

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

PLAINTIFF

AND:

TASEKO MINES LIMITED, 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

STATEMENT OF CLAIM

The Plaintiff

- 1. The Xeni Gwet'in First Nations Government (also known as the Nemaiah Valley Indian Band, the Nemaiah Valley Indian Band or the Nemaiah Indian Band) (the "Xeni Gwet'in") is a body of Indians, for whose use and benefit in common reserve lands have been set apart, and who constitute a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5.**
- 2. The Plaintiff Marilyn Baptiste brings this claim on her own behalf and, as a representative, on behalf of all other members of the Xeni Gwet'in and all other members of the Tsilhqot'in Nation. Marilyn Baptiste is the elected Chief of the Xeni Gwet'in. She is a member of the Xeni Gwet'in and a member of the Tsilhqot'in Nation.**
- 3. The Tsilhqot'in Nation was a distinct Aboriginal group before and at the time of contact with Europeans (the "Date of Contact").**

4. The Tsilhqot'in Nation as it exists today is the continuation of, and successor to, the Tsilhqot'in Nation as it existed at the time of contact with Europeans and, as such, the Tsilhqot'in Nation as it exists today continues to hold the Aboriginal rights that the Tsilhqot'in Nation held at the Date of Contact.

5. From a time prior to the Date of Contact, and continuously to the present day, the Tsilhqot'in Nation has sustained its people, communities and distinctive culture from the lands, waters and resources of its traditional lands (the "Traditional Lands").

6. The Xenigwet'in is a sub-group of the Tsilhqot'in Nation, and its members hold Aboriginal rights as members of the Tsilhqot'in Nation. Pursuant to Tsilhqot'in law, the Xenigwet'in is charged with special rights and responsibilities as caretakers or stewards of a portion of the Traditional Lands of the Tsilhqot'in Nation (the "Caretaker Area").

7. Members of the Xenigwet'in, as members of the Tsilhqot'in Nation, hold proven Aboriginal hunting and trapping rights, and Aboriginal fishing rights (as described below), that depend upon, and are intimately connected to, the lands and waters at issue in this proceeding.

The Corporate Defendant

8. The Respondent Taseko Mines Limited ("Taseko") is a provincially incorporated company (Incorporation Number BC0069082) with its registered office at 1500 Royal Centre, 1055 West Georgia St., P.O. Box 11117, Vancouver, BC, V6E 4N7, Canada. Taseko is the proponent of the proposed Prosperity Gold-Copper Mine Project (the "Prosperity Project"), as described below.

The Provincial Defendants

9. The Defendant, Her Majesty the Queen in Right of the Province of British Columbia ("British Columbia"), asserts ownership of the lands and resources material to the issues in this proceeding, pursuant to s. 109 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3, as amended, subject to the interests of the Tsilhqot'in Nation and the Xenigwet'in, being interests other than that of the Province in these lands. The interests of the Tsilhqot'in and the Xenigwet'in have never been lawfully extinguished or surrendered.

10. The Defendants, Chief Inspector of Mines and the Minister of Energy, Mines and Petroleum Resources (British Columbia), are the provincial officials responsible for issuing mining leases, rights of way and approvals for mining activities and operations pursuant to the *Mines Act*, R.S.B.C. 1996, c. 293, the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, the *Mining Right of Way Act*, R.S.B.C. 1996, c. 294, and associated regulations under these statutes (the “Provincial Mining Legislation”).

11. The Defendant Minister of Environment (British Columbia) is responsible for issuing permits, licences and approvals required or likely required for the Prosperity Project, including water licences, approvals for the short-term use of water, or for changes in and around streams, waste management permits, hazardous waste generator registration and transport licences and fish culture permits.

12. The Defendant Minister of Agriculture and Lands (British Columbia) is responsible under the *Land Act*, R.S.B.C. 1996, c. 245 for granting the surface leases, licences of occupation and statutory rights of way that are required by Taseko for the Prosperity Project.

13. The Defendant Minister of Forests and Range (British Columbia) is responsible for issuing permits, licences and approvals required or likely required for the Prosperity Project, including licences to cut, road use permits and special use permits.

The Federal Defendants

14. The Defendant, the Attorney General of Canada, represents Her Majesty the Queen in Right of Canada (“Canada”). Canada has jurisdiction with respect to the inland fisheries at issue in this proceeding, including *Teztan Biny*/Fish Lake, pursuant to s. 91(12) of the *Constitution Act, 1867*. Canada, as represented by the Governor in Council, has the authority to amend the *Metal Mining Effluent Regulations*, S.O.R./2002-222 (“MMER”) to add *Teztan Biny* to Schedule 2, and thus permit the destruction of *Teztan Biny* as a component of Taseko’s Prosperity Project.

