Citation: ***Taku River Tlingit First Nation v. Ringstad et al***
2002 BCCA 59

Date: 20020131
Docket: CA027488
CA027500
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

NO. CA027488

BETWEEN:

THE TAKU RIVER TLINGIT FIRST NATION and MELVIN JACK, on behalf of himself and all other members of the Taku River Tlingit First Nation

PETITIONERS
(RESPONDENTS)
(APPELLANTS ON CROSS APPEAL)

AND:

NORM RINGSTAD, in his capacity as the Project Assessment Director for the Tulsequah Chief Mine Project, SHEILA WYNN, in her capacity as the Executive Director, Environmental Assessment Office, THE MINISTER OF ENVIRONMENT, LANDS AND PARKS and THE MINISTER OF ENERGY AND MINES AND MINISTER RESPONSIBLE FOR NORTHERN DEVELOPMENT

RESPONDENTS
(APPELLANTS)
(RESPONDENTS ON CROSS APPEAL)

AND:

REDFERN RESOURCES LTD.

RESPONDENT
(RESPONDENT)
(RESPONDENT ON CROSS APPEAL)

- AND -

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RESPONDENTS
(RESPONDENTS)
(RESPONDENTS ON CROSS APPEAL)

Before: The Honourable Madam Justice Southin
The Honourable Madam Justice Rowles
The Honourable Madam Justice Huddart

Paul J. Pearlman, Q.C.	Counsel for the Appellants, Norm Ringstad, Sheila Wynn, The Minister of Environment, Lands and Parks and the Minister of Energy and Mines and Minister Responsible for Northern Development and the Attorney General for British Columbia
Randal J. Kaardal and Lisa D. Hynes	Counsel for the Appellant, Redfern Resources Ltd.
Arthur C. Pape and Beverley-Jean M. Teillet	Counsel for the Respondents, Taku River Tlingit First Nation and Melvin Jack
Place and Date of Hearing:	Vancouver, British Columbia 25th, 26th and 27th September, 2001
Place and Date of Judgment:	Vancouver, British Columbia 31st January, 2002

Dissenting Reasons by:
The Honourable Madam Justice Southin

Written Reasons by:
The Honourable Madam Justice Rowles (P. 77, para. 104)

Concurred in by:
The Honourable Madam Justice Huddart

(Appendices from pp. 139-158)

Reasons for Judgment of the Honourable Madam Justice Southin:

I. INTRODUCTION

[1] In this appeal and cross-appeal from the judgment of the Honourable Madam Justice Kirkpatrick pronounced the 28th June, 2000, the root question, although it is not the question as put either by the learned trial judge or by counsel before us, is this: Who has the power to decide whether natural resources on Crown land lying within an area to which an Indian band (I use that term rather than "First Nation" because in legal matters it behoves judges to use the terminology adopted by Parliament) makes claim shall be turned to account?

[2] Does the power of decision rest with the Legislature of British Columbia under s. 92, especially head 5, and s. 92A of the ***Constitution Acts, 1867-1982***; with the Parliament of Canada under s. 91(24) of the ***Constitution Act, 1867***; or with the Indian band under s. 35 of Part II of the ***Constitution Act of 1982***; or some combination, and if so, what? These are the relevant provisions:

The Legislature -

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,-

* * *

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

* * *

92A. (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

* * *

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

The Parliament of Canada -

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,-

* * *

24. Indians, and Lands reserved for the Indians.

The Indian Band -

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Sections 92A and 35 were both enacted in 1982.

[3] The petitioners below, now the respondents, Taku River Tlingit First Nation, who numbered some 303 in 1997, most of whom resided in and about Atlin, which lies almost on the Yukon/British Columbia border, and are referred to in some of the documents as TRTFN, and to whom I shall refer, I trust acceptably, as the Tlingit, have advanced a claim of aboriginal title to a substantial area of north western British Columbia.

[4] The appellant, Redfern Resources Ltd., seeks to reopen the Tulsequah Chief Mine, which lies hard by the Alaska Panhandle. In the proceedings in issue below, it sought, under the ***Environmental Assessment Act***, R.S.B.C. 1996, c. 119, (the "Act"), first enacted in 1994, a certificate which would permit it, among other things, to build a road from the mine to Atlin, a distance of some 108 km. The Tlingit assert this road would be detrimental to them.

[5] The Act sets out an elaborate process of information gathering and consultation for projects within its purview. The Tulsequah Chief Mine reopening is indisputably such a project.

[6] I attach as Appendix "A" the critical sections of the Act with which, I am sorry to say, the reader will have to become, to some extent, familiar if he or she has any interest in the administrative law questions which have been argued in this Court.

[7] This is the judgment under appeal [28th June, 2000]:

> THIS COURT ORDERS AND DIRECTS THAT:
>
> 1. The application for a Declaration that the Report and Recommendations (the "Recommendations Report") of the Tulsequah Chief Project Committee with respect to: A Decision on a Project Approval Certificate by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines and Minister Responsible for Northern Development (the "Ministers"), prepared by the Project Assessment Director and submitted to the Executive Director, Environmental Assessment Office in or about March, 1998, pursuant to s. 29 of the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119, (the "Act") did not conform to legal requirements, is dismissed;
>
> 2. The application for a Declaration that the referral (the "Referral") by the Executive Director to the Ministers of the Application (the "Application") by Redfern Resources Ltd. ("Redfern") for a Project Approval Certificate for the Tulsequah Chief Mine Project (the "Project"), in or about March, 1998, pursuant

to s. 29 of the *Act* did not conform to legal requirements, is dismissed;

3. The Project Approval Certificate M98-02 ("the Certificate") issued by the Ministers to Redfern for the Project, on or about March 19, 1998, pursuant to s. 30 of the *Act* is quashed and set aside;

4. The Certificate is referred back to the Ministers for reconsideration, after a revised project committee report, which meaningfully addresses the concerns of the Taku River Tlingit First Nation, has been delivered to the Ministers;

5. Counsel for the parties are invited to make further submission with respect to directions as to the basis on which the Certificate should be referred back to the Ministers for reconsideration.

[8] This is the judgment giving directions [27th July, 2000]:

THIS COURT ORDERS AND DIRECTS that the reconsideration proceed as follows:

1. The Executive Director, Environmental Assessment Office, or her designate, shall reconvene the Tulsequah Chief Mine Project Committee (the "Project Committee"). Before the Project Committee meets, the Executive Director or her designate will provide each member of the Project Committee with this Court's reasons for decision of June 28, 2000 and this Court's directions for the reconsideration, and request that the members review the reasons for decision and directions, the Staples' Addendum, as well as the TRTFN Recommendations Report, and refamiliarize themselves with the issues;

2. No later than September 20, 2000, the Project Committee will meet to discuss and meaningfully address the concerns of the Taku River Tlingit

First Nation regarding the Tulsequah Chief mine access road and its impacts;

3. A revised draft recommendations report shall be prepared and circulated to all members of the Project Committee for their review and comment. Subject to paragraph 5 of these directions, the Project Committee may determine time lines for the receipt and circulation of comments from its members on the revised draft recommendations report, and may determine whether a further meeting of the Project Committee is required in order to ensure that the concerns of the Taku River Tlingit First Nation are adequately reflected in the revised recommendations report, before the referral to the Respondent Ministers;

4. The revised recommendations report in final form will be prepared and circulated to all members of the Project Committee;

5. Unless the Project Committee considers it necessary and appropriate to extend the time, the Executive Director, Environmental Assessment Office, will refer the application of the Respondent Redfern Resources Ltd. for a project approval certificate and the revised recommendations report to the Ministers for reconsideration by November 28, 2000. The Executive Director, Environmental Assessment Office, will also provide the Ministers with the Court's reasons for judgment of June 28, 2000 and directions for reconsideration.

From what the Court was told at the hearing of this appeal, I understand these directions, by assent of the parties, have not been carried out.

[9] The Ministers and the Attorney General, as appellants, seek to have clauses 3, 4, and 5 of the judgment of 28th June, 2000 set aside; the Taku River Tlingit First Nation, as cross-

appellant, seeks to have the declarations in clauses 1 and 2 reversed and the referral in clause 4 deleted.

[10] It is convenient to mention now that the declarations in clauses 1 and 2 do not reflect a conclusion of the learned trial judge that all was properly done under the Act up to the exercise of the ministerial power under s. 29.

[11] Those declarations reflect this paragraph of her reasons:

> [31] It is clear that under s. 10 of the *EAA*, the purpose of a project committee is to provide, *inter alia*, advice and recommendations to the executive director and the ministers. The recommendations, which in this case took the form of a report, were an integral part of the exercise of the Project Committee's advisory function. It is clear, however, that the role of the project committee and the executive director is merely advisory and does not amount to a power to order or determine as defined in s. 1 of the *Judicial Review Procedure Act*: see ***Save Richmond Farmland Society Western Can. Wilderness Committee v. Richmond (Township)*** (1988), 36 Admin. L.R. 45 (B.C.S.C.). I therefore conclude that the Recommendations Report and the Referral to the Ministers, standing alone, do not fall within the definition of statutory power and are not subject to judicial review. As noted in the ***Save Richmond Farmland Society*** decision, at 53:
>
> > For the *Judicial Review Procedure Act* to apply, there must be a power to decide in respect of a legal right or duty. To enable a review by the Court there must first be an exercise of the statutory power of decision.
>
> See also ***Benias v. Vancouver*** (1983), 23 M.P.L.R. 269, 3 D.L.R. (4th) 511 (B.C.S.C.) at 272 (M.P.L.R.); and ***Thames Jockey Club v. N.Z. Racing Authority***, [1974] 2 N.Z.L.R. 609 (S.C.) at 616.

[12] I shall address this point hereafter.

[13] As against the question in paragraph 1 which goes to the very heart of British Columbia's place in Confederation, the many administrative law questions canvassed before us are mere quillits and quiddities.

[14] Since first preparing draft reasons in this appeal, I have had the privilege of reading in draft the reasons for judgment of my colleague, Madam Justice Rowles, who does not differ, as I understand her, from me on the issues of administrative law raised before us. Our difference is in the constitutional questions.

[15] I take that from this passage of her reasons:

> [108] It is on the question of whether the chambers judge erred in deciding that the Ministers of the Crown were under a duty or obligation to take into account the Tlingits' aboriginal rights before deciding to issue the Project Approval Certificate that I respectfully disagree with my colleague, Madam Justice Southin, whose draft reasons I have had the advantage of reading.

II. THE ADMINISTRATIVE LAW ISSUES

[16] It is right to consider these issues as if the objector was not aboriginal but was a "municipality in the vicinity" (see the Act, s. 9(2)(c)) who objected to this mine and all

its works on the ground that, in the opinion of the inhabitants, the economic benefits from a mine were less than the economic benefits from a nascent tourism industry which would not flourish, in their opinion, if the wilderness were invaded by monstrous trucks transporting ore to Atlin.

[17] As issues of administrative law turn on a close examination of the statute in issue and of the acts of omission and commission asserted to warrant an order under the ***Judicial Review Procedure Act***, first enacted 30th June, 1976 (S.B.C. 1976, c. 25) which came into force by proclamation on the 1st February, 1977, I must set out at dreary length the proceedings in issue.

[18] It cannot be stressed too often that the ***Judicial Review Procedure Act*** was a procedural Act. It did not make, as the respondents appear to me to be submitting, a sea change in the substantive law upon which the prerogative writs of *certiorari*, *mandamus*, and prohibition rested. That substantive law, although by no means always easy of application, essentially because of difficulties of statutory interpretation (what powers did the Legislature, by this or that phrase or word, intend to confer?), was founded upon a simple proposition: It is the duty of the Queen's judges to ensure that all those upon whom, by enactment of the

Legislature (Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of British Columbia), powers of decision have been conferred, remain within the powers thus conferred. In other words, those persons (tribunals) upon whom powers have been conferred, must be prevented by orders in the nature of *certiorari* and prohibition from arrogating to themselves powers which were not conferred and required by orders in the nature of *mandamus* to exercise their powers as the Legislature intended.

[19] In this context, it is useful to remember that *certiorari* means literally "to be more fully informed". This is illustrated by the general form of writ of *certiorari* to be found in the *Supreme Court Rules, 1961*, Appendix O, No. 1:

> ELIZABETH THE SECOND, by the grace of God, of the United Kingdom, Canada and Her other Realms and Territories, QUEEN, Head of the Commonwealth, Defender of the Faith.
>
> To [*here insert directions*] *A. B.* (and *C. D.* and *E. F.*), and to every of them, Greeting:
>
> We being willing for certain reasons that [*here insert description of order or other proceeding to be removed from the order for the certiorari*] (as is said) be sent by you before Us, do command you, and every of you, that you or one of you do send forthwith under your hands [*or* seals], or the hand [*or* seal] of one of you, before Us, in the Supreme Court of British Columbia, at the Courthouse at , all and singular the said orders.

[20] The Queen's judges did not have, before the enactment of the ***Judicial Review Procedure Act***, and were not given by it, a roving commission to find fault with decisions within the scope of the powers conferred. A judge conducting a judicial review is not sitting in appeal. He or she is deciding whether the tribunal acted within its jurisdiction.

[21] In exercising the jurisdiction of judicial review, the courts have developed some tools of statutory interpretation. As I put it in ***MacMillan Bloedel Ltd. v. Galiano Island Trust Committee*** (1995), 10 B.C.L.R. (3d) 121 at 163-64:

> [93] I think it useful to recall and keep in mind certain fundamental principles....
>
> [94] The second such principle is that the Legislature is presumed not to confer certain powers or means of exercising power, unless the contrary clearly appears from the legislation. Thus, we presume that the Legislature does not intend to confer a power to act contrary to the rules of procedural fairness or to act corruptly. We also presume that the Legislature intends a power conferred to be used only for the purposes of the power as those powers are found in the legislation (see, for instance, ***Roncarelli*** v. ***Duplessis*** (1958), [1959] S.C.R. 121). We also presume that the Legislature does not intend to confer a power to expropriate without compensation (see, for instance, ***British Columbia v. Tener***, [1985] 1 S.C.R. 533 [28 B.C.L.R. (2d) 241, [1985] 3 W.W.R. 673]). But, by the combined effect of ss. 960 and 972, at p. 20 [p. 137], and s. 963, at p. 19 [p. 137], the Legislature of British Columbia authorizes a municipality to "downzone", an exercise of power many persons would consider equivalent to expropriation, and to do so without paying compensation. We also presume that the Legislature does not intend to confer a power to

> discriminate (see ***Kruse*** v. ***Johnson***, [1898] 2 Q.B. 91), although that is a somewhat vague proposition....
>
> [95] But the Legislature, by the terms of the enactment, may oust any or all of these principles, so long as it itself does not contravene the ***Constitution Acts***. The presumptions are not immutable.

[22] To this I would add, after the word "corruptly", the words "or to make an unreasonable decision". In this context, "unreasonable" does not mean, in the eyes of a judge hearing an application for judicial review, "wrong". It means lacking in reason.

[23] As Lord Russell of Killowen put it in ***Secretary of State for Education and Science v. Tameside Metropolitan Borough***, [1976] 3 All E.R. 665 at 703, "History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people."

[24] There was what might be called a further presumption over which much judicial ink has been expended - a presumption that the Legislature did not intend to confer a power to commit errors of law. Hence, the concept of errors in law on the face of the record, a concept which requires, when the issue arises (no counsel directly addressed it here although it does seem to be lurking in the arguments), a consideration of what

for the purpose of the exercise of the supervisory power is the "record".

[25] In recent years, Canada has seen a plethora of cases addressing what is broadly called "the standard of review". For me, in this case, to take a passage from this authority or from that authority would, I think, serve no useful purpose. What I must do is focus on the statute in issue. The issue to be addressed is whether the tribunal (the Minister and the responsible Minister) whose decision was quashed below, acted outside the powers conferred upon it (the Administrative Law question).

[26] That decision was the granting to the respondent, Redfern Resources Ltd. ("Redfern"), on 19th March, 1998, after a process which began three and one-half years before, of a certificate under the Act to authorize the opening of the Tulsequah Chief Mine.

[27] In addition to the principal issue, there is the issue mentioned in paragraph 11, *supra*, which is raised in the cross-appeal.

[28] Because the pursuit by Redfern of the certificate necessary to its commercial purpose has now been in progress seven years - as I remarked to counsel, the Second World War

lasted not quite six years - I think it helpful to give a summary of events as a framework for the lengthy recital of events which this case requires.

September 1994

Redfern applies for a mine development certificate pursuant to the ***Mine Development Assessment Act***, S.B.C. 1990, c. 55.

8th July 1994

The Act, S.B.C. 1994, c. 35, receives Royal Assent.

June 1995

The Act and B.C. Regulation 276/95 come into force.

30th June 1995

Pursuant to s. 93(5) of the Act, the responsible Minister specifies that the Redfern application should be dealt with as if it were at the stage, Draft Project Report Specifications (The Act, Part 2, Div. 7, ss. 21-24).

Project Committee undertakes its work.

October 1995

Draft Project Report Specifications.

February 1996

Final Project Report Specifications.

26th November, 1996

Redfern submits Tulsequah Chief Project Report (five volumes) to Environmental Assessment Office.

13th December, 1996

Project Committee recommends withholding acceptance for public review, citing deficiencies in the report submitted by Redfern.

18th June, 1997

Executive Director grants order allowing amendment of proposal to delete barging as a means of transporting concentrate to tidewater.

8th July, 1997

Redfern submits revised report.

1st August, 1997

Environmental Assessment Office accepts the report (s. 26) and gives required notice under s. 16 fixing the period for public submissions as 8th September, 1997, to 6th November, 1997.

Responses received are tabulated.

December 1997 to early March 1998

What occurred or, from the respondents' point of view, more importantly, what did not occur during this period, I shall set out more fully hereafter.

March 1998

Project Committee (s. 10) submits report. Not all members are in agreement. The majority recommend the granting of the certificate. The Tlingit oppose it, writing a report of their own.

19th March, 1998

Tribunal grants certificate.

11th February, 1999

Tlingit bring this petition for judicial review seeking *inter alia* determination of claims of aboriginal right and title.

24th June, 1999

Kirkpatrick J. orders those claims referred to trial list.

13th to 23rd March, 2000

Petition heard.

28th June, 2000

Kirkpatrick J. pronounces judgment dismissing part of petitioner's claims, quashing certificate, and inviting certain submissions.

27th July, 2000

Kirkpatrick J. delivers further reasons.

27th July, 2000

Respondents other than Redfern give notice of appeal from the judgment of 28th June, 2000.

28th July, 2000

Redfern gives notice of appeal from that judgment.

1st August, 2000

Tlingit give notice of cross-appeal from that judgment.

(a) Position of the Parties Here and Below

[29] The appellants' position is that the statute was observed in every respect and thus there was no want of jurisdiction in the tribunal when it granted the certificate.

[30] For their part, the respondents say that there were flaws in the process up to the referral. It is that attack which makes necessary a detailed account of the events.

[31] Not wishing to misstate the grounds of their attack, I set them out in their own words as contained in their outline presented to the learned judge below:

> The Applicants submit that the application should be granted on the following grounds:
>
> 1. The environmental review did not conform to the purposes or satisfy the requirements of the *Act*, because:
>
> - It was not an open, accountable and neutrally administered process;
> - The project committee established under the *Act* did not carry out a thorough, timely and

integrated assessment of the environmental, economic, social, cultural, heritage and health effects of the Project; and

- The project committee were wrong or exceeded their statutory mandate when they developed aspects of Redfern's Project themselves, including wildlife monitoring programs and access control measures, instead of reviewing the Project as proposed by Redfern.

2. The Recommendations Report did not conform to the purposes or satisfy the requirements of the *Act* because:

- For the reasons in (1), it was not the product of an environmental review process within the contemplation of the *Act*;
- It did not make the substantive decisions required by the *Act*, because it did not analyse and advise on the potential effects of the Project or on the prevention or mitigation of the adverse effects that would be caused by the Project;
- The recommendations were not based on the decision required by the *Act*, viz., whether the Project would promote sustainability by protecting the environment and fostering a sound economy and social well-being; and
- The analyses and recommendations were decided by a few government officials rather than by the project committee.

3. The Referral of Redfern's application to the Ministers did not conform to the purposes or satisfy the requirements of the *Act* because, for the reasons in (1) and (2), the environmental review of the Project and the Recommendations Report did not provide the Ministers with the information required for the proper exercise of their discretion under the *Act*.

4. The Certificate did not conform to the purposes or satisfy the requirements of the *Act* because:

- The Project will not promote sustainability by protecting the environment and fostering a sound economy and social well-being; and

- It was not based on an environmental review and Recommendations Report within the contemplation of and required by the *Act*.

5. The Ministers erred in law when they decided to issue the Certificate because:

- They considered irrelevant matters, viz., what they thought were the majority views of the project committee, rather than the substance of the issues raised by the review and relevant to the decision whether to issue the Certificate;
- They did not consider all relevant matters, viz., the matters raised in the Recommendations Report prepared for them by the Tlingit member of the project committee;
- They reached patently unreasonable conclusions that are not supported by the information and analyses gathered through the environmental review process; and
- The Certificate approves a Project that will undermine rather than achieve the dominant purpose of the *Act*, viz., the promotion of sustainability by protecting the environment and fostering a sound economy and social well-being.

6. The Tlingits' hunting, fishing, gathering and other traditional land use activities in the portion of their traditional territory that will be traversed and impacted by the proposed road are the exercise of aboriginal rights within s. 35 of the *Constitution Act, 1982*. The Certificate approves a Project that will unjustifiably infringe on the Tlingits' exercise of those rights.

7. The Tlingits have aboriginal rights within s. 35 of the *Constitution Act, 1982*, based on their aboriginal title to the site of Redfern's proposed mine and the portions of their territory that would be traversed and impacted by the road. The title of the Crown in right of British Columbia to the lands and resources in those areas, including mineral rights, is subject to the Tlingits' aboriginal title. The Certificate approves a Project that will

unjustifiably infringe on the Tlingits' rights based on aboriginal title.

8. The base line data and analyses on wildlife and habitat provided by Redfern for the environmental review did not meet the standards required to inform the decisions the Ministers were required to make pursuant to the *Act* and their fiduciary obligations to the Tlingits.

