COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *William v. British Columbia (Attorney General),* 2019 BCCA 74

Date: 20190301
Docket: CA45557

Between:

Chief Roger William on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and the Tsilhqot'in Nation

Appellants
(Petitioners)

And

Attorney General of British Columbia and the Chief Inspector of Mines

Respondents
(Respondents)

And

Taseko Mines Limited

Respondent
(Respondent)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated August 23, 2018 (*William v. British Columbia*, 2018 BCSC 1425, Victoria Docket S172735).

Counsel for the Appellants:	T. Dickson A. Laskin
Counsel for the Respondents the Attorney General of British Columbia and the Chief Inspector of Mines:	E. Christie L. DeForrest
Counsel for the Respondent Taseko Mines Limited:	M.S. Oulton J.E. Roos
Place and Date of Hearing:	Vancouver, British Columbia November 22 and 23, 2018
Place and Date of Judgment:	Vancouver, British Columbia March 1, 2019

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Fenlon

Summary:

Appeal from order dismissing petition for judicial review alleging the Province breached its duty to consult and accommodate the appellants when it approved an exploratory drilling program in their traditional territories. Held: appeal dismissed. The reasons of the Province's Senior Inspector of Mines show he considered the appellants' position and gave reasons for rejecting it. Accordingly, there was no breach of the procedural duty in this regard. Further, the record shows that the appellants were made aware that the information collected through the exploratory drilling program could be used for other purposes, and the Senior Inspector was entitled to take this into account in balancing the respective positions of the parties. Although the parties have an honest disagreement over whether the project should proceed, the Senior Inspector's decision was within the range of reasonable outcomes.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This appeal arises from a judicial review of the Province's approval of an exploratory drilling program by Taseko Mines Limited ("TML") in traditional Tsilhqot'in territory near Williams Lake. The chambers judge, in reasons indexed at 2018 BCSC 1425, concluded that the Province's decision was reasonable and dismissed Chief Roger William's petition alleging that the Province breached its duty to consult and accommodate the Tsilhqot'in Nation.

[2] Chief William now appeals. He asks this Court to set aside the order and quash the Province's approval. He submits that the chambers judge erred by:

1. concluding the Province did not breach its procedural duty to consult and accommodate by:
    a. misconceiving or failing to seriously consider the Tsilhqot'in's positions; and
    b. failing to provide a reasoned explanation for why the Tsilhqot'in's positions were not accepted;
2. upholding the Province's approval based on a purpose which did not form any part of the consultation (to inform future environmental assessment applications) ("EA Purpose"); and
3. concluding the Province did not breach its substantive duty to consult and accommodate by unreasonably approving the exploratory drilling program based on TML's stated purpose to meet its deadline to substantially start construction of the mine by January 2020, and where there were serious impacts on established Aboriginal rights.

[3] TML and the Province both seek to uphold the chambers judge's decision. They submit the chambers judge did not err in finding that the consultation process was procedurally adequate. Further, they submit the chambers judge did not err in finding the Senior Inspector's decision to issue the permit, with conditions, fell within the range of reasonable outcomes. They submit the consultation process was meaningful, adequate, reasonable and consistent with the honour of the Crown because:

1. the Crown understood and considered the Tsilhqot'in's positions and provided a reasoned explanation for approving the drilling program; and
2. there was no separate duty to "consult and accommodate the Tsilhqot'in in respect to the EA Purpose".

BACKGROUND

[4] Chief Roger William is a former chief of the Xeni Gwet'in First Nations Government, a subgroup of the Tsilhqot'in Nation. The members of the Tsilhqot'in Nation hold proven Aboriginal hunting, trapping and trade rights throughout the area 125 kilometres southwest of Williams Lake, B.C. that includes Teztan Biny (Fish Lake), Y'anah Biny (Little Fish Lake) and Nabas (the surrounding area) (collectively, the "Area"), as a result of their successful claim in *Tsilhqot'in Nation v. B.C.*, 2007 BCSC 1700, aff'd 2012 BCCA 285, rev'd 2014 SCC 44.

