COURT OF APPEAL FOR BRITISH COLUMBIA

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

Date: 20121122
Nos.: CA039263; CA039264

Docket: CA039263

Between:

Chief James Robert Thomas, also known as Sulsimutstun, Chief of Halalt First Nation, on his own behalf and on behalf of all members of Halalt First Nation, and Halalt First Nation

Respondents
(Petitioners)

And

Her Majesty the Queen in Right of the Province of British Columbia, as represented by the Minister of Environment and the Minister of Community Development

Appellant
(Respondent)

And

District of North Cowichan

Respondent
(Respondent)

And

First Nations Summit, Tsuu T'ina Nation, Ermineskin Cree Nation, Samson Cree Nation and Fort McMurray #468 First Nation

Intervenors

Docket: CA039264

Between:

Chief James Robert Thomas, also known as Sulsimutstun, Chief of Halalt First Nation, on his own behalf and on behalf of all members of Halalt First Nation, and Halalt First Nation

Respondents
(Petitioners)

And

District of North Cowichan

Appellant
(Respondent)

And

Minister of Environment of the Province of British Columbia, Minister of Community Development of the Province of British Columbia, District of North Cowichan

Appellants
(Respondents)

Before: The Honourable Mr. Justice Chiasson
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, July 13, 2011
(*Halalt First Nation v. British Columbia (Environment)*, 2011 BCSC 945,
Vancouver Docket No. S098232)

Counsel for the Appellant, Minister of Environment and Minister of Community Development :	P.E. Yearwood
Counsel for the Appellant, District of North Cowichan	R.E. Harding and G.H. Cockrill
Counsel for the Respondent:	W.J. Andrews
Counsel for the Intervenor: Summit First Nations	M. Morellato, Q.C.
Counsel for the Intervenor: Alberta First Nations	C.D. Leonard
Place and Date of Hearing:	Vancouver, British Columbia May 23–25, 2012
Place and Date of Judgment:	Vancouver, British Columbia November 22, 2012

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] These are appeals from orders made on judicial review of the decision of the appellant Ministers to issue a certificate permitting the appellant District of North Cowichan (the "District") to proceed with a project to pump water from an aquifer. The appeals concern the Crown's duty to consult Aboriginal groups in the context of a statutorily mandated environmental review process.

Background

[2] The District is a municipal entity responsible for providing, among other things, water to the Town of Chemainus on Vancouver Island, British Columbia. The District wanted to install three pumps on the banks of the Chemainus River to avoid turbidity problems that occurred with drinking water (the "Project"). The pumps were to be installed on fee-simple land that had been acquired from a third party in 1989. The river runs through the reserve of the respondent, Halalt First Nation ("Halalt"); a substantial part of the Chemainus River aquifer runs under the reserve. The Halalt is one of six members of the Hul'qumi'num Treaty Group ("HTG"). The Group is engaged in treaty negotiations with Canada and British Columbia under the British Columbia Treaty Process. Freshwater resources, including groundwater, are within the scope of the treaty negotiations.

[3] In March 2001, the District applied for funding under the Canada-BC Infrastructure Program. In May 2003, its application was approved subject to approval of the Project by the Province pursuant to the *Environmental Assessment Act*, S.B.C. 2002, c. 43 [*EAA*]. The Province and the federal government each agreed to fund one-third of the Project. The chambers judge described the involvement of the federal government as a result of this funding arrangement in para. 114 of her reasons:

> When the federal government provides financial assistance to a proponent to construct an undertaking such as the Project, the undertaking is subject to federal review under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [*CEAA*]. Accordingly, the Project triggered the federal

> environmental assessment review process. The Canadian Environmental Assessment Agency (the "CEA Agency") supervised the federal aspects of the environmental assessment. The federal agency known as Western Economic Diversification Canada ("WEDC") administered the federal funds granted to the District for the project. WEDC was responsible for ensuring that the environmental assessment was conducted in accordance with the provisions of the *CEAA.*

[4] In 2003, the District delivered a proposal for the Project to the Environmental Assessment Office ("EAO"), which is an "office of the government" under the *EAA* (s. 2(1)). On July 15, 2003, Mr. Stephen Connolly, a Project Assessment Manager, determined that the Project may have significant adverse effects and issued an order under s. 10(1)(c) of the *EAA* requiring an environmental assessment certificate and directing that the Project could not proceed without an assessment.

[5] The judge described the additional involvement of federal agencies in para. 115:

> Because of the Project's proposed groundwater extraction rate, the federal assessment process required the preparation of a Comprehensive Study Report. The provincial and federal agencies permitted the District to submit one document that met the requirements of both agencies. For that reason, the application submitted by the District to the EAO was described as both its application under the *EAA* (the "Application") and a Comprehensive Study Report under the *CEAA*.

[6] On September 9, 2003, Mr. Connolly met with representatives of the District, a heritage consultant and Mr. Brian Olding, a representative of the HTG. Mr. Connolly "requested the nature of any concerns held by [HTG] and the views of HTG on consultation over this project". In a letter dated October 7, 2003, representatives of the HTG offered their concerns and views on the Project. The HTG wanted "to be assured that the water to be taken from the aquifer under the project [did] not represent a significant depletion of future water availability". It recognized that there are uncertainties in the natural environment: "[a]bsolute certainty is not what we are looking for". The HTG did expect that "professional expertise [would be] brought to bear on producing reasonable estimates of aquifer supply". The HTG representatives also referred to the ongoing treaty negotiations; it stated its position that it had not relinquished title to surface or sub-surface resources in its territory.

[7] On December 9, 2003, Mr. Connolly issued an order under s. 11 of the *EAA*. It recited that Canada and British Columbia would work together to develop a project-specific work plan for a cooperative environmental assessment of the Project. It ordered that "the environmental assessment of the Project be conducted according to the scope, procedures and methods set out in Schedule A". Schedule A provided for the establishment of an Advisory Working Group ("Working Group") that "may comprise representatives of federal and provincial agencies, and First Nations". The order provided for consultation between the District and First Nations. The District was obliged to report on all such consultations to the Project Assessment Manager. Paragraph 18.2 of Schedule A stated:

> For the purposes of completing the Assessment Report, the Project Manager may consult, as necessary:
>
> i. Review Participants in general,
>
> ii. First Nations,
>
> iii. Advisory Working Group, and
>
> iv. any other advisory mechanism deemed necessary to advise on the drafting of the Assessment Report.

On January 31, 2004, Mr. Paul Finkel replaced Mr. Connolly as Project Assessment Manager.

[8] On August 5, 2004, after an initial screening, the District filed an "Application for an Environmental Assessment Certificate and Draft Comprehensive Study Report". The document included technical reports by the District's consultants including Thurber Engineering Ltd. It also described pre-application consultation with the Halalt and other Aboriginal groups. A number of meetings had been held with the Halalt, which included presentations describing the Project. An example of such a meeting is a March 16, 2004 open house that was held at the Halalt First Nation Band Office. The open house was described in the applications as follows:

> ... the Open House provided further details of the proposed project, proposed technical studies, the provincial and federal environmental assessment process and provided an opportunity to pose questions to the DNC and consultants involved with the project.
>
> ...

> The format of the Open House was to present information on the proposed project on descriptive panel boards (Appendix 5) and to provide an opportunity for members of the project team attending their respective boards to answer questions and to provide further information on the project. A feedback form was also provided so that persons attending the Open House could provide written comments on the Applications while at the Open House or forward to the DNC later.

The application included a table that summarized issues identified by First Nations during the pre-application process and the location in the application where such issues were addressed.

[9] On August 5, 2004, Mr. Finkel wrote to the Halalt Chief and Council noting that a copy of the report had been delivered to their office. Mr. Finkel invited them to provide written comments "on the Application to identify any potential impacts that may be of concern". On the same date, Mr. Finkel wrote to the members of the Working Group inviting comments. Several Aboriginal groups of the HTG, including the Halalt, were included.

[10] On August 20, 2004, Mr. Finkel convened an introductory meeting and a site visit. Mr. Olding was included in the requested participants. He did not attend, but was sent a copy of the draft and final notes of the meeting and action items.

[11] On August 27, 2004, Mr. Brian Morales, chief negotiator of the HTG, provided written comments on the District's application. Mr. Finkel immediately contacted Mr. Olding and replied to Mr. Morales on September 22, 2004. In his reply, Mr. Finkel addressed the environmental review process and stated that consultation with First Nations will continue throughout the process "in accordance with the guidelines of the *Provincial Policy for Consultation with First Nations* (October 2002)". He included a copy of the *Policy* with the letter. Mr. Finkel noted in his affidavit describing the September 22 letter that although the *Policy* had been prepared prior to the decisions of the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, "our approach to consultation took those decisions into account".

[12] A copy of the letter was sent to Mr. Olding and to the member First Nations of the HTG. In this communication, as in most, if not all, of his communications to the Halalt, Mr. Finkel stated he would be pleased to meet and to discuss.

[13] On November 1, 2004, Mr. Finkel recorded that the previous week he had been contacted by a representative of the Halalt. He discussed this conversation with Mr. Olding. According to Mr. Finkel's recording, Mr. Olding planned to meet on November 2, 2004 with the Halalt to explain the treaty process and to provide an update on the environmental assessment.

[14] There were further communications between Messrs. Finkel and Olding in October and November 2004. At Mr. Olding's request, they deferred further meetings to the New Year.

[15] On November 24, 2004, Georgia Dixon, a representative of the Halalt, advised Mr. Finkel that the group was waiting for a quotation from a hydrological engineer "to provide independent advice to the Chief and Council with respect to the impacts to Halalt's right and title arising from the Chemainus water supply project". She noted that the Halalt would be applying to the EAO for funding assistance. Over the course of the environmental assessment, the EAO provided $45,000 to the Halalt. The District also provided financial assistance for the Halalt to conduct an oral history project.

[16] On November 25, 2004, after expressing an openness to discuss funding, Mr. Finkel responded that the "hydrology report from Thurber Engineering will likely be distributed next week". The Halalt retained Dr. Wendling of EBA Engineering Consultants Ltd. as its expert.

[17] On November 26, 2004, Ms. Dixon wrote to Mr. Finkel, stating:

> During our conversation this morning, I noted your advice that the issue of Halalt First Nation's rights and title with respect to the [aquifer] is outside the EOA's framework for addressing (please advise if I am mistaken here)...

Mr. Finkel responded on December 3, 2004:

> Thanks for this information. Yes, you are correct about my reference to the subject of rights and title and the scope of the environmental assessment. Resolving rights and title claims, including claims to an aquifer, is beyond the scope of an environmental assessment and would be a subject for discussion at a treaty table. The environmental assessment is a process [focused] on project specific impacts. We will consider whether the Chemainus Wells Project has the potential to adversely impact the effectiveness of the existing well on the Halalt First Nation Reserve (I.R. 2), the sustainability of the aquifer or the flows in the Chemainus River. The Environmental Assessment Office will also follow the guidance in the Provincial Policy for Consultation with First Nations (October 2002) and applicable case law requirements when conducting the environmental assessment. If you have any other questions about the scope of the environmental assessment please let me know.

Ms. Dixon replied the same day clarifying the position of the Halalt:

> Hello Paul, we have a misunderstanding here if there is an impression that Halalt First Nation is anticipating a resolution of title and rights to the [aquifer] through the Environmental Assessment Office. The duty required here is, pursuant to the provincial policy, if Halalt has a sound claim of aboriginal rights and title, then the Crown must accommodate Halalt's interest in proportion to the soundness of claim, depending on the specific circumstances. It is upon these grounds that Halalt is undertaking a consultation process with respect to the [aquifer] and the impacts of the Chemainus Water well project on the subject rights and title, and is entitled to have the Crown's consideration of Halalt First Nation's aboriginal interests.

[18] On December 6, 2004, Mr. Finkel sent a copy of the District's November 30, 2004 hydrology report prepared by Thurber Engineering to the members of the Working Group, which included, Messrs. Morales and Olding, the Halalt and EBA Engineering. On January 17, 2005, Dr. Wendling provided "Comments and Critics of Thurber Engineering Report ... and other related reports".

