



cc DGS  
8/27

885762

December 17, 1991

LOG NO:	0121 T 1
ACTION:	G MCR → WRS Read the reply!
FILE NO:	JAN 24 1992

Ann Ehrcke  
Barrister and Solicitor  
Legal Services Branch  
Ministry of Attorney General

**Re: Fiduciary Duty Associated with the Proposed Mount Milligan Mine Project**

Further to our recent conversations on this issue, please find enclosed a comprehensive collection of background materials and correspondence documenting discussions with the Nak'Azdli and McLeod Lake Bands which have been undertaken by both government and company representatives. Also enclosed is a copy of the draft Mine Development Certificate for the project.

As discussed during our December 12, 1991 meeting, we would greatly appreciate your assistance in providing an opinion as to whether Crown officials have met provincial fiduciary responsibilities with respect to this proposal.

On a related note, you may recall that during our meeting last week, we presented our observation that project-specific aboriginal concerns have often been previously addressed through bilaterally negotiated agreements between the respective native group and the mine proponent. These agreements can cover a wide range of issues, including trapper compensation, training and employment opportunities and business ventures. It is our understanding that Placer Dome will be pursuing similar agreements with the Nak'Azdli and McLeod Lake Bands prior to the construction of the Mount Milligan mine, if and when the project proceeds.

Past successes in using these agreements to satisfactorily address both aboriginal and mining company concerns as they pertain to specific projects are indicative of their importance. As such, could you please include in your opinion a review of whether this vehicle, with the appropriate provisions, can be used to address provincial fiduciary obligations.

LOG NO:	FEB 20 1992 VAN
ACTION:	
FILE NO:	M. Milligan

Thank you in advance for your assistance in this matter. Please do not hesitate to contact me at 356-9623 should you require any additional information or clarification. We look forward to receiving, at your earliest convenience, your opinion on this issue.

Merry Christmas!



Tom Greene  
Manager of Special Projects and Community Affairs  
Mineral Policy Branch

Enclosures

cc: Paul Jarman  
Legal Services Branch

Brian Parrott  
Mineral Policy Branch

Norm Ringstad  
Mine Development Assessment Branch



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December 24, 1991

Our File: 33920-6-8

CONFIDENTIAL

TO: Tom Greene  
Manager of Special Projects and Community Affairs  
Mineral Policy Branch  
Ministry of Energy, Mines and Petroleum Resources

FROM: Ann Ehrcke  
Legal Services

RE: Mount Milligan Mine Project

This is in response to your request for an opinion as to whether Crown officials have discharged the Crown's fiduciary responsibilities respecting this proposal. You advised that the next step is the issuance of a mine development certificate, which essentially gives the go-ahead to the mine, subject to further permitting and perhaps other conditions.

I have reviewed the correspondence you provided and the company's socio-economic assessment of native communities potentially affected by the mine. The two major affected groups are the McLeod Lake Band and the Nak'azdli Band.

Based on this information, my opinion remains that the fiduciary duty has not yet been discharged.

In particular, it does not appear that Crown officials have:

*f. Company/proprietor*

- attempted to assess the nature and extent of aboriginal sustenance activities in the area, or the extent these would be affected by the mine;
- consulted with representatives of the people affected to determine their concerns respecting these effects, and to explore accommodations which might meet their concerns;
- considered the available options, including not permitting the project or permitting the project provided certain accommodations are made; or
- made decisions respecting the project in good faith in view of the above factors.

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What appears to have taken place (based on the information provided) is the following:

- . some assessment by the proponent of the aboriginal sustenance activities in the area. The potential effects on sustenance activities have not been isolated from other effects, but there has been some assessment of the effect on the availability of game and on trapline areas;
- . information sessions with the bands (and others) given by the proponent;
- . some discussion between the proponent and the bands regarding the project and the bands' concerns; and
- . very limited contact, primarily in writing, between Crown officials and the band.

The correspondence indicates significant unmet band concerns, some of which are related or may relate to sustenance activity. These include, but are not limited to:

- . the adequacy of the environmental studies and safeguards;
- . effects on wildlife;
- . concern over the effects on traplines and proposed trapline compensation;
- . concern over possible archeological sites;
- . concerns about the effect of increased traffic on highway 27, which cuts right through a Nak'azdli reserve; and
- . concerns that accommodations which might compensate for some of these effects are not satisfactory (e.g. it appears that the Nak'azdli would prefer guaranteed jobs to monetary trapline compensation).

It does not appear that Crown officials have talked with the bands in any detail about the Crown's fiduciary duty to them, about the potential impacts of the project, and about options and accommodations. Virtually all the relevant information has been gathered and provided by the proponent and the proponent has carried on the bulk of the discussion.

The Crown cannot delegate the decisions it must make as fiduciary to the proponent. Aside from other considerations, the proponent has a conflict of interest. I refer you to our opinion addressed to Randy Prokop on this point.

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As noted in that opinion, this does not preclude the Crown from making use of information collected by the proponent. But Crown officials must satisfy themselves that the information is complete and accurate. Nor does it preclude Crown officials from considering accommodations developed by the proponent and affected bands. To this extent negotiated agreements between the proponent and an affected band may be useful.

However, to discharge the fiduciary duty Crown officials must look at proposed accommodations from the perspective of a fiduciary. They must determine whether accommodations respecting sustenance activity are sufficient to allow the project to go ahead from the Crown's perspective given the fiduciary duty to aboriginal people and the other interests involved. Crown officials could require additional accommodations or could disagree with some of those proposed for various reasons. However, if the company has obtained the agreement to the project and proposed accommodations of those affected, this would obviously be a major factor in the Crown's decision, as a primary purpose of the exercise is to attempt to reconcile certain aboriginal interests with other interests where possible. I note that in the materials provided there is no indication that the bands affected are satisfied with the project, including the proposed accommodations and compensation. Rather, letters such as those to Mr. Ringstad of June 28, 1991 from the Carrier Sekani Tribal Council and of August 13 from the McLeod Lake Band indicate concerns about the project, many of which (judging from the material provided) appear to be outstanding.

I have provided this opinion within a short time frame in order to provide some legal guidance prior to my holiday. I would be pleased to discuss this further, and to review in more detail the outstanding concerns on my return. In particular, it may be worthwhile assessing the mine review process in terms of the fiduciary duty.

I hope this is of help. I would also note for your information that no legal advice was sought from us on this matter until our recent meeting with you. We are not aware of the committee referred to on page 3 of the Placer Dome minutes dated August 7, 1991, nor were we consulted respecting this project.

In accordance with Ministry policy, we ask that this opinion not be disseminated to anyone other than your Ministry personnel without the express consent of the writer.



Ann Ehrcke  
AE:um

cc. Eric Denhoff  
Nick May  
Paul Jarman  
Brian Parrott (Via FAX - 387-5713)