IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Taseko Mines Limited v. Tsilhqot'in National Government,* 2019 BCSC 1507

Date: 20190906
Docket S197557
Registry: Vancouver

Between:

Taseko Mines Limited

Plaintiff

And:

Tsilhqot'in National Government, Chief Joe Alphonse, Chief Russell Myers Ross, Cecil Grinder, John Doe, Jane Doe and Persons Unknown

Defendants

- and -

Docket: S172734
Registry: Victoria

Between:

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

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia, The Chief Inspector of Mines, The District Manager, Caribou-Chilcotin Natural Resource District, and Taseko Mines Limited

Defendants

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

Counsel Taseko Mines Limited: M. Oulton
S. Humphrey
J. Roos

Counsel for, Tsilhqot'in National Government, Chief Joe Alphonse, Chief Russell Myers Ross, Cecil Grinder, and 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:	T. Dickson A. Laskin J. Harman
Counsel for the Attorney General of Canada for the RCMP (July 29 only):	K. Friesen
No other appearances	
Place and Date of Trial/Hearing:	Vancouver, B.C. July 29-31, 2019
Place and Date of Judgment:	Vancouver, B.C. September 6, 2019

Introduction

[1] Taseko Mines Limited seeks to enjoin members of the Tsilhqot'in Nation from blockading its access to an area in which it holds mineral leases and mineral claims and in which it intends to carry out an exploratory drilling program pursuant to a notice of work permit issued under the *Mines Act*, R.S.B.C. 1996, c. 293 and related authorizations issued in July 2017. Members of the Tsilhqot'in Nation seek an injunction prohibiting Taseko Mines Limited from carrying out the exploratory drilling program pending trial of its action, brought pursuant to s. 35 of the *Constitution Act*, *1982*, to quash the notice of work permit on the basis that it infringes their established and conceded Aboriginal rights.

[2] The Tsilhqot'in applicant plaintiffs are Roger William, the former chief of the Xeni Gwet'in First Nations Government, a sub-group of the Tsilhqot'in Nation, the Xeni Gwet'in First Nations Government, and the Tsilhqot'in Nation. I will refer to them and the Tsilhqot'in National Government, the named defendant in Taseko's action, collectively, as the Tsilhqot'in. I will refer to the notice work permit as the NOW permit and the exploratory drilling program as the NOW program.

[3] The applications were argued at the same time. As I have decided that the Tsilhqot'in's application should succeed, Taseko's application is moot.

[4] The government defendants, to which I will refer to collectively as British Columbia, filed an application response to the Tsilhqot'in's application but did not make oral submissions at the hearing of the application. In its response, British Columbia acknowledges that the Tsilhqot'in have Aboriginal rights to hunt and trap birds and animals and the right to trade in skins and pelts as a means of securing a moderate livelihood in an area that includes the area where the NOW program will take place. British Columbia further concedes that the Tsilhqot'in have Aboriginal rights to fish for food for social and ceremonial purposes generally within their traditional territory, including the NOW program area. Some of these rights were addressed in *Tsilhqot'in v. British Columbia*, 2007 BCSC 1700 [*Tsilhqot'in* BCSC]; *William v British Columbia*, 2018 BCSC 1425 [*William* #2] at para. 73; *William v.*

British Columbia (Attorney General), 2019 BCCA 74 [*William* #4] at paras. 5, 38. I will refer to these rights as the established and conceded Aboriginal rights.

[5] The issues to be determined fall out of the *RJR-MacDonald Inc. v. Canada*, [1994] 1 SCR 311 three-part test for an interlocutory injunction: the merits threshold, irreparable harm and balance of convenience as applied to a rights infringement case brought pursuant to s.35 of the *Constitution Act, 1982.*

[6] The parties dispute whether the threshold merits test is a serious issue to be tried or strong arguable case. The Tsilhqot'in argue that the standard serious issue to be tried threshold applies. Taseko argues that if granted, the interlocutory injunction sought by the Tsilhqot'in will amount to granting the relief sought in the main action as the NOW permit will expire prior to trial and therefore the injunction will act to quash the NOW permit approval, which is the relief sought a trial. For that reason, Taseko argues the threshold merits standard should be the strong arguable case standard.

[7] After determining the applicable merits threshold test to be applied, the issues are whether the Tsilhqot'in can meet the applicable merits threshold to establish infringement of their established and conceded Aboriginal rights and whether they can meet the applicable merits threshold on whether British Columbia can discharge its burden to justify the infringement. The Tsilhqot'in argue that the evidence shows their established and conceded Aboriginal rights will be infringed due the disturbance the NOW program will cause in a preferred area to exercise these rights. Taseko argues that the Tshilqot'in's evidence is speculative and imprecise and emphasizes that the interference will be to alleged spiritual and cultural rights which does not amount to meaningful diminution of the established and conceded Aboriginal rights. Taseko points to evidence that the NOW program will only take place in .04% of the Tsilhqot'in's traditional territory and the Tsilhqot'in's established and conceded Aboriginal rights can be exercised elsewhere such that these rights are not meaningfully diminished by the NOW permit.

[8] On justification, the Tsilhqot'in argue that British Columbia will not meet its burden to show that the objective of the NOW permit is compelling and substantial because its objective is now moot. Taseko argues that the primary objective was not moot when the NOW permit was issued and in any event, the collateral objectives are still good and are compelling and substantial.

[9] Irreparable harm is contested. Taseko argues the evidence of harm to the Tsilhqot'in's established and conceded Aboriginal rights is speculative and that any harm will be repaired through the reclamation aspects of the NOW permit. Taseko further argues that it will suffer irreparable harm if the Tsilhqot'in's injunction is allowed because the NOW permit will expire before the trial and any appeals can be concluded. The Tsilhqot'in argue that the immediate harm and the lasting aspects of the NOW program will be devastating to their practices of hunting, trapping and fishing including the spiritual and cultural aspects of those activities and their practice of gathering in the area for teaching, cultural and spiritual purposes.

[10] Finally, the balance of convenience must be considered and each party says it lays with their position. The Tsilhqot'in argue that the balance lies with them because their harm is tangible while Taseko's is not because the obstacles that Taseko faces to construct and operate a mine are such that losing the opportunity to undertake the NOW program is not significant. The Tsilhqot'in further argue that if I find irreparable harm to both, I should favour the status quo which supports the injunction. Taseko argues that because the Tsilhqot'in engaged in self-help by blockading Taseko's route to the site, the balance of convenience favours dismissing the injunction application.

Background

[11] The NOW permit relates to mineral leases and tenure rights Taseko holds under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 in relation to gold and copper deposits southwest of Williams Lake, British Columbia. These leases and rights are good until at least 2035. Taseko estimates there are 11 million ounces of gold and

four billion pounds of copper and seeks to develop and operate a mine to extract the Taseko estimates the mine, if approved, would be in production for 20 years.

[12] The NOW program is to take place in an area covering 47 hectares which includes Teztan Biny (Fish Lake), Y'anah Biny (Little Fish Lake) and Nabas, the surrounding meadowlands. I will refer to this as the "NOW program area". Of the 47 hectares in the NOW program area, 31 hectares will be subject to new disturbance. The disturbances allowed under the NOW permit are: 367 trenches and/or test pits; 122 geotechnical drill sites; 48 km of new excavated trails; 28 km of existing access modification; 20 km of cut lines; 1000 m^3 of timber cuts; a 50-person camp with 11 mobile trailer units; a base camp staging area; storage of up to 10,000 litres of fuel on site; seven water pump locations; and a temporary core shed.

