Federal Court of Appeal  Cour d'appel fédérale

Date: 20150814

Docket: A-34-13

Citation: 2015 FCA 177

CORAM: **PELLETIER J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

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

Appellants

and

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

Respondents

Heard at Winnipeg, Manitoba, on January 13, 2014.

Judgment delivered at Ottawa, Ontario, on August 14, 2015.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: PELLETIER J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] This is an appeal from the judgment dated December 20, 2012 of the Federal Court (*per* Justice Hughes): 2012 FC 1474.

[2] Before the Federal Court was an application for judicial review brought by the respondents. The respondents sought to set aside a decision by the appellants ("Canada") to transfer a property called the Kapyong Barracks to a non-agent Crown corporation. The Barracks are located on lands which the respondents claimed to have the right to purchase in priority to other potential purchasers.

[3] The six respondents alleged that Canada owed them a duty to consult with them before the sale and Canada had not fulfilled that duty. They applied for judicial review to the Federal Court for a declaration to that effect and an order restraining the sale.

[4] The Federal Court found that Canada owed a duty to consult four of the respondents and, further, that Canada had failed to fulfil that duty. It restrained the sale until Canada demonstrated that it had fulfilled that duty and imposed a form of court supervision. Canada appeals the Federal Court's judgment.

[5] The Federal Court held that Canada did not owe two of the respondents, Sagkeeng First Nation and Sandy Bay Ojibway First Nation, a duty to consult. Both Sagkeeng and Sandy Bay Ojibway cross-appeal this aspect of the Federal Court's judgment.

[6] For the reasons that follow, I would allow the appeal only on the issue of remedy and would dismiss the cross-appeals with costs.

B. Facts

[7] As will be seen, a number of questions determined by the Federal Court fall to be reviewed in this Court on the basis of the correctness standard of review. Therefore, a full understanding of the facts giving rise to the Federal Court's judgment is required.

[8] At a broad level of generality, this case is about whether Canada should have consulted with the respondent Aboriginal bands and should have considered their interests when deciding how to deal with the Kapyong Barracks.

[9] This issue does not sit in isolation. Surrounding it is a larger context. For over a century, Canada had broken a treaty promise to provide certain Aboriginal bands with lands. And to remedy the broken promise, Canada entered into certain agreements with some of the bands, including four of the respondent bands, to facilitate their acquisition of lands.

[10] These agreements and their purpose in remedying the broken treaty promise are a large part of the backdrop against which Canada's actions must be judged.

(1) The treaty promise: Treaty No. 1

[11] In 1871, certain Aboriginal First Nations in Manitoba signed Treaty No. 1 with Canada. Under that Treaty, these First Nations agreed to give up their title to land that now comprises a large portion of southern Manitoba, including all of the present City of Winnipeg. In the words of the Treaty, they did "cede, release, surrender and yield up to Her Majesty the Queen and successors forever" their lands. This was meant to facilitate immigration and the acquisition and development of land by immigrants.

[12] In return, Canada was to set aside a certain amount of land in specific areas for their exclusive use. None of that land was in the City of Winnipeg. The amount of land to be set aside was 160 acres for every family of five. Over the years, this requirement has been called the "per capita provision."

(2) Canada's broken promise

[13] The Aboriginal bands fulfilled their side of the bargain under Treaty No. 1. But Canada did not. It never fulfilled the per capita provision. It broke the solemn promise it had made.

(3) Initial efforts to remedy the broken promise

[14] Roughly sixty years later, the *Constitution Act, 1930* came into force. Section 11 of the *Constitution Act, 1930* provided for the setting aside of lands for reserves to enable treaty obligations to be fulfilled.

[15] It was not until the 1990's, some 120 years later, that Canada took concrete steps to remedy its breach of Treaty No. 1.

(4) Recognition of the land claims of five First Nations

[16] These concrete steps to remedy Canada's breach of Treaty No. 1 began with Canada's recognition of the land claims of five Aboriginal bands. Four of these are respondents to this appeal: the Long Plain First Nation, the Swan Lake First Nation, the Roseau River Anishinabe First Nation and the Peguis First Nation.

(5) The development of treaty lands entitlement agreements

[17] In the 1990's, a committee comprised of representatives of First Nations, Canada and Manitoba drafted a treaty lands entitlement framework agreement. This framework agreement was signed in 1997 and became a template for specific treaty lands entitlement agreements.

[18] Some First Nations chose not to participate in the treaty land entitlement framework agreement process and negotiated their own agreements. Thus, the Long Plain First Nation concluded its treaty land entitlement agreement in 1994, the Swan Lake First Nation signed its own treaty land entitlement agreement in 1995 while the Roseau River Anishinabe First Nation's treaty land entitlement agreement was signed in 1996. Only the Peguis First Nation participated in the framework agreement process and signed a treaty land entitlement agreement based on the framework agreement. There are significant differences between the earlier agreements and the Peguis First Nation's agreement.

[19] A fifth band whose land claim was recognized, the Brokenhead Ojibway Nation, ultimately discontinued its claim. Although Brokenhead was involved in many of the events giving rise to this matter, ultimately its involvement has no bearing on this matter and so it will not be referred to further in these reasons.

[20] In the rest of these reasons, the remaining four respondents who had signed treaty land entitlement agreements with Canada shall be referred to collectively as the "four respondents."

(6) Sagkeeng First Nation and Sandy Bay Ojibway First Nation

[21] Canada did not recognize the land claims of two Aboriginal bands who are respondents to this appeal: the Sagkeeng First Nation and the Sandy Bay Ojibway First Nation.

[22] The claim of Sagkeeng remains outstanding, with Canada awaiting further submissions and evidence concerning it. In the present case, Sagkeeng has not filed any evidence in support of an unfulfilled per capita reserve land entitlement under Treaty No. 1.

[23] In the case of Sandy Bay, both Canada and the Indian Claims Commission have rejected its claim on the ground that its treaty land entitlement has already been fulfilled. Accordingly, Canada has not entered into treaty land entitlement agreements with Sagkeeng and Sandy Bay.

(7) The four treaty land entitlement agreements

[24] The agreements with Long Plain First Nation and Swan Lake First Nation provide that Canada will provide the First Nations with a sum of money (which has been paid) to enable each First Nation to purchase land on the open market (within certain limits). Canada also undertakes to take all necessary steps to set the purchased land aside as a reserve for the benefit of the First Nations, if certain conditions are met, one of which is that the purchased land is located in the First Nation's traditional territory.

[25] In the case of the Roseau River Anishinabe First Nation, Canada entered into a more detailed agreement. Like the agreements with Long Plain and Swan Lake, Roseau River was provided with funds with which to acquire lands which Canada undertook to set aside as reserve lands, if certain conditions were met, one of which was that the purchased land was in Roseau River's traditional territory or in the Treaty 1 territory. However, the agreement went further. Under section 4.10 of the agreement, Canada promised that in fulfilling its obligations under the

agreement that it would reasonably exercise any discretions that are preconditions to its acts, it would perform its obligations on a timely basis and it would "use its best efforts" to achieve the agreement's objectives. Further in section 4.12, Canada promised Roseau River that it could acquire at fair market value land under Canada's administration and control that Canada was prepared to make available.

