

DEC 17 2013

S-139404  
No. \_\_\_\_\_

Vancouver Registry



IN THE SUPREME COURT OF BRITISH COLUMBIA

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

PETITION TO THE COURT

ON NOTICE TO:

Minister of Environment  
Province of British Columbia  
PO Box 9047 Stn Prov Govt  
Victoria, BC  
V8W 9E2

Executive Director  
British Columbia Environmental Assessment Office  
1st Floor 836 Yates St  
PO Box 9426 Stn Prov Govt  
Victoria, BC  
V8W 9V1

Attorney General of British Columbia  
PO Box 9044 Stn Prov Govt  
Victoria, BC  
V8W 9E2

Chieftain Metals Inc.  
2 Bloor Street West  
Suite 2000  
Toronto, ON  
M4W 3E2

This proceeding has been started by the petitioners for the relief set out in Part 1 below.

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

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

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

**Time for response to petition**

A response to petition must be filed and served on the petitioners,

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is:

Supreme Court of British Columbia  
800 Smithe Street  
Vancouver, BC  
V6Z 2E1

(2) The ADDRESS FOR SERVICE of the petitioners is:

Randy Christensen and Lara Tessaro  
c/o Ecojustice Canada  
214 – 131 Water Street  
Vancouver, BC  
V6B 4M3  
Fax: 604-685-7813  
Email: [rchristensen@ecojustice.ca](mailto:rchristensen@ecojustice.ca) and [ltessaro@ecojustice.ca](mailto:ltessaro@ecojustice.ca)

(3) The name and office address of the petitioners' lawyers is:

Randy Christensen and Lara Tessaro  
Counsel for the Petitioners  
c/o Ecojustice Canada  
214 – 131 Water Street  
Vancouver, BC  
V6B 4M3

Tel: 604-685-5618 ext 245 and ext 531

Fax: 604-685-7813

Email: [rchristensen@ecojustice.ca](mailto:rchristensen@ecojustice.ca) and [ltessaro@ecojustice.ca](mailto:ltessaro@ecojustice.ca)

### **Claim of the Petitioners**

#### **Part 1: ORDERS SOUGHT**

1. A declaration that the Respondent Executive Director of the British Columbia Environmental Assessment Office ("the Respondent Executive Director") does not have the authority or jurisdiction to make any determination under s. 18(5) of the *Environmental Assessment Act*, SBC 2002, c 43 ("*Environmental Assessment Act*").
2. An order in the nature of *certiorari* quashing and setting aside the purported determination of the Respondent Executive Director under s. 18(5) of the *Environmental Assessment Act*.
3. A declaration that, in absence of any determination made by December 13, 2012 by the Respondent Minister of Environment ("the Respondent Minister") that the proposed Tulsequah Chief Mine Project had been substantially started, the environmental assessment certificate has expired by operation of law.
4. A declaration that, in the absence of a valid environmental assessment certificate, the Respondent Chieftain Metals Inc. ("the Respondent Chieftain") may not lawfully construct or operate all or part of the facilities of the proposed Tulsequah Chief Mine Project.
5. A declaration that, in the absence of a valid environmental assessment certificate, all approvals issued to date under other enactments permitting the Respondent Chieftain to construct or operate the Tulsequah Chief Mine Project in whole or in part are void and of no legal effect.

