Date: 20090930

Docket: T-139-08

Citation: 2009 FC 982

Ottawa, Ontario September 30, 2009

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

BROKENHEAD FIRST NATION, LONG PLAIN FIRST NATION, PEGUIS FIRST NATION, ROSEAU RIVER ANISHINABE FIRST NATION, SAGKEENG FIRST NATION, SANDY BAY OJIBWAY FIRST NATION, SWAN LAKE FIRST NATION, collectively being Signatories to Treaty No.1 and known as "Treaty One First Nations"

Applicants

and

HER MAJESTY THE QUEEN, represented by the Attorney General of Canada, The Hon. Chuck Strahl in his capacity as Minister of Indian Affairs and Northern Development, The Hon. Vic Toews in his capacity as President of Treasury Board, The Hon. Peter MacKay in his capacity as Minister of National Defence, The Hon. Lawrence Cannon in his capacity as Minister Responsible for Canada Lands Company

Respondents

REASONS FOR ORDER AND ORDER

[1] The present Application is an effort by the Applicant Manitoba First Nations to have the Government of Canada recognize, and act upon, its Treaty obligations to them with respect to land. In order to achieve these objectives the First Nations must establish that: a Treaty right to land

currently exists; the right is currently in the process of being implemented; and there are legal expectations upon Canada with respect to the conduct of the implementation which have not been met. I find that the First Nations are wholly successful in meeting these objectives. The following paragraphs provide a brief summary of my reasons for arriving at this conclusion.

[2] In 1871 the Aboriginal People of Manitoba and the Government of Canada came to a land agreement: Treaty No. 1. Among other features, the Aboriginal People were expected to give up title to land to make way for immigration, and in return Canada promised to set aside a certain amount of land for their exclusive use. This promise created a Treaty right to land. The Aboriginal People kept their side of the bargain, but Canada did not. This fact is the single most important feature of the contemporary land dispute which is at the centre of the present Application.

[3] To properly fulfill the compensation-by-land expectation placed on Canada by the Treaty, modern agreements have been negotiated with certain Manitoba Treaty First Nations. The agreements provide for a process whereby First Nations may select certain lands or purchase certain lands with funds supplied by Canada. By agreement, lands so acquired will, in turn, be made into reserves. These agreements are the fulfillment of the Treaty right to land and are currently being implemented. The Supreme Court of Canada has clearly stated the tone and terms that should govern the implementation of this Treaty process. The present Application focuses on the legal expectations placed upon Canada to consult with the Applicant First Nations before any of its decision-making might or does have an adverse effect on the Treaty right to land.

[4] The expectation to consult concerns Canada's decision-making with respect to the disposition of a large and valuable tract of "surplus" land it owns in the core of Winnipeg known as the Kapyong Barracks. Canada has a particular obligation to consult with two of the Applicant First Nations, Brokenhead and Peguis, because each has a right to acquire Federal surplus land. For the reasons which follow, I find that, in its decision-making, Canada has not met the legal expectations placed upon it to so consult, and, as a result, I find that the decision-making with respect to Kapyong Barracks is invalid.

I. The Treaty Right to Land

[5] The following features of Treaty No. 1, signed on August 3, 1871 by the Treaty Commissioners and the Aboriginal People concerned, state the specific and solemn land promise that Canada is obligated to fulfill:

> [2nd paragraph] Whereas all the Indians inhabiting the said country have pursuant to an appointment made by the said Commissioner, been convened at a meeting at the Stone Fort, otherwise called the Lower Fort Garry, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and to the said Indians of the others, and whereas the said Indians have been notified and informed by Her Majesty's said Commissioner that it is the desire of her Majesty to open up to settlement and immigration a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty and arrangements with them so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive year by year from Her Majesty's bounty and benevolence.
>
> […]
>
> [5th paragraph] The Chippewa and Swampy Cree Tribes of Indians and all other the [sic] Indians inhabiting the district hereinafter described and defined do hereby cede, release, surrender and yield up

