Federal Court of Appeal | Cour d'appel fédérale

CANADA

Date: 20091119

Docket: A-480-08

Citation: 2009 FCA 337

CORAM: **SEXTON J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

THE TZEACHTEN FIRST NATION,
THE SKOWKALE FIRST NATION, and
THE YAKWEAKWIOOSE FIRST NATION

Appellants

and

THE ATTORNEY GENERAL OF CANADA,
CANADA LANDS COMPANY LIMITED, and
CANADA LANDS COMPANY CLC LIMITED

Respondents

Heard at Vancouver, British Columbia, on September 30, 2009.

Judgment delivered at Ottawa, Ontario, on November 19, 2009.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: SEXTON J.A.
RYER J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The issue in this case is whether the Crown had a duty, after 2000, to consult with the Tzeachten First Nation, the Skowkale First Nation, and the Yakweakwioose First Nation (which for simplicity I will refer to collectively as "the Tzeachten") before deciding to transfer certain land to Canada Lands Company CLC Limited ("CLC") in 2003. The land, referred to as the Rifle Range and Promontory Heights, is part of the site of former CFB Chilliwack. Justice Tremblay-Lamer determined that no such duty arose, for reasons reported as *Tzeachten First Nation v. Canada*

(Attorney General), 2008 FC 928. The Tzeachten have appealed that judgment. They seek an order setting aside the judgment, a declaration that the 2003 decision to transfer the land was invalid or unlawful, and a declaration that the Crown has and continues to have a legal obligation to consult with the Tzeachten and properly accommodate their interests with respect to the Rifle Range and Promontory Heights.

Facts

[2] The Tzeachten are three communities of the Sto:lo Nation descended from the Chilliwack Tribe, a subgroup of the Sto:lo Nation and a part of the Coast Salish people. They have reserves within the municipal boundaries of Chilliwack, British Columbia. Their evidence is that their reserves are too small to accommodate their needs for housing and community infrastructure.

[3] The Rifle Range and Promontory Heights comprise part of former CFB Chilliwack and are adjacent to the Tzeachten First Nation reserve. The Tzeachten assert an interest in the Rifle Range and Promontory Heights, and indeed on the entire area formerly occupied by CFB Chilliwack, on two alternative bases.

[4] The first basis relates to the allegation of thirteen Sto:lo communities, including the Tzeachten, that the land upon which CFB Chilliwack was located formed part of two Indian Reserves, IR 13 and 14, created for them in 1864 under the authority of James Douglas, then Governor of the Colony of British Columbia. They allege that in 1868, British Columbia unlawfully removed land from IR 13 and 14 and then, in the 1880s, transferred part of the removed land to

Canada in connection with the construction of the national railway. Between 1892 and 1915 Canada transferred some of the land to private individuals and later reacquired some of the land, including the Rifle Range and Promontory Heights, to establish CFB Chilliwack. In 1988 and 1997, the thirteen Sto:lo communities submitted a specific claim to IR 13 and 14 pursuant to Canada's Specific Claims Policy. In July 1999, the Crown declined to recommend this claim for negotiation under the Specific Claims Policy because, in their view, the legal steps required to create the two reserves were never completed by Governor Douglas or by his successor, Frederick Seymour, who did not assent to the creation of the reserves. That decision was appealed to the Indian Claims Commission. In September of 2003, the appeal was placed in abeyance, where it remains pending the conclusion of litigation involving the Douglas Reserve claims.

[5] The second basis relates to the assertion of a claim by eighteen communities of the Sto:lo Nation (including the Tzeachten) to unextinguished Aboriginal title to an area that includes the former CFB Chilliwack land. In 1995, those eighteen Sto:lo communities filed a statement of intent to negotiate a treaty under the auspices of the British Columbia Treaty Commission. The treaty has not been concluded. The treaty negotiations include discussions about additional reserve land.

[6] In 1995, the Crown announced its intention to close CFB Chilliwack. Between September of 1995 and June of 2000, there were approximately 26 meetings between representatives of the Crown and representatives of the Tzeachten. A partial summary of those meetings is provided by Justice Tremblay-Lamer at paragraphs 57 to 61 of her reasons:

¶57 During 1996 and 1997, consultations between the applicants and Canada were focused on two proposals. The first involved Canada continuing to own the Base but its management/administration would fall jointly to CLC and the applicants while their Specific Claim was resolved and/or land selection under the BCTP occurred. The second proposal involved 25% of the Base being disposed of to CLC and of the remaining 75%, approximately half would be managed by a trust controlled equally by CLC and the applicants and the remainder would continue to be held by Canada.