9. In the circumstances of this case, when the Ministers issued the Certificate they breached fiduciary obligations owed to the Tlingits by the Crown in right of British Columbia, because:

- They did not substantially address the concerns raised by the Tlingits concerning the Project and its adverse impacts on their rights;
- They did not ensure effective protection for the Tlingits' aboriginal rights pending the conclusion of a treaty;
- They did not obtain the consent of the Tlingits to issue the Certificate approving the Project.

[32] They sought in the court below this relief:

1. A Declaration that the Report and Recommendations (the "Recommendations Report") of the Tulsequah Chief Project Committee With Respect To: A Decision on a Project Approval Certificate by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines and Minister Responsible for Northern Development (the "Ministers"), prepared by the Project Assessment Director and submitted to the Executive Director, Environmental Assessment Office in or about March, 1998, pursuant to s. 29 of the *Environmental Assessment Act*, RSBC 1996, c. 119, (the "Act") did not conform to legal requirements.

2. A Declaration that the referral (the "referral") by the Executive Director to the Ministers of the Application (the "Application") by Redfern Resources Ltd. ("Redfern") for a Project Approval Certificate for the Tulsequah Chief Mine

> Project (the "Project"), in or about March 1998, pursuant to s. 29 of the *Act* did not conform to legal requirements.
>
> 3. Relief in the nature of certiorari, quashing and setting aside the Project Approval Certificate M98-02 ("the Certificate") issued by the Ministers to Redfern for the Project, on or about March 19, 1998, pursuant to s. 30 of the *Act*.
>
> 4. Such further and other relief as this Honourable Court may deem just.

[33] In their factum on the cross-appeal, they allege that Kirkpatrick J. erred:

> 1. ... in holding that the Recommendations Report and the Referral to the Ministers were not the exercise of a statutory power and therefore not subject to judicial review in their own right.
>
> 2. ... in holding that the conduct of the EAO and the Project Committee did not raise a reasonable apprehension of bias;
>
> 3. ... in referring Redfern's application back to the Ministers for their reconsideration, or in the alternative, that she erred in referring the matter back without ordering steps to correct the problems that gave rise to a reasonable apprehension of bias.

[34] The learned judge summarized her understanding of what was before her in these words [see (2000), 77 B.C.L.R. (3d) 310 (B.C.S.C.) at 319]:

> [13] The petitioners' arguments for judicial review focused on four broad issues:
>
> (a) substantive issues in the environmental review;

(b) procedural errors in the environmental review process and the production of the Recommendations Report;
(c) substantive errors in the Recommendations Report; and
(d) constitutional and fiduciary obligations;

all of which, the petitioners say, give rise to errors in the Recommendations Report, the Referral, as well as errors in the decision to grant the Certificate.

(b) The Certificate and Reasons

[35] Project Approval Certificate M98-02 was, in part, this:

WHEREAS:

A. In September 1994 Redfern submitted an application for a mine development certificate for the Tulsequah Chief mine project pursuant to the *Mine Development Assessment Act* S.B.C. 1990 c. 55;

B. On June 30, 1995, pursuant to s. 93(5) of the Act, the Project was transferred to the environmental assessment process at a step known as "Draft Project Report Specifications".

C. The Project Committee established pursuant to s. 9 of the Act has made recommendations to the Executive Director of the Environmental Assessment Office; and,

D. The Executive Director has referred the Application for the Project for a decision under s. 30 of the Act.

NOW THEREFORE:

The Minister of Environment, Lands and Parks, (the "Minister") with the concurrence of the Minister of Energy and Mines (the "Responsible Minster") pursuant to section 30(1)(b)(i) of the Act, hereby issues this Project Approval Certificate (the "Certificate") to Redfern subject to the following Conditions:

A. CONDITIONS

1(1) Redfern must cause the Project to be designed, located, constructed, operated, dismantled and abandoned substantially in accordance with the documents and commitments listed in Schedule A to this Certificate.

1(2) This Condition is subject to the rule of interpretation that the contents of later-dated documents listed in Schedule A to this Certificate shall vary, rescind, repeal or supersede, as the case may be, the contents of earlier-dated documents listed in Schedule A, where in the reasonable opinion of the Minister, there is a conflict or inconsistency between, or among, any of those documents.

2(1) Despite Condition 1(1), if Redfern proposes a change prior to the start of production to the design, location or construction of the Project as described in the documents listed in Schedule A, that in the reasonable opinion of the Executive Director may have the potential for significant adverse effects, and despite that the change is not a project modification subject to the provisions of the *Environmental Assessment Reviewable Projects Regulation* (B.C. Reg. 276/95), Redfern must provide [to] the Executive Director:

(a) notice of the proposed change; and

(b) plans, analyses, records and other information necessary for an effective assessment by the Executive Director of the proposed change.

2(2) The Executive Director, following receipt of and evaluation of information requested from Redfern under Condition 2(1), may:

(a) make a recommendation to the Minister and the Responsible Minister as to a review process, if in the opinion of the Executive Director one is necessary for an effective assessment of the change, and if the effects are potentially adverse, whether those effects may be mitigated;

(b) on approval by the Minister and the Responsible Minister of the proposed review process, establish that review process and cause it to be conducted; and

(c) on conclusion of the review process, make a recommendation to the Minister and the Responsible Minister regarding the proposed change to the Project.

2(3) On receipt of the recommendation of the Executive Director, the Minister, with the concurrence of the Responsible Minister, may approve the change to the Project in accordance with this Condition and amend this Certificate.

3 Redfern must, in the reasonable opinion of the Minister, have substantially started the Project within five years of the issue date of this Certificate.

4 This Certificate is of no force or effect until validly executed by Redfern, and signed by the Minister and Responsible Minister.

5(1) This Certificate does not constitute a permit, licence, approval or any other authority required under any other enactment.

5(2) Redfern must comply with all applicable orders, directions and conditions, and obtain and comply with all applicable tenures, licences, regulations, approvals, standards and permits, or other authorities, which may include or result from, but are not necessarily limited to, the following provincial enactments:

[Here followed a list of 26 statutes with which Redfern was obliged to comply.]

6 Redfern must:

a) implement the environmental management commitments described in the documents listed in Schedule A, to the reasonable satisfaction of the Skeena Regional Director, Ministry of Environment, Lands and Parks, Smithers.

b) implement to the satisfaction of the Skeena Regional Director, Ministry of Environment, Lands and Parks, Redfern's component of the Environmental Follow-up and Monitoring Program, contained in Appendix 11 of the Project Committee Recommendation report.

c) implement the Fish and Fish Habitat Mitigation and Compensation plan, outlined in the Environmental Follow-up and Monitoring Program referred to in Condition 6(b) to the satisfaction of the Chief Major Projects Review Unit, Habitat and Enhancement Branch, Department of Fisheries and Oceans.

d) ensure that the firearms, hunting, fishing and vehicle use policy listed in Schedule A is actively enforced and complied with by Redfern employees.

e) implement the access management plan for the Tulsequah access road, south of the O'Donnel River crossing included in Volume IV of the project report listed in Schedule A, to the satisfaction of the Skeena Regional Director, Ministry of Environment, Lands and Parks.

f) participate with the Province, First Nations and third parties in a joint management process, if established by the Province, to oversee and monitor the construction, operation, decommissioning and abandonment phases of the Project, including the monitoring and management of the potential for Project related community impacts.

g) to the satisfaction of the Regional Director, North West Region, Ministry of Transportation and Highways (MOTH), reach an agreement regarding responsibility for the additional costs that would be incurred beyond the existing MOTH Atlin highway improvement program, to meet the required specifications identified in the project committee recommendations report for the Project ore transportation on the

British Columbia portion of the Atlin highway.

7 Redfern must, except in connection with granting security to Project lenders or other financing entities or financing facilities, obtain the written consent of the Minister, such consent not to be unreasonably withheld prior to disposing, whether legally, beneficially or otherwise, of:

a) this Certificate, or any right, title or interest conferred by this Certificate, or

b) the Project.

B. SUSPENSION AND CANCELLATION OF CERTIFICATE

This Certificate may be subject to cancellation, suspension in whole or in part, amendment, or the attachment of new Conditions, for any of the following reasons:

(a) the Project is not, in the reasonable opinion of the Minister, substantially started within 5 years of the date of issue of this Certificate;

(b) the Minister has reasonable and probable grounds to believe that Redfern is in default of:

i. an Order of the Supreme Court under Section 69(2), 80 or 82 of the Act,

ii. an Order of the Minister made under section 68 or 70 of the Act, or

iii. one or more requirements or Conditions of this Certificate;

(c) Redfern, or its officers or employees when acting on behalf of Redfern, have been convicted of an offence under the Act, with respect to the Project; or

(d) An Order is made, or a resolution is passed, for the winding up, or dissolution of Redfern, or Redfern is in receivership or bankruptcy proceedings.

The Conditions of this Certificate are agreed to by Redfern Resources Ltd. this 9 day of March, 1998.

[Signed]
Terry Chandler
President and Chief Executive Officer
Redfern Resources Ltd.

[Signed]	[Signed]
Honourable Dan Miller	Honourable Cathy McGregor
Minister of Energy and Mines and Minister Responsible for Northern Development	Minister of Environment, Lands and Parks

Issued this 19th day of March, 1998.

[36] Schedule A, which was "List of Documents Comprising the Tulsequah Chief Application and Project Report", is three pages long and, by my count, comprises some 39 documents, some obviously long and some short. I have attached to these reasons, as Appendix "B", that schedule with the pages in the appeal book at which such of the documents as were in the various affidavits may be found.

[37] I do so because no complete version of the certificate is found in one place in any of the affidavits. Whatever else the "record" consists of in a matter of this kind, all the documents incorporated in the instrument sought to be quashed are an integral part of it.

[38] By the Act, the Ministers were required to give reasons for decision and this is the document so described, dated 19th March, 1998:

> REASONS FOR MINISTERS' DECISION
> UNDER SECTION 30(1)(c) OF THE ACT
>
> The Minister of Environment, Lands and Parks (the "Minister") and the Minister of Energy and Mines and Minister Responsible for Northern Development (the "Responsible Minister") considered Redfern's application and the Project Committee's recommendations. The Minister, with the concurrence of the Responsible Minister, issued Project Approval Certificate M98-02 (the "Certificate") approving the Project, subject to conditions.
>
> The following are the Ministers' reasons for issuing the Certificate:
>
> The majority of the members of the Project Committee consider that:
>
> - all major technical and policy issues related to the Project have been identified and are manageable to acceptable levels with the implementation of the mitigation strategies identified in the documents listed in Schedule A to the referral from the Executive Director and through subsequent compliance with statutory permit, licence, approval and other authorization requirements;
> - the development of the Project, with the successful implementation and compliance of the identified impact management and compensation strategies and the follow-up and monitoring program, is not expected to cause significant adverse environmental effects; and
> - measures with respect to distribution of information about the Project were adequate under the Act.

It is convenient to note now that each of the parties has a bone to pick arising from this document. The Tlingit say that, although it is entitled "Reasons", it does not constitute "Reasons" at all within the meaning of the word in the Act. The appellants say that the learned trial judge improperly drew an inference from the brief period which elapsed between the Recommendations Report and the issuance of this document of a failure of duty on the part of the tribunal. I address these points hereafter.

(c) The Course of Proceedings under the Environmental Review Process

[39] What had happened before 30th June, 1995 (see recital B in the certificate) is described thus in a document, "Draft Project Report Specifications" (see s. 21 of the Act) dated October 1995. As it occupies some 58 pages of the appeal book, I shall not quote it in full, but it said this:

> **Project Committee**
>
> In keeping with the spirit of the new ***Environmental Assessment Act***, the MDAP [Mine Development Assessment Process], in November 1994, set up the Tulsequah Chief Project Committee to coordinate the overall review of the project proposal. The Committee is chaired by a Project Director for the British Columbia Environmental Assessment Office, acting on behalf of the Executive Director of that office. Representatives of the British Columbia and Canadian federal governments, Taku River, Tlingit First Nation, and the Atlin Advisory Planning Commission were invited to participate in the work

> of the Committee. As well, because of the proximity of the project to the United States border, the Alaska State and the United States federal review agencies were invited to sit as full members on the Committee to consider potential transboundary effects. U.S. participation on the project Committee was also sought to maintain a coordinated review of any proposed Alaskan portions of transportation routes that lie outside Canadian jurisdiction, and which would require U.S. and Alaskan permits and/or approvals. Appendix 13 to this document contains guidelines for project committees under the EA process.
>
> **Application Review**
>
> The original two volume submission was distributed for review and comment to the following review participants. In addition, the three volumes revising the project plans were provided to agencies participating in a February 1995 Review Workshop held in Vancouver (see Appendix 2), and to additional participants identified at that workshop.

[40] There followed a two page list of government agencies - provincial, federal and foreign (i.e. Alaskan), First Nations, and persons thought to be "interested parties" including the Sierra Club, the Taku River Recreation Association, the local Member of Parliament, and so forth.

[41] In February 1996, the Final Project Report Specifications were issued pursuant to s. 24(a). This document is some 80 pages long. As to First Nations consultation, it says, in part:

3.5 First Nations Consultation

The project is located in an area of Northwestern British Columbia which is currently the subject of treaty negotiations between the provincial government and the Taku River Tlingit First Nation (TRTFN). Because of its direct interest in the land and resources of the area, TRTFN is participating as a project committee member as legislated by the *Environmental Assessment Act*. Presence on the committee ensures that First Nations have an arena to identify their interests, are provided with all information, and can contribute valuable local knowledge to project design and planning. Additionally, "sidebar" meetings are held with First Nations in their own communities, with review agency staff and company representatives, to ensure direct community-based communication.

The proponent first met with TRTFN representatives on June 16, 1993 to discuss their exploration activities, issues of concern to TRTFN and information requirements. Since that time the proponent has met with TRTFN representatives on a number of occasions to discuss various aspects regarding project development and involvement of the TRTFN.

The proponent has met directly with TRTFN representatives in Atlin on several occasions, and hired TRTFN members to assist with summer exploration activities. The proponent has expressed the commitment to include the TRTFN in the benefits of the project to the maximum extent possible, including sharing in project planning, training, jobs and contracting opportunities. The proponent held an open house and meeting with the TRTFN in Atlin on February 15, 1995 to present its Pre-Application and elicit response. As required by the review process, the proponent has contracted an independent consultant to conduct archaeology and ethnographic studies, with the input of the TRTFN, to identify potential impacts on the TRTFN traditional way of life.

In a document dated 29 September, 1995 entitled "*What We Need to Know*" *Information Requirements for Redfern Resources' Project Report for Tulsequah Chief Mine*, TRTFN submitted its list of information

requirements for the proponent's Project Report (see Appendix 5). In general, TRTFN requires information on wildlife impact, terrain sensitivity, barging impacts, mine development activities and plans (including abandonment), and the effects of a new road into the Taku. These issues have also been raised by review agencies and have been incorporated into the final Project Report Specifications. TRTFN also requests that the proponent conduct a community impact assessment of the project on Atlin.

Additionally, at various meetings held during the initial stages of review, the TRTFN has provided the following verbal comments:

- Impacts on fishery: Although the TRTFN is supportive of genetic diversity, discussions surrounding the protection of fisheries should recognize that King and Sockeye salmon are of commercial significance to the Tlingits. There is not a commercial market for Dolly Varden.
- The TRTFN is especially concerned with protection of wildlife, and requests the review to ensure that all necessary baseline studies have been conducted, and that stringent protection and/or enhancement strategies will be required as a condition of approval.
- The TRTFN does not consider that it has sufficient information on the barging option to provide a considered response. The TRTFN advises that it is concerned regarding:
  - wake/erosion effects on homes and waterfronts;
  - safety issues and damage to fishing nets; and
  - impact on the commercial fishery;

The TRTFN has clearly articulated that uppermost in their concerns is the proposal for a new road. Issues regarding new access are shared by the community as a whole, and are indeed appearing to emerge as contentious in relation to the project. Accordingly, the project committee is requiring the proponent to address the access question in depth, as evidenced by line agency comments and information requirements expressed in Section 4 of this document.

> The overall TRTFN response is provided for the proponents information. Further requirements of the TRTFN are incorporated into the body of this report and detailed under the appropriate heading of Section 4.

[42] Thus, by February 1996, what has always been, and still is, the Tlingit's main sticking point - the location of the road from the mine to Atlin - had become clear.

[43] Under the statute, by s. 24(b), the proponent is required, once the specifications are at hand, to prepare a "project report". What happened thereafter is described thus in a Time Limit Order - the validity of which is not disputed - not made until March 1998:

> C. The proponent prepared and submitted a five volume project report, entitled "Redfern Resources Ltd. - Tulsequah Chief Project Report" to the Environmental Assessment Office on November 26, 1996, and copies were also distributed to Project Committee members. On December 13, 1996, the Project Committee recommended withholding acceptance of the project report for review, as the project report had a number of deficiencies that required revision prior to accepting the project report for public review.
>
> D. On July 4, 1997, the proponent resubmitted a revised project report to the Environmental Assessment Office which was accepted for public review on August 1, 1997. Notice was given to the public inviting comments about the potential effects of the project, with the period for submission of comments set at 60 days, commencing September 8, 1997, and ending November 6, 1997.

[44] The substance of the comments received from the public concerning this project was not addressed at the hearing of this appeal.

[45] In March 1998, the Recommendations Report, which consists of 110 pages of "recommendations" and report and some 268 pages of appendices was submitted. Because of its length, it is not feasible to set it out in full, but it ends at page 103 with "Project Committee Recommendations and Reasons" which continue to page 108 and which I attach as Appendix "C" to this judgment.

[46] Appendix "C" discloses that the Tlingit were opposed to the recommendation of the majority for it ends with this note:

> * - March 6, 1998, [Tlingit] requested more detailed information regarding wildlife, aquatic resources and access to the Taku River Valley
> - requested an extension of the review to provide this and full project committee meetings to discuss.
>
> ** - TRTFN indicated by letter July 25, 1997, that the project report met the project specifications provided that a report pertaining to traditional land use was completed. This report was completed in August 1997 and the project report was accepted at that time. At a later date (March 6, 1998) the TRTFN indicated there were certain information deficiencies in the assessment.

[47] The minority report (whether the Ministers were given it, we do not know) is of some 65 pages. Its introduction sums up

the position of the Tlingit on the alleged flaws in the process:

> INTRODUCTION
>
> At the beginning of this week we received the draft report prepared by the B.C. Environmental Assessment Office respecting a recommendation to be made under Sec.29 of the province's *Environmental Assessment Act* regarding the proposed Tulsequah Chief mine re-opening project. We have reviewed the EAO report and have found it fundamentally flawed, both in terms of content and the process used to create it. As a result, we have prepared this alternate report which we believe more accurately reflects a number of key issues that should be considered by the Project Committee members prior to formulating a recommendation to the government. It has always been our understanding, and we have in the past so requested of the EAO, that there would be an opportunity at the end of the day for the Project Committee to convene as a team of assessors, without the proponent present, to deliberate on the findings of the assessment process and to formulate in an integrated fashion our ultimate recommendation.
>
> It is our contention that, contrary to the picture portrayed in the EAO report, the information before us is not adequate to conclude that the impacts of the project are properly understood. Additionally, we cannot affirm that we have in place the necessary mitigation measures, including monitoring programs, that will ensure sound environmental management of the project. In the text that follows we will elaborate fully on the reasons why we hold this position. The outstanding issues as this review draws to completion are, as we shall demonstrate, substantive, far-reaching, and range in duration far beyond the lifetime of this project.
>
> We shall note here, but not pursue further, our dismay with the abuse of the environmental review process in the last few weeks prior to completion of this report. When it became apparent that substantive deficiencies existed with the information presented by the proponent, Redfern Resources, the Project Committee under the direction

of the EAO engaged in a bizarre exercise of attempting to complete the work the proponent failed to do. This activity was primarily in the area of designing a number of environmental monitoring programs stipulated by the Project Report Specifications (but not provided) that the Project Committee rightly saw would be required to ensure the environmental soundness of the project. The effect of this was to greatly intensify the work assumed by committee members and to impose substantial cost burdens on the review. It also meant that we had to go significantly beyond our regulated timeline for review in order to complete the work. As it turns out, much of the work still falls short of what is required to assure us prior to approving the project that the programs being proposed will be workable, meaningful, and effective.

More importantly, doing the work of the proponent, we contend, is beyond the mandate set out in the *Environmental Assessment Act* and strains our independence as objective assessors of the project. If we do the work, how can we objectively evaluate it? Who shall bear the liability if the programs fail in the long-term? This whole exercise has resulted in both a delay for completing the review which has frustrated the proponent and the Project Committee, and a general abuse of the process which sets a harmful precedent for future reviews.

This report will focus on those areas where a rigorous and honest assessment of the issues has led clearly to conclusions and recommendations which differ from those set out in the EAO Recommendations Report. As we will argue below, to approve the project <u>at this time</u> will be done in the face of great uncertainty about potentially significant impacts and at the risk of destroying the credibility of the environmental review process.

* * *

The problem is that the Project Committee has <u>never</u> met to discuss the results of the various sub-committees which have been reviewing the complex and technical issues to assist in the assessment. There has been a one hour or so meeting of the full

Committee in January of this year to receive a presentation from the Northwest Institute for Bioregional Studies, but nothing more. The Project Committee has not had an opportunity to consider all the information now available for the application, and has not had an opportunity to deliberate as a team of assessors and formulate its recommendation.

* * *

It is unconscionable that this conclusion, one with far-reaching and irreversible consequences for northwestern British Columbia, should be formulated unilaterally behind the scenes and circulated to the Project Committee members - individually and without benefit of even a teleconference - for their approval. It is for that reason that we have found it necessary to write this report

* * *

The issues relating to the road are numerous and complex. There is, first of all, the strategic issue of building a 160 km road into the pristine wilderness of the Taku drainage. The region represents the last major Pacific drainage in Canada that has to date escaped the effects of major industrial development. True, small-scale historic mining has taken place in the Tulsequah valley, but movement into and out of the area was by river barge, and the effects of much of this development have long been removed by natural erosional processes. The small waste rock dumps and mine water currently discharging acid drainage into the river at the old Tulsequah Chief operation remain as impacts scars on the landscape.