[19] The Working Group met on January 20, 2005. Thurber Engineering indicated that the period of greatest concern was the summer months when river levels are low. Over the next number of years, the Working Group was asked to provide comments on material and met on a number of occasions. The Halalt and its advisors participated.

[20] In para. 139 of his affidavit, Mr. Finkel described his approach to consultation as follows:

> I also made inquiries with the Ministry of Attorney General and treaty negotiators to determine whether a formal strength of claim analysis had been done in connection with Halalt. The main information I had at this stage (early 2005) was information I received from treaty negotiators and from Halalt. I was not sure how strong the claim to title was. At that point in time, I did not know about the spawning channel or what use Halalt had historically made of the land on which the Project was located. I do not recall the exact timing, but certainly by mid March, after I had obtained Allan Dakin's views, I was satisfied that, given the proximity of the Project to Halalt's reserve, the fact that the Chemainus River runs through the reserve, and the fact that both Halalt and the District would rely on the same aquifer for groundwater, the Project could have a significant impact on Halalt's asserted rights and decided as a result to engage in deep consultation. (It was later in 2007, based on my review of the Ethnographic Report mentioned below, that I concluded that Halalt's occupation of the area would not have been exclusive but shared with other members of the Hul'qumi'num Treaty Group. But this did not lessen the level of consultation.)

He returned to the topic in para. 391:

> On or about July 11, 2007, I received from the Aboriginal Research Division of the Ministry of Attorney General a research report dated February 15, 2007 prepared by Deidre Duquette that reviewed readily available historic, ethnographic, and archaeological sources concerning the Halalt First Nation. A copy of the report is attached as Exhibit "465". I obtained this report as part of my effort to assess the strength of the Halalt claim to title over the aquifer. As earlier exhibits indicate, it was my understanding since shortly after the Commentary was provided in February 2005 that the question of aboriginal title to the aquifer had not been determined, but that Halalt likely had a strong claim of aboriginal title to the land on which the wells for the Project would be situated. By approximately the end of 2006, however, I also became aware that the District had bought that land from a private land owner some years earlier.

[21] On February 4, 2005, the Halalt delivered an extensive report entitled: "Halalt First Nation Commentary to the Environmental Assessment Office Regarding the District of North Cowichan Application for an Environmental Assessment Certificate". In it, the Halalt addressed its title, the history of its occupation of its traditional territory, the Crown's duty to consult and the consultation that already had taken place. The Halalt also stated its concerns and the accommodation measures that it would consider acceptable, which were described as follows:

> 10.1.1 To accommodate the aboriginal title, there must be measures in place that shows the reduction in pollution to the aquifer and the enhancement of the ecosystem as a whole.
>
> 10.1.2 Protection of the aquifer must be the primary principle for future generations.
>
> 10.1.3 To accommodate the aboriginal title, which confers an economic interest in the aquifer and surrounding lands, the parties will negotiate a water lease subject to conditions precedent and/or positive covenants or restrictive covenants.
>
> 10.1.4 To accommodate the aboriginal title, which confers a cultural interest, the water lease will be in effect as long as the environmental and sustainability conditions are satisfied.
>
> 10.1.5 The conditions will involve measures that show a reduction in pollution, and enhancement of the ecosystem as a whole.

[22] Mr. Finkel prepared a draft response to some of the comments in the Commentary that he considered inaccurate, but decided not to send a formal response. In his affidavit, he stated that he opted not to do so "in the interests of resolving Halalt's concerns". Instead, there was a meeting between the EAO, the District and the Halalt on March 7, 2005. There, the concerns of the Halalt as presented in the Commentary were discussed to ensure that the EAO understood them. Sometime thereafter, Mr. Finkel prepared an "Issues Tracking Document" consisting "of a table [that] summarizes the issues identified in written comments from agencies, First Nations and the public". The document was described as "a tool used by the EAO and Working Group to focus discussions on specific issues".

[23] Over the ensuing few years, there were extensive requests for and exchange of technical information. In addition to Dr. Wendling, the Halalt retained other experts. Because there was some disagreement among the experts, in February 2005, the EAO retained an independent hydrologist, Allan Dakin.

[24] In summary, the initial position of some experts was that there was little relationship between the Chemainus River and the aquifer, that is, pumping water from the aquifer would not affect the river. This was disputed and refuted. Programs were explored to test the effect of pumping on the river. Any summer pumping was

considered likely to impact the river adversely. Release of other water to supplement the river was discussed. Eventually, the Project was modified.

[25] I turn to the first modification beginning with developments that led to it.

[26] On March 15, 2005, Mr. Dakin advised Mr. Finkel that the relationship between the Chemainus River and the aquifer was not understood well enough based on available data. The question whether summer pumping would remove surface water from the river was unresolved. On March 16, 2005, Mr. Finkel informed the federal government and the District of this advice. On Friday, March 18, 2005, the District requested that the EAO temporarily suspend the time limit for the environmental assessment to allow the District "to collect further field monitoring data and to continue consultation with the Halalt First Nation". That day, Mr. Finkel advised the Halalt of the District's request.

[27] On Monday, March 21, 2005, the Halalt asked Mr. Finkel for a copy of the District's letter requesting the suspension of time. Mr. Finkel sent it that day.

[28] On April 11, 2005 Mr. Finkel received Mr. Dakin's report. He sent it to the federal representatives and to the District.

[29] On April 14, 2005, the Halalt asked about the implications of the suspension of time. Mr. Finkel replied that the District had to collect more information before the environmental assessment could continue. He stated that "[n]o decision will be made about the wells project until more work is done and until there is more consultation with the Halalt". He also noted that he had an expert report by a hydrogeologist hired by the EAO to distribute (the Dakin report) and that it would be sent to the Working Group and the Halalt. This was done on April 15, 2005.

[30] Steps were taken to assess the implications of the proposed pumping on the Chemainus River and the aquifer. On July 21, 2006, Thurber Engineering distributed to the Working Group its report on the field monitoring and test program. In an August 18, 2006 email, Mr. Finkel invited comments from the Group. He received some from members of the Group, including the Halalt, Mr. Dakin and Provincial and

federal agencies. Mr. Finkel in turn distributed these comments to the Halalt and others on October 12, 2006.

[31] On October 24, 2006, EAO met with the Halalt. Mr. Finkel reported on his communications with the District and the options available to it: further studies or mitigation. He noted that the District had to retain an aquatic specialist.

[32] On October 25, 2006, the District wrote to the Halalt advising that it proposed to retain a Mr. Todd Hatfield. It also asked for comments. The background of this step was described as follows:

> Paul Finkel of the BC Environmental Assessment office has requested in his Oct 10/06 letter that The District develop a monitoring and mitigation/contingency plan as the next step in the environmental assessment. The terms of reference for this work will be developed in consultation with the working group members and Halalt First Nation. The Plans would be prepared by an aquatic biologist and our ground water consultants. We have received names of experienced biologists from DFO and MOE.

On October 27, 2006, the Halalt advised that it agreed to the selection of Mr. Hatfield.

[33] On December 6, 2006, representatives of the Halalt, the District and the EAO met. Mr. Hatfield also was present. The implications of the July Thurber report were discussed. Mr. Finkel distributed and reviewed an "EAO Summary of Halalt First Nations Issues Presented in 2005", which had been developed "to document and track issues raised previously by the [Halalt] and ensure they are not lost". This document also had been discussed at the October 24, 2006 meeting and was discussed at other meetings throughout the process.

[34] On December 8, 2006, Mr. Finkel distributed a three page summary of Mr. Hatfield's proposed aquatic assessment to the Halalt and others.

[35] Mr. Hatfield sought the participation of the Halalt in a site visit he planned in conjunction with his investigation, but the Halalt declined to participate. Mr. Hatfield sought and obtained the comments of Dr. Wendling and provided technical

information to him. On February 16, 2007, Mr. Hatfield advised that he was working towards a mid-March completion of a draft report. He delivered the report to the District on March 8, 2007. The District sent it to Mr. Finkel on March 13, 2007. On April 4, 2007, Mr. Finkel sent a copy to federal representatives. The draft report indicated that reduction in river flow during low water risked endangering fish and recommended mitigation and monitoring. On July 20, 2007, Mr. Hatfield delivered a draft monitoring plan to Mr. Finkel.

[36] On May 9, 2007, the EAO met with the District to discuss the status of the Project. According to Mr. Finkel's record of the meeting, the District expressed a willingness to modify the operating regime. In an email to his federal counterparts subsequent to the meeting, Mr. Finkel described the "revised operating regime" as follows:

> 1. Use of the wells during the winter months (to a maximum of 131 l/s) to avoid the turbidity problems associated with Banon Creek Reservoir.
> 2. No use of the wells during the summer period (window to be determined but likely from mid June to mid-October) EXCEPT in response to a public health risk (determined by VIHA), an emergency (such as major fire), or if surface water quality is below acceptable standards (e.g. turbidity).
> 3. The restrictions placed on the summer operating regime would be loosened or eventually removed if future testing demonstrates that releases of water from Banon Creek Reservoir successfully mitigate impacts to Chemainus River flows.

This was the first modification or the proposed modification.

[37] According to this email, the District intended to write to the EAO proposing the change. Once this was received, Mr. Finkel planned to distribute the Hatfield report to the Halalt and the Working Group. The District, in a May 24, 2007 letter to the EAO, proposed the above changes. On May 29, 2007, Mr. Finkel sent to the Halalt copies of Mr. Hatfield's draft report and the District's May 24, 2007 letter. He invited the Halalt to have its representatives review and comment on the report and proposed a June meeting with the Halalt to discuss its views on the report, recent information from the District and the Project overall.

[38] The Halalt did not respond to Mr. Finkel's overtures. On June 21, 2007, Mr. Finkel again asked for comments and proposed a meeting with the Halalt. There was no response. On July 4, 2007, Mr. Finkel wrote again. He advised the Halalt that if no comments were received by July 13, 2007, the environmental assessment would proceed on the basis of the material then available. He also noted that a promised oral history, which was funded by the District and expected in October 2006, had not been delivered. The oral history "was to help identify how the Project might impact Halalt's aboriginal rights and title".

[39] On July 6, 2007, Mr. Finkel sent the Halalt copies of correspondence from others commenting on Mr. Hatfield's report. On July 9, 2007 a representative of the Halalt asked for more time to comment.

[40] The Halalt and two of its consultants delivered comments to the EAO on July 27, 2007. The Halalt stated it was pleased to have been given the opportunity to comment on Mr. Hatfield's report. It expressed the need for caution and urged the establishment of a watershed management plan. Mr. Finkel previously had advised the Halalt that although development of a watershed management plan was outside the mandate of the environmental assessment, he would be pleased to put the Halalt in contact with the appropriate provincial agencies.

[41] Mr. Finkel forwarded the Halalt material to the District and the federal representatives on July 30, 2007.

[42] On September 20, 2007, the Halalt met with the EAO and representatives of federal and provincial agencies. In addition to technical advisers, the Halalt's legal advisers were present. Mr. Finkel reviewed the environmental assessment process. The parties discussed technical issues and the concerns of the Halalt. According to the minutes, Mr. Finkel stated that comments were expected from the Ministry of Environment on the Halalt's commentary on the Hatfield report. Mr. Finkel forwarded to the Halalt the Ministry's comments and the comments of Mr. Dakin on November 26, 2007.

[43] Over the next few months, the various consultants exchanged technical information. In December 2007, Mr. Hatfield provided revisions to his report. A further meeting with the Halalt, federal representatives and the EAO took place on February 6, 2008. In addition to the Halalt's technical advisers, a legal representative was present. He discussed the Halalt's Aboriginal rights and title and the Crown's duty to consult.

[44] At this meeting, Mr. Finkel expressed a concern that the Halalt and the District were not meeting. He noted that previously the Halalt had advised the EAO not to mediate because the Halalt preferred to deal directly with the District.

[45] On March 10, 2008, Mr. Finkel advised the District that, "given identified and unresolved environmental effects", the EAO would not recommend for certification the Project as currently designed. He stated he was not recommending any specific course of action, but that the District might want to consider modifying the system as a back-up system for the winter months and to delink the reservoir from the wells proposal. He recorded that his message was a "shock" to the District. Mr. Finkel planned to follow-up his conversation with a letter, but decided to wait until planned meetings between the Halalt and the District took place.