[26] The agreement with the Peguis First Nation is substantially different. Peguis can select a specified amount of unoccupied provincial land and subject to certain conditions, land anywhere in Manitoba, which includes surplus federal land. Under subsection 3.09(6) of the treaty land entitlement agreement, Canada agreed that "wherever possible" title to surplus federal land should be transferred to Peguis, subject to the claims of other bands. Subsection 3.09(7) confirmed that an expression of interest by Peguis in land "does not provide a right or create a guarantee that the land will be available" or that it can be set aside as a reserve. In sections 28.01 and 28.02 of the agreement, Canada also agreed that it would "in good faith, use [its] best efforts to fulfil the terms" of the agreement and to act on a timely basis. Canada is obligated to provide funding to Peguis so that it could purchase land. The Peguis Agreement also requires Canada to provide notice whenever it intends to dispose of certain surplus federal land: see subclause 1.01(82). Like the other agreements, the Peguis agreement does not obligate Canada to sell surplus federal land to Peguis. Rather, Peguis can acquire such land on a willing buyer / willing seller basis.

[27] Canada did not ratify the agreement with the Peguis First Nation until April 2008. Although the agreement became effective only after Canada made the decision being reviewed

(in 2007), the Kapyong Barracks today remain in Canada's possession, unsold. Peguis submits, and I agree, that Canada is now obligated to deal with the Barracks in accordance with the agreement.

[28] All four agreements contain a broad release in favour of Canada. While the wording of each is somewhat different, all mirror the terminology used in the release provision in the agreement with Long Plain. Under that provision, Long Plain "cede[d], release[d] and surrender[ed] to Canada all claims, rights, title and interest it ever had, now has or may hereafter have by reason of or in any way arising out of the Per Capita Provision." It also "release[d] and forever discharge[d] Canada…from… all obligations imposed on and promises and undertakings made by Canada relating to land entitlement under the Per Capita Provision."

(8) The Kapyong Barracks

[29] The Kapyong Barracks, located in the City of Winnipeg, is in two parts. One part, roughly 160 acres, has a former armed forces base on it. This part of the Barracks, which I shall call the "Barracks property" for the remainder of these reasons, was the subject of the application for judicial review before the Federal Court. The other part, roughly 62 acres and containing quarters for married personnel, was not part of the application. The Barracks property lies within the lands covered by Treaty No. 1.

[30] From the perspective of the four respondents, the Barracks property is unique and important. It is a large parcel of land in an urban area that is available for sale and could be

redeveloped by the respondents. Some of the traditional lands formerly inhabited by some of the four respondents now constitute the City of Winnipeg. These days, large pieces of available land in an urban area are not commonplace.

(9) The announcement of the closing of the Barracks

[31] In April 2001, the Department of National Defence announced that it was closing the military base located on the Kapyong Barracks. The four respondents learned of the decision through the news media—Canada did not advise them of the decision.

(10) Initial expressions of interest in the Barracks property

[32] Later in April 2001, two First Nations, the Brokenhead Ojibway Nation and the Long Plain First Nation, expressed interest in the Barracks property. Over a year later, in August 2002, Long Plain wrote again, expressing interest in the Barracks property and observing that it had not received a response to its initial expression of interest.

[33] At this time, Long Plain could do nothing more than make a general expression of interest. Canada had not advised any of the four respondents how much of the Barracks property it was selling, the characteristics of the land or any information bearing upon the value of the land.

(11) Canada's initial plans

[34] Around the time of these initial expressions of interest, Canada went ahead with certain decisions about the Barracks property.

[35] In November 2001, Canada decided that the Barracks property would be dealt with through a Treasury Board policy entitled "Treasury Board Policy on the Disposal of Surplus Real Property" and a "strategic disposal process" within the meaning of the policy. The significance of this is discussed immediately below.

[36] In September 2002, Canada finally responded to the Long Plain First Nation's initial expression of interest in April 2001. Canada notified it that it had classified the Barracks property as "strategic" under the Treasury Board policy.

(12) The Treasury Board policy

[37] The Treasury Board policy governed the disposition of surplus federal property. Under section 7.5 of that policy, surplus federal land fell into two categories, "routine" and "strategic."

[38] Properties of lesser value that could be sold easily and without any substantial investment fell within the "routine" classification. For these properties, interests expressed by the Department of Indian Affairs and Northern Development would be taken into account.

[39] Properties with potential for enhanced value or that were highly sensitive or a combination of the two fell within the “strategic” classification. Under the “strategic” classification, input could be had from “government agencies.” The end result of the properties in the “strategic” classification is usually their transfer to the Canada Lands Company Limited. This company, a federal non-agent corporation, disposes of property for the federal government to third parties.

[40] Canada placed the Barracks property into the “strategic” category. This meant that the Barracks property was not going to be made available to the four respondents on a priority basis. Instead, as a “strategic” property, Canada could assess the value of the Barracks property and could transfer it to the Canada Lands Company.

[41] In this case, the parties have proceeded on the basis that, on the current state of the law, the Canada Lands Company is not subject to any duties to consult with Aboriginal peoples. This is open to question, as the Government of Canada controls the Canada Lands Company and, in appropriate circumstances, could be ordered to cause the Canada Lands Company to act or not act in a particular way. Nevertheless, the parties before us have proceeded on the basis that dealing with the Barracks property through a “strategic disposal process” could have a significant practical effect: the Barracks property would be transferred from an entity subject to duties to consult with Aboriginal peoples (Canada) to a private entity free from any such duties (Canada Lands Company). On this view of things, the Canada Lands Company could then transfer the Barracks property to any third party free from any need to consult with Aboriginal peoples.

(13) Canada's conduct immediately after classifying the Barracks property as "strategic"

[42] A few months after the Barracks property was classified as "strategic," Long Plain renewed with Canada its expression of interest.

[43] Canada replied that any disposal of the Barracks property would take place as a "strategic disposal process" through the Canada Lands Company.

[44] Despite that position, Canada was well aware that the four respondents might have an interest in the Barracks property. The four respondents obtained access to information documents evidencing communications between the Department of Indian Affairs and Northern Development and the Department of National Defence. These show that Canada knew that Aboriginal bands with treaty land entitlement agreements might express interest in the Barracks property.

[45] Despite that knowledge, in December 2002 the Department of Indian Affairs and Northern Development sent a letter to each of the four respondents notifying them that the Barracks property had been classified as "strategic" and so their interests would not be considered on a priority basis. However, the Department advised them that if they had an interest in the Barracks property, they should contact a particular person at the Department of National Defence. The Department offered no information about the land itself.

(14) Responses to Canada's invitation to express interest

[46] The Long Plain First Nation was the only one of the four respondents to respond to Canada's December 2002 letter. It told Canada that it was still interested in the Barracks property. Having no information about the land, it offered no particulars as to its interest.

(15) Canada invites Long Plain to disclose its plans

[47] In March 2003, Canada invited the Long Plain First Nation to advise how much of the Barracks property it was interested in acquiring, what it was willing to pay for it, and what it was going to do with the land. This was an empty invitation—Long Plain had been given no information about the Barracks property, no appraisals, no environmental assessments, no photos. At this time, Long Plain was not even invited to view the Barracks property.

[48] In June 2003, a representative of Canada met with Long Plain. Canada provided Long Plain with aerial photographs of the Barracks property and information about the buildings on it. Around this time, Canada reconfirmed that the Barracks property would be dealt with as a strategic disposal. During the summer of 2003, Long Plain requested more time to provide Canada with information about its desire to acquire the Barracks property.

[49] By September 2003, the Department of National Defence had in hand an appraisal of the Barracks property. This appraisal was not provided to any of the First Nations.

[50] An important meeting took place at this same time. Representatives of Canada met with representatives of Long Plain and Roseau River. Canada asked them to prepare their proposals for the development of the Barracks property so that their interest could be taken into account by the Department of National Defence when it prepared its submission to Treasury Board regarding the disposition of the Barracks property. Again, though, by this time Canada had already advised the four respondents that the Barracks property would be dealt with through the strategic disposal process involving Canada Lands Company.

