Federal Court  Cour fédérale

Date: 20121220

Docket: T-139-08

Citation: 2012 FC 1474

Toronto, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

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 OF 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

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This application deals with real property located within the City of Winnipeg known as the Kapyong Barracks. This property lies within the territory dealt with under a treaty known as Treaty No. 1, entered into in 1871 between Her Majesty Queen Victoria and certain aboriginal bands located within that territory. Her Majesty in Right of Canada is the successor to Queen Victoria and has used that property for military purposes. The Applicants are a number of aboriginal bands who, as successors to the Treaty signatories, have made various claims as to their interest in this property. In November 2007, the Government of Canada decided that it would sell this property to a non-agent Crown corporation for the purpose of disposal by that corporation. The Applicants are seeking to set aside that decision.

[2] For the reasons that follow, I find that the application made by some but not all of the applicants is allowed, the decision to sell the property will be set aside and any further decision to sell is enjoined until after Canada has fulfilled its duty to consult in a meaningful way.

[3] For convenience, I am providing the following index to these Reasons:

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HISTORY OF THIS LITIGATION

[4] This litigation has an unhappy history. The matter came before Justice Campbell of this Court in 2009. In a Judgment dated September 30, 2009, he declared 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.*

[5] Justice Campbell provided reasons cited as 2009 FC 982, [2009] FCJ No 1150.

[6] The Respondent, Canada, appealed from that decision and the matter was heard by the Federal Court of Appeal; Nadon, Letourneau and Sexton JJA, in 2011. They allowed the appeal with costs and sent the matter back to this Court, to a Judge other than Campbell J, for redetermination in light of their Reasons (cited as 2011 FCA 148, [2011] FCJ No 638), written by Nadon JA for the Court. I repeat the conclusion of those Reasons at paragraphs 50 to 54:

> *50 I therefore conclude that the Judge's reasons are inadequate. They do not grapple with and attempt to resolve the difficult legal issues and the confusing evidentiary record that were before him. At paragraph 55 of her Reasons in R.E.M., the Chief Justice sets forth what, in her view, appellate courts should be looking for when attempting to determine whether a judge's reasons are adequate:*

> *[55] The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.*

51 In my view, the Judge failed to seize the substance of the critical issues before him. He also failed to deal adequately with the evidence before him in that he did not address key aspects thereof and did not, as a result, make any findings in regard thereto which would have allowed this Court to conduct a meaningful appellate review.

52 The only alternative open to us, other than returning the matter to the Federal Court, would be for this Court to transform itself into a court of first instance and to make fresh findings of fact and determinations of law based on those findings. That is not our role. Consequently, I am satisfied that we are not in a position to conduct effective appellate review in these circumstances.

53 I note in passing that following the Judge's decision there have been jurisprudential changes in aboriginal law resulting from the Supreme Court's decisions in Rio Tinto Alcan Inc. v. Carrier Skenai Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650, and Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2011] 1 C.N.L.R. 12, ("Beckman"), where the Court discusses when the duty to consult is triggered and how modern land claim agreements, such as those before us in the present matter, shape that duty. In particular, the Judge who redetermines the issues may wish to consider the Crown's argument about the effect of the release provisions in the Crown's respective agreements with the respondents in light of what the Supreme Court said in Beckman about the weight to be given to provisions in properly negotiated, sophisticated land agreements.

54 For these reasons, I would therefore allow the appeal with costs, I would set aside the Judge's decision and I would refer the matter back to the Chief Justice of the Federal Court or to a judge,

> *other than Campbell J., designated by the Chief Justice for redetermination of the issues in the light of these Reasons.*

[7] I will proceed with the mandate of the Federal Court of Appeal having reheard this matter in early December 2012. It must be noted that, by Order of Prothonotary Lafrenière dated September 13, 2012, additional evidence was filed that was not before the Court of Appeal or Justice Campbell. That evidence included documents obtained by the Applicants from the Government of Canada under the provisions of the *Access to Information Act*, RSC 1985, c.A-1.

[8] At paragraph 52 of its Reasons the Court of Appeal declined to make *"fresh findings of fact"* preferring instead to send the matter back to this Court. I will, therefore, determine this matter *de novo*. I will, however, be guided by the determinations of the Court of Appeal and those determinations of Justice Campbell accepted by the Court of Appeal.

DETERMINATIONS BY THE FEDERAL COURT OF APPEAL

[9] The Federal Court of Appeal made a number of factual determinations based on the record before them at the time. Those determinations are, in the most part, accepted by the parties. It is to be remembered that there has been additional evidence filed as a result of Prothonotary Lafrenière's Order, *supra*. I repeat the determinations as found at paragraphs 3 through 24 of the unanimous Reasons of the Court of Appeal as written by Nadon JA:

> *3 In 1871, the aboriginal bands of Manitoba and Canada signed Treaty No. 1. Pursuant thereto, the aboriginal bands agreed to give up their title to the land that now comprises the province of Manitoba in exchange for Canada setting aside a certain amount of land for their exclusive use: 160 acres per family of five. This provision has come to be known as the "per capita provision". For*

reasons which are not relevant to the determination of this appeal, Canada did not fulfill its end of the bargain.