[46] These meetings took place on March 12, May 12, June 9 and 23 and July 17, 2008. It is apparent that the District took to heart the comments of Mr. Finkel because at the May meeting with the Halalt the District sought support for the Project, which it described as using the wells:

> ...during the winter for domestic supply to Chemainus and to continue testing throughout the summer to determine whether or not the aquifer can accommodate summer and winter use.

[47] On July 18, 2008, the District reported its understanding of the Halalt's position to the EAO:

> The Halalt have advised that we have two options:
>
> 1) We sign an agreement with them giving them control or ownership (control and ownership is yet undefined) of the proposed well project including funding their negotiating costs, in which case they will support the project.
>
> 2) We do not sign an agreement -- in this case, they will oppose the project and seek assistance from the Provincial and Federal governments for recognition of their claimed ownership of the groundwater.

[48] On October 8, 2008, Mr. Finkel wrote to the District advising that the environmental assessment was at the referral stage. He expressed concern with the strength of the rationale for the Project now that the District proposed to operate the wells only in the winter. He asked the District to advise by October 31, 2008 whether it wanted to proceed with the existing proposal or to consider other options.

[49] On October 9, 2008, the District wrote to the EAO expressing its view that it was at an impasse with the Halalt. It proposed a revision:

> In an effort to further address the Halalt's concerns about the potential impact of the well project on the Halalt First Nation, the District wishes to propose the following change to the operating regime for the project in addition to the changes outlined in our May 24, 2007 letter (attached).
>
> 1) The District will reduce the number of wells to be constructed from three to two. Wells #2 and #3 will be constructed. Well #1, which is the closest well to the Chemainus River and could potentially have the most significant impact of the three wells to the Halalt Reserve and spawning channel, will not be constructed at this time. Construction of Well #1 in the future would be subject to an amendment to the Environmental Assessment Certificate.
>
> 2) Only one well, either #3 or #2, will be operated at any one time, for the first winter from October 15 to June 15. The control system will be set such that only one well can operate at a time in the winter months. Both wells will only be operated at the same time for testing purposes in the summer to undertake further monitoring and confirm the effectiveness of the mitigation plan.
>
> The District believes that by reducing the number of wells from three to two at this time, it is reducing the potential impact of the project on the Halalt First Nation. We are proposing to construct two wells, but only operate one at a time until further testing confirms that two wells can be run concurrently.

[50] On November 3, 2008, a meeting was held with the EAO, provincial and federal agencies representatives and representatives of the District. The revised proposal was discussed.

[51] On November 10, 2008, Mr. Finkel issued an order under s. 13 of the *EAA*. The operative part of that order stated:

> 1. The scope of the Project set out in 2.1 of the Order issued on December 9, 2003 under section 11 is varied and replaced by the following:
>
> For the purposes of the environmental assessment of the Project, the Project comprises the following physical works and the physical activities associated with their construction, operation and closure:
>
> i. Two groundwater production wells, PW#2 and PW#3 (Figure 1) each with a capacity of approximately 75 l/sec, located on the north shore of the Chemainus River, downstream of the Trans Canada Highway;
>
> ii. Ancillary facilities including monitoring wells, pumphouse, piping, chlorination system, access road and hydro connection;
>
> iii. Approximately 3970 m of water main connecting the wells to an existing water main at the intersection of the Trans Canada Highway and Henry Road;
>
> iv. A 4.54 million litre (1M Imperial gallon) concrete reservoir to be constructed on River Road, connected to the other elements of the Project by existing water main;
>
> v. Subject to the *Reviewable Projects Regulation (BC Reg 370/2002),* operation of the groundwater production wells only between October 15th and June 15th each year; and
>
> vi. Subject to the *Reviewable Projects Regulation (BC Reg 370/2002),* operation of no more than one groundwater production well at any one time.

This was the second modification or the actual modification.

[52] By letter dated November 10, 2008, Mr. Finkel advised the Halalt of the modification. He included copies of his October 8, 2008 letter to the District and its October 9, 2008 letter to the EAO. Mr. Finkel confirmed that it was the position of EAO that no summer pumping would be permitted if the Ministers issued a

certificate. He noted that the District's proposal had included a timetable for the development of a third well, but stated that "this is not EAO's assumption".

[53] On November 12, 2008, Mr. Finkel made an additional order under s. 13 ending further public consultation.

[54] On November 18, 2008, Mr. Finkel advised the Halalt the EAO would distribute a draft environmental assessment report to the Halalt and it would have 30 days to comment.

[55] On November 19, 2008, Mr. Finkel wrote to the District enclosing a copy of his orders. In his cover e-mail, he noted that his letter clarifies that the Project does not include future testing for a third well or emergency operations. A copy of this letter was sent to the Halalt on November 20, 2008 together with a copy of the second s. 13 Order.

[56] Mr. Finkel asked a number of experts whether the revised proposed pumping regime was likely to have any adverse impacts. They advised him that it would not. (See below at para. 177.)

[57] Mr. Finkel sent the draft environmental assessment report to the Halalt on December 10, 2008. He asked for comments by January 23, 2009 and stated that if the Halalt had any questions or wished to meet before that date he should be contacted. The Halalt posed no questions and did not ask for a meeting with Mr. Finkel. He also sent copies of the draft to the District and provincial and federal agencies. The EAO received comments from each of them.

[58] On January 9, 2009, Mr. Finkel sent to the Working Group and to the Halalt a draft "Table of Commitments" and a draft "Issue Tracking Table".

[59] On January 26, 2009, the Halalt sent a letter of comments with attachments to the EAO. On February 9, 2009, Mr. Finkel advised the Halalt that its comments would be included in the package of information provided to the Ministers. He also provided a response to the technical comments in the Halalt's material.

[60] The District's application for an environmental certificate was referred to the Ministers on February 9, 2009. The EAO recommended issuance of a certificate.

[61] On March 9, 2009, the Ministers issued an Environmental Assessment Certificate for the Project (the "Certificate"). The Halalt were advised on March 10, 2009. On June 10, 2009, the federal government approved the Project.

[62] In spring 2010, the wells were constructed. They were put into operation on June 3, 2010. Operations ceased on June 15, 2010. The wells were placed back into service on October 15, 2010 and ceased operation on June 15, 2011.

[63] The Halalt filed a judicial review application on September 3, 2009. It was heard during the months of May, June, July and November 2010. The chambers judge delivered reasons on July 13, 2011. The order of the chambers judge provides:

> 1. It is hereby declared that the Province, as represented by the Environmental Assessment Office (EAO) and the Minister of Environment and Minister of Community Development (Ministers), failed to adequately consult with the Halalt First Nation in the course of the environmental assessment which resulted in the issuance of the Environmental Assessment Certificate #W09-01 (Certificate) for the Chemainus Wells Project (Project).
> 2. It is hereby declared that the Province, as represented by the EAO and the Ministers, failed to reasonably accommodate the potential infringements posed by the Project to Halalt First Nation's asserted Aboriginal rights and title respecting the Project area.
> 3. Implementation of any actions or decisions pursuant to the Certificate are to be stayed pending adequate consultation concerning year-round operation of the well field and, resulting from such consultation, reasonable interim accommodation of Halalt First Nation's interests. For greater certainty, the stay precludes the operation of the wells pending these processes.
>
> ...

[64] The Ministers and the District appealed seeking to set aside this order.

[65] The District applied for a stay of the order of the judge pending appeal. On October 11, 2011, this Court refused the stay (2011 BCCA 544).

[66] This recitation of the background facts, while lengthy, merely highlights what I consider to be important aspects of an extremely protracted and somewhat complicated process. The parties filed extensive affidavit material. The affidavit of Ms. Tricia Thomas filed in support of the application contains 74 exhibits and is over 600 pages. Mr. Finkel's affidavit contains 629 exhibits and is over 4,200 pages. I have referred to some of the meetings and communications between the EAO and the Halalt and between the District and the Halalt, but there were a great many more.

The chambers decision

[67] The chambers judge provided over 200 pages of extensive and comprehensive reasons for judgment. The judge reviewed the facts at length. I shall not attempt to summarize her review. The salient facts emerge in her analysis and conclusions.

[68] The gravamen of the judicial review application was that the Ministers "had no jurisdiction to issue Environmental Assessment Certificate #W09-01 ... because the Crown ... failed to meet its constitutional obligation ... to consult the [Halalt] and to accommodate [their] interests ...". The judge reviewed the relevant provisions of the *EAA* and the *Reviewable Projects Regulation*, B.C. Reg. 370/2002.

[69] In paras. 43, 44 and 46, the judge observed:

> [43] If the executive director or his delegate determines that a reviewable project may have significant adverse effects, he or she must issue an order describing the scope of the required assessment of the project and the procedures and methods for conducting the assessment (s. 11(1)). This is known as the "s. 11 order".
>
> [44] The s. 11 order specifies, among other things, the information required from the proponent of the project "in relation to or to supplement the proponent's application" (s. 11(2)(c)). At the discretion of the executive director, the order may specify the persons and organizations, including First Nations, to be consulted by the proponent or the EAO during the assessment. It may also specify the procedures for consultation during the assessment (ss. 11(2)(f) and (g)). The executive director may specify, by order, time limits for steps in the assessment procedure that are additional to those prescribed in the *EAA* (s. 11(2)(h)).

> ...
>
> [46] The proponent of a reviewable project may apply under s. 16 for an environmental assessment certificate (as occurred in the present case). Once the assessment is completed, the executive director or delegate must refer the proponent's application to the ministers for a decision (s. 17(1)). The ministers must issue a certificate with any conditions they consider necessary, refuse to issue a certificate, or order that a further assessment be carried out as specified by the ministers (s. 17(3)).

[70] The judge then noted s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11, and turned to legislation governing groundwater with the observation that it has relevance to assessing "the strength of Halalt's claims of Aboriginal rights and title" (para. 52).

[71] She reviewed the leading authorities on the Crown's duty to consult, including *Haida Nation*, *Taku River* and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 42, [2010] 2 S.C.R. 650. The judge noted the three-stage process for determining whether the Crown has met its obligation to consult and accommodate as stated by Madam Justice Lynn Smith in *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712, 51 B.C.L.R. (4th) 133. Reference also was made to the writings of Professor Dwight Newman.

[72] At paras. 64-66, the judge commented on the scope of the duty to consult in the context of immediate or future impacts:

> [64] Implicit in the second stage of the inquiry -- the assessment of adverse impact -- is whether government action which engages the duty to consult is confined to decisions having an immediate impact on the Aboriginal right in question, or whether a future impact suffices to trigger the duty.
>
> [65] *Haida Nation* involved the granting of long-term tree farm licences ("T.F.L.") in large areas of Haida Gwaii as distinct from the issuing of cutting permits or operational plans. The Crown argued that any duty to consult the First Nation arose only at the stage of the actual granting of the cutting permits. The Court disagreed. Chief Justice McLachlin explained at para. 76:
>
> > The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks.

> The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut... for the licence.... Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

[66] In *Rio Tinto,* Binnie J. discussed potential impacts, observing the following (at para. 44):

> A potential for adverse impact suffices. Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights...

[Emphasis in original.]

[73] She then referred to *Adams Lake Indian Band v. British Columbia*, 2011 BCSC 266, 20 B.C.L.R. (5th) 356, which dealt with potential future effects.

[74] Observing at para. 77 that the authorities "are somewhat inconsistent", the judge turned to the standard of review. She stated the position of the Ministers in para. 75:

> The Province argued that while the existence or extent of the duty is a question of law, where the appropriate standard of review is correctness, the existence or strength of the duty often involves an assessment of the facts. Where that is the case, said the Province, deference must be shown and the standard of review is reasonableness. Further, both the process of the consultation and the resulting accommodation must be judged on the standard of reasonableness.