The strategic issue surfaces not only because of the national and provincial significance of the affected landscape, but also because the area in question is the subject of treaty negotiations between the Crown and the Taku River Tlingit First Nation. Additionally, the area is proposed as a candidate in the near future for land use planning by, respectively, TRTFN and the Province. These issues, key to the stated intent of the Act, have not been addressed as part of the EAO Recommendations Report, and we discuss this problem below.

> Beyond the question of whether or not the road should be built, now or ever, lies the issue of whether or not the most environmentally acceptable route has been chosen. Has the necessary work been conducted to allow us to choose the optimum route? Are plans for construction sufficiently developed so that assessors can feel comfortable that the road can and will be constructed in an environmentally sound fashion?

[48] They then go on to discuss all the various issues, all of which I think can fairly be said to be related to a fear of environmental degradation from this project, at least as it was proposed by the proponent. Whether this fear is justified is not an issue which as a matter of law can arise in these proceedings for judicial review. The power of judicial review is not a power to be exercised by the judge asking himself or herself, "Would I, if I had been the tribunal, have done what the tribunal did?"

[49] What the Tlingit say are the facts as to the events which occurred between the end of the public process and the making of the report is set out in their petition under the heading, "The facts upon which this Petition is based are as follows":

> 17. Redfern re-submitted its project report on July 8, 1997. The Executive Director accepted it for review on August 1, but asked Redfern to delay distribution until Staples finished his report, which he did later that month. The statutory public review period for Redfern's project report was scheduled for September 8 to November 6, 1997. It was later agreed, at the urging of the Tlingits,

that Staples' report did not adequately address the impacts issue. He was given an extension to complete that work, and his amended chapter on socio-economic impacts was submitted on December 23, 1997.

18. Meetings of the wildlife/access sub-committee were held in December, January and February, in which it was agreed that a number of issues were still unresolved, including:

- a modified route (Warm Bay) had emerged as an alternative for the northern third of the Redfern road, but no study had been done to compare its impacts to Redfern's preferred route;
- Redfern had not provided adequate multi-year base-line data on wildlife and habitat;
- Redfern's habitat information and analyses were not adequate;
- Redfern had provided inadequate information on the Shazah Pass goat population and the Southern Lakes caribou.

No new information or reports were developed on those issues, nor were they resolved in the sub-committee.

19. However the summary of issues prepared for the committee by Ringstad at the end of February said that B.C. government departments were satisfied on all these issues, and that only the Tlingits considered that they were still unresolved. These problems were never discussed in the committee as a whole.

20. Ringstad and B.C. government members of the committee appeared to agree, at the end of the review process, that Redfern's project report contained unacceptable proposals in two important areas: programs to monitor the Project's impacts on wildlife, and mechanisms for controlling the increased access to wildlife populations that would be caused by the northern third of the proposed road, from Atlin to the O'Donnel River. Rather than require Redfern to remedy these serious deficiencies, government officials on the wildlife/access sub-committee undertook the design of monitoring and access control programs for the Project. The Tlingits objected to this shift away

from the committee's mandated role as reviewer of Redfern's project report. Nonetheless sub-committee members worked through February to design the Project's monitoring plans, and an official from the Ministry of Environment, Lands and Parks ("MELP") wrote a letter on March 2, setting out the Project's access management plan.

21. As a result of a number of expert reports and the many discussions in sub-committees, several fundamental problems with the Project had emerged, particularly with respect to the serious impacts the proposed road would have on wildlife and the Tlingits' economy and culture, and the inability of the proponent or government to mitigate those. The Tlingits requested meetings of the committee as a whole, so that reasoned collective decisions could be made about the conclusions and recommendations the committee was required to provide to the Executive Director and the Ministers, based on all the information and analyses that had been gathered.

22. Ringstad and other EAO staff had repeatedly assured the Tlingits that such meetings would be held. The entire committee was scheduled to meet together for a week from January 12-16, 1998, to review the work of the sub-committees and work out the substance of the committee's Recommendations Report. But no such meetings were ever held.

23. Instead, the EAO informed members of the committee on February 26, 1998, that a draft of the Recommendations Report was being prepared by the EAO, and would be sent out for review on March 2, for a final sign-off by March 4. The Tlingits protested this decision to both Ringstad and the Executive Director, but received no response from either. The draft of the committee's report was sent out on March 3. It contained a conclusion that there was no reason not to grant Redfern a project approval certificate.

* * *

28. In his report commissioned by the EAO, Staples said these losses would be cumulative, because placer mining in the Atlin area had already caused land-use adjustments and the loss of animal populations and habitat. He concluded that the

proposed road would impact on resources harvested by the Tlingits and interfere with their land use and cultural activities. He reported that this traditional land use, including hunting, fishing and gathering, is still the critical pillar of community stability, household economies and well-being and cultural identity for the Tlingits, that these activities have been the bedrock for maintaining their culture and values up to the present, and are the basis for them building a sustainable future.

29. Most important for an assessment process under the *Act*, Staples concluded that neither the proponent, the province nor the Tlingits would be able to mitigate these impacts, and that the proposed road would preclude the Tlingits from having the opportunity to shape their own vision for land use and a treaty settlement for a large part of their traditional territory.

30. No report disagreed with these very serious conclusions. No report suggested any way that the Tlingits would be able to successfully adapt their land use or harvesting patterns in the face of these predicted impacts in the heartland of their territory. The substance of the issues raised by Staples report was never discussed in sub-committee or committee meetings, and was avoided in the Recommendations Report published by the EAO in the name of the committee. The Ministers' reasons for decision, required by s. 30(d) of the *Act*, do not discuss the issue. The Certificate contains no terms or conditions that address it.

31. From the beginning to the end of the process, the Tlingits criticized the quality of the data and analysis on wildlife populations and habitat provided by Redfern. They continuously raised the issue, because of their people's heavy reliance on those resources. Solid expert reports provided to the process by Joanne Siderius, Rick Farnell, Norm Barichello and Alejandro Frid supported the view that Redfern's data and analyses did not satisfy accepted professional standards, or make possible the reliable assessment of potential impacts of the proposed road, or provide a base-line for effective monitoring of impacts if the road is constructed, or

> serve as a foundation for effective planning, mitigation measures or adaptive management strategies.

[50] Because the Rules of Court in this Province do not require an answer to the statement of facts asserted in a petition, one must go to the affidavits filed both in support and in response to ascertain whether the facts asserted are established or no.

[51] By recounting hereafter passages from the affidavits, I am not implicitly deciding that all that is in them was admissible for all purposes. In applications for orders in the nature of *certiorari*, evidence outside the record can only properly go to questions of want of jurisdiction on grounds, for instance, of bias, corruption, and lack of procedural fairness, when those questions are open on a proper reading of the statute in issue.

[52] In their amended petition, the Tlingit listed twenty affidavits to be read in support. I think it is fair to say that the principal affidavit on the issues before the learned trial judge (some of them refer to the issues which were sent to the trial list) was that of Tony Pearse, which occupies, including exhibits, some 1,000 pages of the appeal book.

[53] The text is simply this:

I, Tony Pearse, of Mayne Island in the Province of British Columbia, MAKE OATH AND SAY THAT:

1. I am a resource planner, and as such I have personal knowledge of the matters to which I hereinafter depose, except where stated to be on information and belief, and as to those last said matters, I verily believe them to be true.

2. Attached to this Affidavit and marked as Exhibit "A" is a copy of my Curriculum Vitae, setting out my professional and academic experience and qualifications.

3. Attached to this Affidavit and marked as Exhibit "B" is a copy of the Report that I prepared at the request of the Applicants, respecting the environmental assessment and approval process for the Tulsequah Chief Mine Proposal ("my Report").

4. The matters addressed in my Report are within fields in which I have expertise, as shown by my Curriculum Vitae.

5. The facts stated in my Report are based on my personal knowledge or information and belief, and I verily believe that they are all true.

6. My Report and the opinions in it are based on my professional and academic experience and work.

[54] The report Exhibit "B" began thus:

INTRODUCTION

1. From February of 1995 to March 1998 I consulted to the Taku River Tlingit First Nation (TRTFN or Tlingits, hereafter) as technical advisor on the Tulsequah Chief mine re-opening project being proposed by Redfern Resources Ltd.

2. During this period my principal task was to provide technical support to the Tlingit member of the Tulsequah Chief project committee, a committee established under the *B.C. Environmental Assessment Act* to review and make

> recommendations to the Minister of Environment, Lands and Parks and Minister responsible for the project being considered, about the environmental acceptability of the project and any terms and conditions that should accompany approval.
>
> 3. In this report I do two things. In Part One I provide a chronological overview of the process that was administered by the Environmental Assessment Office (EAO) to review the Tulsequah project as proposed by Redfern Resources Ltd., the proponent. This overview is provided from the perspective of the Tlingits' position as a member of the project committee. In Part Two I explain more fully how several of the issues of paramount concern to the Tlingits were dealt with during the environmental assessment process.
>
> [Emphasis mine.]

[55] In those emphasized words lies the root of the difficulty here. The principal deponents, Mr. Pearse, for the Tlingit, and Mr. Ringstad, for the appellants, have a different perspective. This is not surprising, nor do I mention it by way of criticism. It is simply the way things are.

[56] On the footing that paragraphs expressly mentioned in the affidavit in reply of Mr. Ringstad are considered critical, I quote those paragraphs [of Exhibit "B" to Mr. Pearse's affidavit of 9th February, 1999]:

> 16. Release of the draft *Project Report Specifications* from the EAO happened on November 28, 1995. A review of the draft document revealed that the information requirements submitted by the Tlingit had been

treated differently than the requirements from other government agencies. That is, the Tlingit comments were attached as an appendix to the main document, and referenced only in a prefatory section of the main document entitled "First Nations Consultation", where it was stated:

"The overall TRTFN response is provided for the information of the proponent." [p.xvii]

51. On May 28, 1997, the first meeting of an "Aboriginal Study Steering Group" was held to define the terms of reference for a new traditional land use study that would be conducted by Lindsay Staples and funded by the EAO. A second meeting was held June 21 to further refine the terms of reference and to establish timelines for draft and final reports.

52. Redfern submitted its revised *Project Report* on July 8, 1997. The project director requested project committee members to submit their recommendations by July 30 as to whether the report had met the form of the *Project Report Specifications* and could be accepted for review. Since at this point Staples' study was not finished, the project director noted that until this study had been received and distributed along with the *Project Report*, the public review period would not commence.

63. During this same meeting, Karen Diemert, who had replaced Lorne McIntosh as the lead wildlife reviewer for MELP Skeena Region, stated that the proponent had not satisfied the *Project Report Specifications* on wildlife matters. She also stated at one point that the ministry did not consider gated roads as an effective mitigation option for wildlife impacts. This caused an immediate reaction by Ringstad who bolted from his seat and left the room. He told me a few minutes later in the hall that he had placed a call on his cellular phone to the executive director, Sheila Wynn, to report Karen's remarks. He also told me that Karen had no right to make that statement.

> He was obviously upset. At a later point during the meeting while Karen was absent, Garry Alexander made a comment that Karen's position did not reflect the ministry's position.
>
> 70. What turned out to be the last wildlife subcommittee meeting took place on February 12th and 13th by teleconference. Susan Carlick and I attended this meeting on behalf of the Tlingits. Norm Ringstad stated that he expected to distribute a draft *EAO Recommendations Report* to the project committee members the following week for their review. This was a surprise to the Tlingits since there remained many issues yet to be resolved. Susan Carlick expressed concerns about this and reiterated the Tlingits' expectation that the project committee would still meet together, in person, once the work of the subcommittees had been completed. She expressed the Tlingits' position that the subcommittee was spending too much time doing the work of the proponent (primarily designing wildlife monitoring programs) that should have been done long ago, and we had yet to discuss important issues of concern to the Tlingits. In response to this Ringstad was vague about what would happen next, but said that he thought our suggestion for a teleconference with the full committee at the beginning of the following week to talk about how to bring this all to a conclusion, was a good one. However, he did not commit to this (or any other plan), and the teleconference never happened.

[57] The appellant Ringstad filed an affidavit sworn 30th April, 1999, which, with exhibits, is some 600 pages. It includes minutes of meetings, committee summary of conference calls, minutes of workshops, as well as such documents as to which I have already referred as the Project Approval

Certificate and so on. As to what happened, he deposed as follows:

> 42. To assist in its review of the project report, the Project Committee established technical subcommittees to provide arenas within which participants with overlapping mandates, or areas of interest, could discuss issues of mutual concern, identify, and clarify outstanding issues, and further assessment requirements with Redfern, and to seek consensus on which issues were not of a strategic nature, and could be adequately dealt with at the statutory permitting level.
>
> 43. Technical subcommittees were established, or continued, from the previous Mine Development Assessment Process for Acid Rock Drainage (ARD)/metal leaching and water quality, wildlife/ aquatic resources and access related issues, and cumulative effects.
>
> 44. The key Project Committee members, including the TRTFN, Ministry of Environment, Lands and Parks, Department of Fisheries and Oceans, Environment Canada, Ministry of Forests, and the United States representatives in some instances, participated actively in the work of the subcommittees.
>
> 45. In order to facilitate the identification and resolution of all issues raised by the public, review agencies and Project Committee members, I developed and implemented an "issue tracking" document which the technical subcommittees used to guide their discussions. The issue tracking process incorporated and took into consideration all issues raised by government review agencies, Project Committee members, including the TRTFN, the public and stakeholders. In particular, the following studies commissioned by the Northwest Institute for Bioregional Studies provided to the Project Committee during the public comment period were also fully incorporated and considered in the issue tracking process and considered in the overall project assessment:
>
> - Technical Analysis of Proposed Tulsequah Chief Mine, prepared by Glenda Ferris, November 3, 1997

- Proposed Avalanche Assessment of the Proposed Tulsequah Road, prepared by Hector MacKenzie and Christoph Dietzfelbinger, October 31, 1997
- An Evaluation of Wildlife Research Related to the Proposed Tulsequah Chief Mine, prepared by Alejandro Frid, October 31, 1997 (Exhibit "B" to the Affidavit of Alejandro Frid)
- An evaluation of Rescan's Wildlife Sections of the Environmental Assessment for the Proposed Tulsequah Chief Mine, prepared by Norman Barichello, October 31, 1997 (Exhibit "B" to the Affidavit of Norman Barichello)

46. The final version of the issue tracking document is Appendix 6 of the Appendices to the Project Committee Recommendations Report, which is marked as Exhibit "B" to my Affidavit. I directed my staff to provide drafts and updates of the issue tracking document to subcommittee members on November 13 and December 17, 1997; January 27, February 27, and March 2, 1998, to record the results of subcommittee meetings and progress on issues as they were addressed.

47. The Project Committee Recommendations Report was provided to Project Committee members for their review and sign-off on March 3, 1998.

48. Prior to that time, I had my staff provide to all Project Committee members on January 6, 1998, the materials which were ultimately incorporated as the first [31] pages of the Project Committee Recommendations Report, which contain the Table of Contents, an outline of the purpose of the document, a summary of the review processes, the provincial/ federal co-operation agreement, and relationships with neighbouring jurisdictions, site history, project description, scope of project and project review, and a summary of the project review process, including public and First Nations consultation undertaken.

49. Section 5 of the Project Committee Recommendations Report consists of alternatives considered, consideration of potential for effects and means of preventing or mitigating adverse effects, and makes up the next [61] pages. Section 5 also includes a

summary of the results of the issue tracking process. As I have stated in paragraph 45 of my Affidavit, drafts of the issue tracking document, as it was revised from time to time during the *EAA* process were provided to the subcommittee members, including the TRTFN representatives.

50. Sections 6 and 7 of the Project Committee Recommendations Report, consisting of [18] pages, were first provided to Project Committee members as part of the complete Project Committee Recommendations Report on March 3, 1998.

51. The majority of Project Committee members agreed to refer the application to the ministers and also agreed to recommend approval for the project subject to recommendations and conditions which are outlined on pages 6-9 of Exhibit "B".

* * *

70. Between mid January 1998 and March 12, 1998, Mr. Tony Pearse, on behalf of the TRTFN made numerous requests for technical information relating to wildlife/access issues, including route selection, road design, route construction feasibility, ungulate monitoring and *Forest Practices Code* requirements for approval of the mine access road by Special Use Permit.

71. As chair of the Project Committee, I requested that the responsible provincial or federal agencies respond to each of these requests.

72. The requests made by Mr. Pearse and the responses provided to him included the following correspondence, all of which is collectively marked as Exhibit "K" to my Affidavit:

- Jan. 22, 1998 Tony Pearse to Karen Diemert, re Ungulate Monitoring Program
- Jan. 29, 1998 J. Schwab, L.M. Kelly, Milt Moore, MoF, to Norm Ringstad, re Access Road
- Feb. 9, 1998 L.M. Kelly, MoF, to Norm Ringstad, re Winter Access Construction to Sloko River

- Feb. 9, 1998 L.M. Kelly, MoF, to Norm Ringstad, re Access Road, with *Forest Practices Code* material
- Feb. 9, 1998 L.M. Kelly, MoF, to Norm Ringstad, re Winter Access Construction to Sloko River
- Feb. 14, 1998 Tony Pearse to Loren Kelly, re Winter Road
- Feb. 14, 1998 Tony Pearse to Terry Chandler, Redfern, re Access Road Construction
- Feb. 15, 1998 Tony Pearse to Norm Ringstad, re Wildlife Monitoring
- Feb. 15, 1998 Tony Pearse to Terry Chandler, Redfern, re Environmental Monitoring
- Feb. 17, 1998 Tony Pearse to Wally Bergen, Ministry of Energy and Mines (MEM), re Mine Access Road
- Feb. 17, 1998 Terry Chandler, Redfern, to Tony Pearse, re Response
- Feb. 18, 1998 T.D. Pearse to Garry Alexander, MELP, re Access Route Selection
- Feb. 26, 1998 L.M. Kelly to Norm Ringstad, re Final Comments
- Mar. 2, 1998 Tim Eaton, Ministry of Energy and Mines, to T.D. Pearse, re Geotechnical Review
- Mar. 2, 1998 Garry Alexander, MELP, to Tony Pearse, re Access Route
- Mar. 2, 1998 Jim Yardley, MELP, to Tony Pearse, re Wildlife Access Management Plan
- Mar. 2, 1998 L.M. Kelly, MoF, to Tony Pearse, re Winter Road, with excerpts of Forest Practices Board Audit Report
- Mar. 9, 1998 L.M. Kelly, MoF to Norm Ringstad, re Response to Environment Canada
- Mar. 9, 1998 Wally Bergen, MEM, to Norm Ringstad, re Commitment to Monitoring
- Mar. 10, 1998 Garry Alexander, MELP, to Norm Ringstad, re Environment Canada letter

- Mar. 10, 1998 L.M. Kelly, MoF, to Norm Ringstad, re Environmental Monitoring
- Mar. 11, 1998 L.M. Kelly, MoF, to Norm Ringstad, re Potential Heritage Trail Conflicts
- Mar. 12, 1998 L.M. Kelly, MoF, to Norm Ringstad, re TRTFN - Heritage Trail Conflicts

73. I have read the Affidavit of Tony Pearse filed in these proceedings and wish to reply to a number of points he raised, which I have not addressed elsewhere in this Affidavit.

74. In paragraph 16 of his Affidavit, Mr. Pearse asserts that in the draft project report specifications of November 28, 1995, the information requirements of the TRTFN were treated differently than the requirements of other government agencies. In fact, throughout the environmental review process for the Tulsequah Chief Project, the Project Committee followed the practice of collecting information and comments on any given issue, and then having the responsible agency, that is the agency primarily responsible for the particular subject (for example, MELP in the case of wildlife or the Ministry of Forests in the case of geotechnical and engineering design for the access road) determine the type and level of information needed to ensure that the strategic, technical, and policy issues relating to that particular topic were resolved, or would be resolved, at the permitting stage.

[The reference, "In paragraph 16 of his Affidavit" is not precisely correct. The reference should be to "paragraph 16 of Exhibit "B" to his Affidavit". The same is true of all the other paragraphs of Mr. Pearse's "Affidavit" specifically referred to by Mr. Ringstad.]

75. The TRTFN frequently sought information at the level of detail which would be required at the permitting stage of the process, rather than at the level required to enable the Ministers to make a decision regarding the issuance of a project approval certificate.

76. When a responsible agency, such as MELP, made a decision on the level of information required for project certification, it did so after taking into account the views expressed and comments made by the TRTFN, and other members of the Project Committee.

77. In paragraph 51 of his Affidavit, Mr. Pearse refers to the May 28, 1997, meeting of the "Aboriginal Study Steering Group", which was held to define the terms of reference for a new traditional land use study following TRTFN criticism of the work performed for Redfern by Mr. John Dewhirst. The members of that Group agreed that the work done by Redfern on TRTFN traditional and current land use was not adequate, and I recognized that the TRTFN had a particular interest in traditional and current land use. The Aboriginal Study Steering Group was established on my initiative, and I arranged to have the Environmental Assessment Office pay for the land use study performed by Mr. Lindsay Staples. When Mr. Staples' report went to the TRTFN, they had some criticism of aspects of his work, and I agreed with the TRTFN that Mr. Staples should perform additional work, and arranged for further provincial funding to pay for that work. That work resulted in Mr. Staples' Addendum. I believed that it was reasonable and appropriate in this case for the province to commission the traditional and current land use studies carried out by Lindsay Staples in order to advance the environmental review process, and to meet the information requirements of the TRTFN.

78. Again, in response to paragraph 52 of Mr. Pearse's Affidavit, I made the decision that the public review period would not commence until Lindsay Staples' study had been received, and was available for distribution as part of the project report in order to meet the TRTFN's concern that their interests regarding traditional and current land use were adequately identified in the project report.

79. In reply to paragraph 63 of Mr. Pearse's Affidavit, at the January 13, 1998, wildlife subcommittee meeting, Karen Diemert did make a statement to the effect that MELP could not support the Spruce Wilson Access Route. It was this comment

which caused me to call for a short adjournment of the meeting in order for me to clarify whether Ms. Diemert was indeed speaking for MELP. I did not bolt from my seat, as Mr. Pearse suggests. I spoke with Garry Alexander, the MELP Project Committee representative, outside. We then returned to the subcommittee meeting room, where Mr. Alexander stated that Ms. Diemert's views did not reflect the Ministry's position.