4 The land claims of five of the respondents were found to be valid by Canada. Hence, in the 1990s, Canada signed treaty land entitlement ("TLE") agreements with these respondents to rectify its failure to fulfill the per capita provision: in 1994 with the Long Plain First Nation ("Long Plain"), in 1995 with the Swan Lake First Nation ("Swan Lake"), in 1996, with the Roseau River Anishinabe First Nation ("Roseau River") and in 1997, the Brokenhead Ojibway Nation ("Brokenhead") negotiated its claim through the Treaty Land Entitlement Committee of Manitoba Inc. ("TLEC"). That year, TLEC executed the Manitoba Treaty Land Entitlement Framework Agreement (the "Framework Agreement") with Canada. Pursuant thereto, Brokenhead signed its separate TLE Agreement in 1998. In 2008, Peguis First Nation ("Peguis") signed its Agreement with Canada.

5 Each of these agreements entitled the aforementioned bands to acquire private land and to acquire provincial "Crown land" - defined as land that is owned by or under the administration and control of Manitoba and is situated within the Province of Manitoba - on a priority basis to fulfill their treaty land entitlement. The right to acquire land on a priority basis essentially amounts to a right of first refusal with respect to the category of land to which the right relates. The nature and extent of this priority is described in the respondents' agreements with Canada. The priority does not, however, give any of the respondents an entitlement to acquire the land because all of the agreements specify that land will be transferred only on a willing buyer/willing seller basis.

6 The type of arrangement made with each of the respondents varies. With respect to the respondents Long Plain, Swan Lake and Roseau River, their agreements provide for a specific amount of funding from Canada so as to allow them to purchase land to meet their outstanding entitlements. These agreements do not provide for the acquisition of surplus federal land and make no mention, other than in the case of the Agreement with Roseau River, of land under the administration and control of Canada. As to Roseau River's Agreement, it provides at clause 4.12 that it may purchase land under the administration and control of Canada at fair market value.

7 With respect to the respondents Brokenhead and Peguis, their agreements allow them to select a specified amount of unoccupied provincial Crown land and "other land", which includes surplus federal land, and stipulate that Canada will provide an amount of

funding for their use in the purchasing of that land. The agreements with Brokenhead and Peguis further provide that these respondents are entitled to notice from Canada whenever the federal Crown intends to dispose of certain "surplus federal land" - defined for Brokenhead in the Framework Agreement at subclause 1.01(88), and for Peguis at subclause 1.01(82). Both provisions are identical and read 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;*

8 Both of these agreements set out the process for the respondents to acquire surplus federal land. However, to repeat, the agreements do not provide the respondents with an entitlement to acquire the land, but allow them to acquire such land on a willing buyer/willing seller basis. As an example of this is clause 3.05(2) of the Framework Agreement which provides that "Other Land", which includes surplus federal land, may be purchased by a First Nation "on a 'willing buyer/willing seller' basis".

9 There are no agreements with the last two respondents. The claim of the respondent Sagkeeng First Nation ("Sagkeeng") remains outstanding, with Canada awaiting further submissions and evidence in respect of the claim. As to the claim of the respondent Sandy Bay Ojibway First Nation ("Sandy Bay"), Canada and the Indian Claims Commission have rejected it on the ground that Sandy Bay's treaty land entitlement has already been fulfilled.

The Barracks:

10 The Barracks are comprised of two units. One unit covers 159.62 acres of land and includes the operational section of an armed forces base centrally-located within the city of Winnipeg. The other unit covers 61.78 acres of land and includes the married quarters area of the base. Canada says that a decision has been made only with respect to the operational section of the base.

11 On April 12, 2001, a news release from the Department of National Defence ("DND") announced that the Barracks were being closed. At some point following this announcement, the Department of Indian and Northern Development ("DIAND") received notice from DND that the Barracks would be declared surplus.

12 Shortly after the closure announcement, Brokenhead and Long Plain expressed interest in the Barracks.

13 Effective July 1, 2001, Treasury Board enacted the Policy which governs the disposal of surplus federal real property. The Policy divided surplus property disposal into two categories: routine and strategic. All property falls into the first category unless it has an especially high market value or is "sensitive" - in which case it becomes "strategic". The respondents did not seek judicial review of the Policy.

14 In November 2001, Treasury Board decided that the Barracks would be disposed of through the "strategic" process. As a result of this designation and pursuant to the Policy, the Barracks were no longer available to those of the respondents who were entitled to purchase that land on a priority basis. The end result of the strategic disposal process is that the property will be assessed and then transferred to CLC, a federal non-agent Crown corporation which disposes of property for the federal government. The respondents also did not challenge this decision.

15 In August 2002, Long Plain informed Canada that it remained interested in the Barracks. In September 2002, Canada informed Long Plain that disposal of the Barracks would take place pursuant to the strategic disposal process.

16 On December 4, 2002, DIAND sent a letter to each of the respondents notifying them that the Barracks would be dealt with as a strategic disposal and that, as a result, their interest therein would not be considered on a priority basis.

17 In response to DIAND's letter, Brokenhead and Long Plain indicated to Canada that they remained interested in the Barracks.