15. The Defendant Minister of Fisheries and Oceans (Canada) is the federal Minister responsible for granting authorizations for the destruction of fish and for the harmful

alteration, disruption or destruction of fish habitat under the *Fisheries Act*, R.S.C. 1985, c. F-14, which are required by Taseko for the Prosperity Project.

16. The Defendant Minister of the Environment (Canada) is the Minister responsible for leading the process required to amend the MMER to add *Teztan Biny* to Schedule 2, and thus authorize the destruction of *Teztan Biny* as a component of Taseko's Prosperity Project.

17. The Defendant Minister of Transport (Canada) is the Minister responsible for issuing permits, licences and approvals required or likely required for the Prosperity Project, including approvals for works in or around navigable waters.

Crown Officials

18. A reference in this Statement of Claim to a Minister of the Federal or Provincial Crown includes all Crown officials designated by that Minister, or otherwise empowered under the relevant statutes, to make the referenced statutory decisions concerning the permits, licences and approvals required or likely required for the Prosperity Project.

The Prosperity Project

19. Taseko is proposing the development of the Prosperity Project, an open pit gold and copper mine to be located approximately 125 km southwest of Williams Lake, British Columbia. Taseko proposes to develop the mine site on a 35 km² parcel of purported provincial Crown land. The Prosperity Project would include a large open pit mine development with an anticipated 20 year operating life.

20. The Prosperity Project, as proposed, includes the following components:

a.

a mine site including an approximately 2 km wide open pit; waste rock areas; ore, low grade ore and soil stockpiles; a primary crusher and overland conveyer; onsite mill; on-site camp; warehouse; explosives facilities; and maintenance, administrative and support infrastructure (the "Mine Site");

b.

an approximately 125 km long transmission line and substation at the Mine Site (the “Transmission Line”);

c.

new road to connect existing logging roads and highways for access and for transport, including for the transport of concentrate from the Mine Site to the existing Gibraltar Mine Concentrate Loadout Facility near Macalister, 54 km north of Williams Lake; and

d.

the construction of a tailings impoundment area (“TIA”) for the storage of millions of tonnes of mine tailings and waste rock materials.

21. This final element, the construction of a TIA for the Prosperity Project, entails the complete and permanent destruction of *Teztan Biny*/Fish Lake and portions of its connecting streams and water bodies, including portions of Fish Creek (“*Teztan Biny*”). Representatives of Taseko have stated that the Prosperity Project requires the destruction of *Teztan Biny* and that, from Taseko’s perspective, there is no viable alternative for the Prosperity Project to proceed.

22. The *Fisheries Act* and the MMER prohibit the destruction of a fish-bearing lake for use as a TIA, except where the lake appears on Schedule 2 to the MMER, and is thus exempted from this prohibition, and made available for use as a TIA. The Prosperity Project requires an amendment to Schedule 2 to permit the destruction of *Teztan Biny*. The mine, as proposed, cannot proceed without this amendment.

23. After several months of negotiations between the Tsilhqot’in Nation, Canada and British Columbia toward establishing an acceptable joint provincial/federal review panel for the environmental review, British Columbia unilaterally terminated this process and implemented a typical non-review panel environmental assessment for the Prosperity Project. As a result, and over the objections of the Tsilhqot’in Nation, the Prosperity

Project is currently undergoing separate but partially harmonized provincial and federal environmental assessments.

Tsilhqot'in Aboriginal Fishing Rights at *Teztan Biny*

24. The Prosperity Project falls within the Traditional Lands of the Tsilhqot'in Nation, and specifically within the Caretaker Area of the Xeni Gwet'in. Taseko, British Columbia and Canada have all recognized that the Mine Site for the proposed Prosperity Project falls within the Traditional Lands of the Tsilhqot'in Nation. The Transmission Line would also run through the Traditional Lands of the Tsilhqot'in Nation.

25. *Teztan Biny* is a pristine mountain lake in the Caretaker Area of the Xeni Gwet'in and in the heart of the Traditional Lands of the Tsilhqot'in Nation. *Teztan Biny* supports an abundant and unique monoculture of rainbow trout that has been genetically isolated for centuries.