[5] In addition to hunting and trapping, the Tsilhqot'in conduct fishing, gathering, and spiritual and ceremonial activities in the Area. Certain members have cabins there, and it is the site of an active cultural school. The Area is also a resting place for a number of the Tsilhqot'in peoples' ancestors. The petitioners say that the Area has become increasingly critical for the Tsilhqot'in in order to maintain their culture and exercise their rights, as other areas of the Tsilhqot'in territory have become more developed. The Crown concedes that the Tsilhqot'in have strong *prima facie* claims to fishing and gathering rights and to pursue ceremonial and spiritual activities in the Area as a place of unique and special significance for the Tsilhqot'in cultural identity and heritage.

[6] TML is a British Columbia mining company which holds a mineral lease and mineral claims in the Area. TML proposes to develop a mine in the Area. The proposed mine is intended to develop the estimated 11 million ounces of gold and four billion pounds of copper deposited in the Area. Exploration and development efforts have been ongoing in the Area for 20 years. If approved, it is anticipated the mine would be in production for approximately 20 years. TML's tenure rights in the Area remain in place until at least 2035.

[7] The proposed plan for mine development was initially known as the Prosperity Project ("Original Project"). Under the Original Project, Teztan Biny would have been drained and filled with waste rock, and Y'anah Biny and Nabas were to be inundated to create the required tailings pond facility.

[8] Before the mine can be built, both the Province and the federal government must do an environmental assessment ("EA"). Both levels of government play a role in relation to the approval of such projects: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 63–68; *Environmental Assessment Act*, S.B.C. 2002, c. 43; *Reviewable Projects Regulation*, B.C. Reg. 370/2002, Part 3; *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19; and *Regulations Designating Physical Activities*, S.O.R./2012-147, s. 16.

[9] The Original Project was subject to separate provincial and federal EAs. The provincial EA for the Original Project concluded in December 2009 with a recommendation that the Province approve

the Original Project. The assessment found that the Original Project would not have significant adverse impacts on Tsilhqot'in hunting and trapping activities, and would have only minimal impacts on Tsilhqot'in fishing rights.

[10] On January 14, 2010, the Province issued an environmental assessment certificate ("EA Certificate") for the Original Project.

[11] On July 2, 2010, the federal government panel examining the Original Project issued its report. The panel concluded that the Original Project would have significant adverse environmental effects on fish and fish habitat, grizzly bears, navigation, the current use of lands and resources for traditional purposes by the Tsilhqot'in, Tsilhqot'in cultural heritage, and on proven and asserted Tsilhqot'in Aboriginal rights. The federal government accepted these findings, and on November 2, 2010, rejected the Original Project under the prior *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

[12] TML then revised the design of the Original Project and re-applied for federal approval ("New Prosperity Project"). The New Prosperity Project would preserve Teztan Biny, but would still inundate Y'anah Biny and much of Nabas. TML re-applied for federal approval and also applied to amend and extend its provincial EA Certificate to bring it into conformity with the New Prosperity Project.

[13] On January 14, 2015, the Province granted a five-year extension of its EA Certificate. The EA Certificate will expire on January 14, 2020 if construction on the mine has not "substantially started" by that date ("Substantial Start Deadline"). Under the current legislation no further extensions may be granted. TML's EA Certificate amendment application is still pending.

[14] On September 29, 2011, TML obtained provincial approval to carry out exploratory drilling work in the Area ("2012 Drilling Program"). Although TML was initially enjoined from commencing that work (reasons indexed at 2011 BCSC 1675), the parties subsequently reached an agreement that allowed the 2012 Drilling Program to proceed with revised permit conditions.

[15] On November 7, 2011, the federal government referred the New Prosperity Project for review by a new independent panel. On October 31, 2013, this panel released a report that found that the New Prosperity Project would have significant adverse effects on the exercise of Aboriginal rights in the Area, in addition to other environmental and technical concerns.

[16] On November 29, 2013, TML filed a judicial review application in Federal Court challenging this panel's process and report.

