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## Court of Appeal Holds Duty to Consult Does Not Apply to Statutory Interpretation

There is a common misconception that the Crown's duty to consult aboriginal peoples is unstructured and uncertain, and a related misconception that the government consistently loses legal challenges on this basis. A recent decision of the BC Court of Appeal in *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*,<sup>1</sup> proves that neither is the case.

### Background Facts

The proponent sought government approval to develop a sand and gravel pit to produce fracking sand. The proposed project was located within the Fort Nelson First Nation's ("FNFN") traditional territory. The Environmental Assessment Office ("EAO"), like the proponent, determined that the proposed project was not reviewable under the *Environment Assessment Act* ("EAA") on the grounds that the project's anticipated production capacity would not exceed the relevant threshold in the *Reviewable Projects Regulation* (the "*Regulation*").<sup>2</sup> "Production capacity" was interpreted to mean the amount of sand and gravel sold or used in the operation, as opposed to the total amount of sand and gravel that would be excavated in the production process. This

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<sup>1</sup> 2016 BCCA 500

<sup>2</sup> *Reviewable Projects Regulation*, BC Reg 370/2002

interpretation rendered the production capacity below the reviewable limit. Further, the EAO held that it had no duty to consult the FNFN in reaching the conclusion that the proposed project was not reviewable.

### Chambers Decision

The FNFN advanced an application for judicial review on two grounds. First, it alleged the EAO's interpretation and application of the threshold criteria in the *Regulation* was unreasonable. Second, it alleged that the EAO had failed to satisfy the duty to consult when determining the reviewability threshold. On the issue of the EAO's interpretation of "production capacity" threshold in the *Regulation*, the Chambers Judge found that it was unreasonable. The Court held the interpretation was not supported by statutory interpretation principles, and defeated the objectives of the *EAA* in failing to recognize the potential cumulative impact of the project on the environment. On the second issue, the Chambers Judge found that the EAO's decision was akin to a "strategic high-level" decision, and therefore triggered the duty to consult with the FNFN on whether the project was reviewable. The Court set aside the EAO's decisions regarding the proposed project and declared that the Crown had failed to fulfill its duty to meaningfully consult with the FNFN.

### The Appeal Decision

The Court of Appeal disagreed with the Chambers Judge's conclusions and sided with the EAO in allowing the appeal.

Specifically, the Court of Appeal found that the interpretation of the *Regulation* did not attract a duty to consult. The Court of Appeal reviewed the purpose of the duty to consult, which is to ensure that potential adverse impacts to Aboriginal and treaty rights by Crown conduct are identified and addressed. The duty arises when: (1) the Crown has knowledge (actual or constructive) of a potential Aboriginal claim or right; (2) the Crown contemplates conduct; and, (3) there is a potential that the contemplated conduct may adversely affect an Aboriginal claim or

right.<sup>3</sup> While Crown conduct for the purposes of the duty to consult does extend to strategic government decisions, the Court of Appeal found that the interpretation of the threshold in the *Regulation* was not a “strategic high level” decision that could have direct adverse effects on FNFN’s treaty rights.

In support of its decision, the Court of Appeal noted that regulations are rules of general application. The threshold in the *Regulation*, for example, applies universally to all sand and gravel pits in the province. It noted the purpose of interpretation of regulations is to determine the legislative intent and create consistency, equality and predictability. These principles allow regulators and individuals to more easily understand the legislation and how it will be applied in other circumstances. The Court of Appeal noted that by imposing a duty to consult in respect of the interpretation of the *Regulation*, there was the possibility that different interpretations of the same regulation could be applied to different projects. This possibility would be inconsistent with the function and goals of statutory interpretation as it applies to the *Regulation*.

Furthermore, the Court of Appeal noted this was a case in which a single regulator was being asked to interpret its home legislation, not a situation where there were different adjudicators who may reasonably disagree over the interpretation of a statutory section. As a result, the Court of Appeal found that the interpretation the *EAO* provided to both the proponent and FNFN was within a reasonable range of possibilities, it was consistent with the statutory scheme, and this interpretation of the *Regulation* had been applied in other cases.

Finally, the Court of Appeal also said that even if the interpretation of the *Regulation* would have attracted a duty to consult, that duty was fulfilled by the two letters the *EAO* sent in response to letters by the FNFN. The letters provided detailed rationales for their

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<sup>3</sup> *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31.

interpretation, and the Court of Appeal found that this was sufficient.

### Conclusion

While this decision does not in any way diminish the importance of fulfilling the duty to consult where it *does* apply, it is important in recognizing that the circumstances in which that duty applies is not unlimited. It is also important in that the appeal evidences a willingness on the part of the Province to challenge a lower court decision where the duty to consult is applied unduly broadly.

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### a 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.

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