18 In January 2003, Brokenhead initiated the dispute resolution provisions of the Framework Agreement, arguing that the Barracks should not have been removed from the scope of its Agreement with Canada.

19 In March 2003, DIAND asked Long Plain and Brokenhead - the two respondents that had expressed interest in the Barracks - for specific information with regard to the amount of land each was interested in acquiring, the proposed purchase price for that land and the proposed use for any land purchased.

20 Brokenhead and Long Plain subsequently continued to express interest in the Barracks and held several meetings with DIAND. After February 2004, Canada received no further communication from any of the respondents with respect to the Barracks until September 2007.

21 On November 1, 2006, Treasury Board issued the Directive amending the Policy, which provided that Canada should consider the possible effects of declaring a property to be strategic on any relevant aboriginal rights or claims.

22 On September 5, 2007, the respondents wrote to DIAND, advising that they were laying claim to the Barracks as part of their unfulfilled treaty land entitlements. More particularly, the respondents' claim was premised upon a claim of aboriginal title, not only to the Barracks, but to the entire city of Winnipeg. However, by the time of the hearing before the Judge, the respondents' claim was not as broad in that they asserted only a right to be consulted by Canada in respect of reserve land promises made to them pursuant to the per capita provision in Treaty No.1.

23 In November 2007, Treasury Board approved the transfer of the Barracks to CLC for development and disposal outside of the scope of the agreements.

24 On January 25, 2008 the respondents commenced an application for judicial review of the November 2007 Treasury Board decision to transfer the Barracks to CLC, seeking a declaration that Canada had a legal duty to consult and accommodate them before disposing of the Barracks.

DETERMINATIONS BY JUSTICE CAMPBELL

[10] The Federal Court of Appeal, at paragraph 35, accepted as adequate paragraphs 1 to 16 of Justice Campbell's Reasons. They wrote at paragraph 35:

> *35 The beginning of the Judge's Reasons is adequate. He first describes the background context of the case: at paragraphs 1 to 6. He then establishes that correctness is the proper standard of review: at paragraph 7. Next, he reviews some of the relevant jurisprudence pertaining to the honour of the Crown, the principle of reconciliation, and the duty to consult: at paragraphs 8 to 16. However, with respect, the remainder of the Judge's Reasons is rife with uncertainty and contradiction. I see at least eight problems, six of which bear on the adequacy of his reasons and two of which reveals a different kind of error.*

[11] Therefore, I repeat what Justice Campbell wrote at paragraphs 1 to 16 of his Reasons:

> *1 CAMPBELL J.:— 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? 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.

[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..*

THE PARTIES

[12] In this application, as originally filed, there were seven Applicants:

a. Brokenhead First Nation

b. Long Plain First Nation

c. Peguis First Nation

d. Roseau River Anishinabe First Nation

e. Sagkeeng First Nation

f. Sandy Bay Ojibway First Nation

g. Swan Lake First Nation

[13] On October 7, 2011 Brokenhead First Nation filed a Discontinuance. It is no longer a party to this Application. By Order dated December 3, 2012, I removed their name from the style of cause.

[14] The Applicants Peguis, Roseau River, and Sandy Bay filed a common memorandum. Long Plain filed a separate memorandum incorporating by reference much of the memorandum of the first three. Neither Sagkeeng nor Swan Lake filed any memorandum.

[15] At the hearing one Counsel spoke on behalf of Long Plain and Sandy Bay; another spoke on behalf of Roseau River; another spoke on behalf of Peguis; and, another spoke on behalf of Swan Lake and Sagkeeng.

[16] The Respondents, although many, can simply be referred to as Canada. They are The Queen and various Ministers of the Federal Government responsible for certain Ministries; namely, Indian Affairs and Northern Development, Treasury Board, National Defence, and Canada Lands Company. They are commonly represented by the Deputy Attorney General of Canada, who filed a single written memorandum on behalf of all of them. Counsel appeared on behalf of all of them at the hearing.

[17] In effect we have, at the end of the day, claims made and actively pursued by six First Nations bands - Long Plain, Peguis, Sagkeen, Sandy Bay, Roseau River and Swan Lake - against various Ministries of the Government of Canada collectively referred to as Canada.

WHAT IS THE PROPERTY AT ISSUE?

[18] The property at issue is often referred to as the Kapyong Barracks. This property is actually two pieces of real property, both located in the City of Winnipeg, Manitoba. The larger piece comprises 159.62 acres of land and includes operational premises previously used by the Canadian Armed Forces. The smaller piece comprises 61.78 acres of land and includes married quarters previously occupied by members of the Canadian Armed Forces and others. At the outset of the hearing before me Counsel for the Respondents stipulated and the parties agreed that only the larger of these pieces, the operational premises, is the subject of the present judicial review. I will refer to this larger piece as the Kapyong Operational Barracks. I am advised that the name Kapyong comes from the location of a battle in the Korean conflict in the 1950's where Canadian troops distinguished themselves.

