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The Heiltsuk Decision: A New Look at the Duty of Consultation

Charles F. Willms and Kevin G. O'Callaghan, Vancouver, BC

On Thursday, September 18, 2003, Madam Justice Gerow of the Supreme Court of British Columbia gave her decision in ***Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)***, 2003 BCSC 1422. The case was a judicial review of decisions by different Provincial Crown ministries to permit the construction of a $15 million dryland fish hatchery by Omega Salmon Group Ltd. at Ocean Falls, B.C. Chuck Willms and Kevin O'Callaghan of Fasken Martineau DuMoulin LLP's Vancouver office represented Omega at the hearing.

Madam Justice Gerow held that the Heiltsuk Tribal Council (the "Heiltsuk") had not demonstrated a *prima facie* case that the hatchery would infringe any aboriginal rights the Heiltsuk might have in the area, and therefore did not, quash the permits. Although an order was made that the Crown owed a duty of consultation regarding the licences, that order was a result of an admission by the Crown and was not a conclusion drawn from the evidence.

The Court dismissed all the relief sought in the Petition, save for the following orders, which were premised on the Crown's admission that it had failed to consult with the Heiltsuk:

- The decision makers had in December 2001 and continue to have a duty to consult with the Heiltsuk in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Heiltsuk and the short and long term objectives of the Crown and Omega with respect to the licences;
- The decision makers are to provide the Heiltsuk with all relevant information reasonably requested by them;
- The parties are at liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation;
- The relief in the petition to quash the licences and for a prohibition order is adjourned generally;
- The application regarding a declaration that Omega had a duty to consult and seek accommodation with the Heiltsuk is adjourned generally.

This case was commenced by Petition on February 20, 2003 and concerns an application to review the alleged decisions of the Minister of Sustainable Resource Management, the Deputy Comptroller of Water Rights, the Regional Water Manager (Cariboo Region) and Land and Water British Columbia with respect to:

- Conditional water licence 116890 for Martin Lake dated December 19, 2001 and the replacement licence no. 117538 dated August 29, 2002;

- A licence of occupation to operate a commercial fish hatchery, dated January 15, 2002;

- A licence of occupation for a salt water intake pipe, effluent pipe and general dock, dated October 1, 2002; and

- Conditional water licence 116629 for Link River, dated November 18, 2002.

These licences were issued to Omega and were necessary for Omega to construct and operate the Hatchery.

The Heiltsuk claim aboriginal rights and title to a large area of land encompassing approximately 33,735 square kilometres. The land being claimed includes the 8.83 hectare former pulp mill site granted to Omega under the hatchery licence of occupation and the dock and pipe licence of occupation. Much of the land impacted by the hatchery is filled land created prior to the construction of a pulp mill which was operated in Ocean Falls in the 1900s.

Madam Justice Gerow first dealt with the issue of the existence of rights and title. She said:

> [63] Based on the evidence before me of the overlapping claims, the only conclusion I have been able to reach is that both Heiltsuk and Nuxalk assert aboriginal title over the land, but I am unable to determine whether either has a good *prima facie* case of aboriginal title.

Madam Justice Gerow found that the Heiltsuk had a strong *prima facie* case for aboriginal rights to fish in the area and an aboriginal right to non-exclusive occupation of the area and then dealt with the issue of whether a *prima facie* case had been made that those rights identified had been infringed.

With respect to the aboriginal right to non-exclusive use, the Court held that there was no evidence that the hatchery would infringe those rights as the development caused the area to be cleaned up, was on filled land and was for a limited tenure. Also, there was land available in the former townsite of Ocean Falls (once a community of 4000 people, now of 100) and the water being diverted by the hatchery had formerly been used by the pulp mill. Additionally, the Court held that the hatchery would not impact any future negotiations between the Crown and the Heiltsuk.

With respect to the aboriginal right to fish, the Heiltsuk brought forward no evidence that the hatchery would effect the fishery in the waters off Ocean Falls in any way. Additionally, the Court acknowledged that there was evidence from Omega's expert that the construction of the facility will not impact the marine habitat in the area and that the discharge from the hatchery during operation will not pose a threat to marine life.

Although the Heiltsuk attempted to argue that the conduct of the salmon aquaculture industry in B.C. endangered their fishery, the Court refused to entertain this argument stating:

> [95] In my view, the Heiltsuk's concern about potential escape of salmon from fish farms outside Heiltsuk claimed territory is not an issue before the Court. The issues before me are whether the decision makers erred in granting the four licences to Omega, not whether fish farms, aquatic or land based, should exist in B.C.

Accordingly the Court held that the Heiltsuk had not discharged their burden of establishing a *prima facie* infringement of any aboriginal rights.

Given the Crown's admission that it had a duty to consult with the Heiltsuk concerning the licences, Madam Justice Gerow then looked at the issue of whether the Crown had breached its duty of consultation. The Court reviewed the many meetings held between Omega and the Heiltsuk, with some Crown involvement. Following the decision in ***Kelly Lake Cree Nation v. Ministry of Energy and Mines et al.*** (B.C.S.C.), the Court held that the Crown could "rely on consultation which it knows is taking place between aboriginal groups and third parties." (para. 102)

The Court also looked at the conduct of the Heiltsuk throughout the consultation process. The Court relied on previous decisions such as ***Ryan et al. v. Fort St. James Forest District (District Manager) (BCSC)*** and ***Halfway River First Nation v. BC (Ministry of Forests)***, 1999 BCCA 470 for the proposition that the aboriginal group cannot complain of a lack of consultation when they failed to avail themselves of the consultation process open to them. Madam Justice Gerow held:

> [112] The conduct of the Heiltsuk both in stating their position as one of zero tolerance to Atlantic salmon aquaculture and in attending meetings at which they stated they did not consider the meeting to be consultation indicates, in my view, an unwillingness to avail themselves of the consultation process.

In light of the Heiltsuk's failure to engage with Omega and the Crown in consultation, the Court held that "the duty of the Crown to consult was adequately discharged by the Crown and Omega." (para. 118)

On the issue of whether an aboriginal group could rely on a zero tolerance policy to veto certain developments in an area it exercises aboriginal rights, Madam Justice Gerow held:

> [114] No authority has been provided to me to support the proposition that the right to consultation carries with it a right to veto a use of the land. On the contrary, the Supreme Court of Canada has recognized that the general economic development of the Province, the protection of the environment or endangered species, as well as building infrastructure and settlement of foreign populations may justify the infringement of aboriginal title. The government is expected to consider the interests of all Canadians including the aboriginal people when considering claims that are unique to the aboriginal people. It is in the end a balancing of competing rights by the government.

This decision recognizes that it is in industries' interest to engage in discussions with First Nations that assert an interest in a proposed project at an early stage and attempt to continue it even in the face of "zero tolerance" policy. Conversely, aboriginal groups will not be able to rely on "zero tolerance" or statements like "this meeting is not consultation" in avoiding their obligation to consult. This case makes it clear that consultation is a two

way street but does not mean that First Nations may veto proposed projects.

For more information on the subject of this bulletin, please contact the authors:

Charles F. Willms
604 631 4789
cwillms@van.fasken.com

or

Kevin G. O'Callaghan
604 631 4839
kocallaghan@van.fasken.com