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NOVEMBER 23, 2012

CLIENT BULLETIN

Court of Appeal Confirms Adequacy of Consultation Regarding North Cowichan Water Project

In 2003 the District applied for an environmental assessment certificate for a groundwater extraction project involving the construction and operation of three wells near the Chemainus River on land owned by the District. The project was intended to replace the surface water system serving the Town of Chemainus, which was plagued by ongoing turbidity problems, particularly in the winter months.

The Chemainus River runs through the Halalt's traditional territory including the Halalt reserve (I.R. #2). Early in the environmental assessment process, Halalt raised concern that the project might adversely affect the aquifer under the reserve (to which it claimed title) and flow levels and water temperature in the river, thereby impacting aboriginal rights related to its traditional use of the river, including fishing rights.

In response to Halalt's concerns, the Province, the District and Halalt engaged in an extensive series of meetings and other discussions regarding potential impacts of the project. The consultation process spanned some six years and included thorough consideration and discussion regarding numerous reports prepared by experts retained by all three parties.

As the process developed, some of the experts expressed concern that the extraction of groundwater in the drier summer months could have some impact on the river, and that further study would be necessary to determine the extent, if any, of the summer pumping impacts. In response, the District decided in 2008 to revise the project. It amended its environmental assessment application to seek a certificate authorizing the construction of two well rather than three, with pumping to be confined to the period from October 15 to June 15, with only one well of limited pumping capacity operating at a time. With the elimination of summer pumping, the evidence of the experts was that the project would not adversely affect the river or the water supply available to Halalt from the aquifer. An environmental assessment certificate authorizing the revised project was issued to the District in March of 2009 and in September of 2009, Halalt filed a judicial review application to set aside the certificate on the ground that it had not been adequately consulted or accommodated regarding its claimed aboriginal rights or title.

In July of 2011, Madam Justice Wedge of the Supreme Court of British Columbia granted declarations that the Province had indeed failed to adequately consult and accommodate Halalt. Justice Wedge held that the proper project to be considered was a year-round pumping project as originally envisioned, not the winter pumping project for which the actual certificate was issued.

She regarded the decision to issue the winter pumping certificate as a "strategic" decision that would lead to an inevitable amendment to permit summer pumping without aboriginal interests being adequately addressed. She was also critical of the consultation process itself, particularly the Crown's failure to fully assess the strength of the Halalt claims before deciding to engage in "deep" consultation and the Province's decision to allow the District to unilaterally narrow the scope of the project. Justice Wedge directed that all actions under the certificate be "stayed" until adequate consultation and accommodation "concerning year-round pumping" occurred.

In a decision released on November 22, 2012, the British Columbia Court of Appeal reversed the decision of the chambers judge and restored North Cowichan's pumping certificate.

The Court of Appeal focused primarily on what it regarded as the principal error of the Chambers Judge, her decision to require consultation and accommodation regarding the project as originally envisioned rather than the modified and much more limited project authorized by the certificate. The Court of Appeal agreed with the Province and the District that the adequacy of consultation and accommodation must be addressed in relation to the actual Crown decision being challenged not a hypothetical future decision. The Court held that consultation and accommodation should be assessed in relation to the "current" Crown decision only unless that decision "may constrain the ability of the Crown to respond appropriately in the future." The Court held that the issuance of a certificate authorizing limited winter pumping did not affect the Crown's obligation to fully and adequately consult and accommodate Halalt's summer pumping concerns should the District seek to amend the current certificate to authorize such pumping. This was "not a case where the ability of the Crown to address future potential adverse impacts was compromised." Since the evidence was that the pumping regime actually authorized would not adversely affect the river or the aquifer, there was no reason to consult further respecting it. The Court summarized its decision on this issue as follows:

> [142] To summarize, the Project as proposed originally involved year-round pumping. There was extensive consultation about potential adverse effects that could result from such pumping; this resulted in a proposed modification to confine pumping to the winter, but with summer pumping for some purposes. There was further consultation. The Project later was modified to provide for winter pumping only. Any attempt to expand pumping will engage the Crown's duty to consult. 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 clearly was met.

The Court noted the unreasonableness of requiring consultation and accommodation in relation to year-round pumping when Crown approval for such a pumping regime was not currently being sought:

> [146] Neither the Crown nor the ratepayers of the District should have been put to the expense of investigating an option pertaining to a pumping regime that was not being considered at that time. If the District seeks in the future to shift entirely to a groundwater supply, that option then would need to be

> explored in the context of applicable legislation and the Crown's duty to consult.

The Court of Appeal also held that there was nothing improper about the Province failing to consult the Halalt before allowing the District to modify its application to eliminate summer pumping. On this issue the Court said the following:

> [164] It is correct that the Halalt were not consulted before the scope of the Project was altered, initially and finally, but once changes were made, the Halalt were consulted and did provide comments. The comments of the Halalt on the proposed recommendation to the Ministers were provided to the Ministers. The recommendation and the comments of the Halalt addressed the scope of the Project as proposed and as modified.
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> [165] It may be that others would have handled the details of consultation differently, but that is not the test. Did deep consultation take place? On the record, clearly it did. The Halalt contend that they should have been consulted before the Project was modified. The chambers judge agreed. In my view, that proposition is premised on an incorrect appreciation of the legal obligation to consult on this Project. As modified, it did not compromise the Crown's ability to meet its duty to consult. There was no legal obligation to continue consultation on summer pumping. The Crown had no legal duty to consult the Halalt before modifying the Project; the duty was to consult about the Project that was being recommended to the Ministers. The Crown met that duty.

The Court also disagreed with the Chamber Judge's conclusion that the consultation process should be regarded as inadequate by reason of the Crown's failure to do a thorough "strength of claim" assessment prior to deciding to engage in deep consultation with Halalt. The Court noted that such a preliminary assessment is "desirable" and "sometimes" necessary, but that in cases where the Crown concedes the necessity of deep consultation "it is the quality of the consultation that must prevail". The Court concluded that in this case the Crown had engaged in adequate consultation and that appropriate accommodation of Halalt's claims had been made, when the project was modified to eliminate summer pumping which was the only identified source of potential adverse impacts.

The Court's comments about financial compensation are also significant. During the consultation process, Halalt indicated the Crown's duty to adequately accommodate its concerns might be met through financial compensation. The Chambers Judge was critical of the Crown's refusal to consider financial compensation. On this issue the Court of Appeal held that it was not unreasonable to refuse to consider financial compensation in this case, given that the potential adverse impacts had been addressed through modification of the project to address Halalt's concerns. The Court added the observation that "it is not difficult to discern strong policy reasons for refusing compensation."

For further information about this case, please contact Young Anderson.

Gregg Cockrill