Date: 20080730

Docket: T-754-07

Citation: 2008 FC 928

Ottawa, Ontario, July 30, 2008

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN :

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

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by the applicants pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act), as amended, respecting a decision taken by the Treasury Board, to transfer substantially all of the land which remained in the federal inventory from the former Canadian Forces Base at Chilliwack, British Columbia (CFB Chilliwack) to Canada Lands Company CLC Limited (CLC).

[2] The applicants are three communities of the Sto:lo Nation who descend from the Chilliwack Tribe, a subgroup of the Sto:lo and a part of the Coast Salish people. The applicants have Indian Reserves within the municipal boundaries of the City of Chilliwack, close to the former CFB Chilliwack.

[3] The respondent, CLC, is a wholly owned subsidiary of Canada Lands Company Limited (CLCL). CLCL is a Crown corporation and agent of the Crown, declared as such under the *Government Corporations Operation Act*, R.S.C. 1985, c. G-4, effective September 16, 2003. CLCL reports to Parliament through the Minister of Transport, Infrastructure and Communities. CLC purchases properties at fair market value from the federal government and then improves, manages or sells such properties with the goal of achieving optimal financial and community value for both local communities and ultimately the Crown, as its sole shareholder.

I. Background

[4] The lands at the heart of the present application are two parcels of former CFB Chilliwack known as the “Rifle Range” and “Promontory Heights” and referred to collectively as “Parcel C”. The lands are located east of Vedder Road and bounded on several sides by the Indian Reserve of the first applicant, Tzeachten First Nation.

[5] In the 1880s, the Province of British Columbia transferred by statute to the Government of the Dominion of Canada, a tract of land twenty miles in breadth on each side of a railway connecting

the British Columbia seaboard with the railway system which Canada was undertaking to build (the Railway Belt). This tract included the Rifle Range and Promontory Heights. Subsequently, between 1892 and 1915 Canada issued various Crown grants for these lands to private individuals.

[6] In 1942 and 1943, Canada re-acquired a portion of these lands, including the Rifle Range and Promontory Heights for the purpose of establishing CFB Chilliwack.

[7] In 1988 and 1997, thirteen Sto:lo communities, including the applicants, submitted a Specific Claim pursuant to Canada's Specific Claims policy. This policy deals with claims related to the government's administration of land and other Indian assets and to the fulfillment of Indian Treaties, but not with claims of Aboriginal title. In essence, the claim asserted that CFB Chilliwack formed part of two Indian Reserves created in 1864, which were then unlawfully reduced, and the excluded sections conveyed to Canada as part of the Railway Belt.

[8] In July 1999, the Sto:lo Specific Claim was rejected by Canada. The Sto:lo appealed this decision to the Indian Claims Commission. In September 2003, the appeal was placed in abeyance.

[9] In 1995, Canada announced the pending closure of CFB Chilliwack.

[10] Also in 1995, eighteen Sto:lo communities, including the applicants, filed a statement of intent to negotiate a treaty under the auspices of the British Columbia Treaty Commission (the BCTC) with respect to traditional territories which included all of CFB Chilliwack. In 2006, nine

communities, including the applicants, filed an amended statement of intent which also included CFB Chilliwack. Negotiations continue, but no treaty has resulted thus far.

[11] Between September 1995 and June 2000, Canada met with the applicants approximately twenty six times. No agreement with respect to the former CFB Chilliwack lands was reached.

[12] In June 2000, a disposal strategy for the former CFB Chilliwack lands put forward by Canada (the 2000 Disposal Strategy) was approved by the Treasury Board (the 2000 Decision). The strategy provided as follows:

a) transfer Parcel “A”, 62 hectares, to CLC;

b) retain Parcels “B”, “C”, “E”, “F”, and “G” for a two-year period from June 2000 to allow the Chief Federal Treaty Negotiator an opportunity to engage in treaty land selection negotiations with the Sto:lo, and upon the conclusion of those two years to return to Treasury Board to obtain the authority to transfer to CLC any lands not selected for treaty purposes;

c) protect Parcel “D” (known as the Wet Gap property) as a public nature conservancy with the Department of National Defence (DND) leading discussions and consultations with the City of Chilliwack and the Sto:lo and other interested stakeholders to determine the best management arrangement and future ownership to ensure such protection;

d) to retain Parcel “H” with a change in administration to permit the RCMP to use the parcel for training purposes; and

e) have DND retain Parcel “I” consisting of a military cenotaph and an Area Support unit for the Canadian Forces.