6. An order in the nature of prohibition that, in the absence of a valid environmental assessment certificate, the Respondent Minister is prohibited from issuing any further approvals issued under other enactments permitting the Respondent Chieflain to construct or operate the Tulsequah Chief Mine Project in whole or in part.
7. In addition to the relief sought above at paragraphs 1-6, which relief arises from the lack of jurisdiction of the Respondent Executive Director under s. 18(5) and the failure of the Respondent Minister to exercise his jurisdiction under s. 18(5) in the time required, a declaration that the proposed Tulsequah Chief Mine Project was not substantially started prior to December 13, 2012.
8. A declaration that the Respondent Minister was required to consult with and, where necessary, accommodate Petitioner Taku River Tlingit First Nation ("Taku River Tlingits") prior to making a determination under s. 18(5) of the *Environmental Assessment Act*.
9. A declaration that the Provincial Crown has failed to discharge its legal and constitutional duties to consult in good faith and to endeavour to seek accommodations with the aboriginal rights and title interests of the Taku River Tlingits.
10. A declaration that the Respondent Minister breached his duty of procedural fairness to the Taku River Tlingits.
11. Should the court not conclude that the environmental assessment certificate has expired by operation of law, then strictly in the alternative to the relief sought above at paragraphs (3) to (7), an order referring the determination of whether the proposed Tulsequah Chief Mine Project had been substantially started as of December 12, 2012 to the Respondent Minister, including with the direction that the Respondent Minister is required to consult with and, where necessary accommodate the Taku River Tlingits.
12. An interlocutory order directing the Respondent Executive Director to file with the Court the administrative record that he considered and relied on in purporting to make a s. 18(5) determination on May 30, 2012 and any document comprising or reporting that determination.
13. Costs of this Petition.
14. Such further and other relief as this Honourable Court may deem just.

**The grounds for the relief are:**

15. The Respondent Executive Director lacked the authority or jurisdiction to determine if the proposed Tulsequah Chief Mine Project had been substantially started under s. 18(5). Jurisdiction to make a determination under s. 18(5) rests solely with the Respondent Minister.
16. The Respondent Executive Director, through his delegate, intentionally misrepresented that he had the jurisdiction to make this s. 18(5) determination, knowingly misled the Taku River Tlingits, and thus acted in bad faith and failed to uphold the honour of the Crown.
17. The Respondent Minister failed or declined to make any determination under s. 18(5) of whether the proposed Tulsequah Chief Mine Project had been substantially started. Absent that determination being made by the Respondent Minister by December 13, 2012, the environmental assessment certificate expires by operation of law under s. 18(5).
18. The proposed Tulsequah Chief Mine Project was not substantially started prior to December 13, 2012 and, in addition to being made without having jurisdiction to do so under s. 18(5), the determination of the Respondent Executive Director that the project had been substantially started was unreasonable, based on inaccurate information provided by the Respondent Chieftain, and based upon an incorrect interpretation of provisions in the *Environmental Assessment Act*.
19. In the absence of a valid environmental assessment certificate, the Respondent Chieftain may not lawfully construct or operate all or part of the facilities of the proposed Tulsequah Chief Mine Project, pursuant to s. 8(1) of the *Environmental Assessment Act*. Moreover, existing and future approvals permitting construction or operation of the proposed Tulsequah Chief Mine Project, in whole or in part, are void and of no legal effect, pursuant to ss. 9(1) and (2) of the *Environmental Assessment Act*.
20. The Respondent Minister or Respondent Executive Director or both failed to meaningfully consult and accommodate the Taku River Tlingits and thus breached the Provincial Crown's duty to consult, including by:
  - (i) failing to provide any information to the Taku River Tlingits to permit them to understand, assess and make submissions regarding the potential impacts of the Respondent Chieftain's request for a determination under s. 18(5) on their rights, title, and interests and their use of lands, waters, and resources; and

- (ii) failing to discuss with the Taku River Tlingits or offer any form of meaningful accommodation with respect to the determination under s. 18(5).
21. The Respondent Minister or the Respondent Executive Director or both erred in law and acted beyond their jurisdiction by making a determination under s. 18(5) without adequately informing themselves of the existence, nature and scope of the aboriginal title and rights of the Taku River Tlingits.
22. The Respondent Minister or the Respondent Executive Director or both owe a duty of procedural fairness to the Taku River Tlingits and breached this duty of fairness, including by:
- (i) failing to provide the Taku River Tlingits with notice of the s. 18(5) determination under the *Environmental Assessment Act*;
  - (ii) failing to provide the Taku River Tlingits with any opportunity to be heard in relation to the s. 18(5) determination;
  - (iii) failing to provide adequate written reasons to the Taku River Tlingits; and
  - (iv) breaching the Taku River Tlingits' legitimate expectation that they would be notified and given an opportunity to be heard on any s. 18(5) determination.