[51] Notes of the meeting taken by Canada's representative show that Long Plain and Roseau River took a strong position in response:

> [The First Nations] [w]ould not entertain any notion of a balancing of Crown interest in the disposal; their interest comes first and must be addressed before all others. Would similarly not accept the idea that the property was to be re-integrated into the community employing local (that is, City of Winnipeg) planning processes. The perspective of balancing of interests was rejected out of hand.

At this time, Canada had never consulted with any of the four respondents about any of its desires concerning the future use of the Barracks property, including its desire that local planning processes be followed and the Barracks property be re-integrated into the community.

[52] In his notes, Canada's representative also noted that Long Plain and Roseau River considered Canada's policy considerations to be irrelevant when it comes to treaty obligations. Nor did they "once talk about their vision for the property," preferring instead to offer "polemical" views. He recorded that Long Plain and Roseau River wanted Canada to acquire the

property for them or they should be allowed to purchase it at less than market value, and that they should be able to "develop the property as they see fit."

[53] At the same time, the notes of Canada's representative reveal that Long Plain and Roseau River found it difficult to make any offer based on the information given and needed a site visit. In the words of the notes, "[a] site visit was seen to be a pre-condition for a proposal."

[54] Several meetings followed between Long Plain and the Department of Indian Affairs and Northern Development.

[55] In January and February 2004, representatives of Long Plain were given a tour of the Barracks property. At no time were they given a copy of the appraisal of the property. In fact, during the events giving rise to these proceedings, none of the four respondents had ever been given a copy of the appraisal to assist them. There is no evidence in the record showing why they could not be given the appraisal.

[56] In January 2004, counsel for Canada wrote to counsel for Long Plain, advising as follows:

> …Long Plain has been asked, if it is interested in doing so, to provide a proposal to acquire some, or all, of the land. That proposal, if one is made, could be considered before a final decision is made on disposal. It is my understanding that no proposal has yet been submitted by your client. [If] Long Plain is interested in acquiring some or all of the property, this proposal should be submitted as soon as possible. Any proposal should be submitted to [the Department of National Defence]."

[57] For a while after January 2004, matters fell silent. In Canada's case, it had no further communication with any of the four respondents for three years. But it continued to work its way towards a disposal of the Barracks property.

(16) Treasury Board's approval of the sale of the Barracks property to the Canada Lands Company

[58] On May 10, 2005, in furtherance of the decision taken long ago to dispose of the Barracks property through the strategic disposition process, Treasury Board approved the sale of the Barracks property to the Canada Lands Company. Canada did not advise any of the four respondents of this development.

(17) The Treasury Board policy is replaced

[59] In November 2006, Treasury Board issued a directive entitled "Directive on the sale or Transfer of Surplus Real Property." It replaced the 2001 policy referred to in paragraph 35, above. It maintained the classification of properties as "routine" and "strategic." But it added a new requirement: the disposal of "strategic" property was subject to an "assessment of federal and other stakeholder interests." Canada did not disclose this to the four respondents.

[60] At this point, the Barracks property had not actually been transferred to the Canada Lands Company, though that transfer had already been approved. In the Federal Court, there was no evidence to the effect that although the Barracks property had been classified as "strategic," it could not be reclassified under the new policy. In this Court, in response to questioning, Canada

could not point to any impediment to reclassifying the Barracks property in order to facilitate their acquisition by the four respondents under their treaty land entitlement agreements.

(18) The bands pursue their interests

[61] In November 2006, a number of the respondents—not knowing that the sale of the Barracks property had already been approved—wrote to the Treasury Board asking for assurances that their rights would be respected. They requested a meeting. In January 2007, Treasury Board replied stating that there was "no change to the approach through which priority interests have an opportunity to express an interest in surplus lands."

[62] In August 2007, the respondents wrote to the Department of Indian Affairs and Northern Development, asserting a claim against the Barracks property as part of their rights under their treaty land entitlement agreements. Initially, the respondents asserted a claim to Aboriginal title to the whole City of Winnipeg. Later, in legal proceedings, they asserted a right to be consulted stemming from the unfulfilled per capita provision in Treaty No. 1. The respondents sought assurances that their claims would be respected and requested a meeting to discuss the matter. Having received no response, the respondents wrote again in September and November 2007.

(19) Canada confirms the approval of the transfer of the Barracks property to the Canada Lands Company

[63] As mentioned above, in May 2005 Treasury Board had already approved the transfer of the Barracks property to the Canada Lands Company. On November 23, 2007, Treasury Board confirmed that approval.

[64] It appears that confirmation was required because the Department of National Defence had submitted revised plans. The revised plans did not affect the thrust of the matter. As far as Canada was concerned—as it had intended from the very outset—the Barracks property was to be transferred to the Canada Lands Company for disposal.

[65] Canada did this without meeting any representatives of the respondents or responding to their August, September and November letters.

[66] The November 23, 2007 confirmation of approval became the subject-matter of the respondents' application for judicial review, the Federal Court's judgment in this case and this appeal.

(20) Canada responds to the respondents' letters

[67] In December 2007, Canada finally replied to the respondents' letters of August, September and November 2007. It told them that Aboriginal title to the Barracks property had been surrendered by Treaty No. 1.

[68] In its December 2007 letter, Canada added that once the Barracks property was transferred to the Canada Lands Company, the respondents should approach that corporation. Seen from the perspective of the four respondents, this was an empty offer: they were concerned that if the Canada Lands Company were free from any duties to consult they would simply be treated as one group of bidders among so many other bidders.

(21) Legal proceedings begin

[69] The respondents challenged the Treasury Board's decision by way of judicial review. Among other things, they sought a declaration that Canada had a legal duty to consult and accommodate them before transferring the Barracks property. They also sought an order restraining the transfer of the Barracks property to the Canada Lands Company.

[70] Having been told little about Canada's plans for the Barracks property, the respondents were driven during the litigation to pursue access to information requests to find out what had happened behind the scenes. Broadly speaking, that information showed a measure of confusion among various departments and ministries of Canada concerning the proper process to follow concerning the sale of the Barracks property.

(22) Initial determinations by the Federal Court and this Court

[71] The Federal Court (*per* Justice Campbell) held that Canada had a legal duty to consult before it disposed of the Barracks property and Canada did not fulfil that duty: 2009 FC 982.

[72] This Court reversed the judgment of the Federal Court: 2011 FCA 148, 419 N.R. 289. It held that the Federal Court's reasons were inadequate. Rather than finding facts itself, this Court remitted the matter to the Federal Court for re-decision. The judgment of the Federal Court in that re-decision is the matter now before us.

(23) The Federal Court's re-decision: the matter now before us

[73] During the second hearing in the Federal Court, for the first time Canada conceded that it owed a duty to the four respondents to consult with them. However, it submitted that Canada had fulfilled that duty.

[74] The Federal Court rejected that submission and allowed the application for judicial review as it pertained to the four respondents.

[75] The Federal Court held that the scope of the duty was fairly demanding, around the middle of the spectrum of consultation outlined by the Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511. This meant that Canada had to give notice, disclose information, meet with the First Nations to hear and discuss their concerns, take their concerns into meaningful consideration and advise of the course of action taken and why.

[76] According to the Federal Court, Canada fell way short of the mark (at paragraphs 78-80). It described Canada's conduct as "egregious" (at paragraph 79). In its view, Canada did not

respond in a meaningful way to the concerns raised by the respondents from 2001-2004 (at paragraphs 76-78). From 2006-2007, Canada simply ignored the respondents who were later told to take their concerns to Canada Lands Company.