[75] The judge referred to the observations of the Court in *Haida Nation*, which were based on general principles of administrative law because at the relevant time British Columbia did not have a legislative process for consultation. I observe that this is not the situation in this case where an environmental assessment was mandated and Mr. Finkel stated at the outset that he would abide by the Province's *Provincial Policy for Consultation with First Nations*. In para. 80, the judge paraphrased the observations of the Court in *Haida Nation* on the standard of review:

> a) On questions of law, a decision-maker must generally be correct, but on questions of fact or mixed fact and law, the decision-maker may be owed a degree of deference;

b) The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal and constitutional duty. If, however, it is premised on an assessment of the facts, a degree of deference to those findings of fact may be appropriate;

c) Although the Crown must correctly determine the extent or adequacy of the consultation required in the circumstances, the subsequent *process* of the consultation and its outcome will likely be reviewed on a standard of reasonableness. The process must be reasonable, not perfect.

At para. 81, she quoted Chief Justice McLachlin in *Haida Nation* as follows:

> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[76] At paras. 83-84, the judge addressed judicial deference, stating:

> [83] It is important to note the factual matrix underlying the comments of McLachlin C.J. in *Haida Nation* on the standard of judicial review when considering whether the honour of the Crown has been discharged. The Chief Justice prefaced her comments with the observation that there was, at the time, no legislated process in place for consultation with the Haida Nation. That is significant because the standards of judicial review depend on the nature and expertise of the tribunal or decision maker and the statutory mandate within which it does its work. Judicial deference to the factual conclusions of a tribunal theoretically rests on the experience and expertise of the tribunal charged with deciding the matters coming before it. Deference also rests on the presumption that the decision maker is a neutral agency.
>
> [84] It is my respectful view that where the decision maker is one of the parties to the dispute -- that is, a representative of the Crown itself -- the degree of judicial deference owed to its factual findings cannot be the same as that owed to an independent statutory tribunal such as the British Columbia Public Utilities Commission (*e.g.* the tribunal whose decisions were at issue in *Rio Tinto; see also Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103). Such a tribunal is assumed to possess expertise in the matters it adjudicates, and is presumed to be neutral.

She concluded at para. 89:

> I take from the foregoing that the Crown must correctly determine the extent or scope of its duty to consult, and must then engage in consultation that is adequate in the circumstances. The outcome of the consultation process (that is, the accommodation) must fall within the range of reasonable outcomes in the circumstances.

[77] Subsequently, in paras. 90-444, the judge supplied a detailed narrative of the background facts.

[78] In para. 445, the judge returned to the three-stage process for determining whether the Crown fulfilled its obligation to consult and accommodate as set out in *Hupacasath,* summarizing them as:

> ... (1) Did the Crown have knowledge of a potential Aboriginal claim or right?; (2) Did the Crown's contemplated conduct have the potential to adversely affect the claim or right? if so, (3) What was the scope and content of the duty to consult and accommodate in the circumstances of the particular case, and was that duty adequately met? Determination of the third question requires (a) a preliminary assessment of the strength of the claim and (b) consideration of the seriousness of the potentially adverse effect.

[79] The judge observed at para. 448 that the Crown "readily acknowledged" at the outset of the environmental review that it was aware of the claim of the Halalt to Aboriginal title and rights. The Crown also acknowledged that the Project as proposed originally and as first modified had the potential to adversely impact those rights and title. She stated at para. 451:

> It [the Province] identified the adverse impact as the potential of the Project operations to lower the flow levels of the Chemainus River, thereby creating a risk to the River's fish and fish habitat as well as other ecosystems in the River, and depleting the Chemainus Aquifer of groundwater. Specifically, the Province acknowledged that interference with the flow levels of the River and the levels of groundwater in the Aquifer had the potential to significantly and adversely impact Halalt's asserted Aboriginal right to fish, gather plants and bathe for ceremonial purposes in the River.

[80] At para. 640, the judge stated that, as a matter of law, "Halalt was entitled to a timely and transparent assessment of its claims". At para. 641, the judge stated her view:

> The strength of claim assessment must come at the beginning of the process, not at the end, because it is the foundation for the Crown's decision concerning the nature and scope of the required consultation with First Nations.

[81] At paras. 455-558, she examined the strength of the Halalt's claims. She summarized her conclusions at paras. 559-562:

> [559] Based on the foregoing, it is arguable that ownership of the groundwater in the Aquifer adjacent to and under I.R.#2 is deemed to have vested in the Province as early as 1849 or 1858 (when the colonies were established by the Imperial government) or 1866 (when Vancouver Island and mainland British Columbia were joined under one government) or, alternatively, at the time of the Union with the Dominion in 1871. It is also arguable that the proprietary interest in the "use, flow and percolation" of groundwater passed to the Dominion at the time of the Union. Alternatively, it is arguable that the proprietary interest passed to the Dominion when the Province transferred title to Indian Reserve lands to the federal government pursuant to the 1938 OIC.
>
> [560] The evidence establishes that there is not an impermeable barrier between the Chemainus River and the Aquifer as the River flows through I.R.#2 adjacent to the site of the Project. The two are intricately connected. The groundwater feeds the Chemainus River and influences its flow levels. The River is, and has been traditionally, integral to the lives of Halalt because of its fish and fish habitat, plants and bathing holes. It sustains the animals the Halalt people hunt and the plants they gather. The Aquifer's groundwater is a significant source of the water levels for the entire length of the Westholme side channel. The Aquifer is of central importance to the sustenance of fish and fish habitat. The groundwater warms the side channel in the winter and cools it in the summer.
>
> [561] I conclude, based on those considerations, that Halalt has an arguable case that that the groundwater in the Aquifer was conveyed to the federal Crown in order to fulfill the objects for which the reserve lands were set aside. If that is the case, then the Province cannot purport by legislative act to expropriate the groundwater.
>
> [562] I reiterate that the issue in these proceedings is the *prima facie* strength of Halalt's claims. I go no further than to say that Halalt has an arguable case for a proprietary interest in the groundwater of the Chemainus Aquifer, most of which underlies I.R.#2. As such, the Province ought to have considered the claim to be a credible one, rather than dismissing it out of hand. Final determination of this issue, as with the other claims, must be left to the proceedings which will conclusively determine Halalt's title and rights, or resolution at the treaty table.

[82] At para. 563, the judge noted that the position of the Halalt was that by paring down the Project "the District obtained certification of what is in fact a project of a much larger scale" and that, in any event, the limited project has the potential seriously to impact the river and the interests of the Halalt. She stated at paras. 565 and 567-569 and 571:

> [565] I have concluded that the environmental assessment ought to have encompassed all aspects of the Project for which its infrastructure was designed and is intended. The District intends to operate the well field on a year-round basis. That is the scope of the Project with respect to which the

> Province had a duty to consult and accommodate Halalt, and which the EAO ought to have assessed for its recommendation to the Ministers.
>
> ...
>
> [567] Mr. Finkel advised the District to propose further modifications to the Project in 2008 (that is, construction of two wells and extraction during the winter months at 75 L/s and summer pumping for emergency purposes only). Ultimately, the EAO recommended certification of the Project with those modifications.
>
> [568] The Certificate (pursuant to Schedule B, the Table of Commitments) permits the operation of one well at a time during the winter months with a maximum extraction rate of 75 L/s. Significantly, it leaves in the hands of the District the development of the ERCP "in consultation with" VIHA's Medical Health Officer, whose interests are completely aligned with those of the District. The ERCP will address the circumstances under which summer groundwater extraction can occur. The Certificate places no parameters on the circumstances under which, or even the times of year during which, groundwater extraction is permitted pursuant to the ERCP. There are no limits placed on the amounts of groundwater that can be extracted under the ERCP, nor are there any terms requiring implementation of mitigation measures in the event of groundwater extraction during the drier summer months.
>
> [569] Despite the likelihood of summer groundwater extraction, there are no terms in the Certificate concerning measures to augment the River flows in order to mitigate the effects of the summer pumping.
>
> ...
>
> [571] It is my view that the EAO erred in allowing the District to amend the Project description and thereby narrow the scope of the environmental assessment. Halalt was not consulted about the modifications, and voiced its objection to them. Given that the District clearly intends in the near future to extract groundwater on a regular basis (quite aside from emergency extraction) during the summer low flow periods of the Chemainus River, the EAO should have assessed the adverse impacts to Halalt's interests on that basis.

[83] The judge continued to discuss the District's needs and desire to shift entirely to groundwater extraction to supply the needs of Chemainus. She described the extensive activity that was undertaken to assess the implications of summer pumping and possible mitigation measures, including releasing water from other sources to supplement the flow in the Chemainus River.

[84] Investigating the water release option eventually was abandoned. The judge stated it was not clear exactly when. She commented at para. 593:

> The explanation advanced by the Province in argument for removing the water release option from the environmental assessment was that it was not necessary in light of the change in the operating regime to winter pumping only. That explanation is not persuasive. First, as already noted, the reason for the proposed water release option was to provide the District with a means to remove or adjust the restrictions on summer pumping. As such, the proposal was integral to the Project's design and infrastructure, as well as the District's need to shift entirely to a groundwater supply in the near future. For that reason, the water release option ought to have been assessed as part of the Project. Second, the consultants advising the EAO emphasized the importance of timely testing of the water release option not only because the Project was clearly designed for year-round pumping, but because of the more immediate prospect of summer pumping for testing and emergency purposes and the risks such pumping posed to the River's summer flow levels.

[85] The judge commented on Mr. Finkel's view that the Project should be narrowed and on discussions that the Halalt had with the District in the spring of 2008. She observed at para. 604:

> It is clear, however, that at the same time Mr. Finkel was narrowing the scope of the environmental assessment to the operation of one well in the winter months, the District was telling VIHA that it intended to shift entirely to groundwater and simply needed some time to achieve that goal. In his August 19, 2008 memorandum to the District's Public Works Committee, summarized earlier in these reasons, Mr. MacKay plainly set out the District's plan as he had described it to VIHA: While the District continued to seek approval from the EAO for the Project, which would entirely replace the surface water supply, its application for the Certificate was structured such that initially the wells would supply water in the winter months and the District would undertake additional testing to validate summer operation of the wells.

[86] The judge addressed the two s. 13 Orders, stating at paras. 609-612 and 618:

> [609] In its response to Mr. Finkel's letter of October 8, 2008, the District agreed to construct two wells rather than three. In its letter of October 9, 2008, the District said that it would construct the second and third of the three wells (PW#2 and PW#3) and remove PW#1 from the plans. The District asserted that because the second and third wells were slightly further from the Westholme side channel, they were therefore "unlikely" to influence groundwater levels at the side channel. The District provided no hydrogeological basis for this conclusion, nor was there evident in the record any opinion of that nature obtained from the consultants of either the District or the EAO. Nevertheless, that assertion was repeated by Mr. Finkel in his Draft EA Report as a statement of fact, and it appears in the final EA Report as a further step taken to alleviate Halalt's concerns about the effect of groundwater extraction on the side channel. Halalt was not asked for its views on the matter.

> [610] It is telling that even as the District advised of its intention to remove PW#1 from the current design of the Project, it stated that its revised Project proposal included a timetable for the development of PW#1.
>
> [611] Mr. Finkel issued two s. 13 Orders. The first s. 13 Order was issued on November 10, 2008 varying the scope of the Project as previously defined in the s. 11 Order of December 9, 2003. On November 12, Mr. Finkel issued the second s. 13 Order putting an end to any consultation concerning the environmental assessment before referral of the application to the Ministers.
>
> [612] Halalt was not advised or consulted about the matters contained in the s. 13 Orders before they were issued.
>
> ...
>
> [618] Mr. Finkel told Halalt in his November 10, 2008 letter that in the event the District wished to obtain approval for year-round extraction of groundwater, it would have to apply to amend its Certificate under s. 19 of the *EAA.* That is the only evidence (as distinct from argument) advanced in these proceedings by the Province concerning the steps the District would be required to take in order to broaden the Project's operating window to include the summer months.

