Date: 20071005

Docket: T-1691-07

Citation: 2007 FC 1027

BETWEEN:

MUSQUEAM INDIAN BAND

Applicant

and

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
THE HONOURABLE MICHAEL M. FORTIER, P.C.
IN HIS CAPACITY AS MINISTER OF PUBLIC
WORKS AND GOVERNMENT SERVICES,
TREASURY BOARD OF CANADA AND
LARCO INVESTMENTS LTD.**

Respondents

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] On the 19th of September, 2007, the Musqueam Indian Band (the "Applicant" or the "Musqueam") filed an application for judicial review in respect of a decision announced on the 20th of August, 2007 by the Minister of Public Works and Government Services, (the "Minister") that the Government of Canada had sold nine (9) parcels of real property to the Respondent Larco Investments Ltd. ("Larco"), including two (2) properties in Vancouver, British Columbia namely 401 Burrard Street and the Sinclair Centre at 757 West Hastings Street (the "Vancouver properties"). Shortly after the announcement, the Applicant was advised that the sale of the nine (9)

properties was scheduled to close between the first and thirty-first of October, 2007. The announcement indicated that the sale price for the nine (9) properties would be 1.644 billion dollars and that each of the properties would be leased back to the Government of Canada for a period of twenty-five (25) years. The portion of the purchase price allocated to each of the Vancouver properties is in excess of 100 million dollars.

[2] On the 24th of September, 2007, the Applicant filed a motion for an interlocutory injunction restraining the Government of Canada from transferring, selling, or otherwise disposing of the Vancouver properties pending the hearing of the underlying application for judicial review. The principle bases for the application for the interlocutory injunction arose from the Applicant's outstanding land claim in respect of an area that includes the Vancouver properties, the imminent closing date for the real estate transaction, the existence of a clause in the agreement of purchase and sale that entitles the Government of Canada to withdraw any two (2) of the nine (9) properties from the sale and the reality that the uncertainty arising from the Applicant's application for judicial review created, and thus severely impacts on Larco's negotiations to arrange financing for the transaction within a time frame that would allow for the closing of the transaction by the 31st of October.

[3] Given the urgency arising from the foregoing circumstances, a special sitting of the Court at Vancouver was scheduled for Thursday and Friday, the 27th and 28th of September. At the close of the sitting, the Court granted an interlocutory injunction in favour of the Applicant and indicated that reasons would follow. These are those reasons.

BACKGROUND

[4] The Musqueam Indian Band is an Indian Band within the meaning of the *Indian Act*[1]. The present members of the Musqueam Indian Band are descendents of Aboriginal people who lived in an area in the lower mainland of British Columbia that includes downtown Vancouver, where the Vancouver properties are situated. Musqueam has three (3) reserves located in the lower mainland. There are currently approximately one thousand two hundred (1,200) members of the Band, approximately 55% of whom live on reserve. An affiant on behalf of the Musqueam attests that its land base under the reserve system is very small in relation to its membership with the result that the Band suffers from a serious land shortage.

[5] The Musquean Indian Band has been engaged in treaty negotiations with the Governments of Canada and British Columbia since early 1994. It remains committed to protecting the remaining Crown property within its traditional territory that remains in the hands of the Government of Canada. This litigation represents at least the third time in recent years that the Applicant has intervened by litigation in proposed sales of Government lands alleged to be within their traditional territory.

[6] Public Works and Government Services Canada ("PWGSC") provides accommodation services for federal government employees across Canada in leased and Crown owned buildings. The Government determined to look at alternatives which would allow it to move out of the business of real estate management and to focus on what it considered it to be "core" Government activities, while at the same time, saving taxpayer money. To this end, on the 16th of June, 2006, the

[1] R.S. 1985, c. I-5.

Government requested proposals in this regard in relation to thirty-five (35) properties, later increased to forty (40), within the portfolio of Government owned properties. The nine (9) properties that are the subject of the underlying agreement of purchase and sale, including the two (2) Vancouver properties, are within the forty (40) property inventory.

[7] On the 15th of September, 2006, the Government announced that a contract had been awarded to private sector consultants to review the proposal.