## **Part 2: FACTUAL BASIS**

### **The Parties to this Proceeding**

23. The Taku River Tlingits are an aboriginal people within the meaning of s. 35 of the *Constitution Act, 1982*, and a band within the meaning of the *Indian Act*, RSC 1985, c I-5.
24. The Petitioner John D. Ward was elected as the Taku River Tlingits' Spokesperson under the Taku River Tlingit First Nation Constitution Act 1993, as amended. He makes this application on behalf of himself and all other citizens of the Taku River Tlingits.
25. The Taku River Tlingits' main community and residential reserves are in northwestern British Columbia, within and near Atlin.

26. The Respondent Minister is assigned statutory powers and duties under various provisions of the *Environmental Assessment Act*.
27. In particular, the Respondent Minister is assigned the statutory power, pursuant to s. 18(5) of the *Environmental Assessment Act*, to determine, in his reasonable opinion, if a project has been substantially started. The Respondent Minister is the sole person on whom the Legislature has conferred a statutory power of decision under s. 18(5).
28. The Respondent Executive Director is appointed by the Lieutenant Governor in Council to oversee the operations of the British Columbia Environmental Assessment Office (“Environmental Assessment Office”) pursuant to s. 3 of the *Environmental Assessment Act*. The Respondent Executive Director is assigned various statutory powers and duties under the *Environmental Assessment Act*.
29. The Respondent Executive Director is not assigned any statutory power of decision under s. 18(5) of the *Environmental Assessment Act* to determine if a project has been substantially started.
30. In recent years, the person serving as the Respondent Executive Director also has been granted the second title of Associate Deputy Minister. This second title is not prescribed by the *Environmental Assessment Act* or by any other law.
31. The Respondent Chieftain Metals Inc. (“Respondent Chieftain”) is the current proponent of the proposed Tulsequah Chief Mine Project and the current holder of the environmental assessment certificate for the Project.
32. After the former proponent and certificate holder, Redfern Resources Inc., went bankrupt, the Respondent Minister consented to the disposition of both the proposed Tulsequah Chief Mine Project and its environmental assessment certificate to the Respondent Chieftain in August 2010. The environmental assessment certificate was amended to show the Respondent Chieftain as its holder on November 1, 2010.

#### **Taku River Tlingit territory and the proposed Tulsequah Chief Mine**

33. The Respondent Chieftain proposes to construct and operate the Tulsequah Chief Mine Project, a proposed metal mine.
34. The proposed Tulsequah Chief Mine Project, if built, would be located on the Tulsequah River just above its confluence with the Taku River, approximately 100 km south of Atlin, British Columbia and 30 km upstream from the border with Alaska.

35. The Taku River watershed is an 18,000 square kilometre, remote, pristine wilderness area of northwestern British Columbia and southeast Alaska. It is the largest pristine watershed on the Pacific shore of the Western Hemisphere.
36. The proposed Tulsequah Chief mine Project and its accessories are or would be within the heartland of the Taku River Tlingits' traditional territory. Their traditional territory encompasses the southern part of the Yukon River watershed (known as the Atlin Plateau) and the whole of the Taku River watershed. There is no treaty respecting the area. The Taku River Tlingits' aboriginal rights and title there have never been surrendered or extinguished. The area is presently the subject of treaty negotiations between the Taku River Tlingits and the governments of Canada and British Columbia.

#### **The environmental assessment process for the proposed Tulsequah Chief Mine**

37. The Project has long been a matter of significant controversy and public concern. The Taku River Tlingits have long expressed serious concerns about the Project and the merits of its environmental assessment.
38. The Project was proposed to the Environmental Assessment Office in 1995, by the previous proponent Redfern Resources Inc.
39. After a controversial environmental assessment process, the then-Minister of Environment, Lands and Parks and the Minister of Energy and Mines granted a project approval certificate on March 19, 1998.
40. In February 1999, the Taku River Tlingit First Nation commenced a judicial review proceeding challenging the project approval certificate, which matter was ultimately determined by the Supreme Court of Canada in November 2004. The Supreme Court held that the Province was required to consult meaningfully with the Taku River Tlingits in the decision-making process surrounding the project approval application for the Project, and that it had done so.
41. On December 12, 2002, in response to decisions of the British Columbia Supreme Court and Court of Appeal, the Respondent Minister issued a new environmental assessment certificate for the Project to Redfern Resources, Inc. for a period of five (5) years.
42. By September 2007, the Project had not been substantially started. On February 23, 2007 and September 3, 2007, Redfern Resources Inc. applied, under s. 18(2) of the