[87] The judge then discussed the scope of the Certificate in paras. 622-625:

> [622] The District now holds the Certificate for the Project. As I read the provisions of the *EAA,* if the District wishes to apply to expand the Project to include extraction of groundwater in the summer months, it need only apply under s. 19. Accordingly, the "phased approach" to the Project, as described by the District in its July 2008 letter to VIHA, was an attractive alternative to the process stipulated by s. 11.
>
> [623] The result of the "phased approach" is avoidance of a full environmental assessment of groundwater extraction during the summer months when adverse effects are most likely. There is no means of assuring that Halalt will be consulted about summer pumping or the water release option. Those aspects of the Project will now be left to the discretion of one person, the executive director of the EAO, pursuant to an amendment application by the District.
>
> [624] Further, under the Certificate that has been issued, the conditions for emergency pumping at any time of the year, including the summer months, have been left to the discretion of the supplier of the water -- the District -- in consultation with VIHA's Chief Medical Officer. The outlook of the District is clear: its interest is to provide potable water of an acceptable quality to Chemainus from the wells. The interests of VIHA's Chief Medical Officer are aligned with those of the District.

> [625] Finally, the Certificate contains no requirement for mitigation measures to offset groundwater extraction during the summer months.

[88] The judge, at para. 626, returned to the comments in *Rio Tinto* that "... the duty to consult extends to 'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights". She continued in paras. 627-628:

> [627] In the present case, the strategic decision of the District was to replace its surface water supply with a groundwater supply. As Mr. Dakin observed, the District was not about to invest millions in a groundwater extraction system to provide potable water to Chemainus for only two-thirds of the year. It could not use the surface water supply for the balance of the year without spending many millions more to upgrade the surface water system. Year-round pumping was not just "an idea in the heads of a few government officials" (per Professor Newman referring to the *Dene Tha' First Nation* decision). This was not merely the exploration of a possibility of summer groundwater extraction. It had to happen as an integral part of the Project within a relatively short period of time, and had to happen immediately for emergency purposes. The writing was on the wall throughout the environmental assessment process.
>
> [628] The duty to consult must be approached with a good faith determination of the scope of the project in question and the potential impacts of that project. The scope of the Crown's consultation duty is informed, and indeed driven, by that determination. As observed by Professor Newman, approaching the question too narrowly can result in "death by a thousand cuts" to Aboriginal interests. That observation has resonance in this case.

[89] At para. 630, the judge stated that the first inquiry on the judicial review was whether the Crown correctly determined the extent of its duty to consult. She noted that Mr. Finkel swore in his affidavit that he determined at the outset that deep consultation was required, but she viewed this assertion with skepticism (paras. 632-633).

[90] The judge did not consider that the participation of the Halalt in the Working Group fulfilled the Crown's obligations, stating in paras. 651-654:

> [651] Mr. Finkel, and not the Working Group, was the engine driving the environmental assessment. Halalt was sometimes included in meetings or discussions and sometimes not.
>
> [652] The constitutional and legal duty of the Crown to consult and accommodate is not derived from the *EAA*. The duty of the Ministers is a constitutional and legal one that is "upstream" of the statute under which they exercise their powers.

> [653] There may be cases where the statutory requirements concerning the involvement of First Nations in the process are sufficiently stringent that the Crown may be seen to fulfill its duty by fully complying with statutory requirements under the legislation in question. That was the case in *Taku River.*
>
> [654] The circumstances of the present case do not resemble those in *Taku River.* Neither the mandate of the Working Group nor Halalt's involvement in it was sufficient to discharge the Province's duty of consultation in this case.

[91] At para. 678, she refused to accept the discussions between the Halalt and the District as constituting consultation or adequate consultation.

[92] At para. 663, the judge stated that the evidence suggested that the District met with the Halalt in the spring of 2008 with the objective of persuading the Halalt to agree to a project that had been rejected by Mr. Finkel. That point was repeated in para. 669 in which the judge referred to an Information Note authored by Mr. Finkel to his superior. Mr. Finkel, according to the judge, did not advise his superior "that the District was attempting to obtain Halalt's agreement to a project which he ... had concluded should not be certified".

[93] The judge concluded at para. 682:

> In light of the *prima facie* strength of Halalt's claims and the potential of the Project to adversely affect Halalt's interests, the Province had a duty to engage in deep consultation. The process that unfolded did not amount to such. In particular, the EAO failed to consider, and consult with respect to, the impact of year-round operation of the well field. By doing so, it failed to engage in adequate consultation.

[94] The chambers judge then turned to accommodation. She began her consideration of that issue at para. 683, stating:

> I turn next to the question of whether modifications to the scope of the Project constituted reasonable accommodation by the Province. As Halalt's counsel rather colourfully put it, accommodation is not "manna from heaven". Accommodation arises out of, and is the result of, consultation. At the heart of the Crown's duty to consult is engagement with Aboriginal peoples to understand and accommodate their interests in order to achieve the overriding objective of reconciliation. [Emphasis in original.]

[95] At para. 685, the judge commented that the modifications to the Project were not made in response to consultation with the Halalt because there was no discussion with the Halalt in advance of the decisions to reduce the scope of the Project. She stated that the Halalt objected to the reduction and:

> ... took the position that the environmental assessment must properly determine whether groundwater extraction on a year-round basis was environmentally sound.

The judge continued at paras. 686-689:

> [686] The Project modifications were made after the EAO received the scientific opinion of numerous consultants, including those of the EAO and the District, that the Project as proposed in the District's Application would cause significant adverse effects to the Chemainus River and possibly to the Chemainus Aquifer.
>
> [687] I infer from the facts disclosed by the record that it became apparent to Mr. Finkel that the Project as proposed by the District, and as the District ultimately intended to implement it, could not pass environmental muster based on independent scientific evidence. There were legitimate scientific concerns about both an extraction rate of 131 L/s and the prospect of summer extraction for any reason. The water release option, which was necessary to mitigate summer pumping, was a theory which required extensive testing. Against that backdrop, time was running out for the District to use the funds it had acquired under the funding agreement to construct the Project. Mr. Finkel decided the best solution was to suggest to the District that it scale back the Project in a manner that would avoid, at least in the short term, the difficulties posed by an extraction rate of 131 L/s and the extraction of groundwater during the drier months of the year.
>
> [688] Second, in my respectful view one cannot fairly characterize as a reasonable accommodation the decision to remove from the protection of the environmental assessment process the most potentially harmful aspects of the Project. Truncation of the Project resulted in truncation of the environmental assessment. Decisions concerning groundwater extraction on a year-round basis, including any process to determine its viability, are now left to the discretion of the executive director under the certification amendment process. Decisions concerning emergency summer pumping are left to the discretion of the District and the Chief Medical Officer of VIHA. These actions amount to avoidance of Halalt's concerns, not their accommodation. They certainly did not result from consultation.
>
> [689] Third, there is no evidence on the record, from hydrogeological experts or consultants of any kind, that the undertaking finally recommended by the EAO to the Ministers was unlikely to cause significant adverse impacts to the Chemainus River. Mr. Finkel apparently reached that conclusion based on the untested assumption that reducing the originally proposed extraction rate by half was less likely to be harmful. He provided no affidavit evidence as

> to how or why he reached that conclusion. Once again, the "accommodation" was made without any consultation with Halalt and its hydrogeological expert.

[96] At para. 693, the judge commented that it did not appear that "Mr. Finkel turned his mind to the impacts of summer pumping for emergency and contingency purposes". She stated in para. 696 that Mr. Finkel "expressed confidence in meetings during the assessment that Halalt would play a prominent role in the monitoring program", but no such role was contained in the Certificate.

[97] The judge stated at para. 700:

> Most of the measures characterized by the Province as accommodations are not accommodations in fact. They were not responsive to concerns of Halalt, and, in practical terms, some of the measures were inimical to those concerns. Further, Halalt was given no role in the monitoring program, which is the one means of determining whether there are adverse affects from the groundwater extraction.

She concluded at para. 701:

> With respect to each of Halalt's claims, the Province failed to fulfill its constitutional duty to accommodate Halalt's interests.

[98] Beginning at para. 702, the judge addressed compensation as accommodation. In para. 709, she stated that "financial compensation was one of several options that ought to have been available as a means of accommodation for discussion between [the] Halalt and the Province".

[99] In the result, the judge concluded in para. 711 that overall the Crown's accommodation did not fall "within the range of reasonable alternatives in the circumstances". She made the requested declaration, but refused to quash the Certificate. Instead, she stayed action under it pending consultation on year-round pumping.

Positions of the parties

[100] The Ministers contend that the judge erred by holding that the Crown had a duty to consult on the original Project rather than the Project as modified. They also

assert that the judge erred in concluding that the Crown did not undertake deep consultation and did not accommodate adequately.

[101] The District supports the positions of the Ministers, but participates mainly on the basis it contends the judge improperly enjoined the District from proceeding with the Project.

[102] In response to the Ministers, the Halalt state that the Crown had a duty to consult throughout the Project, not just after the November 10, 2008 s. 13 Order and that the consultation and accommodation were inadequate.

[103] In response to the District, the Halalt contend that the judge did not enjoin the District.

Discussion

The legal effect of the Certificate

[104] Where a project is a "reviewable project" under the *EAA*, it cannot be constructed or operated without an environmental assessment certificate (s. 8(1)). When a certificate is issued, a project cannot be constructed or operated "except in accordance with the certificate". This restriction is "[d]espite any other enactment" (s. 8(2)).

[105] The Ministers' Certificate in this case requires the District to operate in accordance with the Proponent's Table of Commitments that is attached as Schedule B. Commitment One of the Table states:

> Subject to the *Reviewable Projects Regulaiton (BC Reg 370/2002)*, the DNC will only operate PW#2 and PW#3 between October 15th and June 15th each year and will not operate more than one of these groundwater production wells at any one time.

This is the only pumping that is authorized by the Certificate.

[106] In para. 567, the chambers judge stated that the EAO recommended winter pumping with "summer pumping for emergency purposes only". With respect, this is

incorrect. The EAO did not recommend summer pumping for any purpose. The s. 13 Order does not provide for summer pumping.

[107] On November 10, 2008, Mr. Finkel wrote to the Halalt making it clear that the Project as reflected in the s. 13 Order provided for the operation of one well only during the winter months, that is, October 15 to June 15. A second well was authorized "to provide a level of redundancy in the system in case the other well fails". Mr. Finkel noted that the District wanted to operate on a year-round basis and had proposed a timetable for the development of a third well, but this was rejected by the EAO.

[108] He made it clear that if the District wished to add a third well it would be subject to an assessment under the *EAA* either as an amendment under s. 19 or as a modification under Part 5(4) of the *Reviewable Projects Regulation* (B.C. Reg. 370/2002). In the same letter, Mr. Finkel advised that he would provide a draft of the assessment report to the Halalt and the relevant agencies for review and comment.

[109] In para. 618, the judge stated:

> Mr. Finkel told Halalt in his November 10, 2008 letter that in the event the District wished to obtain approval for year-round extraction of groundwater, it would have to apply to amend its Certificate under s. 19 of the *EAA.* That is the only evidence (as distinct from argument) advanced in these proceedings by the Province concerning the steps the District would be required to take in order to broaden the Project's operating window to include the summer months.

In fact, Mr. Finkel also provided this advice to the District in a November 19, 2008 letter, a copy of which was sent to the Halalt. It was included in the EAO recommendation to the Ministers.

[110] The chambers judge referred in para. 568 to the provisions in the Table of Commitments that require the District to develop an Emergency and Contingency Plan ("ERCP") in consultation with the Medical Health officer of the Vancouver Island Health Authority ("VIHA") in accordance with the *Drinking Waters Protection Regulation* (B.C. Reg. 200/2003). She stated, [t]he ERCP will address the

circumstances under which summer groundwater extraction can occur". An examination of the *Regulation* shows that it is concerned with responding to an "emergency or abnormal operating circumstances". I see nothing in the *Regulation* that would allow a modification of the clear limitation imposed on the District by Commitment One of the Table quoted above at para. 105.

[111] In my view, the judge erred in concluding that the District was not prohibited from pumping other than with one well at the specified rate during the winter months only. At the hearing of the appeal, the Halalt essentially conceded that the judge misconstrued the Certificate, suggesting that this was understandable given the evidence before her. At the hearing, the Halalt also agreed that if the District were to attempt to expand the Project, the Crown's duty to consult would be engaged. The District and the Ministers concede this fact.

