

I moved to Victoria in 1999 to undertake my PhD, which I completed in an interdisciplinary program between anthropology, history, and law in 2006 (my comprehensive examinations, coursework and committee were populated with faculty members from these departments and faculties). My doctoral dissertation is on the history of social scientists -- anthropologists, geographers, historians, etc -- used as expert witnesses in claims cases in the united states before a tribunal mid-last-century called in the Indian Claims Commission -- and the relationship between descriptions of Indigenous peoples, science, and law. My primary method is historical/archival.

In 2001, I began teaching at UVic in the anthropology department, which possibly explains why it took 7 years to complete my degree. This was about the time that the William/TN case was about to start and further slowing my progress I started witnessing the trial when it began. That is, I went to as many of the days that I could to witness the events; not for the Tsilhqot'in or anyone else but because I believe these issues to be of central importance to all people of BC and Canada. I was interested in what arguments my government representatives used to claim sovereignty and jurisdiction over these lands, and how they purported to legitimate my existence here in BC.

Immediately upon finishing my doctorate, in January 2007, I began a 3 year SSHRC post-doc with the faculty of common law at U de Montreal. Luckily for me, my post doc saw me teach, in essence, full time at UVic (a series of courses including contemporary aboriginal peoples of Canada, ethnology of BC, aboriginal rights, and indigenous studies) and prepare research on the TN trial and judgement -- work that I have published in a refereed academic press and presented before learned colleagues at conferences throughout Canada -- including earlier this month when I participated on a panel regarding Tsilhqot'in Nation and its appeal to the SCC at the UBC law school for the annual Canadian Law and Society meetings.

Although I taught last year in the political science department at UVic (indigenous politics in Canada), I have left the university to help run a business in Victoria and to do other smaller projects. One of the jobs that I now do is help to prepare grant applications for non-profits and businesses alike to secure funding for community projects, such as social housing and music festivals. In this capacity, I prepared the funding application for the friends of Nemaiah valley to participate in the EA, and several of their experts will be presenting in the coming weeks. I also prepared their application for interested party status and that process led me to this hearing today. While learning about that call for participants, I thought I might have something to offer. So, I come to the hearings not as lawyer, environmentalist,

mining expert or someone with strong connections or interests to this place but as an interested individual that may have something to offer to the panel in a very specific way, and when I applied, I offered myself as a “friend” to the panel. It is with an abundance of caution and humility that I present to you today.

In the time that I have allowed to me, I want to communicate 2 points:

**1) Data** -- The first regards the data that the company has provided regarding ethnography and the cultural significance of land use and practices – information that as a cultural anthropologist who has specialised in First Nations’ issues I feel qualified to comment. In the information requests that the Panel made to the company to help define and clarify the EIS, you demanded information regarding the definition of activity in terms of traditional use, First Nations cultural values, and First Nations cultural impacts (ie. IR-5, IR-36).

In Taseko’s response and as we heard yesterday much, if not all, of the empirical data offered to build their argument that the effects of the project are negligible to local folk is dependent on a report by Cindy Ehrhart-English (1994).<sup>1</sup>

In her November 8, 2012 letter to CEAA, Ms. Ehrhart-English completely repudiates TML’s reading of that report. She questions the conclusions drawn, clarifies her own work, and states the following regarding the basis for TML’s claim for the current project:

“Figures 18 and 19 from my 1993 report show very clearly that within the mine development area, Little Fish Lake is the area in which most of the traditional activities have taken place. Taseko ask[ed] me what they might do regarding this indisputable fact as far as mitigation techniques and I suggested, at that time, that they avoid the Little Fish Lake area all together. The reason was because of the importance of that area to the history and culture of the Xenigwet’in and the Tsilhqot’in in general. I thought it was not enough to say this, but that the maps, with the strength of their sample size, and the power of the GIS technology in visually quantitatively analyzing the geographic cultural information from the study, show this in living color. The maps combined with the history that the report relays, and the testimony by the Tsilhqot’in during the hearings from round 1 of the Prosperity project hearings, give qualitative description and illustration of the 1993 study’s cold hard spatial data. I am very surprised that they