26. The members of the Xeni Gwet'in and the Tsilhqot'in Nation have a deep and abiding connection to *Teztan Biny*. From a time prior to and at the Date of Contact, and continuously to the present day, members of the Tsilhqot'in Nation have fished at *Teztan Biny* for sustenance, social and ceremonial purposes, as an integral and defining element of their distinctive culture. Accordingly, the Xeni Gwet'in and the Tsilhqot'in Nation hold a site-specific Aboriginal right to fish in *Teztan Biny* for food, social and ceremonial purposes, protected under s. 35(1) of the *Constitution Act, 1982* (the "Aboriginal Fishing Right at *Teztan Biny*").

27. The Tsilhqot'in Aboriginal Fishing Right at *Teztan Biny* depends intimately on the lands, waters and resources of *Teztan Biny* for its continued exercise. The Aboriginal Fishing Right includes the right, of the Tsilhqot'in Nation, to the protection and conservation of the cultural, ecological and spiritual integrity of the lands, waters and resources in and around *Teztan Biny*, as required to sustain the meaningful exercise of the Aboriginal Fishing Right. This includes the right to a sufficient quantity and quality of fish and fish habitat to sustain the meaningful exercise of the Aboriginal Fishing Right at *Teztan Biny* and the preservation of the unique species of rainbow trout native to *Teztan Biny*.

Tsilhqot'in Aboriginal Hunting and Trapping Rights in the *Teztan Biny* Area

28. The Tsilhqot'in Nation, including the Xeni Gwet'in, also holds proven Aboriginal hunting and trapping rights over an extensive area of land including and surrounding *Teztan Biny*.

29. As recognized by the judgment of the Supreme Court of British Columbia in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, the members of the Tsilhqot'in Nation, including the Xeni Gwet'in, hold the following Aboriginal hunting and trapping rights throughout the lands material to this proceeding:

- a. Aboriginal rights to hunt and trap birds and animals 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; and
- b. an Aboriginal right to hunt and trap for the purposes of trading in skins and pelts as a means of securing a moderate livelihood.

(collectively, the "Aboriginal Hunting and Trapping Rights").

30. Members of the Xeni Gwet'in and Tsilhqot'in Nation continue to exercise their Aboriginal Hunting and Trapping Rights at *Teztan Biny* and throughout the surrounding lands.

The Proposed Extinguishment of the Tsilhqot'in Aboriginal Fishing Right at *Teztan Biny*

31. As described above, Taseko's proposal for the Prosperity Project includes, as an integral and essential element of the Project, the destruction of *Teztan Biny* as a fish-bearing lake. The Prosperity Project necessarily entails the complete and permanent loss of *Teztan Biny* and its resources, including its unique, wild stock of rainbow trout and a pristine supply of water which forms part of the Fraser River watershed.

32. The destruction of *Teztan Biny*, as an essential component of the Prosperity Project, would thus permanently and completely deprive the members of the Xeni Gwet'in and the Tsilhqot'in Nation of the ability to exercise their Aboriginal Fishing Right at *Teztan Biny*. The destruction of *Teztan Biny* would necessarily effect an extinguishment of the Aboriginal

Fishing Right, which is intimately dependent upon, and defined by its attachment to, the specific lands and resources in and around *Teztan Biny*.

33. Neither British Columbia nor Canada can lawfully authorize the extinguishment of an Aboriginal right, subsequent to the enactment of s. 35(1) of the *Constitution Act, 1982*.

34. Accordingly, none of the Provincial or Federal Defendants to this action has the lawful authority to issue any authorization or approval for the Prosperity Project that is predicated on the destruction of *Teztan Biny* (and the consequent extinguishment of the Aboriginal Fishing Right at *Teztan Biny*). Any such authorization would exceed provincial or federal jurisdiction, as the case may be, and would be of no force and effect pursuant to ss. 35(1) and 52 of the *Constitution Act, 1982*.

35. Similarly, Canada, acting through the Governor in Council, lacks the constitutional jurisdiction to amend the MMER to add *Teztan Biny* to Schedule 2 for the purposes of allowing or facilitating the destruction of *Teztan Biny*, or the conversion of *Teztan Biny* into a TIA. Any such amendment would exceed federal jurisdiction and would be of no force and effect pursuant to ss. 35(1) and 52 of the *Constitution Act, 1982*.

36. Sections 32, 35 and 43 of the *Fisheries Act* and s. 5(1) and Schedule 2 of the MMER, or any of these provisions, are constitutionally inapplicable, and of no force and effect, to the extent that they purport to provide authority to permit, approve or allow the destruction of *Teztan Biny*, the conversion of *Teztan Biny* into a TIA, or the destruction of the fish populations in *Teztan Biny*.

