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mcmillan Aboriginal and First Nations bulletin

BC Court of Appeal overturns decision and finds duty to consult met in environmental assessment

On November 22, 2012 in *Halalt First Nation v British Columbia*, 2012 BCCA 472, the BC Court of Appeal overturned the decision of a Chambers Judge regarding the BC Environmental Assessment Office's duty to consult and accommodate the Halalt First Nation with respect to a water well project. Specifically, the BC Court of Appeal found that the duty to consult and accommodate had been met.

why the case is important

The decision of the Court of Appeal is important because it makes clear that:

- Modifications to project design and plans can be sufficient accommodation of aboriginal interests, even if aboriginal groups are not satisfied with those changes. It was not necessary to pay "compensation".
- It is not necessary to spend undue time and resources discussing strength of claim if deep consultation is provided in any event.

- The duty to consult does not extend to activities that a proponent might seek approval for at some point but which are beyond the present authorization being sought.
- Government staff have the ability to engage proponents and aboriginal groups separately and in the order they deem appropriate when consulting, provided all parties are given relevant materials and an opportunity to comment.

discussion

This case involved a challenge to an environmental assessment certificate issued for the Chemainus Wells Water Supply Project in 2009. The District of North Cowichan originally proposed the installation of three wells to draw water from an aquifer on a year-round basis, and the Halalt First Nation had concerns about the impacts to the aquifer and related asserted aboriginal rights.

During the assessment process, the Environmental Assessment Office (EAO) considered the Halalt First Nation's concerns and discussed them with the proponent. In the result, the project was reduced from year-round well operations to operation in the winter months, and from three wells to two, with only one well operating at a time. The environmental assessment certificate that was eventually issued authorized the operation of a well only on those terms.

The District of North Cowichan indicated it would pursue year-round well operations through a subsequent amendment of the environmental assessment certificate.

The Chambers Judge found that the Halalt First Nation was not adequately consulted on two bases; first, the BC EAO did not consider and consult on the implications of year-round well operation and second, the Halalt First Nation was not appropriately consulted about the modifications to the project before the modifications were made. The Chambers Judge issued an order staying project activities pending consultation on year-round well operation.

On the first point, the Court of Appeal returned to the principles of *Rio Tinto*, emphasizing that the subject of the duty to consult must be the specific Crown proposal at issue. The ability of the BC EAO to address future potential adverse impacts of year-round well operations was not compromised because any future application for amendment to the certificate would itself be subject to the duty to consult. The Court of Appeal therefore concluded that the Chambers Judge erred in law by ordering consultation on the speculative year-round well operation.

On the second point, the Chambers Judge's finding arose because the Halalt First Nation was not given prior notice of the District of North Cowichan's modifications narrowing the scope of the project. The Court of Appeal found that the changes were directly related to the concerns the Halalt First Nation had expressed and that the Halalt First Nation was subsequently adequately consulted on the modified scope of the project. The Court of Appeal held that the duty to consult, carried out adequately on the deep end of the *Haida* spectrum by the BC EAO, did not require advance notice of such modifications in the circumstances.

Regarding the duty to accommodate, the Court of Appeal overturned the Chambers Judge's decision that it was not adequately fulfilled, finding that, in fact, the modifications to the project were adopted in response to the Halalt First Nation's concerns and were an accommodation of their interests. The Court of Appeal also held that the BC EAO's refusal to consider financial compensation as a form of accommodation to the Halalt First Nation was not unreasonable, noting that "it is not difficult to discern strong policy reasons for refusing compensation" (180).

The full decision can be viewed here:
http://www.courts.gov.bc.ca/jdb-txt/CA/12/04/2012BCCA0472.htm

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cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.