

Subject: FW: Baptiste v BC - Reply Submissions

Attachments: Reply_14-July-2009.pdf

From: Jay Nelson [mailto:jnelson@woodwardandcompany.com]

Sent: Friday, April 30, 2010 3:08 PM

To: Prosperity Review [CEAA]

Cc: Sean Nixon

Subject: Baptiste v BC - Reply Submissions

Please find attached, for inclusion in the Panel's record, the reply submissions of the Plaintiff in *Baptiste v. Taseko Mines Ltd* et al. Counsel may reference these submissions in closing remarks to the Panel.

Thank you,

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No. VLC-S-S-090073
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARILYN BAPTISTE on her own behalf and on behalf of all other members of the Xenigwet' in First Nations Government and on behalf of all other members of the Tsilhqot' in Nation

PLAINTIFF

AND:

TASEKO MINES LTD., HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, the MINISTER OF ENERGY, MINES AND PETROLEUM RESOURCES (BRITISH COLUMBIA), the CHIEF INSPECTOR OF MINES, the MINISTER OF ENVIRONMENT (BRITISH COLUMBIA), the MINISTER OF AGRICULTURE AND LANDS (BRITISH COLUMBIA), the MINISTER OF FORESTS AND RANGE (BRITISH COLUMBIA), the ATTORNEY GENERAL OF CANADA, the MINISTER OF FISHERIES AND OCEANS (CANADA), the MINISTER OF THE ENVIRONMENT (CANADA), and the MINISTER OF TRANSPORT (CANADA)

DEFENDANTS

**PLAINTIFF'S REPLY TO THE DEFENDANTS'
STATEMENTS OF DEFENCE**

1. This Reply is in response to the Statements of Defence filed by Taseko, by the Provincial Defendants and the Federal Defendants.
2. In this Reply, defined words and phrases are used according to their defined meaning in the Statement of Claim.

Preliminary Matters

3. Taseko pleads at para. 2 of its Statement of Defence that the Plaintiff seeks to prevent Taseko from proceeding with its mining plans for the Prosperity Project. In reply, the Plaintiff

says, to ensure clarity on this point, that she is seeking to prevent, as representative Plaintiff for the Xeni Gwet'in and Tsilhqot'in Nation, the destruction of *Teztan Biny* and the surrounding lands and waters, the extinguishment of Aboriginal Fishing Rights at *Teztan Biny* and the unjustified infringement of Tsilhqot'in Aboriginal rights.

4. The Tsilhqot'in National Government (“**TNG**”) and its leaders and representatives made it clear to Taseko from an early stage of Taseko’s engagement with the Tsilhqot'in about the Prosperity Project, that the Tsilhqot'in people and communities are not necessarily opposed to mining activities, but are opposed to the Prosperity Project as long as it requires the destruction of *Teztan Biny* and the surrounding lands and waters.

Environmental Assessment Processes for the Prosperity Project

5. The Defendants all rely, in varying manners, on the environmental assessment (“**EA**”) processes for the Prosperity Project as providing opportunities for consultation with First Nations and/or opportunities for mitigation of project impacts on First Nations’ rights and interests. As described following, these pleadings do not recognize or reflect the significant flaws in these EA processes.

6. The Provincial Defendants, in para. 9 of their Statement of Defence, say that the Defendant Minister of Environment (British Columbia) consulted First Nations before ordering a separate provincial EA for the Prosperity Project, led by the British Columbia Environmental Assessment Office (“**BCEAO**”). The Plaintiff says that there was no meaningful consultation with the Tsilhqot'in Nation prior to this decision, and in fact this decision was made in accordance with Taseko’s demands, and without any or due regard for the concerns of the Tsilhqot'in Nation.

7. Before the Minister of Environment’s decision to institute a separate provincial EA, the TNG expended months of effort and resources attempting to negotiate a mutually acceptable joint review process and consultation protocol for the Prosperity Project with British Columbia and Canada. Significant progress was made. Throughout much of this process, Taseko actively supported TNG’s efforts to establish a joint review panel and a framework agreement.

8. However, after a joint review panel recommended against the Kemess North Copper-Gold Mine Project, and the federal government accepted this recommendation, Taseko and British Columbia reversed their position. The BCEAO tabled a draft panel review process that would have empowered a joint panel to recommend in favour of the Prosperity Project, but not against it. In May 2008, Taseko advised the BCEAO and the Canadian Environmental Assessment Agency (“CEAA”) that it would not proceed with the Prosperity Project before a joint review panel.

9. Four days later, the BCEAO advised TNG that a joint review panel was no longer an option, unless the panel was barred from making a recommendation as to whether or not the Project should proceed. Over TNG’s objections, in June 2008, British Columbia unilaterally terminated the joint review panel negotiations and ordered a separate, BCEAO-led review process for the provincial EA.