[19] Counsel for the Respondents stipulated at the hearing and the other parties accepted that Kapyong Operational Barracks has at all material times been and is currently owned by the Crown in Right of Canada. In about November 2007, Canada announced its intention to transfer this land to Canada Lands Company Limited (CLC), a federal non-agent Crown corporation, for the purposes of disposal of that land, presumably by sale to the public. Hence, the current dispute has arisen.

[20] The parties are also agreed that in respect of the first two questions the standard of review is correctness. As to the third question, it involves both factual and legal issues and with a caveat expressed by one of the Applicant's Counsel the parties are agreed that the standard of review is reasonableness. The caveat expressed by counsel for Peguis is that, in his submission, there is so little evidence as to the basis for the decision such that the standard is correctness. I find that the standard is still reasonableness. If there is little evidence as to the basis for the decision it would be more likely to be unreasonable.

BASIS FOR THE CLAIM

[21] A reasonable starting point is a treaty entered into by Her Majesty Queen Victoria on the one hand, and certain aboriginal bands, on the other hand known as Treaty No. 1. That Treaty provided for the peaceful settlement of non-aboriginal persons, moving into parts of what we now know as Manitoba; and various aboriginal tribes who made claims respecting their occupation of those lands. Portions of the text of this Treaty were set out in paragraph 5 of the Reasons of Justice Campbell, reproduced earlier in these Reasons. Each band was to receive land, calculated at one hundred and sixty acres per family of five, or proportionately greater or less for families of more or

fewer than five, in various places in Manitoba. This provision is referred to as the Per Capita Provision.

[22] It is common ground between the parties that the land occupied by the Kapyong Operational Barracks lies within the land that is covered by Treaty No. 1.

[23] Treaty No. 1 further provided for a perimeter of land surrounding the reserve lands. The dimensions of this perimeter are disputed however this is not material as the Kapyong Operational Barracks do not lie within this perimeter. The reason the perimeter was raised is that the Treaty contemplates that some settlers may already have established themselves within the perimeter and accommodation would have to be made to take this into account.

[24] It is also common ground between the parties that Canada did not provide all this land as stipulated by Treaty No. 1. As a result, further agreements were negotiated and entered into as between Canada and some but not all of the bands. These are called Treaty Land Entitlement agreements or, by their acronym, TLEA.

[25] A committee representing a number of first nations located in Manitoba, together with representatives of Canada and Manitoba, drafted what is known as a TLE Framework Agreement, which was executed in 1997. Pursuant to this Agreement, Brokenhead executed a Treaty Land Entitlement agreement in 1998.

[26] Four other first nations signed individual Treaty Land Entitlement Agreements. Three were prior to the signing of the Framework Agreement:

Long Plain in 1994

Swan Lake in 1995

Roseau River in 1996

[27] The Peguis Treaty Land Entitlement agreement was executed by Peguis in September 2007, by Manitoba in October 2007; but Canada did not sign until April 2008. It must be remembered that the decision made by Canada that is at issue here was made in November 2007, which is after Peguis and Manitoba signed but before Canada signed.

SAGKEENG AND SANDY BAY

[28] Neither Sagkeeng nor Sandy Bay signed a Treaty Land Entitlement agreement. According to the affidavit of Rasmussen, Senior Lands Advisor to the Lands Directorate of the Department of Indian Affairs and Northern Development, Sagkeeng's claim is still being considered by Canada; Sandy Bay's claim has been rejected by Canada. Despite submissions made by Counsel before me, I do not have anything in the record before me that would contradict the evidence of Rasmussen as to Sagkeeng and Sandy Bay. An affidavit of Verne Laforte, a member of the Sagkeeng Nation is in the record but it does not address the substance of any claim asserted by that Nation. There simply is nothing in the record that would substantiate any basis for a claim made by either Sagkeeng or Sandy Bay in this application. Sagkeeng did not file a memorandum of argument; nor, until Counsel

appeared before me, was there any reason to suspect that this band would be taking an active role in these proceedings.

[29] Therefore, I will dismiss this application as far as it relates to Sagkeeng and Sandy Bay.

LONG PLAIN, SWAN LAKE, ROSEAU RIVER

[30] Each of these parties had signed a Treaty Land Entitlement agreement with Canada before November 2007. Each asserts a claim in respect of the Kapyong Operational Barracks.

[31] Their claim rests first on Treaty No. 1. One basis is the acknowledged unfulfilled "Per Capita" land agreement. Another claim is based on the agreement within the Treaty to deal with settlers within the Treaty lands.

[32] A third claim made under the Treaty is an assertion that some of the lands given to the bands are flooded or unsuitable for agriculture or other Treaty purposes, and that the bands are entitled to replacement lands. I am not satisfied, on the material before me, that this claim is well founded.

[33] Turning to the Treaty Land Entitlement agreement, these Applicants claim that these agreements serve to implement not extinguish Treaty No. 1 land rights. In those agreements, of which Article 4 of the Roseau River is a good example, Canada is to acquire a certain number of acres of land for the purposes of a reserve; in addition, Canada agrees to acquire other lands for the benefit of the band. In Article 7, the band agreed to release, cede and surrender to Canada any claim and all claims arising out of the Per Capita provision.