[17] On February 25, 2014, the federal government rejected the New Prosperity Project ("Second Federal Rejection"). However, an accompanying press release quoted the Minister of the Environment as stating that the federal government "invites the submission of another proposal that addresses the Government's concerns".

[18] TML filed a judicial review application in Federal Court challenging the Second Federal Rejection.

[19] In 2016, TML began preparation of a new exploratory drilling program to gather geological and engineering data in the Area to inform a provincial *Mines Act,* R.S.B.C. 1996, c. 293, permit application ("2016 Drilling Program"). In its current form, the 2016 Drilling Program would cost approximately $15 million and be several times larger in scale than the 2012 Drilling Program, with over twice as many new trails, twelve times as many drill sites and six times the number of test pits. TML submits that the 2016 Drilling Program is necessary in order for the provincial permitting process to be sufficiently advanced to start construction of the mine before the Substantial Start Deadline in the event that federal approval of the project is secured.

[20] The area impacted by the 2016 Drilling Program comprises approximately 0.04% of the Tsilhqot'in's traditional territory as recognized by the Province in the Tsilhqot'in Stewardship Agreement. The 2016 Drilling Program area does not overlap with the Tsilhqot'in title lands.

[21] On July 19, 2016, TML advised the Tsilhqot'in of its intention to apply to the Province for approval of the 2016 Drilling Program. Tsilhqot'in technical staff met with TML on September 12, 2016 to receive more information about the program.

[22] On September 29, 2016, the petitioners advised TML that the Tsilhqot'in opposed the 2016 Drilling Program, particularly on the grounds that the program's objective was to advance a project design that the federal government had already rejected.

[23] On October 13, 2016, TML wrote to the Tsilhqot'in stating that it remained committed to working constructively with the Tsilhqot'in in relation to the 2016 Drilling Program:

> … Please understand that we are not asking for assistance from you in this application. We are instead offering to include you in the planning process so that your specific concerns regarding mutual benefits, environmental and cultural interests, and Aboriginal rights can be addressed at the earliest possible stage.
>
> … [It] remains open to [TML] to make changes to the project design and submit it for further consideration by both federal and provincial governments, should we choose to do so.

[24] On October 17, 2016, TML submitted to the Province a Notice of Work ("NoW") application to carry out the 2016 Drilling Program. Thereafter, TML, the Province and the appellants engaged in a lengthy consultation process. On April 18, 2017, the Tsilhqot'in Nation advised the Province that the NoW application for the 2016 Drilling Program should not be approved.

[25] On July 17, 2017, the Province's Senior Inspector of Mines, Richard Adams, in a 30-page written decision, approved the NoW application for the 2016 Drilling Program, subject to 37 mitigation conditions. In his reasons, Mr. Adams included a detailed review of 17 primary concerns raised by the Tsilhqot'in, as well as an acknowledgment that "the probability of a major mine in the Application area remains speculative". He also noted that the federal decisions did not preclude TML from applying for

a new project design and stated that it would be unreasonable to “subjugate” his decision-making to review processes conducted by others.

[26] On December 5, 2017, TML’s challenges in the Federal Court to the federal panel report and the Second Federal Rejection were dismissed (reasons indexed at 2017 FC 1099; and 2017 FC 1100). TML has appealed those dismissals to the Federal Court of Appeal. As of the date of the hearing of this appeal, the appeal of the Federal Court decisions had not yet been heard.

[27] As matters currently stand, construction cannot begin on the New Prosperity Project because:

a) TML only holds a provincial EA Certificate for the Original Project, and so requires an amended EA Certificate for the New Prosperity Project which has not yet been granted;

b) the federal government has rejected the New Prosperity Project, and such refusal has been upheld by the Federal Court pending appeal; and

c) TML requires a provincial mine construction permit under the *Mines Act*.

[28] A further challenge facing TML is that the EA Certificate, whether amended or not, will lapse in January 2020 if work is not substantially started by that date. If the EA Certificate lapses, TML will need to seek a new provincial EA. Even if the EA Certificate lapses TML’s tenure rights remain in place until at least 2035. As such, barring further developments, TML will remain entitled to take steps to seek approval to build a mine for many more years, regardless of whether the New Prosperity Project is rejected.