[13] The applicants and the Soowahlie brought an application to the Federal Court to challenge the Treasury Board’s decision on July 14, 2000. The Attorney General brought an application to convert the judicial review to a trial of action which was dismissed by a prothonotary and then granted on appeal. The applicants and the Soowahlie brought an appeal from that decision. While the appeal was pending, CLC began the process of selling Parcel A. The applicants brought an application for an interim stay. The application was dismissed, as was an appeal. Following the decision of the Federal Court of Appeal, CLC proceeded with selling Parcel A and the applicants and the Soowahlie discontinued their proceedings.

[14] On June 26, 2002, DND wrote to the applicants and advised them that in accordance with the 2000 Disposal Strategy, DND was preparing to return to the Treasury Board for further direction regarding the disposal of the remainder of the Chilliwack lands.

[15] On August 8, 2003, DND informed the applicants that the Federal Government had authorized the sale of the remainder of the surplus lands from CFB Chilliwack to CLC.

[16] Substantially all of the remaining CFB Chilliwack lands, including the Rifle Range and Promontory Heights were conveyed to CLC on March 31, 2004.

[17] In early May of 2004, representatives of the Chilliwack School District informed the applicants that the School District was planning to acquire land from CLC to construct a new secondary school on a parcel of the CFB Chilliwack lands. The applicants wrote to CLC enquiring into the status of the lands and seeking consultation with CLC before any land was transferred. CLC confirmed it was contemplating the sale and indicated that regional representatives of CLC would be "in direct contact with Sto:lo Nation in advance of any further attention to the subject property".

[18] CLC informed the applicants on December 14, 2004 that it would not consult on any matter relating to the CFB Chilliwack lands and indicated that it understood that "the Treasury Board was satisfied with the extensive consultation that had occurred prior to the approval of the transfer". The applicants' counsel subsequently wrote to the Treasury Board and DND seeking information and consultation, which did not occur.

[19] CLC transferred approximately 14 acres of the Rifle Range land to the Chilliwack School District on March 1, 2005. Subsequently 1.77 acres of the same parcel were transferred to the City of Chilliwack to serve as a park buffer for the school on October 31 or November 15 of the same year.

[20] On March 23, 2005, the Department of Justice advised that Canada would not enter into any consultation with the applicants concerning the transfer of CFB Chilliwack to CLC.

II. Issues

[21] This application raises the following issues:

(1) Did Canada fulfill the duty to consult?
(2) Does this Court have jurisdiction over the respondent, CLC?
(3) Is a duty to consult owed by the respondent, CLC, to the applicants? If so, was it fulfilled?
(4) What remedies are available?

III. The standard of review

[22] The parties to the present application made no submissions with respect to the standard of review. In light of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 62, the first step in determining the appropriate standard of review to be applied is to ascertain whether the jurisprudence has already determined to a satisfactory degree the deference to be accorded with regard to that particular category of question.

[23] In *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, 315 F.T.R. 178 at paras. 91-93, my colleague Justice Edmond Blanchard, following the general principles espoused in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 61-63, indicated that a question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness and further that a question as to whether the Crown discharged this duty to consult and accommodate is reviewable on the standard of reasonableness.

[24] Accordingly, when it falls to determine whether the duty to consult is owed and the content of that duty, no deference will be afforded. However, where a determination as to whether that duty was discharged is required, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] […] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47).

IV. Analysis

1) Did Canada fulfill the duty to consult?

A) General Principles

[25] "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions" (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 1). Reconciliation involves looking both to the future and to the past. Its aim is the creation of healthy and mutually beneficial relationships between Aboriginal and non-Aboriginal peoples, and the redress of historical grievances which will constitute the basis of those new relationships.

[26] The duty to consult and accommodate is part of the process of fair dealing and reconciliation (*Haida Nation*, above, at para. 32). With the affirmation of Aboriginal rights enshrined in s. 35(1) of the *Constitution Act, 1982*, Parliament recognized the existing rights of Aboriginal peoples who had

exercised *de facto* control of land and resources prior to the Crown's assertion of sovereignty. Accordingly, the Crown has a duty of honourable dealing towards Aboriginal peoples from which flows that process of reconciliation (*Haida Nation*, above, at para. 32; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24).

[27] The duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida Nation*, above, at para. 35; see *Taku*, above, at para. 25). In the present case, the parties do not dispute that a duty to consult arose and was owed by Canada to the applicants. Rather, the point of contention between the parties is the scope and content of that duty in this particular case.

