IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Taku River Tlingit First Nation v. British Columbia (Minister of Environment),* 2014 BCSC 1278

Date: 20140711
Docket: S139404
Registry: Vancouver

Between:

The Taku River Tlingit First Nation and John D. Ward, on behalf of himself and all other citizens of the Taku River Tlingit First Nation

Petitioners

And

Minister of Environment for the Province of British Columbia, Executive Director of the British Columbia Environmental Assessment Office, and Chieftain Metals Inc.

Respondents

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

Counsel for the Petitioners:	Randy L. Christensen Lara J. Tessaro
Counsel for the Respondent British Columbia (Minister of Environment), Executive Director of the British Columbia Environmental Assessment Office:	Angela K. Cousins Anna C. Peacock
Counsel for the Respondent Chieftain Metals Inc.:	Thomas Isaac Thomas D. Gelbman
Place and Dates of Hearing:	Vancouver, B.C. May 26-28, 2014
Place and Date of Judgment:	Vancouver, B.C. July 11, 2014

INTRODUCTION

[1] The Petitioners advance four arguments to set aside a determination, made under s. 18(5) of the *Environmental Assessment Act*, S.B.C. 2002, c. 43, that a mining project had been substantially started by May 30, 2012. At issue, as a practical matter, is whether the project can proceed. The project site is in northwestern British Columbia, within territory claimed by the Petitioners.

THE PETITIONERS AND THEIR EARLIER CASE IN THE SUPREME COURT OF CANADA

[2] When I refer to the Petitioners, I shall sometimes refer to them, collectively, as the TRT. They are aboriginal people within the meaning of s. 35 in Part II of the *Constitution Act, 1982*. The Petitioners claim aboriginal title to a territory of 40,000 square kilometres bounded on the north by the Yukon border and on the west by Canada's border with Alaska. The community of Atlin is in the northwest of the claim territory. The mining project at the heart of this petition is almost due south of Atlin and near the border with Alaska. It is on a tributary of the Taku River.

[3] The TRT are not party to a treaty with the Crown setting out rights in the territory over which they assert their sovereignty and aboriginal title. Their title claim is grounded instead in their prior occupation of the territory, along with the other common law criteria by which aboriginal title is to be determined.

[4] In an earlier proceeding, brought more than 15 years ago, the TRT petitioned this Court concerning the same mining project which is under consideration here. That earlier petition was ultimately addressed by the Supreme Court of Canada; see *Taku River Tlingit First Nation v. B.C.*, [2004] 3 S.C.R. 550. *Taku River Tlingit* became a leading case in addressing the Crown's duty to consult and accommodate aboriginal peoples.

[5] Despite the passage of time since *Taku River Tlingit* was decided, there remains an extensive factual overlap between that proceeding and this one. As noted above, the TRT are litigating here in regard to the same mining project addressed in the earlier proceeding. The project then, as now, obtained its approval from the same environmental assessment process, which took place in the 1990s.

[6] There had been a mine at the project site in the 1950s. Beginning in 1994, a mining company, the predecessor proponent to the corporate Respondent in this proceeding, sought permission from the Province to re-open the old mine. A review and approval process unfolded, under the provincial legislation then applicable, and the Province granted, in 1998, a project approval certificate, allowing the project to proceed. There has not been an environmental assessment of the project since.

[7] The TRT complained in the course of the environmental assessment, in particular, about the mining company building a road through their claim territory, between the mine site and Atlin. (The old mine had operated with water access only.)

[8] The three courts in *Taku River Tlingit* recognized the Crown's duty to consult and accommodate the TRT, grounded in the honour of the Crown, deriving from the Crown's assertion of sovereignty in the face of prior aboriginal occupation.

[9] The Supreme Court of Canada concluded that the Crown had fulfilled its duty to consult the TRT because they were notified of, and participated extensively in, the environmental assessment process leading to the project approval certificate.

[10] I note two points from *Taku River Tlingit* relevant to this proceeding. First, the Supreme Court of Canada found that the scope of the duty to consult is proportionate to the assessed strength of the case for aboriginal title and to the seriousness of the potentially adverse effect of the Crown conduct on the title claim. The Court found the TRT's title claim to be a relatively strong one, and that the Crown conduct, *i.e.* authorizing the mine with the road, had a high impact on the title claim.

[11] Second, I note the Court's expectation, expressed in para. 46 of its reasons:

> ... It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN.