> to her Majesty the Queen and successors forever all the lands included within the following limits, […]
>
> [6th paragraph] […].To have and to hold the same to Her said Majesty the Queen and Her successors for ever; and Her Majesty the Queen hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians the following tracts of land, that is to say: For the use of the Indians belonging to the band of which Henry Prince, otherwise called Mis-koo-ke-new is the Chief, so much of land on both sides of the Red River, beginning at the south line of St. Peter's Parish, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families; for the use of the Indians of whom Na-sha-ke-penais, Na-na-we-nanaw, Ke-we-tayash and Wa-ko-wush are the Chiefs, so much land on the Roseau River as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger and smaller families beginning from the mouth of the river; and for the use of the Indians of which Ka-ke-ka-penais is the Chief, so much land on the Winnipeg River above Fort Alexander as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger and smaller families, beginning at a distance of a mile or thereabout above the Fort; and for the use of the Indians of whom Oo-za-we-kwun is the Chief, so much land on the south and east side of the Assiniboine, about twenty miles above the Portage, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger and smaller families, reserving also a further tract enclosing said reserve to comprise an equivalent to twenty-five square miles of equal breadth, to be laid out round the reserve, it being understood, however, that if, at the date of execution of this treaty, there are any settlers within the bounds of any lands reserved by any band, her Majesty reserves the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians.
>
> [Emphasis added]
>
> (Applicant's Record, Vol. 1, pp. 50 – 51)

Decades ago, Canada formally admitted that its land promise in Treaty No. 1 was not kept. Specifically to rectify this breach, Manitoba First Nations entered into Land Entitlement Agreements with Canada and the Province of Manitoba. One method of rectifying the breach set in place by the Agreements was the provision by Canada of some $109,000,000 to be used by First

Nations to purchase land to fulfill the requirements of the per capita land promise in the Treaty. As will be fully described below, of interest to the Applicant First Nations, and in particular to Brokenhead and Peguis, is the purchase of surplus lands owned by Canada in Winnipeg, being the Kapyong Barracks.

[6] The Applicant First Nations argue that Canada's outstanding obligation to fulfill its promise and the existence of the Land Entitlement Agreements represent a current Treaty right to land:

> The Applicant First Nations do not dispute that aboriginal title was affected by Treaty 1. The First Nations agreed to share their lands, to open them up for peaceful immigration and settlement. This commitment has been honoured throughout the years since the treaty was made, and has never been disputed. The Treaty relationship is a living one which endures perpetually. It follows as a matter of course that the Crown's outstanding Treaty Land obligations would require the Crown to consult with them with respect to its disposal of lands which the Crown has declared surplus and which become available as Crown lands to fulfill the Crown's outstanding obligations.
>
> (Reply of the Applicant First Nations to the written submissions of the Respondents in respect of questions posed by Justice Campbell, para. 23)

However, Canada argues as follows:

> Treaty No.1 extinguished Aboriginal title to all the lands to which it relates, including the Kapyong Barracks. The various contemporary Treaty Land Entitlement Agreements fulfill the federal Crown's obligations in respect of the historically unfulfilled per capita treaty land provisions of Treaty No.1.
>
> (Written Submissions of the Respondents in respect of Questions posed by Justice Campbell, para.11)

[7] It is agreed that the standard of review for determining whether a Treaty right to land exists is correctness. There is no dispute that the Treaty promised Aboriginal People that they would

receive land. I find that there is no question that this promise created a right which endures to today. That is, while certain lands were ceded by the Treaty, nevertheless, certain lands were promised to which the Aboriginal People had, and still have, a right. I find that the Agreements are only a vehicle whereby Canada's obligation to meet this outstanding right is to be fulfilled; the obligation is not fulfilled until the per capita obligation is, in fact, met and the right endures until that time. It is not disputed that the Agreements have not yet resulted in the acquisition of land to meet Canada's per capita promise. As a result, I find that Treaty No. 1, including the Treaty right to land which it creates, is still very much in the implementation stage.

II. The Legal Expectations of the Conduct of the Treaty Agreement Process

[8] There is a significant body of law which provides guideposts for Canada to follow in its past and continuing relationship with the Applicant First Nations with respect to their Treaty right to land.