[8] On the 14th of November, 2006, the consultants reported in an "interim" report with respect to nine (9) of the forty (40) properties recommending that Government proceed "immediately" to reduce its owned-to-lease ratio by selling and leasing back conventional office assets which included the nine (9) properties.

[9] On the 5th of March, 2007, the Minister announced that the Government of Canada was proceeding to determine whether it would be advisable to sell and lease-back the nine (9) properties.

[10] On the 7th of March, 2007, an official in PWGSC wrote to the Applicant advising of the announcement, of the fact that bids were then being requested for the nine (9) properties to assess the merits of proceeding with any sale and lease-back and indicating no commitment had yet been made by the Government to sell any of the nine (9) properties then under consideration. The official wrote:

> Before making any decision in relation to the properties, Public Works and Government Services Canada invites the Musqueam First Nation to provide us with comments concerning the nature and extent of any interest the Musqueam First Nation may have with respect to this proposal.

The official went on to indicate that PWGSC would appreciate hearing from the Musqueam "…within thirty days of receipt of this letter."

[11] The Applicant responded by letter dated the 29th of March, 2007 although, for whatever reason, it would appear that that letter was not received by PWGSC until mid to late April. The Applicant wrote, in part as follows:

> Musqueam notes this proposal with concern regarding Canada's ongoing attempts to dispose of crown held land within Musqueam traditional territory. On behalf of the Musqueam Indian Band I inform you Musqueam is not in favour of the proposal for these two properties [the Vancouver properties] for a number of reasons.
>
> As you may be aware, Musqueam has voiced this concern with Canada's policies for many years. In particular Musqueam has had much discussion and correspondence with the Canada Lands Company regarding 401 Burrard [one of the two Vancouver properties] at least as far back as 1996.
>
> If you are not already aware, these two land parcels are in the city of Vancouver within the heart of Musqueam traditional territory, in close proximity to designated Musqueam archaeological sites of major significance, and a few kilometres from our main reserve, Musqueam IR #2. …
>
> On several occasions over the past few years, Musqueam has indicated our lawful interest in the crown held lands within our traditional territory. The properties you propose for disposal could form part of our land claim settlement and are of special importance to us as very, very little land remains within our traditional territory that has not been alienated by the Crown to third parties.
>
> Musqueam would like to meet with you and senior representatives from your Ministry to discuss the current status of the land and the possibility of acquiring the land for uses beneficial to our community. In this regard we hope to deal directly and bilaterally with the Ministry and Canada to work out an accommodation amongst us.
>
> Recent court cases such as the *Haida* decision of the Supreme Court of Canada have confirmed that the honour of the crown requires that First Nations aboriginal interests be accommodated prior to proof of their aboriginal title where evidence of their title is strong. In March of 2005, the Court of Appeal confirmed that the strength of Musqueam's aboriginal interests places a duty on the crown at "the more expansive end of the spectrum" (at para 93 and 94 of *Musqueam Indian Band v. The Minister of Sustainable Resource Management).* This would include the accommodation of our people's need and entitlement for more land. We remind you that Musqueam has already proved an aboriginal entitlement in the celebrated case of *Regina v. Sparrow*.
>
> At present 45% of our population lives off reserve and we do not have the land base to regain our stature as the self-sustaining people we once were. This is a result of

> Musqueam having one of the smallest per capita reserve allocations in Canada. It should be noted that our people are in a unique situation in this Province since we live adjacent to a large urban center and, consequently, the majority of land within our traditional territory has already been alienated to third parties.
>
> Our situation speaks directly to the pronouncement of the Supreme Court in *Haida* when it confirmed it is not in keeping with the duty and honour of the Crown towards First Nations for the Crown to undermine the reconciliation of aboriginal title by disposing of land and resources where doing so would effectively deprive the First Nation of any benefit flowing from its aboriginal entitlement to such lands and resources… This is precisely what Musqueam now faces. We wish to address this problem proactively and positively.
>
> Most of the land within our traditional territory has already been alienated and we face the very real prospect of a landless settlement. This is not acceptable to us and, we believe, also unacceptable to the Crown. We presume the land will not be offered for sale or by any other disposition to third parties prior to completing a suitable accommodation with Musqueam. Accordingly, we wish to discuss the accommodation of our rights with regard to what little Crown held land remains within our territory.
>
> We therefore kindly request that we be accommodated with regard to the two properties and begin the consultation process…immediately.
>
> [citations omitted]