Standard of review

[112] I agree with the judge's articulation of the standard of review in para. 89:

> ...the Crown must correctly determine the extent or scope of its duty to consult, and must then engage in consultation that is adequate in the circumstances. The outcome of the consultation process (that is, the accommodation) must fall within the range of reasonable outcomes in the circumstances.

Strength of claim assessment and deep consultation

[113] Mr. Finkel asserted in para. 139 of his affidavit that he decided to engage in deep consultation. The chambers judge's statement at para. 633 that she viewed this assertion with skepticism, in part, was based on her view that there was "not a single email, memo or note to file indicating that Mr. Finkel made inquires of the Ministry of the Attorney General and others concerning a strength of claim assessment or that he received any response to those inquiries" (para. 635).

[114] As noted previously, in para. 391 of his affidavit, Mr. Finkel further addressed the issue in which he referred to a 2007 report entitled "Research in support of a preliminary assessment of strength of claim in [the] Halalt's First Nations asserted

traditional territory". He stated that he "obtained this report as part of my effort to assess the strength of Halalt claim to title over the aquifer". The report stated it was "confidential and subject to solicitor-client privilege".

[115] The judge referred to the report in para. 639 and observed that the Crown had not asserted privilege over it at the hearing. She stated that Mr. Finkel had given no reason for not providing a copy of the report to the Halalt.

[116] The chambers judge considered it significant that the Crown failed to prepare an assessment of the strength of claim. She stated at paras. 640-641 that it is essential that such an assessment be prepared at the beginning of the process and that the Halalt were entitled to a timely and transparent assessment. I question both as absolute propositions of law.

[117] In para. 39 of *Haida Nation*, the Supreme Court identified the importance of a preliminary assessment of the strength of the claims of an affected Aboriginal group, stating that "the scope of the duty [to consult and accommodate] is proportionate to ... the strength of the case supporting the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed".

[118] Clearly, it is desirable and sometimes may be necessary to prepare an assessment of the strength of claim at the outset of consultation, but, in a case like this where the Crown concedes consultation should be deep, it is the quality of the consultation that must prevail. The lack of a formal assessment does not undermine the consultation provided it is indeed deep consultation.

[119] In *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379, this Court addressed the absence of a formal assessment in para. 88:

> The Neskonlith contend that the City did not conduct an assessment of the strength of the Neskonlith's Aboriginal claim because it, the City, was of the view that as a municipality, it was not subject to the Crown's duty to consult. This assumption, however, is not determinative of the question of whether adequate consultation could have taken place, as illustrated by *Beckman, supra*. In that case, the Territorial government was found to have engaged in adequate consultation even though it did not regard itself as fulfilling a legal obligation in carrying out the consultation it did: see para. 39; and see *Taku*

> *River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74, [2004] 3 S.C.R. 550. [Emphasis added.]

[120] In this case, Mr. Finkel concluded that deep consultation was required because he:

> ...was satisfied that, given the proximity of the Project to Halalt's reserve, the fact that the Chemainus River runs through the reserve, and the fact that both Halalt and the District would rely on the same aquifer for groundwater, the Project could have a significant impact on Halalt's asserted rights and decided as a result to engage in deep consultation.

[121] Mr. Finkel stated that he arrived at this conclusion sometime in early spring 2005, subsequent to receiving Allan Dakin's report. In 2007, he formed the view that the Halalt's occupation of the area had not been exclusive, but stated that this did not change the level of consultation.

[122] Where there is an issue concerning the required extent of consultation, it would be prudent for the Crown to apprise an Aboriginal group of issues that it contends weaken the claims of the group. To fail to do so risks underestimating the strength of the claims, but the exercise is somewhat delicate as is illustrated by this case.

[123] Inherently, an assessment of the strength of a claim is subject to solicitor-client privilege. Mr. Finkel's initial inquiries were to the Department of the Attorney General. The report that he received in July 2007 was marked as confidential and subject to solicitor, client privilege. Repeatedly, the Halalt were asked for a report on their oral history and repeatedly the Halalt noted that preparation of such a report engaged issues of confidentiality. Although funded by the District, the Halalt failed to produce the promised oral history report to the EAO.

[124] In my view, the extent to which parties will share with each other the content of an assessment of the strength of claim will depend on the circumstances faced by them. I do not think that as a matter of law the Halalt were entitled to a "timely and transparent assessment of the strength of its claim" or that the absence of such an assessment always is significant to determining the adequacy of the consultation.

[125] The judge undertook an extensive analysis of the strength of the Halalt's claims. She concluded that the Halalt had an arguable case for title to the water in the aquifer. The Crown does not agree with the judge's conclusion, but takes the position that it does not matter because the Crown accepts that the obligation in this case was deep consultation. I agree with the Crown's position.

[126] The judge's analysis of the strength of the Halalt's claims was very thorough, extending over approximately 107 paragraphs of her reasons and canvassing extensively history and law. I question the extent to which such an analysis should be undertaken on a judicial review application. The parties remain engaged in ongoing negotiations concerning the claims. A detailed examination of claims by the court obliges parties to expose their legal analysis that may adversely affect their negotiating positions. Albeit described as a preliminary, *prima facie* determination, a detailed legal analysis of the positions of the parties is likely to influence them and could create difficulties if the claims subsequently are litigated.

[127] I conclude that the decision of the Crown in this case not to undertake an assessment of claim at the outset of the environment assessment is not determinative of whether the Crown met its obligation to consult. Mr. Finkel concluded for good reason that deep consultation was required. The Crown accepts that the Halalt were entitled to such consultation. In this case, the Halalt were not entitled as a matter of law to an assessment of the strength of claim.

Adequacy of consultation

[128] There were two key findings of the judge that led to the conclusion that the Crown's consultation was inadequate: first, "the EAO failed to consider, and consult with respect to, the impact of year-round operations of the well field" (para. 682); second, the EAO failed to address the Project modifications with the Halalt before the modifications were made.

[129] As to the first finding, the judge stated in para. 750:

> The Province owed a duty of consultation and accommodation to Halalt concerning the actual scope of the Project which is the year-round extraction of groundwater as the sole source of water for Chemainus. The Project's scope requires consideration of the year-round water demands of Chemainus rather than its water needs in the winter months only...

This led to her order that the wells not be operated "pending adequate consultation concerning year-round operation of the well field" (para. 753).

[130] The legal foundation for the judge's approach appears to be comments at para. 44 of *Rio Tinto* to the effect that "the duty to consult extends to 'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights".

[131] It is important to put into context the comments of the Court as relied on by the chambers judge in this case. After stating the passage in para. 44 quoted by the judge, the Chief Justice continued:

> Examples [of strategic, higher level decisions] include the transfer of licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager),* 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)).

[132] The reason for the concern was articulated by the Court in para. 47. In such cases, current Crown conduct may constrain the ability of the Crown to respond appropriately in the future; it "may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions".

[133] In para. 49, the Court in *Rio Tinto* stated:

> The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. [Emphasis in original.]

and in para. 50:

> Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult [is] grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests.

[134] The chambers judge also referred to *Adams Lake*, stating in paras. 70-71:

> [70] The question of potential for adverse impact was considered at some length by Madam Justice Bruce in the recent decision of *Adams Lake Indian Band v. British Columbia*, 2011 BCSC 266. The factual matrix of that decision differs from those discussed by Professor Newman, but the approach taken by the Court to the issue of potential adverse impacts is similar. The issue in *Adams Lake* was the potential for adverse impact on Aboriginal interests of the decision to incorporate Sun Peaks as a municipality. The act of incorporation, in and of itself, did not have an immediate adverse impact. However, incorporation resulted in the transfer of significant aspects of governance from the provincial Crown, which owed the First Nation legal and constitutional duties to consult and accommodate their interests, to an entity (the Sun Peaks Mountain Resort Municipality) which as a matter of law did not owe those duties.
>
> [71] The Court in *Adams Lake*, citing Tysoe J. (as he then was) in *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 at para. 82, observed that a change in the identity of the decision maker has the potential to impact the Aboriginal right claimed in much the same manner as any substantive change in the nature of the authority exercised (*Adams Lake* at paras. 143 and 160).

Adams Lake subsequently was overruled by this Court (2012 BCCA 333).

[135] In *Adams Lake*, Mr. Justice Low stated in para. 59:

> At para. 53 in *Rio Tinto*, the Court said that the duty to consult concerns "the specific crown proposal at issue" and not the "larger adverse impacts of the project of which it is a part'. It continued: "The subject of the consultation is the impact on the claimed rights of the current decision under consideration.

The words quoted from para. 53 by Low J.A. in *Adams Lake* relate to a proposition of the trial judge discussed by Low J.A. in paras. 52 and 53 of *Adams Lake*. I reproduce both paragraphs.

> [52] At para. 181 of the reasons, the judge stated that incorporation was "an integral part of the expansion and development of the resort and, in particular, the influence of the [Corporation] over the policies of the municipal council". She rejected the argument of the Province that the real issue was whether Community could separate consultation on incorporation from consultation about the continuing development of the resort by the Corporation. At para. 188, she held that the Province had "continually failed to realize the real and substantial connection between the incorporation decision and the Sun Peaks development in general".
>
> [53] The chambers judge stated her final conclusion thus:
>
> > [201] I have concluded the Province failed to adequately consult with the Band prior to the issuance of Order in Council 158/2010 by the Lieutenant Governor in Council and that the accommodation arising from the consultation was not within the range of reasonable outcomes. Thus it is appropriate to declare that the Province did not fulfill its constitutional duty to consult with the Band with respect to the incorporation of the Municipality prior to the issuance of Order in Council 158/2010 by the Lieutenant Governor in Council. I am also satisfied that the court has jurisdiction to order the Province to engage in a consultation process with regard to the incorporation of the Municipality to uphold the honour of the Crown and in a manner that reflects the strength of the claims and the serious impact on the Band's interests identified by the court in this judgment. Nothing short of deep consultation and accommodation where possible is appropriate in all of the circumstances. It is also appropriate to order the Province to include consultation about the incorporation of the Municipality in its ongoing consultation process with the Band concerning the MDA and the transfer of the timber administration.

[136] There is little doubt that the District wanted year-round pumping. Even when it finally reduced the scope of the Project, it wanted to retain the ability to undertake test pumping in the summer with the hope that this would lead to a third well. This is not what it got. Mr. Finkel so advised the Halalt in his November 10, 2008 letter. He also made this clear to the District in his November 19, 2008 letter, a copy of which was provided to the Halalt. More importantly, the s. 13 Order, the recommendation of the EAO and the impugned Certificate do not allow pumping in the summer for any purpose.

[137] In my view, this is not a case where the ability of the Crown to address future potential adverse impacts was compromised. The Halalt concede as much on appeal. I conclude that the judge erred as a matter of law in deciding that the Crown failed to meet its duty to consult because it failed to consult with respect to year-round pumping.

[138] In para. 682, the judge stated:

> ...the EAO failed to consider, and consult with respect to, the impact of year-round operation of the well field. By doing so, it failed to engage in adequate consultation.

As a question of fact, this statement cannot be supported on the evidence. From the outset in 2003 through to November 2008, there were multiple scientific reports, many, many meetings and communications all focused on the effect of year-round pumping. The judge's finding can only be considered in the context of her concern with the proposed modification to the Project and, perhaps, with respect to consultation after the s. 13 Order. I shall address these matters subsequently.

[139] As noted in my recitation of the background facts, consultation began in September 2003. On October 7, 2003, the Hul'qumi'num Treaty Group provided comments. Its focus was on avoiding "a significant depletion of future water availability". It expressed that it did not expect "absolute certainty". It expected that professional expertise would be brought to bear "on producing reasonable estimates of aquifer supply". That is exactly what occurred over the ensuing years.

[140] This initial consultation took place before the December 9, 2003 s. 11 Order requiring a certificate and well before the August 5, 2004 application by the District for a certificate. In para. 8, I describe the pre-application consultation. The lengthy history of further discussions with the Halalt and their consultants is described in the Background section of these reasons. It includes funding provided to facilitate the Halalt's participation in the assessment process.