Infringements of Tsilhqot'in Aboriginal Hunting and Trapping Rights

37. In addition to extinguishing the Aboriginal Fishing Right at *Teztan Biny*, the construction, operation and long-term maintenance of the Prosperity Project, and the associated physical disturbances, will adversely affect the Aboriginal Hunting and Trapping Rights of the Xenigwet'in and other Tsilhqot'in members. These adverse effects include:

- a. **diminishing the overall quality and quantity of bird and wildlife habitat thus reducing the populations of birds and wildlife available for hunting and trapping;**
 - b. **fragmenting wildlife habitat and disrupting the migration and residency patterns of birds and wildlife that are hunted and trapped by Tsilhqot'in members;**
 - c. **increased wildlife mortality from increased motor vehicle traffic and increased human activity;**
 - d. **increased bird mortality from collisions with the Transmission Line;**
 - e. **negative impacts on water quality and quantity, with consequent impacts on the quality and quantity of birds and wildlife that are hunted and trapped by Tsilhqot'in members;**
 - f. **loss of access for Tsilhqot'in members to traditional hunting and trapping grounds in and around the Prosperity Project lands;**
 - g. **vastly increasing the amount of human activity in the area and thus reducing the lands over which hunting and trapping can be safely carried out; and**
 - h. **increasing access for non-Aboriginal hunters into the region, thus increasing competition for, and pressure on, bird and wildlife populations.**
38. **The adverse effects of the Prosperity Project on the Aboriginal Hunting and Trapping Rights are unreasonable, would impose undue hardship on the Xenigwet'in and Tsilhqot'in peoples, and would interfere with their preferred means of exercising their Aboriginal Hunting and Trapping Rights. The construction, operation and long-term maintenance of an open-pit mining project of this magnitude, including the destruction of a fish-bearing lake, will significantly impact the ecological, cultural and spiritual integrity of the surrounding lands and waters.**

39. Further, the Provincial Mining Legislation infringes the Aboriginal Hunting and Trapping Rights, and is of no force and effect, to the extent that this legislation confers a discretion on Crown officials to issue mining leases, rights of way and approvals for mining activities and operations, without structuring this discretion to accommodate the Aboriginal Hunting and Trapping Rights of the Tsilhqot'in.

40. These adverse effects of the Prosperity Project, and any authorizations granted by the Defendants, or any of them, for the Prosperity Project, would infringe the Aboriginal Hunting and Trapping Rights of the Xeni Gwet'in and other Tsilhqot'in members, contrary to ss. 35(1) and 52 of the *Constitution Act, 1982*.

Alternative Argument: Infringement of Tsilhqot'in Aboriginal Fishing Right at *Teztan Biny*

41. In the alternative, if the construction, operation and long-term maintenance of the Prosperity Project, and associated physical disturbances (including the destruction of *Teztan Biny*), are not found by this Honourable Court to amount to an extinguishment of the Aboriginal Fishing Right at *Teztan Biny*, the Plaintiff says that these activities amount to a severe infringement of the Aboriginal Fishing Right.

42. The adverse effects on the Aboriginal Fishing Right at *Teztan Biny* include:

- a. the complete and permanent destruction of *Teztan Biny*;
- b. the complete and permanent destruction of the natural ecology of *Teztan Biny*, including its fish habitat, spawning grounds and the existing population of genetically unique rainbow trout;
- c. the serious risk of extirpation of the monoculture of genetically unique rainbow trout supported by *Teztan Biny*;
- d. the complete and permanent loss of a traditional source of wild fish utilized by Xeni Gwet'in and Tsilhqot'in members for food, social and ceremonial purposes;
- e. the complete and permanent loss to the Xeni Gwet'in and other Tsilhqot'in peoples of the ability to exercise their Aboriginal Fishing Right at *Teztan Biny*;
- f. the complete and permanent loss to the Xeni Gwet'in and other Tsilhqot'in peoples of the ability to carry out their ancestral fishing practices at *Teztan Biny*, and to thereby maintain their connection to their ancestors and their culture at this traditional site, and to pass on that connection to their children and future generations; and

g. the destruction of *Teztan Biny* in a manner that is tantamount to the desecration of the deep and abiding connection between the Tsilhqot'in peoples and *Teztan Biny*.

43. Further, sections 32, 35 and 43 of the *Fisheries Act* and s. 5(1) and Schedule 2 of the MMER, or any of these provisions, infringe the Aboriginal Fishing Right at *Teztan Biny*, and are of no force and effect, because these provisions confer a discretion on Crown officials to authorize the destruction of fish and fish habitat, and this discretion is not structured to accommodate the Aboriginal Fishing Right at *Teztan Biny*.