It will therefore surprise no one that the TRT are expecting to be consulted concerning all major steps related to the project.

THE RESPONDENTS

[12] As seen above, I shall refer to the government Respondents simply as the Province or the Crown when the context permits. Sometimes it will be necessary to refer to the government Respondents more specifically.

[13] The corporate Respondent, Chieftain Metals Inc., or simply Chieftain Metals, is the current project proponent. It is a publicly-held company, incorporated to carry out this project. Chieftain Metals took over the project, in September 2010, from the receiver and trustee of Redfern Resources Ltd., or Redfern, the company which obtained the original project approval certificate in 1998. Redfern was a party in *Taku River Tlingit*. In November 2010, Chieftain Metals took the assignment of the environmental assessment certificate, *i.e.* the legislated replacement for the project approval certificate originally issued to Redfern in 1998.

SECTION 18 OF THE *ENVIRONMENTAL ASSESSMENT ACT* AND THE DECISION UNDER SECTION 18(5)

[14] Section 18 of the *Environmental Assessment Act* reads:

> **Duration and effect of certificate**
>
> **18** (1) An environmental assessment certificate must specify a deadline, at least 3 years and not more than 5 years after the issue date of the certificate, by which time the holder of the certificate, in the reasonable opinion of the minister, must have substantially started the project.
>
> (2) However, the holder of an environmental assessment certificate may apply in writing to the executive director for an extension of the deadline specified in the environmental assessment certificate, stating why the proponent wishes an extension of the deadline.
>
> (3) On receipt of an application under subsection (2), the minister or the executive director must complete a review of
>
> (a) the application, and
>
> (b) the reasons given under subsection (2),
>
> in accordance with any procedure determined by the minister or the executive director to assess the proposed extension.
>
> (4) The minister or the executive director may
>
> (a) extend the deadline specified in the environmental assessment certificate, on one occasion only, for not more than 5 years, or
>
> (b) refuse to extend the deadline.
>
> (5) After the deadline specified under subsection (1) or, if an extension is granted under subsection (4), after the period of the extension, if the project has not yet been

> substantially started, in the reasonable opinion of the minister, the environmental assessment certificate expires.
>
> (6) After a reviewable project is substantially started, in the reasonable opinion of the minister as set out in subsection (1) or (5), the certificate remains in effect for the life of the project, subject to cancellation or suspension under section 37.

[15] Following the decision of our Court of Appeal in *Taku River Tlingit*, 2002 BCCA 59, the authorized provincial ministers issued the project approval certificate (re-issued it, practically speaking, after this Court, see, 2000 BCSC 1001, quashed the first one) on December 12, 2002.

[16] Pursuant to s. 18(1), above, the certificate directed the certificate holder to substantially start the project within five years of the issuance of the certificate. So Redfern, the original proponent, had until December 12, 2007 to substantially start.

[17] That did not happen.

[18] Instead, Redfern applied on February 23, 2007 for a five-year extension. That was granted on September 20, 2007. The new deadline for substantially starting became December 12, 2012.

[19] Sections 18(2)-(4) governed that extension process. A review of those subsections, and s. 18 as a whole, shows how time-sensitive the legislature is about environmental approvals. Under s. 18(1), there is a deadline for substantially starting. Under s. 18(3), a deadline extension cannot be obtained without the application being reviewed at a senior level. Section 18(4) allows only a single extension, and then for no more than five years.

[20] As will be seen, s. 18(5) further demonstrates the importance of getting on with projects within a reasonable time after their initial approval.

[21] The project still was not substantially started by December 12, 2012. The current proponent, the Respondent, Chieftain Metals, could see that the deadline would not be met and, on April 19, 2012, applied for a determination that the project was, by then, substantially started. That application was driven by s. 18(5), above, which provided, in effect, that the environmental assessment certificate expired if the project was not substantially started by December 12, 2012. The subsection left it to the minister, in his "reasonable opinion", to determine whether the project had been substantially started. The minister, or more accurately in this case the associate deputy minister, determined on May 30, 2012, that the project had, by

then, been substantially started. The Petitioners' four arguments are directed against that determination.

PETITIONERS' FIRST ARGUMENT: THE WRONG PERSON DETERMINED THAT THE PROJECT WAS SUBSTANTIALLY STARTED

[22] As noted above, a determination under s. 18(5), that the project was substantially started, was made not by the minister, but by the associate deputy minister. The Petitioners emphasize that s. 18(5) speaks of the minister only for making the determination.