80. In reply to paragraph 70 of the Pearse Affidavit, by mid February 1998, the TRTFN had clearly articulated their concerns regarding the potential impacts of the access road on wildlife and their use of the affected lands. Those concerns were identified in the Project Committee Recommendations Report, and were addressed through a range of measures including Redfern's Access Management Plan and the Environmental Monitoring and Follow-up Program which I have previously described, as well as in the recommendations of the majority of the Project Committee for increased wildlife management and enforcement.

81. Other concerns raised by the TRTFN included matters such as TRTFN jurisdiction to approve permits for the project, revenue sharing, and TRTFN control of use of the access road by third parties. As chair of the Project Committee, I believed that these matters were outside the ambit of the *EAA* process and were more appropriately the subject for negotiation between the TRTFN and government in a forum other than the *EAA* process.

82. By late February 1998, the positions of all of the Project Committee members, including the TRTFN had crystallized. There had been extensive discussion and consideration of the wildlife and access issues through the subcommittee deliberations in which the TRTFN had fully participated. By March 3, 1998, when the Environmental Assessment Office circulated the Project Committee Recommendations Report, in my view the time had come, after a three and a half year review process, for the Ministers to make a decision.

83. The Project Committee Recommendations Report, which went forward to the Ministers on March 12,

> 1998, included each Project Committee member's position on the referral, as well as the recommendations of the majority of the Project Committee.
>
> [Emphasis mine.]

[58] In a supplemental affidavit sworn the 6th March, 2000, Mr. Ringstad deposed as follows:

> 3. In response to paragraph 8 of Mr. Pearse's Affidavit of February 20, 2000, the environmental review process was not "abruptly stopped" by the circulation of the draft project committee recommendations report. In paragraphs 46-51 of my Affidavit sworn April 30, 1999, and paragraph 3 of my Affidavit filed May 6, 1999, I described the iterative process followed in providing project committee members with drafts and updates of the issue tracking document during the period November 13, 1997 through March 2, 1998 as a means of recording the results of subcommittee meetings and progress on issues as they were addressed. I also described the distribution of the segments of what became the project committee recommendations report between January 6, 1998 and March 3, 1998. As well, I sought and obtained an extension of the normal 70 day time limit for the project review committee to provide recommendations of the Executive Director. On March 13, 1998, the Minister of Environment, Lands and Parks approved the Time Limit Order T4, a copy of which included in Appendix 1 the project committee recommendations report, Exhibit "B" to my Affidavit of April 30, 1999. That Order extended the time for the project committee to make its recommendations to the Executive Director from January 21, 1998 to March 13, 1998. This was the fourth time limit extension which I or Mike Kent had sought, and the Minister had granted, during the environmental assessment process for the Tulsequah Chief Project.
>
> 4. In response to paragraph 10 of Mr. Pearse's Affidavit of February 20, 2000, it is true that the project committee did not meet after January 15,

> 1998. However, as a result of the request of the TRTFN, and some other project committee members for more time to consider the work and results of the subcommittees, I sought and obtained the Minister's approval for an extension of the review period. During the period from January 15 to March 2, 1998, various subcommittees continued to meet. The results of the work of the subcommittees were recorded in the issue tracking documentation. I arranged for drafts of the issue tracking documents to be circulated to subcommittee members on the dates set out in paragraph 46 of my Affidavit of April 30, 1999. Throughout this process, subcommittee members commented upon the drafts, and, as the work of the subcommittees proceeded, further drafts of the issue tracking document were prepared and circulated.

[59] He then goes on and explains how the various reports, including the Staples' report, were dealt with.

(d) The Reasons Below

[60] As I am not sure I have completely grasped the purport of the learned judge's reasons, I set out what I take to be the critical passages:

As to what the Ministers did or did not do and ought to have done (at 325-327):

> [34] It is plain from the decision that the Ministers relied on the conclusions of "the majority of the members of the Project Committee." That is clearly a reference to the Recommendations Report. There is no indication that the Ministers made an independent assessment of the merits of the issues raised by the proponents' application. Further, the time lapse between the filing of the Recommendations

Report and the decision of the first minister (one day) strongly suggests that there could not have been an independent assessment. In my view, it is therefore reasonable to infer that the Recommendations Report was the only basis on which the Ministers decided to issue the Project Certificate.

[35] Accordingly, it is, in my view, necessary to determine whether the Recommendations Report fulfilled the statutory mandate of the Project Committee under s. 10 and whether it provided lawful reasons for the exercise of the Ministers' statutory powers of decision to issue the Certificate. In other words, because the Ministers' decision refers only to the Recommendations Report, the court must assume that the Ministers' decision was founded on that Report and did not consider, for instance, the Tlingits' Recommendation Report prepared by them in opposition to the approval of the Certificate. It is critical that the Project Committee fulfilled its statutory mandate so that the Ministers could be assured that the environmental review process envisioned in the *EAA* was met.

[36] In undertaking this review I am mindful that the court is not substituting its view on substantive matters for discretionary decisions of administrative bodies:

* * *

[37] The fundamental question, therefore, is whether the Ministers' decision to issue the Certificate, resting as it does on the Recommendations Report of the Project Committee, satisfies the statutory purposes of the *EAA* enumerated in s. 2:

> (a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,
>
> (b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
>
> (c) to prevent or mitigate adverse effects of reviewable projects,

> (d) to provide an open, accountable and neutrally administered process for the assessment
> (i) of reviewable projects, and
> (ii) ...
> (e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia's neighbouring jurisdictions.

[38] As well, the Tlingits emphasize the purposes of the Project Committee as set out in s. 10 of the *EAA* (and set out at para. 21).

[39] The Tlingits submit, and I agree, that the provisions of s. 10 must be construed in light of the broad public purposes that underlie statutory schemes mandating environmental assessment. For instance, in ***Friends of the Oldman River Society v. Canada (Minister of Transport)***, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1 (S.C.C.) at 71 [S.C.R.], La Forest J. held:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D.P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., *Assignment Environmental Rights in Canada*, (Toronto: Butterworths, 1981), at p. 247:
>
> > The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent’s development desires with environmental protection and preservation.
>
> As a planning tool it has both an information-gathering and a decision-making component which

> provide the decision-maker with an objective basis for granting or denying approval for a proposed development: see M.I. Jeffery, *Environmental Approvals in Canada* (Toronto: Butterworths, 1989), at p. 1.2, § 1.4; D.P. Emond, *Environmental Assessment Law in Canada* (Toronto: Emond-Montgomery Ltd., 1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.

As to the "standard of review" (at 332):

> [54] Balancing all of these factors, including the absence of a privative clause; the fact specific nature of the statutory scheme; the fact specific nature of the decision; and the fact that the decision-makers are Ministers without any special expertise, I conclude that considerable deference should be accorded to the decision of the Minister. I conclude that the decision of the Minister should be subject to review on a reasonableness standard. I consider this standard appropriate in light of the complexity of the environmental issues addressed, the need for effective regulation of environmental matters, and the acknowledgement that effective regulation is best administered by those most knowledgeable and informed about what is being regulated. Nevertheless, the standard I have chosen permits recourse to the courts for judicial intervention in cases in which the Minister has been shown to have acted unreasonably. See ***Southam*** at para. 61.

As to the Administrative Law issue (at 345):

> [107] There can be no question that the overall scheme of the *EAA* is premised upon an open, accountable and neutrally administered process. There is a natural tension which prevails between the advocates of sustainability and those of industrial projects. The *EAA* was evidently designed to ensure that the tensions between those competing

> views be dealt with in an open way. In order that the ministers called upon to make decisions under the *EAA* do so in the open, accountable and neutral manner mandated by the *EAA*, it is necessary that they be exposed to minority views. The difficulty posed by the Recommendations Report is that the Ministers were insulated from those views by the failure of the Recommendations Report to fairly and fully advise the Ministers of the disputes which form the core of the Tlingits' concerns. In that respect, I consider that the Ministers' decision failed to take into account a relevant factor. Furthermore, the failure goes to the heart of the environmental review process and, as such, renders the Ministers' decision unreasonable.
>
> [108] I would therefore conclude that there was, in this regard, a breach of the rules of procedural fairness. I find that the failure of the Project Committee to finally meet and discuss with the Tlingits their concerns gave rise to the failure on the part of the Project Committee to report to the Ministers the final concerns of the Tlingits and the various reports reflecting those concerns. As noted, that was information which ought to have been considered by the Ministers, and by reason of its absence from the recommendations of the Project Committee, was not considered. That failure was sufficiently egregious as to result in a finding that the Ministers' decision was unreasonable.
>
> [Emphasis mine.]

As to the Tlingit assertion of apprehension of bias, she concluded that the process used to produce the Recommendations Report did not give rise to a reasonable apprehension of bias.

(e) The Refusal of the Declarations

[61] As the Tlingit understand the learned judge's reasons, she held that there could be no remedy against what is done by

a Project Committee or the executive director under the statute because neither exercises a "statutory power of decision".

[62] I am not certain that the learned judge went so far. Her reasons are open to the construction that the nature of the attacks being made against the process were such as could only arise against a tribunal with a statutory power of decision. If, however, the Tlingit's understanding is correct, then, with respect, the learned judge erred because judicial review under the statute is not limited to tribunals with "powers of decision".

[63] By s. 2(2) of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241:

> **2** (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
> (a) relief in the nature of mandamus, prohibition or certiorari;
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

[64] Thus, subsection (a) embodies all the substantive remedies of the prerogative writs.

[65] Subsection (2) is the statutory embodiment of ***Dyson v. Attorney-General***, [1911] 1 K.B. 410 (C.A.) in which the plaintiff sued for a declaration that certain demands made upon him, purportedly under the ***Finance (1909-1910) Act***, 1910 (10 Edw. 7, c. 8) were not authorized by the statute.

[66] In the course of his judgment, Farwell L.J. remarked, at 423:

> 3. The next argument on the Attorney-General's behalf was "ab inconvenienti"; it was said that if an action of this sort would lie there would be innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers. But the Court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions: there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court.

[67] If, therefore, at any stage of the process laid down in the Act there was a failure on the part of the Project Committee or the executive director to observe a statutory requirement or a claim to do something not authorized by the Act, the Court could so declare. If, for instance, the executive director failed to observe the requirement of

s. 16(1)(c) to give notice to the public of a project report accepted for review, the court could so declare and prevent further action until this step was observed.

[68] At the outset of this judgment, I referred to certain principles of statutory interpretation which in appropriate cases can found judicial review in the nature of a prerogative writ. I see no reason in theory why these principles, if there is a proper factual foundation and the statutory scheme does not exclude them, should not apply in judicial review by way of a claim for a declaration against a person exercising a statutory power *simpliciter*. I know of no impediment, in either reason or authority if fraud had occurred in the review process, to the court declaring a Recommendations Report of no force and effect on the simple footing that the Legislature could not have intended a fraudulent process to have legal force.

[69] Insofar as relief is sought against the exercise of a statutory power not of decision, it is simply a question of whether the statute has been observed.

[70] What the Tlingit say is, as I understand it, that the committee did not give appropriate weight to the various factors laid down in s. 2 of the statute.

[71] But a reading of the evidence in this case indicates to me that during the whole process weight was given to all the considerations laid down in s. 2. The real complaints of the Tlingit are that the committee did not give as much weight to some considerations as the Tlingit considered they should have; the executive director, because the Tlingit wanted more studies and so forth, perhaps should have rejected the report and not made the referral, and the Ministers ought not to have granted the certificate because of these acts of omission and commission. But under the statute, in my opinion, these are not matters for judicial review.

[72] To put it another way, I am of the opinion that the two declarations made in the judgment below were properly made, albeit my reasons may differ from those of the learned trial judge.

[73] The next ground of cross-appeal is an assertion that the learned judge ought to have held that the conduct of the Environmental Assessment Office and the Project Committee gave rise to a reasonable apprehension of bias.

[74] As I understand the submission of the Tlingit, it founds this assertion on the conduct of the appellant Ringstad.

[75] Thus, Mr. Pape says in his factum:

> 37. In the end, Mr. Ringstad and the EAO usurped the authority of the Project Committee to determine its own process, with respect to the scheduling and arrangements for producing the Recommendations Report that would issue in its name. In doing so he was not acting in simply a co-ordinating fashion, as would have been proper in his capacity as chairman of the Committee. (In this respect, it is respectfully submitted that Kirkpatrick, J. did not deal with the real substance of this issue, in paragraph 113 of her Reasons.) By using his position as he did, to determine procedural matters, Mr. Ringstad actually dominated the substance of the Recommendations Report. He did not do so in an open, accountable or neutral way. Rather, he did this in a way that
>
> - adopted, as recommendations, the final positions taken by government members of the Committee on disputed matters;
> - did not fully or fairly explain the dissenting evidence, analyses and recommendations that were developed by and on behalf of the Tlingits; and
> - did not explain the way that the Report had actually been prepared.

[76] In making this argument, counsel for the Tlingit did not assert that there was any particular breach of s. 9 nor is it argued that the Recommendations Report in its final form did not conform in its content to s. 10.

[77] In my opinion, what happened in early 1998 bears a very different construction. This process had gone on and on at very considerable expense. It was clear that nothing short of changing the route of the road from the mine to Atlin would satisfy the Tlingit. They had made their points. The majority did not accept them. The executive director and the

chairman of the committee had a duty (whether it was a duty enforceable by *mandamus*, I need not address) to bring the matter to an end and put the issue before the Ministers for their determination. Carrying out that duty cannot be characterized as bias or demonstrating a lack of "neutrality".

(f) The Quashing of the Certificate

[78] I proceed on the footing that the learned judge found as a fact that the Ministers were not fully informed of the Tlingit's position on various questions and could not therefore have made their decision in accordance with s. 2, and thus acted unreasonably.

[79] I have a number of difficulties with this finding:

1. It reads into the statute something which is not there.

   If s. 30 was to this effect:

> The Ministers may, if
> (a) the project promotes sustainability;
> (b) there has been a thorough, timely and integrated assessment of the environmental, etc., effects of the project;
> (c) the proposal prevents or mitigates adverse effects of the project;
> (d) there has been an open, accountable and neutrally administered process for the assessment of the project;
> (e) all the various persons named in s. 2 participated in the project;
>
> issue a certificate, etc.

I would understand the learned judge's reasoning, for the Legislature would then have made the power to issue a certificate exercisable only if the conditions specified existed. The Act does not say anything like that. If it did, we would then have to embark on a consideration of whether the standard of review is correctness or reasonableness. One might, I suppose, by a long stretch, construe the Act as meaning "if in the opinion of the Ministers" (a), (b), etc., or "if the Ministers, on reasonable grounds, believe" (a), (b), etc. But even if one or the other is a proper construction of the statute, the evidence does not disclose that the Ministers did not hold those opinions and it does not disclose a lack of reason. For the profound difference in meaning between such formulations as "if X", "if A believes X", and "if A on reasonable grounds believes X", see ***Liversidge v. Anderson***, [1941] 3 All E.R. 338 (H.L.).

2. There is no basis in the evidence for concluding that the Ministers were ignorant of what had been going on since 1994. The learned judge appears to be assuming that the Ministers were living in some kind of splendid isolation,

ignorant of the controversy, and thus knew nothing at all about the Tulsequah Chief Project until the report was on their respective desks, rather like a Court of Appeal judge who knows nothing of a case until the papers are in his or her chambers. There is no evidence that that was so and no constitutional reason why it should be so.

3. In coming to this conclusion of "fact", if it should be so described, the learned trial judge drew an adverse inference from the short time lag between the referral and the decision. In my opinion, no such inference should have been drawn. To quote *Broom's Legal Maxims*, 10th ed. (London: Sweet & Maxwell, 1939) at 642:

> Again, where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. In these cases the ordinary rule is, *omnia proesumuntur rite et solenniter esse acta donec probetur in contrarium* - everything is presumed to be rightly and duly performed until the contrary is shown. The following may be mentioned as general presumptions of law illustrating this maxim: -That a man, in fact acting in a public capacity, was properly appointed and is duly authorised so to act; that in the absence of proof to the contrary, credit should be given to public officers who have acted, *prima facie*, within the limits of their authority, for having done so with honesty and discretion;.....
>
> [Footnotes omitted; emphasis mine.]

4. Not only does the Act not contain any such words as those I have constructed above, but also it contains no obligation on the Ministers to be "fully informed" before deciding what to do. If it contained such a requirement, we should have to decide what the word "fully" means in the context.

[80] Earlier I addressed what I perceive to be the fundamental nature of judicial review. The learned judge, as I read her reasons, did not ask herself what the Legislature in this statute, either expressly or by necessary intendment, required of the tribunal in order for its decision to be lawful. She committed the fundamental error identified in ***Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control Licensing Branch)***, 2001 SCC 52, of not asking whether the Legislature has made its own determination of what procedures are necessary in the administration of the statute in issue. There is good reason for this legislative scheme: a decision as to whether a project shall or shall not proceed engages the tribunal in weighing many considerations put forward by competing interests - indeed sometimes those most concerned are at loggerheads. The decision in the end must be "political", using the word in its non-pejorative sense.

[81] The Tlingit, as I indicated earlier, attack the certificate on the ground that the "reasons" are no reasons. To my mind, they are as much reasons as reasons of a judge who says, as judges sometimes do, "I accept the arguments of counsel for the plaintiff [or defendant] and therefore the plaintiff [or defendant] will have judgment." See generally for a discussion of what are sufficient "reasons" when a statute requires them, ***Save Britain's Heritage v. Secretary of State for the Environment and others***, [1991] 2 All E.R. 10 (H.L.).

[82] As to all the attacks made on administrative law grounds on this certificate, I say that the Legislature has enacted a process that implicitly entrusts to the Ministers an exclusive power to decide whether the purposes of the statute have been met and, if not, what should be the next step. There is no room for a judicial assessment of whether the Ministers are right or wrong.

[83] Here, when one has the Recommendations Report and the reasons in hand, it is plain that for better (in Redfern's opinion) or worse (the Tlingit's opinion), the Ministers have determined that the benefits of this project outweigh its detriments.

[84] No argument was addressed to us that we should conclude as a matter of statutory interpretation that the Tlingit were entitled to a hearing before the tribunal made its decision.

[85] In concluding that as a matter of administrative law there is no foundation for an order in the nature of *certiorari* quashing the certificate, I do not wish to be misunderstood.

[86] I am not saying that a certificate under this Act could never under any circumstances be attacked. I should think it would be a good foundation for attack that a proponent had bribed a member of the Project Committee to recommend favourably. I should be prepared to hold, as a matter of statutory interpretation, that the Legislature did not intend that a certificate should be valid even if it were induced by fraud.

[87] It might also be a good ground that the process laid down by the Act was so attenuated as to be a sham, simply because I do not consider the Legislature intended the process to be a sham. This process may have been brought to an abrupt end - "truncated" is Mr. Pape's description - but it was no sham.

III. THE CONSTITUTIONAL QUESTION

[88] At the outset, I posed what I perceive is the root issue in this case. It is, at least for those of us who live west of the Rocky Mountains, or if we are northerners, west of the 120th meridian, a profoundly important issue, but not one upon which I am so naïve as to believe that my opinion will be of any persuasive value. For that reason, I shall keep my comments brief.

[89] Mr. Pearlman, who appears for the Attorney General of British Columbia (see s. 16(1) of the ***Judicial Review Procedure Act***) submits that unless and until an aboriginal right is determined no question of infringement can arise and therefore no duty of consultation exists.

[90] As he put it in his factum:

> 70. The learned chambers judge found that in the final stages of the environmental review process, the Ministers had not fulfilled their statutory and common law obligations of meaningful consultation with the Tlingit.
>
> 71. The Appellants have submitted in paras. 36 to 69 of this Factum that the Ministers fulfilled their statutory duties. The Appellants respectfully submit that the constitutional or fiduciary obligation to consult with First Nations, as distinct from any administrative law duty of procedural fairness, only arises after there has been a determination that the First Nation has existing aboriginal or treaty rights under s. 35 of

> the *Constitution Act, 1982*, and that those rights may be infringed by Crown sanctioned activities.
>
> 72. In the case at bar, all issues requiring proof of the Petitioner's claims of aboriginal right and title were severed and referred to the trial list by order of the chambers judge pronounced April 30, 1999. Those issues were not before the chambers judge at the judicial review hearing.
>
> 73. In *Delgamuukw*, *supra*, Lamer, C.J. discussed the Crown's fiduciary duty in the fourth, or justificatory stage of the analysis of an aboriginal title claim, where the onus shifts to the Crown to justify an infringement of aboriginal title.
>
> 74. Similarly, in *Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd.* (2000), 186 D.L.R. (4th) 403, the Ontario Court of Appeal held that it was only after a First Nation had established an infringement of an existing aboriginal treaty right through an appropriate hearing that the duty of the Crown to consult with First Nations was a factor for the court to consider in the justificatory phase of the proceeding.

[91] I consider that paragraph 74 correctly sets out the thrust of the judgment of Borins J.A., speaking for the Ontario Court of Appeal.

[92] As I understand my colleague's judgment, she holds, although not, I think, in so many words, that the Ontario Court of Appeal was in error.

[93] Were this a treaty case, it might apply here. Although put differently, that was the substance of my view in ***Halfway River First Nation v. British Columbia (Ministry of Forests)***

(1999), 178 D.L.R. (4th) 666, 64 B.C.L.R. (3d) 206 (B.C.C.A.), in which I dissented.

[94] Here, there is no treaty, and yet I cannot think it right, when it is plain that the Tlingit have some sort of rights in north western British Columbia, to say there is no duty at all.

[95] Although the power to legislate as to resource development appears to be vested in the Province, it is at least theoretically possible that the power to define by legislation, the process of consultation, and the meaning of "justification", is vested in Parliament. In my opinion, such a division would be at best cumbersome and at worst unworkable.

[96] It is also possible that neither the Legislature nor Parliament has that power, in which case the many Indian bands of British Columbia, as to all resource development within lands claimed by them, have a right of veto, or at least have a right to have each proposed project considered by the courts on a case-by-case basis, in which case the courts will have the say and there will be endless litigation. I raise the question of whether a conclusion by a trial judge that a certain infringement is justified would be a question of fact, a question of mixed fact and law, or a question of law.