[9] Chief Justice McLachlin in *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511, at paragraph 20, speaks to the legal expectations of unresolved Treaty rights:

> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[it] is always assumed that the Crown intends to fulfill its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

A. *The Honour of the Crown*

[10] In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R 388, the Supreme Court of Canada was asked to review the Crown's duty to consult in the context of Treaty 8 and the transfer of lands in Alberta. On this issue, at paragraph 51, Justice Binnie gave this direction:

> The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfillment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow*, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.
>
> [Emphasis added]

In addition, at paragraph 33, Justice Binnie recognizes that Treaty implementation is a process within which the Crown is obligated to act honourably:

> Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at para. 19:

> The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship."
>
> [Emphasis added]

[11] It is important to note that the Yukon Court of Appeal in its decision on *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*, 2008 YKCA 13, at paragraph 67 relied on Justice Binnie's reasons to conclude that "the honour of the Crown and a duty to consult and accommodate applies in the interpretation of treaties and exists independent of treaties."

B. *Reconciliation*

[12] The Treaty Commissioner for Saskatchewan sees Treaty implementation as part of a process of reconciliation. The Commissioner's following comment, cited by the Applicant First Nations, is a helpful observation in understanding the importance of a non-litigious engagement between Aboriginal People and government when making decisions which directly affect Aboriginal Treaty rights:

> In law, as both the *Haida* and *Mikisew* cases emphasize, reconciliation is a "process," and that process does not end with the making of a treaty. The process carries on through the implementation of that treaty and is guided by a duty of honourable dealing. The very nature of the treaties is to establish mutual rights and obligations. Fulfilling treaties is not a one-way street. Accordingly, the honour of Treaty First Nations is also at stake in the

> treaty implementation process. As the Supreme Court of Canada has stated, "At all stages, good faith on both sides is required."
>
> ("Treaty Implementation: Fulfilling the Covenant", Office of the Treaty Commissioner, Saskatoon, 2007, pp. 127 – 128)
>
> (Reply of the Applicant First Nations to the written submissions of the Respondents in respect of questions posed by Justice Campbell, para. 35)

[13] It is fair to say that the negotiation of Land Entitlement Agreements under Treaty No. 1 was a process of reconciliation between the interests and ambitions of Aboriginal People and the Federal and Manitoba Crown. The Applicant First Nations rely on Justice Binnie's direction, at paragraph 1, in *Mikisew Cree First Nation* with respect to this intended reconciliation in challenging Canada's conduct by the present Application:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.
>
> (Reply of the Applicant First Nations to the written submissions of the Respondents in respect of questions posed by Justice Campbell, para. 17)

C. *Duty to Consult*

[14] Chief Justice McLachlin in *Haida Nation* at paragraph 35 defines the test for when the duty to consult arises:

> But, when precisely does a duty to consult arise? <u>The foundation of</u>

> 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.
>
> [Emphasis added]

[15] The Supreme Court of Canada first addressed the scope and content of consultation in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 where at paragraph 168 it stated that "consultation must be in good faith, and with the intention of substantially addressing the concerns of aboriginal peoples whose lands are at issue." Subsequent jurisprudence such as *Haida Nation* adds to this statement by finding that consultation might range from, at the lower end of the spectrum, giving notice of a decision that might affect a right, to meaningful consultation at the higher end, depending on the infringement on the right in question.

[16] In *Haida Nation* at paragraph 46, Chief Justice McLachlin describes meaningful consultation:

> Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997) provides insight (at pp. 21 and 31):
>
> > Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ... .
> >
> > genuine consultation means a process that involves:
> > - gathering information to test policy proposals;
> > - putting forward proposals that are not yet finalized;
> > - seeking Maori opinion on those proposals;
> > - informing Maori of all relevant information upon which those proposals are based;

- not promoting but listening with an open mind to what Maori have to say;
- being prepared to alter the original proposal;
- providing feedback both during the consultation process and after the decision-process.