B) The Scope and Content of the Duty to Consult

[28] The scope and content of the duty to consult 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*, above, at para. 39; *Taku*, above, at para. 29).

[29] The duty to consult can be conceptualized as existing along a spectrum. The particular scope and content of that duty are determined by multiple factors including the *prima facie* strength of the claim, the significance of the right and potential infringement, and the nature of the potential

damage to the claimed right or title. Where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor, the content of the duty may only be "to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation,* above, at para. 43). Conversely, where there is a strong *prima facie* case for the claim, the right and potential infringement is of high significance to the Aboriginal peoples concerned and the risk of non-compensable damage is high, deep consultation may be required (*Haida Nation,* above, at para. 44). This deep consultation may include "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida Nation,* above, at para. 44).

[30] Each case must be approached individually and flexibly given that "the level of consultation required may change as the process goes on and new information comes to light" (*Haida Nation,* above, at para. 45). The guiding principle is maintaining the honour of the Crown and effecting reconciliation between the Crown and Aboriginal peoples. Before a settlement is reached, the Crown is bound by its honour to balance societal and Aboriginal interests in decisions affecting their potential claims (*Haida Nation,* above, at para. 45).

i) The preliminary assessment of the strength of the case

[31] Given that the present case involves a claim of title, it is useful to review the law regarding the establishment of Aboriginal title in Canada. In the case of *R. v. Marshall; R. v. Bernard,* 2005

SCC 43, [2005] 2 S.C.R. 220 at paras. 55-57, the Supreme Court of Canada dealt briefly with the central principles:

> 55 (. . .) To establish title, claimants must prove "exclusive" pre-sovereignty "occupation" of the land by their forebears: *per* Lamer C.J., at para. 143.
>
> 56 "Occupation" means "physical occupation". This "may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources": *Delgamuukw, per* Lamer C.J., at para. 149.
>
> 57 "Exclusive" occupation flows from the definition of aboriginal title as "the right to exclusive use and occupation of land": *Delgamuukw, per* Lamer C.J., at para. 155 (emphasis in original). It is consistent with the concept of title to land at common law. Exclusive occupation means "the intention and capacity to retain exclusive control", and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent (*Delgamuukw*, at para. 156, citing McNeil, at p. 204). Shared exclusivity may result in joint title [page247] (para. 158). Non-exclusive occupation may establish aboriginal rights "short of title" (para. 159).

[38] Pursuant to *Marshall*, above, at paras. 58 and 59, occasional entry and use will not suffice and seasonal use of the lands for hunting and fishing or for other resource harvesting will typically translate into the existence of an aboriginal right to the resource not aboriginal title. I would add that Aboriginal peoples may be capable of proving exclusive occupation even if other groups entered and used the lands in question, if such access was granted upon request (*Delgamuukw v. British Columbia)*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 at para. 156).

[32] The applicants submit that they have a strong *prima facie* case for Aboriginal title to the Rifle Range and Promontory Heights. The evidence of the applicants' Aboriginal title is of three

types: (1) oral history evidence in affidavit form of the activities of the Chilliwack Tribe of the Sto:lo Nation, (2) evidence relating to their Specific Claim to reserve lands, and (3) a report containing archeological analysis of past activity of the Chilliwack Tribe in the vicinity of CFB Chilliwack.

[33] The oral history evidence indicated that before the 1920s, when it was diverted, the Chilliwack River ran through the Rifle Range and Promontory Heights areas. The people of the Chilliwack Tribe used the river as a main transportation route for travel to and from a main village site and also for trading purposes. They fished salmon from the river, and hunted and gathered food from the surrounding area, including the Rifle Range and Promontory Heights. Finally, long before the river was diverted, the Chilliwack erected and maintained a look-out on Promontory Heights to protect their community from invading tribes who used the river to conduct raids.

[34] The evidence from their Specific Claim to reserve lands indicated that in 1864, William McColl was sent into the Fraser Valley by Governor James Douglas to survey and lay out reserves for the Sto:lo People. However, these reserves were subsequently reduced and the excluded territory made available for settlement by Joseph Trutch, Chief Commissioner of Land and Works under Governor Frederick Seymour. Governor Douglas' instruction to McColl were transcribed as follows:

> Mr. McColl will mark out with corner and intermediate posts whatsoever land the Indians claim as theirs and at any village where the quantity of Land demanded by the Indians is not equal to ten acres for each family Mr. McColl will enlarge the Reserve to that extent.

These lands included the Rifle Range and Promontory Heights areas.