*Environmental Assessment Act*, to the Respondent Executive Director for the maximum five year extension of time to substantially start the Project.

43. In the summer of 2007, the Taku River Tlingits were notified by the Environmental Assessment Office about the Respondent Executive Director's anticipated decision under s. 18(4) regarding the time extension application, and their comments were requested. The Environmental Assessment Office has a practice of seeking comments from potentially affected First Nations on time extensions under s. 18(4).
44. On September 20, 2007, pursuant to s. 18(4)(a) of the *Environmental Assessment Act*, the Respondent Executive Director granted Redfern's request and extended the deadline in the environmental assessment certificate to December 12, 2012.

**The Respondent Executive Director's purported decision under s. 18(5)**

45. On April 19, 2012, the Respondent Chieftain wrote a letter to the Environmental Assessment Office, to the attention of Derek Sturko, Executive Director and Associate Deputy Minister, requesting a determination that the Project had been substantially started ("April 19, 2012 Request Letter"). The April 19, 2012 Request Letter provided the Respondent Chieftain's submissions and information in support of that opinion.
46. On June 12, 2012, the Environmental Assessment Office replied to the Respondent Chieftain, advising that the Respondent Executive Director had determined on May 30, 2012 that the Project has been substantially started ("June 12 Decision Letter").
47. The June 12, 2012 Decision Letter does not provide any of the Respondent Executive Director's reasons for his purported s. 18(5) determination. Nor does it disclose what records were before him and that he considered in coming to his determination. The January 25, 2013 Reasons Letter was not copied to the Respondent Minister.
48. The Respondent Executive Director's decision was not disclosed publically for more than four months after it was made. On October 15, 2012, the Environmental Assessment Office posted a copy of the June 12, 2012 Decision Letter to the Environmental Assessment Office's online registry ("EAO Registry")
49. On or about October 30, 2012, the Taku River Tlingits learned about the Respondent Executive Director's decision through the EAO Registry. At no time did the Respondent Executive Director or the Minister bring this decision to the specific attention of the Taku River Tlingits.

50. The Respondent Executive Director has not yet released publically the April 19, 2012 Request Letter by the Respondent Chiefstain.
51. On November 01, 2012, the Taku River Tlingits brought their concerns with this decision before the TRTFN/BC Government to Government (G2G) Forum seeking an explanation and a collaborative approach to the Environmental Assessment Office. On November 09, 2012, in response, British Columbia's G2G representatives, advised during a TRTFN/BC G2G Co-Chair's telephone call that they had spoken to the Environmental Assessment Office and that, for various reasons, they supported its decision that the project had been substantially started.
52. On January 4, 2013, two months after learning about the decision, counsel for the Taku River Tlingits wrote to the Respondent Executive Director stating the Taku River Tlingit's position that the project was not substantially started and requesting the reasons for his s. 18(5) decision.
53. On January 25, 2013, a delegate of the Respondent Executive Director replied to the Taku River Tlingits, enclosing the April 19, 2012 Request Letter ("the January 25, 2013 Reasons Letter") The January 25, 2013 Reasons Letter provided the criteria that were said to have been relied upon. However, the Respondent Executive Director declined to explain how those criteria were thought to apply to the facts of this Project and did not respond to the Taku River Tlingit's position that the Project was not substantially started.