[23] However, s. 23(1) of the *Interpretation Act*, R.S.B.C. 1996, c. 238, provides that words in an enactment empowering a minister to do something include the associate deputy minister.

[24] Derek Sturko, who made the determination that the project was substantially started, was lawfully appointed by order in council as both the associate deputy minister and the executive director of the environmental assessment office.

[25] Thus, by s. 23(1) of the *Interpretation Act*, the legislature authorized Mr. Sturko, as associate deputy minister, to make the determination he did, that the project was substantially started. The legality of his appointment as both associate deputy minister and executive director is not in issue in this proceeding, and the fact that Mr. Sturko held both positions does not negate his power under s. 18(5) as associate deputy minister.

[26] The Petitioners argue that s. 2(1) of the *Interpretation Act* has application here. It reads:

> **Application**
>
> **2** (1) Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

[27] The Petitioners argue that s. 23(1) of the *Interpretation Act* does not apply because a contrary intention appears in the *Environmental Assessment Act*. In other words, they say that a proper reading of s. 18(5) does not contemplate anyone other than the minister herself (himself, I believe at the relevant time, herself since June 10, 2013) making the "substantially started" determination.

[28] I do not accept that submission. Nothing in s. 18 reveals why the associate deputy is not to operate in the minister's shoes in accordance with s. 23(1) of the *Interpretation Act*.

[29] *Ramawad v. Canada (Minister of Manpower and Immigration)*, [1978] 2 S.C.R. 375, addresses the question. Under the *Immigration Act*, a determination by a special inquiry officer not to issue a visa could be waived by the minister if the minister found there to be special circumstances. In *Ramawad*, the special inquiry officer himself determined that there were no special circumstances. The Court set aside a resulting deportation order finding that Parliament could not have intended that the officer whose determination was under review could himself make the finding (no special circumstances) which effectively negated the review.

[30] In this proceeding, I am not addressing a case of delegation, which was at issue in *Ramawad*, but s. 23 of the *Interpretation Act*, read with s. 2 of that *Act*, gives rise to the same analysis. Did the legislature intend to preclude the application of s. 23 of the *Interpretation Act*, using s. 2 of that *Act*, when a decision needs to be made under s. 18(5) of the *Environmental Assessment Act*? *Ramawad* demonstrates why the answer is no. It is illustrative of the point that for a provision like s. 23 of the *Interpretation Act* to be ousted, its application would have to plainly offend the legislative intention. There is nothing like that here. Taking sections 2 and 23 of the *Interpretation Act* into account, there is no intention manifested in s. 18(5) of the *Environmental Assessment Act* contrary to having the associate deputy minister stand in for the minister. The lawful operation of the *Environmental Assessment Act* was not undermined in any way by s. 23(1) of the *Interpretation Act* having application.

[31] The Petitioners also argue that a reading of the whole of s. 18 of the *Environmental Assessment Act*, along with s. 17, demonstrates that the executive director is treated differently from the minister, with lesser powers. Therefore, the argument goes, when s. 18(5) empowers the minister only, Mr. Sturko, who was also the executive director, could not act. It must be remembered, however, that Mr. Sturko's determination under s. 18(5) is allowed, pursuant to s. 23(1) of the *Interpretation Act*, because he was the associate deputy minister. The fact that he also happened to be the executive director did not deprive him of his powers as the associate deputy minister.

PETITIONERS' SECOND ARGUMENT: THE DETERMINATION UNDER SECTION 18(5), THAT THE PROJECT WAS SUBSTANTIALLY STARTED, WAS WRONG

[32] The standard for reviewing a determination under s. 18(5) is reasonableness. The subsection itself addresses, "the reasonable opinion of the minister". That in itself, in my view, determines what review standard applies, but I will return to the standard of review at the end of addressing this second argument of the Petitioners.

[33] Even though reasonableness is the applicable review standard, the associate deputy minister was still, of course, governed by the wording of the subsection. "Project", a key term in s. 18(5), is defined in s. 1 of the *Environmental Assessment Act* to mean any:

> (a) activity that has or may have adverse effects, or
>
> (b) construction, operation, modification, dismantling or abandonment of a physical work;

[34] Those words need to be interpreted in keeping with their ordinary meaning in the context of the statute in which they appear; see *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559. The object of the *Environmental Assessment Act* is the protection of the environment. The definition of a project, therefore, is intended to address primarily physical activities affecting the land environmentally, as contrasted with bureaucratic activities, for example, which do not. Thus, in deciding whether a project has been substantially started, the decision maker should focus less on the permits which have been granted, and the money expended, as two examples, and more on what has taken place physically at the site, on the ground, as it were.