[35] The archeological evidence resulted as part of the process by which CFB Chilliwack was decommissioned. During this process, DND commissioned a comprehensive study of the Base lands, which included an archeological overview assessment.

[36] The overview revealed the following pertinent information:

a) The CFB Chilliwack lands are within the traditional territories of the Soowahlie and Tzeachten bands. (p.79 Applicant's Record (AR) vol. 1)

b) One expert opined that although the Chilliwack people migrated to some degree, occupation of the area in the vicinity of Promontory Heights was ongoing for a considerable period before the final move above Vedder Crossing. (p. 81, AR vol. 1)

c) However, the reserves incorporated were all within the region of later Chilliwack occupancy, while the early village sites on the upper portion of the river were excluded. (p. 85, AR vol. 1)

d) One expert has suggested that the movement of the Chilliwack downriver was in part precipitated by the establishment of the Hudson's Bay Company Fort Langley in 1827 which resulted in fewer attacks from the coast and served as an inducement to trade. (p. 85, AR vol. 1)

e) The Chilliwack settlement pattern was semi-sedentary. Villages were inhabited from November to March, after which time most people moved to hunting camps, fishing stations and plant gathering or other resource sites for the duration of the spring and summer. (p. 82, AR vol. 1)

f) The Chilliwack used the full seasonal and spatial range of resources available in their territories through fishing hunting, and gathering activities. (p. 83, AR vol. 1)

g) The Chilliwack erected a defensive site used to anticipate raiding parties or approaching visitors, on the north bank of the river on a high rocky ridge (which may be the look-point described in Mr. Robert's affidavit). (p. 85, AR vol. 1)

[37] The respondent, CLC, submits that proof of Aboriginal title, of pre-sovereignty exclusive use and occupation of the land, is not a simple matter. While I agree with this statement, I note that the determination of the applicants' title claim to the lands in question is not the focus of this judicial review. In the present case, the analysis requires that the Court engage in a preliminary assessment of the applicants' claim in order to determine the content of the duty to consult.

[38] The applicants have put forth evidence of pre-sovereignty use and occupation. The oral history evidence depicts the applicants' use of the river for transportation and as a source of food, as well as the use of the surrounding area for gathering activities and a look-out point. The evidence from their Specific Claim to reserve lands, which emanates from a period of time after the assertion of sovereignty in the region, indicates the lands which the applicants claimed as their own at that time, but not necessarily the exclusivity of pre-sovereignty occupation. The archeological evidence is consistent with the oral history evidence in that it supports the applicants' use and occupation of the lands in question during the relevant period, albeit in a semi-sedentary or seasonal fashion. In sum, the evidence is of a people using the panoply of resources available to them in a specific geographical region in a manner consistent with seasonal changes in the local resource base.

[39] The lacuna in the applicants' title claim is with respect to the regularity and exclusivity of their use and occupation. As indicated above, seasonal hunting and fishing in a particular area will typically translate into hunting or fishing rights, not aboriginal title (*Marshall*, above, at para. 58). Further, the fact that a portion of the territory claimed was underwater and used as a transportation and trading route makes the exclusive occupation of this particular portion all the more difficult to prove. At the same time, the existence of the look-out tower and the oral history evidence of its use in guarding against raids are suggestive of at least an intention if not a capacity to keep unwanted parties out of their territory.

[40] The evidence of the applicants' claim is inconclusive. That the applicants historically used the lands in question, I believe, is strongly established by the material before the Court; however, that they occupied these lands with sufficient regularity and exclusivity is not clear. Accordingly, upon a preliminary assessment, I would qualify the strength of the applicants' claim of Aboriginal title over the lands in question as one of moderate strength.

ii) The seriousness of the potentially adverse effect

[41] The Supreme Court has suggested that the significance of the right claimed and potential infringement to the Aboriginal peoples concerned as well as the risk of non-compensable damage are particularly relevant when analyzing the seriousness of the potentially adverse effect upon the title claim (*Haida Nation*, above, at para. 44).

[42] The cases of *Musqueam Indian Band v. Canada*, 2008 FCA 214, [2008] F.C.J. No. 919 (QL) (*Downtown Offices)* and *Musqueam Indian Band v. Canada (Governor in Council)*, 2004 FC 579, [2004] 4 F.C.R. 391 (*Garden City*) are instructive on this issue. These cases are helpful to the extent that they deal with qualifying the nature of the harm to a claimed Aboriginal right or title.

