Summary of Kapyong Decision

February 10, 2016

History of the Proceedings

Canada's decision to transfer the Kapyong Lands to Canada Lands Corporation was challenged when a Notice of Application for Judicial Review was filed in Federal Court by the Peguis First Nation ("Peguis") and other Treaty One First Nations in January, 2008. They sought an order to "quash" (or "undo") the decision to transfer the lands and also sought a declaration that Canada had a duty to consult and accommodate in good faith with Peguis and other Treaty One First Nations with respect to the Kapyong Lands before any disposition decision. The matter was initially heard by the Federal Court Trial Division and Peguis and the other Treaty One First Nations were successful. On September 30, 2009 Justice Campbell held that the November 2007 Decision (to dispose of Kapyong to Canada Lands Company) was invalid; that Canada had a legal duty to consult on its decision to dispose of surplus federal lands at Kapyong Lands and Canada did not meet that duty; and, in particular, that Canada acted contrary to law by failing to meet the mandatory legal requirement of consultation with Peguis and the other Treaty One First Nations.

The matter was appealed to the Federal Court of Appeal by Canada. The Appeal was heard in February, 2011 and the Decision was rendered on May 2, 2011. The Court of Appeal allowed the appeal and held that the Judge's reasons were inadequate, and referred the matter back to the Federal Court Trial Division for redetermination.

The matter was reheard in Winnipeg before the Honourable Justice Hughes in December, 2012 and the same issues were considered again. On December 13, 2012, the Honourable Justice Hughes of the Federal Court Trial Division issued his Reasons.

Justice Hughes found that Canada conceded it had a duty to consult. The Court held that the duty to consult was at least in the middle of the 'consultation spectrum; and that Canada did not owe a duty to consult two of the First Nations Respondents: Sagkeeng First Nation and Sandy Bay Ojibway First Nation as these two did not provide sufficient evidence of an unfulfilled treaty land entitlement.

The Court ultimately held that there was a duty to consult and that Canada failed to fulfill this duty in a meaningful way and allowed the Application. The 2007 decision of Canada to sell Kapyong to Canada Lands Corporation was set aside and Canada was enjoined from selling Kapyong until it could demonstrate to the Court that it has fulfilled its duty in a meaningful way.

Canada appealed the Judgment of Hughes J. to the Federal Court of Appeal. Sagkeeng First Nation and Sandy Bay Ojibway First Nation brought a cross appeal. The Appeal and cross appeals were heard in January, 2014 and the unanimous Reasons were rendered on August 14, 2015. The Federal Court of Appeal allowed the appeal in part - only with respect to the issue of remedy and dismissed the cross appeals. The Federal Court of Appeal held that Canada owed a

duty to consult Peguis First Nation, Long Plain First Nation, Swan Lake First Nation and Roseau River Anishinabe First Nation (the "Four Respondents") and failed to meet its obligations.

With respect to Peguis' interests, the following findings of the Federal Court of Appeal are significant:

1. The Court of Appeal took notice of the uniqueness of the Peguis Treaty Land Entitlement Agreement.

    (a) First, the Court of Appeal noted that there "...are significant differences between earlier [TLE] agreements and the Peguis First Nations' agreement." (para 18).

    (b) Substantive differences noted include (but are not limited to) the following:

        (i) that Peguis can select land anywhere in Manitoba including Federal Surplus Land;

        (ii) that pursuant to subsection 3.09(6) of the Peguis TEA, Canada agrees that 'wherever possible' title to surplus federal land should be transferred to Peguis subject to the claims of other First Nations;

        (iii) subsection 3.09(7) expression of interest does not create a right or guarantee land will be available;

        (iv) sections 28.01 and 28.02 provide that Canada will use good faith and best efforts to fulfill the terms of the agreement and to act on a timely basis;

        (v) Canada is required to provide notice under the agreement; and

        (vi) like other agreements, Peguis may acquire such land on a willing buyer and willing seller basis (para 26).

    (c) Although the Peguis Treaty Land Entitlement Agreement was not ratified by Canada until April 2008, Canada is now obligated to deal with Kapyong pursuant to the Peguis TLE Agreement (paras 27, 126).

    (d) The Peguis Treaty Land Entitlement Agreement does require specific forms of consultation (para 120).