10. British Columbia’s actions have undermined the confidence of the Tsilhqot’in leadership and communities in the impartiality and fairness of the provincial EA process. In particular, the BCEAO and British Columbia have undermined the confidence of the Tsilhqot’in leadership and communities by:

- a. Reversing their position on a joint review panel for the Prosperity Project after a joint review panel recommended against the Kemess North Project, and the federal government accepted this recommendation;
- b. Proposing a joint panel review process that would have empowered a joint review panel to recommend in favour of the Prosperity Project but not against it;
- c. Four days after receiving Taseko’s objection to a joint review panel, advising that a joint review panel was no longer an option unless it could not make any recommendation as to whether or not the Project should proceed in the public interest;
- d. Unilaterally terminating the joint review panel negotiations, over TNG’s objections; and

- e. Ordering a separate, BCEAO-led review process for the provincial environmental assessment, over TNG's objections.

11. These actions have sent a clear signal that the BCEAO and British Columbia are more concerned with appeasing Taseko and securing an approval for the Prosperity Project than with ensuring a fair and impartial assessment of the Prosperity Project on its merits.

12. Because the Tsilhqot'in leadership and communities have lost confidence in the impartiality of the provincial EA process, as a result of the above actions, the TNG could not engage in good faith in the provincial environmental review. Since British Columbia unilaterally terminated the joint review panel negotiations, the TNG has consistently stated that it cannot and will not participate in the provincial EA. To date, the TNG has not participated in the provincial process.

13. These events provide an answer to the Provincial Defendants' assertion, at paras. 10 and 11 of their Statement of Defence, that the provincial EA is scoped to consider potential adverse affects on First Nations' Aboriginal interests and to mandate consultation with First Nations by Taseko. Because of British Columbia's actions, which irrevocably compromised the perceived integrity and impartiality of its environmental assessment, the Tsilhqot'in Nation has not participated in any manner in the provincial regulatory review.

14. Moreover, British Columbia amended its *Environmental Assessment Act*, R.S.B.C. 1996, c. 119, in or about 2002, to remove many of the mechanisms that previously promoted First Nations' substantive participation in environmental reviews and in key decisions and conclusions reached in the course of such environmental reviews. These amendments:

- a. Abolish the project committee structure (eliminating the role of affected First Nations in designing and conducting the provincial EA);
- b. Give the minister and the executive director unconstrained discretion to determine the scope, procedures and methods of the environmental assessment, which allows for considerable political interference in the design and conduct of an environmental assessment;

- c. Require the EA review to “reflect government policy”; and
- d. Impose arbitrary time limits on the EA process, regardless of whether more time is needed to fully address emergent environmental issues (see *Prescribed Time Limits Regulation*).

15. At para. 14 of its Statement of Defence, Taseko states that its Environmental Impact Statement (“EIS”) for the Prosperity Project will be considered in very thorough provincial and federal environmental review processes. The Plaintiff denies the effectiveness of the provincial process for the reasons set out above. Further, the ability of the Plaintiff to meaningfully participate in the federal review process was frustrated by extensive delays in securing participant funding.

16. CEAA did not conclude a participant funding agreement with the TNG until long after the comment period on the draft Terms of Reference, the draft EIS Guidelines and the Panel selection had passed. In fact, the TNG did not secure participant funding until the public comment period on Taseko’s EIS had almost concluded. These delays in funding, despite the TNG’s persistent efforts to expedite the process, effectively compromised the TNG’s ability to participate at these formative stages of the federal process.

The Proposed Replacement Reservoir

17. At para. 15 of its Statement of Defence, Taseko says that the plan for the Prosperity Project contemplates the creation of a new lake (which the Plaintiff says is more accurately described as a reservoir) stocked with fish from *Teztan Biny*.

18. However, the proposed replacement reservoir will not and cannot compensate for or detract from the extinguishment of Tsilhqot’in Aboriginal Fishing and Caretaker Rights at *Teztan Biny*. There are a number of reasons, including the following:

