Citation: Taku River Tlingit et al. V Ringstad et al. 2000 BCSC 1001

Date: 20000628

Docket: A990300

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

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 and REDFERN RESOURCES LTD.

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE KIRKPATRICK

(IN CHAMBERS)

Counsel for Petitioners:	A. Pape & J. Teillet
Counsel for Respondents, Norm Ringstad, Sheila Wynn, Minister of Environment, Lands and Parks, Minister of Energy and Mines, and Minister Responsible for Northern Developments, and The Attorney General of British Columbia	P.J. Pearlman, Q.C. S.I. Macdonald
Counsel for Respondent, Redfern Resources Ltd.	R. Kaardal & L.D. Hynes
Dates and Place of Hearing:	March 13-18 & 20-23, 2000 Vancouver, B.C.

The Parties

[1] This is an application for judicial review pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, of the environmental review process and subsequent issuance of a Project Approval Certificate (the "Certificate"), under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119 (the "*EAA*").

[2] The subject of the environmental review and Certificate was a proposal by Redfern Resources Ltd. ("Redfern") to re-open the Tulsequah Chief Mine on the Taku River system (the "Project"). The project proposal is to mine approximately 2500 tonnes per day of ore. The mine was operated by Cominco Ltd. in the 1950's, at which time the ore was transported by barge down the Taku River. The real dispute about the Project centres on the plan to build a 160 km access road through a pristine wilderness area in northwestern British Columbia, from Atlin to Tulsequah, to permit access to the mine site and transport of the ore to Atlin.

[3] The area to be traversed and impacted by the proposed road is the portion of the traditional territory of the petitioners, the Taku River Tlingit First Nation (the "Tlingits") where their traditional land use activities are

most concentrated — particularly the hunting, fishing and gathering on which they heavily rely.

[4] The Tlingits participated fully in the environmental review. They assert that the information gathered through that process showed that by opening up that portion of the territory, the access road would cause adverse impacts to wildlife and to the Tlingits' ability to rely on the resources of that area for their domestic economy, culture and well-being.

[5] The respondent Norm Ringstad is a project director and the mining sector lead in the Enviromental Assessment Office (the "EAO") and was the chair of the Tulsequah Chief Project Committee. As project director, he was delegated the duties and powers of the executive director under the *EAA*.

[6] The respondent Sheila Wynn is the Deputy Minister of the Ministry of Environment, Lands and Parks and executive director (the "Executive Director") of the EAO.

Relief Sought

[7] The relief sought in the petition as initially filed was as follows:

- Relief in the nature of *certiorari*, quashing and setting aside the Report and Recommendations of the Tulsequah Chief Project

> Committee (the “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 “Recommendations Report” or “Report”);
>
> - Relief in the nature of *certiorari*, quashing and setting aside the referral by the Executive Director to the Ministers of Redfern’s Application for a Project Approval Certificate (the “Referral)”; and
>
> - Relief in the nature of *certiorari*, quashing and setting aside the Project Approval Certificate M98-02 issued by the Ministers to Redfern (the “Certificate”).

[8] The respondents argued that *certiorari* is not available as a remedy with respect to either the Recommendations Report or the Referral, because neither is an exercise of a statutory power of decision within the meaning of the *Judicial Review Procedure Act*. That point was conceded by the Tlingits early in the hearing. However, the petitioners nevertheless argue that a declaration may be issued with respect to the formulation of the Recommendations Report and the Referral because each involves the exercise of a statutory power.

[9] At the commencement of the hearing of the petition, the petitioners applied for and were granted leave to amend the relief sought, pursuant to Rule 24(1), as follows:

- 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;

- 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; and

- 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*.

Procedure Respecting Aboriginal Rights

[10] The petition and the outline were filed pursuant to Rule 65 on February 11, 1999. The petitioners relied, *inter alia*, on aboriginal rights that they assert within s. 35 of the *Constitution Act*, 1982 — harvesting rights and aboriginal title.

[11] Pursuant to an application by the respondents under Rule 52(11)(d), on April 30, 1999, I ordered that issues requiring the determination of the Tlingits' claims of aboriginal rights and title, as set out in paragraphs 6, 7 and 9 of the outline, be severed from the judicial review application and referred to the trial list. Leave to appeal from that order was refused by Goldie J.A. on June 25, 1999 and an application to review the decision of Goldie J.A. was dismissed by the Court of Appeal on September 22, 1999.

[12] Therefore the substantive aboriginal rights asserted by the Tlingits in their petition are not relied on in this application.

Issues

[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.

[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.

Statutory Framework

[20] In light of the arguments raised on this judicial review, the relevant sections of the *Judicial Review Procedure Act* are:

> **1 "statutory power of decision"** means a power or right conferred by an enactment to make a decision deciding or prescribing
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
>
> (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,
>
> and includes the powers of the Provincial Court.
>
> **"statutory power"** means a power or right conferred by an enactment
> ...
> (b) to exercise a statutory power of decision,
> ...

> (e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability.
>
> **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.

[21] The sections of the *EAA* which the Tlingits view as relevant to the issue of the exercise of statutory power in this case are:

> **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.

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.

29(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.

...

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

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.

Judicial Review

[22] A fundamental premise of judicial review is that a court in exercising the powers of judicial review does not act as an appellate body. The court's role is to determine whether the impugned decision was made within the statutory jurisdiction of the person or body making the decision. See ***Lawson v. British Columbia (Securities Commission)*** (1990), 65 D.L.R. (4th) 537 (B.C.S.C.), aff'd (1992), 88 D.L.R. (4th) 533 (B.C.C.A.).

[23] As noted earlier, although the Tlingits initially sought relief in the nature of *certiorari* in respect of the Recommendations Report, the Referral to the Ministers, and the decision of the Ministers, the Tlingits now concede that only the Ministers' decision to issue the Certificate is subject to *certiorari* because it is clearly the exercise of a statutory power of decision subject to review under the *Judicial Review Procedure Act*.

[24] However, the Tlingits nevertheless argue that the court should declare that the Recommendations Report and the Referral to the Ministers are subject to a declaration under s. 2(2)(b) of the *Judicial Review Procedure Act* because, it is argued, actions taken in respect of the Report and the Referral are within the meaning of "statutory power" under the

definition of statutory power in s. 1 of the *Judicial Review Procedure Act*:

> (e) to make an investigation or inquiry into a persons' legal right, power, privilege, immunity, duty or liability;

[25] That argument raises two threshold questions:

> (1) does the court have jurisdiction to grant a declaration in respect of the Recommendations Report and the Referral? and
>
> (2) what requirements, if any, are there in the *EAA* concerning the Recommendations Report and the Referral?

[26] The respondents correctly observe that there is nothing in the *EAA* which overtly requires the Project Committee or the EAO to prepare or produce a report of the findings of the Project Committee. The respondents thus argue that the Recommendations Report prepared in this case was an extra-statutory product of the review process, and therefore not subject to a declaration under the *Judicial Review Procedure Act*.