[97] Another way of addressing the matter is to ask whether the ***Environmental Assessment Act*** meets the requirements of ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010. If it does not, then the statute, if not *ultra vires*, is at least constitutionally inoperative insofar as it purports to give persons appointed under it power to permit a project to proceed which is not accepted by the Indian band in whose claimed territory it lies.

[98] Counsel for the respondents did not, as I understand him, advance his argument in just those words, and I am not at all sure that he advanced it at all.

[99] For what it is worth, I have concluded that the Act does meet the demands of ***Delgamuukw***. It provides a process of consultation sufficient to the purpose which, on the facts, was carried out.

[100] I appreciate that the Tlingit say it was not. But I have concluded on the whole of the evidence that the objections and reservations of the Tlingit were known to the other members of the committee before the referral and were made known to the Ministers in the Recommendations Report. The right to be consulted is not a right of veto. To put it another way, the right to be heard, whether in this or any

other process, and no matter how great the issue, is not a right to victory.

IV. CONCLUSION

[101] My colleagues have decided to remit this matter to the Ministers in these words:

> In keeping with the assumption that the Ministers of the Crown will consider afresh the matter of the issuance of the Project Approval Certificate, I would remit the matter for reconsideration by the Ministers. In effect, the Ministers are directed by this judgment to revisit the question of the issuance of the Project Approval Certificate, bearing in mind these reasons for judgment, including the division of powers question under the ***Constitution Act, 1867*** that was explored in the recent decision of this Court in ***Paul***, *supra*, 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.

[102] With all respect, I consider that this remit does nothing but prolong the agony of both Redfern Resources Ltd., the proponent of this project, and the Tlingit.

[103] For my part, I would allow the appeal and dismiss the petition.

"THE HONOURABLE MADAM JUSTICE SOUTHIN"

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

[104] This is an appeal from an order dated 28 June 2000, quashing a Project Approval Certificate issued by Ministers of the Provincial Crown under s. 30 of the ***Environmental Assessment Act***, R.S.B.C. 1996, c. 119 (the "***EAA***") to Redfern Resources Ltd. for its Tulsequah Chief Mine Project in northern British Columbia. The reasons for judgment are reported at (2000), 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C.S.C.), 2000 BCSC 1001.

[105] The appellant Ministers of the Crown and the Attorney-General of British Columbia (the "Crown") argue that the chambers judge erred by finding that the Ministers, in the final stages of the environmental review process, had not fulfilled their obligations of meaningful consultation with the Tlingits, on whose traditional lands the proposed Project was to proceed. The ground of appeal is stated this way:

> The chambers judge erred in law in determining that the Crown owed a constitutional and fiduciary duty of consultation to the Tlingit, who had asserted, but not yet proven aboriginal rights or title.

[106] The position of the Crown, as set out in the appellants' factum, is that the Ministers fulfilled their statutory duties

and that “the constitutional or fiduciary obligation to consult with First Nations, as distinct from any administrative law duty of procedural fairness, only arises after there has been a determination that the First Nation has existing aboriginal or treaty rights under s. 35 of the *Constitution Act, 1982*, and that those rights may be infringed by Crown sanctioned activities.”

[107] 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 Tlingits having established any aboriginal rights or title in relation to the area which would be affected by the Tulsequah Chief Mine Project.

[108] It is on the question of whether the chambers judge erred in deciding that the Ministers of the Crown were under a duty or obligation to take into account the Tlingits' aboriginal rights before deciding to issue the Project Approval Certificate that I respectfully disagree with my colleague, Madam Justice Southin, whose draft reasons I have had the advantage of reading.

[109] In my opinion, the decisions of the Supreme Court of Canada to which the Crown referred us do not support the proposition that under a legislative scheme such as the one contained in the ***EAA,*** the Crown's obligation to consult with the Tlingits would arise only after the Tlingits had established aboriginal rights or title in court proceedings.

II. Facts

[110] The Tlingits are an aboriginal people within the meaning of s. 35 of the ***Constitution Act*****, 1982** and a band within the meaning of the ***Indian Act***, R.S.C. 1985, c. I-5. The Tlingits' community and reserves are located near Atlin, British Columbia. The Tlingits' traditional territory encompasses the southern part of the Yukon River watershed known as the Atlin Plateau and the whole of the Taku River watershed. The Tlingits rely on hunting, fishing and gathering to sustain themselves.

[111] The Tulsequah Chief Mine, which is located in the Taku River system near the border with the Yukon Territory and the State of Alaska, was operated in the 1950's by Cominco Ltd. One of the appellants, Redfern Resources Ltd., now owns the mine. Redfern wants to reopen the mine and to take out approximately 2500 tonnes of ore per day.

[112] Redfern's proposal to reopen the mine (the "Project") became the subject of an environmental review under the ***EAA***. The controversial aspect of the Project centred on Redfern's plan to build an access road to the mine site that could be used to haul the ore from the Tulsequah Chief Mine to Atlin. When Cominco operated the mine, the ore was transported by barge down the Taku River.

[113] The proposed access road would traverse a portion of the traditional territory of the Tlingits where their traditional land use activities are most concentrated. The area is not covered by a treaty but at the relevant time the area was the subject of treaty negotiations between the Tlingits and the Governments of Canada and British Columbia.

[114] Redfern applied for approval of the Project in September 1994. A Project Committee established under the ***EAA*** included representatives from the federal and provincial governments, the Tlingits, the Atlin Advisory Planning Commission, the State of Alaska, and some United States federal review agencies. The Project Committee was established to review the process and make recommendations to the executive director of the Environmental Assessment Office ("EAO").

[115] The relevant sections of the ***EAA*** are set out in Appendix “A” to Madam Justice Southin’s reasons for judgment and need not be repeated here.

[116] Until December 1997, the review process apparently accommodated the expressed needs of the Tlingits, who at all times asserted their aboriginal rights and their concerns about the impact of the proposed road on their culture and habitat and on their treaty negotiations.

[117] In early March 1998, the process was, as the chambers judge described it, “abruptly truncated”.

[118] On 12 March 1998, the Project Committee Report and the Tlingits' Recommendations Report were provided to the Minister of Environment, Lands and Parks. On 13 March 1998, the Minister of Energy Mines and Petroleum Resources signed the reasons for decision and, on 19 March 1998, the Minister of Environment, Lands and Parks did so. On 19 March 1998, the Ministers issued a Project Approval Certificate under the ***EAA***.

[119]After the decision had been made, the Taku River Tlingit First Nation and Melvin Jack (collectively, the "Tlingits") brought a Petition under the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 to quash the Ministers’ decision to issue the Project Approval Certificate pursuant to the ***EAA.***

[120] In an outline filed in the court below on 11 February 1999, the Tlingits stated nine grounds for the relief they claimed. The first five grounds put forward by the Tlingits were based upon allegations that the Ministers had either erred in the exercise of their statutory powers or acted in excess of jurisdiction. The appellants did not take issue with those grounds being properly the subject-matter of judicial review but they argued before the chambers judge that two other grounds, and a portion of a third ground, raised complex issues of fact and law which were not suitable for summary determination and therefore ought to be severed and referred to the trial list under Rule 52 of the ***Rules of Court***. Rule 52(11)(d) reads, in part:

> (11) On an application the court may ...
>
> (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.

[121] The first two grounds put forward by the Tlingits that the appellants said would raise complex issues were these:

> 6. The Tlingits' hunting, fishing, gathering and other traditional land use activities in the portion of their traditional territory that will be traversed and impacted by the proposed road are the exercise of aboriginal rights

> within s. 35 of the *Constitution Act, 1982*. The Certificate approves a Project that will unjustifiably infringe on the Tlingits' exercise of those rights.
>
> 7. The Tlingits have aboriginal rights within s. 35 of the *Constitution Act, 1982*, based on their aboriginal title to the site of Redfern's proposed mine and the portions of their territory that would be traversed and impacted by the road. The title of the Crown in right of British Columbia to the lands and resources in those areas, including mineral rights, is subject to the Tlingits' aboriginal title. The Certificate approves a Project that will unjustifiably infringe on the Tlingits' rights based on aboriginal title.

[122] The third ground the appellants asserted was not suitable for summary determination was contained in Ground 9, in which the Tlingits alleged that when the Ministers issued the Project Approval Certificate, they breached fiduciary obligations owed to the Tlingits by the Provincial Crown because they did not ensure effective protection of the Tlingits' aboriginal rights pending the conclusion of a treaty.

[123] The appellants' motion under Rule 52 to sever the issues was granted by the chambers judge on 30 April 1999 in reasons that may be found at [1999] B.C.J. No. 984 (Q.L.) (B.C.S.C.). The arguments of the appellants seeking to have the aboriginal issues severed and referred to the trial list are set out in the reasons of the chambers judge allowing the motion:

> [12] Counsel for the Crown and Redfern argue that questions of aboriginal rights and title are not suitable for summary determination because such questions raise complex issues of fact and law. They contend that the summary procedure of a judicial review would prejudice them because the absence of pleadings inhibits the respondents' ability to know the case they must meet and defend. In particular, they say they do not know the exact nature of the rights asserted; the area over which aboriginal title is asserted; and the nature of the unjustified infringement. In addition, the respondents argue that the nature of the evidence required to establish or defend against these claims requires assessments of credibility. In essence, the respondents assert that the determination of these issues cannot be effectively made on the basis of affidavit evidence alone, which, they say, inhibits a full grasp of all of the evidence.

[124] The reasons given by the chambers judge for concluding that the application to sever ought to be granted are set out, in part, below:

> [19] It is clear that any determination of the existence and scope of aboriginal rights or title will require a detailed and rigorous examination of historical, anthropological, and archaeological evidence as well as evidence of aboriginal history and conventional documentary historical evidence. Given the complexities described in ***Van der Peet*** and ***Delgamuukw***, it is difficult to see how such evidence can be properly assessed and synthesized without the benefit of a trial.
>
> [20] Counsel for the Tlingits argues that the determination of aboriginal rights or title can nevertheless be made in the context of a judicial review,...
>
> [21] Counsel for the Tlingits further argues that because the *Judicial Review Procedure Act* mandates that the review be brought by petition, the Tlingits should be able to proceed in the summary way

provided in the legislation. However, it is clear from the decision in ***Lawson v. British Columbia (Solicitor General)*** (1992), 63 B.C.L.R. (2d) 334 (C.A.), that the summary procedure provided by the *Act* "was designed to eliminate technical complexities, especially those associated with prerogative writs" (per Goldie J.A. at 355). I find it difficult to conceive, on issues as inherently difficult and complex as aboriginal rights and title claims, that, in ordinary circumstances, aboriginal claims can be summarily determined in the context of a judicial review.

* * *

[25] I am also not persuaded, on the material filed, that the underpinning for the rights and interest claimed by the Tlingits are uncontested, as asserted by their counsel. The Tlingits rely on numerous references to aboriginal rights and title contained in the documents filed in the review under the *Environmental Assessment Act*. However, it is clear that the review under the *Environmental Assessment Act* is a consultative process in which there is no need to make a determination with respect to aboriginal rights or title. Under the *Act*, once the rights are asserted, the parties proceed on the basis that those rights must be considered. It is not at all clear on the material filed by the Tlingits that the references to aboriginal rights or title were subjected to any vigorous analysis. For the purposes of the assessment, they were simply accepted.

[26] In addition, on the basis of the material filed by the Tlingits, there appear to be significant differences in respect of the opinions filed on the issue of title.

[27] Based on the submissions of counsel for the Crown and Redfern, it is abundantly clear that neither respondent concedes or accepts that the Tlingits have title or rights over the whole of the territory claimed and that the Tlingits' claims in that regard will be vigorously challenged. It is plain that there exists disputes of fact and law and that there exists a triable defence to the claims asserted by the Tlingits.

[125] The Tlingits' application for leave to appeal the order made by the chambers judge under Rule 52 was refused on 25 June 1999 by Goldie J.A.: 1999 BCCA 442, 128 B.C.A.C. 120, [1999] B.C.J. No. 1665 (Q.L.) (C.A.). A review of that decision was subsequently dismissed by a panel of this Court: 1999 BCCA 550, 131 B.C.A.C. 13, [1999] B.C.J. 2204 (Q.L.) (C.A.).

[126] On the leave application before Goldie J.A., counsel for the Tlinglits argued that the decision of the chambers judge to sever the issues under Rule 52 would result in disputes involving aboriginal rights and title always having to be resolved by trial. Goldie J.A. framed the issue on the leave application this way:

> The issue is whether leave ought to be granted to enable this Court to determine whether the chambers judge erred in principle in the making of a discretionary order.

[127] In paragraph 20 of his reasons for judgment refusing leave, Goldie J.A. referred to the decision in ***Canadian Energy Services Ltd. v. Gotaverken Energy Systems Ltd.***, [1990] B.C.J. No. 1336 (Q.L.) (C.A.), Gibbs J.A.; aff'd (1990), 42 C.L.R. 50, [1990] B.C.J. No. 1976 (Q.L.) (C.A.), Hinkson, Proudfoot and Hollinrake, JJ.A., in which Gibbs J.A. said, quoting with

approval from the respondents' factum, in relation to a discretionary interlocutory order:

> 8. This court has said almost countless times that the decision of a judge of first instance on a discretionary matter is not to be interfered with by an appellate court unless the exercise of discretion was clearly wrong or unless it works a very substantial injustice....

[128] Mr. Justice Goldie concluded that the chambers judge had not erred in law or misapprehended the evidence and dismissed the application.

[129] At the time the judicial review petition was heard on 13 to 18 March and 20 to 23 March, 2000, the issues that had been severed under Rule 52 had not been determined.

III. Reasons of the chambers judge

(a) Summary of the arguments put forward by the Tlingits on the hearing of their petition under the *Judicial Review Procedure Act*.

[130] The arguments put forward by the Tlingits before the learned chambers judge are summarized in the following passages of her reasons:

> [13] The petitioners' arguments for judicial review focused on four broad issues:
>
> (a) substantive issues in the environmental review;

(b) procedural errors in the environmental review process and the production of the Recommendations Report;
(c) substantive errors in the Recommendations Report; and
(d) constitutional and fiduciary obligations;

all of which, the petitioners say, give rise to errors in the Recommendations Report, the Referral, as well as errors in the decision to grant the Certificate.

[14] For the Tlingits, the primary concern about the Project is the road proposal. It will open up the heartland of the Tlingit territory for the first time, and therefore raises concerns about their ability to sustain the land-based economic, social and cultural system on which they collectively rely as an aboriginal people. The Tlingits explained that perspective at all stages of the environmental review process.

[15] The Tlingits' concerns about the road proposal were expressed in terms of:

(a) their sustainability as a people — including the need to sustain their culture, domestic economy and social well-being by, *inter alia*, protecting the fish and wildlife habitat on which it relies, as well as their own ability to harvest those resources;
(b) interference with the aboriginal rights they assert in their traditional territory — in particular their aboriginal title and their harvesting rights; and
(c) their treaty negotiations — including the ways the Project will compromise those.

[16] Extensive reference was made during the course of the hearing to the substantial body of evidence and expert reports filed in the environmental assessment process that supported the concerns of the Tlingits. That evidence was directed to the systemic nature of the Tlingits' land use practices; their reliance on that land use system to sustain them socially, economically, and culturally; the adverse effects the road will have on vulnerable

> wildlife populations on which they rely; the very serious effects of increased access to the Blue Canyon/Wilson Creek area; and the road's effects on specific sites, including their main traditional trail and hunting and fishing camps.
>
> [17] The Tlingits also asked the court to note the body of evidence and expert reports concerning the absence of a regional land use plan and the fact that treaty negotiations between the Tlingits and the government are not concluded. The Tlingits argued that proceeding with the construction of the road, in advance of an established regional land use plan and a treaty, will prejudice and limit the options available to the Tlingits in both land use planning and treaty negotiations.

(b) The foundation on which the chambers judge proceeded in determining the issues before her.

[131] Before the chambers judge, the Crown did not challenge the expressed concerns of the Tlingit and the chambers judge proceeded on the basis that those concerns were not in dispute. In that regard, the chambers judge stated:

> [18] As the petitioners noted in their reply argument, the respondents did not take issue with or challenge the Tlingits' concerns or point to any body of evidence which challenged their arguments in this regard.
>
> [19] Consequently, as requested by the petitioners, I propose to address the issues raised in the petition for judicial review in the context that those concerns addressed by the Tlingits are not in dispute.

(c) The land use and treaty process and the environmental review process

[132] On the relevance of the land use and treaty process to the environmental review process, the chambers judge said:

> (b) Impacts on Tlingit land use and the treaty process
>
> [70] Throughout the environmental review process, the Tlingits emphasized their reliance on their system of land use to support their domestic economy, and their social and cultural life. That reliance was recognized by all of the experts who prepared reports for the environmental assessment.
>
> [71] Mr. Staples concluded that the new road would impose serious impacts upon resources utilized by Tlingit harvesters as well as significant interference with land use activities and cultural pursuits. He further concluded that the province, the proponent Redfern, and the Tlingits were not adequately prepared to handle the predicted impacts and that no meaningful mitigation or compensation measures were in place or even plausible. He concluded that any benefits from the proposed project to the Tlingits would be marginal and of short duration. He advised that the road would preclude the substantial opportunities presently available to the Tlingits in shaping their own visions for land use and treaty settlement.
>
> [72] There is no question that both the province and the proponent, Redfern, were aware that the Tlingits were engaged in the B.C. treaty process. Mr. Staples identified the treaty process as the best means for solving the problems posed for the Tlingits by the Project. Among the proposals for mitigation offered by Mr. Staples, was the interim measure of negotiation at the treaty table.
>
> [73] The Tlingits assert that this issue was not addressed specifically in the Recommendations Report and should have been in order to satisfy the requirements of ss. 2(a) and (b) of the *EAA*.

[74] The respondents assert that the *EAA* is not a land use planning statute nor an act authorizing treaty making or any other determination of aboriginal rights or title and therefore the Ministers are not authorized to impose a moratorium on a project approval pending conclusion of a treaty or land use process. The Crown respondent argued that the Ministers have no mandate under the *EAA* to withhold project approval where one of the interested participants is engaged in an entirely independent process of indeterminate duration, namely the treaty process. Indeed, to do so, the Crown argues, might well constitute an irrelevant consideration resulting in loss of jurisdiction.

[75] In answer to this, the Tlingits argue that the evidence before the Ministers and the object of the statute required that the unfinished business of land use and treaty negotiations be addressed because the issuance of the Project Certificate would have an irreparable impact on the Tlingits' land use and treaty negotiations which go to the very root of their sustainability. Thus, in tying the issues of land use and treaty negotiation to the issue of sustainability, the Tlingits say that those were matters properly within the ambit of the statute and ought to have been a focus of consideration by the Ministers.

[76] In this regard, I note that, at p. 72 of the Recommendations Report, the Tlingits' concerns in this regard are referred to:

> The first nation as a whole will suffer serious harm to their future interest, particularly in the light of the approaching treaty settlement...The road will predetermine how Tlingit can use their land and will thwart TRTFN's ability to establish a regional land use plan for their territory and to exercise effective decision-making over their resource base...

[77] It appears, therefore, that the impact of the road on the treaty process and on future land use was at least marginally addressed in the Recommendations Report. The Tlingits acknowledge that the issue was listed in the issue tracking

> table prepared during the environmental review process and reproduced in the Recommendations Report. However, the Tlingits nevertheless argue that merely identifying the problem is insufficient to meet the requirements of the *EAA* in that it does not address solutions to the problem.
>
> [78] I am not persuaded that the Ministers would have fallen into jurisdictional error if they had decided that the *EAA*'s objective of promoting sustainability could not be achieved without the development of a regional land use plan or the conclusion of a treaty with the Tlingits. However, I am also not persuaded that the Ministers were obliged to come to that decision. I say this because there is an evident array of other measures that could have been adopted by the Ministers which would protect the sustainability of the Tlingits' land use, economy, and culture short of requiring the conclusion of a treaty or a regional land use plan.

(d) Reasons for concluding that the Project Approval Certificate ought to be quashed.

[133] The reasons of the chambers judge for concluding that the Ministers of the Crown had an obligation to ensure that they "had effectively addressed the substance of the Tlingits' concerns" are set out in paragraph 130 of her judgment:

> [130] Notwithstanding the above, there can be little doubt that the weight of authority, particularly emanating from the Supreme Court of Canada, that the existence of aboriginal interests should inform governments who make decisions which are likely to affect those interests. In the case at bar, this is so because the provincial and federal governments have entered into treaty negotiations with the Tlingits. The federal government agreed to negotiate land claims with the Tlingits in 1984 on the basis of a preliminary

> determination that they had aboriginal rights in their territory flowing from their pre-existing use and occupation of the land and resources of the area. This, together with the fact that the federal government accepted the Tlingits' claim under the Comprehensive Land Claims Policy, was known to the provincial government when it entered into a framework agreement to negotiate with the Tlingits under the B.C. treaty process. Furthermore, the Tlingits have asserted their aboriginal rights at all stages of the environmental review. Given the extreme importance of the Ministers' decision to the Tlingits, the Ministers should have been mindful of the possibility that their decision might infringe aboriginal rights. Accordingly, they should have been careful to ensure that they had effectively addressed the substance of the Tlingits' concerns with respect to when, and on what terms and conditions, the mineral rights to be exploited by Redfern should be developed.

[134] After stating her conclusion that the Ministers' decision to issue the Project Approval Certificate had to be quashed, the chambers judge observed that Redfern had expended ten million dollars to move the process to its present stage and that Redfern had made genuine and full efforts to comply with the ***EAA*** and to address the concerns of the Tlingits. The chambers judge directed, at para. 137, that the matter be referred back "to the Ministers for reconsideration after a revised project committee report, which meaningfully addresses the Tlingits' concerns, has been delivered to the Ministers."