- a. The proposal is vague and incomplete, lacks scientific rigour and is unlikely to succeed in breeding the stock of indigenous fish from *Teztan Biny* and introducing them into a new, artificially created environment;
- b. The proposed replacement reservoir will replace, at best, only a small portion of the fish-bearing habitat presently provided by *Teztan Biny*;
- c. The proposed replacement reservoir will be an inadequate and unreasonable substitute for the several thousand year-old rich and functional aquatic and wetland ecosystem in and around *Teztan Biny*;
- d. The Tsilhqot'in Nation holds the Aboriginal Fishing Right at *Teztan Biny* because of its special connection to *Teztan Biny*, as a central and defining aspect of its distinctive culture, dating back prior to the Date of Contact. This Aboriginal Rights attaches to, and is defined by, their intimate connection to *Teztan Biny*.
- e. From the Tsilhqot'in perspective, the Aboriginal Fishing and Caretaker Rights cannot simply be transferred to a replacement reservoir. This is completely antithetical to the deep cultural, historical and spiritual connection of the Tsilhqot'in people to their traditional lands.
- f. Aboriginal fishing rights are established based on a strict test requiring proof that the First Nation engaged in the relevant practice, custom or tradition at a particular location as an integral element of its pre-contact culture. For legal reasons (as well as the practical, cultural and spiritual reasons set out above), the Aboriginal rights of the Tsilhqot'in people at *Teztan Biny* are likely not transferable to another location, where the time-depth and cultural connection required to prove Aboriginal rights cannot be made out.
- g. The Aboriginal Hunting and Trapping Rights in and around the *Teztan Biny* watershed will be infringed through short- and long-term effects of the Prosperity Project on species that the Tsilhqot'in rely on, and by the permanent loss of the several thousand year-old rich and functional aquatic and wetland ecosystem in and around *Teztan Biny*.

Real and Present Threat to the Plaintiff's Rights

19. In reply to paras. 6-7 and 16(c) of the Federal Defendants' Statement of Defence, and para. 19 of the Provincial Defendants' Statement of Defence, the Plaintiff says that her claims are not premature, speculative or incapable of judicial assessment. The proposal for the Prosperity Project raises a live controversy between the Parties and presents a real and present threat to the rights asserted by the Plaintiff in this action.

Provincial Defendants – Justification for Infringement of Tsilhqot'in Aboriginal Rights

20. In reply to para. 21 of the Provincial Defendant's Statement of Defence, the Plaintiff says that the Provincial Defendants cannot justify the infringement of the Tsilhqot'in Aboriginal Hunting and Trapping Rights, or the Aboriginal Fishing Right at Teztan Biny, because:

- a. There is no substantial and compelling legislative objective in this case to justify an infringement of this nature and magnitude to Tsilhqot'in Aboriginal rights;
- b. British Columbia's conduct of the provincial environmental assessment process has been fundamentally flawed, has evinced a clear emphasis on appeasing the proponent over addressing the Aboriginal rights and concerns of the Tsilhqot'in Nation, and has effectively compromised the confidence of the Tsilhqot'in Nation in the integrity and impartiality of this process;
- c. The destruction of *Teztan Biny* for the Prosperity Project cannot satisfy the requirement of minimal impairment of Aboriginal rights;
- d. The destruction of *Teztan Biny* will deprive the Tsilhqot'in of their preferred means of exercising their Hunting and Trapping Rights and their Aboriginal Fishing Right at *Teztan Biny*, in a complex ecosystem imbued with deep cultural, ancestral and spiritual meaning;
- e. Consultation with the Tsilhqot'in Nation has not been adequate or meaningful, especially in light of the clear impacts on proven Hunting and Trapping Rights and the profound impacts on the asserted Aboriginal Right to Fish at *Teztan Biny*; and

- f. The public interest does not favour destroying *Teztan Biny*, incurring public costs for monitoring and management of tailings impoundment area *in perpetuity*, and the financial and environmental risks associated with the Prosperity Project for the short-term economic benefits that will accrue for the approximately 20 year operating life of the mine (assuming Taseko and the Prosperity Project both remain financially feasible for the anticipated duration of the project).

Federal Defendants – Justification for Infringement of Tsilhqot’in Aboriginal Rights

21. In reply to para. 16(b) of Canada’s Statement of Defence, the Plaintiff says that the objectives of the federal fisheries legislation and policies as described by Canada in this subparagraph do not extend to or justify the authorization by Canada to destroy an entire fish-bearing, freshwater lake and an abundant fish population. There is no substantial or compelling legislative objective under the *Fisheries Act* to justify such authorization or the resulting infringements of Tsilhqot’in Aboriginal rights.

22. In further reply to para. 16(b) of Canada’s Statement of Defence, the Plaintiff says that Canada has not pleaded the material facts to support a defence of justification.

Place of Trial: Vancouver

Dated: July 14, 2009

“Jack Woodward”

Solicitor for the Plaintiff

This Reply is filed by Jack Woodward, of Woodward & Company whose place of business and address for delivery is 2nd Floor, 844 Courtney Street, Victoria, B.C. V8W 1C4, Tel: 1-250-383-2356, Fax: 1-250-380-6560.