**The Respondent Executive Director's purported s. 18(5) decision failed to uphold the honour of the Crown**

54. The January 25, 2013 Reasons Letter intentionally and knowingly misrepresented the Environmental Assessment Office's official position on who has the jurisdiction to make s. 18(5) determinations.
55. In the January 25, 2013 Reasons Letter, the delegate of the Respondent Executive Director advised the Taku River Tlingits that the Executive Director "ultimately determines" whether a proponent has substantially started a project, and that the Environmental Assessment Office makes a recommendation to the Executive Director.
56. The Respondent Executive Director's January 25, 2013 Reasons Letter misstated the Environmental Assessment Office's published policy guidance, in force currently and at the time of the purported s. 18(5) determination on May 30, 2012. That published policy guidance states that the Minister of Environment "ultimately determines" whether a

proponent has substantially started a project, and that the Environmental Assessment Office makes a recommendation to the Minister.

57. The Respondent Executive Director, through his delegate, intentionally misrepresented the Environmental Assessment Office's official position as published in policy guidance, and knowingly misstated the law.
58. The January 25, 2013 Reasons Letter was intended to mislead and did mislead the Taku River Tlingits, and was issued in bad faith.
59. The June 12, 2012 Decision Letter is the only record documenting any s. 18(5) determination that is currently posted on the EAO Registry.
60. Information posted on the EAO Registry suggests that the Respondent Minister has never made any similar determinations under s. 18(5). It appears that the Respondent Executive Director has an unlawful practice of making determinations under s. 18(5), despite being aware that he lacks the jurisdiction to do so.

**The Respondents did not notify or consult the Petitioners about the s. 18(5) decision**

61. The BC Supreme Court, BC Court of Appeal and the Supreme Court of Canada have all recognized that the Taku River Tlingits have a strong claim of rights and title that could be impacted by the Tulsequah Chief Mine, and that this obliges the Provincial Crown to consult the Taku River Tlingits.
62. However, the Taku River Tlingits were not advised that Respondent Chieftain had requested a determination under s. 18(5) of the *Environmental Assessment Act*. Neither the Respondent Executive Director nor the Respondent Minister consulted or accommodated the Taku River Tlingits about this request for a determination.
63. Neither the Respondent Executive Director nor the Respondent Minister advised the Taku River Tlingits that a decision had been made under s. 18(5) of the *Environmental Assessment Act*.
64. The Taku River Tlingits have specific, relevant information regarding the construction status of the Project. They dispute that the Project has been substantially started or had been substantially started as of May 30, 2012. Had the Taku River Tlingits been consulted before the s. 18(5) determination was made, they would have provided information showing that some works and activities relied on by the Respondent

Chieftain in its April 19, 2012 Request Letter, and later relied on by the Respondent Executive Director, have not been undertaken or do not form part of the Project.

65. The Respondent Executive Director's purported decision under s.18(5) had the effect of granting the Respondent Chieftain an unlimited extension of time in which to construct and operate the Project, beyond the time period originally permitted under the environmental assessment certificate.
66. The Taku River Tlingits' interests, rights and title are adversely impacted by any decision to extend the period of time in which the Project may be constructed and operated.
67. The Taku River Tlingits have had ongoing concerns with the proposed Tulsequah Chief mine Project and are troubled by the impact that this Project—should it ever go forward—would have on their traditional territory.
68. Because of these concerns, the Taku River Tlingits wrote to the Respondent Executive Director's delegate, Garry Alexander, Project Assessment Director/Project Lead for the Environmental Assessment Office, on January 4, 2013 seeking information regarding the factors and developments that the Respondent Executive Director relied on when purporting to make this determination and expressing the Taku River Tlingit's view that the project was not substantially started.
69. The Project is within the heartland of the Taku River Tlingits' traditional territory. The area that would be traversed and impacted by the proposed access road is endowed with significant populations of large mammals, and is the part of the territory where there is the most concentrated pattern of Tlingit use and occupation, particularly for the harvesting of wildlife and fish, and also for cultural and spiritual activities. Currently that area is in a pristine wilderness condition, as is almost the whole of the Taku Watershed.
70. The Taku River Tlingits have exercised and asserted aboriginal rights including the right to harvest and manage fish, marine resources, to hunt and manage wildlife and to manage forests and water.
71. The Taku River Tlingits' traditional territory includes countless numbers of traditionally used sites including archaeological sites and fish weirs.
72. The Taku River Tlingits have asserted aboriginal title to the area.