[27] The respondents further contend that the Recommendations Report and the Referral do not fall within the ambit of the definition of "statutory power" because neither are

investigations “into a person’s legal right, power, privilege, immunity, duty or liability.” In support of their submission, the respondents refer to the decision in ***Colony Farm Holdings Ltd. v. British Columbia (Racing Commission)***, [1991] B.C.J. No. 2837 (Q.L.), (8 October 1991) Vancouver Registry A913344 (B.C.S.C.). That case involved the application for judicial review of a recommendation made by the Racing Commission to the Ministry of the Solicitor General in respect of proposals for a new racing track. The issue was whether the conduct of the Racing Commission in carrying out the task assigned to it by the Solicitor General was subject to judicial review. Donald J. (as he then was) held that the *Horse Racing Act* contained no mandate that the Commission give advice and guidance to the government, stating at p. 6-7:

> ...If the Commission agrees to do that it operates outside the Act. Consequently, how it decides to carry out this function is not a proper subject for judicial review in this case because (i) it is not operating under its statutory powers; and (ii) it is not determining anyone’s rights.

[28] The circumstances prevailing in the case at bar are clearly distinguishable from those in ***Colony Farm***. The underlying purpose of the *EAA* is to provide advice to government. Under s. 29 of the *EAA*, the executive director is mandatorily required to “take into account the application,

the project report [prepared pursuant to s. 19(1)(b) of the *EAA*, and distinct from the Recommendations Report produced in this case] and any comments received about them."

[29] Under s. 29(2) of the *EAA*, the executive director, **on the recommendation of the project committee**, must refer the application to the minister and responsible minister for a decision under s. 30. As noted, the statute is silent as to how that recommendation is to be conveyed by the project committee to the executive director and by the executive director to the ministers.

[30] The review process in the case at bar spanned the period September 1994 to March 19, 1998, a period of three and a half years. The provisions and purposes in ss. 2 and 10 of the *EAA* and the magnitude and volume of the information and evidence considered by the Project Committee make it doubtful that the recommendations of the Project Committee could be conveyed to the Executive Director, and in turn, to the Ministers, in any manner other than a written report. The words of s. 29(4) of the *EAA* seem to invite a written report. How else, but by a document, could a recommendation accompany a referral? I therefore conclude that the Recommendations Report is not an extra-statutory product of the review process, but is rather a step in the process provided for by the statute.

[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.

[32] However, I consider that my finding in this regard does not preclude me from considering the alleged procedural and substantive errors in the preparation of the Recommendations Report and in the Referral. I arrive at this conclusion based on the following analysis. Section 30(1) of the *EAA* provides:

> (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,
>
> ...
>
> (c) the ministers must give written reasons for the decision under subsection (1)(b)...

[33] The reasons for the Ministers' decision in this case comprise three short paragraphs:

> 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 [the *EAA*].

[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:

> ...It is...a clearly-established rule that the courts should not interfere with the exercise of discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

Maple Lodge Farm v. Government of Canada, [1982] 2 S.C.R. 2 at 7, 137 D.L.R. (3d) 558.

[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 Old Man River Society v. Canada (Minister of Transportation)***, [1992] 1 S.C.R. 3 at 71, 88 D.L.R. (4th) 1, 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.

[40] The Tlingits accordingly submit that the circumstances of this case and s. 2 of the *EAA* required that:

> (a) all matters bearing on the sustainability of the Tlingits' land-based way of life be addressed in the environmental review;
>
> (b) in order to achieve that, the review would need to address:
>
> (i) the identification and protection of the environmental interests on which the Tlingits rely; and
>
> (ii) measures to foster a sound economy and social well-being for the Tlingits;
>
> (c) the conclusions and recommendations from the environmental review process should address the above matters, with a view to promoting the sustainability of the resources and institutions on which the Tlingits rely;
>
> (d) the environmental review be thorough and integrated, and the Project Committee's analysis, advice and recommendations reflect such an assessment;
>
> (e) Ministerial decisions under the Act be based on such an environmental review and corresponding analysis, advice and recommendations;
>
> (f) Ministerial decisions under the Act promote the sustainability of the Tlingits' land-based way of life, by identifying and protecting the environmental interests on which they rely and by fostering a sound economy and social well-being for the Tlingits.

The Tlingits have framed their submission in this regard from their unique perspective. They concede that the environmental review process is not confined to promoting only their sustainability. However, as a First Nation whose interests are vitally affected, there can be no question that Tlingit interests and concerns must be fully addressed.

[41] The Tlingits further submit that in the circumstances of this case, s. 10 of the *EAA* required that:

> (a) the Project Committee should have decided, collectively, on the advice, analysis and recommendations they would provide to the Ministers; and
>
> (b) the Committee's advice, analysis and recommendations should have addressed, as distinct topics, potential effects of the road, and the prevention or mitigation of those effects which would be adverse.

The Tlingits concede that there is no statutory requirement that all members of the Project Committee agree as to the recommendation to be forwarded to the Ministers. However, it is clear that opportunities must be given for all committee members, including the Tlingits, to express, in a meaningful way, their views.

[42] The Tlingits submit that there were procedural and substantive errors in the environmental review, the production

of the Recommendations Report, the Referral and the decision to issue the Certificate which resulted in failure to comply with statutory requirements; failure to consider relevant matters; consideration of irrelevant matters; unreasonable decisions; and patently unreasonable decisions.

Standard of Review

[43] The parties presented two different approaches to the issue of the standard of review to be applied in this case. The Tlingits and the Crown respondents approach the issue from the perspective of the line of authority roughly commencing with ***Calgary Power Ltd. v. Copithorne***, [1959] S.C.R. 24 and wending its way through ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385; ***Canada (Director of Investigation) and Research) v. Southam*** (1996), [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1; ***Pushpanathan Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982, 160 (4th) 193; and ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

[44] The respondent, Redfern, says that it is inappropriate for the court to go behind a decision of a Minister of the Crown unless that decision was made in bad faith or did not comply with statutory conditions. Redfern cites, as support

for that approach, the decisions in ***Union of Nova Scotia Indians v. Canada (Attorney General)*** (1996), 22 C.E.L.R. (NS) 293 (F.C.T.D.); ***Cheslatta Carrier Nation v. British Columbia (Project Assessment Director)*** (1998), 53 B.C.L.R. (3d) 1 (S.C.); and ***Bow Valley Naturalists Society v. Alberta (Minister of Environment Protection)*** (1995), 35 Alta. L.R. (3d) 285 (Q.B.).

[45] In my view, these two approaches really amount to an examination of two sides of the same coin. The analysis advocated by Redfern, if it discloses that the decision was made in bad faith (which is not alleged here) or failed to comply with statutory conditions (which is alleged) will, in the result, be found to be unreasonable or patently unreasonable depending upon the severity of the breach, and the other factors relevant to the determination of the standard of review.

[46] There is no dispute that the Ministers' decision to issue the Project Certificate was discretionary. The standard of review of administrative decisions has been the subject of abundant judicial scrutiny. The Supreme Court of Canada, most recently in the decision ***Baker v. Canada (Minister of Citizenship and Immigration)***, *supra*, discussed the appropriate

approach to the review of discretionary decision-making.