[43] In *Downtown Offices*, Justice Sexton highlighted the fact that the dispute in that case revolved around the disposition by the federal government of two offices to Larco Investments Limited. The buildings were situated on two acres of property in downtown Vancouver over which the applicants claimed title. Of importance was the fact that the use of the property upon disposition to Larco would not change. This was contrasted with the case of *Garden City* where Justice Phelan found that the Musqueam not only claimed an interest in the land, but that the land had unique importance to the Musqueam (*Downtown Offices*, above, at para. 55, *Garden City*, above, at para. 16) and that the use and the character of the properties could change as a result of the transaction (*Downtown Offices*, above, at para. 56).

[44] The applicants assert that the issuance of fee simple grants constitutes a serious infringement on their title. In affidavit evidence, Chief Hall of the Tzeachten First Nation, affirmed that his community has a pressing need for land to provide housing to its growing membership and to meet the social and economic needs of present and future generations. He affirmed that the current Tzeachten reserve is approximately 700 acres in size, with approximately 670 acres subject to certificates of possession through which individual Band members hold a possessory interest. The remaining 30 acres is almost all taken up with a cemetery, sports field, and small commercial

development. He emphasized problems of overcrowding and deterioration of housing stock on the reserve and lack of additional land for community services such as elders' facilities, day care, health care and recreational facilities, lack of space for economic development and no timber or other natural resource that can be developed to support the community. The Rifle Range and Promontory Heights are immediately adjacent to the Tzeachten Reserve and thus are uniquely suited to the expansion of the community.

[45] The respondent, CLC submits that the sale involves no fresh infringement. The infringement, if any, occurred a century ago when the federal Crown issued grants of the lands that now comprise Parcel C. With title gone in the eyes of provincial law, the land itself was irreversibly changed and a further sale of Parcel C involves only a perpetuation of the infringement that has been outstanding since the creation of the Railway Belt.

[46] With respect, I disagree. While, if the applicants do indeed have a valid title claim, an infringement can be said to have occurred when the lands were originally conveyed to private landowners, when the lands were re-acquired by the federal Crown, a unique situation was created whereby the Crown was in a position, to a certain extent, to address that alleged original infringement. Once lands are passed to third parties, the Crown's ability to preserve any rights or title that an Aboriginal group may have is curtailed. Should title subsequently be proven, the government response could be more limited, and in some cases restricted to the provision of compensation.

[47] It is true that given that the applicants have not used the land in over a century, the sale to CLC does not entail a loss of any right which they had been previously enjoying. However, downplaying the infringement by suggesting that it forms part of a long history of previous infringement is not consistent with the honour of the Crown which requires reconciliation.

[48] In my opinion the present circumstances can be distinguished from those of *Downtown Offices*, in that, in all likelihood, the character of the land will change once it is developed and sold by CLC. In *Downtown Offices*, the land in question was already the site of an office building and would continue to be so. In the present case we are dealing with a relatively undeveloped piece of land capable of serving multiple interests.

[49] I accept that given the land and financial constraints bearing upon the applicants, the decision to convey the land in question represented an infringement of their potential Aboriginal title. However, based on the record, I am of the view that the damage is compensable. I note that Chief Hall admits in his affidavit that the applicants tabled a counter-offer during the negotiations which proposed that Canada acquire the CFB Chilliwack lands from the Sto:lo based on a fair market valuation of the lands. This casts doubt upon the unique importance of the land beyond a propriety interest, to the applicants.

[50] Accordingly, as with the strength of the claim, the seriousness of the potentially adverse affect of infringement presents a complex picture. With the decommissioning of CFB Chilliwack, the government was in a unique position to address the applicants' historical claim and present need

for land. However, given that the nature of the applicants' interest in the land does not appear to be based on its unique importance, any present infringement may be compensated, monetarily or otherwise, over the course of treaty negotiations.

iii) The Scope and Content of the Duty to Consult in the Present Case

[51] Based on the foregoing, I am of the view that the Crown's duty to consult is more than minimal and lies between the two extremes of the spectrum. Accordingly, in order to fulfill that duty in the present case, something beyond merely giving "notice, disclos[ing] information, and discuss[ing] any issues raised in response to the notice" was required (*Haida Nation,* above, at para. 43). What was required in the present case was good faith consultation and a process aimed at addressing the applicants' concerns.

C) Did Canada Fulfill the Duty to Consult?