[141] In para. 17, I set out a November-December 2004 exchange between Mr. Finkel and a representative of the Halalt, which, in my view correctly described the legal positions of the Crown and the Halalt and correctly describes the process that was undertaken. The objective of consultation is to ascertain and to address the effect of Crown conduct on the interests of Aboriginal peoples. It derives from the recognition that there are unextinguished Aboriginal rights and title and flows out of the honour of the Crown; the Crown cannot imperil Aboriginal rights and title where it must participate by treaty negotiation or litigation in determining the existence and scope of such interests. Treaty negotiation leads to reconciliation. Consultation and accommodation foster reconciliation by respecting the interests of Aboriginal groups.

[142] To summarize, the Project as proposed originally involved year-round pumping. There was extensive consultation about potential adverse affects 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.

[143] In my mind, the judge's comments in para. 566 illustrate the consultation and accommodation that took place:

> The evidence amply supports the conclusion that the Project as configured in the District's Application in 2003 (that is, construction of three wells and year-round extraction of groundwater at 131 L/s) had the potential to adversely impact the Chemainus River in a significant way and similarly impact Halalt's claims of Aboriginal rights and title. Mr. Finkel came to that conclusion based on the opinions of the hydrogeological and biological experts. The evidence also establishes that the Project as modified in 2007 (that is, construction of three wells and extraction during the winter months at 131 L/s; summer pumping for emergency and testing purposes) also had the potential to adversely impact the Chemainus River and Halalt's interests. Mr. Finkel acknowledged this in his Draft EAO Information Note to Mr. Junger in March 2008.

Unfortunately, these observations were followed immediately by the judge's mistaken view that the EAO had recommended approval of the Project with summer pumping for testing and emergency purposes.

[144] At para. 611, the judge referred to the second s. 13 Order as "putting an end to any consultation concerning the environmental assessment before referral of the application to the Ministers". Insofar as the Halalt are concerned, the statement is not correct. In his November 10, 2008 letter, Mr. Finkel advised the Halalt of the changed scope of the Project, told them a draft assessment report would be circulated for comments and invited the Halalt to contact him. The draft was sent to the Halalt on December 10, 2008. On January 9, 2009, Mr. Finkel sent to the Working Group and to the Halalt a draft Table of Commitments and a draft Issue Tracking Table. The Halalt responded at the end of January 2009; their response was provided to the Ministers. The second s. 13 Order put an end to public consultation only. It is not relevant to this case.

[145] At para. 593, the judge rejected the Crown's explanation for why the water release option was abandoned. She held that it should be investigated because the District needed "to shift entirely to a ground water supply in the near future". The recommendation to the Ministers and the Certificate as approved did not allow the District to do so. In my view, the Crown's explanation made perfect sense.

[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.

[147] The effect of the judge's order is to impose on the Ministers a requirement to consult concerning an application that was not before them and to require the applicant to incur the time and costs of investigating a project it is not pursing. The judicial review was of the Certificate. Its scope defined the scope of the review. Only limited winter pumping was recommended and authorized. The reasonableness of

the Ministers' decision had to be tested in that context, not in the context of an application that was not before them.

[148] I now turn to the second key basis on which the judge concluded that the Crown had not fulfilled its duty of consultation: the two modifications to the Project.

[149] In my view, Mr. Finkel was not obliged to advise the Halalt of his concerns before expressing them to the District and allowing it, the proponent of the Project, an opportunity to consider its position. He was entitled to express his concern with the original and the modified proposal. The Halalt commented on the original proposal; they commented on the revised proposal and on the proposal that ultimately was recommended to the Ministers.

[150] The duty to consult and the interests of the Halalt in this case cannot be considered in a vacuum. In *Rio Tinto*, the Court made it clear that the duty to consult may be exercised in the context of the work of an administrative tribunal. According to the Court at para. 55, the scope of the duty to consult "depends on the mandate conferred by the legislature that creates the tribunal". Consultation took place in the context of an environmental review of a project proposed by the District. Federal and Provincial agencies were involved both from an environmental perspective and because the Project was, in part, federally and provincially funded. In my view, it was wholly appropriate for Mr. Finkel to provide information to the proponent and to the other agencies that were involved directly in considering approval of the Project. He often, but not always, did that before providing the information to the Halalt. The record shows that in due course the Halalt were provided with the information and were given an opportunity to comment. Repeatedly, throughout the process, Mr. Finkel invited the Halalt to pose questions and he offered to meet with them to discuss any issues they had. In my view, the fact that the information may have been provided initially to the direct participants in the environmental assessment process does not undermine the consultation that took place.

[151] The judge was very critical of Mr. Finkel's conduct in the spring of 2008 and suggested that he did not report that the District was attempting to obtain the agreement of the Halalt to a project Mr. Finkel had rejected (para. 669).

[152] The issue also was addressed in an earlier section of the judge's reasons.

[153] The judge was critical of the fact that the Halalt were not informed that Mr. Finkel advised the District that he would not recommend the Project as then proposed. The judge appears to have been concerned that somehow the failure to inform the Halalt of Mr. Finkel's comments was improper because the District subsequently met with the Halalt in an effort to gain their support. She stated in para. 334 that "the District scheduled a series of meetings with Halalt, apparently with a view to persuading Halalt to support the Project as proposed". Further comments were in paras. 338 and 340:

> [338] On April 17, 2008, Mr. Finkel advised Mr. Junger by email that he would defer submitting his report to the Ministers because the District planned to meet with Halalt on May 12 to discuss "the status of the Project and EAO's current findings". It is unclear what Mr. Finkel meant by the reference to his "current findings" when he was aware that neither he nor the District had advised Halalt of those findings.
>
> ...
>
> [340] The District said the purpose of the meeting was to determine "what it would take" to have Halalt's support for the Project as currently proposed. There is no mention in the minutes of the meeting of the District's knowledge that the EAO would not recommend the Project as proposed.

[154] I observe that, the April 17, 2008 e-mail from Mr. Finkel to his superior does not state that the District planned to meet with the Halalt to discuss "EAO's current findings". It states: "[t]he District wishes to complete this meeting with Halalt <u>prior to further discussions with EAO</u> about the status of the project and EAO's current findings" [Emphasis added].

[155] As the judge noted in para. 339, the District explained its proposal and recorded its position in the meeting's minutes as follows:

> North Cowichan believes there has been a complete and thorough technical analysis for the well project through the environmental assessment process

> which also identified areas of concern for which a mitigation plan was tabled. The Municipality's proposal is to utilize the wells during the winter for domestic supply to Chemainus and to continue testing throughout the summer to determine whether or not the aquifer can accommodate summer and winter use.

Although Mr. Finkel had indicated his concerns with this approach and ultimately refused to incorporate it into the s. 13 Order, there is no doubt that the District continued throughout to want to proceed as it outlined to the Halalt at the meeting.

[156] The next paragraph of the minutes begins with the statement "[t]he Municipality would like to know what it would take to have the Halalt's support for the well project". Presumably, the District felt that such support would be important to it in any further discussions with the EAO.

[157] In my view, it made good sense to await the outcome of the discussions between the District and the Halalt. The Halalt had made it clear that they did not want the EAO to be in the middle of their discussions with the District. It also offered an opportunity for the Halalt and the District to forge a consensus.

[158] In part, it was her concern with the conduct of the District that led the judge to reject the meetings between the District and the Halalt as not satisfying the Crown's duty to consult. I agree with the judge's observation that the Crown cannot delegate its ultimate responsibility for consultation (paras. 676 and 678). It can delegate some procedural aspects of consultation, but at the end of the day the ultimate responsibility is that of the Crown.

[159] I do not consider that the District was the Crown's delegate. By the terms of the s. 11 Order (s. 10.2), the District was obliged to consult with the Halalt and to report to the Crown, but nothing in the material suggests that the Crown looked to the District to fulfill the Crown's duty to consult and accommodate.

[160] In *Neskonlith Indian Band,* Madam Justice Newbury addressed consultation in words I consider to be apt for the present case:

Adequacy of Consultation

[84] This brings us to the final issue – whether, assuming (i) that the Neskonlith have a strong case for Aboriginal title to their reserve land; (ii) that the City was authorized to consider the Aboriginal rights and claims of the Neskonlith in issuing the permit, *and* (iii) that an adverse effect sufficient to trigger the duty to consult occurred or might occur, the consultation carried out in this case was sufficient to satisfy the honour of the Crown. Again I note that in my respectful view this is an issue of mixed fact and law to which the standard of reasonableness applies and that "so long as every reasonable effort is made to inform and to consult, such efforts would suffice." (*Haida*, at para. 62.)

[85] I have described at length the correspondence between Chief Wilson and the Mayor of Salmon Arm, in which the Chief consistently reiterated her Band's objections to Shopping Centres' proposed development. These objections were repeated at the public hearing held by the City council in October 2008, which hearing led to the defeat of the then proposal; and at the public meeting held in December 2009 to discuss the revised proposal. It will be recalled that Shopping Centres decided to reduce the size of the development further even after it had received final approval under the *RAR*, and that Chief Wilson again stated her Band's opposition to the entire development in a letter dated May 26, 2010 and in her statements made at the at the public hearing in July 2010.

[86] ...Chief Wilson was provided with all the supporting materials to be considered by the City in connection with the permit, including the Stantec report dated May 6, 2011. Around this time, the Neskonlith retained Dr. Church and as has been seen, his letters of opinion were forwarded to and commented on by Stantec. A veritable "war of the experts" ensued and ultimately Dr. Church framed the one concern that lies at the heart of this proceeding – the *possibility* of an "imperative demand for flood protection, leading either to [possible] river channel modifications or to dike construction" along the River. In addition the Neskonlith submitted the less focussed opinion of Dr. Turner, which included the concern that any flood mitigation measures on the ethnobotany and indigenous uses of the area would be highly significant and required further consideration.

[87] The Neskonlith were again represented and made their objections known at the meeting of the Council on July 11, 2011 following which Council approved the granting of the permit. Further expert reports were generated by the geomorphology experts when the final revised development permit was sought and granted after another hearing.

...

[89] Can it be said that the Neskonlith's concerns regarding the elevation of the proposed development were not "taken seriously"? (See *Beckman*, *supra*, at para. 78.) The Neskonlith were treated respectfully by the City and its staff; they were given copies of all relevant materials; they were heard at various meetings; their expert reports were obviously reviewed with care by the owner's experts; and various modifications, including the reduction of the development to only 20 acres, were made by Shopping Centres to its plans in the process. Although Dr. Turner advocated a more complete botanical

> assessment of whether the development should be permitted *at all*, it has not been shown that further expert reports on the specific issue of the *development permit* would have provided material assistance to the decision-maker or might have led to a different decision. The issue of the permissible elevation for the shopping centre cannot be said to have been ignored or taken lightly, and in the end was resolved on the basis of scientific assessment by qualified professional engineers.
>
> [90] The Neskonlith submit that "Even the lowest form of consultation demands substantive engagement and discussion" with the First Nations, and that that has not occurred in this case. In the absence of any statute or case law that requires a particular form of consultation, I cannot agree. I conclude that the process in this case was reasonable; that the Neskonlith were fully and promptly informed of all applications and amendments relevant to the permit and to the development generally; that they were given several opportunities to express their concerns; that their objections (and those of others) were taken seriously and did lead to material modifications of the planned development; and that the City's decision itself lay within the range of reasonable outcomes.
>
> [Underline emphasis added.]

[161] I agree with the judge's comment at para. 651, which I repeat:

> Mr. Finkel, and not the Working Group, was the engine driving the environmental assessment. Halalt was sometimes included in meetings or discussions and sometimes not.