[12] The three citations in the foregoing quotation are to *Haida Nation v. British Columbia (Minister of Forests)*[2], *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*[3] and *R. v. Sparrow*[4]. The second of those decisions, *Musqueam v. British Columbia*, is a decision of a three member panel of the British Columbia Court of Appeal with all three members of the panel concurring in the result but writing separate reasons. The pin-point reference to that decision is to the reasons of the Honourable Mr. Justice Hall.

[13] PWGSC responded by letter dated the 4th of May, 2007 proposing a meeting during the latter part of the week of the 21st of May, 2007. The proposed meeting took place on the 22nd of May.

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[2] [2004] 3 S.C.R. 511.
[3] 2005 BCCA 128, March 7, 2005.
[4] [1990] 1 S.C.R. 1075.

[14] Minutes of the meeting prepared by a senior official of PWGSC indicate that the meeting commenced at 10:15 a.m. and continued for approximately one (1) hour. The minutes record that a PWGSC official indicated that bids for the nine (9) properties would be received by the 12th of June and that the bids would be evaluated through the summer with recommendations going forward in August. The minutes further indicate that the expected closing of the transaction would be in September/October of 2007 and that there would be a clause in the lease-back arrangements providing an option for the Crown to buy back the properties after twenty-five (25) years for "government policy reasons".

[15] A representative of the Applicant inquired whether the meeting amounted to an information sharing session. The response was that it was just that. It was agreed that access for the Applicant to the "data room" established for the use of potential bidders would be provided. The Musqueam did not avail themselves of such access.

[16] An affidavit on behalf of the Applicant attested to by an individual who attended the foregoing meeting on the Applicant's behalf describes the meeting as "an information meeting" and a "…preliminary meeting to setting up a consultation process". Hand written notes of the meeting made by the same person confirm that impression. In any event, it is clear from the affidavits filed by both parties before the Court and their respective notes or minutes of the meeting, that no further meeting was scheduled.

[17] On the 31st of May, 2007, an official of PWGSC wrote to the Applicant, thanking the Musqueam for the meeting held on the 22nd of May, and posing questions and outlining further steps that would be taken as follows:

> …what information can you provide to support an assertion of aboriginal title over the above-mentioned properties [the Vancouver properties]? Do these properties in particular have a special significance to the Musqueam First Nation? Is there any other information that you feel would be important for us to consider?
>
> Prior to making any decisions on these properties, we will review all of the material related to aboriginal interests that has been gathered or received to make our assessment of strength of claim and of impact. The results of this assessment will determine how we will proceed.

A response was requested. "…by the end of June."

[18] The Applicant responded by letter dated the 29th of June, 2007 indicating that it was gathering material and that it would provide a response and related material within two (2) weeks. The Applicant again replied on the 11th of July, 2007 in a letter running to some six (6) pages and responding to PWGSC's letter under the headings: "Your Letter of May 31, 2007", "Our Aboriginal Title to the Properties", "Serious Impact of the Proposed Sales on our Aboriginal Title", "The absence of any Public Necessity for the Proposed Sales", "Reversing the Past Breach of the Duty to Consult", and "Future Steps". The letter was accompanied by two (2) expert opinions, one from an individual who had conducted ethnographic research among Musqueam peoples and whose doctoral thesis in anthropology at the University of Washington in 1970 was "…directly concerned with Musqueam social and cultural systems." The second report was prepared by an archaeologist and heritage consultant. Both speak authoritatively to the long claims to settlement by the Musqueam of what is now the heart of Vancouver.

[19] By letter dated the 27th of July, 2007, the Applicant's letter and attachments was acknowledged. The Musqueam were assured that the letter and attachments had been reviewed. They were assured that "no final decision has yet been made by the Crown to dispose of [the Vancouver] properties". The Musqueam were further assured that they would be notified in writing of any final decision.