[13] Historically, the Tsilhqot'in have brought claims pertaining to Aboriginal rights and land title claims in an area greater than but including the NOW program area.

[14] In [*Tsilhqot'in* BCSC], Mr. Justice Vickers declared that the Tsilhqot'in had an "Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses", as well as an "Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood": paras. 1240 and 1265. The claim area in that case included the NOW program area. These declared Aboriginal rights were upheld on appeal: *William v. British Columbia*, 2012 BCCA 285 at paras. 288 and 344 and were not raised on appeal to the Supreme Court of Canada: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in* SCC].

[15] Regulatory approval disputes and litigation pertaining to the proposed mine and the NOW permit and have been ongoing for many years as described in *William v. British Columbia (Attorney General)*, 2019 BCCA 112 [*William* #5] at paras. 5–16.

[16] In 2010, Taseko proposed the development of what was then known as the Prosperity Mine. The development underwent separate provincial and federal

environmental assessments. The provincial assessment recommended approval of the project and on January 14, 2010, the province issued an environmental assessment certificate permitting Taseko to proceed with development of the Prosperity Mine. Pursuant to s. 18 of the *Environmental Assessment Act*, S.B.C. 2002, c. 43 and the environmental assessment certificate, Taseko had five years to commence construction of the mine.

[17] The design for the Prosperity Mine included draining Teztan Biny, filling it with waste rock and flooding Y'anah Biny and Nabas to create the tailings pond facility.

[18] On July 2, 2010, the federal environmental assessment panel concluded that the Prosperity Mine development 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 people, Tsilhqot'in cultural heritage, and on proven and asserted Aboriginal rights. The federal government accepted those conclusions and rejected the proposed development under the then governing *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

[19] In 2011, Taseko redesigned the proposed mine, renamed it the New Prosperity Project, and reapplied to the federal government for approval. Under the revised proposal, Taseko would preserve Teztan Biny, but would still flood Y'anah Biny and much of Nabas. While seeking federal approval, Taseko applied to British Columbia for an amendment of its environmental assessment certificate to apply to the New Prosperity Project. At that time, Taseko also obtained approval to carry out an exploratory drilling program to inform the assessment of the redesigned project. On December 2, 2011, in *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675 [*Taseko Mines*], Justice Grauer granted an injunction restraining Taseko from carrying out that work. The parties eventually agreed to terms that allowed the exploratory drilling program work to proceed in 2012.

[20] A federal environmental assessment panel reviewed the New Prosperity Project and issued a report in October 2013. It concluded the New Prosperity Project would have significant adverse effects on the exercise of Aboriginal rights and

cultural practices and would also negatively impact the environment, fish and wildlife. The federal government rejected the New Prosperity Project. Taseko brought judicial review applications pertaining to the report and the rejection.

[21] On January 14, 2015, British Columbia granted a five-year extension of the environmental assessment certificate which still pertains to Prosperity Mine, not New Prosperity Project.

[22] In 2016, Taseko began developing the NOW program.

[23] On July 17, 2017, British Columbia's Senior Inspector of Mines granted approval of the NOW program subject to 37 mitigating conditions intended to address the Tsilhqot'in's concerns. The Senior Inspector acknowledged that the probability of a major mine was speculative, but also noted that the federal rejections did not preclude Taseko from applying for approval with another new design.

[24] On July 19, 2017, the Tsilhqot'in commenced a petition to quash the NOW permit on the grounds that British Columbia breached its duty to consult. At the same time, the Tsilhqot'in filed this claim challenging the NOW permit as an unjustifiable infringement of their declared and conceded Aboriginal rights.

[25] The Tsilhqot'in also brought applications seeking interlocutory injunctions on both the consultation petition and the infringement action preventing Taseko from commencing work on the NOW program until those matters had been heard and determined. The injunction applications were heard from July 31 to August 3, 2017 before Mr. Justice Steeves. During the course of the hearing, the Tsilhqot'in discontinued the injunction application in this infringement action and continued only with the consultation petition injunction application. The court reserved its decision. Soon thereafter, the Canadian Environmental Assessment Agency brought a petition to restrain Taseko from carrying out the NOW program. Because of that, the court adjourned the Tsilhqot'in's consultation petition injunction application generally.

[26] On December 5, 2017, the federal court dismissed Taseko's applications challenging the February 2014 federal rejection of the New Prosperity Project:

Taseko Mines Limited v. Canada (Environment), 2017 FC 1099; 2017 FC 1100. Taseko appealed. The appeal was heard by the Federal Court of Appeal in January/February of 2019, and the decision is currently on reserve.

[27] The Canadian Environmental Assessment Agency's petition was rejected on June 22, 2018: *Canada (Canadian Environmental Assessment Agency) v. Taseko Mines Limited*, 2018 BCSC 1034.

[28] Mr. Justice Branch heard the consultation petition and the application for an interlocutory injunction in June 2018. He granted the interlocutory injunction: *William v British Columbia*, 2018 BCSC 1271 [*William* #1]; but ultimately dismissed the consultation petition (*William* #2*)*, holding that both the consultation process and degree of accommodation were such that the honour of the Crown was maintained, and adequate reconciliation efforts were made in granting approval. The Tsilhqot'in appealed and sought an interlocutory injunction pending appeal. Madam Justice Dickson granted an injunction enjoining Taseko from starting work until the consultation petition appeal was heard: *William v. British Columbia (Attorney General)* unreported, September 17, 2018, CA45557 [*William* #3]. The Court of appeal dismissed the appeal: *William v. British Columbia*, 2019 BCCA 74 [*William* #4]. The Tsilhqot'in filed an application for leave to appeal and an application for a stay pending the leave determination. Mr. Justice Butler granted the stay (*William* #5*)*. On June 13, 2019, the Supreme Court of Canada dismissed the leave application.

[29] The five-year extension to Taseko's provincial environmental assessment certificate expires on January 14, 2020 and cannot be further extended if the mine project has not "substantially started" by that date. Mine construction must be commenced for the mine to be substantially started. If the environmental assessment certificate lapses, Taseko will need to seek a new provincial environmental assessment certificate.

[30] At this time, construction cannot begin for several reasons. Taseko's provincial environmental assessment certificate does not pertain to the New Prosperity Project unless the province grants the amendment Taseko has sought; the federal government has rejected the New Prosperity Project and the refusal has been upheld by the Federal Court (the Federal Court of Appeal decision is under reserve); and Taseko requires a provincial mine construction permit under the *Mines Act*.

[31] Taseko intends to proceed with the NOW program despite the other obstacles to constructing and operating a mine. The last injunction which enjoined Taseko from proceeding with the NOW program expired with the Supreme Court of Canada's dismissal of the Tsilhqot'in leave to appeal application in June 2019. Taseko immediately gave notice that it would proceed with the NOW program and that it intended to mobilize on-site starting on July 2, 2019. The Tsilhqot'in set up a blockade preventing Taseko access to the NOW program area and subsequently issued a notice of intention to proceed in this action, which the Tsilhqot'in had not been prosecuting pending the outcome of the consultation petition.

Tsilhqot'in's Injunction Application

Threshold merits – Serious Issue to be Tried or Strong Arguable Case?

[32] At the first stage, the court is to undertake a preliminary investigation of the merits. The usual threshold is a "serious question to be tried", in the sense that the underlying claim is neither frivolous nor vexatious: *R. v. Canadian Broadcasting Corp.,* 2018 SCC 5 at para. 13. This threshold is relatively low; a prolonged examination of the merits is generally neither necessary nor desirable: *RJR-MacDonald* at 335–338; *Taseko Mines* at para. 42.