[162] This observation has two dimensions: participation in the Working Group in and of itself may not be sufficient; the corollary is that non-participation in whole or in part is not fatal. To assess whether the Crown has met its duty to consult, the entire context must be considered. In its recommendation to the Ministers, the EAO summarized the participation of the Halalt in the assessment process:

> From 2005 to 2007 EAO provided funding support to Halalt to retain technical expertise, including a hydrogeologist, and to review the Application and additional documents prepared and submitted by the Proponent. In February 2005 the Halalt provided EAO with *The Halalt First Nation Commentary to the Environmental Assessment Officer regarding the District of of North Cowichan Application for an Environmental Assessment Certificate for the Chemainus Water Well Supply Project (February 20, 2005)*, hereafter referred to as the *Commentary*. This document set out in detail Halalt's perspective on the proposed Project and Halalt's interests, including Halalt's asserted rights and title. The range of issues identified in the *Commentary* became [the] focus of consultations between EAO and Halalt over the course of the environmental assessment and are discussed throughout the Assessment Report.

> During the review of the Application the Proponent participated in working group meetings organized by EAO to discuss Project issues and findings, including working meetings on January 20, 2005 and March 8, 2005 that included representation from Halalt and the HTG. The Proponent also participated in three meetings organized by EAO with Halalt representatives on June 16, 2005, July 5, 2005 and December 6, 2006 to discuss a range of issues identified in the *Commentary*.
>
> Halalt's hydrogeologist attended meetings with the Proponent's hydrogeologist and EAO's hydrogeologist on January 23, 2006 and May 31, 2006 to hear and discuss preliminary findings from the 2005 pumping test and monitoring program. The Proponent also met five times with the Halalt between March 2008 and July 2008 to discuss the proposed Project.
>
> In addition to the working group meetings and joint meetings with the Proponent, EAO and Halalt met directly to discuss Halalt concerns on March 7, 2005, May 2, 2005, June 7, 2005, July 20, 2006, October 24, 2006, September 20, 2007, and February 6, 2008.

[163] One example of the approach of the EAO is Mr. Finkel's November 26, 2007 e-mail to the Halalt, which states as follows:

> Attached for your information are comments from the Ministry of Environment (including my original request for comments) and from Allan Dakin regarding the Chemainus Wells Project. EAO has forwarded these comments to the District of North Cowichan for review and response.
>
> I will review the environmental assessment timetable I provided at our September meeting and circulate a revised timetable shortly. The next step for EAO will be to issue a first draft of an assessment report (December) and seek a mutually agreeable date for another meeting with Halalt First Nation to follow-up on our discussion from September.

[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.

[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.

[166] This case is a judicial review of the Ministers' decision to issue a certificate approving a project. It cannot be contended that there was no consultation. In my view, it equally is untenable to conclude that the consultation was inadequate. I conclude that the Crown met its duty to consult.

Accommodation

[167] The chambers judge concluded that the Crown did not adequately accommodate the concerns of the Halalt for a number of reasons:

> 1. "... the modifications to the Projects were not made in response to consultation with Halalt. The EAO had no discussions with Halalt about scaling back the Project and, as a result, the environmental assessment. The EAO made the decision to do so and then advised Halalt" (para. 685);
>
> 2. "...one cannot fairly characterize as a reasonable accommodation the decision to remove from the protection of the environmental assessment process the most potentially harmful aspects of the Project. Truncation of the Project resulted in truncation of the environmental assessment. Decisions concerning groundwater extraction on a year round basis, including any process to determine its viability, are now left to the discretion of the executive director under the certification amendment process. Decisions concerning emergency summer pumping are left to the discretion of the District and the Chief Medical Officer of VIHA. These actions amount to avoidance of Halalt's concerns, not their accommodation. They certainly did not result from consultation" (para. 688);
>
> 3. "...there is no evidence on the record, from hydrogeological experts or consultants of any kind, that the undertaking finally recommended by the EAO to the Ministers was unlikely to cause significant adverse impacts to the Chemainus River" (para. 689);
>
> 4. it does not "appear that Mr. Finkel turned his mind to the impacts of summer pumping for emergency and contingency purposes. The s. 13 Orders and the EA Report are silent on the issue" (para. 693);
>
> 5. the Halalt were not given participation in monitoring the wells operations (para. 696);
>
> 6. financial compensation should have been considered (para. 709).

[168] I shall address each of these observations.

1. The modifications in response to consultation

[169] In my view, it is clear that the modifications were made in response to the concerns of the Halalt. The comments of the chambers judge in para. 566, quoted above, confirm this. Those modifications resulted in scaling back the Project, which the District was entitled to do. This did not eliminate the fact that consultation on year-round pumping had taken place for several years.

[170] In the absence of the judge's incorrect understanding of the Certificate and incorrect legal and factual approach to the question of year-round pumping, I cannot see how scaling back the Project to avoid the potential adverse consequences of summer pumping was not an accommodation in the interests of the Halalt.

2. Decisions concerning year-round pumping and summer pumping

[171] Continued consultation on year-round pumping no longer was necessary because it was eliminated. The discretion of the executive director must be exercised in accordance with his statutory mandate, just as it was when it was determined at the outset that a certificate was required. At a September 20, 2007 meeting of the Working Group attended by the Halalt, Mr. Finkel explained that if there were an application under s. 19 the "EAO would first conduct a min-environmental assessment of the proposed change to determine whether the change would result in significant adverse effects". He observed that the Certificate would be amended only if the EAO was satisfied there would be no significant adverse effects. He stated that that the proposed changes would be reviewed "with the appropriate agencies and Halalt". The federal representative at the meeting advised that proposed changes likely would result in a review under applicable federal legislation and that "[t]he federal government would consult with Halalt about changes and possibly invite further public review".

[172] The matter also was addressed by Mr. Finkel in his November 10, 2008 letter to the Halalt. He stated that the District would be obliged to "collect and provide

information needed to assess whether an increase in groundwater extractions could have significant adverse effects" and that any application to increase groundwater extractions "would be carefully examined given the existing uncertainty about the impact of groundwater extractions during the summer months". Mr. Finkel confirmed that the Halalt would be consulted "about any test program proposed to gather data about impacts and mitigation, and consult[ed] in any review process established to review the results".

[173] Further, it is not correct that "[d]ecisions concerning emergency summer pumping are left to the discretion of the District and the Chief Medical Officer of VIHA".

[174] Although she alluded to it in para. 406 of her reasons, the judge apparently did not consider the implications of Part 5(4) of the *Reviewable Projects Regulation*. At the hearing of the appeal, the Crown advised that a request by the District to develop a third well to accommodate year-round pumping would be a modification. It would engage the provisions of the *EEA* as are applicable to a "reviewable project".

3. No evidence of advice received by Mr. Finkel

[175] There clearly was evidence that Mr. Finkel received advice "that the undertaking finally recommended by the EAO to the Ministers was unlikely to cause significant adverse impacts to the Chemainus River". For example, Mr. Finkel received the following emails describing the impacts on the river:

- December 30, 2008: an hydrologist with the Vancouver Island Region of B.C Environment, who specified a "very low potential for impact" on surface water flows;
- January 7, 2009: an ecosystem biologist with the Ministry of the Environment, who noted a "low potential for significant impacts to fish, wildlife and vegetation";
- January 22, 2009: Section Head, Water Protection, Water Stewardship Division – Regional Operations, Vancouver Island Region, who expressed no concern.

4. Mr. Finkel's awareness of the impacts of emergency and test pumping

[176] Mr. Finkel clearly turned his mind to summer emergency and test pumping. As noted previously, he specifically addressed this in his November 10, 2008 letter to the Halalt and in his November 19, 2008 letter to the District, a copy of which was sent to the Halalt. In both letters, he made it clear that the s. 13 Order did not provide for summer emergency and testing pumping.

5. Halalt's participation in the monitoring program

[177] The Crown takes the position that the Halalt did not ask to participate in the monitoring program, but, in any event, were involved extensively in discussions concerning monitoring. The Halalt's response to EAO's draft assessment report appears to support the Crown's position. The Halalt asked that the District be required to conduct comprehensive monitoring and expressed the desire that the monitoring program be "determined in consultation with Halalt". They did not ask to participate in monitoring.

[178] The following are examples of consultation with the Halalt on monitoring:

- July 27, 2007: Dr. Wendling sent a letter to the EAO in which he addresses monitoring among other matters concerning the Project;
- August 16, 2007: Mr. Finkel sent a communication to the Halalt enclosing a number of documents, including a draft monitoring plan prepared by a consultant;
- September 20, 2007: a meeting between the EAO, other Provincial representatives, Federal representatives and the Halalt at which time Dr. Wendling made a presentation that included monitoring;
- February 6, 2008: a meeting with the same parties at which time a draft monitoring plan was distributed.

[179] In my view, it was not unreasonable for the Ministers not to include the Halalt in the monitoring program. Monitoring is undertaken by independent consultants. The Halalt are provided with the results of the monitoring. The decision who should undertake monitoring in the circumstances of this case is not a matter that should be of concern to a court on a judicial review.

6. Financial compensation

[180] I also am of the view that the refusal to consider compensation was not unreasonable in the circumstances of this case. It is not difficult to discern strong policy reasons for refusing compensation.

[181] As noted previously, at the outset of the process the Hul'qumi'num Treaty Group wanted "to be assured that the water to be taken from the aquifer under the project does not represent a significant depletion of future water availability". It was recognized that there are uncertainties in the natural environment: "[a]bsolute certainty is not what we are looking for". It was expected that "professional expertise [would be] brought to bear on producing reasonable estimates of aquifer supply". In my view, that is exactly what occurred over the many years of the environmental review.

[182] At para. 703, the judge stated:

> Halalt observed that the objective of preserving asserted Aboriginal rights and title in this case would only have been met entirely if the Ministers refused to certify the project...were the Project to receive approval, accommodation should be aimed at reducing the degree of the infringement as opposed to preventing infringement altogether.

I think this is exactly what was done.

[183] I consider that the Project as approved by the Ministers reasonably accommodated the adverse impacts identified by the Halalt.

New evidence

[184] The District applies to adduce the monitoring report of operations during the winter months of 2009 to 2010. It reports no adverse impacts on the aquifer. The Halalt object to the admission of this new evidence. Their expert responded to it and the Halalt assert that it is controversial. I read Dr. Wendling's comments. He does not quarrel with the conclusion that the aquifer was not affected adversely. His concerns seem to focus on water quality in the wells and, to some extent, on methodology.

[185] In my view, the evidence should be admitted. The chambers judge proceeded on the basis that there was no evidence that the Project as approved would not have an adverse impacts on the aquifer. Although I consider she erred in that regard, the new evidence relates directly to that issue and suggests that the judge's factual assumption was not correct (*Jen v. Jens*, 2008 BCCA 392, 84 B.C.L.R. (4th) 250 at para. 29, quoting Lambert J.A. in *North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201 at paras. 25-26, 84 D.L.R. (4th) 402 (C.A.)).

Conclusion

[186] The District required a certificate to construct and operate the wells. Construction and operation could only take place as permitted by the Certificate. Summer pumping was not permitted.

[187] The District was entitled to request a modification of the originally proposed Project and the EOA was entitled to amend its s. 11 Order to reflect a modified project. The Halalt were entitled to be consulted on whatever project was being considered by the EAO and, particularly, on whatever project was to be considered by the Ministers.

[188] For several years, the District proposed year-round pumping. Through their expert advisors, the Halalt expressed concern with such pumping. The Project was scaled back to two wells with summer pumping for testing and emergencies. The Halalt commented on that. The Project was scaled back to winter pumping with no

summer pumping. The Halalt were afforded the opportunity to comment on that. Their comments were provided to the Ministers before a decision was made.

[189] The Project as submitted to the Ministers and approved by them addressed the concerns of the Halalt based on the advice of consultants, including those of the Halalt. That advice reflected the traditional use the Halalt made of the waters in issue.

[190] In my view, the chambers judge erred in law by requiring continued consultation on year-round pumping and erred in fact in concluding that such consultation had not taken place.

[191] In my view, the judge's conclusion that the Crown did not reasonably accommodate the interests of the Halalt was based on her misinterpretation of the effect of the Certificate. This led to an incorrect characterization of the scope of the Project as approved.

[192] On the facts, there clearly was deep consultation. The accommodation of limiting pumping to a single pump during the winter months was reasonable.

Disposition

[193] I would allow these appeals and set aside the declarations and orders made.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice D. Smith"

I agree:

"The Honourable Madam Justice Neilson"