[35] Similarly, temporary structures at the site, if they will be soon removed, followed by remediation, are less important to consider than structures which will be in place for the duration of the project.

[36] The words "substantially started" in s. 18(5) are not defined in the *Act*. "oxforddictionaries.com" presents the following definitions of "substantial" having application here: "of considerable importance, size, or worth; concerning the essentials of something; real and tangible."

[37] Thus, to have been substantially started, the project needed to have been started in its essentials, in a real and tangible way.

[38] Also, I would say that the activity the decision maker needs to look at in the s. 18(5) assessment is activity since December 12, 2002, when the project certificate was issued. That is because of s. 18(1), which, in my view, treats the issuance of the certificate as the starting point.

[39] In summary then, with regard to addressing whether the project was substantially started by December 12, 2012, the decision maker needs to focus primarily on physical activities, since December 12, 2002, having a long-term impact on the site.

[40] The environmental assessment office's user guide can also provide some assistance in defining "substantially started". It says this, at p. 39:

> The term "substantially started" is not defined in the *Environmental Assessment Act*. The Minister of Environment ultimately determines whether the proponent substantially started the project. In making a recommendation to the Minister of Environment, the EAO considers each situation on a case-by-case basis and considers all relevant factors and questions, such as:
>
> - Has there been a significant investment of time, effort, and resources to physically develop one or more main project elements?
> - Does the activity amount to a significant or important step to develop the overall project, or is the activity considered ancillary, secondary, or temporary?
> - Would the proponent have undertaken the activity regardless of the project?

[41] The user guide is not legislation, and if its provisions conflicted with the statute, it could offer no assistance. That is not the case here, and, as the Supreme Court of Canada said in *Baker v. Canada*, [1999] 2 S.C.R. 817, at para. 72, a government-published guide can be of great assistance to a court in determining how a legislative provision ought to be interpreted. I would note that the user guide, in this case, corroborates the legislative focus on long-term, physical works as the main object of the "substantially started" analysis.

[42] The record at first instance for the s. 18(5) decision under review here is modest. The decision was precipitated by a four-page letter (with two pages of attachments) dated April 19, 2012, from the proponent to the environmental assessment office, directed to the attention of the decision maker. The letter presented the proponent's case that a substantial start had been achieved. The decision itself, that the project was substantially started, is recorded in a document entitled, Environmental Assessment Office Decision Note, prepared for the decision maker, dated May 22, 2012, and signed by him on May 30, 2012. That document, with the April 19 letter from the proponent, I believe, constitutes the whole of the documentary record at first

instance for the statutory decision. The Decision Note is little more than two pages, plus two pages of attachments. By its tenor and format, the Decision Note strongly recommended a conclusion that the project had been substantially started. The associate deputy minister agreed with the recommendation, and signed the Note to record his determination that the project had been substantially started by the time he signed it.

[43] The Petitioners argue that, on both the decision date, May 30, 2012, and the deadline of December 12, 2012, the project was not substantially started. They say it was barely started, and therefore, that the associate deputy minister erred in finding as he did.

[44] The Petitioners point out that of the 11 elements comprising the project as approved, very little has been done on site except tree clearing, save for the near completion of the gravel airstrip.

[45] The Petitioners advance this, the second of their four arguments, even though reasonableness, not correctness, is the governing review standard.

[46] The Petitioners filed in this proceeding detailed evidence, by way of affidavit, supportive of their position that the project, on the ground, is barely started. Unfortunately for the Petitioners in this their second argument, that evidence was not before the decision maker in May 2012, when he found that a substantial start had been made. Had it been, the outcome in May 2012 might well have been different.