[135] The relevant parts of the formal order dated 28 June 2000, provide:

THIS COURT ORDERS AND DIRECTS THAT:

* * *

3. The Project Approval Certificate M98-02 ("the Certificate") issued by the Ministers to Redfern for the Project, on or about March 19, 1998, pursuant to s. 30 of the *Act* is quashed and set aside;

4. The Certificate is referred back to the Ministers for reconsideration, after a revised project committee report, which meaningfully addresses the concerns of the Taku River Tlingit First Nation, has been delivered to the Ministers;

5. Counsel for the parties are invited to make further submission with respect to directions as to the basis on which the Certificate should be referred back to the Ministers for reconsideration.

[136] The subsequent order giving directions, dated 27 July 2000, provides:

THIS COURT ORDERS AND DIRECTS that the reconsideration proceed as follows:

1. The Executive Director, Environmental Assessment Office, or her designate, shall reconvene the Tulsequah Chief Mine Project Committee (the "Project Committee"). Before the Project Committee meets, the Executive Director or her designate will provide each member of the Project Committee with this Court's reasons for decision of June 28, 2000 and this Court's directions for the reconsideration, and request that the members review the reasons for decision and directions, the Staples' Addendum, as well as the TRTFN Recommendations Report, and refamiliarize themselves with the issues;

2. No later than September 20, 2000, the Project Committee will meet to discuss and meaningfully

address the concerns of the Taku River Tlingit First Nation regarding the Tulsequah Chief mine access road and its impacts;

3. A revised draft recommendations report shall be prepared and circulated to all members of the Project Committee for their review and comment. Subject to paragraph 5 of these directions, the Project Committee may determine time lines for the receipt and circulation of comments from its members on the revised draft recommendations report, and may determine whether a further meeting of the Project Committee is required in order to ensure that the concerns of the Taku River Tlingit First Nation are adequately reflected in the revised recommendations report, before the referral to the Respondent Ministers;

4. The revised recommendations report in final form will be prepared and circulated to all members of the Project Committee;

5. Unless the Project Committee considers it necessary and appropriate to extend the time, the Executive Director, Environmental Assessment Office, will refer the application of the Respondent Redfern Resources Ltd. for a project approval certificate and the revised recommendations report to the Ministers for reconsideration by November 28, 2000. The Executive Director, Environmental Assessment Office, will also provide the Ministers with the Court's reasons for judgment of June 28, 2000 and directions for reconsideration.

IV. Grounds of appeal and cross-appeal

[137] In their grounds of appeal, the appellants assert that the chambers judge erred:

> (a) ... in her determination that the standard of review to be applied to the decisions of the Ministers was "reasonableness *simpliciter*";
>
> (b) ... in concluding that the Project Committee and Recommendations Report failed to adequately address the "sustainability of the TRTFN" and that such a failure rendered the Ministers' decision unlawful and unreasonable;
>
> (c) ... in determining that the Crown owed a constitutional and fiduciary duty of consultation to the Tlingit, who had asserted, but not yet proven aboriginal rights or title.

[138] The relief sought by the appellants is that their appeal be allowed and the order of the chambers judge quashing the Project Approval Certificate be set aside.

[139] In their cross-appeal, the Tlingits assert that the chambers judge erred:

> (a) ... in holding that the Recommendations Report and the Referral to the Ministers were not the exercise of a statutory power and therefore not subject to judicial review in their own right;
>
> (b) ... in holding that the conduct of the EAO and the Project Committee did not raise a reasonable apprehension of bias;
>
> (c) ... in referring Redfern's application back to the Ministers for their reconsideration, or in the alternative,... in referring the matter back without ordering steps to correct the problems that gave rise to a reasonable apprehension of bias.

V. Argument of the appellants on the question of whether the chambers judge erred "in determining that the Crown owed a constitutional and fiduciary duty of consultation to the Tlingit, who had asserted, but not yet proven, aboriginal rights or title".

[140] The arguments put forward on behalf of the Crown on Ground (c) are set out in the following paragraphs of the appellants' factum:

> 70. The learned chambers judge found that in the final stages of the environmental review process, the Ministers had not fulfilled their statutory and common law obligations of meaningful consultation with the Tlingit.
>
> 71. The Appellants have submitted in paras. 36 to 69 of this Factum that the Ministers fulfilled their statutory duties. The Appellants respectfully submit that the constitutional or fiduciary obligation to consult with First Nations, as distinct from any administrative law duty of procedural fairness, only arises after there has been a determination that the First Nation has existing aboriginal or treaty rights under s. 35 of the *Constitution Act, 1982*, and that those rights may be infringed by Crown sanctioned activities.
>
> 72. In the case at bar, all issues requiring proof of the Petitioner's claims of aboriginal right and title were severed and referred to the trial list by order of the chambers judge pronounced April 30, 1999. Those issues were not before the chambers judge at the judicial review hearing.
>
> 73. In *Delgamuukw*, *supra*, Lamer, C.J. discussed the Crown's fiduciary duty in the fourth, or justificatory stage of the analysis of an aboriginal title claim, where the onus shifts to the Crown to justify an infringement of aboriginal title.
>
> 74. Similarly, in *Ontario (Minister of Municipal Affairs and Housing) v. TransCanada Pipelines Ltd.* (2000), 186 D.L.R. (4th) 403, the Ontario Court of

Appeal held that it was only after a First Nation had established an infringement of an existing aboriginal treaty right through an appropriate hearing that the duty of the Crown to consult with First Nations was a factor for the court to consider in the justificatory phase of the proceeding.

* * *

77. The decision of this Court in *Halfway River First Nations v. British Columbia (Ministry of Forests)* is distinguishable. There, the First Nation had existing rights under Treaty No. 8. *Halfway River* does not stand for the proposition that the Crown is under a duty to consult with respect to asserted aboriginal rights. Finch, J.A., one of the two majority justices, distinguished between the duty to consult as an aspect of the *Sparrow* test for the justification of infringement of a proven right, and procedural fairness. Of the three justices who heard *Halfway River*, only Huddart J.A. concluded that statutory decision makers were under a positive duty to determine the scope of asserted aboriginal or treaty rights.

78. In the case at bar, the chambers judge found that:

a. the existence of aboriginal interests should inform the government that make decisions which are likely to affect those interests;
b. that was so in the case at bar because the provincial and federal governments had entered into treaty negotiations with the Tlingit;
c. the Tlingits had asserted their aboriginal rights at all stages of the environmental review; and
d. the Ministers should have been mindful of the possibility that their decision might infringe aboriginal rights and, therefore, should have been careful to ensure that they had effectively addressed the substance of the Tlingits' concerns.

79. In *Gitanyow First Nations of Canada*, Williamson J. held that the Crown in Right of Canada, and in Right of British Columbia, in entering negotiations

> with the Gitanyow under the BC Treaty process, had a duty to negotiate in good faith.
>
> 80. Here, the Ministers were not engaged in treaty making. Rather, they were exercising statutory powers of decision to approve or reject Redfern's application for a project approval certificate under s. 30 of the *Act* in an environmental review process in which the Tlingits fully participated. That process provided for the representation and consideration of aboriginal interests, along with those of other agencies and entities potentially affected by the project.
>
> 81. The Ministers' statutory duties, and their decision, were entirely independent of the treaty process. The Appellants respectfully submit that in the absence of established aboriginal rights or title, the Ministers owed the Respondents no constitutional or fiduciary duty of consultation.

[141] In the appellants' submission, the following decisions of the Supreme Court of Canada support their argument that any constitutional or fiduciary obligation to consult with First Nations only arises after there has been a determination that the First Nation has existing aboriginal or treaty rights under s. 35 of the ***Constitution Act, 1982: R. v. Sparrow***, [1990] 1 S.C.R. 1075; ***R. v. Adams***, [1996] 3 S.C.R. 101; ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010; and ***R. v. Marshall***, [1999] 3 S.C.R. 456.

VI. Analysis

[142] The essence of the Crown's argument, found in paragraphs 71, 72 and 81 of the appellants' factum set out above, appears to me to come down to these propositions:

(1) Aboriginal rights may be infringed by Crown sanctioned activities.

(2) Absent the establishment of aboriginal rights or title, the Ministers of the Crown did not owe the Tlingits any constitutional or fiduciary duty of consultation.

(3) The aboriginal rights issues raised by the Tlingits in their Petition had been severed; therefore the chambers judge ought not to have considered those issues because they were not before her.

[143] I will consider each of those propositions in turn.

(a) Proposition one: Aboriginal rights may be infringed by Crown sanctioned activities.

[144] The appellants' broad proposition that "aboriginal rights may be infringed by Crown sanctioned activities" is open to question in the context of the present case for it ignores the limits on provincial power that result from the division of powers under the ***Constitution Act, 1867.***

[145] Under the ***Constitution Act, 1867***, it is only the Parliament of Canada that can make laws in relation to the class of subjects: "Indians, and Lands reserved for the Indians."

[146] In ***Delgamuukw***, the issue raised by the Province of British Columbia on its cross-appeal was whether the Province had the power to extinguish aboriginal rights after it had joined Confederation in 1871. The Supreme Court of Canada concluded that it did not and the Court was unanimous on that point: see ***Delgamuukw***, *supra*, paras. 172-183 and 206.

[147] On the question of the power of the Province to extinguish aboriginal rights and title, Lamer C.J.C. said, by way of introduction, at para. 172:

> For aboriginal rights to be recognized and affirmed by s. 35(1), they must have existed in 1982. Rights which were extinguished by the sovereign before that time are not revived by the provision. In a federal system such as Canada's, the need to determine whether aboriginal rights have been extinguished raises the question of which level of government has jurisdiction to do so. In the context of this appeal, that general question becomes three specific ones. First, there is the question whether the province of British Columbia, from the time it joined Confederation in 1871, until the entrenchment of s. 35(1) in 1982, had the jurisdiction to extinguish the rights of aboriginal peoples, including aboriginal title, in that province. Second, if the province was without such jurisdiction, another question arises -- whether provincial laws which were not in pith and substance aimed at the extinguishment of aboriginal rights

> could have done so nevertheless if they were laws of general application. The third and final question is whether a provincial law, which could otherwise not extinguish aboriginal rights, be given that effect through referential incorporation by s. 88 of the *Indian Act.*

[148] The Court's clear answer to each of those questions was no: ***Delgamuukw***, paras. 173-183.

[149] The reasoning in ***Delgamuukw*** on the limits on the power of the provincial government in relation to Indians and Indian Lands was recently considered in this Court by Mr. Justice Lambert in ***Paul v. British Columbia (Forest Appeals Commission)*** (2001), 89 B.C.L.R. (3d) 210, 201 D.L.R. (4th) 251, 2001 BCCA 411; Supplementary Reasons: 2001 BCCA 644; [2001] B.C.J. No. 2237 (Q.L.).

[150] A discussion of the implications of the decision in ***Delgamuukw*** regarding the division of powers for the development of provincial resource rights may be found in a Case Comment by Professor Nigel Bankes in (1998), 32:2 *U.B.C. Law Review* 317, entitled: "*Delgamuukw,* Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights".

[151] While the analysis in ***Delgamuukw*** was directed to the question of whether the province was able to extinguish

aboriginal title, in my opinion, the Supreme Court's analysis on the three questions arising out of the division of powers under the ***Constitution Act, 1867***, would also apply so as to limit the power of the province to infringe aboriginal rights and title.

[152] In this case, the Tlingits did not challenge the constitutionality of the project assessment and approval scheme contained in the ***EAA,*** based on a division of powers argument under the ***Constitution Act, 1867,*** but that does not alter or diminish the force of the analysis and conclusions reached by the Supreme Court of Canada on the three questions considered on the Province's cross-appeal in ***Delgamuukw***.

(b) Proposition two: Absent the establishment of aboriginal rights or title, the Ministers of the Crown did not owe the Tlingits any constitutional or fiduciary duty of consultation.

[153] The proposition the Crown has put forward in this case is that "the constitutional or fiduciary obligation to consult with First Nations, as distinct from any administrative law duty of procedural fairness, only arises after there has been a determination that the First Nation has existing aboriginal or treaty rights under s. 35 of the *Constitution Act, 1982*, and that those rights may be infringed by Crown sanctioned activities".

[154] In essence, the Crown's position is that the before there is any obligation on the part of the Crown to consult with aboriginal peoples concerning an aboriginal right, the aboriginal right must first have been established in court proceedings. To support that position, the Crown relies on certain passages found in decisions of the Supreme Court of Canada in which s. 35(1) of the ***Constitution Act, 1982*** was under consideration. The cases, and the passages in those cases on which the Crown relies, are as follows: ***R. v. Sparrow***, *supra*, at 1110-1113; ***R. v. Adams***, *supra*, at paras. 46, 51-53, and 63; ***Delgamuukw v. British Columbia***, *supra*, at para. 162; and ***R. v. Marshall***, *supra*, at paras. 111-113.

[155] In my respectful view, the passages on which the Crown relies, when read within the context of the issue being addressed or considered by the Supreme Court, do not support the Crown's position or arguments in this case.

[156] Section 35(1) of the ***Constitution Act, 1982,*** which is not subject to s. 1 of the ***Canadian Charter of Rights and Freedoms*** or to legislative override under s. 33, provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[157] The appropriate framework for the interpretation of s. 35(1) of the ***Constitution Act, 1982*** has been considered by the Supreme Court of Canada in a number of decisions in which aboriginal or treaty rights have been invoked or claimed, beginning in 1990 with ***Sparrow***.

[158] In ***Sparrow***, the background leading to the entrenchment of aboriginal rights in the ***Constitution Act, 1982*** was set out in the unanimous reasons of the Court, given by Dickson C.J.C. and La Forest, J., under the heading "Recognized and Affirmed". The heading is a reference to the words in s. 35(1) that "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Under that heading, the Court said, in part (at 1102-1106):

> ... [I]n finding the appropriate interpretative framework for s. 35(1), we start by looking at the background of s. 35(1).
>
> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; [citations omitted]. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach ....
>
> For many years, the rights of the Indians to their aboriginal lands - certainly as <u>legal</u> rights - were virtually ignored. The leading cases defining

Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community".... It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal Government on August 8, 1973 issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country". (Emphasis [of Dickson C.J.].) See *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People*, August 8, 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility". But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal

supporting documents. "The Government", it stated, "is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position; ... As recently as *Guerin v. The Queen*, [1984] 2 S.C.R. 335, the federal government argued in this Court that any federal obligation was of a political character.

It is clear, then, that s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power....

[Emphasis added.]

In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 *Osgoode Hall L.J.* 95, says the following about s. 35(1), at p. 100:

> ... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied

> those courts the authority to question sovereign claims made by the Crown.

[159] In ***R. v. Van der Peet,*** [1996] 2 S.C.R. 507, Chief Justice Lamer spelled out the reason for the recognition of aboriginal rights and the reason for those rights being constitutionally protected (at 527, 537-539):

> 3 In order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible. As Dickson J. (as he then was) said in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, a constitutional provision must be understood "in the light of the interests it was meant to protect". This principle, articulated in relation to the rights protected by the *Canadian Charter of Rights and Freedoms*, applies equally to the interpretation of s. 35(1).
>
> 4 This judgment will thus, after outlining the context and background of the appeal, articulate a test for identifying aboriginal rights which reflects the purposes underlying s. 35(1), and the interests which that constitutional provision is intended to protect.
>
> * * *
>
> 27 When the court identifies a constitutional provision's purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision; it is articulating the reasons underlying the protection that the provision gives. With regards to s. 35(1), then, what the court must do is explain the rationale and foundation of the recognition and

affirmation of the special rights of aboriginal peoples; it must identify the basis for the special status that aboriginal peoples have within Canadian society as a whole.

28 In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights: *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 112; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), [1976] 2 S.C.R. v; it is this which distinguishes the aboriginal rights recognized and affirmed in s. 35(1) from the aboriginal rights protected by the common law. Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*, *supra*.

[Emphasis added.]

29 ... The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights; ...

30 In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

31 More specifically, what s. 35(1) does is provide the constitutional framework through which

> the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

[160] The decisions of the Supreme Court in ***Sparrow*** and ***Van der Peet*** make clear that aboriginal rights and title were not created by the ***Constitution Act, 1982*** but pre-dated the constitutionalization of those rights.

[161] To argue, as the Crown does here, that the constitutional or fiduciary obligation to consult with aboriginal peoples only arises after there has been a determination that the aboriginal peoples have existing aboriginal or treaty rights under s. 35 of the ***Constitution Act, 1982,*** is wholly inconsistent with the passages from ***Sparrow*** and ***Van der Peet*** to which I have just referred.

[162] In my opinion, the Crown’s position that the obligation or duty to consult with aboriginal peoples is triggered by a determination that aboriginal rights or title exists, rests on a misreading or misinterpretation of the Supreme Court’s decisions.

[163] The cases that have come before the Supreme Court to date on s. 35(1) of the ***Constitution Act, 1982***, have generally involved prosecutions for regulatory offences in which an aboriginal right has been raised as a defence to the charge. The notable exception is ***Delgamuukw***, in which a claim for aboriginal title was advanced.

[164] In ***Sparrow***, the appellant was charged under the federal ***Fisheries Act*** with fishing with a drift net longer than permitted by the terms of his Band's Indian food fishing licence. The appellant admitted the facts constituting the offence but defended the charge on the basis that he was exercising an existing aboriginal right to fish for food and ceremonial purposes and that the net length restriction in the Band's licence was invalid in that it was inconsistent with s. 35(1) of the ***Constitution Act, 1982***.

[165] In that case, the Supreme Court set out the following framework for analysis of the constitutional issue where the aboriginal right was invoked as a defence to the charge. The first question to be determined within that framework is whether the defendant has demonstrated that he or she was acting pursuant to an aboriginal right. The second question to be determined is whether the right claimed has been

extinguished and the third, whether the infringement is justified.

[166] In ***Sparrow***, the trial judge's finding that the appellant "was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River for salmon" was supported by evidence and the Musqueam Band's aboriginal right to fish for food was not seriously challenged.

[167] The Crown argued, however, that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the federal ***Fisheries Act.*** The Supreme Court firmly rejected that argument and held that the Crown had failed to discharge the burden of proving extinguishment: see pp. 1095-1099.

[168] That left the question of the impact of s. 35(1) of the ***Constitution Act, 1982*** on the regulatory power of Parliament and on the outcome of Mr. Sparrow's appeal. On the question of the construction of s. 35(1), the Supreme Court said, in part, at 1106-1108:

> The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was

confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the *Constitution Act, 1982*, which deal with aboriginal rights, it said the following, at p. 322:

> This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future.... To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.*, [1983] 1 S.C.R. 29....

* * *

In *R. v. Agawa*, *supra*, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:

> The second principle was enunciated by the late Associate Chief Justice MacKinnon in **R. v. Taylor and Williams** (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:
>
> > "The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite

> apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."
>
> This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see **Guerin v. The Queen**, [1984] 2 S.C.R. 335; 55 N.R. 161; 13 D.L.R. (4th) 321.
>
> In *Guerin*, *supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.
>
> We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from *Nowegijick*, *Taylor and Williams* and *Guerin*, should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content....

[169] As to the constitutional restraint on legislative power resulting from the entrenchment of aboriginal rights and how

that restraint on legislative power is to be effected, the Supreme Court said, at 1108-1111:

> In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the *Charter*, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).
>
> There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.
>
> We refer to Professor Slattery's "Understanding Aboriginal Rights", [(1987), 66 *Can. Bar Rev.* 727], with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork"

characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these two extreme positions must be rejected in favour of a justificatory scheme.

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

> In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation made pursuant to the *Fisheries Act*. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

[170] The Supreme Court then turned to consider the appropriate analysis to be undertaken under s. 35(1) of the ***Constitution Act, 1982,*** when there has been a *prima facie* interference with an aboriginal right. On the justificatory standard and analysis to be undertaken, the Court said (at pp. 1111-1113 and 1119):

> Taking the above framework as guidance, we propose to set out the test for *prima facie* interference with an existing aboriginal right and for the justification of such an interference. With respect to the question of the regulation of the fisheries, the existence of s. 35(1) of the *Constitution Act, 1982*, renders the authority of *R. v. Derriksan*, *supra*, inapplicable....
>
> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal

right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group....

* * *

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food....

If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

* * *

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little

> infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

[171] In its factum, the Crown referred to pages 1110-1113 of ***Sparrow*** to support its proposition that any constitutional or fiduciary obligation to consult with aboriginal peoples only arises after there has been a determination that aboriginal or treaty rights exist. The portion of the Supreme Court's judgment in which pages 1110 to 1111 appear are found in the section headed "Recognized and Affirmed", which begins on page 1101. I have already set out above the substance of what was said in that portion of the judgment. In my opinion, nothing said by the Court under the heading "Recognized and Affirmed" 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.

[172] Under the heading “Section 35(1) and the Regulation of the Fisheries”, which begins on page 1111, the Supreme Court turns to the test for *prima facie* interference with an existing aboriginal right and for the justification of such an interference. Nothing said in ***Sparrow*** under that heading suggests to me that the constitutional obligation governments have in relation to the rights of aboriginal peoples is triggered only if an aboriginal right has been established in court proceedings. In other words, the justificatory analysis set out in ***Sparrow*** at pages 1111-1119 provides no foundation for the position the Crown has taken on this case.

[173] To accept the Crown’s proposition that the obligation to consult is only triggered when an aboriginal right has been established in court proceedings would ignore the substance of what the Supreme Court has said, not only in ***Sparrow*** but in earlier decisions which have emphasized the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see ***Guerin v. The Queen***, [1984] 2 S.C.R. 335 and ***Nowegijick v. R.***, [1983] 1 S.C.R. 29. Indeed, if the Crown’s proposition were accepted, it would have the effect of robbing s. 35(1) of much of its constitutional significance.

[174] Moreover, decisions of the Supreme Court of Canada have referred to the importance of s. 35(1) of the ***Constitution Act, 1982,*** in providing a foundation for the negotiation and settlement of aboriginal land claims. To say, as the Crown does here, that establishment of the aboriginal rights or title in court proceedings is required before consultation is required, would effectively end any prospect of meaningful negotiation or settlement of aboriginal land claims. In that regard, I note the concluding comments of Lamer C.J.C. in para. 186 of ***Delgamuukw***:

> Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) - "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

[175] The Crown has also referred us to some passages in ***R. v. Marshall***, *supra,* found in the dissenting reasons of McLachlin

C.J.C., to support the proposition that, absent the establishment of aboriginal rights or title, the Ministers of the Crown did not owe the Tlingits any constitutional or fiduciary duty of consultation.