[33] There is a more stringent "strong arguable case" standard which applies when granting an interlocutory injunction is tantamount to granting the relief sought in the main action or amounts to a final determination of the action. The justification for this higher standard is because of the potential unfairness in resolving an action at an interlocutory stage, and effectively disposing of the case prior to a trial, without

a full adjudication on the merits: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 at para. 229. As stated in *RJR-MacDonald* at 338, this higher standard also arises when "the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial".

[34] In this case, the issue is whether an interim injunction prohibiting Taseko from undertaking the NOW program amounts to the granting of relief, a final determination of the action, or removes any benefit of proceeding to trial. The NOW permit, which the Tsilhqot'in seek to quash in the underlying claim, will expire in July 2020, and so if Taseko is enjoined until the action is heard, it is very unlikely the trial could be completed in time to for the 4-6 weeks required to complete the NOW program.

[35] The Tsilhqot'in submit that the interlocutory injunction would not be tantamount to granting the relief sought in the main action nor cause Taseko hardship because Taseko can extend the NOW permit by two years, to July 2022, under s. 5(1) of the *Permit Regulation*, B.C. Reg. 99/2013. The Tsilhqot'in submit that the extension process is essentially mechanical, as the provision provides for a deemed authorization if Taseko gives notice that it intends to extend the permit. The Tsilhqot'in have affirmed that they will consent to such an extension if the interlocutory injunction is granted.

[36] The Tsilhqot'in assert that four weeks is enough to try the underlying action. They have inquired about trial dates for a trial of four weeks and indicate that there are dates available in about two years. They argue that a trial in 2021 will leave enough time for Taseko to carry out the NOW program by July 2022 if Taseko is successful at the trial. The Tsilhqot'in are prepared to go to trial sooner if the other parties are agreeable. They seek an order for an expedited trial.

[37] Taseko argues that the extension is not mechanical as the Tsilhqot'in assert because s. 3 of the *Permit Regulation* authorizes the Chief Inspector to overturn a deemed authorization in order to protect health, safety, the environment or a cultural heritage resource. However, there is nothing to suggest that the extension would be

assessed any differently than the original permit. In my view, the extension is essentially mechanical and I conclude that, effectively, Taseko will have until July 2022 to complete the NOW program.

[38] Taseko argues that the time to complete trial, allow time for appeals and allow the time to undertake the NOW program cannot be accommodated by an extension to July 2022.

[39] If appeals are factored in, the timing is too tight. In my view, appeals should not be included in the timing scenario as that requires an assumption about which party will be successful and whether stays pending appeals are granted. In determining whether two years is sufficient to get to trial and how long the trial will be, I take into account that the Aboriginal rights in issue have been declared or conceded subject to the argument Taseko raises about the cultural or spiritual activities it asserts the Tsilhqot'in have not established as Aboriginal rights. I also take into account that the issue of adequate consultation has been decided in favour of British Columbia. The issues pertaining to infringement and justification will be the focus of the trial but even they are not new to the parties as some of the factual and legal elements have been argued by the parties before different courts and bodies over many years. The discovery process will not be perfunctory, but it also will not be as time consuming as it would be if the issues were new to the parties. Based on the evidence and submissions before me, and only for the purposes of determining whether the timeline to trial is workable, it is my view that if the parties prioritize the matter, eighteen months to two years should be adequate to prepare for trial. Without concluding precisely how long will be needed for trial, a one to two month trial in the summer or fall of 2019 will allow adequate time for the NOW program to be undertaken by July 2022 if Taseko is successful at trial.

[40] Accordingly, I conclude that the injunction, if granted, is not tantamount to granting relief nor is it bound to impose a hardship removing any benefit of trial. The threshold merits test is the serious question to be tried standard.

Is there a Serious Issue to be Tried?

[41] Section 35 rights infringement actions are decided in accordance with the framework set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and further explained in *Tsilhqot'in* SCC at paras. 77, 120–122, and 125. The burden is on the Aboriginal group to establish an infringement of their Aboriginal rights. Once an infringement is established, the Crown must establish that the infringement is justified.

The characteristics of the rights at stake

[42] In determining whether rights have been infringed, in *Tsilhqot'in* SCC, the Supreme Court of Canada said a court must start with the characteristics of the rights at stake (in that decision, a claim for title) and then consider whether the proposed limit to the rights results in a meaningful diminution.

[43] The Tsilhqot'in assert that their pleaded Aboriginal rights were established in *Tsilhqot'in* BCSC, and/or have been conceded by British Columbia in this action.

[44] Taseko argues that as a matter of pleadings and proof, the Aboriginal rights have not been adequately particularized in the claim, are too broad, and the evidence led on this application does not adequately relate to the claim as pleaded.

[45] While specificity and particularization of pleadings are necessary to avoid an unfocussed trial, as held in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at paras. 40–44 [*Lax Kw'alaams* SCC], the Supreme Court of Canada has also recognized, in *Tsilhqot'in* SCC at paras. 20–23, that a technical approach to pleadings in Aboriginal land claims and rights cases should not be adopted so long as the pleadings provide "an outline of the material allegations and the relief sought". As Chief Justice McLachlin stated for the Court:

> [23] … cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the

> matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

[46] Taseko argues that the claims made in the notice of application and the evidence led in support are focussed on the "rights to gather and the rights to pursue ceremonial and spiritual activities", and "cultural enjoyment and value of the area" or "spiritual and healing value of the area", but these cultural and spiritual aspects are not part of the declared or conceded Aboriginal rights. Taseko argues that there is a disconnect between the finding made by Vickers J. in *Tshilhqot'in* BCSC*,* that the Tsilhqot'in have the right to hunt and trap for "spiritual, ceremonial and cultural uses", and the Tsilhqot'in's assertion on this application that the rights have spiritual or cultural components. Taseko argues that there is a difference between the spirituality of the activity, which Taseko says is now asserted as a right but was not proven as a right, and the uses to which the products of a right can be put.

[47] In the judicial review proceedings pertaining to the duty to consult, the Crown conceded that the Tsilhqot'in have "strong *prima facie* claims to fishing and gathering rights and to pursue ceremonial and cultural activities in the Area as a place of unique and special significance for the Tsilhqot'in cultural identity and heritage": *William* #4 at para. 5.

[48] Taseko argues that these concessions, and the findings made in the judicial review proceedings, cannot be "repurposed" in this action, and that findings about the Aboriginal rights and the infringement of them must be made by the trial judge, relying on *LaxKw'alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management) et al,* 2005 BCCA 140*,* at paras. 25-26. I agree that the trial judge will be the one to determine whether the Tsilhqot'in meets their burden of proving infringement. Whether and how the trial judge makes use of concessions or findings made in previous actions or proceedings is not a matter for me to determine. However, on an application for an injunction, such concessions and judicial findings are relevant to assess the strength of the disconnect that Taseko asserts and whether there is a serious issue to be tried.

[49] Taseko may pursue the distinction between cultural and spiritual aspects of the rights and cultural and spiritual uses of the products of the rights at trial, but for present purposes the distinction does not rise to the level of establishing a disconnect that precludes the Tsilhqot'in raising a serious issue to be tried on the manner in which they have framed their action and this application.

[50] Given that hunting and trapping rights are proven as described, the concessions made by the Crown with regard to fishing rights and the concession made by the Crown of a strong *prima facie* right pertaining to gathering to pursue spiritual and ceremonial activities, I am satisfied there is a serious issue to be tried that the Tsilhqot'in's established and conceded Aboriginal rights are imbued with spiritual and cultural aspects that include the right to gather for those purposes.