¶58 No agreement was reached moving forward with the first proposal and the second was eventually rejected by the applicants as they would not accept a transfer of any portion of the CFB Chilliwack to CLC.

¶59 From late 1997 onwards, two major options were discussed. The first option being that 60% of the lands would be retained for possible treaty land selection with the remaining lands transferred to CLC. The applicants rejected this proposal as they were of the view that since they owned all the lands, they should be compensated for lands they were giving up. The second option involved a transfer of lands to be identified by the applicants to the Department of Indian Affairs and Northern Development, which would then be leased back to them for a period of between 4-9 years with the applicants subsequently obtaining the lands at the conclusion of any treaty. The remaining lands not identified by the applicants would be transferred to CLC for disposal. An agreement could not be reached on this proposal.

¶60 In 1998, the discussions focused on another two options. Pursuant to the first proposal the applicants would select lands within the Base and DND lands outside, but near the Base that would accommodate their various needs, which would ultimately be transferred to them. The second option envisioned a joint venture arrangement between CLC and the applicants. The idea put forward by Canada was that part or all of the Base would be transferred to a CLC/applicants joint venture which would be outside the treaty process, and the joint venture would proceed to develop the lands transferred.

¶61 The applicants rejected the first option and while they were interested in the second option, they wished to have a portion of the Base excluded from the joint venture and

> transferred to them. The exclusion of land from the joint venture was a concern to CLC since, depending on the amount of land excluded, the joint venture might no longer be financially viable. The applicants indicated that they would bring the joint venture proposal to the Chief's Council on November 16, 1998 to seek directions, but never returned with an answer and the option lapsed.

[7] The position of the Tzeachten throughout the period of the meetings and discussions referred to above was that they have a pressing need for additional land for housing and other community purposes, they have an unresolved specific claim as well as an unresolved claim of Aboriginal title to the CFB Chilliwack lands, and that restoring the CFB Chilliwack lands to them would be the only just and appropriate resolution of their specific claim. According to the affidavit of Chief Joseph Leonard Hall sworn June 14, 2007, the Tzeachten considered none of the Crown's proposals to be meaningful responses to their claims.

[8] Chief Hall also deposes that the Tzeachten tabled a proposal, based on their position that the CFB Chilliwack land had originally been set aside for them as IR 13 and 14, that the Crown buy the CFB Chilliwack land from them at fair market value. Chief Hall stated that after that proposal was made, Canada essentially ended the discussions. Chief Hall does not say when that proposal was made, but it appears from the affidavit of Paul Gono, who represented the Crown in most of the meetings with the Tzeachten, that it occurred at a meeting in late 1999 .

[9] In the spring of 2000, a submission was made to the Treasury Board (I assume by either Public Works and Government Services Canada or the Department of National Defence ("DND")) relating to the disposition of the former CFB Chilliwack land. In the proposal, the land was divided

into parcels designated A through I. The Rifle Range and Promontory Heights were designated Parcel C. The proposal was as follows:

a. Parcel A would be transferred immediately to CLC, with the intention that it be improved or sold.
b. Parcels B, C, E, F and G would be retained for a two-year period from June 2000 to allow the Chief Federal Treaty Negotiator an opportunity to engage in treaty land selection negotiations with the Sto:lo Nation, and upon the conclusion of those two years to return to the Treasury Board to obtain the authority to transfer to CLC any lands not selected for treaty purposes.
c. Parcel D would be protected as a nature conservancy.
d. Parcel H would be used by the Royal Canadian Mounted Police for training purposes.
e. Parcel I would be retained by DND for a military cenotaph and area support unit for the Canadian Forces.

[10] In May of 2000, the Tzeachten and Soowahlie (another Sto:lo community) also made a submission to the Treasury Board, consisting of a detailed study setting out the importance to them of the CFB Chilliwack land, and a plan for its development, including band housing, band infrastructure, and some commercial and mixed use for revenue generation.

[11] On June 16, 2000, an Order in Council (P.C. 2000-925) was made to authorize the transfer of Parcel A to CLC. On the same date, the Treasury Board informed the Tzeachten and Soowahlie that their submission had been considered, but the Treasury Board had decided to accept the Crown

proposal. With specific reference to item (b) of the proposal (referring to Parcels B, C, E, F and G), the letter says this:

> Finally, approximately two-thirds of the site will be retained in the federal inventory for two years to permit further discussion with the Sto:Lo Nation on possible land selection under the treaty process.