[29] On September 17, 2018, Madam Justice Dickson ordered an interlocutory injunction enjoining TML from beginning work on the 2016 Drilling Program, pending resolution of this appeal.

THE CHAMBERS DECISION

[30] On August 23, 2018, the chambers judge dismissed Chief William’s petition for judicial review. He reviewed the Senior Inspector’s decision on a reasonableness standard. He held that the Province’s approval of the NoW for the 2016 Drilling Program fell within the range of reasonable outcomes, such that the honour of the Crown was maintained. He also concluded that the Senior Inspector’s reasons provided adequate justification, transparency and intelligibility for the decision and why the Tsilhqot’in’s positions were not accepted.

[31] The chambers judge recognized that the Province had a duty to consult and accommodate the Tsilhqot’in in relation to its approval of the 2016 Drilling Program. He found that the combined strength of the Aboriginal rights at issue, and the extent of potential interference, put the Tsilhqot’in’s concerns at the “upper end of the spectrum” requiring a deep level of consultation.

[32] The chambers judge held that the Senior Inspector gave due regard to the Tsilhqot’in’s concerns. He noted the Senior Inspector reviewed over 3,400 pages of material. His decision contained 14 pages of analysis of 17 concerns advanced by the Tsilhqot’in and imposed 37 conditions in an effort to specifically accommodate those concerns. The chambers judge found that the

Province's alleged failure to recognize or adequately consider the Tsilhqot'in's concerns was not so flawed that it rendered the process of consultation and accommodation unreasonable.

[33] The chambers judge concluded that the Senior Inspector's treatment of the federal rejection of the New Prosperity Project was reasonable. Rejecting Chief William's assertion that the Senior Inspector was constrained by the status of the federal approval process to reject the 2016 Drilling Program unless and until federal approval was obtained, or to make it conditional on that approval, the chambers judge held that a provincial officer considering an application for an exploratory permit under the *Mines Act* need not defer to a separate assessment made under a federal statute. The chambers judge found this is especially the case where the federal regime examines a different record contemplating a different nature and scope of work (mine construction and operation as opposed to exploratory drilling), and where federal approval is not required for the activities covered by the provincial permit. The chambers judge concluded that Chief William's argument in respect of this point effectively asks the court to re-weigh the evidence to arrive at a different result.

[34] The chambers judge concluded that the Senior Inspector's consideration of TML's stated purpose to meet the Substantial Start Deadline was not so flawed that it rendered his accommodation response outside the range of reasonable outcomes. The chambers judge further found that TML had valid reasons for undertaking the 2016 Drilling Program other than meeting the Substantial Start Deadline, such as to inform future environmental assessment applications. The chambers judge also held that it was reasonable for the Senior Inspector to conclude it was possible for TML to meet the Substantial Start Deadline at the time of his decision. Finally, the chambers judge found that TML's stated urgency was not the determinative factor in the Senior Inspector's analysis, and therefore did not render his decision unreasonable.

STANDARD OF REVIEW

[35] This Court's task on appeal is to determine if the chambers judge properly applied the correct standard of review. In *University of British Columbia v. Lister*, 2018 BCCA 139 at paras. 20–21, this Court explained as follows:

> [20] It is common ground that this Court's task on appeal is to determine if the chambers judge properly applied the correct standard of review of the adjudicator's decision. The standard of review for this Court was described by Groberman J.A. (Garson J.A. concurring) in *Henthorne v. British Columbia Ferry Services Inc*., 2011 BCCA 476 at paras. 74 and 79:
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> > [74] … no deference is owed to the reviewing judge in respect of his or her determination of the appropriate standard of review… Whatever standard applies, however, the question for the reviewing court is whether the tribunal erred in law by making a decision that did not satisfy the standard. The question of whether the tribunal decision met the standard is a question of law on which the reviewing court will not be entitled to deference on appeal.
> >
> > …
> >
> > [79] … even when judicial review is concerned with alleged errors of fact by the tribunal, the issues before the reviewing court will be questions of law. Indeed, almost all judicial review applications concern issues of law. On those issues, an appeal court owes no deference to the chambers judge. In accordance with the criteria set out in *Housen,* then, the appellate court will, for practical purposes be in the same position as it would be

> if it were reviewing the decision of the tribunal directly. Deference will be owed to the chambers judge who conducted the judicial review only in those limited situations where he or she was called upon to make an original finding of fact, or to undertake an original exercise of discretion.
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> [21] See also *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47.