[77] In its judgment, the Federal Court set aside the Treasury Board's November 23, 2007 confirmation of approval of the sale of the Barracks property to the Canada Lands Company. It restrained Canada from selling the Barracks property to the Canada Lands Company or anyone else "until [it] can demonstrate to the Court that [it has] fulfilled in a meaningful way [its] duty to consult with the [First Nations]." In effect, this was not just a restraining order; it was also a supervision order.

[78] As for the Sagkeeng First Nation and Sandy Bay Ojibway First Nation, the Federal Court held that Canada owed them no duty to consult. On the evidence before it (see paragraphs 21-23 above), Sagkeeng and Sandy Bay had not established any rights or interests necessary to establish such a duty. In particular, neither had demonstrated any unfulfilled per capita reserve land entitlement under Treaty No. 1 and neither had a treaty land entitlement agreement.

[79] Other specific aspects of the Federal Court's reasons will be commented upon in the course of these reasons.

C. The issues

[80] In this case, the Federal Court was reviewing the Treasury Board's November 23, 2007 decision approving the transfer of the Barracks property to the Canada Lands Company. The question before the Federal Court was whether that decision could stand on the basis of the consultations undertaken by Canada.

[81] In the circumstances of this case, that general question resolved itself into a number of particular questions:

(1) Did Canada owe duties to Sagkeeng First Nation and Sandy Bay Ojibway First Nation to consult with them?

(2) To the extent that duties were owed (and Canada conceded the existence of duties to consult owed to the four respondents), what is the content and scope of those duties?

(3) On the facts of this case, were those duties fulfilled?

(4) If not, what remedy should be ordered?

[82] In these reasons, I shall deal with the Federal Court's answers to these questions in that order. But first, some comments about the standard of review are apposite.

D. The standard of review

[83] The first task for this Court on an appeal from a judgment on an application for judicial review is to determine whether the Federal Court judge chose the proper standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 46-47.

[84] Taking the first three questions set out above, the Federal Court held that the standard of review was correctness on the first two questions and reasonableness on the third question (at paragraph 20).

[85] Before us, the parties agree that the Federal Court properly chose the standard of review.

[86] Although this Court is not bound by the parties' agreement concerning the standard of review (see *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152), I agree with the parties. The standard of review adopted by the Federal Court is consistent with holdings on this point by the Supreme Court: *Haida Nation*, above at paragraph 61; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at paragraphs 63-65; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 at paragraph 48. I would add only one gloss to this. To the extent that the existence, content and scope of the duties to consult depends upon factual findings, a "degree of deference" to those findings "may be appropriate": *Haida Nation* at paragraph 61.

[87] There remains one final standard of review issue to be resolved. Having set aside the November 23, 2007 decision approving the sale of the Barracks property to the Canada Lands Company, the Federal Court had to consider what remedy to give. As mentioned above, among other things, it decided to restrain Canada from selling the Barracks property until such time as Canada demonstrated that it had fulfilled its duty to consult. Its choice of remedy was a factually-suffused exercise of discretion. What is the standard of review for that sort of remedial decision?

[88] Remedial decisions by the Federal Court on judicial review fall into a special category. They are decisions not about what the administrative decision-maker has decided—a realm where the administrative law standards of review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 hold sway—but rather what the Court should do, not unlike decisions it makes itself on preliminary objections to the hearing of the judicial review, such as the existence of an adequate alternative forum, mootness or prematurity. This Court has ruled that the appellate standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 should apply to those decisions: *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139 at paragraphs 37-39; *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, 467 N.R. 201 at paragraphs 25-26.

[89] It seems to me that remedial decisions of the Federal Court as a reviewing court fall into the same category. Thus, consistent with *Housen*, where the remedy depends upon the factual appreciation and discretion of the court—a question of mixed fact and law where facts and discretion predominate—the appellate court should accord deference to the remedial decision.

This standpoint is consistent with other decisions of this Court: see, *e.g.*, *Canada (Attorney General) v. Jodhan*, 2012 FCA 161, 350 D.L.R. (4th) 400 at paragraph 75.

[90] The Supreme Court has not definitively and overtly resolved the standard of review for remedial decisions in administrative law. However, it does seem to accord deference to the factually-suffused decisions of reviewing courts that smack of remedial discretion, provided there is no error in principle: see, *e.g.*, *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at paragraph 39 ("deference" for this Court's decision to dismiss an application for judicial review because of the existence of an adequate alternative forum); see also *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 at paragraph 87 (absent any error in an extricable legal principle, deference should be given to an exercise of remedial discretion in favour of ongoing court supervision).

[91] Accordingly, for the purposes of the Federal Court's remedial decision in this case, absent any error in legal principle the standard of review shall be one of deference.

E. Should the Federal Court's judgment stand?

[92] Having found that the Federal Court chose the proper standard of review on the various questions it had to address, we must ask whether the Federal Court properly applied the standard of review: *Agraira*, above at paragraphs 46-47. If it did, then, subject to its choice of remedy, its judgment must stand.

[93] In the case of the questions that we review for correctness, we simply assess whether the Federal Court erred. In the case of those questions subject to reasonableness review, we re-do the reasonableness analysis to see if we reach the same conclusion as the Federal Court. In *Agraira* at paragraph 46, the Supreme Court likened this to "step[ping] into the shoes' of the lower court."

(1) Did Canada owe duties to Sagkeeng First Nation and Sandy Bay Ojibway First Nation to consult with them?

[94] As mentioned above, we are to review the Federal Court's answer to this question for correctness.

[95] The Federal Court concluded that Canada did not owe duties to Sagkeeng and Sandy Bay. It relied upon the facts summarized at paragraphs 21-23 above. Simply put, there was no evidence in the record to support that either had a land claim or an unfulfilled per capita reserve land entitlement under Treaty No. 1. In fact, in Sandy Bay's case, Canada and the Indian Claims Commission have found that its treaty land entitlement has already been fulfilled. Therefore, the Federal Court did not find that any of the necessary prerequisites for a duty to consult were met.

[96] I find no error on the part of the Federal Court on this issue. Therefore, I would dismiss the cross-appeals of Sagkeeng and Sandy Bay.

[97] At the beginning of the hearing of the application in the Federal Court, Canada conceded that it owed the other four respondents a duty to consult, a concession which it re-affirmed

before this Court. As the respondents framed their case in terms of the duty to consult, and the Federal Court initially decided the case on that basis, this concession did not appear to require any justification. However, this case may or may not fall within the ambit of the jurisprudence in which a duty to consult has been found because government action threatened to permanently interfere with lands in which First Nations claimed an aboriginal right or title. In light of Canada's concession, the way in which this case has been developed to date, and the undesirability of seeking further submissions at this point, I am proceeding on the basis that the issues before us—to be assessed according to the standard of review above—are the content and scope of Canada's duty to consult with the other four respondents, whether Canada fulfilled that duty and, if not, what remedy should be granted.

[98] Whether or not cases such as this one come within the duty to consult as articulated in *Haida*, above, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, and *Beckman*, above, I leave to be decided in a future case. I might add that it seems to me that the result is largely the same when the matter is viewed through the lens of the Crown's obligation to act to preserve the honour of the Crown.

(2) What is the content and scope of Canada's duty to consult with the four respondents?

[99] As mentioned in paragraphs 84-86, above, we are to review the Federal Court's answer to this question for correctness, giving some deference to any related factual-findings.

[100] On this question, examining the circumstances of this case, the Federal Court held that the duty to consult entailed not just the minimal aspects of the obligation of giving notice, disclosing information and responding to concerns raised but extended to a duty to meet, a duty to hear and discuss, a duty to take the First Nation's concerns into meaningful consideration and a duty to advise as to the course of action taken and why.