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<sup>1</sup> IR-36 also purports to rely on Ehrhart-English (1994).

would attempt to propose to place a tailings pond on the area that the 1993 study's figures 18 and 19 clearly show as being one of the most important cultural areas in the entire 1993 study area (the other area being the mouth of the Taseko River). People have practiced their aboriginal rights in more ways at Little Fish Lake than any other place in the 1993 study area." (Ehrhart-English, November 2012)

Regarding the topic of First Nations values and cultural importance, the data used by the Proponent are highly questionable at best, and if their expert is accepted as *an* expert on the area, she concludes that the destruction of Little Fish Lake is culturally significant and New Prosperity, as it is presently conceived, is not supported by her study. If she is not an expert, then, they have offered no empirical evidence in their responses. The significance is that this undermines the empirical reality of their claims and clearly demonstrates their distance from local First Nations' values and rights.

To me, this is very significant. All of the experts with knowledge of the proposal are in agreement about the importance of the area to the Tsilhqot'in and on the effects of the proposed plan and this point should be taken as indisputable.

**2) Rights, Title, and consultation** -- Regardless if we follow the trial judgement or the Court of Appeal, aboriginal rights in this instance are understood to a greater extent than virtually everywhere else in BC. For instance, the appeals court which is thought to be more limiting on title than the trial judgement states:

[237] Aboriginal title, while forming part of the picture, is not the only – or even necessarily the dominant – part. Canadian law provides a robust framework for recognition of Aboriginal rights. The cultural security and continuity of First Nations can be preserved by recognizing their title to particular “definite tracts of land”, and by acknowledging that they hold other Aboriginal rights in much more extensive territories.

[236] Aboriginal rights of various sorts protect cultural security and safeguard the ability of First Nations to continue to engage in traditional lifestyles. ~~Indeed, as British Columbia points out, the phrase “cultural security and continuity” was originally used in *Sappier; Gray* to describe the function of Aboriginal rights in general, not merely Aboriginal title.~~

Again, if we think to the Panel's information requests to the company last year, we see that TML acknowledges that there will be numerous negative effects stemming from the project. These include:

aesthetics, intermittent blasting, dust, unrelenting noise, unceasing light, and a cordoned off area that will limit movement, freedom, and control. TML says, “As industrial noise is foreign to the area, the atmosphere in the area immediately surrounding the mine would be altered for users accustomed to the relative quiet and exclusively natural sounds (wind noise, vegetation rustling, bird calls etc.) that existed at the site prior to development.” 40-4. They claim that these effects are insignificant because when the project area is compared with the entire Tsilhqot’in rights area, the area affected is relatively small.

First, TML affirms the fact that this project will contain many negative effects for the immediate area under consideration; the relative size of the rights area is not the concern of the Panel or TML. What is important is that there is no debate that the infringement will occur if the mine is developed. Secondly, TML explains that access and use of the area will be restricted and controlled. They state, “During all phases of the operation, Fish Lake visitors would no longer be able to come and go from the site freely.” They say that access is required to 1) sign in at a main gate, where the area entire area would be fenced, and 2) “be escorted across property by mine personnel” (40-5). Under their explanation for this plan, it is acknowledged that rights holders will be limited in their freedom and in the practice of their traditions in the area.

In the information requests, you wrote, quoting the original panel “that the established Tsilhqot’in rights to hunt and trap in the mine site area would be directly affected as they would no longer be able to exercise those rights until after the mine closed and the land was reclaimed. Even then, the restored landscape would be permanently altered. The Tsilhqot’in stated that they would likely not use the area to exercise their Aboriginal rights due to the perception of contamination. The original panel determined that the effect of the Project on the established Tsilhqot’in Aboriginal rights would be irreversible. The original panel has also considered Taseko’s proposed mitigation measures including the establishment of a no hunting zone for the Project area. The original panel stated that “this proposed mitigation would limit the ability of First Nations to practice their established Aboriginal right to hunt and trap in the Project area and may impact their Aboriginal rights to hunt and trap in other areas within the territory due to increased pressures on wildlife populations elsewhere.” 41-1-2

There appears to be nothing in TML's responses to address these concerns, or to offer any specific mitigations for the infringement of aboriginal rights.<sup>2</sup> I have not found any information to challenge the conclusions of the first panel (whom you quote specifically on this issue).