[51] Taseko also argues that the Tsilhqot'in's claim is a bare pleading regarding fishing within the NOW program area that is not supported by any evidence relating it to pre-contact activities, or the importance of those activities, and that the hunting and trapping rights are for a much broader area and so are not site-specific to Teztan Biny, Y'anah Biny or Nabas.

[52] I do not accept this argument. The Tsilhqot'in's hunting and trapping rights in their traditional territory as a whole, including the NOW program area, were established in *Tsilhqot'in* BCSC, and British Columbia's concessions regarding fishing pertain to their traditional territory which includes the NOW program area. The Crown's concession regarding gathering rights and ceremonial, spiritual and cultural activities relate to the NOW program area as a place of unique and special significance for the Tsilhqot'in's cultural identity and heritage: *William* #2 at para. 73; and *William* #4 at paras. 5, 38. By definition, the findings and concessions of Aboriginal rights include the concept of pre-contact activity.

[53] The site specific quality of these established and conceded Aboriginal rights, as described in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 138 and in *Tsilhqot'in* BCSC at paras. 1173–1175, is supported by the evidence of Tsilhqot'in members and elders on this application as described below.

[54] I am satisfied there is a serious issue to be tried that the Tsilhqot'in have the established and conceded Aboriginal rights in the NOW program area.

Infringement

[55] Once an Aboriginal right has been established, the court must ask whether there has been a meaningful diminution of that right. If so, an infringement of the right is made out. Meaningful diminution has been defined as including "anything but an insignificant interference with that right": *R. v. Morris*, 2006 SCC 59 at para. 53. As set out in *Tsilhqot'in* SCC at para. 122, citing *Sparrow* at 1112, the following three factors will aid in determining whether an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right.

[56] The Tsilhqot'in plead that the NOW program area is of unique and special significance to the Tsilhqot'in, is critical for the Tsilhqot'in culture, identity, and the exercise of the Tsilhqot'in's Aboriginal rights will be significantly and irreparably impacted by the NOW program, even if all proposed mitigation measures are fully implemented. The impacts the Tsilhqot'in assert are: the Tsilhqot'in will be prohibited from accessing the NOW program area at certain times; noise; industrial activity; and workers which will cause wildlife and the Tsilhqot'in to avoid the program area; lasting adverse effects on the environment and biodiversity due to increased fragmentation of wildlife habitat; deforestation; and increased hunting by non-Tsilhqot'in at a time when regional moose populations have plummeted.

[57] Taseko argues that the Tsilhqot'in's evidence does not meet the merits threshold for infringement that results in meaningful diminution because it is speculative and imprecise when compared to studies which show that exploratory drilling will not have material impact on wildlife and fish; because the NOW work program area is only .04% of the Tsilhqot'in's traditional territory and the Tsilhqot'in's established and conceded Aboriginal rights can be exercised elsewhere; and because the Tsilhqot'in's evidence emphasizes that the interference will be to

alleged spiritual and cultural rights which does not amount to meaningful diminution of established or conceded Aboriginal rights.

The evidence on impact

[58] The Tsilhqot'in rely on affidavit evidence of their members to establish the importance of certain areas to the practice of their established and conceded Aboriginal rights. This is a permissible means to adduce such evidence on an interlocutory injunction: see *Yahey v. British Columbia*, 2017 BCSC 899 at para. 88.

[59] With regard to Taseko's argument that the evidence is only speculative, I observe that when proffering evidence of a rights infringement that will be occasioned by exploratory drilling work not yet undertaken, the evidence is bound to have a speculative quality. The trial judge will have to determine which evidence is reliable on this point. My task is to simply determine whether there is a serious issue to be tried.

[60] The evidence of members of the Tsilhqot'in include the affidavit of Richard William who deposed that Tsilhqot'in members will avoid Teztan Biny and Nabas while the work is underway because people do not hunt or trap around this kind of noise and activity. He was taught by his elders to be quiet while hunting. He deposed that these areas are important places for the Tsilhqot'in to teach their youth how to live a Tsilhqot'in way of life through hunting, trapping, fishing, gathering plants and medicines, ceremonies, living on the land, speaking the language, and learning the stories.

[61] Marilyn Baptise, an elected chief of the Xeni Gwet'in, one of the six bands that comprise the Tsilhqot'in nation, deposed that Tsilhqot'in members depend on the area for hunting and trapping, for ceremonial practices, for fishing and for gathering plants and medicines. She deposed that the area is special and unique because it is a "one stop shop" for their cultural practices: fishing, trapping, hunting, gathering, spiritual and ceremonial activities. She also deposed that the area is important for food security which requires continuity and a healthy, intact ecosystem. She deposed that many Tsilhqot'in elders eat food from this area and many

Tsilhqot'in go to the area because it was one of the few areas that is still intact. She deposed that much of their traditional territory is not suitable for these activities because of development, in particular clear cut logging.

[62] Norman William, a Xeni Gwet'in and Tsilhqot'in member deposed that he spent much of his childhood and youth in Nabas. As of the age of ten, he trapped during the winters at Y'anah Biny and at different locations near there including Nabas and Teztan Biny. He saw negative affects after the 2012 exploratory drilling program including less game, and more non-Tsilhqot'in hunters travelling on the new access trails on all-terrain vehicles. He deposed that if the NOW program goes ahead, the animals would run away and so the hunting would not be good. He deposed that gatherings would not occur during drilling work because they would not have peace and could not teach their youth while the work was going on with the workers there. He deposed that Nabas, an area in which he has harvested his entire life, would not recover during his lifetime.

[63] Cecil Grinder deposed that he is a Tsilhqot'in member. He started hunting at Teztan Biny when he was seven or eight years old. He deposed that there are other spiritual places in the Tsilhqot'in territory, but the area around Teztan Biny is powerful because it is quiet and less disturbed than other places. He testified that they could not do healings or gatherings at Teztan Biny while the exploratory work goes on. He testified that the previous exploratory work damaged the area around Teztan Biny, including Nabas. There are a lot more trails, and he sees a lot more people on them on all-terrain vehicles.

[64] Photographs of the 2012 exploratory work are in evidence. Access trails are the width of a backhoe and amount to extensive incursions into the forestation and foliage. Roads are the widths of two vehicles. The photos depict the landscape covered with the debris of timber harvesting and the imprints of industrial heavy equipment. The 2012 exploratory drilling program was on a much smaller scale than the drilling to be undertaken pursuant to the NOW permit which permits twice as many new trails to be cut, twelve times as many drill sites, and six times as many

test pits: *William* #4 at para. 19. Given the evidence pertaining to the 2012 drilling program, the concerns of the Tsilhqot'in cannot be dismissed as merely speculative.

[65] With regard to Taseko's assertion that the Tsilhqot'in evidence cannot be reconciled with scientific studies and the latter should be preferred, I note that based on all of the evidence, Senior Mines Inspector Adams concluded that the drilling activity may cause wildlife to change use of the area, may cause changes in wildlife distribution, and may increase access for non-aboriginal hunters, trappers and poachers until the new trails that will be cut are re-claimed. He found the trails would also have a longer term impact on wildlife and habitat features. He also found that harvesting of 1048 square metres of timber will have affects for 15 to 20 years. However, he also found that negative impact on some species may have positive impacts on others. The Senior Mines Inspector described how the reclamation and mitigation possibilities could minimize or avoid some of the negative impact.