[36] The standard of review in cases of this kind was discussed in *Prophet River First Nation v. British Columbia (Minister of the Environment)*, 2017 BCCA 58 at paras. 43–52. It is common ground that the standard of review is one of reasonableness. In *Prophet River*, Lowry J.A. for the court, described the task as follows:

> [52] … Absent any discrete question of law, it is now for this Court to determine whether the standard of reasonableness was properly applied. This is to be done by assessing whether the process followed in the course of consulting with and accommodating the appellants was, in the circumstances, reasonable having regard for the nature of that standard recognized in law. The question, one of mixed fact and law, is to be considered as if being addressed initially by the judge save that no clear findings of fact made by him are to be altered in the absence of palpable and overriding error.

DISCUSSION

A. Overview

[37] In this case there is no dispute about the existence of a duty to consult. At paras. 67–70 of his reasons, the chambers judge summarized the appropriate legal test. In that regard, he said:

> [67] The duty to consult with Aboriginal peoples and accommodate their interests is a constitutional obligation grounded in the honour of the Crown: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 34; *Haida Nation* at para. 16; *Clyde River* at para. 19.
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> [68] The Crown's duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it": *Haida Nation* at para. 35. There is no dispute that this test was met on the facts of this case.
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> [69] Once the duty to consult is engaged, it is a matter of defining the content of that duty. In *Haida Nation*, the Supreme Court of Canada described this exercise as follows:
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> > [43] ... I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice...
> >
> > [44] At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

[45] Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[46] Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations...

[47] When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in R. v. Marshall, [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

[48] This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in Delgamuukw is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

...

[63] Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[Emphasis added.]

[70] Later decisions have added further content to these principles:

a) The duties of consultation and accommodation apply even in the case of established rights, such as those under a treaty or, as the Province concedes here, those recognized by a judicial decision: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras. 53-57.

b) The cumulative effects of an ongoing project, and historical context, may inform the scope of the duty: *Chippewas* at para. 42. That said, the review proceeding must nonetheless focus on the particular decision at issue, and not serve as a means of challenging earlier decisions: *Louis* at paras. 75-76, 81-83; *Rio Tinto* at paras. 52-54; *Upper Nicola Indian Band v. British Columbia (Environment)*, 2011 BCSC 388 at para. 119.

c) Where meaningful consultation has occurred, a failure to reach an agreement does not breach the obligation of good faith: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director*), 2004 SCC 74 at para. 22. Parties may be unable to reconcile their differences because of an honest but fundamental disagreement over whether the project should be permitted to proceed: *Prophet River* at para. 67.

d) Aboriginal claimants must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart the government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: *Prophet River* at para. 65; *Chippewas* at paras. 58-60.

e) Even if there is adequate consultation, if accommodation is also appropriate, the accommodation outcome can be reviewed separately to determine if it falls within the range of reasonable outcomes from an administrative law perspective: *Beckman* at paras. 15, 48, 81; *Ktunaxa* at para. 82; *Halalt First Nation* at para. 112.

> f) Reasonable accommodation can include consideration of whether the project should proceed at all given its adverse impacts on Aboriginal rights: *West Moberly 2011* at para. 149; *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283 at para. 127; *Clyde River* at para. 32.
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> g) The test for duty to accommodate does not require that the Crown accommodate to the point of undue hardship for the non-Aboriginal population: *Beckman* at para. 81.
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> h) Section 35 of the Constitution guarantees to Aboriginal peoples a process, not a particular result: *Ktunaxa* at para. 79.
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> i) Consultation and accommodation efforts will not be deemed unreasonable merely because immitigable impacts are identified: *Prophet River* at para. 65.