[101] Broadly, I agree with this conclusion of the Federal Court subject to certain modifications discussed below. However, I do so for reasons different than those offered by the Federal Court.

[102] In reaching its conclusion, the Federal Court properly charged itself as to the applicable law (at paragraph 71). That applicable law provides that the content and scope of the duty to consult varies with the circumstances. It is best thought of as a spectrum of duties, at one end minimal and at the other end maximal. The duty 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": *Haida Nation* at paragraph 39; *Carrier Sekani*, above at paragraphs 48 and 51; *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204, 405 F.T.R. 182 at paragraphs 113-114; *Adams Lake Indian Band v. Lieutenant Governor in Council*, 2012 BCCA 333, 35 B.C.L.R. (5th) 253 at paragraphs 59 and 74-79.

[103] Even at the lower end of the spectrum, the duty can require significant conduct by the Crown: providing notice to the First Nation, engaging directly with the First Nation, providing timely information about matters relevant to known First Nation interests, providing information about potential adverse impacts on those interests so that concerns can be expressed, listening to

concerns expressed, considering those concerns, and attempting to minimize any adverse effects: *Mikisew*, above at paragraph 64.

[104] The scope and nature of the duty to consult is also affected by the entire factual matrix of this case—in this case guided by the treaty land entitlement agreements and the case law on the duty to consult but also by the concepts of honour, reconciliation and fair dealing that underlie those agreements and the duty to consult. When kept front of mind, these concepts help to inform the nature and scope of the duty: *Haida Nation*, above at paragraphs 27 and 36. The Supreme Court explained this idea in the following way:

> The jurisprudence of this Court supports the view that 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*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" [*sic.*] (emphasis in original).

(*Haida Nation*, above at paragraph 32.)

[105] The honour of the Crown in its dealings with Aboriginal peoples is of paramount importance in matters such as this. In the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples. Repeatedly, this idea has been held to pervade this area of law: see, e.g., *R. v. Taylor* (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227

(Ont. C.A.), leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385; *R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193; *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324; *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513; *Mikisew Cree First Nation*, above. Indeed, today the honour of the Crown has been confirmed as a constitutional principle: *Beckman*, above at paragraph 42. The honour of the Crown "is always at stake in its dealings with Aboriginal peoples" and "is not a mere incantation, but rather a core precept that finds its application in concrete practices": *Haida Nation*, above at paragraphs 16-19.

[106] Because the concepts of honour, reconciliation and fair dealing are relevant, "[t]he history of dealings between the Crown and a particular First Nation" are also relevant: *Mikisew Cree First Nation*, above at paragraph 63.

[107] To date, the Supreme Court has developed the law concerning the scope and nature of the duty to consult as a special body of law, divorced from normal administrative law principles. To me, however, administrative law remains relevant and the special body of law developed by the Supreme Court is consistent with it. It may be useful in cases like the present to think of the duty to consult within the rubric of administrative law. After all, the matter before us is an administrative law matter—an appeal of an application for judicial review brought to challenge the Treasury Board's November 23, 2007 discretionary decision to sell the Barracks property to the Canada Lands Company.

[108] As a general matter, where the legal and practical interests of a party may be affected by a discretionary decision, the decision-maker must afford procedural fairness: see, *e.g.*, *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44. A higher level of procedures is often accorded where the legal and practical interests are higher: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paragraph 25. Where the decision-maker has undertaken that certain procedures will be followed, for example in an agreement, the decision-maker will be held to them: *Baker* at paragraph 26. And where Aboriginal peoples are concerned, the concepts of honour, reconciliation and fair dealing—matters of constitutional import—may bear upon the matter, sometimes significantly, affecting the level of procedures to be afforded.

[109] In this case, Canada, the owner of the Barracks property, seeks to divest itself of that property. In doing so, it has a discretion concerning how to go about that. To the four respondents, this is unique and important land: see paragraph 30, above. And the concepts of honour, reconciliation and fair dealing are very much in play in this case.

[110] On this last-mentioned point, I note that in lieu of full satisfaction of the four respondents' unfulfilled right to receive lands under the per capita provision of Treaty No. 1—which is now impossible—the four respondents now have rights under the treaty land entitlement agreements concerning lands that may come available. As land buying opportunities arise over time, the four respondents may be able to acquire lands, presently unascertained, in substitution for the lands promised under the unsatisfied per capita provision of Treaty No. 1. The treaty land entitlement agreements work to facilitate the realization of those opportunities.

[111] It is true that, putting aside arguments that might be made in a future case on the basis of specific wording in some of the agreements, the four respondents do not have rights to demand specific conveyances of particular lands in Manitoba that become available. However, the purpose of the agreements is clear: over time, the four respondents will acquire as yet unascertained lands in Manitoba to fulfil the unmet promise of Treaty No. 1. By signing the treaty land entitlement agreements, Canada has committed to that purpose.

[112] In this case, the Barracks property owned by Canada has become available for disposition. To the extent that each of the First Nations' treaty land entitlement agreement applies to the Barracks property, Canada is no ordinary vendor. Canada's exercise of discretion concerning how to go about the sale of the Barracks property must be guided by the treaty land entitlement agreements it has signed, its commitment to the purpose of those agreements, and the concepts of honour, reconciliation and fair dealing. In this case, honour, reconciliation and fair dealing—often expressed as the obligation to avoid sharp dealing—are particularly important because of Canada's broken promise in Treaty No. 1. The agreements, designed to redress that, are not just commercial agreements whose meaning is divined by parsing the technical meaning of particular words in the agreement.

[113] For this reason, I am not persuaded by Canada's primary submissions on this point. Canada says that the extent of its duty to consult must be found in the written words of the treaty land entitlement agreements. In particular, "the consultative obligations which arose were in respect of those First Nations with Treaty Land Entitlement Agreements, to the extent as stipulated therein" [my emphasis]: Canada's Memorandum of Fact and Law at paragraph 3. The

agreements exclusively establish "the specific nature and extent of the parties' rights and obligations regarding Per Capita Provision reserve land entitlement" and "the manner in which those rights and obligations are to be implemented": Canada's Memorandum of Fact and Law at paragraph 43. In the case of the three treaty land entitlement agreements other than the one with the Peguis First Nation, "the only obligation upon Canada that would arise [from them] would be to give due/fair consideration to any offer made by one of these First Nations for the purchase of the property": Canada's Memorandum of Fact and Law at paragraph 45. In the case of the agreement with Peguis First Nation, "[s]lightly more expansive rights/obligations are provided" but these trigger duties to consult only "at the low end of the spectrum": Canada's Memorandum of Fact and Law at paragraph 46. Canada adds (at paragraph 47 of its Memorandum) that the relevant question is whether "transfer of the property to [the Canada Lands Company would] render the reserve land entitlement of any First Nation unattainable, or adversely impact upon the ability of First Nation to achieve its reserve land entitlement"?

[114] As a result of this analysis, Canada says that in the case of Long Plain, Swan Lake and Roseau River, Canada was only obligated "to give due/fair consideration to any offer made by one of [them] for the purchase of the Property": Canada's Memorandum of Fact and Law at paragraph 45. In the case of the Peguis First Nation, Canada admits that its treaty land entitlement agreement contains "[s]lightly more expansive rights/obligations" when Canada intends to sell surplus federal land: Canada's Memorandum of Fact and Law at paragraph 46. Under that agreement, Canada must give notice that it intends to dispose of the land, provide an appraisal of the fair market value of the land and be afforded with an opportunity to purchase the land. But, in the end, Canada is not obligated to sell the land to the Peguis First Nation.