[20] No further "consultation" or communication occurred until a letter from PWGSC to the Applicant dated the 20th of August, 2007. On that date, by letter, PWGSC notified the Applicant of a final decision by the Crown to sell the nine (9) properties, including the Vancouver properties. PWGSC wrote:

> The information provided by Musqueam First Nation on July 11, 2007 and the information gathered independently by PWGSC was reviewed and it is our view that the Crown has fulfilled any legal obligation that it may have to consult with respect to the proposed disposition of these properties.
>
> The sale is scheduled to close at the latest on October 31, 2007.

No details of relevant information "gathered independently by PWGSC" would appear to have ever been communicated to the Applicant and thus, no opportunity to review such information or to respond to it was provided.

[21] Institution of this litigation followed.

THE ISSUES

[22] The issues on this application for an interlocutory injunction and related relief are the following:

1) the test for the granting of an interlocutory injunction in circumstances such as those here before the Court;

2) whether there is a serious issue to be tried on the underlying application for judicial review;

3) whether the Applicant will suffer irreparable harm not compensable in damages if an interlocutory injunction is not granted;

4) the balance of convenience or inconvenience as between the parties taking into account the public interest;

5) if an interlocutory injunction is to be granted, whether the Applicant should be relieved of the usual requirement that an undertaking to abide by any order of this Court concerning damages caused by the granting or extension of the injunction; and

6) costs.

ANALYSIS

1) The test for granting of an interlocutory injunction

[23] The parties before the Court were in agreement that the Applicant must satisfy the tripartite test set forth in *RJR-MacDonald Inc. v. Canada (Attorney General)*[5]. The elements of that test are serious issue to be tried, irreparable harm and balance of convenience or inconvenience. On the facts of this matter, because the relief requested here is in part similar to the relief sought on the ultimate disposition of the underlying judicial review, the threshold of "serious question" requires somewhat greater scrutiny as to the merits than might otherwise be the case. Further, as anticipated by the enumeration of the issues above, in considering the balance of convenience or inconvenience, while this matter is not a constitutional case, I am satisfied that the Court must consider the public interest and the presumed legitimacy in the public interest of the Crown decision at issue.

2) Serious issue

[24] The sole issue on the application for judicial review underlying this application for an interlocutory injunction is whether Her Majesty the Queen in Right of Canada and related Respondents (the "Crown respondents"), which is to say all of the remaining Respondents except Larco, had a duty to consult with the Applicant in good faith concerning any disposition of the Vancouver properties prior to any such disposition, or not only to consult but also to accommodate, and whether the Crown respondents, if such a duty existed on the facts of this matter, fulfilled that duty to consult or to consult and accommodate prior to the disposition at issue. My colleague Justice Phelan dealt with an identical issue on and application for an interlocutory injunction in *Musqueam Indian Band v. Canada (Governor in Council)*[6] (the "Garden River" matter). Justice Phelan wrote at paragraphs [24] to [31] of his reasons:

> [24] The essence of the Band's [the Applicant's] case is described in its Memorandum of fact and law as follows:
>
> > 9. What Musqueam is pursuing in this proceeding is an opportunity for good faith negotiations and a sincere effort on the part of the Crown to accommodate their rights and interests relating to the Garden City property. They seek this opportunity before any transfer of the lands, to CLC or otherwise occurs. This is the basis for their request for interlocutory relief.
>
> [25] The plea is, as I understand it, analogous to a demand for "good faith" bargaining in the labour context but complicated by principles of fiduciary duty owed the natives generally and principles of public law and the jurisdiction of the Canada respondents.
>
> [26] Reviewing the facts established by the Applicant and as mentioned in paragraph 18, it is fairly arguable that the Government of Canada has not engaged in either negotiation or accommodation of the type which the Applicant says it is required to do.
>
> [27] The critical issue as per paragraph 23, is whether there is a sufficiently serious issue as to whether such duty to negotiate and accommodate exists.

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[5] [1994] 1 S.C.R. 311 at 334.
[6] [2004] 4 F.C. 391 (T.D.).