[12] After the June 2000 discussions, the Chief Federal Negotiator for the Sto:lo treaty negotiations, Mr. Robin Dodson, indicated an interest in discussing the held back lands with the Sto:lo treaty negotiator, Mr. David Joe, in the context of a set-off in the final treaty settlement. Mr. Joe advised Mr. Dodson that he had no mandate to discuss these lands as a set-off since they were subject to a specific reserve interest (referring to the specific claims of the Tzeachten to IR 13 and 14). Mr. Joe also advised the Crown negotiator to contact the Sto:lo communities with an interest in the CFB Chilliwack lands directly with a view to resolving the specific claims.

[13] No further discussions occurred, and no agreement was reached between the Crown and the Tzeachten with respect to the disposition of any of the former CFB Chilliwack land.

[14] In July of 2000, the Tzeachten and Soowahlie commenced an application in the Federal Court for judicial review of the decision to transfer Parcel A to CLC. Meanwhile, CLC began selling parts of Parcel A. The Tzeachten and Soowahlie moved for an order staying any further transfers pending the disposition of their application, but their motion was dismissed by the Federal Court and their appeal to this Court was dismissed. The Federal Court proceeding was discontinued.

[15] On June 7, 2002, Mr. Dodson informed Mr. Joe that that the Minister of National Defence was about to return to the Treasury Board to seek additional instructions on the disposition of the held back portions of the former CFB Chilliwack land. Mr. Dodson indicated that Indian and Northern Affairs Canada ("INAC") would advise the Minister that it had no interest in acquiring any of that land for possible use in treaties.

[16] On June 26, 2002, DND wrote to the Tzeachten about the held back land. That letter reads in relevant part as follows:

> The two-year hold period has now expired and INAC has recently advised that they will not be acquiring any of the former CFB Chilliwack lands for treaty settlement purposes. This same decision was provided to Mr. Dave Joe, Sto:lo Nation Chief Negotiator from Mr. Robin Dobson [sic], the Chief Federal Negotiator on 7 June 2002.
>
> With this letter I wish to advise that the Department of National Defence is now preparing to return to the Treasury Board of Ministers, in accordance with the June 2000 disposal plan, for further direction regarding the disposal of the remainder of the Chilliwack lands.

[17] On August 8, 2003, the DND informed the Tzeachten that the Crown had authorized the sale of the remainder of the held back land to CLC. That transfer was completed on March 31, 2004. By the time of the commencement of the proceedings leading to his appeal, CLC had sold 14 acres of the Rifle Range to the Chilliwack School District.

[18] From the perspective of the Tzeachten, the transfer of the Rifle Range and Promontory Heights to CLC removed that land from the federal inventory potentially available to settle either

the Sto:lo treaty or the Tzeachten specific claims. Because they considered those particular parcels of land to be among the best possible choice for any expansion of their current reserves, especially the Tzeachten First Nation reserve that is adjacent to the Rifle Range and Promontory Heights, they see the transfer as a substantial and possibly permanent loss. The position of the Tzeachten is that the Crown was obliged to engage in further consultations with them after 2000 and before dealing with any of the land that was subject to the two-year hold period.

[19] The Tzeachten commenced an application for judicial review to seek a declaration that the 2003 decision to transfer that land to CLC was unlawful, a declaration that the Treasury Board, the Minister of National Defence, CLC and its parent corporation, Canada Lands Company Limited ("Canada Lands"), had a legal obligation to consult with the Tzeachten before selling or developing the Rifle Range and Promontory Heights, and an order in the nature of mandamus directing the Minister, Canada Lands and CLC to consult with the Tzeachten and accommodate their interests. The Tzeachten did not assert any claim in respect of 14 acres within the Rifle Range land that had been sold to the Chilliwack School District.

[20] The application for judicial review was dismissed by Justice Tremblay-Lamer, for reasons that she explained at length. I summarize her principal conclusions as follows:

a. The Tzeachten have a moderately strong Aboriginal claim to the Rifle Range and Promontory Heights, and the Crown's transfer of that land represents an infringement of their potential Aboriginal title. However, the damage is

compensable, monetarily or otherwise, in the course of treaty negotiations. In these circumstances, there was a duty to consult that was more than minimal, requiring good faith consultation and a process addressing the concerns of the Tzeachten.

b. The 2003 authorization of the transfer of the Rifle Range and Promontory Heights put into effect the disposal strategy for the former CFB Chilliwack land that was adopted in 2000. Accordingly, the relevant period for the purposes of determining whether Canada fulfilled its duty to consult is between 1995 when the closure of CFB Chilliwack was announced and 2003 when the transfer of the Rifle Range and Promontory Heights was authorized.

c. From 1995 to 2000, Canada engaged in significant consultation with the Tzeachten which at times rose to the level of deep consultation (referring to *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at paragraph 44). During those consultations, Canada attempted to address the concerns of the Tzeachten by tabling various proposals that would either see portions of the land retained by the Crown, or have the Tzeachten co-manage a portion of the lands. These were good faith attempts by Canada to harmonize conflicting interests and move toward reconciliation (referring to *Haida Nation*, paragraphs 45 to 49, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74, at paragraph 25).

d. The Tzeachten participated in the discussions in good faith, and their unwillingness to compromise what they perceived to be their strong legal claims was not unreasonable. They fulfilled their reciprocal duty, as described in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at paragraph 161.

e. In spite of the good faith efforts on both sides, no agreement was reached. However, that does not indicate that the Crown breached any duty to consult or failed to act honourably. The law does not require parties to agree.