[66] In March 2017, British Columbia provided the Tsilhqot'in with a Revised Impacts Assessment regarding the NOW program. As summarized by Mr. Justice Branch in *William* #2 at para. 33, this assessment described the following impacts:

> [33] …
>
> a) It "would be an extensive drilling program, several times the scale and magnitude of the [2012 exploratory program]";
>
> b) Teztan Biny and Nabas areas are "places of unique and special significance for the Tsilhqot'in cultural identity and heritage" and "highly valued by the Tsilhqot'in due to its remoteness, peacefulness and relatively pristine nature of these lands and waters ...";
>
> c) "... [T]he exploration work can be disruptive and may have significant emotional impacts that are difficult to quantify in an assessment" such as Tsilhqot'in members "avoiding use of this area for hunting and trapping activities during an active drilling program";
>
> d) "The moose population has plummeted in recent years making the hunting grounds around Teztan Biny and Nabas more significant and the potential displacement of moose due to the drilling activity more of an impact";
>
> e) "[Tsilhqot'in] community members exercising Aboriginal Interests in this area may be impacted by noise, industrial activity, and dust which will cause adverse impacts to the Tsilhqot'in community members who traditionally hunt in the area over the next 3 years, depending on how close they are to the drilling area";

f) It will "significantly impact" Tsilhqot'in's use and enjoyment of this "culturally and spiritually significant area" and "may result in the [Tsilhqot'in] choosing to avoid the area entirely until the work is done, including for fishing activities" and "gathering activities";

g) It is "likely to have serious impacts on social, cultural, spiritual and experiential aspects of [Tsilhqot'in] hunting and trapping activities" and "fishing activities";

h) Activities, "including drilling, trenching, access trails and 50-man camp will have serious impacts on the [Tsilhqot'in's] ability to use and enjoy the area";

i) "… [T]he impact on [Tsilhqot'in's] strong claim of an Aboriginal right to cultural and spiritual practices in this area is assessed as serious".

[67] The evidence supports a serious issue to be tried that the impact of the NOW program will be a meaningful diminution in relation to the established and conceded Aboriginal rights in the program area.

The .04% argument

[68] Taseko argues that the NOW program area covers only .04% of the Tsilhqot'in's traditional area which is comprised of the area where they have proven title, the area in which they have proven rights, and a greater area they describe as their traditional territory. Taseko argues that the interference that will be caused by the NOW program does not reach the tipping point where the area of interference compared to the area available to the Aboriginal group is sufficient to be a meaningful diminution.

[69] The Tsilhqot'in argue that a meaningful diminution can be established if there is interference with the Aboriginal group's preferred area to exercise its rights, regardless of the size of that area compared to the rights area as a whole. They have plead and led evidence that Teztan Biny and Nabas are preferred areas to hunt, trap and fish. They also point to evidence that the NOW program area, despite the 2012 exploratory drilling, is relatively undisturbed, compared to other parts of their proven rights areas where there have been significant forestry activities and forest fires. Certain parts of the greater areas are not accessible to the Tsilhqot'in, especially elders, because of the nature of the terrain.

[70] Denying the holder of a right their preferred means of exercising it can constitute a meaningful diminution of the right: *Tsilhqot'in* SCC at paras. 104–105. Preferred means may include the preferred area in which to exercise the right in question: *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para. 187 per Madam Justice Huddart, concurring; *R. v. Little*, [1993] 3 C.N.L.R. 214 (B.C.S.C.), rev'd on other grounds (1995), 131 D.L.R. (4th) 220 (C.A.).

[71] However, the case law also considers whether the Aboriginal right can be exercised elsewhere in considering whether the restriction truly is a meaningful diminution, or merely an insignificant interference. As observed by Justice Sharlow , in dissent but not on this point, in *Canada (Canadian Heritage) v. Mikisew Cree First Nation*, 2004 FCA 66, rev'd 2005 SCC 69 at para. 135, the overall size of the area in which the right in question can be exercised and the size of the specific area to be affected by the project in question are not particularly relevant considerations in and of themselves. The key consideration is whether the preferred means of exercising these rights is integrally linked to the place where the proposed project is to take place or where the project may create adverse impacts. A preferred area may be small but integral to the practicing of the right in question. Correlatively, simply because an area is rendered inaccessible or less-than-optimal for the exercise of the right, does not inexorably lead to the conclusion that a *prima facie* infringement has occurred. Actual evidence of hardship, and the scope of the protected right, are integral to the analysis: *R. v. Lefthand,* 2007 ABCA 206 at paras. 177-180, leave to appeal to S.C.C. ref'd 385 N.R. 392 (note), 385 N.R. 393 (note), per Conrad J.A., concurring. This evidence may take into account consideration the relative accessibility and convenience of the preferred area, compared to other areas where the right could be exercised, in addition to the comparative quality of exercising the right between the preferred and non-preferred areas: *R. v. Catarat*, 1999 SKQB 28 at para. 70, aff'd 2001 SKCA 50, leave to appeal ref'd [2001] S.C.C.A. No. 382.

[72] The Tsilhqot'in have led evidence on the factors relating to the NOW program area including that it includes preferred areas to fish, hunt and trap that are culturally and spiritually important areas; they area is relatively ecologically intact and

undisturbed, and therefore quiet and peaceful, which improves the hunting, fishing and trapping compared to other traditional areas; large portions of the traditional areas are not suitable for hunting, fishing and trapping due to settlement, logging, and forest fire devastation; and the NOW program area is accessible due to forest service roads and other access means compared to other traditional areas which are hard to access due to the terrain, especially for elders.

[73] In my view, infringement is a serious issue to be tried, notwithstanding that the NOW program is .04% of the Tsilhqot'in's traditional territory.

Cultural, spiritual and gathering aspects of the rights interference

[74] Taseko argues that the evidence of the Tsilhqot'in is mostly about the interference with cultural, spiritual and gathering practices. Taseko argues that such interference is not a meaningful diminution of hunting, trapping and fishing Aboriginal rights because the cultural aspects are not necessary to these rights and without proof of necessity, there is no infringement.

[75] In response, the Tsilhqot'in argue that cultural issues lie at the core of s. 35 rights because the purpose of s. 35 is "to provide cultural security and continuity for the particular aboriginal society": *R. v. Sappier, R. v. Gray*, 2006 SCC 54 at para. 33. In addition, they rely on evidence that, from the perspective of the Tsilhqot'in, there is no distinction between culture, spirituality, community and their hunting, trapping and fishing rights.

[76] In my view, the issue of whether and how cultural, spiritual and gathering practices relate to the established and conceded Aboriginal Rights is an aspect of the serious issue to be tried.

Justification

[77] If the Tsilhqot'in establish that their rights were infringed, the burden will shift to British Columbia to justify the infringement. To do so, British Columbia must demonstrate that: (1) it complied with its duty to consult the Tsilhqot'in; (2) its actions are backed by a compelling and substantial objective in the public interest; and (3)

the infringement is consistent with the Crown's fiduciary obligations, including that the objective's benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework "permits a principled reconciliation of Aboriginal rights with the interests of all Canadians": *Tsilhqot'in* SCC at para. 125.

[78] In this case, the consultation petition established that the consultation process upheld the honour of the Crown. The remaining issues are whether there is a serious issue to be tried as to whether the NOW permit is backed by a compelling and substantial objective in the public interest and whether the infringement is consistent with the Crown's fiduciary obligations.

The NOW permit's objective

[79] The Tsilhqot'in assert that the objective of the NOW permit when it was issued in 2017 was the "substantial start" objective: to gather data to obtain permits to start construction of the mine prior to the January 2020 expiry of the provincial environmental assessment certificate. They argue that since substantial start cannot be accomplished for reasons other than this injunction application, the objective can no longer be compelling and substantial if it ever was.

