

Kapyong Lands Update

February 10, 2016

This update is to inform the Peguis Membership on this important matter. This update is one of more upcoming updates for Membership. Please note that a more comprehensive summary of the Kapyong Decision is a companion document to this update.

Past History

This is largely about the potential sale of the Kapyong Barracks in Winnipeg and the Peguis Treaty Land Entitlement Agreement as it affects those lands. The Barracks are approximately 160 acres and is a former armed forces base with an additional 62 acres for living quarters for married military personnel which are not subject to the court case. The lands are along the Kenaston Boulevard in the Tuxedo area of Winnipeg, and as such are valuable lands for development.

In 2001, the Department of National Defence (“DND”) announced it was closing the Barracks but did not advise Peguis or any other potentially affected First Nations since. In November 2001, Canada decided that the disposal of the Barracks property would be dealt with through a Treasury Board Policy on federal land disposal through a “strategic process” as opposed to a “routine” process. It also made this decision without any prior notice or consultation with Peguis or other potentially affected Treaty One First Nations. The result of a “strategic” process is that Canada must transfer the lands to Canada Lands Corporation (“CLC”) which is a federal crown corporation which acquires surplus crown land and after carrying out development, sells the lands for a profit for Canada.

When various First Nations raised interest in the lands as “surplus federal lands” for potential acquisition, Canada responded that the lands were being disposed of through this “strategic” process free of any priorities to the First Nations, including to Peguis under its Treaty Entitlement Agreement.

The Peguis First Nation Treaty Entitlement Agreement (TEA) provides that Peguis First Nation will be given a “right of first refusal” to acquire any Surplus Federal Land located in Treaty One or Treaty Two Areas. Section 3.09 (pg. 44) of the TEA provides details and process for how Surplus Federal Land will be offered to Peguis and acquired. Canada also has an obligation under Section 35 of the Constitution Act (1982) to consult with Peguis regarding any decisions that may impact Treaty and Aboriginal rights. This Surplus Federal Land dispute and the Treaty right to land is a decision that meets this criteria.

When Canada refused to cooperate under the provisions of the TLE, in essence, hiding behind this “strategic” process, the First Nations brought on a federal court application seeking to “quash” (or undo) this decision by way of judicial review. The court battle raged on for several years with two complete Federal Court decisions and appeals, resulting in a successful challenge by the First Nations where the decision was in fact quashed on August 14, 2015.

A summary and synopsis of the complete Federal Court of Appeal Decision is a companion document to this update.

Court Decision

The following are a few main points of the Decision:

1. The court “quashed” (undid) the decision to sell the lands to CLC. Now Canada must consult properly while complying with the TLE Agreements before disposing of the lands.
2. Four First Nations (including Peguis) were successful in affirming Canada’s duty to consult with them, and Peguis also succeeded in confirming that TLE obligations need to be fulfilled as part of that duty. Brokenhead Ojibway Nation chose to withdraw from the litigation, selecting to seek alternative dispute mechanism under their TLE Framework Agreement. Sagkeeng and Sandy Bay were unsuccessful in that they did not provide sufficient evidence that there was an unfulfilled TLE obligation owed or a TLE Agreement giving rise to the right to be consulted.
3. Consultation levels in this case include the following: Canada must be in close communication, providing all relevant information in a timely way, respond to relevant questions, carefully consider informed concerns, representations and proposals, and must **“follow any relevant provisions in treaty land entitlement agreements”**.
4. In dealing with Peguis, Canada has to live up to the concepts of honour, reconciliation and fair dealing that underlie the Treaty, the Peguis TEA and the duty to consult.
5. In respect of Peguis, the court referenced its TEA as “substantially different” specifically reviewing its TEA provisions for surplus federal lands and stating that the Peguis TEA was breached! (This may give rise to Peguis seeking a specific and additional remedy under its own TEA.)

Note: A complete copy of the court ruling can be picked up at the band office or downloaded off our website.

The judge ruling states (paragraph 27): “Peguis submits, and I agree, that Canada is now obliged to deal with the Barracks in accordance with the [Peguis TEA] agreement.” This is a significant statement and guides Peguis Chief & Council in their approach to the Kapyong lands.

Having been unsuccessful in court, Canada sought to negotiate with all 7 First Nations even though only four were successful in court in confirming their rights to be consulted. Peguis proceeded to meet with Canada and the other 6 First Nations and hear them out. Meetings with Canada are continuing. These negotiations are very complex since there are so many different parties involved in the matter and each First Nation has different interests, rights and assets.

Treaty One In-Common?

There has been discussion with community on a range of approaches, including a 100% Treaty I in-common reserve approach. Chief and Council have discussed this at length with legal and other advisors. Peguis opposes this approach for many good reasons. This approach would mean that Peguis would get no land in Peguis' name at all. Peguis would hold shares and be in business with all six other bands, in a minority position with little or no say as to what is agreed to with Canada, the City of Winnipeg, or any developer. Peguis would have no control over costs, expenses and the distribution of profit, if any, to its membership.

Peguis **opposes** this position, but is open to further dialogue on a portion of the lands being held as a "common reserve" with the other Treaty One First Nations while protecting Peguis' interests for its own lands.

Peguis Vision and Goals

Peguis seeks a meaningful and direct ownership over our share of the Land and conversion to reserve status in accordance with our Treaty Entitlement Agreement and to develop and sustain its economy and jurisdiction.

Peguis seeks to work with the City of Winnipeg, Canada and other First Nations to fully develop the lands to their maximum economic potential.

Peguis must ensure qualified arms-length management of the property with revenue flowing to the business partners, First Nations and City of Winnipeg.

Peguis will insist on negotiations with the City, at the right time, to ensure proper development that will accommodate traffic flow in the region.

Peguis will seek development planning with the City of Winnipeg based on Best Practices for urban reserves.