Issues on appeal

[21] There are four grounds of appeal stated in the Tzeachten memorandum of fact and law. They are discussed separately below.

Did the Federal Court err in treating the 2003 decision to transfer lands as the second stage of an earlier discussion and therefore one that did not require further consultation?

[22] Justice Tremblay-Lamer conceived the 2000 disposal strategy as a decision made by the Crown that, given the negotiations between 1995 and 2000, the Crown could reasonably be expected to implement in accordance with its terms. The disposal strategy called for a two-year hold period for a large part of former CFB Chilliwack, including the Rifle Range and Promontory Heights, and contemplated that the land subject to the two-year hold period would be removed from

the federal inventory unless, within that two-year period, there was an indication that the land was required for the settlement of a Sto:lo treaty.

[23] This understanding of the facts is consistent with all of the evidence on the record. In my view it was reasonably open to Justice Tremblay-Lamer to conclude, as she did, that the 2003 disposal decision could not be separated from the adoption in 2000 of the disposal strategy, and that the extent and quality of the consultations between the Crown and the Tzeachten had to be assessed on that basis. I would therefore reject this ground of appeal.

Did the failure to reach an agreement relieve the Crown of its duty to accommodate the Tzeachten?

[24] This ground of appeal, as I understand it, is closely connected to the previous one. The Tzeachten argues that the Crown was not free to implement the 2000 disposal strategy in relation to the Rifle Range and Promontory Heights without continuing to consult with the Tzeachten. More specifically, the position of the Tzeachten is that the honour of the Crown precluded the Crown from removing the Rifle Range and Promontory Heights from its inventory after the two-year hold period without further consultation with the Tzeachten. In support of this argument, the Tzeachten rely on the following factors: (1) the Tzeachten have a moderately strong Aboriginal title claim to the Rifle Range and Promontory Heights as well as an unresolved specific claim to IR 13 and 14, (2) the Rifle Range and Promontory Heights are adjacent to the current Tzeachten First Nation reserve, which would give it a unique value as potential Tzeachten reserve land, and (3) the Crown had demonstrated its willingness over a period of years to table a number of proposals for the use and management of the Rifle Range and Promontory Heights that could have saved it from

permanently being removed from inventory of land that could form part of an eventual settlement of the Tzeachten claims.

[25] Given Justice Tremblay-Lamer's understanding of the facts, which in my view is unimpeachable, it seems to me that the question is what, if anything, the Crown was required to do during the two-year hold period. The answer to that question depends mainly on the stated purpose of the hold period, which was to keep the land available for a two-year period for the purpose of settling the Sto:lo treaty.

[26] The Tzeachten point out that a two year period is not a realistic time frame for concluding an Aboriginal treaty. I agree. However, the terms of the two-year hold period did not necessarily require that the Sto:lo treaty be concluded within the two years. It contemplated only that the land be selected for treaty purposes. I take that to mean that the land would continue to be held back as long as sufficient progress was made in the negotiation of the Sto:lo treaty that INAC would be in a position to indicate that the land might be required to settle that treaty.

[27] However, the Tzeachten took no steps after 2000 to move the treaty negotiations forward in relation to the Rifle Range and Promontory Heights. On the contrary, the record indicates that the Sto:lo treaty negotiator told the Chief Federal Negotiator that he had no mandate to discuss the Rifle Range and Promontory Heights in the context of the treaty negotiations, apparently because the Tzeachten wanted their specific claim to IR 13 and 14 resolved first. The record discloses no change in that situation by 2003.

[28] The Tzeachten were aware of the existence and purpose of the two-year hold period, and must have been aware that no steps had been taken to include the Rifle Range and Promontory Heights in the treaty negotiations. All parties knew that the Crown and the Tzeachten had engaged in many years of negotiations without success, and the Tzeachten had consistently rejected every Crown proposal relating to the Rifle Range and Promontory Heights because of its strongly held belief in the strength of its specific claim.