[38] It is common ground that the 2016 Drilling Program would have serious impacts on the Tsilhqot'in's proven Aboriginal rights to hunt and trap in the area. Furthermore, the Crown concedes the Tsilhqot'in hold Aboriginal fishing rights, and agrees they have a strong *prima facie* claim to pursue gathering, ceremonial and spiritual activities in the Area. This combination of the strength of the Aboriginal rights, and the extent of interference, puts this claim at the upper end of the spectrum, and it therefore requires a deep level of consultation.

[39] The crux of the dispute is that the parties are unable to reconcile their differences because of an honest but fundamental disagreement over whether the project should be permitted to proceed. TML's position is that they need to undertake the 2016 Drilling Program so that they can be in a position to commence construction of the mine as required under the EA Certificate prior to the Substantial Start Deadline. TML maintains that if it is unable to commence construction prior to the Substantial Start Deadline, their investment to date of $20 million in the environmental assessment processes would be lost and they would face additional costs of $10–$15 million if they had to apply for a new provincial EA.

[40] The Tsilhqot'in maintain that the certain and substantial interference with their rights that the 2016 Drilling Program would entail should not be allowed when the mine that the program is aimed at advancing remains unauthorized and the Substantial Start Deadline is unlikely to be achieved. In the circumstances, it is their position that the application for the 2016 Drilling Program should be denied as it has no achievable purpose or, in the alternative, any approval should be deferred until the federal government approves the New Prosperity Project, or made conditional on federal government approval.

[41] The Senior Inspector was clearly aware of these competing concerns. The core question is whether given the above circumstances, by approving the 2016 Drilling Program, the Province breached its duty to consult and accommodate and its obligation to act honourably. It must be remembered that the duty to consult and accommodate guarantees a process not a result. As the Supreme Court of Canada explained in *Ktunaxa Nation v. Minister of Forests*, 2017 SCC 54:

> [79] … The duty is to consult and, where warranted, accommodate. Section 35 guarantees a process, not a particular result. The Aboriginal group is called on to facilitate the process of consultation and accommodation by setting out its claims clearly (*Haida Nation*, at para. 36) and as early as possible. There is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. The ultimate obligation is that the Crown act honourably.

[42] Against this background I turn to the stated grounds of appeal which I will deal with in turn.

B. Breach of Procedural Duty

[43] The first two grounds of appeal relate to procedural failures in the consultation and accommodation process, while the third ground concerns an alleged breach of the province's substantive duty to consult and accommodate. I will deal with the process submissions together and then separately consider the alleged substantive breach.

[44] The alleged procedural breaches are three in nature. The first is that the Senior Inspector misconceived or failed to seriously consider the Tsilhqot'in's position that the 2016 Drilling Program should be deferred until, or made conditional on, federal approval of the New Prosperity Project. The second is that he failed to provide a reasonable explanation why the Tsilhqot'in's positions were not accepted. The third goes to the failure to consult on the potential EA Purpose of the application when that purpose did not form any part of the consultations.

[45] Similar submissions were made to the chambers judge who made specific findings rejecting these submissions. He specifically found that the Senior Inspector did give due regard to the petitioners' concerns (at para. 82). In that regard, the chambers judge noted that TML had put forward its own evidence in relation to the petitioners' concerns which the Senior Inspector was also under a duty to consider. As the Senior Inspector stated:

> I have given my full consideration to these matters and made my own independent determinations as to the significance and appropriate weighting of each in making my decision.

[46] The Senior Inspector's decision contains no less than 14 pages of analysis of the various concerns advanced by the petitioners. Evidence that the Senior Inspector did give the petitioners' concerns a reasonable level of consideration is also reflected in the fact that he imposed 37 conditions in an effort to specifically accommodate those concerns. As the chambers judge noted (at paras. 94–95), the Senior Inspector expressly considered the federal government's rejection of the New Prosperity Mine Project a number of times. In this section of his reasons, he also stated:

> I have considered the [Tsilhqot'in's] alternate suggestions together, either that I defer any decision until there has been a change in the Federal position on New Prosperity; or in the event I decide to approve the Application, that the approval be conditional on TML first obtaining the necessary environmental assessment approvals for New Prosperity.