73. In attempting to persuade the delegate of the Respondent Executive Director that the Project was substantially started, the Respondent Chieftain presented information in its April 19, 2012 Request Letter. No other information was solicited or considered by the Respondent Executive Director, including any information from the Taku River Tlingits.
74. Some of the information presented by the Respondent Chieftain to the Respondent Executive Director in the April 19, 2012 Request Letter, and subsequently relied on by the Respondent Executive Director, was incorrect.
75. Some of the physical works and activities relied on by the Respondent Chieftain in its April 19, 2012 Request Letter, and subsequently relied on by the Respondent Executive Director, and that were asserted by the Respondent Chieftain to be elements or parts of the Project, had not in fact been started or undertaken.
76. Some of the physical works and activities relied on by the Respondent Chieftain in its April 19, 2012 Request Letter, and subsequently relied on by the Respondent Executive Director, are not actually elements or parts of this Project. Rather, these physical works and activities are unrelated to, and did not form part of the Project as defined and regulated under the *Environmental Assessment Act*.
77. Some of the physical works and activities relied on by the Respondent Chieftain in its April 19, 2012 Request Letter, and subsequently relied on by the Respondent Executive Director, including those related to ongoing exploration activities, would have been undertaken regardless of the Project.
78. When considered either individually or cumulatively, the physical works and activities relied on by the Respondent Chieftain in its April 19, 2012 Request Letter, and subsequently relied on by the Respondent Executive Director, some of which physical works and activities had not started and some of which are not part of the Project, did not amount to significant or important steps to develop the overall Project.
79. Rather, the few physical works and activities that had in fact been started or undertaken as of May 30, 2012, and that were in fact elements or parts of the Project, were ancillary, secondary or temporary in nature.
80. Some of the matters relied on by the Respondent Chieftain in its April 19, 2012 Request Letter are not physical works and activities, but rather permitting approval or investment activities.

81. The Respondent Chieftain's failure to substantially start its Project, as set out in the preceding paragraphs, continued through to December 12, 2012, and continues to the present day.

### **Part 3: LEGAL BASIS**

#### ***The Environmental Assessment Act applies to the Tulsequah Chief Mine Project***

82. The *Environmental Assessment Act* has applied to the Project since December 30, 2002, the date that the legislation came into force.
83. Pursuant to s. 51(8)(a), the environmental assessment certificate for the Project, originally issued under predecessor legislation, is deemed to have been issued under the *Environmental Assessment Act*.

#### ***The Minister of Environment has sole jurisdiction to determine if a project has been substantially started under s. 18(5) of the Environmental Assessment Act***

84. The Respondent Minister is the sole person on whom the Legislature has conferred a statutory power of decision under s. 18(5). Likewise, the Respondent Minister is the sole person who has the power to determine if a project has been substantially started under other related provisions of the *Environmental Assessment Act* [ss. 6, 18(1), 18(6) and 37].
85. The Respondent Executive Director is not assigned any statutory power of decision under s. 18(5) of the *Environmental Assessment Act* to determine if a project has been substantially started, nor under various related provisions [ss. 6, 18(1), 18(6) and 37].
86. By contrast, the Legislature has expressly assigned, in ss. 18(3) and (4), to both the minister and the executive director the duty to review an application to extend an environmental assessment certificate and the power to extend that deadline.
87. The Respondent Executive Director lacked the jurisdiction to make any determination or reach any opinion under s. 18(5) of the *Environmental Assessment Act*. The Respondent Executive Director's purported decision under s. 18(5) is without jurisdiction, incorrect, and contrary to law.
88. Only the Respondent Minister had the jurisdiction to make a statutory determination under s. 18(5). The Respondent Minister failed or declined to exercise his statutory power of decision, and consequently lost jurisdiction to reach an opinion under s. 18(5).

