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MEMORANDUM

Date:
November 30, 2012

Our File:
591

To:
Devlin Gailus Clients

From:
John Gailus & Caitlin Mason

Re:
***Halalt First Nation v British Columbia,* 2012 BCCA 472**

SUMMARY

The District of North Cowichan (the "District") proposed a new groundwater extraction system to replace the existing surface water system providing drinking water to the community of Chemainus (the "Project"). The Project was subject to a joint Federal-Provincial environmental assessment. Halalt First Nation ("Halalt") challenged an Environmental Assessment Certificate (the "Certificate") issued for the project. Halalt alleged that the Crown, through the BC Environmental Assessment Office (the "EAO"), failed to fulfill its duty to consult and accommodate Halalt. Upon judicial review, the BC Supreme Court determined that the Crown had indeed failed to meet its obligations. The trial judge found that Halalt had a *prima facie* claim of Aboriginal title to both the land in the area and the groundwater under it. The court held that the EAO had failed to consult on the impact year-round pumping and to address the Project modifications with Halalt before they were made. The trial judge ordered a stay on the pumping pending consultation on year-round well operations.

The chambers decision was overturned on appeal. The BC Court of Appeal determined that the chambers judge had misapprehended the scope of the Certificate and erred in law and fact when she concluded that the Crown failed to meet its duty to consult with respect to year-round pumping. In fact, the Certificate only allowed for pumping during winter months. The court concluded that consultation on year-round pumping was unnecessary in the circumstances.

FACTS

Halalt is a member of the Hul'qumi'num Treaty Group ("HTG"). Halalt has an Indian reserve ("IR#2"), located on the south bank of the Chemainus River, and the Chemainus River flows through the reserve. Halalt operates

a salmonid enhancement project in a side-channel of the river found on reserve. The Chemainus River is fed almost entirely from groundwater, and a substantial part of the Chemainus Aquifer lies beneath IR#2. Halalt relies on the health of the river ecosystem for food (from fish) and ceremonial purposes. In addition, Halalt obtains its drinking water supply from wells drilled into the Chemainus Aquifer.

In 2003, the District proposed to install three wells on the north bank of the river, adjacent to IR#2, to extract groundwater from the Chemainus Aquifer and supply drinking water to the community of Chemainus. Chemainus relied on surface water stored in the Banon Creek Reservoir (the "Reservoir"). In the winter, the Reservoir suffered from excessive turbidity due to, among other things, logging in the watershed. In the summer there was a shortage of water flow. The District intended to completely replace the existing surface water supply with a groundwater supply.

Initially, the District denied any relationship between the Chemainus River and the Chemainus Aquifer. However, a number of pumping tests conducted between 2004 and 2006 demonstrated that, contrary to the District's assumptions, the Chemainus River is hydraulically connected to the Chemainus Aquifer, and that extracting groundwater draws down the river. As a result of these tests, expert consultants concluded that the Project posed a risk of reducing river flows and creating significant adverse effects on fish and fish habitat, particularly during the drier summer months. In response, the District proposed in 2007 to modify the project to exclude operation during the dry summer months, except in the case of emergencies or substandard surface water quality, until such time as further testing showed that summer operation would not significantly impact the river or such impacts could be mitigated by releasing water from the Reservoir into the river. The EAO eventually concluded that even with this limitation, the Project posed a significant risk to the Chemainus River. The EAO informed the District that it would recommend that the Project as proposed would not be approved. Halalt was not made aware of this fact.

The District tried and failed to gain Halalt's support for the Project, knowing that the EAO would recommend against it. When these attempts failed, the EAO allowed the District to further reduce the scope of the project to the construction of two wells (rather than three), with no more than one well operating at any time during the winter months. Halalt was not involved in discussions regarding this modification.

During the consultation process, Halalt participated in a working group established by the EAO to provide it with advice and information during the assessment process. Halalt was often informed of decisions after they were made and left out of meetings and discussions attended by other members of the working group.

APPEAL DECISION

In overturning the lower court's decision, the Court of Appeal determined the chambers judge made a number of fatal legal and factual errors.

First, the court rejected the notion that the EAO was required, as a matter of law, to provide Halalt with assessment of the strength of claim early on in consultation. The lack of formal assessment was not found to undermine consultation when the Crown concedes that deep consultation is required.[1] This statement is not supported by the jurisprudence. It is at the outset that the Crown makes a preliminary assessment of the claim and the potential adverse impacts the Governments actions may have on Aboriginal interests. To say that there

[1] *Halalt First Nation v British Columbia*, 2012 BCCA 472 [Halalt] at paras. 118 and 124.

was a deep consultation duty, without more does not suffice. The Courts have recognized that if the Crown misapprehends the nature and scope of the right, then consultation is rendered meaningless. Halalt ought to have been given and had an opportunity to comment on the Crown's preliminary assessment of the strength of their claims and the potential impacts. That did not happen.