The Senior Inspector thus took account of the Tsilhqot'in's positions. Having done so, I agree with the chambers judge that it is not the court's role on judicial review on a reasonableness standard to re-weigh relevant considerations to arrive at a different result.

[47] The chambers judge summarily rejected the submission that the Senior Inspector had failed to provide a reasonable explanation why the Tsilhqot'in's position was not accepted. In that regard, the chambers judge found that the Senior Inspector's reasons "provided adequate justification, transparency and intelligibility" (at para. 121). He found the Senior Inspector's reasons provided a

satisfactory explanation as to why the petitioners' position was not accepted (para. 122). I agree with his conclusions on this issue.

[48] The question of the failure to consult on the potential EA Purpose of the application raises a somewhat different issue. In regards to this ground, it is suggested that the consultation process was limited to TML's need to meet the January 2020 Substantial Start Deadline. While the record makes clear that was the primary purpose of the application, it is also clear from the material that there were other potential reasons to seek approval of the 2016 Drilling Program. While the federal government had rejected the New Prosperity Project, it had not closed the door on a mine being built, and indeed in its rejection, had invited further proposals. Further, TML in its letter of October 13, 2016, had disclosed to the Tsilhqot'in that the technical information obtained from the 2016 Drilling Program might be used in regards to a subsequent mine application.

[49] It is important to note that this potential use of the information was brought forward in response to the Tsilhqot'in's position that it was not appropriate to approve the 2016 Drilling Program because the mine could not be built because of the Second Federal Rejection. While that rejection certainly posed a significant hurdle that TML would have to overcome before any mine could be constructed, it did not mean that a subsequent mine proposal could not obtain federal approval. While the possible use of the 2016 Drilling Program in future EA proceedings was clearly collateral, it was a matter the Senior Inspector was entitled to take into account in balancing the respective positions of the parties.

[50] For the above reasons, I would not accede to the petitioners' procedural objections to the Senior Inspector's approval.

C. The Substantive Decision

[51] The Tsilhqot'in also challenge the substantive decision to approve the 2016 Drilling Program on the grounds that approval of the program in the circumstances of this case did not fall within the range of reasonable outcomes, which may include, in some cases, rejection or deferral of a proposed activity.

[52] I agree with the Tsilhqot'in that in circumstances of this case it was open to the Senior Inspector to reject the 2016 Drilling Program application. The Senior Inspector himself recognized that rejection was one of the options that was open to him. Had he rejected the proposal, such a decision may well have been reasonable.

[53] That, however, does not mean that the approval of the 2016 Drilling Program was unreasonable. At the time of the application it was still possible for TML, if federal approvals were forthcoming, to commence construction before the Substantial Start Deadline. While the Senior Inspector knew that the federal authorities may never approve the mine, he was also aware that some $15–20 million that had been expended to date in obtaining the provincial EA Certificate would be lost if the mine was not commenced by January 2020. He also knew that TML's tenure rights in the Area remained in place until at least 2035, and information gathered in the course of the 2016 Drilling

Program could be used to make future applications if the New Prosperity Project did not obtain federal approval.

[54] It cannot be said in the circumstances of this case that the decision made by the Senior Inspector was unreasonable. He was charged with making the decision and the decision he made was within the range of reasonable outcomes. I would not accede to this ground of appeal.

[55] The issue on this appeal is whether the decision of the Senior Inspector was reasonable. As set out in *Prophet River*, our role is limited to determining whether the chambers judge properly applied the standard of reasonableness. In my view, he did.

[56] In this case, reconciliation cannot be achieved because of an honest disagreement over whether the project should proceed. The process of consultation was adequate and reasonable in the circumstances. The fact that the Tsilhqot'in position was not accepted does not mean the process of consultation was inadequate or that the Crown did not act honourably.

[57] I would dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Madam Justice Fenlon"