III. The Treaty Right to Acquire Federal Surplus Land

[17] A central issue in the conduct of the Land Entitlement Agreement process is the degree to which Canada has discharged its duty to consult the Applicant First Nations in its decision-making with respect to the Kapyong Barracks. During the course of the hearing of the present Application, Counsel for the Applicant First Nations confirmed that, and it is agreed that, on this distinct issue only the Brokenhead First Nation and the Peguis First Nation are directly affected. This is so because the Land Entitlement Agreement with respect to each provides the right to purchase "surplus" federal lands; the Kapyong Barracks are "surplus" federal lands.

[18] In 1998, Brokenhead First Nation became a signatory to the Manitoba Framework Agreement on Treaty Land Entitlement (TLE Framework Agreement). Article 3.10 of the TLE Framework Agreement describes an elaborate process by which the Brokenhead First Nation can acquire surplus federal land; a process which might very well be rendered impossible to follow by the implementation of government policy as described below:

> **3.10 Specific Principles for the Acquisition of Surplus Federal Land**
>
> (1) Where the Department of Indian Affairs and Northern Development receives notice of Surplus Federal Land which is located in the Treaty Area of an Entitlement First Nation identified in Schedule B, the department shall forward to that Entitlement First Nation and to the TLE committee notice of that Surplus Federal Land and a copy of any appraisal or an estimate of the fair market value of that Surplus Federal Land, provided:

(a) the Period of Acquisition of that Entitlement First Nation has not expired; and

(b) the Entitlement First Nation has not Acquired its Other Land Amount as of the date the Department of Indian Affairs and Northern Development receives notice of the Federal Surplus Land.

(2) An Entitlement First Nation described in Subsection (1) may give notice in writing to Canada within 30 days of receiving the notice referred to in Paragraph (1)(a), expressing an interest in Acquiring the Surplus Federal Land and in that case:

(a) the Department of Indian Affairs and Northern Development shall take those steps as may be required under the policy of the Treasury Board of Canada existing at that date relating to the sale of Surplus Federal Land to express an interest in obtaining a transfer of administration of the Surplus Federal Land for the purpose of enabling the Entitlement First Nation to Acquire the Land;

(b) the Department of Indian Affairs and Northern Development shall advise the Entitlement First Nation as to whether, in accordance with the policy referred to in Paragraph (a), the administration of the Surplus Federal Land will be transferred to it for that purpose; and

(c) subject to Subsection (5), in the event the Entitlement First Nation is advised that the land will be transferred to the Department of Indian Affairs and Northern Development, the Entitlement First Nation shall have 60 days to Acquire the Surplus Federal Land or to enter into an agreement with the Department of Indian Affairs and Northern Development pursuant to which, among other things:

i. sufficient funds (being not greater than the fair market value of the Surplus Federal Land and any adjustment as between Canada and the Entitlement First Nation in respect of Municipal and School taxes) will be provided to the Department of Indian Affairs and Northern Development by the Entitlement First Nation to permit that department to obtain administration of the land; and

ii. a right to lease the land for a sum sufficient to discharge the obligations of the Entitlement First Nation under

Paragraph (5) will be provided to the Entitlement First Nation for the period of time between the date responsibility for the land is transferred to the Department of Indian Affairs and Northern Development and the date the land is set apart as Reserve for the Entitlement First Nation.

(3) In the event more than one Entitlement First Nation gives notice in accordance with Subsection (2), Canada shall advise each of the Entitlement First Nations of their competing interests and those Entitlement First Nations shall resolve those competing interests and notify the Department of Indian Affairs and Northern Development in writing of the resolution of those competing interest within the time limit within which that department must proceed to express interest in obtaining that Surplus Federal Land under the policy referred to in Paragraph (2)(a), failing which that department shall be under no obligation to pursue obtaining the transfer of administration of that Surplus Federal Land.

(4) In the event an Entitlement First Nation, having been advised that the land will be transferred to the Department of Indian Affairs and Northern Development in accordance with Paragraph (2)(c), fails to satisfy its obligations under that Paragraph, the Department of Indian Affairs and Northern Development will be under no further obligation to pursue the transfer of the administration of the Surplus Federal Land.