[34] Counsel argues that the release does not affect claims arising out of the "perimeter" provisions of Treaty No. 1, or other claims such as the "replacement lands" claim. Nor, Counsel argues, is the agreement by Canada to acquire reserve lands and other lands, affected.

[35] I find that these three bands have an arguable, but by no means certain, claim to the land occupied by the Kapyong Operational Barracks.

PEGUIS

[36] Peguis is in an unusual position. As of November 2007, the date of the decision at issue, Canada had not signed the Peguis Treaty Land Entitlement agreement, although Peguis and Manitoba had.

[37] The Peguis Treaty Land Entitlement agreement is elaborate. Depending who reads it and how it is read, it appears to acknowledge and then disclaim rights and provisions. It does, however, provide for a dispute resolution mechanism. I asked Counsel for Peguis and Canada why neither of their clients had invoked this provision, or whether it would be appropriate to do so now. Neither had a good answer. Instead, each Counsel was anxious that I determine the matter before me. Given that the agreement was not signed by Canada before the November 2007 decision was made, I determine that the Peguis agreement is not relevant to my determination respecting the November 2007 decision. I will, therefore, make that determination.

[38] Peguis' claim to the land occupied by the Kapyong Operational Barracks prior to November 2007 rests on an interpretation of Treaty No. 1 similar to that advanced by Long Plain, Swan Lake and Roseau River.

[39] The Peguis Treaty Land Entitlement agreement as signed by Canada in April 2008 contains in clause 23.01 a release similar to that in the other agreements respecting the Per Capita provision.

[40] Each of Long Plain, Peguis, Roseau River and Swan Lake point to provisions in their agreements; an example of which is section 5.2 of the Roseau River agreement, which affords to the band the benefit of provisions not in their agreement, but which are afforded to other bands. In argument, this has been referred to as the "me too" provision.

[41] There is much in the Peguis agreement that seemingly contradicts other terms of the agreement. It is not necessary that a finely detailed study of that agreement needs to be made here. It is sufficient to determine that Peguis has an arguable claim, but by no means a certain claim respecting lands occupied by the Kapyong Operational Barracks.

[42] In summary, I find that each of Long Plain, Swan Lake, Roseau River and Peguis have an arguable, but not certain, claim to the lands occupied by the Kapyong Operational Barracks. Sagkeeng and Sandy Bay have not established a claim on the record before me.

WHAT DECISION WAS MADE BY CANADA IN RESPECT OF THE PROPERTY AT ISSUE?

[43] The Respondents concede that in November 2007 a decision was taken by the government of Canada, in Cabinet, to transfer the land occupied by the Kapyong Operational Barracks to Canada Lands Company Limited (CLC) a non-agent Crown corporation for the purpose of disposal by that corporation. It is common ground that this corporation is not bound, as the Crown would be, by certain obligations to aboriginal peoples such as the honour of the Crown.

[44] There is no document in the record before me that reflects this decision. Nor do I have many of the documents or information that one expects would have been before the Ministers when they made their decision. The Applicants sought disclosure of these documents under the *Access to Information Act* but privilege was claimed for much of them. The further evidence before me includes the few documents that the Applicants were able to secure.

DOCUMENTS AND ACTIONS RELATING TO THE DECISION

[45] The Court has been left in a position where it must guess what materials were before the decision makers in November 2007. Counsel for the Applicants have placed before me some documents that it would be reasonable to assume must have been before or at least contemplated by the decision makers.

[46] In April 2001, the Minister of Defence announced that the military personnel located at Kapyong Operational Barracks would be relocated to another base at Shilo. Exhibit C to the Locke affidavit is a copy of the announcement.

[47] A policy paper released by the Treaty Board in July 2001 entitled "Treasury Board Policy on the Disposal of Surplus Real Property". At section 7.5, it provides for two methods of disposition; one described as "Routine process"; the other as "Strategic process". The Routine process makes provision, subparagraph (c), for interests expressed by the Department of Indian and Northern Affairs. The Strategic process makes no such provision, other than to provide for input by "government agencies".

[48] Almost immediately, in April 2001, Long Plains wrote to a number of Canadian government Ministers expressing an interest in acquiring the Kapyong Operational Barracks under the Treaty Land Entitlement agreement. They received no response. Their solicitors sent follow-up letters in 2002 and 2003.

[49] There has been provided as evidence subsequent to the Court of Appeal decision, documents released under the *Access to Information Act*. These documents show that as early as September 2001, the Department of Indian and Northern Affairs was communicating with the Department of Defence, at the Assistant Deputy Minister level, to indicate there may be an interest expressed under the Treaty Land Entitlement agreements. Those communications continued through 2004. It is clear that each of these departments was aware of possible claims by certain aboriginal bands and of a need to make a decision as to what position to take in respect thereof.

[50] As far as the aboriginal bands are concerned, the first communication they received from the government was a letter dated December 4, 2002 addressed to a number of Chiefs and Council of a number of bands, including the Applicants; stating, among other things, that if the band had an

interest in the Kapyong property, they should contact a certain person at the Department of National Defence.