[47] However, the tests for introducing new evidence on judicial review are strict. Were it otherwise, the unsuccessful party in the administrative process could simply try again on judicial review by presenting an entirely new factual basis for justifying its position. That approach would undermine administrative decisions, rendering them nothing more than the first round for a later judicial review. New evidence on judicial review is admissible to prove a lack of jurisdiction, a denial of natural justice or no evidence at first instance to support the conclusion reached at that stage; see, *Society of the Friends of Strathcona Park v. British Columbia (Environment)*, 2013 BCSC 1105, paras. 93-105; *Kinexus Bio Informatics Corp. v. Asad*, 2010 BCSC 33, paras. 17-20; and *Morlacci v. British Columbia (Minister of Energy, Mines and Petroleum Resources)* (1997), 44 B.C.L.R. (3d) 41 (C.A.), para. 16. None of those criteria are present here.

[48] Where, as here, reasonableness is the standard of review, the law permits broad discretion to the decision maker. Given the information presented to him in May 2012, I do not find his conclusion, that there had been a substantial start, to have been an unreasonable one.

[49] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, an adjudicator examined the reasons for an employee's dismissal, and accorded the employee related procedural rights, when the employer had not alleged cause. The Court dismissed the employee's appeal, finding that even on a "reasonableness" test, the adjudicator's decision could not stand. However, the Court's formulation of the "reasonableness" standard, a standard emphasizing deference to those who decide at first instance, presents a barrier to the Petitioners' second argument, which I believe cannot be overcome.

[50] Deference is called for here, first, from the wording of s. 18(5) itself, which turns on the reasonable opinion of the decision maker. Second, as observed in *Dunsmuir*, above, at para. 54, deference is normally called for where the decision maker is interpreting a statute closely connected with his or her normal functions, because of the familiarity he or she can bring to the task. *Dunsmuir* also reminds us that the applicant carries the onus of proving unreasonableness. Finally, *Dunsmuir* instructs us that the reasonableness analysis addresses whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. In my view, the decision here under s. 18(5), at least based on the record as it stood then, satisfies those criteria, with the result that the decision under s. 18(5) satisfies the reasonableness test.

PETITIONERS' THIRD ARGUMENT: THE CROWN HAD A DUTY TO CONSULT THE TRT

[51] The finding that the project had been substantially started flowed almost inevitably from the one-sided flavour of the information upon which it was based. Moreover, that information, in my view, did not focus enough upon the physical activities at the site which, I found above, to be the activities most closely linked to the meaning of "project" in s. 18(5). The associate deputy minister, reading the letter from the proponent and the Decision Note, would have been hard pressed to come to any other conclusion than the one he reached.

[52] The Petitioners advise that if they had been consulted, the decision maker would have received from them extensive information to show that there was nothing like a substantial start

at the project site. I expect that information would include what is contained in the voluminous evidence the Petitioners sought to rely on by affidavit in this Court when they argued that the decision was unreasonable. Clearly, if such information had been in the mix, available to the decision maker, the analysis leading to the s. 18(5) determination would have been more even-handed and in depth, and might well have resulted in the opposite outcome.

[53] The Respondents admit there was no consultation with the TRT here. There was not even notice. The Petitioners stumbled upon the s. 18(5) decision months after it was made.

[54] The Respondents admit, as well, based on law which is now well-settled, that the standard of review for whether a duty to consult exists is correctness. Further, the Crown concedes that the threshold for whether the duty is present is a low one.

[55] Understandably, the Petitioners expected consultation. As noted earlier in these reasons, after the TRT appeared in connection with this project in the Supreme Court of Canada, the Court expected that, throughout the permitting, approval and licensing process, the Crown would continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRT.

[56] A starting point in examining the authorities on the duty to consult is found in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, where the Court held that the duty to consult arises when the Crown has knowledge of the potential existence of an aboriginal right or title, and contemplates conduct that might adversely affect it (*Haida*, para. 35).

[57] The Respondents rely primarily on two authorities they say effectively negate a duty to consult in this case.

[58] The first is, *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650. In that case, a large dam was built in the 1950s, which altered water flows so as to affect first nations' historic use of the Nechako River. The dam went into operation long before the legal concept of a duty to consult was born. The lawsuit arose because, in 2007, Rio Tinto entered into a long-term energy supply agreement to sell to BC Hydro, a Crown corporation, power from the dam excess to Rio Tinto's own needs. The first nations, the Carrier Sekani Tribal Council, alleged a duty on the Crown to consult with them in regard to the 2007 agreement. The British Columbia Utilities Commission, whose determination the Supreme Court of Canada

upheld, found that the 2007 agreement did not have the potential to adversely impact the first nations' claims.