(5) An Entitlement First Nation which is intending to Acquire Surplus Federal Land, or any other Person intended to hold title to the Surplus Federal Land for the benefit of the Entitlement First Nation, shall be responsible for all costs incurred by the Department of Indian Affairs and Northern Development with respect to the operation and maintenance of the Surplus Federal Land and any improvements located thereon (including, without limitation, the costs of providing heat, water, sewer and electricity to any improvements located on the land and any amounts paid or payable for Municipal and School Taxes) from the effective dates of transfer of administration of the land to the Department of Indian Affairs and Northern Development.

(6) The parties intend that, wherever possible, title to the Surplus Federal Land should be transferred to the Entitlement First Nation or any Person intended to hold title to the Surplus Federal Land for the benefit of the Entitlement First Nation or be set apart as Reserve on the effective date of transfer of administration of the land to the Department of Indian Affairs and Northern Development.

> (7) The parties recognize that in accordance with the policy of the Treasury Board of Canada relating to the sale of Surplus Federal Land, an expression of interest in Acquiring Surplus Federal land by an Entitlement First Nation under Subsection (2) or the taking of steps by the Department of Indian Affairs and Northern Development in accordance with Paragraph (2)(a) does not provide a right or create a guarantee that the land will be available to be Acquired by the Entitlement First Nation or that the land if Acquired by the Entitlement First Nation or a Person on behalf of the Entitlement First Nation will be set apart as Reserve.
>
> (Applicant's Record, Vol. III, p. 892)

[19] In 2006, the Peguis First Nation signed a Treaty Entitlement Agreement with Canada and Manitoba. This agreement is not associated with the TLE Framework Agreement but, nevertheless, by Article 3.04(iv)(b) of that Agreement, the Peguis First Nation is entitled to surplus federal land in similar fashion to the Brokenhead First Nation.

[20] However, with respect to obligations outstanding to the Brokenhead and Peguis First Nations under the surplus lands provisions of the Agreements as identified, because of the release provisions of each Agreement, Canada argues that it has none:

> […] The release provisions of the various agreements are clear and unequivocal. To quote from the Treaty Land Entitlement Framework Agreement as an example:
>
> "In consideration of this Treaty Land Entitlement Agreement, the Entitlement First Nation……does hereby:
> (a) release to Canada all claims, rights, title and interest the Entitlement First Nation or any Predecessor Band ever had, now has or may hereafter have by reason of or in any way arising out of the Per Capita Provision; and
> (b) release and forever discharge Canada, Her Servants, agents and successors from:

> i. all obligations imposed on, and promises and undertakings made by, Canada related to land entitlement under the Per Capita Provision;
>
> No duty of consultation arises out of the Treaty Land Entitlement Agreements either. These agreements are not the implementation of Treaty No.1; they are the end result of the implementation. The agreements are the instruments by which one particular treaty right has been consensually resolved through obviously extensive and exhaustive negotiations. Once again using the Treaty Land Entitlement Framework Agreement as a reference, the respondents draw the Court's attention to the following provisions:
>
> 40.01 Entire Agreement
> (2) Upon execution by Canada, Manitoba, the TLE Committee and an Entitlement First Nation of a Treaty Entitlement Agreement, this Agreement and the Treaty Entitlement Agreement, jointly, shall constitute the entire agreement between the parties and the Entitlement First Nation to:
> (a) the fulfillment of Canada's obligation to lay aside and reserve tracts of land under the Per Capita Provision for that Entitlement First Nation or its Predecessor Band in the manner and to the extent herein provided;
>
> 40.10 No Creation of New Treaty Rights
> This Agreement is not a treaty and does not create any new treaty rights for any Entitlement First Nation within the meaning of subsection 35(1) of the *Constitution Act, 1982*.
>
> [Emphasis added]
>
> (Written Submissions of the Respondents in respect of the Questions posed by Justice Campbell, paras. 18-19)

[21] Thus, Canada makes the argument that the release provisions effectively release it from the content of its legal obligations to the Applicant First Nations arising from Treaty No. 1. The import of this argument is that the First Nations signatories agreed that their historical and legal relationship

with Canada is at an end. I find that this is not, and cannot be, a correct interpretation of the legal effect of the Agreements.