[115] Canada assures us that its position does not mean that the treaty land entitlement agreements "were intended to effect a contracting out of its duty of honourable dealing" or that they "serve to extinguish Per Capita Provision treaty rights": Canada's Memorandum of Fact and Law at paragraph 43. Canada's position is that while the mere execution of the treaty land entitlement agreements does extinguish Per Capita Provision treaty rights, the fulfillment of the rights and obligations to any particular First Nation under its agreement discharges Canada's obligations to that First Nation under the Per Capita provisions of Treaty No. 1.

[116] The problem is that Canada has focused too much upon a technical non-purposive interpretation of the terms of the treaty land entitlement agreements and in particular the specific wording of the release provisions. In Canada's view, the sum total of its duty to consult the four respondents is set out in the treaty land entitlement agreements and those agreements must be read narrowly according to their precise text without regard to the broader considerations described above.

[117] In my view, the treaty land entitlement agreements, seen in their proper historical context, reveal a genuine, *bona fide* desire, intention and commitment on the part of Canada—consistent with its obligations of honourable conduct, reconciliation and fair dealing with Aboriginal peoples—to engage in a process to rectify Canada's broken promise in Treaty No. 1 over time. To fulfil that desire, intention and commitment, Canada must act like the willing seller contemplated in the treaty land entitlement agreements. It must make its intentions concerning its property known to parties which, to its knowledge, have an interest in acquiring the property, provide them relevant information, give them the opportunity to make their intentions known,

and consider their proposals carefully. While specific language in the treaty land entitlement agreements ousting that level of interaction between Canada and the four respondents would have to be respected (see *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557, 2010 SCC 17 at paragraph 7), I note that there is no such language here. In the end, as Canada frequently reminds us in its Memorandum, Canada is under no obligation to convey the lands. But the process Canada must follow is more involved than it urges upon us.

[118] Agreements such as these are not be interpreted like commercial contracts. Instead, they must be interpreted in accordance with the objectives of honourable conduct, reconciliation and fair dealing with Aboriginal peoples:

> The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

(*Beckman*, above at paragraph 10; and see also paragraphs 12, 67 and 71.)

[119] As well, Canada cannot contract out of its obligations to act honourably, to deal fairly and to consult with First Nations. Put another way, agreements it enters into with Aboriginal

peoples should be interpreted as much as possible to ensure consistency with those obligations. As the Supreme Court has said:

> 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.

(*Beckman*, above at paragraph 61.)

[120] I note that except for the treaty land entitlement agreement with the Peguis Nation—which does require specific forms of consultation—the other agreements are silent on the issue. Given the wider context behind the agreements—in particular, their purpose in redressing Canada's broken promise under Treaty No. 1— and given the larger obligations to act honourably, to deal fairly and to consult with First Nations, I do not take silence on the issue of consultation in the agreements to be a positive statement that the consultation in this case with the four respondents can be as limited as Canada says.

[121] In these circumstances, Canada's obligation was not just to give notice to the four respondents that it was selling the Barracks property and offer a bit of information to them about it. In these circumstances, given the background of Treaty No. 1, the purposes behind the treaty land entitlement agreements, and the concepts of honour, reconciliation and fair dealing, much more was needed. As the British Columbia Court of Appeal has said:

> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, whenever possible, demonstrably integrated into the proposed plan of action.

(*Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 D.L.R. (4th) 470 at paragraphs 159-160 cited with approval by the Supreme Court in *Mikisew Cree First Nation*, above at paragraph 64.)

[122] In the end, defining the level of the duty of consultation or the requirements imposed by the duty to act honourably are, in light of the above principles, a matter of some subjectivity and impression. The cases help, but only to some extent.

[123] The cases show that at the lower end of consultation, Canada must "…give notice, disclose information and discuss any issues raised in response to the notice": *Haida Nation* at paragraph 43. This means that Canada must engage with the respondents, meaning it must "solicit and listen carefully" to the respondents' concerns: *Mikisew Cree First Nation*, above at paragraph 64.

[124] After much reflection guided by the cases, for the reasons I have given above, I agree with the Federal Court that Canada's obligation went beyond that minimal level of consultation. Canada must be in close and meaningful communication with the four respondents, give them relevant information in a timely way, respond to relevant questions, consider carefully their fully-informed concerns, representations and proposals, and, in the end, advise as to the ultimate course of action it will adopt and why.

[125] If the issue is approached from the perspective of the obligations flowing from the honour of the Crown, the result is much the same.

[126] In both cases, Canada's conduct in relation to each of the four respondents will have to be guided by the specific provisions in the treaty land entitlement agreement with that respondent.

[127] The matter can be put differently. It is useful to remember that this Court in fact is sitting in appeal of an application for judicial review brought to challenge the Treasury Board's November 23, 2007 decision to transfer the Barracks property to the Canada Lands Company. That decision is a discretionary decision.

[128] In reviewing the exercise of that discretion, one must first consider what factors the Treasury Board (or, more generally, Canada) had to take into account. Here, there are several factors. Canada cannot transfer the Barracks property to the Canada Lands Company until the duty to consult is fulfilled. Canada must also have regard to the specific terms of the treaty land entitlement agreements. Against these considerations, Canada may also have regard to other policy considerations. For example, perhaps Canada has a legitimate interest in the future use of the land and the consistency of that use with municipal bylaws and requirements. Perhaps it has other legitimate concerns. Put another way, "[a]boriginal concerns [are to] be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns": *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 at paragraph 2.

[129] Precisely what factors might have to come to bear in the decision and how they might be weighed need not be fully enumerated and settled upon in this case. However, to reiterate, the foregoing analysis suggests that in assessing whether to sell the land and to whom, Canada must be in close and meaningful communication with the four respondents, give them relevant information in a timely way, respond to relevant questions, consider carefully their fully-informed concerns, representations and proposals, follow any relevant provisions in treaty land entitlement agreements and, in the end, advise as to the ultimate course of action it will adopt and why. In circumstances such as these, as long as the consultation is meaningful, Canada has no obligation to reach an agreement with the four respondents: *Taku River*, above at paragraph 2. But the decision Canada makes, like all administrative decisions, must at a minimum be acceptable and defensible on the facts and the law: *Dunsmuir*, above at paragraph 47.

[130] Finally, before concluding this section of my reasons, I wish to address one last submission made by Canada. Canada complains that the Federal Court failed to adequately assess the nature of the claims of each of the four respondents. It notes that in a twenty-three page decision, it devoted only one page to the issue. It complains that the Federal Court simply adopted what the four respondents said to it, without undertaking an independent analysis of the nature or strength of the claims asserted or the effect of Canada's conduct on the four respondents' interests.

[131] The short answer to this is that the need for an analysis of the nature and strength of each First Nation's claim was overtaken by Canada's concession at the outset of the hearing in the Federal Court that it had a duty to consult. Once Canada made that concession, the content of the

duty to consult, described above, was informed by the terms of the treaty land entitlement agreements, the purposes underlying those agreements (*i.e.*, the need to facilitate the four respondents' ability to purchase land to redress the broken promise in Treaty No. 1), and the unique and important nature of the Barracks property.

(3) Did Canada fulfil its duty to consult?

[132] As mentioned in paragraphs 84-86, above, we conduct reasonableness review ourselves to see whether we agree with the Federal Court's decision that the November 23, 2007 approval of the sale to Canada Lands Company was unreasonable, *i.e.*, neither acceptable nor defensible because duties to consult were not fulfilled.

[133] In doing this, we must ensure that we are not applying too exacting a standard. Situations such as the one in this case are complicated and dynamic, involving many parties and concerning issues that are legally and factually difficult. Even in healthy relationships where there is mutual trust and ample communication over simple issues, there can be isolated innocent omissions, misunderstandings, accidents and mistakes. As this Court put it in *Ahousaht v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722 at paragraph 54, in determining whether the duty to consult has been fulfilled, "perfect satisfaction is not required": see also *Haida Nation* at paragraph 62.

