Fort Nelson First Nation V. British Columbia (Environmental Assessment Office), Supreme Court Of Canada, Case No. 37449, 15 June 2017

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The Supreme Court of Canada dismissed a leave application by the Fort Nelson First Nation relating to a judicial review proceeding in British Columbia. The underlying proceeding related to the proper interpretation of the phrase " production capacity " in a BC regulation, and whether a non-binding decision by the Environmental Assessment Office (EAO) was properly the subject of judicial review. Further, the case raises the issue of whether the EAO's interpretation of the legislation triggered a duty to consult First Nations.

The proponent of a proposed silica mine in northern BC took the position that the term "production capacity" in the *Reviewable Projects Regulation* 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 would not be a "reviewable project" under BC's environmental assessment regime. The appellant Fort Nelson First Nation ("FNFN") submitted to the EAO that "production capacity" meant the total amount of sand or gravel extracted and, in consequence, the mine would be a reviewable project. The EAO provided a non-binding opinion agreeing with the proponent's interpretation and provided a detailed rationale for its view.

The FNFN applied for judicial review of the EAO's opinion, and were successful at the B.C. Supreme Court: 2015 BCSC 1180. The chambers judge held that the "decision" of the EAO about the meaning of “production capacity” was unreasonable. In the alternative, the Court held that the Crown's duty to consult had been triggered since the decision under review must be treated as being akin to a "strategic high level decision", and the Crown failed to satisfy this duty.

The B.C. Court of Appeal reversed this decision: 2016 BCCA 500. The Court of Appeal held that the EAO's expression of a non-binding opinion was not a "decision" that could be the subject of judicial review. 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. The only way for a third party like the 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*. The Court of Appeal also held that the EAO's interpretation of "production capacity" was reasonable.

On the consultation issue, the Court of Appeal 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. Further, the correspondence between the EAO and the FNFN with respect to the interpretation issue was sufficient to discharge the duty to consult even if it did apply in the circumstances.

The Supreme Court of Canada dismissed the FNFN's leave application with costs.

https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/16682/index.do

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