    (e) The Federal Court of Appeal noted that Canada broke specific obligations under the Peguis Treaty Land Entitlement Agreement (as noted above in paras 1(b). (para 134).

2. The scope and nature of the duty to consult is guided by the TEA and case law on the duty to consult but also of honour, reconciliation and fair dealing which underlie the TLE agreements and the duty to consult which is focused on the broad intention of righting a wrong, namely, to provide Peguis with lands as per the intent of Treaty One, and not simply a narrow view or reading (paras 104, 112) as argued by Canada.

3. Administrative law principles such as procedural fairness are relevant where the legal interests of parties are affected by a discretionary decision. A higher level of procedural fairness may be required where Aboriginal Peoples are concerned "... concepts of honour, reconciliation and fair dealing - matters of constitutional import -may bear upon the matter affecting the level of procedures to be afforded." In this case, the Federal Court of Appeal held that Canada's obligation was not just to give notice, but that much more was required (paras 107, 108).

4. The Court of Appeal notes that Canada relies too heavily on the technical interpretation of the TLE Agreements, and must fulfill the broader purpose of these TLE Agreements. In particular, Canada "...must act like the willing seller contemplated in the treaty land entitlement agreements." (paras 115- 117).

5. Canada's consultation obligation is beyond the minimal level of consultation and "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." (paras 124, 129).

6. With respect to the issue of remedy, the Federal Court of Appeal held that in effect, the Federal Court Trial Division had issued a restraining order and a supervision order. (para 140) while it is within the jurisdiction of the Court to do so, the Federal Court of Appeal held that there was no basis in principle or on the facts for such an order. The Federal Court of Appeal held that the quashing of Canada's decision to convey Kapyong to the Canada Lands Company along its Reasons for Judgment is sufficient remedy, and held that there is no reason to believe that Canada would misconduct itself (paras 154, 155).

Under the Peguis TLE Agreement, there is an obligation on the part of Canada as found by the Federal Court of Appeal to utilize best efforts to transfer surplus Federal lands to Peguis pursuant to the Peguis TLE Agreement and in the context of this case, the honour of the Crown clearly dictates that Canada must act as a "willing seller" in this regard.

The Court further held that the scope of the consultation obligation owed to Peguis "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 One." (para 112).

The Court found specifically at paragraphs 26 to 28 that specific obligations were owed to Peguis. In paragraph 134, the Court found specifically with regard to Peguis that:

> [134] "Further in the case of Peguis First Nation Canada broke specific obligations under the Treaty Land Agreement it had with it see paragraph 26 to 28 above."
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> [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 I 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.

Other First Nations:

The Court found that Canada owed no duty to consult with Sagkeeng First Nation and Sandy Bay Ojibway First Nation since neither had established any rights or interests necessary to establish this duty. Neither had demonstrated, with sufficient evidence, any unfulfilled per capital reserve land entitlement under Treaty One and neither had a TLE Agreement.

Brokenhead Ojibway Nation chose not to proceed in this judicial review, instead proceeding with its own dispute resolution to process under its own TLE Agreement which is worded very similarly to the Peguis TLE with respect to surplus federal lands. As a result, the Court did not include Brokenhead in any references to duties owed by Canada to consult. However, having now granted the decision to transfer the lands to CLC, Canada must now "start over" on the consultation front and it is an open question whether there isn't a significant duty on Canada to consult Brokenhead in the newly minted consultation process once it begins.

Q & A:

Q: Does this decision give Peguis the land?

A: No. This case only goes so far as to "quash" (legally undo) a decision to transfer the land to Canada Lands Corp. Now Canada must properly consult and comply with the TLE in how it disposes of the land.

Q: Do we have to share the land with any other Treaty One First Nations?

A: Only if Peguis any other First Nations and Canada agree by negotiations.

Q: What are the next steps?

A: Negotiation, and failing that, consultations with Canada. These negotiations are confidential yet Chief & Council will continue to update membership seeking their input.

Q: What will consultation look like?

A: Canada will have to live up to its legal duties and the Peguis TLEA where it must act as a "willing buyer". Mere notice, information and meetings to hear out Peguis just won't do.

Chief and Council are very confident that Peguis' strong interests will result in direct ownership of these lands, in whole or in part, for Peguis First Nation.