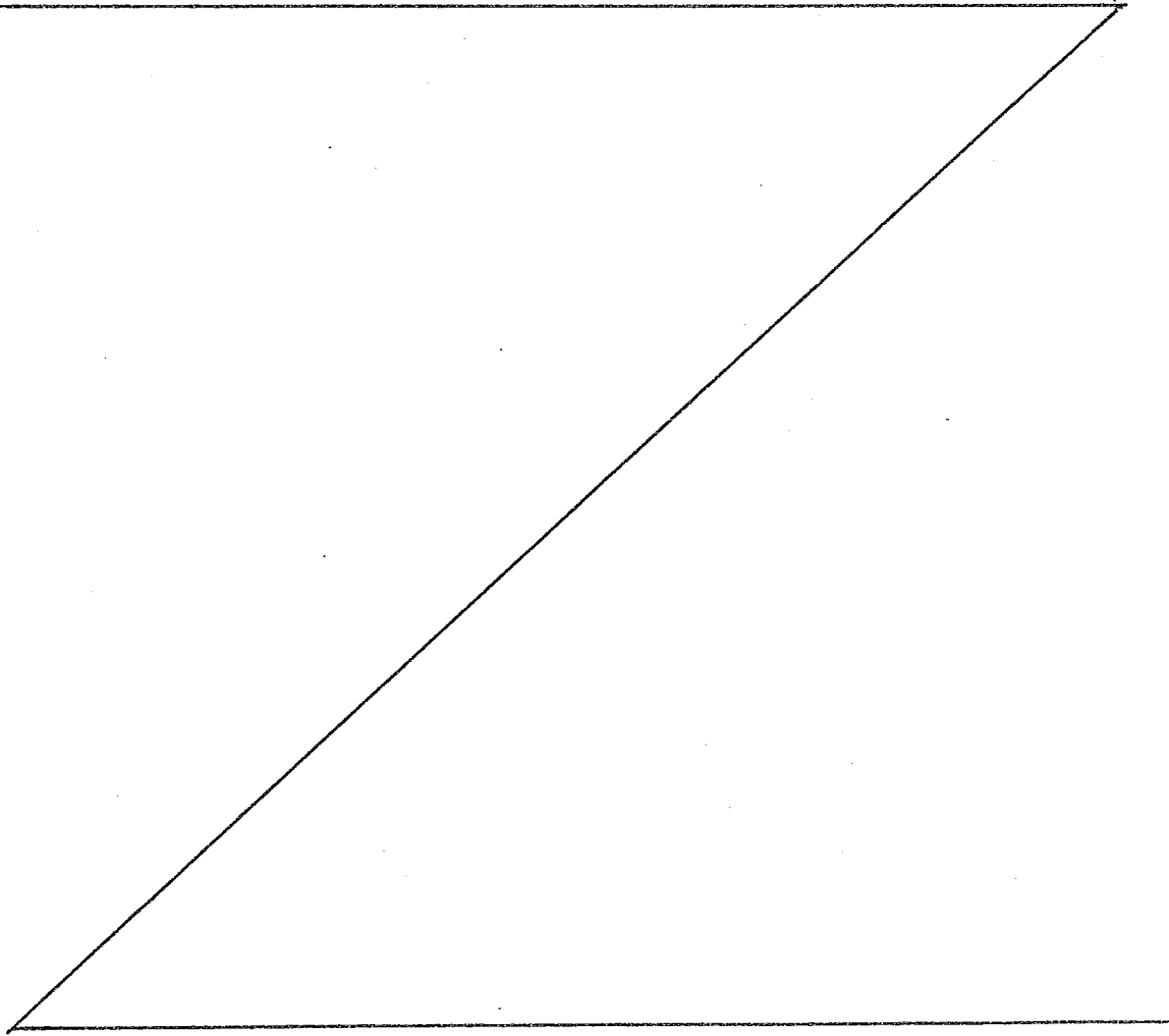
35. In sum, although correspondence was exchanged, the Crown Officials refused or failed to address the fundamental concerns of the Xeni Gwet'in and the Tsilhqot'in about the Exploratory Work or the depth of the potential impacts for Tsilhqot'in Aboriginal rights and culture. As a result, the Crown Officials failed to appreciate or acknowledge the deep levels of consultation and accommodation demanded in the exceptional circumstances of these Applications.

36. Rather than making commensurate efforts to consult and accommodate the Xeni Gwet'in and the Tsilhqot'in (e.g. meeting with TNG to substantively address concerns; providing some funding for technical support; providing relevant information), the Crown Officials failed to extend some of the most basic courtesies of consultation (e.g. timely notice of decisions; reasons for decision).

37. These failures have fueled conflict rather than promote reconciliation.. TML has indicated that it is prepared to commence the Exploratory Work, while the Tsilhqot'in are still waiting – six weeks after the NOW Approval – for the Crown's explanation as to how Tsilhqot'in Aboriginal rights and concerns were heard or addressed.

Part 3: LEGAL BASIS

1. The Crown's failure to discharge its constitutional obligations of consultation with, and reasonable accommodation of, the Xeni Gwet'in and the Tsilhqot'in Nation, as established in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, constitutes a reviewable error of law within the meaning of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

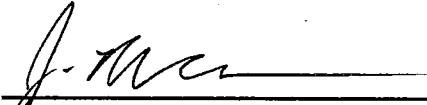


Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Chief Marilyn Baptiste;
2. Affidavit #1 of John-Paul Laplante; and
3. Such further and other materials as this Court may permit.

The petitioners estimate that the hearing of the petition will take 2 days

Date: November 10, 2011



Jay Nelson
 petitioner lawyer for petitioner(s)

To be completed by the court only:

Order made

In the terms requested in paragraphs _____ of Part 1 of this petition

With the following variation and additional terms:

Date: _____

Signature of Judge Master