[134] In the previous section of these reasons, I have defined the scope of Canada's duty to consult. In this case, Canada did not fulfil the duty so defined:

- When Canada closed the Barracks and realized it had surplus land, it did not notify the four respondents and call for discussions: see paragraph 31 above.

- Long Plain expressed interest in the Barracks property and asked for discussions in April 2001, but Canada did not respond for nearly eighteen months: see paragraphs 32-33 and 36 above.

- In November 2001, Canada decided to pursue a "strategic" disposal process, one that would place the Barracks property in the hands of the Canada Lands Company: see paragraphs 35 and 40-41 above. Consultation must take place before important decisions like this are made: *Sambaa K'e Dene First Nation*, above at paragraph 165.

- Access to information documents show that Canada was aware of First Nations' interest in the Barracks property. But despite knowing of that interest, it did not consult: see paragraph 44 above.

- Long Plain renewed its expression of interest in the Barracks property following Canada's decision to pursue a "strategic" disposal process. Canada responded only by reasserting its decision to pursue a "strategic" disposal process: see paragraphs 42-43 and 46 above.

- Canada wrote the respondents in December 2002 notifying them that the decision to pursue a "strategic" disposal process had been made and informing them that their interests would not be considered on a priority basis: see paragraph 45 above. This is only an assertion of a position, not a form of discussion consistent with consultation.

- At the same time, Canada invited the respondents to contact a particular person at the Department of National Defence if they had an interest in the Barracks property: see paragraphs 50 and 53 above. But at this point, Canada had not provided the respondents with any information about the Barracks property so that they could determine the extent of their interest and whether they wanted to proceed further.

- Long Plain again expressed its interest in the Barracks property but in March 2003 Canada asked it to provide detailed information about what portion of the Barracks property it wanted, what it was willing to pay, and what it was going to do with the Barracks property: see paragraph 47 above. Having not been given any information about the Barracks property, Long Plain could not respond to Canada's invitation.

- Canada had an appraisal of the Barracks property by September 2003 but it did not provide it to Long Plain, which had already expressed its interest: see

paragraph 49 above. There is nothing in the record to suggest that the appraisal could not have been given to Long Plain or to any of the other three respondents.

- Later in 2003, meetings and site visits took place. But by then important decisions about the Barracks property had already been made. Canada did not disclose the appraisal to assist it with its consideration of the matter: see paragraph 55 above.

- There was a period of three years where Canada fell completely silent, not engaging in any form of consultation: see paragraph 57 above.

- In May 2005, Treasury Board approved of the sale of the Barracks property to the Canada Lands Company. This was done before any meaningful consultations with the four respondents had taken place. However, that approval was not final: the final approval was not until November 23, 2007. Canada could still consult with the four respondents see paragraph 58 above.

- In November 2006, further expressions of interest from a number of the respondents were made. Rather than meeting with them and providing them with information, the Barracks property remained classified as “strategic” land to be sold to the Canada Lands Company: see paragraph 61. After all, Treasury Board had already given its approval.

- From August to November, 2007, the four respondents wrote seeking assurances their interests would be respected and they requested a meeting to discuss the matter. Canada did not respond in a meaningful way to these concerns. It did not reply until after the final decision to sell the lands to Canada Lands Company on November 23. 2007 was made: see paragraphs 62-63 above.

- In that reply, Canada told the four respondents to consult with the Canada Lands Company, an entity it may have believed had no legal obligation to consult with Aboriginal peoples: see paragraph 68 above. This is an open question.

- Further, in the case of the Peguis First Nation, Canada broke specific obligations under the treaty land entitlement agreement it had with it: see paragraphs 26-28 above.

[135] Summarizing the 2006-2007 period, the Federal Court held as follows (at paragraph 79):

> The matter is more egregious in the 2006 to 2007 period. Canada simply ignored correspondence written by and on behalf of the [four respondents]. 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 Lands Company. The [four respondents] were simply ignored. After the fact, the [four respondents] were told to take their concerns to the Canada Lands Company. I find the treatment of the concerns raised by the [four respondents] and other [A]boriginal bands to be far short of the scope of even the minimum duty to consult.

[136] I agree with the Federal Court, though I do not see the evidentiary basis for finding that this matter is "egregious." This affects my later analysis of the remedy the Federal Court granted.

[137] Examining the record myself, I see no particular *animus* on the part of Canada. Instead, fairly read, the record shows a repeated lack of understanding on the part of Canada about the nature and scope of the duty to consult in the particularly unusual circumstances of this case. At the time the events of this case took place, the case law on the nature and scope of the duty to consult was embryonic. Canada first approved the transfer of the Barracks property to the Canada Lands Company in 2005 just after the Supreme Court released its seminal but very general decision in *Haida Nation*. After approving the transfer, Canada acted consistently with that approval, reluctant to alter its course. As these reasons suggest, it should have altered its course. But that sort of inertia is not enough to warrant the use of the term "egregious." I also note Canada's concession before the Federal Court, albeit belated, that it does have a duty to consult. I also note that although Canada could have tried to transfer the Barracks property at any time after 2005, it did not do so. We are not dealing with an intransigent, defiant party.

[138] Canada complains that with the possible exception of Long Plain, some of the four respondents were insufficiently active in asserting their interests. Here, Canada has a point. There were occasions when some of the four respondents should have come forward and participated actively in a process of consultation. At the end of these reasons, I return to this point.

[139] But for present purposes, without timely notice of the possible availability of the Barracks property and without provision of information about the land to the four respondents, they could hardly have been expected to come forward and constructively dialogue. And, after a while, Canada's conduct set out above may well have led some of the four respondents to

withdraw entirely from the matter and advance extreme positions of entitlement, as they did in the September 2003 meeting with Canada, and afterward. As is often the case when relationships become dysfunctional, fault can be found on both sides.

(5) The Federal Court's choice of remedy

[140] In paragraph 4 of its judgment, the Federal Court restrained Canada from selling the Barracks property to the Canada Lands Company or anyone else until Canada could demonstrate to it that it has fulfilled the duty to consult. In effect, this was a restraining order and a supervision order. As mentioned at paragraph 91, above, this choice of remedy—one that was fact-based and discretionary—is entitled to deference.

[141] At the outset, Canada asks this Court to quash the restraining order and the supervision order in paragraph 4 of the Federal Court's judgment because the Federal Court did not offer adequate reasons. Canada says that, without adequate reasons, this Court cannot be sure that the Federal Court charged itself correctly on the law and did not commit any palpable and overriding error on the facts.

[142] In my view the Federal Court's reasons were adequate.

[143] We are not to insist that courts explicitly address every last issue, set out the obvious or show how they arrived at their conclusion in a "watch me think" fashion: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paragraphs 17 and 43-44; *R. v. Dinardo*, 2008 SCC 24, [2008] 1

S.C.R. 788 at paragraph 25; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245 at paragraph 27. Instead, we are to adopt a very practical and functional approach to the adequacy of reasons: see, *e.g.*, *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 at paragraph 55; *R.E.M.*, above at paragraph 35; *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 at paragraph 101. Reasons must be read as a whole in their overall context, including the evidentiary record before the court, the submissions made, the issues that were live before the court and the fact that judges are presumed to know the law on basic points: *R.E.M.*, above at paragraphs 35 and 45. The main concern is whether the reasons, short as they may be, are intelligible or capable of being made out and permit meaningful appellate review: *Sheppard*, above at paragraph 25; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R.E.M.*, above at paragraph 35. Here, the Federal Court met the standard.