[51] A chronology of events from Canada's point of view was provided pursuant to the *Access to Information Act* request. It shows, among other things, that as of 9 Sept 03 an appraisal of the property was submitted to the Department of National Defence. In January and February 2004, representatives of Long Plain and Brokenhead were given a tour of the Kapyong facility. Nothing in the record shows that a copy of the appraisal was given to any band. A document released under the *Access to Information Act* entitled *"Implementation Mandate-Annex A'* indicates that when a subsequent transfer to CLC was to be made a price of $8.6M had been established together with certain conditions such as environmental remediation and preservation of a historic building. This was not disclosed until after the Court of Appeal had heard the matter.

[52] In June 2004, the Department of Indian and Northern Affairs advised the Department of Defence that they had no interest in the Kapyong property, but that Long Plain and Brokenhead had expressed an interest.

[53] On July 10, 2004, the Winnipeg Free Press carried an article entitled "First Nation abandons bid to buy military site". The article indicated that Long Plain, but not Brokenhead, was abandoning its claim to the Kapyong property. The newspaper clipping obtained from the Canadian government files bears the handwritten note "Peter – Well done – Fraser".

[54] At that point in 2004, everything seems to have become quiet. No band took a step until late 2006. Neither did Canada.

[55] Effective November 1, 2006, the Treasury Board issued a "Directive on the Sale or Transfer of Surplus Real Property". It apparently replaced the 2001 policy. Again, this directive states that disposal of property shall be categorized as "routine" or "strategic". In this case, as provided for in section 6.8, the disposal of strategic property will require an "assessment of federal and other stakeholder interests".

[56] On that same day, November 1, 2006, solicitors for a number of aboriginal bands affected by the Treaty Land Entitlement agreements wrote to the Treasury Board asking for assurances that their rights be respected and requested a meeting with the proper departmental officials.

[57] Treasury Board responded by a letter dated January 25, 2007 stating that there was "no change to the approach through which priority interests have an opportunity to express an interest in surplus lands".

[58] On August 17, 2007 (not 2008, as written); again on September 29, 2007, and again on November 4, 2007 letters were sent by a group of aboriginal bands, including the Applicants, collectively calling themselves Treaty One First Nations. The letter went to the Minister of Indian Affairs, Attorney General of Canada and Treasury Board. These letters sought assurances that their rights would be respected and requested a meeting with "proper government officials" to discuss the matter and implementation of the directive. These letters went unanswered.

[59] In November 2007, Canada announced its intention to transfer the property to Canada Lands Company Limited. There was no meeting with representatives of the bands or any other communication with them before the decision was taken. Instead, on December 3, 2007, the Minister of Indian Affairs and Northern Development wrote to the Treaty One Chiefs stating that once the land had been sold to Canada Lands Company, they should take the matter up with that Company. As previously stated, it is common ground that Canada Lands Company would not be bound by the same restrictions as the Crown.

[60] In January 2008 this application for judicial review was filed.

RELIEF REQUESTED

[61] The Applicants have requested the following relief in their Notice of Application:

1. A declaration that Her Majesty the Queen in Right of Canada has a legal duty to consult in good faith with the Applicant Treaty One First Nations concerning any disposition of the Property, prior to any disposition of the Property, and to seek workable accommodation of the aboriginal and treaty interests of the Applicant Treaty One First Nations in the Property;

2. A declaration that the Government of Canada has not fulfilled the legal duty to Her Majesty the Queen to consult with the Applicant Treaty One First Nations concerning the disposition of the Property nor has made workable accommodation of the

Applicant's aboriginal and treaty interests in the Property prior to any disposition of the Property, including its transfer to the Canada Lands Company;

3. An order restraining the transfer of the Property to Canada Lands Company or other disposition of the Property. Alternately, if the Property has already been transferred, an order that the effect of any transfer of the Property to Canada Lands Company be stayed until final disposition of this matter;

4. An order that the Applicant Treaty One First Nations is not required to undertake to abide by any order concerning damages caused by the granting or extension of the order restraining or staying the transfer;

5. Relief from any requirement for an undertaking in damage in favour of the Respondents;

6. An order that the Applicant *(sic)* and the Respondents shall be at liberty to apply to This Honourable Court for any further directions or relief, or to address any issue in respect of these proceedings as either party shall deem necessary;

7. Such other and further relief as This Honourable Court deems just; and

8. Costs of these proceedings.

ISSUES

[62] Bearing in mind the mandate of the Court of Appeal, I consider that I am required to determine the following issues:

1. Whether Canada had a duty to consult with some or all of the Applicants?

2. If there was a duty to consult, what is the scope of that duty?

3. If there was a duty, did Canada adequately fulfil that duty within the required scope?

STANDARD OF REVIEW

[63] The parties are agreed that there are three fundamental questions before the Court; the first is whether Canada had a duty to consult with some or all of the Applicants. The second is: What was the scope of that duty? The third is: If there was such a duty, did Canada adequately fulfil that duty within the required scope?

[64] The parties are all agreed that the first two questions should be answered on the standard of correctness. I agree as well.

[65] The third question is one of mixed fact and law. All but the Counsel for Peguis agree that the standard of review is reasonableness. Peguis argues that, since there is so little in the record to indicate the basis for making the decision, that the standard should be correctness. I disagree, if the record is scant so be it. The appropriate standard is reasonableness.