[80] In *William* #4, the objectives of the NOW permit were characterized as follows:

> [48] … it is suggested that the consultation process was limited to [Taseko'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, [Taseko] 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] … 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.

[81] I accept that the primary objective of the NOW permit was to meet the January 2020 substantial start deadline and that its collateral objective was to gather data for other potential mine applications. I also accept that a collateral objective can be compelling and substantial depending on the circumstances.

[82] To constitute a compelling and substantial objective, "the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective." See: *Tsilhqot'in* SCC at para. 82. The parties agree that the objective(s) of the NOW permit must be the objective(s) for which it was issued in 2017: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 331–336. The parties disagree on whether evaluating whether the permit's objectives are compelling is based on the circumstances at the time the permit was issued, or at the time of this injunction application.

[83] The Tsilhqot'in argue the latter, relying on *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 932–933; and *R. v. Butler*, [1992] 1 S.C.R. 452 at 494–496.

[84] Taseko acknowledges that in the *Charter* context, it is open to governments to justify legislation on the basis that its objective has become pressing and substantial, regardless of whether it was necessarily pressing and substantial at the time the legislation was introduced. However, Taseko argues this analysis should not be extended beyond the *Charter* context to the s.35 rights infringement framework.

[85] In my view, this issue is not one which needs to be, or should be, resolved on this interlocutory injunction. The only question that I must resolve is whether there is a serious issue to be tried as to the compelling nature of the permit's objectives.

[86] The NOW permit was issued in 2017. The Tsilhqot'in assert the permit did not have a compelling objective when it was granted, and its objective is even less compelling now. The primary objective was to gather data to obtain further permits and approvals to start construction on the mine by January 2020, failing which the environmental assessment certificate issued by British Columbia would expire. The

Tsilhqot'in argue that even in 2017, substantially starting construction by January 2020 was unlikely because Taseko had neither federal nor provincial approval for the New Prosperity Mine. They say it is impossible now because they still do not have approval from either level of government and it is likely the mine will have to be redesigned for federal approval.

[87] With regard to the collateral objectives, the Tsilhqot'in argue that they relates to the bigger picture of operating the mine, or redesigning the mine in order to obtain federal approval for it. They say that these objectives are not compelling since Taseko does not have permission to operate the mine, and it is not known in what form the mine will operate since Taseko has not decided to redesign the mine.

[88] Taseko argues that no matter how you look at the primary and collateral objectives, the NOW program is in furtherance of developing a mine which will contribute to the economic development of the British Columbia interior through the creation of jobs and economic growth. These are both objectives the Supreme Court of Canada has identified as being capable of justifying an incursion on Aboriginal rights: *Tsilhqot'in SCC* at para. 83, citing *Delgamuukw* at para. 165.

[89] In my view, the uncertainty around this mine generally, both in 2017 and now, and the moot substantial start goal, are such that there is a serious issue to be tried on whether the primary objective of the NOW permit is compelling and substantial. An element of the issue is the time at which the compelling and substantial nature of it is assessed.

[90] There is also a serious issue to be tried on the collateral objectives. They are *prima facie* compelling, but whether they are definitively compelling is affected by consideration of whether the collateral purposes are connected to the ultimate construction and operation of the mine. The evidence on this application does not include whether the data gathering is necessary or how it will be used with regard to the ultimate goal of constructing and operating a mine.

[91] Given a serious issue to be tried on the compelling and substantial nature of the objectives, it is not necessary to assess whether there is a serious issue to be tried on whether the alleged infringement is consistent with the Crown's fiduciary obligations. For this reason, and because it is premature to address the issue of whether the infringement was consistent with the Crown's fiduciary obligations in the absence of any findings as to the precise nature of the infringement in need of justification (see *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 at para. 274), I will not do so.

Irreparable harm and balance of convenience

[92] Irreparable harm and the multi-factor balance of convenience test are commonly considered together in one analysis: *Yahey* at paras. 34-36 citing *A.G. British Columbia v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), aff'd [1991] 1 S.C.R. 62. The overall determination to be made is who will suffer greater harm from the granting or refusal of the injunction. The relevant factors to be considered are:

a) the adequacy of damages as a remedy for such harm;

b) the likelihood that awarded damages will be paid;

c) whether the harm from granting or refusing the injunction would be irreparable;

d) which of the parties has acted to affect the status quo;

e) the strength of the applicant's case;

f) the public interest; and

g) any other factors affecting the balance of justice and convenience.

Irreparable harm, adequacy of damages, and likelihood that damages will be paid

[93] The Tsilhqot'in argue that interference with the ability to exercise Aboriginal rights in preferred places constitutes irreparable harm that damages cannot remedy as it impacts Aboriginal identity, spirituality, laws, traditions, culture, and rights connected to and arising from a relationship to the land. They rely on *Wahgoshig*

First Nation v. Ontario, 2011 ONSC 7708 at para. 51 citing *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] O.J. No. 3140 (S.C.J.) at paras. 79-80.

[94] The Tsilhqot'in rely on the evidence from its members about the damage that will be done by the NOW program, as well as the acknowledgements made by British Columbia in the 2017 Revised Impacts Assessment summarized above, and the statements made by this court and the Court of Appeal on various injunction and stay applications.

[95] Taseko argues that the NOW permit contains many conditions designed to avoid irreparable harm through, for example, reclamation, and because exploratory drilling work has already been done, the marginal harm does not rise to the level of being irreparable.

[96] In *Taseko Mines*, Mr. Justice Grauer heard cross applications for injunctions between Taseko and the Tsilhqot'in with regard to a permit issued by British Columbia for exploratory work in the same area as the NOW program area. He considered similar arguments in assessing irreparable harm and the balance of convenience. In granting the Tsilhqot'in's injunction, Grauer J. stated as follows:

> [64] Taseko submits that much of the harm asserted by the petitioners overstates the actual impact the work will have:
>
> > [61] ...The area in which the work under the Approvals will be conducted is not the pristine environment contemplated in some cases in which interlocutory injunctions have been granted. The work is in an area which is already had various mining related activities take place, and some of the current work is in the same location as previous works.
>
> [65] It seems to me, with respect, that this highlights one of the significant problems raised by the petitioners. Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.
>
> [66] The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners.

> Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished. …
>
> [67] In my view, this not only establishes significant irreparable harm to the petitioners' substantive rights … It also speaks to the *status quo*.

[97] Subsequent presiders have adopted these remarks, and reached the same conclusion, including Mr. Justice Branch in the interlocutory injunction application in the consultation petition, *William* #1. Branch J. added that certain points made in *Taseko Mines* applied with "additional force" given that the NOW program is of much larger scope than the 2012 program enjoined by Grauer J.; it is the third proposed exploratory program, which increases the cumulative effects recognized by Grauer J.; and the evidence put forward by the Tsilhqot'in had strengthened since the *Taseko Mines* decision because the Tsilhqot'in were able to report interferences with their recognized or alleged aboriginal rights that occurred when the 2012 drilling program took place pursuant to an agreement between the parties.

[98] These observations apply on this application especially given the evidence that 31 of the 47 hectares to be disturbed will be new disturbance, and the evidence that even though there has been some industrial activity in the area, it is relatively undisturbed compared to large portions of the Tsilhqot'in traditional territory.