[28] In *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*…the British Columbia Court of Appeal set out the existence and nature of the duty owed:

> To accept the Crown's proposition that the obligation to consult is only triggered when an aboriginal right has been established in court proceedings would ignore the substance of what the Supreme Court has said, not only in *Sparrow* but in earlier decisions which have emphasized the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation. …Indeed, if the Crown's proposition was accepted, it would have the effect of robbing s. 35(1) of much of its constitutional significance.
> …
> In my opinion, the jurisprudence supports the view taken by the chambers judge that, prior to the issuance of the Project Approval Certificate, the Minister of the Crown had to be "mindful of the possibility that their decision might infringe aboriginal rights" and, accordingly, to be careful to ensure that the substance of Tlingit's concerns had been addressed.

[29] The Canada Respondents, therefore, have a responsibility to safeguard the interests of natives, which the Band says it is not doing.

[30] The Canada Respondents also have a competing obligation to act in the best interests of the public at large which may entail engaging in tough negotiations. The balancing of these competing obligations is no easy matter and will be an issue for determination on the judicial review hearing.

[31] In 2002, the British Columbia Court of Appeal, gave further guidance on the nature of the obligations owed. In *Haida Nation v. British Columbia (Minister of Forests)*, … that Court defined the issue it was considering as …:

> The principle issue in this appeal is about whether there is an obligation on the Crown and on third parties to consult with an aboriginal people who have specifically claimed aboriginal title or aboriginal rights, about potential infringements, before the aboriginal title or rights have been determined by a Court of competent jurisdiction.

[32] The B.C. Court of Appeal held that this was an important issue because the Crown could otherwise ignore or override aboriginal title or aboriginal rights until those had been established by treaty or judgment.

[33] Likewise in this case, the Canada Respondents could while ignoring the obligation to consult and accommodate (to the extent that it exists), sell or alienate the very subject-matter of the consultation and accommodation.

[citations omitted]

[25] At the time the "Garden River" matter was before my colleague Justice Phelan, an appeal from the British Columbia Court of Appeal in the *Haida Nation*[7] matter referred to in the foregoing quotation had been heard by the Supreme Court of Canada. Judgment had not been delivered. Judgment for the Court was delivered by the Chief Justice on the 18th of November, 2004 providing further guidance on the duty to consult and to accommodate. The following passages are extracted from that judgment:

> At paragraph 14:
> …Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

> At paragraphs 16 and 17:
> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, …; *R. v. Marshall*,… . It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
>
> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginals peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": Delgamuukw, … .

> At paragraphs 25 to 27:
> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.
> …

[7] *Supra*, note 2.

> Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?
>
> The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting those interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. This is not honourable.
>
> And at paragraph 35:
> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests),* …
>
> [citations omitted, emphasis added]

[26] Much more that is relevant to the facts of this matter is said in the judgment of the Supreme Court in *Haida* than what has just been quoted. That being said, I am satisfied that what has been quoted from *Haida* and from other authorities has more than established that the issue of the duty to consult in good faith and perhaps to accommodate is a serious issue that is live and current on the evidence that was here before the Court. I am further satisfied that it is also sufficient for purposes of this injunction application, taking into account the degree of scrutiny required on the facts of this matter with regard to the "serious issue" element of the tripartite test, that the issue was here raised and is fairly arguable. Whether the nature of the Vancouver properties, including their relatively small land-base footprints and their location in the heart of the business center of downtown Vancouver impact in a manner that would allow the underlying application for judicial review to be

distinguished from the equivalent application in the "Garden City" matter, earlier referred to, is a matter for determination, if indeed determination is necessary, on another day.