So, the assertion that rights and title is settled, frivolous or even a non-issue is countered by the actual political and legal history of the area. Moreover, the appeal of the rights and title case will be heard by the SCC in a few months. The responsibility that falls to the federal government is outlined in *Haida* and *Sappier; Gray* and it is onerous. We need leadership and consistency here; and hearings like this could provide meaningful guidance for how we are all going to deal with these issues. How we are going to build community; how we will consult; and how we will live together.

#### b) Consultation

The duty to consult is important but the instructions of how to do it are confusing at best. I would point to CEEA's "Aboriginal Consultation in the Context of Environmental Assessments: The Federal Perspective" written and presented by Sheila Risbud (2012) as a strong indicator of the issues under concern. We do know from that informative paper that the EA process is understood by CEEA and the federal government as a mechanism to fulfill this constitutional obligation, however.

All First Nations organisations affected by the proposed project and those that stand in solidarity with the Tsilhqot'in have voiced their opposition to the mine and to the method of how the project is transpiring. If we are to be partners in building a dynamic and healthy relationship and at least one of the parties is contending, as Joe Alphonse and Roger William recently did in a letter to various federal ministers, that "The plan is completely unacceptable," then, I think, we have to consider what are the possibilities and limitations of consultation if it alienates one party so greatly. In that letter, the Chiefs continue: "For our people, the proposed New Prosperity mine represents the most direct threat to our cultural survival since the residential school system. There can be no question that this proposal calls for the highest levels of consultation with the Tsilhqot'in people." If this statement is not hyperbole, then we have to pause and reflect for a moment about what we are trying to do.

To close, I'd like to bring the discussion of consultation back to Tsilhqot'in Nation for a moment. Justice Vickers of the BCSC said in his 473 page judgement, after hearing and deliberating on testimony for 5

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<sup>2</sup> IR 47- Traditional Use is relevant here too. TML minimizes the effects of the mine relative to a larger, contested area. Once again, they do not offer mitigations to what amounts to this limitation of rights and title.

years that “‘Tsilhqot’in people have survived despite centuries of colonization. The central question is whether Canadians can meet the challenges of decolonization.” In that decision, Vickers goes on at length about reconciliation and the effort to affect a positive change to an historical and contemporary contentious relationship.

In this way, these hearings reflect the potency (or impotency) of aboriginal rights and show how the constitutional obligation to consult with First Nations is being played out on the ground. I think we must consider very strongly what this process here, this month, means with respect to consultation, political relationships, legal obligations, and the potential care that we can show to one another in the building of community. Here’s why: I can report to you that, for instance, at the meetings of the Canadian Law and Society meetings three weeks ago, these hearings and the appeal to the SCC are being seen as beacons, or an indicator of direction: to steer clear of or move toward. Like the court case, other indigenous communities and their allies are looking to how their interests are being received and respected in these proceedings.

To this point, Grand Chief Stewart Phillip, President of the Union of BC Indian Chiefs, said “This bad project is one of the first to be forced through the now gutted federal environmental review process borne out of the Harper Government’ omnibus bills C-38 and C-45. If this review fails to come to the same conclusion as the last one, then we’ll know that the changes to the EA process are indeed about approving disastrous and unscrupulous projects over the objections of First Nations and the general public and at the great expense to the environment.”

And Robert Phillips, from the First Nations Summit, recognises that “This is also a test case of the federal government’s commitment to First Nations Title, Rights and Treaty Rights. If spending 20 years in court proving our rights means nothing at the end of the day, then we’ll only see conflict on the ground.”

The sense that options for Indigenous peoples are rapidly closing down in Canadian society is being felt all over the country and we can see growing protests and the potential for conflicts increasing. We (You) have an opportunity here to be a beacon to guide our direction toward a healthy path. Similarly to the Mackenzie Valley Pipeline Hearings in the NWT in the 1970s, a recommendation could be made to place a moratorium on this development until proper claims by Canada to this land has been worked out. This could force parties to implore the governments to work harder to work towards reconciliation and the building of strong, vibrant communities.