[99] When issuing the interlocutory injunction pending the appeal of the dismissal of the consultation petition, *Williams* #3, Madam Justice Dickson said:

> [38] Like Justice Branch, I agree with Justice Grauer's analysis in the 2011 injunction reasons. As he did, I note that the scope of the 2016 Program is much larger than its predecessor and that it is the third such program, which increases the cumulative negative effects. I also agree with Justice Branch that there is a material risk of serious, irreparable harm to the appellants if the 2016 Program proceeds which outweighs the risk of harm to Taseko, particularly as mitigated by the factors Justice Branch described in his reasons and that I have quoted.
>
> [39] Whether any further delay will actually cause Taseko's EA Certificate to lapse or precipitate the demise of the overall project is not established. However, it is more than likely that permanent alteration of the Area will jeopardize the appellants' ability to exercise their Aboriginal rights during the course of work and for years to follow. As Justice Grauer stated, if the injunction does not issue, the appellants will have lost their asserted right … On the other hand, granting the injunction will not deprive Taseko of the

> opportunity to obtain the geological and engineering information it may require, albeit with some delay.

[100] As it is now apparent that the provincial environmental assessment certificate will expire in January 2020 before work on the mine is substantially started, this expiry is no longer relevant to the irreparable harm analysis because it cannot be avoided regardless of the outcome of this application. However, Taseko is understandably concerned about the expiry of the NOW permit. This permit, if renewed in July 2020, will permanently expire if the work is not completed by July 2022. Although I have found that it is possible to complete the trial in time for that work to complete if Taseko is successful at trial, it is not a sure thing and there is a material risk that the NOW permit will expire before the work is completed.

[101] The expiry of the NOW permit constitutes harm to Taseko if the inability to undertake the NOW program adversely affects Taseko's goal of constructing and operating a mine. This requires a finding that the collateral objectives of the NOW permit is connected to mine construction and operation. However, the collateral purpose of gathering data is not well articulated in the sense of what is to be collected, how it will be used specifically and whether the full scope of the NOW program is necessary to undertake this data collection. There is a suggestion that the data could be used to redesign the mine, but the evidence is that Taseko has not decided to redesign the mine, the federal government has twice rejected Taseko's proposals and Taseko's current environmental assessment certificate is in respect of a mine design it is no longer pursuing. The temporary loss of an ability to collect undefined data for an undefined or only vaguely defined purpose does not amount to significant harm.

[102] Taseko also argues that it will suffer reputational harm if it is not permitted to advance its work because preferred contractors ready to work now may not be available in the future. This type of harm is, in my view, far less serious than the harm the Tsilhqot'in have established.

[103] It is clear that the harm asserted by the Tsilhqot'in is not compensable in damages. The courts in *Taseko Mines*, *William* #1, *William* #3, and *William* #5 have found such damages to be irreparable and I agree.

[104] Taseko argues that it will suffer irreparable harm given that the Tsilhqot'in have not provided an undertaking as to damages and seek to waive this requirement.

[105] Unless the court otherwise orders, a party seeking a pre-trial or interim injunction must provide an undertaking to abide by any order that the court may make as to damages: Rule 10-4(5), *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The Tsilhqot'in have not done so because they say they are not in a financial position to make such an undertaking. The Tsilhqot'in advanced the same or similar reasoning in both *Taseko Mines* and *William* #1.

[106] In *Taseko Mines*, Grauer J. waived the requirement to provide an undertaking as to damages under Rule 10-4(5), because of his assessment of the balance of convenience, because of the relative strength of the claims, the relative harm to be suffered by the parties, the relative economic resources they had available to them, and because the Tsilhqot'in had given notice that no action should be taken while it considered its options.

[107] Mr. Justice Branch, in *William* #1, similarly relieved the Tsilhqot'in of having to provide an undertaking as to damages, relying on Grauer J.'s reasoning in *Taseko Mines* and his view that equity favoured the result: see para. 19.

[108] As summarized in *Wahgoshig First Nation* at para. 77, courts have waived the damages undertaking requirement for Aboriginal parties due to constrained finances or impecuniosity where there has been egregious behavior by the respondent, or if it would be in the public interest: see also *Platinex* at paras. 113-124.

[109] Several factors favour waiving the undertaking as to damages requirement. The financial difficulty of such an undertaking are obvious, not just because of the potential magnitude based on the estimate of the value of the copper and gold

deposits, but because the considerable uncertainly around Taseko ever operating a mine makes the estimate of the quantum of damages that such an undertaking would cover virtually impossible. Aspects of the Tsilhqot'in's claim appear to not only raise a serious issue to be tried but to be strong, while others are challenging. The public interest in reconciliation also supports the waiving of the damages undertaking. While other public interest issues, such as deterring self-help tactics such as the blockade and the economic benefits in the Williams Lake area and British Columbia generally, weigh against granting the waiver, the balance remains in favour of granting it. I conclude that the requirement to undertake to pay damages should be waived in these circumstances.

[110] Having waived the undertaking as to damages, the financial loss or harm that may be suffered by Taseko is considered irreparable given the Tsilhqot'in's position that they do not have the financial resources to pay damages: *William* #5 at para. 49 citing *Snuneymuxw First Nation et al. v. H.M.T.Q. et al.*, 2004 BCSC 205 at para. 34; *Red Chris Development Company Ltd. v. Quock*, 2014 BCSC 2399 at para. 66-69.

[111] Given the nature of Tsilhqot'in's harm, and the waiver of the undertaking as to damages, there is a material risk of irreparable harm to both parties.

Status quo

[112] In *Wale* at 346, the Court held that where there is a material risk of irreparable harm to both parties, the court should favour the status quo. Madam Justice McLachlin stated "where the only effect of an injunction is to postpone the date upon which a person is able to embark on a course of action not previously open to him, it is a counsel of prudence to preserve the status quo".

[113] In *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.), Lambert J.A. said as follows about assessing the status quo at 103:

> … The first aspect involves a consideration of which party took the step which first brought about the alteration in their relationship which led to an alleged actionable breach of the rights of one of the parties; the second aspect involves a consideration of which party took the action which is said to be an actionable breach of the rights of the other party; and the third aspect

> involves a consideration of the nature of the conduct which is said to be wrongful and which is being carried on at the time that the application for the interim injunction is brought. …

[114] Taseko argues that the status quo is defined as of the time the claim is brought, citing *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 at para. 325. As Taseko has been authorized since July 2017 to carry out the NOW program, it is the Tsilhqot'in who seek to alter the status quo by enjoining Taseko's program-related activities.

[115] The Tsilhqot'in submit that the injunction will maintain the status quo, which is the the ongoing ability to exercise their Aboriginal rights in the relatively undisturbed NOW program area. The NOW program has not started, construction and operations of the mine have never started and may never start. Hence, they argue that Taseko will alter the status quo should it commence work on the NOW program.

[116] In *Relentless Energy Corporation v. Davis et al.*, 2004 BCSC 1492, the plaintiff sought an injunction restraining the defendants from obstructing, interrupting or interfering with their construction of a road on Crown land for which it had governmental permits to build. The defendants stated that the road stood to negatively affect land upon which Aboriginal rights had been claimed. Madam Justice Satanove dismissed the application for an injunction and held, at para. 25, that the status quo was the prevention of the road being built because "… the road has not yet been built. The defendants have been hunting and trapping in this area in the preceding years right up to the present. The status quo is preserved by denying the injunction*."*

[117] In *Red Chris Development Company Ltd. v. Quock*, 2014 BCSC 2399 at para. 69, Mr. Justice Punnett found that the "presence, development and operation" of the plaintiff's mine was the status quo given that construction had already commenced. It was the defendant blockaders, asserting they were the rightful title-holders of the lands upon which the mine was being constructed, who were seeking to alter this status quo by preventing access to the mine.