[176] In ***Marshall***, the accused, a Mi'kmaq Indian, was convicted at trial of offences set out in the federal fishery regulations. The issue at trial was whether the accused possessed a treaty right to catch and sell fish under the treaties of 1760-61 that would exempt him from compliance with the fishery regulations. The Supreme Court of Canada reversed the convictions, based on the majority's interpretation of the content of the accused's treaty right.

[177] The passages in ***Marshall*** that are said to support the Crown's position in this case are found at p. 530 in paragraphs 111-113 of the Chief Justice's reasons, set out below. I have also included paragraphs 114 and 115 so the context of what she said is clear:

> 111 A claimant seeking to rely on a treaty right to defeat a charge of violating Canadian law must first establish a treaty right that protects, expressly or by inference, the activities in question, see: *Sioui*, *supra*, at pp. 1066-67. Only then does the onus shift to the government to show that it has accommodated the right or that its limitations of the right are justified.
>
> 112 To proceed from a right undefined in scope or modern counterpart to the question of justification

would be to render treaty rights inchoate and the justification of limitations impossible. How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government, in the absence of such definition, to know how far it may justifiably trench on the right in the collective interest of Canadians? How are courts to judge whether the government that attempts to do so has drawn the line at the right point? Referring to the "right" in the generalized abstraction risks both circumventing the parties' common intention at the time the treaty was signed, and functioning illegitimately to create, in effect, an unintended right of broad and undefined scope.

113 Instead of positing an undefined right and then requiring justification, a claim for breach of a treaty right should begin by defining the core of that right and seeking its modern counterpart. Then the question of whether the law at issue derogates from that right can be explored, and any justification for such derogation examined, in a meaningful way.

114 Based on the wording of the treaties and an extensive review of the historical evidence, the trial judge concluded that the only trade right conferred by the treaties was a "right to bring" goods to truckhouses that terminated with the demise of the exclusive trading and truckhouse regime. This led to the conclusion that no Crown breach was established and therefore no accommodation or justification required. The record amply supports this conclusion, and the trial judge made no error of legal principle. I see no basis upon which this Court can interfere.

VI. Justification

115 Having concluded that the Treaties of 1760-61 confer no general trade right, I need not consider the arguments specifically relating to justification.

[178] In my respectful view, what Chief Justice McLachlin said in ***Marshall*** does not support the proposition the Crown has put forward in this case. ***Marshall*** is also a case involving the prosecution of a regulatory offence. By their very nature, prosecution cases must focus on the specific type of activity that has been proscribed by regulation. If the defence asserts that the regulation in question infringes an aboriginal right protected by s. 35(1) of the ***Constitution Act, 1982***, the analytical framework a court uses in considering the alleged infringement is similar, but not identical to, the one used to determine whether an accused's ***Charter*** right has been infringed.

[179] Where an accused asserts that his or her ***Charter*** rights have been violated, the onus is on the accused to establish the ***Charter*** breach. Assuming the breach is established, the court must determine what remedy is called for under s. 24(2) of the ***Charter***.

[180] In a case in which an aboriginal or treaty right is asserted as a defence in relation to a regulatory offence, the onus is on the accused to establish a *prima facie* infringement of the aboriginal right asserted. If the aboriginal right is not established by the accused, there is no burden on the Crown to establish justification of the alleged infringement.

If the right is established, however, the Crown has the burden of justifying the *prima facie* infringement, using the justificatory analysis set out in ***Sparrow.***

[181] In ***Sparrow***, the content of the aboriginal right did not have to be explored because it was not seriously disputed that the Musqueam had an aboriginal right to fish for food and ceremonial purposes in the area where the alleged offence had taken place.

[182] In ***Marshall***, the Chief Justice did not have to consider the question of justification because, unlike the majority, she found no reason to interfere with the trial judge's conclusion on the evidence that the treaty right asserted by the accused had not been established.

[183] While it is so that the onus of proving a *prima facie* infringement of an aboriginal right under s. 35(1) of the ***Constitution Act, 1982*** lies on the individual or group challenging legislation or regulations, it does not logically follow that until an aboriginal right has been established in court proceedings, the right does not exist.

[184] ***R. v. Adams***, *supra*, and ***Delgamuukw***, *supra*, are the other Supreme Court of Canada cases on which the Crown relied in support of its arguments. In my opinion, neither of those

cases provide any support for the proposition that the Crown's constitutional or fiduciary duty to the Tlingits would arise only after the Tlingits had established aboriginal rights or title in court proceedings.

[185] In ***R. v. Adams***, the appellant, a Mohawk, was charged with fishing without a licence on Lake St. Francis, contrary to a provision in the *Quebec Fishery Regulations*. The constitutional question before the Supreme Court was whether, by reason of the appellant's aboriginal rights under s. 35(1), the provision in the provincial fishery regulations was of no force or effect with respect to the appellant by virtue of s. 52 of the ***Constitution Act, 1982.*** The fundamental issue in ***Adams*** was whether aboriginal rights are inherently based in claims to land, or whether claims to land are simply one manifestation of a broader-based conception of aboriginal rights.

[186] In ***Delgamuukw***, the Supreme Court had before it a case in which a claim had been made for aboriginal title in relation to an area of land in northern British Columbia that had traditionally been used by a number of different aboriginal peoples. The paragraph in ***Delgamuukw*** on which the appellants rely to support their position in this case is set out below [para. 162]:

The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the "legal and factual context" of each appeal (*Gladstone*, *supra*, at para. 56). *Sparrow* and *Gladstone*, for example, interpreted and applied the fiduciary duty in terms of the idea of priority. The theory underlying that principle is that the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first. However, the fiduciary duty does not demand that aboriginal rights always be given priority. As was said in *Sparrow*, *supra*, at pp. 1114-15:

> The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. [Emphasis [of Lamer C.J.].]

Other contexts permit, and may even require, that the fiduciary duty be articulated in other ways (at p. 1119):

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

Sparrow did not explain when the different articulations of the fiduciary duty should be used. Below, I suggest that the choice between them will in large part be a function of the nature of the aboriginal right at issue.

[187] The foregoing paragraph in ***Delgamuukw*** appears in that part of the judgment of Lamer C.J.C. that is headed “Infringement of Aboriginal Title: the Test of Justification”. That paragraph, when read together with paragraphs 163-164, makes the point that the requirements of the Crown’s fiduciary duty may vary with the nature of the aboriginal right in issue. Nothing in that part of the judgment in ***Delgamuukw*** says or suggests that the existence of aboriginal rights or title depends on those rights or title being established in court proceedings.

[188] As noted above, in ***Sparrow***, it was not necessary to consider the nature of the aboriginal right at issue in that case because there was really no dispute about the right of the Musqueum Band to fish for food and ceremonial purposes in the area in which the offence was alleged to have occurred. In ***Marshall***, the accused was charged with fishing for eels in contravention of provisions in the federal fisheries legislation. The appeal turned on the interpretation of the Mi’kmag Treaties of 1760-61.

[189] In ***Delgamuukw***, because of the claims being made in the action by the various aboriginal peoples, the Supreme Court had to consider the content of aboriginal title, how it is to

be protected under s. 35(1) of the ***Constitution Act, 1982***, and what is required for its proof.

[190] In the case before us, the chambers judge was not required to make a specific determination of the nature of specific aboriginal rights the Tlingits claimed to have or the boundaries of any lands over which they might be found to have aboriginal title. Instead, the question was whether the Ministers of the Crown "had effectively addressed the substance of the Tlingits' concerns with respect to when, and on what terms and conditions, the mineral rights to be exploited by Redfern should be developed."

[191] The footing on which the learned chambers judge proceeded in arriving at her decision to quash the Project Approval Certificate is clear from her reasons, the relevant portions of which I have reproduced above. The chambers judge stated (in paragraph 130) that the federal government had agreed to negotiate land claims with the Tlingits in 1984 on the basis of a preliminary determination that they had aboriginal rights in their territory flowing from their pre-existing use and occupation of the land and resources of the area. That fact, together with the fact that the federal government had accepted the Tlingits' claim under the Comprehensive Land Claims Policy, was known to the provincial

government when it entered into a framework agreement to negotiate with the Tlingits under the B.C. treaty process.

[192] The chambers judge also pointed out (in paragraph 70) that the Tlingits, throughout the environmental review process, had emphasized their reliance on their system of land use to support their domestic economy and their social and cultural life and all of the experts who prepared reports for the environmental assessment recognized that reliance. That approval of the project would have a profound impact on the Tlingits' way of life and their ability to sustain themselves in their traditional territory was not disputed.

[193] In my opinion, the jurisprudence supports the view taken by the chambers judge that, prior to the issuance of the Project Approval Certificate, the Ministers of the Crown had to be "mindful of the possibility that their decision might infringe aboriginal rights" and, accordingly, to be careful to ensure that the substance of the Tlingits' concerns had been addressed.

[194] In summary, I am of the view that the Crown's argument that any obligation to consult the Tlingits would arise only after there had been a determination that the Tlingits had aboriginal rights or aboriginal title which could be infringed by issuance of the Project Approval Certificate rests on a

misreading of the decisions of the Supreme Court of Canada. To accept the appellants' proposition would largely negate the purpose of the constitutional protection provided by s. 35(1) of the ***Constitution Act, 1982***.

(c) Proposition 3: The aboriginal rights issues raised by the Tlingits in their Petition had been severed, therefore the chambers judge ought not to have considered those issues because they were not before her.

[195] The chambers judge proceeded with her analysis on the footing that the Tlingits' land use practices and their reliance on that land use system to sustain themselves socially, economically and culturally were not in dispute and that the construction of the road, "in advance of an established regional land use plan and a treaty, [would] prejudice and limit the options available to the Tlingits in both land use planning and treaty negotiations". The chambers judge proceeded on that footing because, as she noted in her reasons, the Tlingits' concerns to which she had referred had not been disputed by any of the appellants.

[196] The reasons given by the chambers judge for concluding that the Ministers of the Crown had an obligation to ensure that they "had effectively addressed the substance of the Tlingits' concerns" is set out in paragraph 130 of her reasons, which I will repeat for convenience of reference:

> [130] Notwithstanding the above, there can be little doubt that the weight of authority, particularly emanating from the Supreme Court of Canada, that the existence of aboriginal interests should inform governments who make decisions which are likely to affect those interests. In the case at bar, this is so because the provincial and federal governments have entered into treaty negotiations with the Tlingits. The federal government agreed to negotiate land claims with the Tlingits in 1984 on the basis of a preliminary determination that they had aboriginal rights in their territory flowing from their pre-existing use and occupation of the land and resources of the area. This, together with the fact that the federal government accepted the Tlingits' claim under the Comprehensive Land Claims Policy, was known to the provincial government when it entered into a framework agreement to negotiate with the Tlingits under the B.C. treaty process. Furthermore, the Tlingits have asserted their aboriginal rights at all stages of the environmental review. Given the extreme importance of the Ministers' decision to the Tlingits, the Ministers should have been mindful of the possibility that their decision might infringe aboriginal rights. Accordingly, they should have been careful to ensure that they had effectively addressed the substance of the Tlingits' concerns with respect to when, and on what terms and conditions, the mineral rights to be exploited by Redfern should be developed.

[197] In the context of the present case, it is my opinion that the undisputed facts to which the chambers judge referred provided an ample foundation for the analysis contained in paragraph 130 of her reasons.

[198] To accept the argument that the chambers judge ought not to have considered any aboriginal rights issues because those

issues were not before her, having been severed under Rule 52, could well result in a serious injustice to the Tlingits.

[199] The Crown did not argue, either before the chambers judge or before this Court, that the substance of the Tlingits' concerns had been met or accommodated prior to or through the issuance of the Project Approval Certificate. Had steps been taken to accommodate the concerns the Tinglits had raised throughout the environmental review process under the ***EAA,*** for example, by a change in the location of the road from the mine and through insertion of terms and conditions in the Project Approval Certificate, there might have been a live issue as to whether the Ministers' issuance of the Project Approval Certificate constituted an infringement of the Tlingits' aboriginal rights. However, the Crown did not raise such an argument and, considering the material before the chambers judge, it is difficult to see how such an argument could be made successfully.

[200] Had the Crown's argument in the court below been that the Tlingits' aboriginal rights had not been or would not be infringed by the issuance of the Project Approval Certificate, the chambers judge may have been required to determine the nature and extent of the aboriginal rights the Tlingits had asserted in their Petition in order to determine whether there

had been an infringement of the Tlingits' constitutional rights. If that had been the Crown's argument, it seems to me that the proper procedural course in this case would have been to adjourn the hearing of the Petition under the ***Judicial Review Procedure Act*** so that the issues that had been severed under Rule 52 could be brought forward for determination.

[201] Whether consultation has taken place is a relevant factor in the justificatory analysis but, as I read the Supreme Court of Canada decisions on s. 35(1) of the ***Constitution Act, 1982,*** consultation alone does not necessarily satisfy the Crown's constitutional and fiduciary obligations. As Chief Justice Lamer pointed out in ***Delgamuukw***, there is always a duty to consult, but what is required by way of consultation will vary with the circumstances. Under the heading, "Justification and Aboriginal Title", Lamer C.J.C. said (at 1112-13):

> 168 Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of

> aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

VII. Summary and conclusion

[202] The Tlingits are an aboriginal people within the meaning of s. 35(1) of the ***Constitution Act, 1982***, who participated in an environmental review process required under provincial legislation in relation to a project that would have a profound impact on their aboriginal way of life and their ability to sustain it. The Tlingits were willing to participate in that process in an apparent effort to have their needs accommodated but the Project Approval Certificate

for the Tulsequah Chief Mine Project was issued without their concerns having been met.

[203] The fact that the 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***.

[204] In appealing the order quashing the Project Approval Certificate issued under the ***EAA***, the Crown has argued that "the constitutional or fiduciary obligation to consult with First Nations, as distinct from any administrative law duty of procedural fairness, only arises after there has been a determination that the First Nation has existing aboriginal or treaty rights under s. 35 of the *Constitution Act, 1982*, and that those rights may be infringed by Crown sanctioned activities". The Supreme Court decisions on which the appellants rely do not support that argument and, for the reasons I have stated, I would not accede to it.

[205] Section 5 of the ***Judicial Review Procedure Act***, which is the legislation invoked by the Tlingits in challenging the Ministers' decision in this case, provides:

> 5 (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.
>
> (2) In giving a direction under subsection (1), the court must
> (a) advise the tribunal of its reasons, and
> (b) give it any directions that the court thinks appropriate for the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

[206] A decision of Ministers of the Crown in matters involving aboriginal rights must reflect both the division of powers under the ***Constitution Act, 1867***, and the fiduciary and constitutional obligations on the Crown under s. 35(1) of the ***Constitution Act, 1982***.

[207] In keeping with the assumption that the Ministers of the Crown will consider afresh the matter of the issuance of the Project Approval Certificate, I would remit the matter for reconsideration by the Ministers. In effect, the Ministers are directed by this judgment to revisit the question of the issuance of the Project Approval Certificate, bearing in mind these reasons for judgment, including the division of powers question under the ***Constitution Act, 1867*** that was explored in

the recent decision of this Court in ***Paul***, *supra*, 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.

[208] In the result, I would dismiss the appeal of the order quashing the Project Approval Certificate. I would set aside the order of the chambers judge remitting the matter to the Project Committee and the Ministers and direct instead that the matter simply be remitted to the Ministers.

"THE HONOURABLE MADAM JUSTICE ROWLES"

I AGREE:

"THE HONOURABLE MADAM JUSTICE HUDDART"

APPENDIX "A"

ENVIRONMENTAL ASSESSMENT ACT
R.S.B.C. 1996, c. 119

These are the "critical sections" of the ***Environmental Assessment Act*** referred to in paragraph 6 above:

Purposes

2 The purposes of this Act are
(a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,
(b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
(c) to prevent or mitigate adverse effects of reviewable projects,
(d) to provide an open, accountable and neutrally administered process for the assessment
(i) of reviewable projects, and
(ii) of activities that pertain to the environment or to land use and that are referred to the board in accordance with the terms of reference mentioned in section 51(1)(c), and
(e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia's neighbouring jurisdictions.

* * *

Project Committee

9 (1) After an application for a project approval certificate has been accepted under section 8 for review and within the prescribed period after the proponent supplies the

copies referred to in section 8(2), the executive director must establish a project committee for the reviewable project that is the subject of the application.

(2) The executive director must invite each of the following to nominate a number of individuals not exceeding the number specified for that nominator by the executive director, to represent the nominator on a project committee established under subsection (1):
(a) the government of British Columbia;
(b) the government of Canada;
(c) any municipality or regional district in the vicinity of the project or in which the project is located;
(d) any first nation whose traditional territory includes the site of the project or is in the vicinity of the project;
(e) any of British Columbia's neighbouring jurisdictions in the vicinity of the project.

(3) After the establishment of a project committee and at the request of a body listed in subsection (2)(a) to (e), the executive director may invite that body to nominate to the project committee a number of individuals, not exceeding the number specified by the executive director, from any agency or department of a body listed in subsection (2)(a) to (e), not already represented on the project committee at the time of the invitation.

(4) An individual who ceases to be a member of a project committee may be replaced by an individual to be named to the committee by the original nominator, and a project committee is comprised of the continuing nominees under subsections (2) and (3) and any individuals named to the committee as replacement members.

(5) The executive director is the chair of a project committee unless the executive

director delegates the responsibility of chairing that committee to another individual employed in the Environmental Assessment Office.

(6) Subject to the regulations, a project committee may
(a) determine its own procedure, and
(b) provide for the conduct of its meetings.

Purpose of Project Committee

10 The purpose of a project committee established for a reviewable project is, in respect of that project,
(a) to provide to the executive director, the minister and the responsible minister expertise, advice, analysis and recommendations, and
(b) to analyze and advise the executive director, the minister and the responsible minister as to,
(i) the comments received in response to an invitation for comments under this Act,
(ii) the advice and recommendations of the public advisory committee, if any, established for that reviewable project,
(iii) the potential effects, and
(iv) the prevention or mitigation of adverse effects.

* * *

Public comment on steps in the review process

16 (1) Within the prescribed period after any of the following steps in the review of a reviewable project, the executive director must give notice to the public inviting comments, relevant to that step, about the potential effects of the project:
(a) the receipt by the executive director from the proponent of the copies, referred to in section 8 (2), of the

application accepted under section 8 for review;

(b) the preparation, under section 21, of the draft project report specifications;

(c) the receipt by the executive director from the proponent of the copies, referred to in section 26 (2), of a project report accepted under section 26 for review;

(d) the preparation, under section 31, of the draft terms of reference.

(2) In a notice under subsection (1) the executive director must specify a period within the prescribed limits during which any comments must be received at the office of the executive director in order to be taken into account

(a) in the decision under section 19 to either

(i) refer the application to the minister and responsible minister for a decision under section 20, or

(ii) order that the project report be prepared under Division 7 and that the project undergo further review under Division 8,

(b) in preparation in final form under section 24, of the project report specifications,

(c) in a referral, under section 29, of the application to the minister and responsible minister for a decision under section 30, or

(d) in the preparation in final form, under section 32, of the terms of reference.

* * *

Division 7 — Preparation of a Project Report

Draft project report specifications

21 Within the prescribed period after an order, under section 19 (1) (b) or 20 (b) (iii), that

a project report be prepared and that the project undergo further review, the executive director must

(a) prepare project report specifications in draft form that identify, and require the project report to contain or be accompanied by, any information, analysis, plans and other records that the executive director, on the recommendation of the project committee, considers relevant to an effective assessment of the potential effects of the project, and

(b) deliver a copy of the draft project specifications to the proponent.

Matters to be included in project report

22 Without limiting section 21, the project report specifications may identify, and may require the project report to contain or be accompanied by, information and analysis that reveal, explain or give particulars of

(a) the rationale for the project,

(b) the site selection procedure for the project, the reason why the site was chosen and a description of alternative sites considered,

(c) the existing environmental, economic, social, cultural, heritage and health characteristics and conditions that may be affected by the project,

(d) the potential for direct and indirect effects of the project,

(e) alternatives to the methods of construction, operation, modification, dismantling or abandonment proposed in the application,

(f) the potential effects of the alternatives referred to in paragraph (e),

(g) potential impacts on the exercise of aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*,

(h) health issues,

(i) the potential for accidents with adverse effects,

(j) data necessary or useful to enable the assessment of the probable cumulative effects of the project,
(k) the potential cross-boundary effects of the project, and
(l) means of incorporating energy efficiency and energy conservation measures into the design and operation of the project.

Plans to be provided

23 Without limiting section 21, the project report specifications may identify, and require the project report to contain or be accompanied by, one or more plans, showing in a manner satisfactory to the executive director how the proponent intends to carry out all or any combination of the following:
(a) public consultation about the project;
(b) consultation with first nations whose traditional territory includes the site of the project or is in the vicinity of the project;
(c) measures to prevent or mitigate adverse effects of the project;
(d) monitoring the effects of the project;
(e) evaluating the adequacy of any measures proposed to prevent or mitigate adverse effects of the project.

Preparation and submission of project report according to specifications

24 Within the prescribed period after expiry of the period specified under section 16 for receiving comments concerning the draft project report specifications, the executive director must
(a) prepare the project report specifications in final form by making any revisions that the executive director, on the recommendation of the project committee, considers necessary for an effective assessment of the potential effects of the project, and
(b) deliver the final form of the project report specifications to the proponent together with a request that the proponent

(i) prepare the project report in accordance with the project report specifications, and

(ii) submit the project report to the executive director for review under Division 8.

* * *

Accepting a project report for review

26 (1) Within the prescribed period after the submission of a project report to the executive director in accordance with a request under section 24 (b) (ii), the executive director, on the recommendation of the project committee, must

(a) accept the project report for review if it meets the final form of the project report specifications and deliver written notice of the acceptance to the proponent, or

(b) withhold acceptance of the project report for review if the project report does not meet the final form of the project report specifications and deliver written notice to the proponent, giving particulars of the deficiencies.

(2) The executive director, in any notice delivered under subsection (1) (a), must specify the number of copies of the project report needed from the proponent for the purpose of the review and require the proponent to supply the copies.