[144] It is evident from the reasoning of the Federal Court and the record before it why it restrained the sale of the Barracks property. If it did not do so, at some time in the future Canada, believing it had discharged its duty to consult, could sell the Barracks property to the Canada Lands Company or to a third party. But Canada's belief might be wrong. If Canada proceeded in that way and if, in fact, it had not discharged its duty to consult, the Barracks property would be gone and any later proceeding to redress Canada's failure to discharge its failure would be moot. The Federal Court's restraining order protects against any unilateral conduct by Canada that would render any later challenge by the four respondents moot.

[145] It is also evident why the Federal Court made a supervision order. It considered Canada's conduct to be "egregious."

[146] Aside from the allegedly insufficient reasons offered by the Federal Court, Canada also submits that the restraining order and supervision order cannot be sustained on this record. In Canada's view, they are overly-intrusive and trench upon the operation of the executive branch of government. Canada also says that the supervision order violates the *functus officio* principle: the prohibition against a Court from reopening or amending a final decision, except for where there has been a slip in drawing up the judgment or an error in expressing the Court's intention in its judgment. Further, the four respondents did not specifically ask for a supervision order in their notice of application.

[147] Although we must show deference to remedial choices made by the Federal Court, in my view there was no basis in principle or on the facts of this case for the Federal Court to make the restraining order and the supervision order. Thus, I would set aside paragraph 4 of the judgment of the Federal Court.

[148] First, the restraining order. In my view, on this evidentiary record, it cannot be sustained. One cannot say that Canada will not obey the letter and spirit of this Court's decision. For many years leading up to the judgment of the Federal Court, Canada was free to transfer the Barracks property to the Canada Lands Company but did not. There is no reason to think that Canada will now act unfairly or unilaterally concerning the Barracks property. Further, as a result of these reasons, Canada is now well-aware of its obligations, and there is no evidence to suggest that it will not govern itself accordingly.

[149] Next, the supervision order. The Supreme Court has told us that in appropriate circumstances, supervision orders can be made in order to ensure the proper implementation of their orders: *Doucet-Boudreau*, above. In *Doucet-Boudreau*, the Supreme Court considered that the trial judge's supervision order was appropriate because of the Government of Nova Scotia's long-standing pattern of disregard for French language educational rights. In this case, the Federal Court had a similar concern, describing Canada's conduct as "egregious" (at paragraph 79). But, as I have said above, one cannot say that Canada's conduct is "egregious" on the record before us.

[150] Supervision orders are "a remedy of last resort, to be employed only against governments who have refused to carry out their…responsibilities": *Jodhan*, above at paragraph 171, quoting Peter Hogg, *Constitutional Law of Canada*, Vol. 2, 5th ed., Supp. 2007, at page 40-45. On this record, Canada has not refused its responsibilities. Rather, it has been unsure about its responsibilities.

[151] Finally, the four respondents did not specifically request a supervision order, nor did the Federal Court advise the parties that it was contemplating such an order and invite submissions as to whether it should make such an order.

[152] It is true that the four respondents did make a general request in their notice of application for any other orders that are appropriate. But that sort of general request does not always empower a court to grant relief not specifically asked for. This is especially true where the relief is unusual and intrusive.

[153] In this case, it appears that the supervision order—an unusual and intrusive sort of order—came as a surprise to the parties. In the circumstances of this case, the four respondents should have specifically requested it or the Federal Court should have raised the possibility of it in advance so that the parties could have made submissions on it.

[154] Overall, the circumstances in this case are much like those in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120 where the Supreme Court found repeated infringements of Charter rights. It issued a declaration recognizing those infringements, but decided that no other remedies needed to be granted. Here, in my view, a quashing of Canada's decision to convey the Barracks property to the Canada Lands Company along with these reasons is a sufficient remedy and no other remedies needed to be given.

[155] I add that if Canada were to misconduct itself, many other remedies could be available. For example, if Canada were to transfer the Barracks property to the Canada Lands Company, the four respondents might be able to obtain remedies on short notice, where justified and appropriate, to prevent further disposition of the land or to require Canada to cause the land to be conveyed back to it. There may also be real estate remedies existing under Manitoba law, but I need not explore these here.

[156] In light of the foregoing, I conclude that the restraining order and the supervision order in paragraph 4 of the Federal Court's judgment should be set aside.

F. Postscript

[157] I wish to offer one final comment about fulfillment of duties to consult.

[158] Consultation is not a one-way street. All parties must actively engage in the process:

> There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan et al v. Fort St. James Forest District (District Manager)* (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

(*Halfway River*, above at paragraph 161; *Ahousaht*, above at paragraphs 50-53; see also *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484, 345 F.T.R. 119 at paragraph 42.)

[159] Both parties must act to advance their respective rights in a prompt and conciliatory way:

> It is up to the parties, when…issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way.

(*Beckman*, above at paragraph 12.)

[160] The record shows that on occasion some of the four respondents have been dilatory in investigating the Barracks property, asking questions of Canada, and pursuing their interests in the Barracks property. On occasion, some of them were not responsive to invitations by Canada to engage in consultative activities.

[161] A continuation of this sort of conduct in the future by any of the four respondents exposes them to risk. If they behave uncooperatively or recalcitrantly, they may be foreclosed in the future from complaining that they were not sufficiently consulted.

[162] As for Canada, it now has the guidance given by these reasons.

[163] Finally, it is to be hoped that whatever rancour, bitterness and mistrust among the parties may have existed in the past, the parties will now proceed to engage in constructive, respectful consultations concerning the Barracks property for the benefit of all.

G. Proposed disposition

[164] For the foregoing reasons, I would allow the appeal in part and set aside paragraph 4 of the judgment dated December 20, 2012 of the Federal Court in file T-139-08. As the four respondents have been largely successful on most of the major issues in the appeal, I would grant them their costs of the appeal. I would dismiss the cross-appeal with costs.

"David Stratas"

J.A.

“I agree
J.D. Denis Pelletier J.A.”

“I agree
Eleanor R. Dawson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-34-13
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE HUGHES DATED DECEMBER 20, 2012, NO. T-139-08	
STYLE OF CAUSE:	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 v. LONG PLAIN FIRST NATION *et al.*
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	JANUARY 13, 2014
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	PELLETIER J.A. DAWSON J.A.
DATED:	AUGUST 14, 2015

APPEARANCES:

Jeff Dodgson Dayna Anderson	FOR THE APPELLANTS
Harley Schachter Kaitlyn Lewis	FOR THE RESPONDENTS, LONG PLAIN FIRST NATION AND ROSEAU RIVER ANISHINABE FIRST NATION
Jeffrey R. W. Rath	FOR THE RESPONDENT, PEGUIS FIRST NATION
Uzma Saeed Bradley Regehr	FOR THE RESPONDENTS, SWAN LAKE FIRST NATION AND SAGKEENG FIRST NATION
J.R. Norman Boudreau Earl Stevenson	FOR THE RESPONDENT, SANDY BAY OJIBWAY FIRST NATION

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE APPELLANTS
Duboff Edwards Haight & Schachter Winnipeg, Manitoba	FOR THE RESPONDENTS, LONG PLAIN FIRST NATION AND ROSEAU RIVER ANISHINABE FIRST NATION
Rath & Company Priddis, Alberta	FOR THE RESPONDENT, PEGUIS FIRST NATION
D'Arcy & Deacon LLP Winnipeg, Manitoba	FOR THE RESPONDENTS, SWAN LAKE FIRST NATION AND SAGKEENG FIRST NATION
Booth Dennehy LLP Winnipeg, Manitoba	FOR THE RESPONDENT, SANDY BAY OJIBWAY FIRST NATION