44. The Provincial Mining Legislation also infringes the Aboriginal Fishing Right at *Teztan Biny*, and is of no force and effect, to the extent that this legislation confers a discretion on Crown officials to issue mining leases, rights of way and approvals for mining activities and operations, without structuring this discretion to accommodate the Aboriginal Fishing Right at *Teztan Biny*.

45. The adverse effects of the Prosperity Project on the Aboriginal Fishing Right are unreasonable, would impose undue hardship on the Xeni Gwet'in and Tsilhqot'in peoples, and would interfere with their preferred means of exercising their Aboriginal Fishing Right. Any authorizations granted by the Provincial or Federal Defendants, or any of them, for the Prosperity Project, if predicated on the destruction of *Teztan Biny*, infringe the Aboriginal Fishing Right of the Xeni Gwet'in and other Tsilhqot'in members, contrary to ss. 35(1) and 52 of the *Constitution Act, 1982*.

Relief Sought

46. Wherefore the Plaintiff claims as follows:

- a. a declaration that the Tsilhqot'in Nation has an existing Aboriginal right, within the meaning of s. 35 of the *Constitution Act, 1982*, to fish at *Teztan Biny* for food, social and ceremonial purposes;
- b. a declaration that the Tsilhqot'in Aboriginal right to fish at *Teztan Biny* includes the right to the protection and conservation of the cultural,

ecological and spiritual integrity of the lands, waters and resources in and around *Teztan Biny*, as required to sustain the meaningful exercise of the Aboriginal Fishing Right;

c. a declaration that the destruction of *Teztan Biny*, or its conversion into a tailings impoundment area, would extinguish the Aboriginal right of the Tsilhqot'in Nation to fish at *Teztan Biny* for food, social and ceremonial purposes;

d. a declaration that the Provincial and Federal Defendants, or any of them, lack the constitutional jurisdiction to issue any authorization or approval for the Prosperity Project, or make any amendment to Schedule 2 of the MMER, that is predicated on or permits the destruction of *Teztan Biny*, as this would constitute the extinguishment of the Aboriginal right of the Tsilhqot'in Nation to fish at *Teztan Biny* for food, social and ceremonial purposes, contrary to ss. 35(1) and 52 of the *Constitution Act, 1982*;

e. a declaration that the adverse effects of the Prosperity Project, and any authorizations granted by the Provincial and Federal Defendants, or any of them, for the Prosperity Project, would unjustifiably infringe the Aboriginal Hunting and Trapping Rights of the Xeni Gwet'in and other Tsilhqot'in members, contrary to ss. 35(1) and 52 of the *Constitution Act, 1982*;

f. in the alternative, a declaration that the adverse effects of the Prosperity Project, and any authorizations granted by the Provincial and Federal Defendants, or any of them, for the Prosperity Project, would unjustifiably infringe the Aboriginal right of the Tsilhqot'in Nation to fish at *Teztan Biny* for food, social and ceremonial purposes, contrary to ss. 35(1) and 52 of the *Constitution Act, 1982*;

- g. in the further alternative, damages and/or equitable compensation from Canada and British Columbia, or either, for any infringement of Aboriginal hunting, trapping or fishing rights;**
- h. a declaration that ss. 32, 35 and 43 of the *Fisheries Act*, R.S.C. 1985, c. F-14 and s. 5(1) and Schedule 2 of the *Metal Mining Effluent Regulations*, S.O.R./2002-222, or any of these provisions, are constitutionally inapplicable, and of no force and effect, to the extent that they purport to provide authority to permit, approve or allow the destruction of *Teztan Biny*, the conversion of *Teztan Biny* into a tailings impoundment area, or the destruction of the fish populations in *Teztan Biny*;**
- i. an interim, interlocutory and/or permanent injunction against the Defendants, or any of them, restraining them from issuing or acting pursuant to any authorization or approval for the Prosperity Project, or making any amendment to Schedule 2 of the MMER, that is predicated on or permits the extinguishment or unjustified infringement of the Aboriginal fishing, hunting or trapping rights of the Tsilhqot'in Nation;**
- j. pre- and post- judgment compound interest in respect of any damages or compensation;**
- k. costs; and**
- l. such further and other or partial relief as this Honourable Court may deem just.**

Place of Trial: Vancouver

Dated: January 6, 2009

"Jack Woodward"
Solicitor for the Plaintiff

This Statement of Claim 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.

Action No.
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 Xeni Gwet'in First Nations Government
and on behalf of all other members of the Tsilhqot'in Nation**

PLAINTIFF

AND:

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DEFENDANTS

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**WRIT OF SUMMONS &
STATEMENT OF CLAIM**

WOODWARD & company

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File No: 4512
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