[29] There is no doubt that the Crown could at any time have decided to extend the hold period beyond the two years stipulated in the 2000 disposal strategy. However, given the circumstances, it would in my view be unreasonable to require the Crown to extend the hold period in order to undertake further consultations with the Tzeachten. I agree with Justice Tremblay-Lamer that, with respect to the adoption and implementation of the 2000 disposal strategy, the Crown's duty to consult had been met by June of 2000 when the disposal strategy was adopted and that no further duty to consult arose after 2000 when the Crown implemented the disposal strategy in accordance with its terms.

Did the Federal Court err in applying from injunction law the tests of "uniqueness" and "compensability" in determining the extent of the duty to consult?

[30] This ground of appeal is focussed on Justice Tremblay-Lamer's conclusion that the Tzeachten's loss of the Rifle Range and Promontory Heights would be compensable (see paragraphs 42 to 51 of her reasons). In my view, there is no merit to this ground of appeal.

[31] As I understand Justice Tremblay-Lamer's reasons, she was not applying the law of injunctions when she considered the question of compensability. She was applying the principle from *Haida Nation* (at paragraph 44) that it is relevant, when assessing the seriousness of the potentially adverse effect of a decision on an Aboriginal title claim, to consider whether the adverse effect is compensable in money, or whether it is not compensable in money because the subject of the claim is unique in some substantial way relating to an unrecognized Aboriginal claim. I see no error in her analysis of that issue.

[32] The Tzeachten are understandably concerned that, despite the conclusion of Justice Tremblay-Lamer that the transfer of the Rifle Range and Promontory Heights is a compensable loss, the Crown will take the contrary position in the context of treaty negotiations or in proceedings relating to the unresolved specific claim to IR 13 and 14. However, the Crown conceded in argument, correctly in my view, that the decision in this case does not dispose of any claim the Tzeachten may assert for compensation based on its claim to IR 13 and 14 or its claim to Aboriginal title. Therefore, the matter of compensation remains open to negotiation or litigation in relation to either of those claims.

Did the Federal Court err in failing to consider the effect of the assertion of Cabinet privilege over the 2003 decision, in assessing whether that was a decision that required consultation?

[33] In my view this ground of appeal is not properly raised. The Tzeachten did not take steps to challenge the assertion of Cabinet privilege, nor did they seek to cross examine the deponents of any of Canada's affidavit.

The position of Canada Lands and CLC

[34] Canada Lands is a Crown corporation and, by virtue of the *Government Corporations Operation Act*, R.S.C. 1985, c. G-4, an agent of the Crown. CLC is a wholly owned subsidiary of Canada Lands. There is no statute designating CLC as an agent of the Crown. However, the Tzeachten argued in the Federal Court that CLC is an agent of the Crown and was a proper respondent because of its mandate to receive and dispose of the land in issue.

[35] Both corporations were named as respondents in Federal Court proceedings. They did not seek to be removed as respondents. However, they argued in the Federal Court that, because CLC is not a "federal board, commission or other tribunal" as defined in the *Federal Courts Act*, R.S.C. 1985, c. F-7, the Federal Court has no jurisdiction to make an order against it pursuant to section 18.1 of the *Federal Courts Act*. Justice Tremblay-Lamer accepted that argument, and the point was not contested in this appeal. Justice Tremblay-Lamer declined to determine whether CLC was an agent of the Crown.

[36] Despite their success on the question of jurisdiction of the Federal Court, Canada Lands and CLC made written and oral submissions on the merits of the appeal. All but one of the arguments of

Canada Lands and CLC cover the same ground as the Crown arguments. The exception was the alternative argument of Canada Lands and CLC that no duty to consult ever arose in relation to the former CFB Chilliwack lands. This argument is not consistent with Canada's position that it had a duty to consult but had discharged that duty, and for that reason it is not an argument that should be entertained in this appeal. In my view, none of the arguments of CLC and Canada Lands assisted the Court in resolving this appeal.

Conclusion

[37] For these reasons, I would dismiss this appeal. I would award costs to the Attorney General of Canada but not to the other respondents.

"K. Sharlow"
J.A.

"I. agree.
J. Edgar Sexton J.A."

"I agree.
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-480-08
(APPEAL FROM REASONS FOR JUDGMENT AND JUDGMENT OF MADAM JUSTICE TREMBLAY-LAMER OF THE FEDERAL COURT DATED JULY 30, 2008, DOCKET NO. T-745-07)	
STYLE OF CAUSE:	The Tzeachten First Nation et al v. The Attorney General of Canada et al
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 30, 2009
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CONCURRED IN BY:	SEXTON J.A. RYER J.A.
DATED:	November 19, 2009

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