ISSUE #1: Whether Canada had a duty to consult with some or all of the Applicants?

[66] Counsel for the Respondents in addressing the Court at the hearing made a significant concession. It was conceded that Canada did have a duty to consult with the Applicants. This concession did not extend to Sagkeeng or Sandy Bay; however, this is irrelevant, as I have found that there is insufficient evidence before me to support the claims of either of those Applicants in this judicial review.

ISSUE #2: If there was a duty to consult, what was the scope of that duty?

[67] As was conceded by the Respondents, there was a duty to consult with all Applicants except Sagkeeng and Sandy Bay. The second issue is, therefore, the scope of that duty.

[68] The Supreme Court of Canada, in *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 has provided significant guidance as to the scope of the duty to consult. In brief, the scope must be assessed on a case-by-case basis. The more serious the claim by an aboriginal nation, the greater is the duty to consult. I repeat what the Chief Justice, for the Court, wrote at paragraphs 24, 27 and 43 to 48:

> *24 The Court's seminal decision in Delgamuukw, supra, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.*
>
> . . .

27 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 these 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. That is not honourable.

. . .

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty [page533] on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or

administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown [page534] may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 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 finalised*
>
> *- 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.*
>
> *47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong prima facie case exists for the claim, [page535] and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in R. v. Marshall, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".*
>
> *48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in Delgamuukw is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.*

[69] The Supreme Court in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC 43 referred to post-*Haida Nations* case law at paragraph 38, where the Chief Justice, again writing for the Court, wrote:

> *38 The duty to consult embodies what Brian Slattery has described as a "generative" constitutional order which sees "section 35 as serving a dynamic and not simply static function" ("Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433, at p. 440). This dynamicism was articulated in Haida Nation as follows, at para. 32:*
>
> > *... the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982.*

> *As the post-Haida Nation case law confirms, consultation is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations": D. G. Newman, The Duty to Consult: New Relationships with Aboriginal Peoples (2009), at p. 21.*

[70] In *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53, Binnie J for the majority discussed the duty to consult at paragraphs 55 and 61 as follows:

> *55 However, the territorial government presses this position too far when it asserts that unless consultation is specifically required by the Treaty it is excluded by negative inference. Consultation in some meaningful form is the necessary foundation of a successful relationship with Aboriginal people. As the trial judge observed, consultation works "to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address" (para. 82).*
>
> . . .
>
> *61 I think this argument is unpersuasive. The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in Haida Nation and affirmed in Mikisew Cree, it is a doctrine that applies independently of the expressed or implied intention of the parties.*

[71] Justice Mactavish of this Court in *Sambaa K'e Dene Band v Duncan*, 2012 FC 204, has provided an excellent summary of the law respecting the duty to consult and the scope of that duty. I repeat what she wrote at paragraphs 113 to 119 and 165:

> *113 The Supreme Court held in Haida Nation, above at para. 39, that the scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the*

right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

114 That is, the degree of impact on the rights asserted will dictate the degree of consultation that is required in a specific case: Mikisew, above at paras. 34, 55 and 62-3. The more serious the potential impact on asserted Aboriginal or Treaty rights, the deeper the level of consultation that will be required.

115 The level of consultation required will vary from case to case, depending upon what is required by the honour of the Crown in a given set of circumstances: Haida Nation, above at para. 43. See also Rio Tinto, above at para. 36; Taku River, above at para. 32; Tsuu T'ina Nation v. Alberta (Minister of Environment), [2010] 2 C.N.L.R. 316, [2010] A.J. No. 479 (Q.L.) (Alta. C.A.) at para. 71, and Ahousaht, above at para. 39.

116 Where, for example, the claims are weak, the Aboriginal right is limited, or the potential for infringement is minor, the only duty on the Crown may be to give notice, to disclose information, and to discuss any issues raised in response to the notice: Haida Nation, above at para. 43.

117 In contrast, where a strong prima facie case for the claim has been established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, "deep consultation" aimed at finding a satisfactory interim solution, may be required: Haida Nation, above at para. 44.

118 While the precise requirements of the consultative process will vary with the circumstances, the consultation required in relation to claims lying at the stronger end of the spectrum may demand the opportunity for the claimants to make submissions, to participate in the decision-making process, and to receive written reasons which demonstrate that their concerns were considered and which reveal the impact those concerns had on the decision: Haida Nation, above at para. 44.

119 Other cases may fall between these two ends of the spectrum. Each case has to be examined individually in order to ascertain the content of the duty to consult in a particular set of circumstances. Moreover, the situation may have to be re-evaluated from time to time, as the level of consultation required may change as the process goes on and new information comes to light: Haida Nation, above at para. 45.

. . .

> *165 If it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions. Once important preliminary decisions have been made there may well be "a clear momentum" to move forward with a particular course of action: see Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management), 2004 BCSC 1320, 34 B.C.L.R. (4th) 280 at para. 75. Such a momentum may develop even if the preliminary decisions are not legally binding on the parties.*

[72] In the present case, I have found that the Applicants Long Plain, Peguis, Roseau River and Swan Lake have an arguable, but not proven claim in respect of the land occupied by the Kapyong Operational Barracks. I put the scope of the duty to consult at the middle of the range established by the Supreme Court in *Haida Nation*. At the low end of the spectrum, where a claim is weak, that Court in *Haida Nation*, at paragraph 43 wrote that the scope of the duty:

> *"…may be to give notice, disclose information, and discuss any issues raised in response to the notice…"*

[73] At the other end of the spectrum, where a strong prima facie case for the claim is established, that Court wrote at paragraph 44 of *Haida Nation*:

> *"…the consultation at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that the Aboriginal concerns were considered and to reveal the impact they had on the decision."*

[74] In the present case, in putting the duty somewhere in the middle of these two criteria, I find that the scope of Canada's duty lay beyond the minimum of giving notice, disclosure of information

and responding to concerns raised, so as to include at least some of the higher duties including a duty to meet with the Applicants, to hear and discuss their concerns, to take those concerns into meaningful consideration and to advise as to the course of action taken and why. I emphasize taking the concerns into meaningful consideration and repeat what the Supreme Court wrote at paragraph 46 of *Haida Nation*

> *"Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations."*

ISSUE #3: If there was a duty, did Canada adequately fulfil that duty within the required scope?

[75] As previously stated, Canada conceded that there was a duty to consult. I have held that the scope of that duty included the giving of notice, disclosure of information, responding to concerns raised, meeting and discussing with the Applicants those concerns, taking the concerns into meaningful consideration, and advising as to the course of action taken and why.

[76] In considering whether Canada fulfilled the scope of its admitted duty to consult, I will break the events into two time periods. The first is the period from 2001 to 2004; the second is late 2006 to November 2007.

[77] In the 2001 to 2004 period, I find that Canada did give notice to the Applicants and other aboriginal bands a year or so after the bands expressed an interest in the Kapyong property. Very little information was provided even though, apparently by the end of 2003, Canada had in its possession an appraisal of the property. A tour of the property was conducted in early 2004.

[78] Even at the minimum level of duty to consult, Canada did not fulfil its obligations. It did not disclose relevant information that it had. It did not respond in a meaningful way to concerns raised by the Applicants and other bands.

[79] The matter is more egregious in the 2006 to 2007 period. Canada simply ignored correspondence written by and on behalf of the Applicants. It ignored a request for a meeting. It did not provide any information such as the appraisal or basis of the selling arrangements negotiated with Canada Land Company. The Applicants were simply ignored. After the fact, the Applicants were told to take their concerns to Canada Land Company. I find the treatment of the concerns raised by the Applicants and other aboriginal bands to be far short of the scope of even the minimum duty to consult.

[80] I find that Canada has failed to fulfil the scope of its duty to consult with the Applicants.

IN CONCLUSION

[81] Having found, as Canada conceded, that there was a duty to consult with the Applicants Long Plain, Peguis, Roseau River and Swan Lake, and that Canada failed to consult meaningfully within the scope of that duty, I will allow this application as requested by those Applicants. I will set aside the November 2007 decision to sell the Kapyong Operational Barracks to Canada land Company and will enjoin that sale until Canada can demonstrate to the Court that it has fulfilled its duty in a meaningful way.

[82] These amended Reasons and Judgment have been provided since Counsel for the Applicants have drawn to my attention that, in the Reasons and Judgment issued in December 13, 2012, I had inadvertently interchanged Sandy Bay and Swan Lake in certain places. Those errors have been corrected here.

[83] The parties may make submissions as to costs in writing (five pages or less) by January 15, 2013.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application as made by the Applicants Long Plain, Peguis, Roseau River and Swan Lake is allowed;

2. The application as made by the Applicants Sagkeeng and Sandy Bay is dismissed;

3. The Respondents' decision of November 2007 to sell the Kapyong Operational Barracks to Canada Lands Company is set aside;

4. The Respondents are enjoined from selling the Kapyong Operational Barracks to Canada Lands Company, or anyone else, until they can demonstrate to the Court that they have fulfilled in a meaningful way their duty to consult with the Applicants; and

5. The parties may make submissions as to costs, not to exceed five pages, by January 15, 2013.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-139-08
STYLE OF CAUSE:	LONG PLAIN FIRST NATION, ET AL v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Winnipeg, Manitoba
DATES OF HEARING:	December 4 and 5, 2012
AMENDED REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	December 20, 2012

APPEARANCES:

J. R. Norman Boudreau	FOR THE APPLICANTS LONG PLAIN FIRST NATION, and SANDY BAY OJIBWAY FIRST NATION
Jeffrey R. W. Rath Nathalie Whyte	FOR THE APPLICANT PEGUIS FIRST NATION
Harley Schachter Bill Haight Kara Bjornson	FOR THE APPLICANT ROSEAU RIVER ANISHINABE FIRST NATION
R. Ivan Holloway Uzma Saeed	FOR THE APPLICANTS SWAN LAKE FIRST NATION, and SAGKEENG FIRST NATION
Jeffrey Dodgson Jeff Echols	FOR THE RESPONDENTS

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