Court Of Appeal Finds No Duty To Consult When Government Interprets Environmental Legislation Court Of Appeal Dismisses Fort Nelson First Nation V. British Columbia (Environmental Assessment Office), 2016 BCCA 500

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The B.C. Court of Appeal recently released a decision (*Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500) that considers what kinds of "decisions" may be challenged by First Nations in respect of Environmental Assessments.

The narrow issue in the dispute was the meaning of the phrase "production capacity" in the *Reviewable Projects Regulation* to the Environmental Assessment Act. The proponent of a proposed silica mine in Northern B.C. took the position that production capacity means the amount or sand or gravel to be used or sold, not the total amount of sand or gravel excavated in the process. On that interpretation, the mine was not a reviewable project. The proponent sought an opinion from the Environmental Assessment Office ("EAO"), which wrote back expressing a non-binding opinion that the proponent's interpretation was correct. Fort Nelson First Nation ("FNFN") disagreed and engaged in correspondence with the EAO in which it expressed its view that "production capacity" meant the total amount of sand or gravel extracted. On that interpretation, the project would be a reviewable project. The EAO disagreed and provided a detailed rationale for its view that production capacity means the amount sold or used.

FNFN successfully sought judicial review of the EAO's opinion. The chambers judge held that this "decision" was unreasonable and that the EAO had a duty to consult FNFN prior to reaching its decision on the proper interpretation.

The first issue on appeal was whether the EAO's expression of a non-binding opinion was a "decision" that could be the subject of judicial review. The Court of Appeal held that it was not, noting that the determination as to whether a project is reviewable is proponent driven. Although the Minister of Environment or the Executive Director of the EAO can independently order that a non-reviewable project undertake an environmental

assessment, there is no statutory power enabling the EAO to make a decision as to whether a project is reviewable or not. Thus, the only way for a third-party like FNFN to challenge a proponent's decision as to whether a project is reviewable is to seek judicial review of the statutory authorizations enabling the project — in this case, various permits and authorizations under the *Mines Act* and *Land Act*. None of those permits had been granted at the time in question.

The Court also held that the EAO's interpretation of "production capacity" was reasonable, noting that the ordinary grammatical meaning of "production capacity" suggests a relation to economic output rather than total excavation. It disagreed with FNFN's position that this interpretation was inconsistent with the purpose of the Act (as it does not focus on environmental impact). In the Court's view, the numerical thresholds for reviewable projects under the regulation are merely imperfect "proxies" that are intended to provide clear guidance to proponents as to whether a project is reviewable. Thus, it makes sense to define the thresholds with reference to measures that are more meaningful to proponents, who would be primarily concerned with economic output. Where non-reviewable projects nevertheless have the potential for significant environmental effects, the Minister or Executive Director can order an environmental assessment to plug the gap. For these reasons, the Court concluded that the EAO's interpretation was reasonable.

The Court also held that a decision as to how to interpret a regulation did not give rise to a duty to consult. Interpretation of legislation or regulations gives rise to outcomes that are general in nature, whereas the duty to consult is designed to apply to decisions that have specific impacts on specific First Nations. This result is consistent with the Federal Court of Appeals' recent decision in *Courtoreille v. Canada*, 2016 FCA 311. In any event, the Court also held that the correspondence between the EAO and FNFN with respect to the interpretation issue was sufficient to discharge the duty to consult even if it did apply in the circumstances.

This decision should provide some assurance to proponents engaged in activities that are potentially subject to environmental regulation that seeking non-binding advice from the regulator will not lead to a decision that can be challenged through judicial review, potentially setting back the project's timeline.

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