3) Irreparable Harm

[27] Will the imminent closing of the sale of the Vancouver properties result in irreparable harm to the Applicant not compensable in damages? The Court must consider not the magnitude of the harm, but the "nature of the harm" which would be caused. While money can be paid as compensation for anything, the mere fact that compensation can be ordered does not resolve the issue. The Court must consider the true nature of what may be lost. It would not appear to be in dispute that the Vancouver properties are situated within the territory described in The Musqueam Declaration of Aboriginal Title made by the Musqueam Nation in June, 1976. Treaty negotiations were entered into by the Applicant with Canada and British Columbia and that negotiation process has been ongoing, albeit apparently sporadically, since early 1994. In the affidavit filed on behalf of the Applicant on this application, the affiant attests:

> …
> 5. Musqueam currently has approximately 1,200 band members, approximately 55% of whom live on reserve. The land base of the Musqueam people under the reserve system is very small and we are suffering from a serious land shortage. Our reserve allotment on a per capita basis is the smallest of all British Colombia bands. There are currently over 200 band members waiting on the band housing list. A significant number of adult members of the Band are unemployed at this time, and high unemployment has been a chronic problem for our members.
>
> 6. The properties located at 401 Burrard Street and 757 West Hastings Street [the Vancouver properties] which are in issue in this application are located within Musqueam traditional territory.

[28] Thus, the issues that concern the Applicant might well not be amenable simply to a monetary settlement. An enhanced land base is critical to the Applicant and, as earlier noted, the

Vancouver properties are among a limited inventory of lands remaining in the hands of the Government of Canada within the Applicant's claim area.

[29] Against the foregoing brief summary of considerations, I am satisfied that the Applicant will suffer irreparable harm not compensable in damages if the Vancouver properties are alienated by the Government of Canada without full and meaningful consultation in good faith, and perhaps accommodation, in accordance with the honour of the Crown.

4) Balance of Convenience or Inconvenience

[30] As earlier noted, on the facts of this matter, in determining where the balance of convenience or inconvenience lies as between the Applicant and the Crown respondents, the public interest must be taken into account.

[31] Counsel for the Crown respondents urged that deference is owed by this Court to the responsibility of the Crown respondents to make and to implement public policy in the public interest and that the sale of the Vancouver properties, together with the other seven (7) properties included in the sale and lease-back arrangement at issue, amounts to just that, a partial implementation of a government policy adopted in the public interest with substantial benefits flowing from increased efficiency in government operations and substantial short term and long term savings of public monies. In contrast, counsel for the Musqueam urged that there is a strong interest, not only on the part of the Musqueam, but of the public in general, in preserving the honour of the Crown through the conduct of full and meaningful consultations in good faith, and, if

appropriate, accommodation of the Musqueam interests, before any transfer of title to the Vancouver properties takes place.

[32] I am satisfied that, on balance, the public interest in preserving the honour of the Crown outweighs the public interest, of a comparatively short to medium term nature, deriving from the essentially immediate sale of the Vancouver properties. The reality that, on the evidence before the Court, the Crown might have a right to recover title to the Vancouver properties some twenty-five (25) years into the future, does not, of itself, constitute adequate compensation to the Musqueam for the loss of full and meaningful consultation, and possibly accommodation.

5) An undertaking to abide by any Order of this Court concerning damages caused by the granting or extension of an interlocutory injunction

[33] In written materials filed on behalf of the Applicant on this application, the Applicant submits that it should not be required to follow the usual practice of providing an undertaking in damages if it is successful on the application. It submitted that its case for an injunction is far stronger than that of the Crown respondents to the contrary, both on the serious issue to be tried and the balance of convenience tests, that special circumstances exist in this matter in that the Applicant is seeking its injunction against the Crown and in that its application is based on a fundamental constitutional right. Further, the Applicant urges that the potential for damages, given the size of the total real estate transaction at issue, is very high and uncertain. Counsel urged that the burden of such an undertaking would be unsustainable, notwithstanding that the Applicant acknowledges that it is not “impoverished”.

[34] In response, counsel for the Crown respondents urges that no special circumstances exist that would justify relief in favour of the Applicant from provision of a meaningful undertaking which undertaking would, in effect, amount to some assurance of protection in favour of the interests of all Canadian taxpayers.

[35] At the opening of the hearing of the application, the Court inquired whether the Applicant had put itself in a position to provide an undertaking in the event that it was successful in achieving an interlocutory injunction and the Court determined that it should not be relieved of the responsibility to provide an undertaking. Counsel for the Applicant responded that the Applicant had given no consideration to the position it would be in if it were successful on its injunction application and were not granted relief from provision of an undertaking. The Court expressed concern with this response.