L'Heureux-Dubé J., writing for the court, stated at para. 55:

> The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim, supra*, at pp. 589-60; *Southam, supra*, at para. 30; *Pushpanathan, supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament....

[47] The Tlingits urge the court to adopt a standard of review of reasonableness *simpliciter*. The Crown respondents urge a standard of patently unreasonable, relying on decisions made in relation to environmental legislation in which a high

degree of deference has been accorded to decision-makers. The respondents place particular reliance on the decision in ***Union of Nova Scotia Indians v. Canada (Attorney Genera)***, *supra*, at para. 37:

> Yet it must be remembered that the decision of the ministers under the C.E.A.A. is not a scientific decision; it is a decision made in the exercise of judgment that takes into account appropriate scientific, economic, political and social considerations.

That passage, it seems to me, is a description of the kind of "polycentric" decision referred to in ***Baker***. At para. 38, the court stated:

> The very nature of the decision means that in judicial review proceedings, the Court must inevitably defer to the statutory decision maker, unless persuaded that the decision is patently unreasonable, in the sense that it cannot rationally be justified in light of all the information available to the decision maker at the time of the decision. So long as there is information on which the decision could be rationally based, the Court will not intervene.

[48] As noted, the respondents urge the court to adopt a standard of review which accords a high degree of deference to the Ministers, relying in part upon decisions in environmental cases in which such a standard was accepted. I do not think it can be said that all discretionary decisions made in relation to environmental legislation are necessarily accorded

a high degree of deference. Rather, I think the court's task is, as directed by the decision in ***Baker***, to apply the pragmatic and functional approach to determine the appropriate standard of review for the decision made, and the factors affecting the determination of that standard as outlined in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, *supra*.

[49] The first factor to be considered is the absence or presence of a privative clause. There is no privative clause in the *EAA*.

[50] The second factor is the expertise of the decision-maker. As in ***Baker***, the decision-makers here are the Ministers. As L'Heureux-Dubé J. noted in ***Baker***, at para. 59:

> The fact that the formal decision-maker is the minister is a factor militating in favour of deference.

L'Heureux-Dubé J. concluded that the minister had some expertise relative to courts in immigration matters. In the circumstances of the case at bar, it is clear that members of the Project Committee possess expertise in various areas relevant to the environmental review process and therefore deference should be accorded to their views. There is no suggestion, however, that the Ministers themselves hold any

particular expertise in environmental matters. The critical question is whether the decision of the Ministers was based on an appreciation of all of the scientific and expert evidence that was available. If the answer to that question is negative, then little deference should be accorded to the decision maker. As I find later in these Reasons that important evidence put forward by the Tlingits was not examined either fully or at all, I would ascribe little deference to the decision-makers in relation to this factor.

[51] The third factor to consider is the purpose of the *EAA* as a whole. The purposes of the *EAA* are clearly stated in s. 2. They are to promote sustainability; to provide a thorough, timely and integrated assessment of the effects of the project; to prevent or mitigate adverse effects; to provide an open, accountable and neutral process; and to provide participation for the enumerated groups.

[52] The purposes of the *EAA* make it plain that a wide array of interests are to be accommodated in the review process. It thereby invokes the passage from ***Pushpanathan***, at para. 36:

> ...These considerations are all specific articulations of the broad principle of "polycentricity" well-known to academic commentators who suggest that it provides the best rationale for judicial deference to non-judicial agencies. A "polycentric issue is one which involves a large

> number of interlocking and interacting interests and considerations." (P. Cane, *An Introduction to Administrative Law* (3rd edition, 1996) at p. 35).
>
> While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties. Where an administrative structure more closely resembles this model, courts will exercise restraint.

It is clear from an examination of the *EAA,* and in particular the stated purposes of the *EAA* in s. 2 and the purpose of the Project Committee as stated in s. 10, that this administrative structure closely resembles the polycentric model. That factor weighs in favour of a finding that the decision of the Ministers should be accorded significant deference.

[53] The fourth factor to be considered is the nature of the problem, and especially whether it relates to determination of law or facts. The decision to grant the Certificate clearly is one which requires a considerable appreciation of the proposed Project, the assessment of the environmental, economic, social, cultural, heritage and health effects of the Project, as well as matters relating to the prevention and mitigation of adverse effects of the Project. It is not a decision which involves the application or interpretation of definitive legal rules. It is a highly discretionary and

fact-based decision which favours the court according deference to the decision-maker.

[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.

[55] The determination of what constitutes an unreasonable decision was addressed in ***Southam,*** at para. 56:

> ...An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons

> support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.
>
> (my emphasis)

Substantive Errors

[56] The Tlingits submit that the analysis and advice provided by the Project Committee to the Executive Director and in turn by the Executive Director to the Ministers did not fulfil the statutory mandate or result in reasonable conclusions. In this regard, the Tlingits referred to four specific failings in the Recommendations Report and, by inference, the decision of the Ministers:

> (a) the failure to determine whether the road promotes sustainability with respect to the Tlingits as a people;
>
> (b) the effects of the road on Tlingit land use and the treaty process;
>
> (c) whether the road promotes sustainability of wildlife and the Tlingit domestic economy, and whether the proponents' wildlife baseline information was adequate for the purposes of the environmental review; and
>
> (d) unreasonable reliance on mitigation matters.

[57] I will address each of those alleged failings.

(a) Sustainability

[58] As noted, the first enumerated purpose of the *EAA* is "to promote sustainability." It is significant that the term "sustainability" is not mentioned in the Recommendations Report. Indeed, the Tlingits argue that the Recommendations Report failed to provide advice or analysis on that most important question. As noted earlier, the Tlingits do not say that only their interests are affected by the proposed road. However, they do say that a central substantive question for the environmental review was whether the Project was a sustainable development in the sense that it would protect Tlingit environmental interests and foster a sound economy and social well-being for the Tlingits. Thus, the Tlingits say that Redfern's application raised profound concerns which they say the Project Committee listed but the substance of which the Project Committee never grappled with. The Tlingits therefore argue that one of the stated purposes of the *EAA*, namely to provide an integrated assessment, was not met.

[59] By the end of the environmental review process, the Project Committee had evidence before it of five expert reports. The first (the "Dewhirst Report") was prepared at the request of Redfern in August 1996. In October 1996, Martin Weinstein prepared a review of the Dewhirst Report for

the Tlingits in which he concluded that the assessment of the Project in the Dewhirst Report was inadequate, an allegation which was disputed by both Redfern and Mr. Dewhirst. As a result of the disagreement between the Tlingits and Redfern regarding the Dewhirst Report, the EAO commissioned a study by Lindsay Staples, a consultant agreed to by the Tlingits and whose terms of reference for the study were also agreed to by the Tlingits. Mr. Staples completed his study in August 1997. As a result of concerns expressed by the Tlingits about that report, the EAO contracted with Mr. Staples to prepare an addendum which was submitted to the Project Committee in December 1997. At p. 47 of his addendum, Mr. Staples stated:

> This study and the original report have repeatedly made the assertion that, fundamentally, TRTFN [Tlingit] traditional land use is the means by which their system of social and economic relations, the values associated with them, and the viability and identity of their community are maintained. TRTFN traditional land use arises not from the desire to accomplish certain narrow economic ends, such as bringing home food, but from the values and relationships that traditional land use sustains.
>
> Seen in this light, impacts on traditional land use are impacts that affect the integrity and well-being of TRTFN institutions and the social and cultural well-being of the community. These links cannot be overstated. At bottom, they are the fundamental difference between the TRTFN and non-native society, in that their traditional institutions and system of governance are fashioned to a great extent from the very values their traditional land use supports.