[59] The Court found there to be three criteria necessary to the existence of a duty to consult: the Crown's knowledge of potential aboriginal claims; proposed Crown conduct; and, whether the aboriginal claim could be adversely impacted by the Crown conduct which was contemplated.

[60] Because the third criterion was not satisfied in *Rio Tinto*, the duty to consult did not arise.

[61] The Respondents concede the presence of the first two criteria in this case, Crown knowledge of the TRT's claim and the s. 18(5) determination constituting Crown conduct. The Respondents say, however, that the third criterion from *Rio Tinto*, which was absent in that case, is also absent here. I respectfully disagree.

[62] The 2007 agreement in *Rio Tinto* changed nothing in the landscape of the first nations' claim territory. The dam had been in place and operating for decades and would remain so whether the agreement was signed or not. (The particulars on that point are found in *Rio Tinto* at paras. 12-16.)

[63] Here, by contrast, the Crown conduct in finding that the project was substantially started directly affects what may happen at the project site in the TRT's claim territory. In the context of s. 18(5), if a "substantially started" finding is not made, the environmental assessment certificate expires. Without the certificate, the mine cannot be built. The significance of the "substantially started" determination in s. 18(5) is seen in s. 18(6); after a project is substantially started, the certificate remains in effect for the life of the project, subject only to supervisory powers provided later in the *Environmental Assessment Act*.

[64] Analytically speaking, the facts here are the opposite of those in *Rio Tinto* in connection with the third criterion for consultation. Whereas the government conduct in that case could have no physical impact whatever on the claim territory, the government conduct under s. 18(5) could be determinative of whether a project even exists in the claim territory.

[65] The second of the two cases the Respondents rely upon primarily is *Louis v. British Columbia (Minister of Energy, Mines and Petroleum Resources)*, 2013 BCCA 412. In my view, however, *Louis* too should be distinguished.

[66] In that case, a mining company held a valid, existing mining permit in an area subject to a first nation's claim. The litigation did not challenge that permit, which allowed the company to mine on the land indefinitely. The existing permit rights were substantial and the company sought the right to expand, so as to achieve a relatively small increase in the size of the mine. The Crown sought to consult in good faith with the appellant first nation, but consultations failed over a dispute about their scope.

[67] In the petition at bar, the respondent, Chieftain Metals, unlike the mining company in *Louis*, has no rights to build or operate a mine unless it obtains the "substantially started" determination under s. 18(5). Without that, rights it obtained earlier, pursuant to an environmental review in the 1990s, expire. The first nation litigating in *Louis* was already living with a relatively large mine, duly authorized, but complained about the level and scope of consultation the Crown attempted concerning approvals for a modest mine expansion. The Court found, rightly in my respectful view, that the Crown was correct to keep an extended operating life for the mine off the table in consultations when the mining company had previously obtained the right to mine at the site for an indefinite period. In my view, *Louis* cannot be treated as authority for blocking consultation where the decision in question might determine whether a mine will even exist.

[68] The Respondents assert that there was really no role for the Petitioners to play in the s. 18(5) process, and that the process ought to exclude the Petitioners and be restricted to exchanges between the proponent and the Crown on whether there had been a substantial start to the project.

[69] I do not read the authorities as being that restrictive in the duty to consult analysis.

[70] Here, the Petitioners had extensive evidence to offer, directly relevant to the central question, which evidence was entirely missing from the record the decision maker had available to consider in May 2012. Yet the outcome of the process, given the provisions of s. 18(5), read with s. 18(6), could not have affected the Petitioners' interests more directly. Chieftain Metals

asserts that the Petitioners are conflating the project and the s. 18(5) decision, and says that there can be consultation on the project in isolation, but not regarding the s. 18(5) decision itself. Yet without the s. 18(5) decision, there can be no project. What the Petitioners seek here is not repeat consultation on the impact of the project, but limited consultation on the narrow and new question of whether the project can still proceed in the face of so many years of delay, when measured against the time-sensitive provisions of s. 18.

[71] To conclude regarding the Petitioners' third argument, there is a duty to consult here, which I will return to under the section at the end of these reasons addressing remedy.

PETITIONERS' FOURTH ARGUMENT: PROCEDURAL FAIRNESS DICTATES THE PETITIONERS RECEIVING NOTICE AND THE OPPORTUNITY TO MAKE WRITTEN RESPONSE

[72] The Petitioners advance their fourth argument in the alternative to their third argument, which addressed the duty to consult. If I am correct in having found a duty to consult in this case, the Petitioners' fourth argument is unnecessary. I say that because, in my view, the remedy flowing from the Petitioners succeeding on either argument is the same remedy, as addressed below.