[22] Given the Supreme Court of Canada's decisions with respect to the continuing nature of the relationship between Aboriginal People and Canada with respect to treaty rights, and given that the Agreements are part of the implementation of a Treaty right to land, I find that the fair and correct interpretation of the release provisions is nothing more than a limit on Canada's liability to fulfill the promise breached. The practical effect of the release is that Canada is only required to supply land and/or money to purchase land to the limit of the per capita promise provision of the Treaty.

[23] In my opinion, the release does not affect Canada's continuing obligations in the implementation of the First Nations' Treaty right to land, and, in particular, it does not affect Canada's obligation to meet its duty to consult. The duty to consult arising from the principle of the honour of the Crown, as well as Canada's constitutional and legal duty to First Nations pursuant to s. 35 of the *Constitution Act, 1982*, cannot be the subject of contracting out.

[24] Therefore, in its dealings with the Applicant First Nations, and in particular with the Brokenhead and Peguis First Nations, I find that Canada had a duty to consult.

IV. Government Decision Making: The Kapyong Barracks

[25] The Kapyong Barracks is the Canadian Forces Base that housed the 2nd Battalion Princess Patricia's Canadian Light Infantry until the regiment relocated to CFB Shilo, Manitoba in 2004. The Department of National Defence is currently the custodian of the 90 hectare area. Kapyong is

located on Kenaston Boulevard in the southwest quadrant of Winnipeg between the two affluent neighbourhoods of Tuxedo and River Heights. The Kapyong Barracks is also located in the traditional territory of the First Nations People of the Chippewa and Swampy Cree Tribes, ancestors of the Brokenhead and Peguis First Nations People.

[26] The Kapyong Barracks is prime land for commercial development. Canada's decision-making with respect to the disposition of the land is specifically for this purpose. The Applicant First Nations' interest in the land is for the same purpose, but under their control, including a long standing interest is the creation of an urban reserve.

[27] In the present Application, Canada has vigorously defended its position that, based on the extinguishment and release arguments, no duty to consult existed when it conducted it decision-making with respect to the Kapyong Barracks. However, Canada also makes an alternative argument which I cannot take seriously. Canada argues that, if a duty to consult did exist, it did consult. It is not credible to take the position in law that a very serious action is not required and to conduct yourself accordingly, and then argue that, if it is required, it was accomplished.

[28] The record in the present Application shows that the Applicant First Nations expressed their interest in the Kapyong Barracks over a six-year period, from 2001 to 2007, and they believed that the Land Entitlement Agreements entered into with the Crown gave a priority in favour of First Nations in the property disposal process. While the record discloses that some dialogue took place about the disposition of the Kapyong Barracks, in particular with the Long Plains and Brokenhead First Nations, it also establishes that from the beginning to the end of the decision-making with

respect to the lands, it is clear that Canada had no intention to grant the First Nations any meaningful consultation as described in Chief Justice McLachlin's decision in *Haida Nation*. I find there is no basis in fact to support Canada's alternative argument, and it is dismissed.

[29] There is no point in setting out the details of the past course of conduct between Canada and the Applicant First Nations over the land in question because I find that Canada admits that it believed that it did not have a duty to consult as the explanation for its actions. Be that as it may, by this decision, a new phase begins in the relationship between the Canada and the Applicant First Nations.

V. The Duty to Consult on the Kapyong Barracks

[30] The Applicant First Nations bring the present Application to require Canada to draw-back on its decision-making with respect to the Kapyong Barracks, and to only proceed forward in consultation with them. Therefore, it is important to define the point to which the draw-back is required for Canada to discharge the duty to consult.

[31] Canada made three discrete decisions regarding the disposition of the Kapyong Barracks: in April 2001, Canada decided to declare the Kapyong Barracks as "surplus" federal lands; in November 2001, Canada decided to classify the surplus lands at Kapyong Barracks for "strategic" property disposal; and in November 2007, Canada decided to transfer the surplus lands at Kapyong Barracks to the Canada Lands Company pursuant to the Treasury Board Directive on the Sale or Transfer of Surplus Real Property (see: Transcript of September 10, 2009, p. 29, lines 22 – 24).