[36] Before the completion of the hearing, the Applicant had an opportunity, albeit a limited opportunity, to reconsider its position with regard to an undertaking. Counsel for the Applicant advised that, on reconsideration, the Applicant was prepared to provide an undertaking but with an up-side limit of $2 million. Counsel for the Crown respondents maintained her position that an unlimited undertaking should be provided.

[37] At the close of hearing, the Court advised that an interlocutory injunction would issue in favour of the Applicant and that an undertaking in damages in the limited amount of $2 million would be required. The Court's reasoning in accepting the undertaking offered by the Applicant

was the following: first, no special reasons to the satisfaction of the Court exist in this matter that would justify relieving the Applicant from the burden of providing an undertaking in damages; that being said, the Court accepted submissions on behalf of the Applicant that the only evidence before the Court on potential damages was highly speculative resulting in an estimated amount of potential damages that would have placed an unreasonable burden on the Applicant on all of the facts of this matter. That being said, the Court expressed its concern that the position adopted by the Applicant on this issue that left the Applicant with essentially no opportunity to examine what options might be available to it to support an assumption by it of a more substantial undertaking at an assumable cost.

[38] The Court's order herein, issued on the date of completion of the hearing, required the Applicant to file and serve its limited undertaking that same day in order to preserve the impact of the injunction issued. The Applicant fulfilled the requirement.

6) Costs

[39] The Applicant sought its costs of this application. In light of what the Court considered to be the unacceptable position adopted by the Applicant on the issue of an undertaking in damages, the Court, in its discretion, declined to order costs to follow the event. The Court's Order issued the day of completion of the hearing provided that there would be no order as to costs.

CONCLUSION

[40] For the foregoing reasons, an Order of the Court issued on the 28th of September last in the following terms:

UPON motion dated September 24, 2007, on behalf of the Applicant, pursuant to Rules 373 and 377 of the *Federal Courts Rules, 1998,* for:

1. an interlocutory injunction restraining Her Majesty the Queen in Right of Canada, Treasury Board of Canada and Minister of Public Works and Government Services, as applicable, from transferring, selling, or otherwise disposing of the following properties pending the hearing of the application filed herein:

(a) 401 Burrard Street, Vancouver, BC
Parcel Identifier: 018-392-164
Lot 1 Block 1 District Lot 185 Plan Lmp11726; and

(b) Sinclair Centre, 757 West Hastings Street, Vancouver, BC
Parcel Identifier: 006-834-353
Lot 15 District Lot 541 Plan 20191

(the "Properties") and

2. an order that the Applicant is not required to undertake to abide by any order concerning damages caused by the granting or extension of the injunction;

3. an order that the Applicant is entitled to costs of this motion.

THIS COURT ORDERS that, for reasons to follow,

1. The interlocutory injunction as described in paragraph 1 above is, subject to paragraph 2 below, granted.
2. The Applicant shall serve and file this day an undertaking in damages in favour of the Respondents, other than Larco Investments Ltd., in the limited amount of two million dollars ($2,000,000.00). In the event of failure to so file and serve an undertaking, the injunction granted by paragraph 1 of this Order is dissolved.
3. There is no Order as to costs.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario
October 5, 2007

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1691-07
STYLE OF CAUSE:	MUSQUEAM INDIAN BAND Applicant And HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE HONOURABLE MICHAEL M. FORTIER, P.C. IN HIS CAPACITY AS MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES, TREASURY BOARD OF CANADA AND LARCO INVESTMENTS LTD. Respondents
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 27 and 28, 2007
REASONS FOR ORDER:	GIBSON J.
DATED:	October 5, 2007

APPEARANCES:

Rhys Davies Sarah Ciarrocchi	FOR THE APPLICANT
Donnaree Nygard Lindsay Morphy	FOR THE CROWN RESPONDENTS
Randall Hordo	FOR THE RESPONDENT LARCO

SOLICITORS OF RECORD:

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Department of Justice, Vancouver, British Columbia	FOR THE CROWN RESPONDENTS
Hordo & Bennett Vancouver, British Columbia	FOR THE RESPONDENT LARCO