[52] As a preliminary matter, it is necessary to address the applicants' argument that the 2003 authorization to transfer the remaining CFB Chilliwack lands to CLC was a separate decision from the 2000 Decision authorizing the Disposal Strategy. They argue that the circumstances which triggered the federal government's duty to consult and accommodate in the present case were those surrounding the Treasury Board authorization in 2003 to transfer the remaining lands to CLC. They attempt to distinguish between the authorizations given in 2000 and 2003 on the basis that, unlike in 2000, the 2003 authorization disposed of the remaining lands forever from Canada's perspective. This distinction is of some importance to the applicants' arguments given that no consultation occurred between the 2000 decision and the 2003 transfer authorization beyond the provision of

notice. This is in contrast to the approximately twenty-six meetings held between Canada and the applicants before the 2000 Disposal Strategy was approved.

[53] I agree with the respondent, CLC that the applicants' submissions on this point represent "an artificially compartmentalized approach to the facts". The transfer authorization which took place in 2003 was simply the operationalization or finalization of the Disposal Strategy approved in 2000 by the Treasury Board. Despite the applicants' arguments to the contrary, the 2000 and 2003 authorizations were essentially two stages of the same decision. There was no change in the context and no new information which arose between the relevant dates which would require an additional round of consultation. Accordingly, the relevant period for the purposes of determining whether Canada fulfilled its duty to consult is between 1995 when closure of the CFB Chilliwack was announced and 2003 when the Treasury Board authorized the transfer of the remaining CFB Chilliwack lands to CLC.

[54] From 1995 to 2000, Canada engaged in significant consultation with the applicants which at times rose to the level of deep consultation, such as when they were permitted to make submissions directly to the Treasury Board (*Haida Nation*, above, at para. 44). For example, in 1996 the applicants met with the President of the Treasury Board regarding CFB Chilliwack. Further, the applicants prepared a report dated May 17, 2000 entitled "Re-use Strategy for CFB Chilliwack" which set out the applicants' plans for how the Base should be used and submitted it to the Treasury Board. Additionally, in October 1999, Canada provided the applicants with a copy of a draft

submission to the Treasury Board regarding the lands in question, seeking their comments and input.

[55] During the period of consultation, Canada attempted to address Aboriginal concerns in the various proposals tabled that would either see portions of the lands in question retained by the Crown, or have the applicants co-manage a portion of those lands. These policy changes were consistent with the Supreme Court of Canada's ruling in *Haida Nation*, above, at para. 46, that "[m]eaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations" (see and *Taku*, above, at para. 25). In my view these were attempts made by Canada "to harmonize conflicting interests and move further down the path of reconciliation" (*Haida Nation*, above, at para. 49).

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

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

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

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

[60] The applicants rejected the first option and while they were interested in the second option, they wished to have a portion of the Base excluded from the joint venture and transferred to them. The exclusion of land from the joint venture was a concern to CLC since, depending on the amount

of land excluded, the joint venture might no longer be financially viable. The applicants indicated that they would bring the joint venture proposal to the Chief's Council on November 16, 1998 to seek directions, but never returned with an answer and the option lapsed.

[61] After these final two major proposals, negotiations on the fate of the lands in question essentially ceased. As indicated previously, the applicants submitted a land use plan for the Base to the Treasury Board in May of 2000. In June 2000, the applicants received notice that a Disposal Strategy had been approved by the Treasury Board according to which one third of the remaining CFB Chilliwack lands were to be held back for a period of two years to allow the Chief Federal Treaty Negotiator an opportunity to engage in treaty land selection negotiations with the Sto:lo.

[62] After this date the applicants were provided with notice of impending action to be taken concerning the lands including when DND was returning to the Treasury Board for instructions regarding the remaining CFB Chilliwack lands and when the sale of those lands to CLC was imminent.

[63] However, one attempt in 2000 was made to further negotiations. The federal government offered to discuss the remaining CFB Chilliwack lands with the Sto:lo treaty negotiator in the context of a set-off in the final treaty settlement; however, the negotiator indicated he had no mandate to discuss these lands as a set-off and advised the federal government to contact the communities with an interest in the CFB Chilliwack lands directly. This did not occur.

[64] The respondents submit that the actions of the applicants over the course of negotiations is indicative of a failure on their part to fulfill their reciprocal obligation to carry out their end of the consultation (*R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653 at para. 45). It is established that Aboriginals "must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached" (*Haida Nation*, above, at para. 42).

[65] For instance, during a meeting of September 12, 1997, Chief Steven Point, on behalf of the applicants, reiterated the position that the applicants wanted all the land returned to them with the lands to be held until conclusion of the treaty process. Further, according to the applicants, the report submitted on May 17, 2000 to the Treasury Board regarding their proposed land use strategy for the Base was premised on the following assumption: "Our plan is premised firstly on the fact of the lands being within the Douglas Reserve [the subject of the Specific Claim] and is based on our ownership of the lands". (p. 480, Applicants' Record, vol. 2). Thus, the applicants' position over the course of the consultation period did not change.