[118] *Red Chris* and *West Moberly* are different from this case because in both of those cases, construction or operations of the industrial undertaking had commenced. Even though Taseko is authorized to undertake the NOW program, the status quo is the NOW program area undisturbed by the NOW program. In similar circumstances, Grauer J. concluded in *Taseko Mines* that the disturbance to the land would change the status quo as opposed to the delay to lawfully permitted work. I conclude that the NOW program will change the status quo.

Strength of the Tsilhqot'in's case

[119] I have found that the Tsilhqot'in have raised a serious issue to be tried on infringement and on defending against British Columbia's burden to prove justification. Where serious issue to be tried is the threshold merits test, it is important that the injunction chambers judge not comment more than necessary on the merits. On the strong arguable case standard the injunction chambers judge is required to considerably delve into the merits.

[120] Taseko argues that the merits are important to the balance of convenience and because in its submission the Tsilhqot'in do not meet the alternate strong arguable case threshold, the merits weighs against granting an injunction.

[121] While I have deliberately avoided saying more than necessary about the merits, on all the evidence and all of the arguments, the impression I formed was that parts of the Tsilhqot'in's case are strong, while other issues are challenging for all of the parties. An obvious example of a challenging issue is the assessment of whether the NOW program objective is compelling and in particular the sub-issue of the time at which the assessment of compelling and substantial takes place. If it takes place when the substantial start date primary objective is moot, the strength of the Tsilhqot'in's case improves versus assessing it when the NOW permit was approved. The opposite is true for the positions of British Columbia and Taseko. In my view, the overall strength of the Tsilhqot'in's case is such that the merits do not shift the balance of convenience.

Public interest

[122] Taseko also alleges that the Tsilhqot'in have unreasonably delayed in proceeding with this infringement action and the public benefit is harmed by such applications being brought after such delay. Taseko also argues that the Tsilhqot'in unreasonably delayed in bringing this injunction application and because the Tsilhqot'in established a blockade first, the Tsilhqot'in do not come to court with clean hands and the court should not grant the equitable relief sought.

[123] With regard to delay in prosecuting the action, it was commenced at the same time as the consultation petition but not pursued for two years. The Tsilhqot'in explain that they held it in abeyance while they pursued the consultation petition because it is more expeditious and had it been successful, the infringement action would not be necessary. The resolution of the consultation issue advances the infringement action in any event as that issue need not be re-litigated.

[124] With regard to commencing the injunction application, Taseko gave notice it intended to proceed with the work immediately after the Supreme Court of Canada denied leave on the consultation petition. A month passed before the Tsilhqot'in brought its injunction application. I do not consider a one month delay in bringing the injunction application to be unreasonable.

[125] In my view, the Tsilhqot'in's approach has been reasonable and the public interest has not been detrimentally affected by the delay.

[126] However, with regard to the blockade, I have no hesitation in saying the Tsilhqot'in ought not to have responded to Taseko's notice that it would start work on the NOW program with a blockade. I agree that the blockade as a self-help remedy is a public interest factor weighing against the Tsilhqot'in's injunction application both in terms of the public interest and as a matter of the Tsilhqot'in seeking equitable relief: see *Lax Kw'alaams* 2004 BCCA 392 at para. 40; *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.) at 586.

[127] Taseko also points to significant evidence of the economic benefit of the NOW program in the Williams Lake area at a time when major employers are cutting back or closing down in the forest industry in particular. The evidence demonstrates that Taseko will use local contractors and workers where possible and the program will create a significant number of jobs and indirect economic activity. What jobs are not created locally will be created in British Columbia in any event.

[128] On the other hand, actions regarding rights infringements are an important part of the reconciliation process and so of general public importance: *Lax Kw'alaams* SCC at para. 12; *Tsilhqot'in* SCC at para. 82, 118 and 119; *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 73; and *Taseko Mines* at para. 60.

Conclusion on irreparable harm and balance of convenience

[129] Overall, the Tsilhqot'in stand to suffer greater irreparable harm if the injunction is not granted than Taseko will if it is. The status of Taseko's goal to operate a gold and copper mine is uncertain with many difficult hurdles to overcome. Taseko's harm is to lose the chance to proceed with the NOW program. However, the primary objective of this permit, to substantially start the overall mine project by January 2020 is no longer achievable and the harms suffered by the loss of the collateral objectives, gathering data for the purposes of further applications, permits, or mine redesign, is not well explained and is not as certain, as imminent or as tangible as that of the harm that the Tsilhqot'in will suffer.

[130] Taseko's economic interests are important but the evidence that the NOW program will facilitate Taseko's plans to construct and operate a mine is not concrete or compelling. The NOW program will significantly disturb the NOW program area interfering with established, conceded, and asserted Aboriginal rights with the only tangible benefit being to provide jobs over a few months.

[131] While there are important public interest issues on both sides, the imperative of reconciliation, an element of which is the ability to pursue infringement actions, is such that the balance of convenience is in the Tsilhqot'in's favour.

Conclusion

[132] The Tsilhqot'in's application for an interlocutory injunction is granted on the following terms:

1) until the Tsilhqot'in's claim in this proceeding is heard and determined, or until further order, Taseko, its agents, and its employees are enjoined from undertaking the drilling program authorized under the notice of work permit granted on July 14, 2017 and any associated regulatory approvals;

2) pursuant to Rule 22-4(2) of the *Supreme Court Civil Rules*, the period prescribed by Rule 22-4(4)(a) is shortened from 28 days to 5 days;

3) pursuant to Rule 10-4(5) of the *Supreme Court Civil Rules*, the Tsihlhqot'in are relieved of the undertaking to abide by any order that the court may make as to damages; and

4) any party may apply upon eight days' notice to vary or set aside the terms of the order in paragraph 1 in the event that circumstances change materially.

[133] The Tsilhqot'in also sought an order that the trial be expedited. I did not receive submissions on what such an order would entail for the parties or for trial scheduling. If an expedited trial is warranted, that should be considered as part of case management and through discussions between the parties and the registry with the assistance of a judge at a case planning conference. At the conclusion of the injunction application hearings, I urged the parties to set a trial date so that in the event I granted the Tsilhqot'in's application, no time would be lost while these reasons were under reserve. The parties should schedule a case planning conference at the earliest possibility to address the timeline to trial. In the event that any of the parties seek the early appointment of a trial judge, they shall make the request in accordance with Practice Direction 4.

[134] Taseko's application for an injunction prohibiting the Tsilhqot'in's blockade is moot and dismissed for that reason.

[135] With regard to costs, Taseko argues that the Tsilhqot'in's actions in blockading are such that its application should be dismissed and costs awarded to Taseko in any event of the cause. The Tsilhqot'in seek costs of their application and solicitor-own client costs of Taseko's application. Although I have found the Tsilhqot'in's delay in bringing its injunction application to not be unreasonable from a delay perspective, I have also found that the Tsilhqot'in ought not to have responded to the Taseko's intention to proceed with the NOW program with a blockade. In my view, it is appropriate to address such behaviour through costs. In similar circumstances, Mr. Justice Grauer ordered that Taseko have the costs of its application even though it was not successful and ordered that the costs of the Tsilhqot'in on their injunction application be in the discretion of the trial judge: *Taseko Mines* at paras. 74 and 77. I order that Taseko have the costs of its application payable forthwith and that the Tsilhqot'in's costs of their application be in the discretion of the trial judge. The three days of oral submissions are allocated equally to each application.

"Matthews J."