While at this point in time Canada has not yet transferred the Kapyong Barracks to Canada Lands Company, the transfer is imminent depending on the outcome of the present Application.

[32] According to the 2006 Treasury Board Directive on the Sale or Transfer of Surplus Real Property, which was first introduced in 2001, the concept of declaring lands as strategic is stated:

> Strategic surplus real properties are properties or portfolios of properties with potential for significantly enhanced value, those that are highly sensitive, or a combination of these factors. Because of the complexity associated with these properties, they may require innovative efforts and a comprehensive management approach to move them into the market. Canada Lands Company, CLC Limited, as the government's disposal agent, disposes of these selected surplus properties through a strategic disposal process.
>
> (Applicant's Record, Vol. I, p. 108)

[33] The Applicant First Nations argue that the draw-back position in Canada's decision-making must be to the point before the November 2007 decision to transfer the Kapyong Barracks to the Canada Land Company. I agree with this argument.

[34] It is not disputed that the implementation of the Treasury Board Directive with respect to the Kapyong Barracks negates the Brokenhead and Peguis First Nations' ability to implement the "surplus lands" provisions of their Agreements. This is so because the Agreements stipulate that "federal surplus land" is defined as land, the title to which is not vested in a "federal crown corporation". In addition a number of other conditions are also imposed.

[35] The impositions are very specific. For example, Article 3.03 of the TLE Framework Agreement to which the Brokenhead First Nation is a signatory sets out "Specific Principles for

Selection of Crown Land". Article 3.06 sets out "Specific Principles for Selection or Acquisition of Land in an Urban Area". Article 3.10 sets out "Specific Principles for Acquisition of Surplus Federal Land". Surplus Federal Land is defined at Definition 88 in the Agreement as follows:

> "Surplus Federal Land" means any "federal real property", as defined in the *Federal Real Property Act*, excluding any "real property" as defined in the *Federal Real Property Act* to which the title is vested in a "federal crown corporation" as defined in section 83 of the *Financial Administration Act*, that is:
>
> a. within the Province of Manitoba;
> b. determined by a "minister", as defined in the *Federal Real Property Act*, who has the "administration", as defined in the *Federal Real Property Act*, of that "federal real property", to no longer be required for the program purposes of that "minister's" department;
>
> c. determined by that "minister" to be available for sale; and
>
> d. made available by that "minister" to any "other minister" of Canada for a transfer of administration in accordance with any then existing policies or directives of the Treasury Board of Canada.
>
> (Applicant's Record, Vol. III, p. 862)

[36] In the present case, the Kapyong Barracks will be placed out of the reach of the Brokenhead and Peguis First Nations as surplus lands if a transfer takes place to the Canada Lands Company. Therefore, the draw-back in decision-making must be to the point in time just before the decision was taken to transfer the Kapyong Barracks to the Canada Land Company. It is at this point in the decision-making continuum that meaningful consultation must take place.

[37] There is no doubt that Canada understood that acting on the Treasury Board Directive would have a profound and adverse impact on the ability of the Brokenhead and Peguis First Nations' ability to acquire federal land, and, in particular, federal land that might be used to meet its valid interest and ambition to create an urban reserve. Thus, I find that the intention by Canada to transfer

the Kapyong Barracks to the Canada Land Company triggered a duty to consult the Brokenhead and Peguis First Nations before the intention was carried out in the form of a decision. In my opinion, having made this decision without lawful consultation, Canada's decision to act on the Treasury Board Directive is unlawful and a failure to maintain the honour of the Crown.