[66] With respect, I disagree with the respondents' characterization of the applicants' behaviour. It is true that the applicants believed over the course of negotiations, and believe to this day, that they have Aboriginal title over the lands at the heart of this dispute. This is not a "position" that is required to change in order to fulfill any reciprocal duty on their part. Indeed, it is because of this belief that they have engaged in the BCTC and also because of their belief in their Douglas Reserve claim that they have participated in the Specific Claims process.

[67] The reciprocal duty incumbent upon Aboriginal peoples was elaborated upon in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 D.L.R. (4th) 666 at para. 161 as a duty 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 also *R. v. Douglas*, above)

[68] I am aware of some reticence on the part of the Sto:lo Nation to participate early on in the process. For example, a letter dated July 16, 1996 was sent by CLC at the behest of the Treasury Board, to the applicants with the purpose of receiving comments on their terms of reference for the CFB Chilliwack re-use strategy. The response of Chief Steven Point was that they were not prepared to participate in a process that will in any way diminish or otherwise impair their Aboriginal rights. (pp. 98-103, CLC Record vol. 2).

[69] However, aside from some initial hesitation, there is no evidence in the record that the applicants refused to meet or participate, or imposed unreasonable conditions in the negotiations. They expressed their concerns to the respondents, made suggestions over the course of consultations, including that a portion of the lands be hived off and handed over to them just as a portion was planned on being hived off and conveyed to CLC. I see no conditions put forth in negotiations which I am able to characterize as unreasonable. They submitted their own land use

strategy to the Treasury Board and there were approximately 26 meetings in which the applicants participated.

[70] In spite of good faith attempts made by the parties involved, as sometimes occurs in negotiations, no agreement was reached. The duty to consult does not include a duty to agree (*Haida Nation*, above, at para. 42). What is required is conduct consistent with the process of reconciliation. On the evidence before me, I see a "commitment (. . .) to a meaningful process of consultation", on the part of both Canada and the applicants (*Haida Nation*, above, at para. 42), informed by the spirit of compromise that is inherent in the reconciliation process (*Taku*, above, at para. 2).

[71] The consultation "process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim" (*Haida Nation*, above, at para. 48) and at some point a government decision will have to be made. By 2000 it appears that both the Crown and the applicants' positions had crystallized.

[72] The process, in my view, was consistent with the maintenance of the Crown's honour. Particularly, the 2000 Disposal Strategy represented an interim compromise which balanced both the interests of the applicants in preserving some land pending final resolution of their claim and that of the Crown to develop surplus federal lands. According to the strategy, one third of the remaining CFB Chilliwack lands was to be held back for a period of two years to allow the Chief Federal Treaty Negotiator an opportunity to engage in treaty land selection negotiations with the

Sto:lo. The applicants contend that two years is insufficient time to conclude treaty negotiations and emphasize that the first treaty to result from the BCTC process was ratified by the Tsawwassen First Nation in 2007, after 14 years of negotiation.

[73] Negotiations with the Crown concerning the lands in question began essentially in 1995, and while there was some debate as to when the government was actually prepared to sell the CFB-Chilliwack lands, on the facts, the hold-back was in effect for more than two years. This was a reasonable time period for negotiations to proceed; the finalization of a treaty was not what was required. I would add that between receiving notice of the 2000 Disposal Strategy and notice that DND would be returning to the Treasury Board for directions in 2002, the applicants appear to have made no attempts to continue negotiations with respect to the lands.

[74] Based on the foregoing, I conclude that Canada fully discharged its obligation to consult in the present case. I am of the view that Canada's conduct was entirely consistent with maintaining the honour of the Crown in the present case and attempted to balance societal and Aboriginal interests in a manner consistent with *Haida Nation*, above, at para. 45. The process engaged in by Canada, including the proposals tabled and the breadth and depth of the consultations carried out, falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para. 47).

2) Does this Court have jurisdiction over the respondent CLC?

[75] The applicants argue that CLC is an agent of the Crown and thus bound by the honour of the Crown to consult with the applicants when it disposes of property on behalf of the government of Canada in which they have claimed an interest. The respondent, CLC, challenges the Court's jurisdiction on this judicial review to direct it to consult with the applicants, or otherwise enjoin it from disposing of Parcel C as it sees fit, and contests the applicants' characterization of CLC as a Crown agent.