[73] As the Supreme Court of Canada found in *Taku River Tlingit*, the Petitioners have been consulted from the beginning with regard to this project. They were consulted prior to the issuance of the original certificate and with respect to the subsequent amendments to that certificate. Above in these reasons is already set out the Supreme Court of Canada's expectation of ongoing consultation with the Petitioners over this project. Part of the long consultation history which has taken place is what both sides refer to as a "government-to-government" agreement between the Petitioners and the Crown addressing a broad range of common interests in the TRT's claim territory.

[74] It was uncharacteristic of the Crown not to notify the Petitioners when the s. 18(5) decision came up, and the Petitioners had a legitimate expectation that they would be notified. They were understandably surprised when they were not.

[75] It appears that the duty to consult aboriginals in accordance with fulfilling the honour of the Crown derived from concepts established in administrative law. The Supreme Court of Canada first noted the link between the duty to consult and administrative law in *Haida*,

above. In determining what constitutes consultation appropriate to the circumstances, the Court observed in *Haida*, at para. 41, that, "regard may be had to the procedural safeguards of natural justice mandated by administrative law." In *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, the Court said, at para. 46, that the "procedural safeguards" mandated by administrative law include not only natural justice but the broader notion of procedural fairness. It will also be recalled, from the *Taku River Tlingit* decision, that the Court found the duty to consult to have been satisfied from the TRT's participation in the administrative process associated with the original project approval certificate.

[76] The Supreme Court of Canada, from all the work it has devoted to the issues of consultation and accommodation, has perhaps replaced administrative law rules with rules particular to consultation and accommodation in the constitutionally-protected realm of aboriginal rights.

[77] I question therefore whether there is still room for an independent administrative law analysis and remedy, as called for by the Petitioners' fourth argument. If I was wrong in finding a duty to consult, and if an administrative law analysis still can stand alone in this context, I find that administrative law protects the Petitioners' interests here. I add that I do not see why an administrative law approach cannot survive in this context, provided it does not clash with what are now well-established tests in the duty to consult analysis.

[78] In my view, the facts here engage procedural fairness principles and in particular the doctrine of legitimate expectations. That doctrine has been expressed as follows by the Supreme Court of Canada in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para. 131:

> The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker, supra*; *Mount Sinai, supra*, at para. 29; Brown and Evans, *supra*, at para. 7:2431. Where the conditions for its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

[79] Having regard to the passage above from *C.U.P.E. v. Ontario*, the Crown's practices, conduct or representations in its dealings with the TRT regarding this project over the past 20 years, have been clear, unambiguous and unqualified in giving the Petitioners a reasonable expectation that they would be consulted before a decision was taken, which was possibly, in this case obviously, contrary to their interests.

[80] Therefore, if administrative law still stands in this context, separate from the duty to consult analysis, I find that the doctrine of legitimate expectations has application and was violated by the Crown not notifying the TRT and giving them the opportunity to provide input before the s. 18(5) decision was reached.

CONCLUSIONS AND REMEDY

[81] In summary, I find first, that the s. 18(5) determination was made by someone who was authorized to make it, the associate deputy minister; second, that the s. 18(5) decision cannot be found to have been unreasonable given the record, such as it was, upon which it was based; third, that there existed here a duty to consult, which was breached; and fourth, in the alternative to the third finding, that if there is still room for an administrative law analysis, the doctrine of legitimate expectations has application here but was not honoured.

[82] The remedy is the same with respect to my finding on both the third and the fourth of the Petitioners' arguments. The determination under s. 18(5) needs to be made again. I remit the question to the minister for her to determine whether the project was substantially started as of December 20, 2012. Before the minister undertakes that task, the Crown shall consult the Petitioners by giving them 45 days' notice in which to present whatever written submissions they select addressing the question of whether the project was substantially started by December 20, 2012.

[83] Those submissions, I expect, will be properly considered in good faith, and taken into account in the s. 18(5) analysis, in keeping with my interpretation of s. 18(5), particularly at paras. 32-41 above.

[84] The Respondents will pay the costs of the Petitioners unless there is some agreement or law precluding that order.

"MACINTOSH J."