[60] Mr. Staples' addendum spanned some 62 pages. One of the central complaints raised by the Tlingits on this judicial review is that the Staples' addendum was not reviewed by the Project Committee or the wildlife sub-committee after it was submitted in December 1997. Mr. Ringstad disputes this assertion. He deposes that he placed both the original Staples' report and the addendum in the project registry, provided them to Redfern, and had them incorporated into Redfern's project report.

[61] Mr. Ringstad's response does not, with respect, answer the real complaint of the Tlingits. That is, neither the Project Committee nor the wildlife sub-committee had a full opportunity to deal with the Staples' addendum report in a meaningful and serious way. In the meantime, the EAO, citing "extreme workload", notified the Project Committee members that they would be receiving the Project Committee's draft Recommendations Report on March 2, 1998 which Project Committee members were expected to review and sign off by March 4, 1998.

[62] Tony Pearse, a resource planner engaged by the Tlingits to act as their representative on the Project Committee, expressed his condemnation of the termination of the review on such short notice as follows:

> How can the Project Committee, which has not ever met to deliberate on the results of all the work undertaken by the various subcommittees, complete its job properly when you allow only two days for review of a draft report the contents of which nobody has seen, plus roughly the same time period for review of all the recent related supporting technical information? Do we assume rightly that you have already made up your mind about the project and formulated the recommendation for us? There are, to my latest count, a number of issues still outstanding that are key to the viability of this project. How can you approve the project without pulling these together?...The precedent being set here for the integrity of subsequent reviews is extremely dangerous. If the Project Committee never meets to discuss the review results and formulate a recommendation, what is the point of having one? How does this meet the stated intentions of the *Environmental Assessment Act*?

[63] Mr. Pearse's inquiry was never answered. On March 6, 1998, the Tlingits submitted a separate recommendations report which reiterated the concerns expressed by Mr. Pearse and which concludes, at p. 67, with the following plea:

> Despite a tremendous pressure placed on the Project Committee to get this project through the review process in a form where approval can be given, which at the end significantly perverted the process, the review has done its job. It has correctly identified a host of unresolved strategic issues related to the proposed access road. These cannot now be swept under the rug at political convenience or obscured by veil of bureaucratic bafflegab. The right recommendation is to reject the proposed project as being premature and too beset with information inadequacies, undetermined but significant environmental risk and naive optimism about future management capacity. We so recommend.

[64] The respondents assert that there is no requirement in the *EAA* requiring the Project Committee to collectively review the material and report or which requires that the Project Committee reach a consensus in respect of the information that has been gathered. The respondents say that the Recommendations Report submitted to the Executive Director and referred to the Ministers provided the Ministers with a fair and accurate description of the views, concerns, and recommendations of each of the Project Committee members, including the Tlingits.

[65] The respondents argue that the Tlingits' essential complaint is that they are unhappy with the decision made and blame that on the failure to accept the Tlingits' opinion of the adverse effects of the road. Redfern asserts that the project was more than adequately assessed and that the Tlingits were full participants in the review process. Redfern's view is that the Ministers had all the information they needed to make a rational decision and the Tlingits' discontent with the decision amounts to an argument that they were entitled to "more analysis" and more consultation. In this regard, Redfern asserts that the Tlingits provided no authority that requires, as a constituent element of fairness, a requirement for "more analysis."

[66] The Tlingits do not argue that the sustainability of the Tlingits is the sole factor to be considered under s. 2(a) of the *EAA*. The Tlingits' point is that it is a factor that could not be ignored in the circumstances of this case. When the Tlingits called for more analysis, it was in the context of their argument that the issue of sustainability was not addressed either expressly, thoroughly, or in an integrated way by the Project Committee or in the Recommendations Report. Central to the Tlingits' concerns was the absence of a regional land use plan or a treaty, which they see as threatening the Tlingits' sustainability. The Tlingits thus argue that these were circumstances which the Ministers could not ignore.

[67] It is curious that the protracted review process which, up until late 1997, seemingly accommodated the needs of the Tlingits and others to raise and address their specific concerns, was abruptly truncated by the urgent demands of the EAO that a decision be made by early March 1998. The respondents contend that the review process was brought to an end by reason of the requirement of s. 2(b) of the *EAA* that the assessment of environmental projects be "timely." In my view, it is difficult to justify the hurried closure of the assessment when matters of such significance to the Tlingits

remained to be addressed. It is impossible to reconcile the decision to grant the Certificate with the objectives of the statute if the decision does not address the Tlingits' concerns of sustainability.

[68] I hasten to add that I do not suggest that the concerns raised, for example, in Mr. Staples' addendum must necessarily have been accepted or agreed upon by the balance of the Project Committee members. I say only that these were matters of significance which deserved the due consideration of the Project Committee, the relevant sub-committees, and the consideration of the Ministers.

[69] Although the respondents assert that the Ministers must be taken to have considered all of the material submitted to them, including the Tlingits' Recommendations Report, it should be noted that the Recommendations Report and the Tlingit Recommendations Report were provided to the Ministers on March 12, 1998. The reasons for decision were signed by the Minister of Energy, Mines and Petroleum Resources on March 13, 1998 and by the Minister of Environment, Lands and Parks on March 19, 1998, the same date on which the Project Approval Certificate was issued. Because the Recommendations Report makes no reference to the sustainability of the Tlingits (and indeed makes no reference to sustainability at all); and

because the Ministers' decision incorporates by reference the Recommendations Report; and given the almost instantaneous approval by the Minister of Energy, Mines and Resources, I conclude that it is doubtful that the wealth of material represented by the Recommendations Report and the Tlingit Recommendations Report was in fact considered by the Ministers. This should not be surprising given the nature of the environmental review process and the Ministers' expected reliance on the advice and recommendations of the Project Committee. However, if the recommendations of the Project Committee do not fairly and accurately describe the concerns of all of the Project Committee members, including the Tlingits, then it seems to me that the Ministers' decision must be regarded as an exercise of discretion which failed to consider a relevant matter under the statute. In such circumstances, the court will exercise its supervisory jurisdiction.

(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.

(c) Does the road promote sustainability of wildlife and the Tlingit domestic economy? Was the proponent's wildlife baseline information adequate for providing analysis and advice on those issues?