* * *

Referral to ministers for decision

29 (1) In making a referral, under this section, of an application for a project approval certificate, the executive director must take into account the application, the project report and any comments received about them.

(2) Within the prescribed period after expiry of the period specified under section 16(2), for receiving comments concerning the project report, the executive director, on the recommendation of the project committee, must refer the application to the minister and responsible minister for a decision under section 30.

(3) Despite subsection (1), the executive director must not make a referral under this section unless any specified further measures under section 14, relating to the distribution of information about the project, have been carried out.

(4) A referral under this section may be accompanied by recommendations of the project committee relevant to a decision under section 30.

Ministers' power to approve, reject or refer to board

30 (1) Within the prescribed period after the referral, under section 29, of an application for a project approval certificate to the minister and the responsible minister,

(a) the ministers must consider the application and any recommendations of the project committee,

(b) the minister with the concurrence of the responsible minister must

(i) issue a project approval certificate to the proponent and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the project approval certificate to the proponent, or

(iii) refer the application to the Environmental Assessment Board for the public hearing required under section 52,

(c) the ministers must give written reasons for the decision under subsection (1)(b), and
(d) the decision and written reasons must be delivered to the proponent.

(2) If a referral is made under subsection (1)(b)(iii), the Lieutenant Governor in Council may designate a regular or temporary member of the board to act as chair for the purpose of the public hearing.

* * *

Minister's order to cease or remedy

68 (1) If the minister considers that a reviewable project is not being constructed, operated, modified, dismantled or abandoned or, in the case of an activity that is a reviewable project, carried out, in accordance with a project approval certificate, the minister,
(a) if a project approval certificate for the reviewable project has not been issued or has been issued but does not remain in effect, may order that construction, operation, modification, dismantling or abandonment of the project cease, or that the activity cease, either altogether or to the extent specified by the minister, until the proponent obtains a project approval certificate, or
(b) if a project approval certificate for the reviewable project has been issued and remains in effect, may
(i) order that construction, operation, modification, dismantling or abandonment of the project cease, or that the activity cease, either altogether or to the extent specified by the minister, until the holder of the project approval certificate complies with it, or
(ii) order that the holder of the project approval certificate

carry out, within the time to be specified in the order, measures specified by the minister in order to mitigate the effects of noncompliance.

(2) An order under this section may be made to apply generally or to one or more persons named in the order.

Order for compliance

69 (1) If the minister considers that a person is not complying, or has not complied, with an order made under this Act, the minister may apply to the Supreme Court for either or both of the following:

(a) an order directing the person to comply with the order or restraining the person from violating the order;

(b) an order directing the directors and officers of the person to cause the person to comply with or to cease violating the order.

(2) On application by the minister under this section, the Supreme Court may make an order it considers appropriate.

Compliance agreement

70 (1) If the minister considers it appropriate to do so, the minister may give the holder of a project approval certificate an opportunity to make a written compliance agreement with the minister, by which the holder undertakes to comply with the project approval certificate within the time and on the terms to be specified in the agreement.

(2) Despite a compliance agreement, the minister may make an order referred to in section 68 in respect of the holder of a project approval certificate or another person that is the subject of an order under section 68

(a) on matters not covered by the agreement,
(b) when the agreement is not complied with, on matters covered in the agreement, and
(c) on matters provided for in the agreement if all the material facts related to those matters were not known by the minister at the time of the agreement.

(3) On the application of a holder of a project approval certificate that has a compliance agreement with the minister, the minister may approve the alteration of the agreement.

* * *

Court order to comply

80 If a person is convicted of an offence under this Act or the regulations, then, in addition to any punishment the court may impose, the court may order the person to comply with the provisions of this Act.

* * *

Restitution

82 If a person is convicted of an offence under this Act, then, in addition to any other penalty, the court may order the person convicted to pay compensation or make restitution.

* * *

Transitional Provisions

93 ...

(3) An application or matter must be continued and disposed of under this Act as an application for a project approval certificate if, immediately before June 30, 1995, the application or matter is undergoing review as
(a) a regulated project under the *Utilities Commission Act*,

(b) a reviewable mine development under the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, or

(c) a project reviewable under procedures generally known as the major project review process.

(4) An application or matter must be continued and disposed of under this Act as an application for a project approval certificate if

(a) immediately before June 30, 1995, the application or matter pertains to a project that

(i) is a type of project for which one or more approvals under other enactments are required, and

(ii) is the subject of an existing proposal made by a person who does not have all of the required approvals under other enactments, and

(b) on June 30, 1995, the project is a reviewable project.

(5) The minister with the concurrence of the responsible minister, after first receiving the recommendations of the executive director, may make an order

(a) specifying the step in the review process under this Act to which an application or matter described in subsection (3) or (4) must proceed, or

(b) varying the review process to the extent necessary to accommodate the review under this Act of that application or matter.

APPENDIX "B"

SCHEDULE A

LIST OF DOCUMENTS COMPRISING THE TULSEQUAH CHIEF APPLICATION AND PROJECT REPORT

referred to in paragraph 36 above [A.B. 1496-1498]

Document	Appeal Book reference
Application - 1994	
• Pre-Application for Mine Development Certificate, Redfern Resources Ltd., June 1994	
• Baseline Environmental Monitoring Protocols, Redfern Resources Ltd., June 1994	
• Pre-Application for Mine Development Certificate - Addendum Dated February 1995	
Project Report - 1997	
• Tulsequah Chief Project - Wildlife Capability/Suitability Maps, Redfern Resources Ltd., July 1997	
• Tulsequah Chief Project Report - Volume I Executive Summary, Redfern Resources Ltd., July 1997	A.B. Vol. 16 pp. 2809-2830 (excerpt)
• Tulsequah Chief Project Report - Volume II Project Description, Redfern Resources Ltd., July 1997	A.B. Vol. 16 pp. 2766-2809
• Tulsequah Chief Project Report - Volume II Appendices, Redfern Resources Ltd., July 1997	
• Tulsequah Chief Project Report - Volume III Environmental Setting (Part 1 of 2), Redfern Resources Ltd., July 1997	
• Tulsequah Chief Project Report - Volume III Environmental Setting (Part 2 of 2), Redfern Resources Ltd., July 1997	
• Tulsequah Chief Project Report - Volume III Appendices (Part 1 of 2), Redfern Resources Ltd., July 1997	
• Tulsequah Chief Project Report - Volume III Appendices (Part 2 of 2), Redfern Resources Ltd., July 1997	
• Tulsequah Chief Project Report - Volume IV Environmental Management, Redfern Resources Ltd., July 1997	
• Tulsequah Chief Project Report - Volume V Environmental Impacts and Mitigation, Redfern Resources Ltd., July 1997	

• Tulsequah Chief Project Report - Volumes IV and V Appendices, Redfern Resources Ltd., July 1997	
• Tulsequah Chief Project Report - Cultural, Sustenance and Socioeconomics Addendum, Redfern Resources Ltd., July 1997	A.B. Vol. 15 pp. 2648-2724
• Memo from J. Loukras, Redfern Resources Ltd., to recipients of the Tulsequah Chief Project Report, August 26, 1997, providing replacement pages to Project Report.	
• Update of Humidity-Cell Testwork, Tulsequah Chief Project, Redfern Resources Ltd., October 16, 1997	
• Determining the Impact of the Tulsequah Chief Mine Project on the Traditional Land Use of the Taku River Tlingit First Nation, prepared by Lindsay Staples for the EAO, August 1997	A.B. Vol. 3 pp. 301-376
• Determining the Impact of the Tulsequah Chief Mine Project on the Traditional Land Use of the Taku River Tlingit First Nation: Addendum on Impacts, prepared by Lindsay Staples for the EAO, December 1997	A.B. Vol. 3 pp. 377-443
• Tulsequah Chief Project Committee, Review Agency and Public Issue Responses Wildlife and Fish/Fish Habitat, Redfern Resources Ltd., December 15, 1997	A.B. Vol. 18 pp. 3186-3213
• Tulsequah Chief Project - Proponent Response to ARD/ML/WQ Issues Identified by the Project Committee, the Public and Public Organizations, Redfern Resources Ltd., December 17, 1997	
• Tulsequah Chief Project Committee, Review Agency and Public Issue Responses to Issue Tracking Items Concerning Cyanide, Monitoring and Management Plans, Reclamation, Mine Development, Road and Transportation, Socioeconomic/ Land Use and Heritage, Redfern Resources Ltd., December 24, 1997	
• Letter from T. Chandler to T. Pearse, December 24, 1997 Responding to Concerns Regarding Tailing Pond Performance	
• Tulsequah Chief Project - Impact Assessment for Yukon Transportation System, Redfern Resources Ltd., January 14, 1998	
• Responses to ARD/Water Quality Issues Raised at the Subcommittee Meeting of January 14, 1998, Redfern Resources Ltd., January 15, 1998	
• Fax Memo from J. Loukras, Redfern Resources Ltd. to ARD/Water Quality subcommittee members, January 20, 1998, providing correction to the January 15, 1998 ARD/Water Quality response from Redfern regarding the proposed interim mine water treatment schedule	
• Letter from D. Osmond, Gartner Lee Limited to T. Chandler, February 17, 1998, providing the final version of the environmental effects monitoring plan	*Environmental monitoring plans, A.B. Vol. 11, p. 1926-A.B. Vol. 12, p. 2026

• Letter from T. Chandler to N. Ringstad, January 27, 1998, providing preliminary cost estimates for the Warm Bay/ McKee creek access road alternative and GPS plotted location of the TRTFN heritage trail north of the Sloko River	A.B. Vol. 14 pp. 2365-2366
• Redfern Resources Ltd. Tulsequah Chief Project Firearms, Hunting, Fishing and Vehicle Use Policy, January 1998	A.B. Vol. 16 p. 2742
• Letter from T. Chandler to N. Ringstad, January 29, 1998, outlining Redfern's commitment to participation in the grizzly bear cumulative effects assessment and long term grizzly bear monitoring plan	A.B. Vol. 16 pp. 2743-2744
• Letter from T. Chandler to N. Ringstad, February 9, 1998, summarizing Redfern's commitment to adhere to the proposed Right-of-Way for construction access to the Sloko River	A.B. Vol. 16 p. 2745
• Letter from T. Chandler to N. Ringstad, February 9, 1998, providing Redfern's agreement with the conditions outlined by MOTH regarding improvements to the British Columbia portion of the Atlin public road	A.B. Vol. 16 p. 2749
• Letter from T. Chandler to N. Ringstad, February 12, 1998, outlining Redfern's position regarding future compensation for loss of grizzly bear habitat	A.B. Vol. 16 p. 2752
• Letter from T. Chandler to T. Pearse, February 17, 1998, regarding commitments to follow-up and monitoring	A.B. Vol. 16 p. 2756
• Letter from T. Chandler to T. Pearse, February 17, 1998, providing additional information on the proposed access road	A.B. Vol. 16 pp. 2757-2759
• Letter from T. Chandler to T. Pearse, February 18, 1998, providing additional information on access road construction	A.B. Vol. 16 p. 2762
• Letter from T. Chandler to N. Ringstad, March 2, 1998, providing commitment to implement proponent components of proposed follow-up and monitoring program	A.B. Vol. 16 p. 2763
• Letter from T. Chandler to N. Ringstad, March 6, 1998, providing commitment to adhere to requirements outlined in the MEI January 20, 1998, ARD/Metal Leaching document	*Jan. 20, 1998 ARD/Metal Leaching document only, A.B. Vol. 11 pp. 1888-1897
• Letter from T. Chandler to N. Ringstad, March 11, 1998, providing commitment for access road deactivation at end of mine life	A.B. Vol. 16 p. 2765

APPENDIX "C"

PROJECT REPORT
PROJECT COMMITTEE RECOMMENDATIONS AND REASONS
PP. 103-108
referred to in paragraph 45 above [A.B. 1485-1490]

7.0 PROJECT COMMITTEE RECOMMENDATIONS AND REASONS

The table included in this section outlines the positions of the project committee members with respect to a referral of Redfern's application for a project approval certificate to ministers at this time. The majority of the project committee has concluded that the proponent has addressed the issues summarized in the February 1996 project report specifications; the issues raised in the review of the 1997 project report; and additional issues raised as further data and information were collected, and analysed and submitted by the proponent to address issues raised in the review of the project report. The majority of the project committee has also concluded that the public and First Nations consultation program conducted under the former MDAP, and concluded under the EA process, has fulfilled the requirements of the Act.

In accordance with section 29(2) of the Act, the majority of the project committee recommends to the Minister of Environment, Lands and Parks and the Minister of Energy and Mines and Minister Responsible for Northern Development that:

- with respect to issues identified in the project report specifications and review resolved at the completion of the overall review of the project report, there is no reason not to grant a project approval certificate;

- in a decision the ministers should consider the concerns raised by the public that the project should be subject to a public hearing; and

- if a project approval certificate is issued for the project, consideration should be given to the recommendations and conditions contained in this report in particular.

The project committee recommendations report also meets the requirements of a Screening Report pursuant to the *Canadian Environmental Assessment Act*. The Department of Fisheries and Oceans, as the lead Responsible Authority, will base a CEAA conclusion for the project on the contents of the PC Recommendations Report (the Screening Report), the DIAND Yukon screening of the proponent's ore hauling on the Yukon Public highway system, advice from expert federal authorities, and other factors relevant to federal decision-making.

In making a recommendation to the ministers, the majority of project committee members took into consideration that:

- all major technical and policy issues have been identified and are considered to be manageable to acceptable levels with the implementation of the mitigation strategies identified in this report and through subsequent compliance with statutory permit, licence, approval and other authorization requirements;

- the development of the project, with the successful implementation and compliance of the identified impact management and compensation strategies and the follow-up and monitoring program, is not expected to cause significant adverse environmental effects;

- the proponent has developed and will implement a policy restricting hunting and fishing by employees, contractors and visitors while in the project area to minimize impacts on vulnerable fish and wildlife resources; and,

- the proponent confirmed in writing to the commitments required of the proponent, identified in of the project committee recommendations report.

The majority of the project committee recommends that the following conditions be included in the project approval certificate, if the project is approved:

- the proponent should implement the commitments contained in this document, and in the proponent's components of this follow-up and monitoring program attached as Appendix 11 to this document, to ensure that appropriate mitigation and environmental protection strategies are implemented, assessed and adaptively manage any foreseen impact identified as project development proceeds; and,

- the proponent and the local Guide Outfitters and Trapline Holders are encouraged to continue to discuss and attempt to resolve issues raised by Guide Outfitters and Trapline Holders during the project review.

The majority of the project committee agrees that all key issues were addressed and that there are workable plans for avoidance or mitigation of significant adverse environmental effects including the following:

Acid Rock Drainage (ARD)/Metal Leaching

The majority of the project committee accepts the conclusions of the key review agencies responsible for the assessment of the potential for and prevention of ARD and metal leaching, and that the development of the project in accordance with the conditions recommended in this report will not cause significant adverse environmental effects.

Geotechnical Review of Structures

On the basis of the geotechnical reports submitted by the proponent, the majority of the project committee accepts the Ministry of Energy and Mines and Ministry of Forests recommendation to support project approval on the understanding that the minesite and access road components will be designed, constructed and operated to ensure no significant adverse environmental effects.

Fish Habitat Mitigation and Compensation

The federal Department of Fisheries and Oceans has accepted that, if the project is designed, constructed, operated and decommissioned in accordance with the plans outlined in the project report and its appendices, potential impacts would, be mitigated so that there would be no significant adverse effect on fish and fish habitat. Mitigation and compensation measures as proposed by the proponent and reviewed and modified by DFO and MELP to achieve "no net loss" of fish habitat productivity are acceptable. This acceptance is based on compliance with a Fish and Fish Habitat Mitigation and Compensation Plan pursuant to the *Fisheries Act of Canada*, outlined in the follow-up

and monitoring program and to be finalized prior to issuance of Section 35(2) Fisheries Act authorization following project certification.

Wildlife, Access Management and Cumulative Effects

The project committee has concluded that the development of the project has the potential to increase access to the project area resulting in increased pressure on sensitive fish and wildlife resources. However, if appropriate control measures are implemented as proposed, and if all potential users of the fish and wildlife resources agree to respect conservation measures, the project should not result in any significant cumulative effects of increased or uncontrolled harvest of fish and wildlife resources.

The potential for cumulative significant environmental effects on sensitive fish and wildlife resources exists if the new existing access is not carefully managed. The majority of the project committee recommends that measures to mitigate such impacts include:

- specifying that the Tulsequah Chief Road be a controlled private industrial road with all non-legitimate land or resource tenure holder use prohibited under appropriate provincial status and by means of a gate(s) to ensure compliance. Funding and management of the gate(s) access should be provided by the proponent;

- increasing the government fisheries and wildlife inventory, monitoring, management and enforcement in the local area to ensure successful implementation of the follow-up and monitoring program and compliance with current or proposed harvest and access regulations;

- implementing a government review and adjustment of harvest regulations in order to assist in enforcement. This would include review of the daily catch limits and possession limits for fish, timing of allowable harvest of fish and wildlife seasons, and any restrictions on the areas where harvest of fish and wildlife could occur. This would include designation by government of a no hunting zone adjacent to roads in the area identified by MELP as requiring such a hunting restriction;

- reviewing and coordinating government resource allocation between First Nations guide outfitters, the general public, hunters and fishers;

- implement a two year Grizzly Bear Cumulative Effects study; and,

- forming a Joint Management arrangement between resource agencies, and the TRTFN to facilitate identification and resolution of access management and related issues.

Management of Indirect Impacts of Access

The majority of the project committee has concluded that if the proposed Tulsequah Chief access road, to be developed through the Upper Taku River watershed, is tenured as a private industrial road, the road must be controlled by a gate(s) such that public access will be restricted. If the access control measures are effective, the impacts on the public harvest of the sensitive fish and wildlife resources will not be significant. However, the project committee recommends that measures to mitigate such impacts should include those identified and recommended above.

First Nations Issues

While various sections of the project committee report including the issue tracking document attached as appendix 6 to this document, addresses issues raised by First Nations, section 5.10 and 5.11 of the project committee recommendation report focuses on the aboriginal rights issues/concerns raised by First Nations during the review of this project, and identifies measures to address them. Please see section entitled "Wildlife, Access Management and Cumulative Effects" above, for additional details regarding First Nations concerns.

Environmental Supervision and Monitoring

The majority of the project committee supports the commitment from the proponent to provide independent environmental supervision during construction and abandonment of the mine and related infrastructure, and access road. The environmental supervision plan, identified in the follow-up and monitoring program, is to be funded by the proponent, and implemented with the assistance of the key permitting agencies and the TRTFN. The environmental supervision plan will reflect the requirement for an adequate level of supervision and monitoring as determined by key permitting agencies, in consultation with the proponent.

Program Follow-Up and Monitoring

The majority of the project committee has concluded that all issues identified in the review of the project have been resolved or are known to be resolvable through further review and assessment at the permitting stage. This conclusion is predicated on the basis that the necessary mitigation and related management strategies identified in the review will be undertaken and complied with during the construction, operation, dismantling and abandonment of the project.

The majority of the project committee recommends that government discussion regarding a Joint Management arrangement with the TRTFN continue, as such an arrangement would assist the implementation of a coordinated approach to enhanced meaningful participation by the TRTFN in:

- the review of application for permits, licences, approvals and other authorizations as project development proceeds;

- the ongoing monitoring, reporting and assessment of compliance and performance outlined in the follow-up and monitoring program; and

- the monitoring and management of project related impacts on the local Atlin community.

The majority of the project committee also recommends that, subject to s. 38 of the Act, the proponent provide a summary of the results of the assessment of the annual reporting of the follow-up and monitoring program to the Executive Director of the Environmental Assessment Office, for placing on the project registry.

Minority Project Committee Conclusions, Recommendations and Reasons

Four project committee members could not, at this time, provide a recommendation regarding certification. Two of those agencies, the State of Alaska and US Environmental Protection Agency, indicated that if a timeline extension for a recommendations to Ministers was not granted, that the project be subject to review by the Environmental Assessment Board. These agencies also provided specific comments, which are documented in Section 5 under the appropriate headings. The other

two project committee members, representatives of the State of Alaska and the Taku River Tlingit First Nation, cited concerns regarding the adequacy of information in the project report and review timeframes. In addition, one project committee member, the representative for the Atlin Planning Advisory Committee, abstained from providing a recommendation, although that representative continued to receive information throughout the review. These positions are outlined below.

PROJECT COMMITTEE MEMBER	RECOMMENDATIONS		REASONS		
	Refer Application to Ministers	Certify/ Deny or EA Board	Project Report Specs Satisfied	Permit Requirements Identified	Other
Ministry of Small Business, Tourism and Culture:					
Archaeology	Yes	Certify	Yes	Yes	
Tourism	Yes	Certify	Yes		
Ministry of Environment, Lands and Parks	Yes	Certify	Yes	Yes	
Ministry of Forests	Yes	Certify	Yes	Yes	
Ministry of Energy and Mines (formerly MEI)	Yes	Certify	Yes	Yes	
Ministry of Transportation and Highways	Yes	Certify	Yes	Yes	
Yukon Territorial Government (Dept of Community and Transportation Services)	Yes	Certify	Yes	Yes	
Coast Guard	Yes	Certify	Yes	Yes	
Environment Canada	Yes	Certify	Yes	N/A	
Department of Fisheries and Oceans	Yes	Certify	Yes	Yes	
Atlin Advisory Planning Commission	Abstain	Abstain			
Alaska State	No		Not Determined	N/A	requested time extension to review recom-mendations report. If not granted, refer to Board
United States Environmental Protection Agency	No	EA Board	Not Determined	N/A	
United States Department of Interior	No	EA Board	No	N/A	
TRTFN	No		No, March 6, 1998**	N/A	*

* - March 6, 1998, requested more detailed information regarding wildlife, aquatic resources and access to the Taku River Valley
- requested an extension of the review to provide this and full project committee meetings to discuss.

** - TRTFN indicated by letter July 25, 1997, that the project report met the project specifications provided that a report pertaining to traditional land use was completed. This report was completed in August 1997 and the project report was accepted at that time. At a later date (March 6, 1998) the TRTFN indicated there were certain information deficiencies in the assessment.