Second, the court found that the Certificate prohibited pumping other than one well at a time, according to the specified rate, during winter months only.[2] The Court of Appeal held that the chambers judge was incorrect in concluding that the Certificate authorized "summer pumping for emergency purposes", a point that was conceded by Halalt.[3] However, the Chambers Judge correctly pointed out the District's intention was to shift to year-round pumping and that the entire infrastructure of the Project was designed, financed and constructed with that in mind. The Court of Appeal did not address this issue. Decisions that make a subsequent project or modification more likely are the proper subject both of environmental assessment and consultation.[4]

Third, the court determined that the trial judge's conclusion that Halalt had not been consulted on year-round pumping could not be supported by the evidence. In fact, the court found that extensive consultation had been undertaken with Halalt about the potential effects of year-round pumping.[5] Moreover, after the District abandoned its plans for year-round pumping, there was simply no requirement for the District to consult or investigate a project that it is not currently pursuing.[6] The court held:

> The decision under review allows winter pumping only. There was and is no ongoing duty to consult about year-round pumping as that proposal has been abandoned. Where there was such a duty, it was clearly met.[7]

Fourth, the Crown's duty to consult Halat regarding the proposed (and ultimately approved) modifications to the pumping schedule was met. The record showed that the District had wanted year-round pumping and as a result of the consultation process, the Project had been scaled back. The court found that this demonstrated the responsiveness of the District and the EAO to the concerns raised by Halalt. Although Halalt did not participate in the development of the modifications,[8] the court seemed to think it sufficient that it was provided with the opportunity to comment on the final modification.[9] The court stated:

> It is correct that the Halalt were not consulted before the scope of the Project was altered, initially and finally, but once the changes were made, the Halalt were consulted and did provide comments...<u>the Crown had no legal duty to consult Halalt before modifying the Project.</u>[10] [emphasis mine]

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[2] Halalt, at para. 111.
[3] *Ibid.*
[4] *West Moberly First Nations v. British Columbia*, 2011 BCCA 247 at 124-125*; See also Canadian* Environmental Assessment Act, 2012 re. Cumulative effects assessment
[5] Halalt, at paras. 138 and 142.
[6] Halalt, at para. 147.
[7] Halalt, at para. 142.
[8] Provincial authorities found that the operation of one well, during winter months, would have a low potential for adverse environmental effects. But it is unclear how this modification was developed and if it was developed based on expert advice.
[9] Halalt, at para. 149-150.
[10] Halalt at paras.164 and 168.

The Crown must consult with the First Nation *about the consultation process itself*, including the design of any regulatory processes and the role of the First Nation in those processes. If those processes change, the First Nation should be involved as well. That did not happen in this case.

The court also found it reasonable that Halalt was not included in the development other aspects of the Project as well, such as the water monitoring program. Despite Halalt requesting that the monitoring program be developed by the EAO "in consultation with Halalt" the court found it was sufficient to simply be provided with the end result of that monitoring.[11]

Fifth, the fact that the EAO provided information to "direct participants" in the environmental assessment process and not Halalt did not undermine consultation. That is, the EAO had no obligation to advise Halalt of its concerns about the Project before expressing them to the District. In fact, the court determined it "made good sense to await the outcome of discussions between the District and the Halalt"[12] notwithstanding the fact the Halalt was unaware the EAO was not prepared to accept the Project as proposed at the time. This finding seems to turn the principle of the Honour of the Crown on its head and does not withstand even minimal scrutiny. What is evident from the evidence is that the EAO engaged in questionable behaviour in its dealings with Halalt and acted as an enabler for the District.

Sixth, the court stated that approval of the Certificate did not compromise the Crown's ability to address future adverse impacts of the Project. The court emphasized that any attempt to expand the pumping will engage the Crown's duty to consult again. However, it is difficult to determine what the contours of that consultation will be, given that the infrastructure, with the exception of a third well, is already in place. It is unlikely that any 'deep consultation' will be required when the District is either ordered, or determines it necessary to move to year-round pumping.

Finally, the court stated that the EAO's refusal to consider financial compensation was not unreasonable, as there are "strong policy reasons for refusing compensation."[13] This finding fails to include any analysis of the Halalt claim to Aboriginal title and rights to the Chemainus Aquifer itself. While the Supreme Court of Canada has recognized the economic component of Aboriginal title, the Court of Appeal summarily dismissed this aspect of Halalt's claim.

In our view, this decision is extremely troubling. The Court of Appeal was focussed on the remedy granted by the Chambers Judge, the staying of the Certificate, rather than the process of consultation and accommodation leading up to the decision to grant the Certificate. Hopefully, Halalt will consider seeking leave to appeal this decision to the Supreme Court of Canada.

[11] Halalt, at para. 179.
[12] Halalt, at para. 157.
[13] Halalt, at para. 180.