[79] There can be no question that the effect of the road on wildlife was a matter of fundamental importance in the environmental review. The Tlingits' primary assertion in this regard is that the baseline data provided in the review process and the Recommendations Report was inadequate. They say that in order to assess the environmental impact of the road on wildlife, the current situation must be known so that assessors can make informed predictions about the potential impacts of the proposed project and whether adverse effects can be prevented or mitigated. It seems obvious that current, accurate, baseline information provides a reference point for future monitoring programs.

[80] Section 10(b)(iii) and (iv) of the *EAA* requires that the Project Committee review the project to determine the potential effects, and the prevention and mitigation of adverse effects, of a reviewable project.

[81] At the hearing of the judicial review, both the Tlingits and Redfern examined in detail the baseline information that was before the Project Committee. There can be no question that there was a divergence of views in respect of the adequacy of the baseline data both among the Project Committee members and the experts.

[82] In making their argument, the Tlingits essentially asked the court to undertake a review of the scientific evidence and make a determination of its adequacy. The difficulties posed by such a review were addressed in ***Union of Nova Scotia Indians v. Canada (Attorney General)***, *supra*, which referred to ***Alberta Wilderness Association v. Express Pipelines Ltd.*** (1996), 42 Admin. L.R. (2d) 296 (Fed. C.A.) which held, at 304:

> No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes. ...[T]he principal criterion set by the statute is the “significance” of the environmental effects of the project: that is not a fixed or wholly objective standard and contains a large measure of opinion and judgment. Reasonable people can and do disagree about the adequacy and completeness of evidence which forecast

> future results and about the significance of such results without thereby raising questions of law.

The court in the ***Union of Nova Scotia Indians*** thus concluded, at para. 71, that:

> The very nature of the decision means that in judicial review proceedings the court must inevitably defer to the statutory decision maker, unless persuaded that the decision is patently unreasonable, in the sense that it cannot rationally be justified in light of all the information available to the decision maker at the time of the decision. So long as there is information on which the decision could be rationally based, the court will not intervene.

[83] In the case at bar, the wildlife sub-committee of the Project Committee, which included representatives of the Ministry of the Environment, Lands and Parks; the Ministry of Forests; the Federal Department of Fisheries and Oceans; and the Tlingits, identified potential impacts of the Project on wildlife and wildlife habitat. The impacts were extensively discussed at meetings of the wildlife sub-committee and the Project Committee. The representatives of the Ministry of Environment, Lands and Parks concluded that the Recommendations Report provided sufficient wildlife inventory information to satisfy the requirements of the Project certification decision. However, it acknowledged that if the Project were approved by the Ministers, additional and more

detailed baseline data would be required at the permitting level to provide for adaptive wildlife management while the Project was under operation. The Project approval by the Ministers included conditions which provided for environmental follow-up and monitoring.

[84] Redfern argues that the court should not undertake a substantive review of the merits of the Project, including the adequacy of the baseline data and the mitigation measures. Generally, I agree with that submission, except to the extent that some limited review of the baseline data and the mitigation measures is nevertheless necessary in order to determine whether the decision of the Minister was unreasonable. In making this determination, the remarks of Iacobucci J. in ***Quebec (Attorney General) v. Canada (National Energy Board)***, [1994] 1 S.C.R. 159 at 178 are instructive:

> While the respondents are correct in asserting that the principle of curial deference applies to the weighing of the evidence by the Board in the exercise of its discretion, this principle cannot be invoked to save a decision for which there is no foundation in the evidence or that is based on irrelevant considerations. Once the Board decides that a particular factor is relevant to its decision, there must be some evidence to support the conclusion reached relating to it. The Board must not act unreasonably in evaluating the evidence it requests to make its decision: *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*.

[85] Upon the review of all of the scientific and other evidence filed in this judicial review application, I conclude that it cannot be said that there was no foundation in the evidence for the decision made by the Ministers. It can be said, however, that there was inadequate (and perhaps no) assessment of evidence produced by or on behalf of the Tlingits. In this respect, the decision was unreasonable.

(d) Unreasonable reliance on prevention and mitigation measures

[86] The Tlingits argue that it was unreasonable for the Project Committee in its Recommendations Report to conclude that the impacts of the proposed Project could be mitigated by the proposed mitigation measures. Those measures included a manned gate; a no hunting/firearms policy for the proponent's personnel; restricted access on the road; regulatory measures; proposed management committees; and road closure. The Tlingits say that all of the measures proposed are fundamentally speculative.

[87] The Tlingits' concerns in this regard focused on two principal areas: the closure of the road and wildlife monitoring. One of the requirements of the Certificate is that the proponent develop a road closure plan. The idea of closing the road was to ensure that the territory will revert

to its pre-road state following closure of the mine after its expected nine year life span. The closure is proposed as a measure intended to limit adverse effects on wildlife and the Tlingits' land use system. The Tlingits argue that this is an unduly speculative concept in that the experts are unanimous that the predicted road closure is not only speculative but naive and should not be relied upon as a mitigation measure. The concern was addressed in a letter from the Office of the Governor of Alaska on November 5, 1997:

> ...We know of no previous examples of a new road, of the length and profile of that being proposed for this project, that has been decommissioned...Since procedures exist to allow additional "new" users of the road...a strong possibility exists that this road will not be decommissioned in the foreseeable future. We believe that there is a substantial possibility that extensive future use and development of the Lower Taku River will occur as a direct result of the current proposal.

[88] Similar concerns were addressed in the Staples' impacts addendum, which as noted, was not appropriately considered by the Project Committee:

> More likely, over the course of the mine's life the potential impacts will become more pronounced and more challenging to address, as public and private resource interests increase and proposals for spare roads are developed, further fragmenting the land base of the TRTFN traditional territory and making any mitigation of these access related impacts on TRTFN traditional land use very difficult.

[89] In this connection, the Tlingits also refer to various provincial statutes, including the *Mining Right of Way Act*, R.S.B.C 1996, c. 294, the *Provincial Forest Use Regulation*, B.C. Reg. 176/95 and the LUCO Report, all of which suggest that it is unreasonable to conclude that legislation will act as a mitigation measure after closure of the mine when it may in fact act to guarantee access of other interests and lawfully excuse the governments from closing the road.

[90] In connection with wildlife monitoring, the Tlingits argue that the Recommendations Report treats ongoing monitoring through the life of the Project as a substitute for baseline information and treats monitoring as a mitigation measure in and of itself.

[91] The Tlingits assert that these measures are so fundamentally speculative that they cannot properly be considered mitigation measures and cannot withstand the "somewhat probing" analysis required by the reasonableness test set out in ***Baker*** or by the patently unreasonable test set out in ***Southam***.

[92] Section 10 of the *EAA* required the Project Committee to provide the Ministers with advice and analysis respecting the two discrete issues of the potential effects of the Project and the prevention or mitigation of adverse effects.

Fulfilment of those requirements is fundamental to achieving one of the principal objectives of the *EAA*, namely the promotion of sustainable development. If those purposes are to be achieved, the ministers who exercise discretionary authority on the basis of the analysis and advice generated by the environmental review process must be able to base their decisions on clear and reliable analysis and advice on those two discrete matters. Therefore, the starting point for any decision to certify a project must be the presence of clear information about the potential effects of the project on environmental matters. In order for the ministers to properly exercise their discretion, it is necessary for the project committee to set out, expressly and distinctly, its analysis and conclusions.

[93] The Recommendations Report at pp. 80 to 91 sets out the issues and concerns related to the management of direct and indirect effects of access, prevention and mitigation of adverse effects of access and a follow-up and monitoring program.

[94] The Recommendations Report acknowledges that “there is potential for significant direct and indirect adverse impacts on wildlife habitat populations if access is managed improperly.” (page 85). The Recommendations Report goes on to

note that the majority of the Project Committee members regard the access control plan proposed by Redfern will be effective in preventing adverse environmental impacts. It further notes that the Tlingits remain unconvinced that those measures will be effective in addressing wildlife impacts. In my view, a fair assessment of the Recommendations Report satisfies both the somewhat probing test in ***Baker*** and the patently unreasonable test in ***Southam***. In other words, I consider that the Ministers were adequately advised by the Recommendations Report on these two distinct issues such that the exercise of their discretion in this regard cannot be considered to be unreasonable.

Procedural errors

[95] The Tlingits submit that there were three distinct procedural errors made with respect to the environmental review process and the production of the Recommendations Report:

(a) important reports and materials prepared for the process were not considered by either the Project Committee or the applicable sub-committee;

(b) the Project Committee never met collectively to decide the analysis advice in the Recommendations Report; and

(c) members of the Project Committee, rather than the proponent Redfern, developed important aspects of the proposal for the road, and then purported to assess and provide analysis and advice about those aspects of the proposal.

[96] I have already concluded that the Staples' addendum was not adequately considered by the Project Committee or the wildlife sub-committee and that this failure to consider the Staples' report constituted a substantive error on the part of the Project Committee, the Recommendations Report, and, therefore, the decision of the Ministers.

[97] The Tlingits also assert that an access management plan and colour-coded terrestrial ecosystem maps ("TEM"), which graphically illustrate the Tlingit concerns of access and habitat displacement, were not considered by the Project Committee or any sub-committee.

[98] The wildlife sub-committee acknowledged that the Tlingit issues would need to be discussed in the Project Committee. Those issues included, among other things, the matters addressed in the Staples' reports and the TEM reports. It is significant that the EAO produced a version of the issues tracking table which suggested that the sub-committee had

finished dealing with all issues when in fact it was agreed that certain issues needed to be further discussed. The Recommendations Report does not explain this failure in the process. Instead, it leaves the impression that those issues were dealt with in the normal way.

[99] In a guide prepared in respect of the environmental assessment process which is described as intending to assist First Nations and the public in understanding the environmental assessment process, it states at pp. 1-17:

> Following a specified review period of between 45 and 60 days, the project committee considers all of the information submitted and comments received, and makes recommendations to the executive director.

[100] The Tlingits say that, in reliance on the guide and on the assurances of the Executive Director, they were led to believe that their concerns would be fully addressed.

[101] Until January 1998, the general procedure used in the environmental review process in this case was for the Project Committee and the sub-committees to discuss reports and materials. That practice, together with the guide to the environmental assessment process, created in the Tlingits a reasonable expectation that these reports would be considered by the Project Committee and the sub-committees. When, in their view, their concerns were not addressed at the time of

the submission of the Recommendations Report, the Tlingits objected in writing to the EAO. They received no reply in respect of those complaints. Furthermore, no opportunity was provided to discuss these procedural concerns with the Project Committee. The Recommendations Report did not explain the procedure used to produce the Recommendations Report nor the dispute about it.

[102] It is significant that s. 2(d) of the *EAA* requires that the environmental review process be conducted by procedures that are open, accountable and neutrally administered. Section 9(6) of the *EAA* provides for the project committee to determine its own procedures, not the EAO. Section 10 of the *EAA* requires the project committee itself to provide the ministers with the analysis, advice and recommendations. The Tlingits were required to be included as members of that committee by virtue of s. 9(2)(d) of the *EAA*. It follows therefore that they should have been full participants in decisions about the Recommendations Report.

[103] The respondents contend that there was no breach of the statutory process or of the rules of procedural fairness in the failure of the Project Committee to meet to discuss the final Recommendations Report. In support of their position, the respondents refer to the fact that the *EAA* is silent as to

the process by which the project committee is to provide the executive director and the ministers with its advice and recommendations. As well, the respondents refer to s. 9(6) of the *EAA* which provides that:

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

[104] The Tlingits argue, in reliance on a number of arbitration decisions, including:

> ***U.N.A. Local 1 v. Calgary General Hospital*** (1989), 39 Admin. L.R. 244 (Alta. Q.B.), aff'd (1990), 46 Admin. L.R. 245 (C.A.);
> ***Newfoundland Association of Public Employees v. Newfoundland (Treasury Board)*** (1995), 132 Nfld. & P.E.I.R. 205 (N.S.C.T.D.);
> ***Newfoundland Assn. of Public Employees v. Memorial University of Newfoundland (Marine Institute)*** (1998), 26 C.P.C. (4th) 225 at 258-72 (C.A.);
> ***Re MacMillan Bloedel Limited and International Union of Operating Engineers, Local 882***, Unreported Arbitration (Munroe) February 10, 1983

that all of the members of the Project Committee, including the Tlingits, needed to be exposed to the counter-veiling points of view on relevant issues, and have an opportunity to react, not only to the opening positions of other members of the Project Committee, but also to their views as they developed in response to comments by others. The Tlingits say that the failure to do this amounts to procedural misconduct.

[105] Until December 1997, the Tlingits had a full opportunity to consult with other members of the Project Committee and in fact influenced much of the work of the Project Committee. Their legitimate concern is that the collective process of the Project Committee was abandoned in the final weeks of the environmental review process, thereby eliminating the Tlingits' final opportunity to persuade others to take into account their serious concerns.

[106] I accept that the Project Committee did not make undertakings as to the procedure it would follow as was the case in ***Gaw v. Canada (Commissioner of Corrections)*** (1986), 2 F.T.R. 122 (F.C.T.D.). Nor is this a case as found in ***Old St. Boniface Residents' Association Inc. v. Winnipeg (City)***, [1990] 3 S.C.R. 1170 wherein the court will provide an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. Here, there was ample opportunity for the Tlingits to make representations, except in the final stages of the review process. In my view, the statutory requirement of consultation with First Nations affected by a proposed project must mean adequate and meaningful consultation. In the case at bar there was unquestionably meaningful consultation which was suddenly and inexplicably cut off.

[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.

Apprehension of Bias

[109] The Tlingits assert that a reasonable apprehension of bias arises in this case by reason of:

(a) the Recommendations Report was prepared by the EAO, not the Project Committee; and

(b) government representatives to the Project Committee or various sub-committees took it upon themselves the task of development plans or proposals for monitoring or mitigating measures for the Project, instead of environmentally reviewing the applicable plans and proposals as proposed by the proponent.

(a) Preparation of the Report

[110] The reasonable apprehension of bias test has been articulated as follows by the Supreme Court of Canada in

Committee for Justice & Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369 at 394:

> The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.