[38] A word of caution is required at this point in the legal process presently engaged between Canada and the Applicant First Nations. During the course of oral argument, Counsel for Canada made this statement:

> MR. GLINTER: What I can say, based on my many years acting on behalf of the Government of Canada, is that if this Court issues a declaration saying that the government acted beyond its jurisdiction or illegally or improperly, the government would stop doing what it was doing and re-evaluate the situation and comply with the directions given by the Court with respect to how they should have done it better, or, alternatively, they would appeal the decision, but they would not act in the face of a declaration from the Court.
> MR. JUSTICE: All right. So --
> MR. GLINTER: So if the Court --
> MR. JUSTICE: -- how it should have been done is part of the applicants' argument.
> MR. GLINTER: The most that this Court can do is declare that there was a right that triggered a duty to be consulted, or for the government to consult, they failed at the discharge of that duty and, therefore, any order that they made -- there has to be an order that was made that is the subject of this review -- is not effective, presumably.
> And we would take it from there by then engaging the First Nations in discussions on a basis that we thought was appropriate to the circumstances of the case. And if we could reach an agreement, that would be great. And if we couldn't, that would be great too. <u>There's nothing that requires the parties to reach an agreement as a result of a consultation, as long as the consultation is done in a fair, […] manner, that nobody is derogating from their responsibilities, and that includes both parties.</u>
> <u>But if we can't reach an agreement or we can't reach accommodation, well, we'll then just proceed to sell the property to the Canada Lands Company. We'll do whatever it is that we had to</u>

> do.
> If my learned friends have an objection at that point to our transferring the property because the consultation in their opinion was not thorough enough or satisfactory, it's open to them to bring the matter back to the Court for review.
>
> [Emphasis added]
>
> (Transcript of September 10, 2009, pp. 187 – 188)

Chief Justice McLachlin in *Haida Nation* makes it clear that accommodation is a feature of the duty to consult. My word of caution is that, if the standard for meaningful consultation, including accommodation, expressed by Chief Justice McLachlin is not met in the consultation that should take place between Canada and the Brokenhead and Peguis First Nations as result of this decision, the chain of legal dispute will not be broken, and disruption to the aspirations of Canada and the Applicant First Nations will continue. In my opinion, while there is an onus on Canada to consult, there is a shared responsibility to have the consultation succeed. Consultation requires engagement in good faith with a shared willingness to move forward to find a mutually acceptable solution. My hope is that this solution can be found with respect to the Kapyong Barracks.

ORDER

THIS COURT ORDERS that:

For the reasons provided in conclusion of the present Application, pursuant to s. 18.1(3) of the *Federal Courts Act*, I declare that:

Canada had a legal duty to consult on its decision to dispose of surplus federal lands at Kapyong Barracks and Canada did not meet that duty; and, in particular,

Canada acted contrary to law by failing to meet the mandatory legal requirement of consultation with the Brokenhead and Peguis First Nations before the making of the November 2007 decision to transfer the surplus lands at Kapyong Barracks to the Canada Lands Company pursuant to the Treasury Board Directive on the Sale or Transfer of Surplus Real Property; and, as a result,

The November 2007 decision is invalid.

I award cost of the present Application to the Applicant First Nations.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-139-08
STYLE OF CAUSE:	BROKENHEAD FIRST NATION, LONG PLAIN FIRST NATION, PEGUIS FIRST NATION, ROSEAU RIVER ANISHINABE FIRST NATION, SAGKEENG FIRST NATION, SANDY BAY OJIBWAY FIRST NATION, SWAN LAKE FIRST NATION, collectively being Signatories to Treaty No. 1 and known as "Treaty One First Nations" and HER MAJESTY THE QUEEN, represented by The Attorney General of Canada, The Hon. Chuck Strahl in his capacity as Minister of Indian Affairs and Northern Development, The Hon. Vic Toews in his capacity as President of the Treasury Board, The Hon. Peter MacKay in his capacity as Minister of National Defence, The Hon. Lawrence Cannon in his capacity as Minister Responsible for Canada Lands Company
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	SEPTEMBER 10, 2009
REASONS FOR ORDER AND ORDER:	CAMPBELL J.
DATED:	SEPTEMBER 30, 2009

APPEARANCES:

James Jodouin	FOR THE APPLICANTS
Harry Glinter Jeff Dodgson	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

JAMES JODOUIN Booth Dennehy LLP Barrister & Solicitor Winnipeg, Manitoba	FOR THE APPLICANTS
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENTS