Date: 20080613

Docket: A-454-07

Citation: 2008 FCA 214

CORAM: **DESJARDINS J.A.**
SEXTON J.A.
EVANS J.A.

BETWEEN:

MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES

Appellant

and

MUSQUEAM INDIAN BAND
and SQUAMISH NATION

Respondents

Heard at Vancouver, British Columbia, on May 12, 2008.

Judgment delivered at Ottawa, Ontario, on June 13, 2008.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: DESJARDINS J.A.
EVANS J.A.

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REASONS FOR JUDGMENT

SEXTON J.A.

[1] This is an appeal by the Minister of Public Works and Government Services (the "appellant") of the Order of the Motions Judge dated September 28, 2007 granting an interlocutory injunction as requested by the respondent Musqueam Indian Band ("Musqueam") to restrain the appellant from selling two downtown office buildings in Vancouver, subject to an undertaking by Musqueam in favour of the appellant in the limited amount of two million dollars. The underlying proceeding is an application for judicial review requesting an order restraining the sale or other disposition of the properties, as well as a declaration that Her Majesty the Queen in Right of Canada

had a legal duty to consult with Musqueam in good faith concerning any disposition of the properties, prior to any disposition of the properties, and to endeavour to seek workable accommodations of Musqueam's Aboriginal and treaty interests in the properties.

[2] Musqueam cross-appeals and asks that it not be required to provide any undertaking to abide by an order concerning damages caused by the granting or extension of the injunction.

[3] The case of *RJR-MacDonald v. Canada (Attorney General)* [1994] 1 S.C.R. 311 ("*RJR-MacDonald*") confirmed the three criteria an applicant must satisfy in order to obtain an injunction: (1) there must be a serious issue to be tried in the underlying proceeding, (2) the applicant must face irreparable harm not compensable in damages if an interlocutory injunction is denied, and (3) the balance of convenience, taking into account the public interest, must favour the applicant. The three factors are conjunctive: failure to satisfy any one factor will lead to the denial of the interlocutory injunction. The onus is upon the applicant to satisfy each factor.

[4] The effect of the Motions Judge's approach to the test laid out in *RJR-MacDonald* is to provide aboriginal groups (who complain that the federal government has failed to consult them) with what amounts to a veto over the federal government transferring title to property located in any area claimed as traditional territory of that group, despite the fact that the Aboriginal group has made no claim that (1) possible degradation to the property affecting its aboriginal rights might occur in the event the property is transferred; and (2) it requires that specific property for its own use. Such a result eliminates the need for the aboriginal group to show irreparable harm and does

not respect the balance between societal interests and aboriginal interests that the Supreme Court of Canada was attempting to achieve in developing the duty to consult grounded in the honour of the Crown.

[5] The context of the proposed transaction and the nature of the two properties are vital to a proper analysis of this case. The transaction dealt with two large office complexes in the downtown core of Vancouver, the nature and use of which was not going to change as a result of the transaction.

[6] For the reasons that follow, I conclude that the Motions Judge erred in fact and law in deciding that Musqueam would face irreparable harm upon the disposition of the properties in question. I would thus allow the appeal. As such, it is unnecessary to address the cross-appeal.

Facts

The Parties

[7] Musqueam is an Indian Band within the meaning of the *Indian Act*, R.S. 1985, c. I-5 (the "Act"). Musqueam is governed by an elected Chief and ten elected councillors under the provisions of the Act. It has three reserves located in the lower mainland of British Columbia. Its main reserve consists of 416.32 acres fronting the north arm of the Fraser River in Southwest Vancouver. The present members of Musqueam claim to be descendants of Aboriginal people who lived in an area in the lower mainland of British Columbia that includes downtown Vancouver.

[8] Musqueam claims all of Vancouver, and beyond, as its traditional territory. Other First Nations also claim traditional territories which include the downtown core of Vancouver, and which overlap with the Musqueam claim. Included in this group are the Squamish Nation, the Sto:lo Nation, and the Tsleil-Waututh Nation. The Hul'qumi'num Treaty Group claims a marine traditional territory that includes the area surrounding downtown Vancouver. In addition, the appellant has suggested that the Kwiketlem First Nation, who is not presently involved in treaty negotiations, has possible overlaps with the claims of Musqueam.

[9] Canada accepted Musqueam's submission of ownership of Vancouver under the Comprehensive Land Claims Policy process for negotiation in 1991, and since 1994, has from time to time been engaged in treaty negotiations with Musqueam under the current British Columbia Treaty Process ("BCTP"). The Government of Canada has not at any time recognized that Musqueam has a legal entitlement to the Properties.

[10] In the six-stage process of the BCTP, Musqueam is currently in Stage 4 – "the Negotiation of an Agreement-in-Principle" – the results of which ultimately form the basis for a treaty. Since entering Stage 4 of the BCTP, negotiations with the respondent have been essentially dormant. Apart from introductions of new personnel representing the federal team, the federal Crown was involved in only one bilateral meeting with Musqueam on September 28, 2005 to discuss Stage 4 Agreement-in-Principle negotiation work-planning.

[11] Musqueam is alleged to be unresponsive to several requests made in October and November 2005 to resume meetings. Efforts to contact Musqueam were discontinued in 2006 due to a lack of response to requests to suggest meeting dates or to confirm that negotiations were proceeding in some way. There has been no progress in moving through Stage 4 of the BCTP since then. Musqueam claims that its unresponsive behaviour may have been due to pressing litigation matters that placed significant demands on its attention and resources since 2004, reducing its ability to participate fully in the BCTP.

[12] Public Works and Government Services Canada ("PWGSC") provides accommodation services for federal government employees across Canada in leased and Crown-owned buildings. PWGSC determined to look for options which would allow it to move out of the business of real estate management and to focus on what it considered to be "core" government activities, while at the same time, saving taxpayer money. That is, PWGSC wished to lower its owned-to-lease ratio of its real estate to transfer the risks of owning real estate to the private sector. To this end, on June 16, 2006, PWGSC requested proposals for purchasers of a number of properties, including the particular properties discussed below.

The Properties

[13] This appeal and the underlying judicial review application concern the properties of 401 Burrard Street and the Sinclair Centre at 757 West Hastings Street in Vancouver, BC (the "Properties"). The Properties are described by the appellant as follows:

> The property at 401 Burrard St. was originally acquired by the Federal Crown from private parties in 1948. A Customs house was constructed on the site in or about 1955 and later

> demolished in or about 1995. At that point, the land, which had been transferred from the Federal Crown to the Canadian National Railway Company in 1992, was transferred to Canada Lands Company CLC Limited. Prior to the completion of the construction of the current building, the property was transferred back to the Federal Crown in 2002. 401 Burrard St. is used almost exclusively as office space by federal government departments. There is a small coffee shop, storage space used by the property manager and space used for telecom services.
>
> The land on which Sinclair Centre is built is made up of a number of parcels. All of the parcels were previously privately held. In 1904 a portion of the property was acquired by the Federal Crown for the construction of Vancouver's main post office. Over the years, the Federal Crown continued to acquire portions of the land on which the current Sinclair Centre is situated, with the final portion being transferred to the Federal Crown in 1984. Sinclair Centre is made up of the old post office building and adjoining buildings. It contains a number of private retail outlets as well as office space which is used by federal government departments.

The parties appeared to agree during oral argument that the total area of the properties encompassed about two acres. The Properties are situated within the territory described in the Musqueam Declaration of Aboriginal Title released in June of 1976.

Events Leading to the Current Proceedings

[14] On March 5, 2007, the appellant publicly announced that the federal government would proceed with marketing nine federally owned properties, which included the Properties, as part of a sale and leaseback scheme. The respondents, as well as the Tseil-Waututh, Sto:Lo and New Westminster bands, were contacted.

[15] Musqueam raised a number of concerns regarding the proposed sale and requested a consultation process with representatives of PWGSC, initially by letter dated March 29, 2007 (this letter was not allegedly received until a second copy was sent on April 19, 2007). Musqueam's

concerns included the Crown's obligation to accommodate aboriginal interests, the fact that the Properties could form a part of a land claim settlement between Musqueam and the Crown, and Musqueam's need and entitlement for more land for housing.

[16] During the week of May 1, 2007, the federal government advertised the sale of the Properties in national media advertisements and on the government's online tendering system. On May 4, 2007, PWGSC sent a letter requesting a meeting with Musqueam representatives.

[17] On May 22, 2007, Musqueam had an informational meeting with representatives of the PWGSC. Musqueam was provided with a Confidential Information Memorandum that was being made available to prospective purchasers. Minutes of the meeting prepared by a senior official of PWGSC indicate that the meeting took place for approximately one hour. The evidence indicates that no further meeting was scheduled. According to the appellant, Musqueam's representatives were told on more than one occasion that the Crown would be able to repurchase the buildings.

[18] On May 31, 2007, an official of PWGSC wrote to Musqueam, posing, *inter alia*, the following questions:

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

[19] Musqueam sent a letter to PWGSC dated June 29, 2007, in response to the May 31, 2007 letter. In Musqueam's letter it indicated its view that the May 22, 2007 meeting was only a preliminary step to developing a consultation process. By letter dated July 11, 2007, Musqueam delivered two expert reports purporting to relate to the Properties, specifically the Report "Musqueam Occupation of Downtown Vancouver's Coal Peninsula" by Dr. Leonard C. Ham and an opinion letter written by Dr. Michael Kew. The reports refer to Musqueam's occupation and general historical use of the downtown Vancouver area. They do not support Musqueam's arguments about serious land shortage, nor do they point to any unique attachment to the Properties in particular.

[20] By letter dated July 27, 2007, PWGSC acknowledged receiving the materials sent by Musqueam. They assured Musqueam that "no final decision has yet been made by the Crown to dispose of the properties." Musqueam alleges that it did not receive this letter until August 28, 2007.

[21] On August 20, 2007 the appellant announced the decision to sell the Properties (along with the seven other properties) to Larco Investments Ltd. ("Larco"). Larco had been the highest bidder in a request for bids for the Properties. The allocated prices for the Properties were each in excess of $100,000,000. PWGSC also communicated this news to Musqueam by letter, adding, "it is our view that the Crown has fulfilled any legal obligation that it may have to consult with respect to the proposed disposition of these properties".

[22] The transaction included, *inter alia*, the following elements:

- The Crown would lease back the Properties for 25 years, with the right to renew for an unlimited number of 10 year terms.
- The leases provide the federal Crown with a right to purchase the assets at the end of the lease terms in the event of a decision of the appellant which is of a political or policy nature and which has not principally been made to benefit directly from financial gain. These provisions were, according to the appellant, "specifically included to protect any possible aboriginal claims to the properties that may later be proven."
- The leases also provide the Crown with a right of first refusal and a right of first offer should Larco wish to sell the properties
- The leases permit the Crown to sublease the Properties at the Crown's discretion.

[23] On August 22, 2007, Musqueam responded with a letter to PWGSC stating that they felt that the Crown had not fulfilled its duty to consult. On August 28, 2007, PWGSC sent a fax to Musqueam which stated that, in the Crown's view, it had fulfilled any duty to consult. It also sent to Musqueam a report commissioned by Public History Inc., dated August 2007, with respect to an assessment of potential Aboriginal use and occupation of the Properties. This report focused on the competing aboriginal claims to the areas around the Properties.

[24] On September 19, 2007, the respondent applied for judicial review in respect of the decision to sell the Properties. The request for relief includes, *inter alia*:

- A declaration that Her Majesty the Queen in Right of Canada has a legal duty to consult with Musqueam in good faith concerning any disposition of the Properties, prior to any disposition of the Properties, and to endeavour to seek workable accommodations of the Musqueam Aboriginal and treaty interests in the Properties;
- A declaration that Her Majesty the Queen in Right of Canada has not fulfilled her legal duty to consult with Musqueam concerning the disposition of the Properties or made workable

accommodations of Musqueam's Aboriginal and treaty interests in the Properties prior to any such disposition; and

- An order restraining the sale or other disposition of the Properties.

[25] On September 24, 2007, Musqueam filed a motion for an interlocutory injunction restraining the Government of Canada from transferring, selling, or otherwise disposing of the Properties pending the hearing of the underlying application for judicial review. That interlocutory injunction was granted and is the subject of this appeal.

[26] The financial benefits of the transactions were linked to the historically high real estate values, and thus the timing of any transaction was arguably crucial. PWGSC entered into a binding contract to proceed with the transaction. While that contract allowed the Properties to be removed from the transaction, the appellant argues that there was a cost to doing so: the appellant lost the advantage of the favourable market conditions. At the time of the injunction hearing the appellant estimated that the delay caused by the injunction would result in an effective reduction in the purchase price of $33 million. The estimate was based on major banks' predictions as to what interest rates would be in twelve months (the assumption was that a judicial review would ultimately take twelve months).

[27] The Squamish Nation ("Squamish") successfully moved to be added as a respondent to this appeal by way of an order granted by Nadon J.A. on February 7, 2008 (A-454-07). The Properties also lie within territory to which Squamish claims aboriginal rights and title.

Statutory Provisions

[28] The Federal Court's power to award interim injunctions is outlined in Rule 373 of the *Federal Court Rules, 1998* which provides, in part:

(1) On motion, a judge may grant an interlocutory injunction.	(1) Un juge peut accorder une injonction interlocutoire sur requête.
(2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.	(2) Sauf ordonnance contraire du juge, la partie qui présente une requête pour l'obtention d'une injonction interlocutoire s'engage à se conformer à toute ordonnance concernant les dommages-intérêts découlant de la délivrance ou de la prolongation de l'injonction.
…	[…]

[29] Section 35 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 provides:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	(1) Les droits existants – ancestraux ou issus de traités – des peuples autochtones du Canada sont reconnus et confirmés.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.	(2) Dans la présente lois, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.	(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed	(4) Indépendamment de toute autre disposition de la présente loi, les droits – ancestraux ou issus de traités – visés au

equally to male and female persons.	paragraphe (1) sont garantis également aux personnes des deux sexes.

Decision Below

[30] On September 28, 2007, the Motions Judge granted an interlocutory injunction restraining Her Majesty the Queen in Right of Canada, the Treasury Board of Canada and the Minister of Public Works and Government Services, as applicable, from transferring, selling, or otherwise disposing of the Properties pending the hearing of the application with respect to the alleged failure of the Crown to consult Musqueam. He also ordered that Musqueam had to serve and file an undertaking in damages in favour of the appellant in the limited amount of two million dollars.

[31] The appellant and Musqueam agreed that the test for the granting of an interlocutory injunction was the one set out in *RJR-MacDonald*. With respect to the existence of a serious question to be argued, the Motions Judge decided, at para. 23, that "because the relief requested here is in part similar to the relief sought on the ultimate disposition of the underlying judicial review, the threshold of 'serious question' requires somewhat greater scrutiny as to the merits…" The Motions Judge concluded that the issue of the duty to consult in good faith "is a serious issue… and is fairly arguable" (at para. 26). In concluding so, he followed the reasons of Justice Phelan in *Musqueam Indian Band v. Canada (Governor in Council)* 2004 FC 579 (the "*Garden City*" case), and bolstered that holding by referring to the Supreme Court's reasoning in *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511 ("*Haida Nation*").

[32] With respect to the question of irreparable harm, the Motions Judge concluded that the issues that concerned Musqueam might not be addressed in a monetary settlement, as "An enhanced land base is critical to the Applicant and, as earlier noted, the Vancouver properties are among a limited inventory of lands remaining in the hands of the Government of Canada within [Musqueam's] claim area" (at paragraph 28).

[33] With respect to the balance of convenience stage of the *RJR-MacDonald* test, the Motions Judge decided that the public interest in preserving the honour of the Crown outweighed the public interest derived from the sale of the Properties. He also noted, at paragraph 32:

> The reality that, on the evidence before the Court, the Crown might have a right to recover title to the Vancouver properties some twenty-five (25) years into the future, does not, of itself, constitute adequate compensation to the Musqueam for the loss of full and meaningful consultation, and possibly accommodation.

[34] Turning to the question of an undertaking, the Motions Judge was concerned by the fact that Musqueam had given no consideration to the position it would be in if it were successful on its injunction application and were not granted relief from the obligation to provide an undertaking. Counsel for Musqueam advised that, on reconsideration, Musqueam was prepared to provide an undertaking but only with an up-side limit of $2 million, whereas the appellant maintained that an unlimited undertaking was necessary. The Motions Judge ordered the undertaking because "no special reasons to the satisfaction of the Court exist in this matter that would justify relieving [Musqueam] from the burden of providing an undertaking in damages" (at para. 37). However, the Motions Judge also recognized that the evidence regarding potential damages was "highly speculative".

Issues

[35] The appellant raised five issues in this appeal:

- Was the correct standard on the first branch of the *RJR-MacDonald* test merely a "fairly arguable" issue?
- Applying the appropriate standard, did Musqueam meet the first stage of the *RJR-MacDonald* test?
- Did the Motions Judge err in finding irreparable harm?
- Was the respondent's unwillingness to provide a full undertaking in damages, and the fact that the injunction effectively granted the respondent the final relief sought, relevant considerations in the balance of convenience test?
- Did the Motions Judge err in allowing the respondent to provide a limited undertaking as to damages after specifically finding that no special reasons existed that would justify relieving the respondent from the burden of providing an undertaking as to damages?

[36] On cross-appeal, the respondent raises the following issue: did the Motions Judge err in not exercising his discretion to order that Musqueam not be required to provide an undertaking to abide by any order concerning damages caused by the granting or extension of the injunction?

Standard of Review

[37] The granting of an injunction is a discretionary decision. Discretionary decisions are not completely insulated from review and an appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts: *British Columbia (Min. of Forests) v. Okanagan Indian Band* 2003 SCC 71 at para. 42. See also *Bellegarde v. Canada (Attorney General)* 2004 FCA 34 at para. 4.

Analysis

Introduction

[38] As indicated earlier, the test to grant an interlocutory injunction is three-fold:

- Is there a serious issue to be tried on the underlying proceeding?
- Will the applicant suffer irreparable harm not compensable in damages if an interlocutory injunction is not granted?
- What is the balance or convenience or inconvenience as between the parties, taking into account the public interest?

The onus was on Musqueam to prove each element of the test: *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)* (1998), 234 N.R. 96, [1998] F.C.J. No. 1690 (QL) (C.A.) at para. 4.

[39] In my opinion, this appeal centres around the question of irreparable harm. As such, I will deal with that question first. I will subsequently briefly address the remaining issues in this appeal.

Irreparable Harm

[40] The entirety of the Motions Judge's analysis on this issue, at paragraphs 27-29 of his decision, is reproduced below:

> Will the imminent closing of the sale of the Vancouver properties result in irreparable harm to the Applicant not compensable in damages? The Court must consider not the magnitude of the harm, but the "nature of the harm" which would be caused. While money can be paid as compensation for anything, the mere fact that compensation can be ordered does not resolve the issue. The Court must consider the true nature of what may be lost. It would not

> appear to be in dispute that the Vancouver properties are situated within the territory described in The Musqueam Declaration of Aboriginal Title made by the Musqueam Nation in June, 1976. Treaty negotiations were entered into by the Applicant with Canada and British Columbia and that negotiation process has been ongoing, albeit apparently sporadically, since early 1994. In the affidavit filed on behalf of the Applicant on this application, the affiant attests:
>
> > …
> >
> > 5. Musqueam currently has approximately 1,200 band members, approximately 55% of whom live on reserve. The land base of the Musqueam people under the reserve system is very small and we are suffering from a serious land shortage. Our reserve allotment on a per capita basis is the smallest of all British Colombia bands. There are currently over 200 band members waiting on the band housing list. A significant number of adult members of the Band are unemployed at this time, and high unemployment has been a chronic problem for our members.
> >
> > 6. The properties located at 401 Burrard Street and 757 West Hastings Street [the Vancouver properties] which are in issue in this application are located within Musqueam traditional territory.
>
> Thus, the issues that concern the Applicant might well not be amenable simply to a monetary settlement. An enhanced land base is critical to the Applicant and, as earlier noted, the Vancouver properties are among a limited inventory of lands remaining in the hands of the Government of Canada within the Applicant's claim area.
>
> Against the foregoing brief summary of considerations, I am satisfied that the Applicant will suffer irreparable harm not compensable in damages if the Vancouver properties are alienated by the Government of Canada without full and meaningful consultation in good faith, and perhaps accommodation, in accordance with the honour of the Crown.

[41] The Motions Judge seems to base his finding of irreparable harm on the assumption that, in terms of the negotiations process, the only land available to Musqueam was land owned by the federal government. This is a palpable and overriding error of fact.

[42] In addition, nowhere in the Motions Judge's reasons did he consider the nature of the properties and how they are of specific relevance to Musqueam. Such an omission constitutes an error of law.

[43] Finally, the Motions Judge failed to substantiate precisely how an award of damages could not compensate Musqueam in the event of the disposition of the Properties. This, too, constituted an error of law.

[44] Indeed, I am not convinced that there has been a demonstration of irreparable harm by either the Motions Judge or the respondents. Interpreting their arguments as liberally as possible, there are three potential reasons to find irreparable harm:

- The need for an "enhanced land base";
- The loss of the opportunity for the Properties to be the subject of treaty-negotiations; and
- The loss of an opportunity for Musqueam to consult and be accommodated.

Irreparable Harm #1: Enhanced Land Base

[45] The need for an "enhanced land base" does not, in and of itself, constitute a basis for a finding of irreparable harm.

[46] Musqueam led no evidence that the Properties are of special interest or of unique character to them. Rather, they simply argued that they need more land for housing.

[47] As indicated earlier, the Properties are fully developed, urban properties primarily suited for business. Musqueam has provided no indication of their anticipated plans for this property. It could hardly be said that two acres on which large office buildings are located would satisfy Musqueam's need for more land for housing.

[48] It is obvious that Musqueam could receive monetary compensation equal to the value of the Properties and buy vacant land for housing far in excess of two acres. Therefore they could adequately be compensated in damages and there is no irreparable harm.

[49] In this light, the comments of Justice Rothstein (as he then was) in *Soowahlie Indian Band v. Canada (Attorney General),* 2001 FCA 387 ("*Soowahlie*") are helpful. The case of *Soowahlie* concerned an application against Her Majesty the Queen in Right of Canada ("Canada") for an interlocutory injunction enjoining Canada from transferring a 62-hectare portion of a former Canadian Forces base at Chilliwack, British Columbia to the Canada Lands Company. The Band alleged that the land was reserve land or was subject to Aboriginal title, and that in the past the land was a place for meeting and for travel routes, that hunting and gathering took place on the land and that fishing took place nearby. Accordingly, they argued that they had an historical connection to the land and if it were disposed of, that connection would be lost. Justice Rothstein concluded that

the principles of expropriation with compensation would be sufficient to compensate the Band if necessary, and noted at para. 7:

> The appellants have demonstrated no special circumstances relating to the land. They say they require the land to sustain themselves. The historical connection which the appellants claim is unrelated to their anticipated use of the land and there is no evidence as to why this particular land is required having regard to their anticipated use. The appellants have not established a case of irreparable harm. It is sufficient to conclude that if, as the appellants allege, the disposition of the land constitutes a breach of a fiduciary duty by the respondent, the Court will be in a position to order damages or to fashion such other remedy as may be suitable based on the evidence before it. [Emphasis added.]

Irreparable Harm #2: Opportunity for the Properties to be the Subject of Treaty-Negotiations

[50] This argument in favour of an injunction can be dismissed briefly without entertaining the appellant's argument that impacts on the treaty process cannot be considered here. Counsel for Musqueam in oral agreement conceded that if the lands were sold, they could still make a claim for their value either in the treaty negotiations or in a separate claim. At this point it is also helpful to point out that, unlike its provincial counterparts, the federal government does not limit the subject-matter of negotiations to Crown lands: land for treaties may include fee simple land acquired by or for the aboriginal groups on a willing seller/willing buyer basis.

[51] Moreover, if Musqueam were to establish in the future that it has an enforceable interest in either of the Properties, the agreement of purchase and sale provided the Crown with an ability to regain title to the Properties in order to pass that title to Musqueam. The sale and leaseback transaction provided the Crown with a first right of refusal should the purchaser wish to sell the properties during the course of the Crown's 25 year lease. In addition, the Crown would have had the option to repurchase the properties from Larco at the end of that lease. In the meantime, the

Crown would have retained the right of use of the properties through its lease, including the right to sublease, and thereby could have provided Musqueam with use of the properties if such an interest was established. Therefore, if a right to title were established prior to the expiry of the 25 years, any delay in providing that title would not harm Musqueam.

Irreparable Harm #3: Loss of an Opportunity for Musqueam to Consult and be Accommodated

[52] In this case, the loss of an opportunity for Musqueam to consult and be accommodated is insufficient to constitute irreparable harm. I agree with the appellant that if an allegation of inadequate consultation always constituted irreparable harm, that could constitute a veto over the government transferring any title to property which is located in an area claimed as a traditional territory of an Aboriginal group. That would explicitly contradict the comments of the Supreme Court of Canada in *Haida Nation* at para. 48: "This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim." Rather, it is necessary to look deeper in each case and discern whether the failure to consult constitutes irreparable harm.

[53] At this point it is helpful to step back and briefly review the law governing the duty to consult. The duty to consult, based on the honour of the crown, 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…." (*Haida Nation* at para. 35, emphasis added; see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74 ("*Taku River*")). That is, the duty to consult arises in the context of the concern over Crown activity infringing on aboriginal rights before the rights can be proven. The requirement for

consultation assists in the prevention of land and resources from being changed and denuded during the process of proving rights: *Haida Nation* at para. 33. However, the facts at bar suggest that no pending right would be violated by a disposition of the Properties.

[54] In *Garden City* the Motions Judge in that case concluded that the loss of Musqueam's right to be consulted could not be compensated by damages. He elaborated at paragraphs 44, 46 & 48:

> The nature of the harm which would be suffered if the Garden City property is transferred is the loss of the right to negotiate and be accommodated in respect of that land. Once the land is transferred, that right is effectively lost.
>
> […]
>
> This situation is analogous to those where there is requirement for an environment study be done before a permit is issued or for proper notice to be given before a decision is made. The relevant considerations are public law principles and remedies. They are jurisdictional in nature, not monetary.
>
> […]
>
> If the Band's right is to have meaning, it cannot be allowed to be lost on the assumption that "sending a government cheque" would always suffice. It would be too tempting to allow government authorities to ignore these types of conditions to the exercise of power by merely permitting payment of some form of compensation as a substitute for the proper exercise of powers. [Emphasis added.]

[55] If what was meant by the Judge in *Garden City* was that the mere assertion of the duty to consult itself is always sufficient to prove irreparable harm, then I disagree. Rather, I think the decision can be explained by the fact that in *Garden City* the lands comprised 136 acres and the Judge in that case had found that Musqueam not only claimed an interest in the land, but that the land had unique importance to Musqueam (*Garden City*, at paragraph 16).

[56] In the case before this Court the Properties are office buildings in downtown, Vancouver, encompassing two acres. Their use upon disposition to Larco will not change. This is distinct from the *Garden City* case, where the use and character of the properties could change as a result of the transaction, and where Musqueam had submitted evidence of the land's unique importance beyond a proprietary interest.

[57] The content of the duty to consult lies on a spectrum, depending on the strength of the claim to title, the extent of the Aboriginal right claimed, and the potential for infringement. As Chief Justice McLachlin stated in *Haida Nation*, at paragraphs 43-4:

> …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 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.
>
> 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.

[58] Without commenting on the content of Musqueam's right to be consulted and possibly accommodated (since the merits of that case are to be heard after the current issue concerning injunctive relief is concluded) it is helpful, for illustrative purposes, to compare the facts in this case with the rights at stake in the leading cases on the duty to consult. In *Haida Nation* the decision to issue licences to cut trees on the Haida Gwaii could have deprived the Haida Nation of forests vital to their economy and their culture. As Chief Justice McLachlin stated at paragraph 7, "The stakes are huge. […] Forests take generations to mature… and old-growth forests can never be replaced." In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, the building of a road through a reserve impacted a significant number of trappers and hunters. In *Taku River*, the building of a road through Taku River Tlingit's First Nation territory passed through an area critical to their economy and could have had an impact on its continued ability to exercise its Aboriginal hunting, fishing, gathering, and other traditional land use activity rights. In our case, there has been no allegation of an infringement of any aboriginal right that would or even may result from the disposition of the Properties. If there is no harm alleged in terms of an absolute rights analysis, how can the loss of a right to be consulted with respect to that right constitute irreparable harm? Moreover, if loss of the Properties can be adequately compensated in damages (see "*Irreparable Harm #1: Enhanced Land Base*" above), then surely the loss of the right to consult about disposing of the Properties can equally be compensated in damages in this case.

[59] It was argued that refusing an injunction in this case would set a precedent in that the Crown could always claim that there was no irreparable harm because damages could always be an adequate remedy. I do not agree. Each case has its own particular facts. Where an Aboriginal band

leads evidence of unique need, special connections to the land in question, or a potential change in the character of the land in question, the result may well be different.

[60] In light of the conclusion on irreparable harm, I am of the view that the appeal must be allowed and the injunction be set aside. Therefore it is not, strictly speaking, necessary to consider the other issues. However, I shall make some comments on the remaining issues in this appeal.

Balance of Convenience and Undertaking

[61] There was no basis for the Motions Judge to order a limited undertaking. The usual unlimited undertaking would have been more appropriate given the circumstances of this case. Moreover, the awarding of a limited undertaking should have been a factor to be considered in the "balance of convenience" branch of the *RJR-Macdonald* test.

[62] Rule 373(2), as indicated earlier, provides:

(2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.	(2) Sauf ordonnance contraire du juge, la partie qui présente une requête pour l'obtention d'une injonction interlocutoire s'engage à se conformer à toute ordonnance concernant les dommages-intérêts découlant de la délivrance ou de la prolongation de l'injonction.

It seems to me that the default position under this provision is that a limited undertaking should not be accepted unless the Court is presented with some evidence with respect to compelling circumstances that warrant a limited undertaking or no undertaking. In this case, Musqueam filed no

evidence, let alone any evidence with respect to its ability to pay. Therefore the Motions Judge had no evidence on which to order that the undertaking be limited.

[63] Indeed, the Motions Judge noted that "no special reasons to the satisfaction of the Court exist in this matter that would justify relieving [Musqueam] from the burden of providing an undertaking in damages" (at paragraph 37). Why, then, did he only order a limited undertaking? The Motions Judge likely based his decision on the plea of counsel that Musqueam could not afford a proper undertaking. Counsel for Musqueam made the same argument before this Court. At no time did Musqueam attempt to file evidence stating that they could not afford to provide an unlimited undertaking. Given that they were the only party in a position to explain their financial situation, I believe that an adverse inference should have been drawn by the Motions Judge with respect to their failure to provide any evidence in this regard. Certainly, there was no evidence that the two million dollar undertaking would have been sufficient to compensate the appellant for any loss it might suffer if it turned out that the injunction should not have been granted.

[64] In considering the "balance of convenience", the considerations that the Motions Judge balanced were the public interest in having the appellant carry out its proposed transaction with the public interest in preserving the honour of the Crown, the latter of which would be accomplished by not permitting the transaction to proceed until the appellant's consultation record had been reviewed by the court in the judicial review. According to the Motions Judge, the public interest in preserving the honour of the Crown trumped any interest in carrying out the proposed transaction.

[65] Similar to the test for irreparable harm, this limited approach to the balance of convenience test also results in an injunction against the disposition of land being inevitable whenever an aboriginal group involved in the treaty process alleges that the Crown has insufficiently consulted or accommodated.

[66] In this case, the undertaking provided was inadequate. As a result of the injunction, it is possible that the appellant had lost $33 million dollars in what was a time-sensitive transaction. In previous jurisprudence the absence of an undertaking has been taken into account in assessing whether or not to grant an injunction: *Soowahlie, supra* at para. 13 and *Siska Indian Band v. British Columbia (Minister of Forests)* (1998), 62 B.C.L.R. (3d) 133, [1998] B.C.J. No. 1661 (QL) (B.C.S.C.) at para. 29. The same reasoning should also apply with respect to the adequacy of a limited undertaking, in my opinion.

[67] Given the inadequacy of the limited undertaking, the balance of convenience weighs in favour of the appellant.

[68] The Motions Judge erred in law and made a palpable and overriding error of fact in failing to consider the impact of a limited undertaking in assessing the balance of convenience in granting an injunction. The Motions Judge also made an error of law and a palpable and overriding error of fact in not granting an unlimited undertaking in the absence of any evidence to suggest that a limited undertaking was warranted.

[69] My conclusions on the issue of balance of convenience and undertakings support the conclusion that the appeal should be allowed.

Serious Issue

[70] Following the House of Lords decision of *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, the Supreme Court of Canada confirmed in *RJR-MacDonald* that the first branch of the test for an interlocutory injunction is simply whether there is a serious question to be tried. The threshold has been classified as a low one, and a judge must simply be satisfied that the application is neither vexatious or frivolous, as "A prolonged examination of the merits is generally neither necessary nor desirable" (*RJR-MacDonald* at paragraph 50).

[71] However, when the result of the application for injunction will impose such hardship on one party as to remove any potential benefit from proceeding to trial, a more extensive review of the merits should be done by the judge (at paragraph 51 of *RJR-MacDonald*). Indeed, the appellant, Musqueam and the Motions Judge all agreed that because the relief requested was in part similar to the relief sought on the ultimate disposition of the underlying judicial review, the threshold for "serious question" requires greater scrutiny as to the merits than might otherwise be the case.

[72] Ultimately, however, the Trial Judge concluded, at paragraph 26:

> …I am satisfied that what has been quoted from *Haida* and from other authorities has more than established that the issue of the duty to consult in good faith and perhaps to accommodate is a serious issue that is live and current on the evidence that was here before the Court. I am further satisfied that it is also sufficient for purposes of this injunction application, taking into account the degree of scrutiny required on the facts of this matter

> with regard to the "serious issue" element of the tripartite test, that the issue was here raised and is fairly arguable. [Emphasis added.]

[73] The use of the test "fairly arguable" causes one to wonder whether the Motions Judge properly understood the correct test. This is especially of concern where the Motions Judge himself, with the consent of the appellant and Musqueam, stated that a more scrutinizing standard should be applied due to the nature of the relief claimed (see the Motions Judge's reasons at paragraph 23). The Motions Judge also noted at paragraph 26:

> Whether the nature of the Vancouver properties, including their relatively small land-base footprints and their location in the heart of the business center of downtown Vancouver impact in a manner that would allow the underlying application for judicial review to be distinguished from the equivalent application in the "Garden City" matter, earlier referred to, is a matter for determination, if indeed determination is necessary, on another day.

It seems to me that given the stark difference in facts between this case and the *Garden City* case, and his reliance on *Garden City*, it may not have been appropriate to leave the question of distinguishing the *Garden City* case for "another day." The consequence is that this Court would have to examine the facts to see if there is a serious issue to be tried.

[74] Because of the earlier reasons in which I concluded that the appeal should be allowed, it is unnecessary to delve further into this issue.

Conclusion

[75] For the reasons above, I would allow the appeal with costs, set aside the decision of the Motions Judge and dismiss the motion for an interlocutory injunction.

"J. Edgar Sexton"
J.A.

"I concur
Alice Desjardins J.A."

"I agree
John M. Evans J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-454-07
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE GIBSON DATED SEPTEMBER 28, 2007, NO. T-1691-07	
STYLE OF CAUSE:	*Minister of Public Works and Government Services v. Musqueam Indian Band and Squamish Nation*
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 12, 2008
REASONS FOR JUDGMENT BY:	Sexton J.A.
CONCURRED IN BY:	Desjardins J.A. Evans J.A.
DATED:	June 13, 2008

APPEARANCES:

Donnaree Nygard Ms. Morphy	FOR THE APPELLANT
Rhys Davies Q.C. Sara Ciarrocchi	FOR THE RESPONDENT, Musqueam Indian Band
Gregory J. McDade Q.C. Maegen M. Giltrow	FOR THE RESPONDENT, Squamish Indian Band

SOLICITORS OF RECORD:

John H. Sims Q.C. Deputy Attorney General of Canada	FOR THE APPELLANT
Davis LLP Vancouver, British Columbia	FOR THE RESPONDENT, Musqueam Indian Band
Ratcliff & Company LLP North Vancouver, British Columbia	FOR THE RESPONDENT, Squamish Nation