In the words of the Federal Court of Appeal in the same case ([1976] 2 F.C. 20 at 29 (C.A.)), the test is:

> [W]hat would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?

[111] The respondents argue that the apprehension of bias principle has no application in the present case to the process leading to the Recommendations Report and Referral because there was no decision maker in the process. The respondents argue that the petitioners' assertion that the process used to produce the Recommendations Report gives rise to a reasonable apprehension of bias is unfounded. In support of that argument, the respondents refer to the fact that the executive director is the statutorily designated chair of the project committee under s. 9(5) of the *EAA* and is responsible pursuant to the *EAA* for many administrative matters throughout the review process.

[112] The Tlingits assert that it is reasonable to assume that the EAO prepared the draft Recommendations Report with the knowledge that certain aspects of the draft might not be agreed to by the Tlingits. The petitioners argue that by assuming the roles of drafting and co-ordinating the production of the Recommendations Report, which was to be presented as a report of the majority of the Project Committee, the EAO adopted a process that was biased in favour of the provincial government, since it had appointed a majority of the members of the Project Committee.

[113] I am not persuaded that the process used to produce the Recommendations Report gives rise to a reasonable apprehension of bias. The Project Committee evidently chose the mechanism of a written report as a means of conveying its recommendations to the Executive Director under s. 29(2) of the *EAA*. The preparation and production of the Recommendations Report by the Project Committee as a whole would be an entirely unmanageable process. It makes sense that the preparation of the Recommendations Report would be co-ordinated, as it was here, through the EAO.

[114] Furthermore, the letters, memoranda, and e-mail messages circulating among the members of the Project Committee at the time the Recommendations Report was being

finalized make it clear that government representatives on the Project Committee were not confined in their ability to speak freely on the many procedural and substantive issues facing the Project Committee.

(b) Government preparation of the Recommendations Report

[115] Redfern, as the proponent of the Project, was required to produce various plans or proposals respecting aspects of the Project. When the Project Committee or sub-committees decided that some aspects of Redfern's proposal were either missing or seriously deficient, members of the Project Committee took it upon themselves to develop the plans and proposals on those aspects of the Project. The Tlingits' concern is that, if the Project Committee itself develops the proposals for key mitigation measures, rather than the proponent, how can the ministers or the public have confidence that the effectiveness of those measures has been assessed thoroughly and by an independent procedure? The Tlingits say that in acting as they did, members of the Project Committee purported to act as both proponent and assessor, thereby giving rise to an apprehension of bias. Furthermore, the Tlingits say that the Recommendations Report does not disclose this procedural irregularity, even though it was challenged in the Tlingits' Recommendation Report. This, the Tlingits say,

is a failure to provide for openness and accountability with respect to procedural irregularities, and thus affects the weight and reliability that the ministers and the public should reasonably attribute to particular portions of the Recommendations Report.

[116] The respondents assert that the Tlingits' argument in this regard is untenable. The respondents note that the function of the project committee as set out in s. 10(b)(iii) and (iv) of the *EAA* is to analyze and advise the executive director and the ministers as to potential effects in the prevention or mitigation of adverse effects. They say nothing in the *EAA* precludes the EAO or members of the project committee from participating in the design of studies intended to assist the project committee in fulfilling its mandate. They say that precluding the project committee from considering improvements to programs designed to measure and mitigate environmental impacts would be contrary to the purposes of the *EAA*.

[117] The Tlingits agree that Project Committee members could not be disqualified from commenting on and expressing opinions about aspects of the proposal in respect of which they have knowledge or expertise or regulatory authority. However, the Tlingits' concern is that, in this case, members

of the Project Committee have gone too far, because they have themselves developed both the concept and the details of critically important mitigation measures. In so doing, the Tlingits say that those Project Committee members are no longer in a position to provide a disinterested assessment because they are assessing their own proposals.

[118] Although I agree with the Tlingits' sentiment that a project committee member might have difficulty objectively assessing their own proposal, that concern must be measured in the context in which the project committee works. The project committee draws on a diverse and large membership, all of whom bring their individual expertise and experience to the committee. It is clear from a review of the correspondence and minutes of the Project Committee that individual committee members were not reluctant to express their views. It is difficult to accept that a proposal by one or more Project Committee members would not be exposed to the scrutiny and analysis of other disinterested members of the committee. Accordingly, I conclude that a reasonable apprehension of bias does not arise in respect of this second concern of the Tlingits.

Constitutional and Fiduciary Duty Issues

[119] The Tlingits submit that, in the circumstances of this case, there was an affirmative constitutional obligation on the Crown to ensure that the discretionary powers under the *EAA* were exercised in way that would prevent approval of the Project unless it would be a sustainable development with respect to its effects on the Tlingits. The petitioners assert that these obligations arise from the constitutional principle requiring the protection of minorities under s. 109 of the *Constitution Act*, 1867 and s. 35 of the *Constitution Act*, 1982.

[120] The Tlingits also submit that the Crown owed fiduciary obligations to the Tlingits. They say those obligations arise from the Crown's general fiduciary relationship to aboriginal peoples, the Crown's unilateral powers, and the Tlingits' corresponding vulnerability in the circumstances of this case. In this regard, it is important to note that the Tlingits have asserted their aboriginal rights, under both the federal comprehensive claims process and the B.C. treaty process, and the Crown has undertaken treaty negotiations with the Tlingits.

[121] The Tlingits submit that the statutory obligations under the *EAA* should be construed in light of the Crown's

constitutional and fiduciary obligations. Because of those fiduciary obligations, the Tlingits say that the Crown's statutory obligations under the *EAA* needed to be carried out:

> (a) in accordance with the standard of care required of fiduciaries;
>
> (b) so as to maintain the integrity of the treaty negotiation process, *inter alia*, by ensuring interim protection for the core subject matter of those negotiations;
>
> (c) with a view to ensuring protection for vulnerable interest bearing on the sustainability of the Tlingits as a people; and
>
> (d) in a way that ensured there would not be unjustifiable interference with vulnerable interests that might reasonably be the subject of rights within s. 35 of the *Constitution Act*, 1982.

[122] The Tlingits thus argue that, in light of the Crown's constitutional and fiduciary obligations to them, the respondent Crown has failed to act lawfully in the decision to grant the Certificate.

(a) Constitutional Issues

[123] Reduced to its essence, the Tlingits' argument is that the Crown has an affirmative constitutional obligation to protect the Tlingits' sustainability. The respondents' essential position is that constitutional duties do not arise until there is a determination of an aboriginal right within the meaning of s. 35 of the *Constitution Act*, 1982. The Tlingits rest their argument on the decisions in ***R. v. Adams***, [1996] 3 S.C.R. 101 and ***Cheslatta Carrier Nation v. British Columbia***, *supra*, and ***Halfway River First Nation v. British Columbia (Ministry of Forests)***, [1999] 4 C.N.L.R. 1 (B.C.C.A.).