**Any determination that the Project has been substantially started is unreasonable at law**

89. Even had the Respondent Minister, as the correct decision-maker, made the statutory determination under s. 18(5) on May 30, 2012, a determination at that date that the Project had been substantially started would be unreasonable and based upon an incorrect interpretation of provisions in the *Environmental Assessment Act*.
90. In the specific alternative to the preceding paragraph, the determination by the delegate of the Respondent Executive Director, on May 30, 2012, that the Project had been substantially started was unreasonable and based upon an incorrect interpretation of provisions in the *Environmental Assessment Act*.
91. As of the present day, it cannot reasonably and lawfully be concluded by the Respondent Minister that the Project has been substantially started.
92. In the specific alternative to the preceding paragraph, as of the present day, it cannot reasonably and lawfully be concluded by the Respondent Executive Director that the Project has been substantially started.

**The Environmental Assessment Certificate expired by law on or about December 13, 2012**

93. An environmental assessment certificate must specify a deadline, at least three (3) years and not more than five (5) years after the issue date of the certificate, by which time the proponent, in the reasonable opinion of the minister, must have substantially started the project [s. 18(1)]. However, the holder of a certificate may apply in writing to the executive director for an extension of the deadline specified in the environmental assessment certificate [s. 18(2)], and either the minister or the executive director may grant that extension [ss. 18(3) and (4)].
94. Subsection 18(4) provides that the minister or the executive director may only extend the deadline specified in an environmental assessment certificate on one occasion only, for not more than five (5) years. In September 2007, the Respondent Executive Director extended the deadline in the environmental assessment certificate to December 12, 2012.
95. Pursuant to s. 18(5), if a proponent is granted an extension of the deadline specified in the environmental assessment certificate under s. 18(4), then after the period of that extension, if the project has not yet been substantially started, in the reasonable opinion of the minister, the environmental assessment certificate expires.

96. After the December 12, 2012 deadline passed, the Respondent Minister failed or declined to reach the reasonable opinion that the Project had been substantially started.
97. As the Respondent Minister failed or declined to reach any opinion that the Project had been substantially started of December 12, 2012, the environmental assessment certificate expired by the operation of law.

**The absence of a valid environmental assessment certificate invalidates other approvals for the Project**

98. As there is no valid environmental assessment certificate, pursuant to s. 8(1) of the *Environmental Assessment Act*, the Respondent Chieftain may not lawfully construct or operate all or part of the facilities of the Project
99. As there is no valid environmental assessment certificate, pursuant to s. 9(1) of the *Environmental Assessment Act*, the Respondent Minister is prohibited from issuing any further approvals under an enactment permitting the Respondent Chieftain to construct or operate all or part of the facilities for the Project.
100. As there is no valid environmental assessment certificate, pursuant to s. 9(2) of the *Environmental Assessment Act*, any and all approvals issued to date that permit the Respondent Chieftain to construct or operate all or part of the facilities for the Project are void and without legal effect.

**The Crown Respondents Breached their Constitutional Duty to Consult**

101. The provincial Crown owes a constitutional duty and a duty of good faith to consult with, and where appropriate, accommodate aboriginal peoples when contemplating conduct which may adversely affect asserted aboriginal title or rights or both. This duty to consult and accommodate arises when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that may adversely affect it.
102. The Crown's assertion of sovereignty and the *de facto* control of land and resources that were formerly in the control of aboriginal people form the foundation of the Crown's duty of honourable conduct. The honour of the Crown is always at stake in its dealings with aboriginal people and it is this honourable obligation that gives rise to the duty to consult with aboriginal people in a process of fair dealing and reconciliation regarding aboriginal and treaty rights.

103. The duty to consult is also derived from Canada's Constitution. Section 35(1) of the *Constitution Act*, 1892 states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
104. The Crown is required to deal with First Nations in good faith which means the Crown must deal with the Taku River Tlingits with the intention of substantially addressing the First Nation's concerns before decisions are made.
105. The Respondent Minister and Respondent Executive Director failed to discharge the provincial Crown's legal duty to consult with and, where necessary, to accommodate the Taku River Tlingits, including failures to:
- a) to notify or provide full information to the Taku River Tlingits about the Respondent Chieftain's request for a determination pursuant to s. 18(5) of the *Environmental Assessment Act* and potential impacts;
  - b) to consult with the Taku River Tlingits with the intention of substantially addressing their concerns about the impacts and potential impacts of the s. 18(5) determination;
  - c) where necessary, to accommodate the Taku River Tlingits' concerns; and
  - d) such other failures as Counsel for the Petitioners may advise.

**The Crown Respondents Breached their Duty of Procedural Fairness**

106. The Respondent Minister or the Respondent Executive Director or both owe a duty of procedural fairness to the Taku River Tlingits.
107. The Respondent Minister or the Respondent Executive Director or both breached the duty of procedural fairness owed to the Taku River Tlingits by:
- a) failing to provide the Taku River Tlingits with any notice of or information regarding the Respondent Chieftain's request for a s. 18(5) determination under the *Environmental Assessment Act*;
  - b) failing to provide the Taku River Tlingits with any opportunity to be heard;
  - c) failing to provide adequate written reasons to the Taku River Tlingits; and
  - d) such other failures as Counsel for the Petitioners may advise.

108. In addition, the Taku River Tlingits had a legitimate expectation that they would be notified and given an opportunity to comment about any application for a decision about whether the Project had been substantially started under s. 18(5). In May 2007, the Respondent Executive Director had notified the Taku River Tlingits of the application for a decision about whether the Project, having not been substantially started, should be granted a time extension under s. 18(4), and had provided the Taku River Tlingits with an opportunity to make written comments.
109. The Taku River Tlingits view the s. 18(5) decision as having a potentially greater impact than the s. 18(4) decision, and they expected to be notified and provided with an opportunity to make written comments on the s. 18(5) decision, before December 12, 2012, when the environmental assessment certificate expired. Before the December 12, 2012 deadline, contrary to the legitimate expectations of the Taku River Tlingits, the Respondent Executive Director purported to make the s. 18(5) decision without any notice to them.

### ***The Judicial Review Procedure Act***

The Petitioners will rely upon:

110. Section 2 of the *Judicial Review Procedure Act*, RSBC 1996, c 241 ("*JRPA*") empowers the court to grant relief in the nature of certiorari, mandamus or prohibition; and to order a declaration or an injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.
111. In the alternative, should the court not conclude that the environmental assessment certificate has expired, section 5 of the *JRPA* empowers the court to direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specific matter, the whole or any part of a matter to which the application relates. In directing reconsideration, the court must advise the tribunal of its reasons and give any directions that the court thinks appropriate.
112. Section 17 of the *JRPA* empowers the court, on an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision, to direct that the record of the proceeding, or any part of it, be filed in the court.

### ***The Supreme Court Civil Rules***

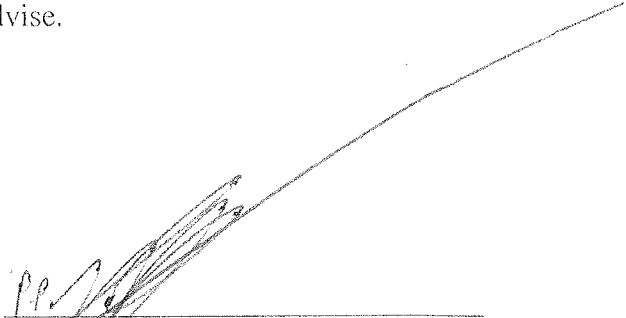
The Petitioners will also rely upon:

113. The Supreme Court Civil Rules generally, and particularly Rule 16.

**Part 4: MATERIAL TO BE RELIED ON**

1. The Affidavit of Tony Pearce, to be affirmed.
2. The Affidavit of John Ward, Spokesperson for the Taku River Tlingit, to be affirmed.
3. The Affidavit of Tina Brooks, Tulsequah Chief Project Lead, Taku River Tlingit First Nation, to be affirmed.
4. Other affidavits as Counsel for the Petitioners may advise.

The December 17, 2013



---

Randy Christensen  
Solicitor for the Petitioners