[124] I note that in ***Adams***, the Supreme Court of Canada confirmed the aboriginal right to fish claimed by the accused, finding at para. 46, that the evidence met the test in ***Van der Peet***. In ***Halfway River***, the Halfway Nation were signatories to a treaty. In both cases, the obligations of the Crown were triggered by a finding of an aboriginal right. The Tlingits have asserted aboriginal rights and title in respect of the territory in which they live. They are in the midst of treaty negotiations. They have commenced legal proceedings in this court for declarations of aboriginal rights and title which have not proceeded.

[125] The respondents argue that s. 35 of the *Constitution Act*, 1982 is not engaged until such time as the Tlingits have established the aboriginal rights and title they say would be unjustifiably infringed by the Project. The decisions in ***Adams***, ***R. v. Guerin***, [1984] 2 S.C.R. 335, ***R. v. Sparrow***, [1990] 1 S.C.R. 1075, and ***R. v. Marshall***, [1999] 3 S.C.R. 456, cited by the respondents, would suggest that the principles laid down in those decisions require an analysis that moves first from a finding of an aboriginal right. There has been no such finding in respect to the Tlingits.

[126] The limited extent of the Crown's duty urged by the respondents is, in my view, excessively rigid and confining, especially when considered in light of the Crown's duty to negotiate as defined in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010 at 1123, at para. 186:

> ...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.

[127] The Tlingits also rely on the underlying constitutional principle of the protection of minorities. In support of their position, the Tlingits refer to the decision in ***Lalonde v. Ontario (Health Services Restructuring Commission)*** (1999), 181 D.L.R. (4th) 263 (Ont. Sup. Ct. of Justice). In ***Lalonde***, the court reviewed the decision to close a hospital serving the Francophone population of the Ottawa-Carleton region in Ontario. The court analyzed the decision considering the fundamental organizing principle of the protection of minority rights in the Constitution. The constitutional validity or invalidity of the legislation was not in issue. The court held, at para. 54:

> What is at issue is whether certain conduct of a government agency falls within the parameters of what is permitted by the Constitution.
>
> As Chouinard J. noted in *Commission des Droit de la Personne v. Canada (A.G.)*, [1982] 1 S.C.R. 215, at pp. 227-228, there is a difference between the validity of legislation and the possibility of unconstitutional behaviour under the legislation.

[128] In ***Lalonde***, the court rejected the argument that the impugned decision should be set aside on ordinary administrative law grounds and held that the decision should be set because it failed to take into account the importance

of Francophone institutions and thereby failed to act according to law. It is important to note, however, that the court concluded that the constitutional mandate for the protection of minority rights was an independent principle underlying the Constitution and that it was not open to the decision-maker to ignore, as the court found it did, the Francophone minority interests.

[129] In my view, the ***Lalonde*** decision has limited application to the circumstances prevailing in the case at bar. It is clear that the *EAA* requires that aboriginal interests be considered in the assessment of a reviewable project. That is made evident by the statutorily mandated participation of affected First Nations in the review process. There can be no question that the interests of the Tlingits were considered in the review of the Project and it cannot be said that there was a complete failure to consider their minority rights as was the case in ***Lalonde***.

[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.

(b) Fiduciary obligation issues

[131] Following on the above, the Tlingits argue that because the Crown had notice of the Tlingits' assertion of their aboriginal title and harvesting rights, the Crown was

obligated to take affirmative steps to ensure that it was not acting in breach of fiduciary obligations to protect their interests until the Crown determined that no such obligations or risks existed. In support of their position, the Tlingits rely, *inter alia*, on the decision in ***Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)***, [1996] 4 S.C.R. 344, 2 C.N.L.R. 25. That decision is plainly distinguishable from the circumstances prevailing in the case at bar. In that case, the Crown's fiduciary duties were examined in the context of an agreement pursuant to which the Band surrendered its reserve lands. The court examined the breach of fiduciary obligations in the context of the relationship extant in that case.

[132] In any event, I conclude that the review process taken in the case at bar up until December 1997, satisfied any fiduciary or other obligations owed to the Tlingits by the Crown. Until that time, the Tlingits were full participants in the environmental review process and were afforded ample opportunity to consult with, and make their views known to, the Project Committee. In that regard, I consider that any fiduciary obligations owed by the Crown, and any obligations to consult, were satisfied.

[133] The Tlingits say, however, that the obligations of the Crown go beyond mere consultation and amount to a requirement that there be agreement by the Tlingits with respect to the decision to be made. In support of that position, the Tlingits rely on the passage in ***Delgamuukw***, *supra*:

> ...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.

[134] I recognize that the above passage was developed under the court's discussion of the justification principles laid down in ***Sparrow*** and in respect of the infringement of a determined aboriginal right. Nevertheless, it addresses the fundamental issue underlying this case: what degree of consultation is acceptable in the circumstances of the Tlingits, the Crown and Redfern? Considering all of the circumstances of this case, I am unable to conclude that the

Crown respondent was required to extract an agreement from the Tlingits in respect of the Project proposal. Indeed, the Tlingits did not seriously argue that an agreement from them was required (in recognition of the fact that they are not the only parties affected by the proposal). I agree, however, with the Tlingits' proposition that the consultation must be meaningful and must at least consider solutions concerning the disputes arising in the environmental review process. The Tlingits assert in this case that those concerns might have been addressed by the commissioning of further expert reports on such issues, particularly those dealing with monitoring programs, mitigation measures, and the threat to wildlife viability.

[135] It is impossible to know at this stage what considerations the Ministers might have had for those issues had they been fully informed of the Tlingits' final concerns in the period December 1997 through March 1998. However, it is clear that the Ministers' reasons demonstrate that the statutory obligation to promote sustainability, an object of the *EAA*, was not fully addressed. In this regard, I conclude that the Ministers' obligations under the statute and at common law were not fulfilled.

Decision

[136] It follows from all of the above that the Ministers' decision should be quashed. The Tlingits argue that the process is so thoroughly tainted at so many levels that the matter should not be referred back to the Ministers for reconsideration but that, if necessary, the entire process begin afresh. The respondents ask that, if the matter is to be referred back to the Ministers for reconsideration under s. 5 of the *Judicial Review Procedure Act*, that further submissions be made concerning the directions to be given to the Ministers in respect of that referral.

[137] The review process in this case has been an exceedingly long one. Redfern has expended an extraordinary amount of money to move the process to this stage ($10 million). All of the evidence before the court establishes that Redfern has made genuine and full efforts to comply with the *EAA* and has made a genuine effort to satisfy the concerns of the Tlingits. Although I have concluded that the Tlingits' concerns have not been fully considered, I am unable to say that the entire process has been compromised or tainted. Indeed, it appears that, up until early December 1997, the environmental review process met all of the statutory requirements and any constitutional or fiduciary

obligations which might otherwise apply. It was only in the unexplained rush to formalize a decision that the considered approach previously adopted was abandoned. Accordingly, I consider that the matter should 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. I recognize, however, that there are intricacies and aspects to that process which I cannot foresee. Accordingly, I invite counsel to submit further submissions as to the basis on which the decision should be referred back to the Ministers for reconsideration.

"P.A. Kirkpatrick, J."
The Honourable Madam Justice P.A. Kirkpatrick