[76] In support of their argument that this Court has jurisdiction over CLC, the applicants refer to the decision of my colleague Justice Michael Phelan in *Musqueam Indian Band v. Canada (Governor in Council)*, 2004 FC 1564, 135 A.C.W.S. (3d) 362, where an application was made by CLCL and CLC to be removed as respondents in that application on the grounds that they were not a "federal board, commission or other tribunal" within the meaning of s. 2 and therefore, beyond the Court's jurisdiction under ss. 18 and 18.1 of the Act. In dismissing the application Justice Phelan noted the following at para. 32:

> While these respondents [CLCL and CLC] have many characteristics of a private corporation, there are aspects of its organization and mandate that have a significant government component. The parent company is a Crown agent; the subsidiary acts as agent for the parent or on its behalf. Both respondents have the same policies and these policies are in line with government policies. CLCL, as parent company, reports to Parliament through a Minister and complies with federal Crown objectives. The sources of both respondents' mandates are the federal Crown.

[77] However, this case is not dispositive of the matter before me. The context in which the preceding paragraph was written was a motion to strike CLCL and CLC as respondents, and thus

the applicable legal principle was whether the judicial review, including the question of jurisdiction over the parties, was "bereft of any possibility of success". Thus, the issue of the Court's jurisdiction was not ultimately determined.

[78] Accordingly, it falls to this Court to make a determination on the matter of its jurisdiction over CLC. The jurisdiction to grant remedies is limited to "federal boards, commission or other tribunal" (s. 18(1) of the Act). Section 2 of the Act defines a "federal board, commission or other tribunal" as:

> (. . .) any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

[79] As stated by the Court in *Larny Holdings Ltd. (c.o.b. Quickie Convenience Stores) v. Canada (Minster of Health)*, [2003] 1 F.C. 541, 2002 FCT 750, at para. 26, quoting Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998, loose-leaf edition), at para. 2:4310, "the source of (. . .) authority, and not the nature of either the power exercised or the body exercising it, is the primary determinant of whether it falls within the definition [found at subsection 2(1) of the Act].

[80] The applicants argue that CLC's authority to dispose of lands on behalf of Canada derives from a number of sources including CLC's original mandate from Cabinet, the *Treasury Board Policy on the Disposal of Surplus Real Property* (the *Treasury Board Policy*) and the terms and

conditions of transfer of properties by the Treasury Board. These sources of authority in turn originate from a prerogative of the Crown and the powers conferred on the Treasury Board and the Governor in Council by s. 16 of the *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50.

[81] The *Treasury Board Policy* establishes the procedures to be followed in the disposal of Crown land. It is issued pursuant to the *Financial Administration Act*, R.S., c. F-10, subsections 7(1), 9(1.1), and 9(2), and the *Federal Real Property and Federal Immovables Act*, subsection 16(4). Of particular relevance to CLC, the *Treasury Board Policy* at "Appendix B – Components of the Strategic Disposal Process" indicates that:

> The custodial department should also prepare a disposal strategy and recommendation, seeking approval of the disposal strategy from the appropriate authority. For sales to the CLC, this document should also identify principles for future development, as appropriate, and state the conditions or limitations to be imposed on the proposed redevelopment plan, if necessary. (p. 97, CLC Record, vol. 1)

[82] The *Federal Real Property and Immovables Act*, which governs the acquisition, administration and disposition of real property and immovables by the Government of Canada, sets out, at s.16, the authority for the disposition or lease of federal real property in the following manner:

16. (1) Despite any regulations made under subsection (2), the Governor in Council may, on the recommendation of the Treasury Board, in accordance with any terms and subject to any conditions and restrictions that the Governor in Council	16. (1) Par dérogation aux règlements d'application du paragraphe (2), le gouverneur en conseil peut, sur la recommandation du Conseil du Trésor et sous réserve des conditions et restrictions que lui-même juge indiquées :

considers advisable, (a) authorize the disposition or lease of federal real property or federal immovables for which disposition or lease there is no provision in or under any other Act;	a) autoriser la disposition ou la location d'immeubles fédéraux ou de biens réels fédéraux dans les cas qui ne sont pas déjà prévus sous le régime d'une autre loi;
(. . .)	(. . .)

[83] Accordingly, while both the *Treasury Board Policy* establishing the process for disposal of Crown land, and the authority to dispose of that land with Governor in Council approval are set out in the statutes noted above, it cannot be said that either are what confer power and jurisdiction on CLC. While it was these authorities that permitted Canada to sell lands to CLC, they are not what gave CLC the authority to be on the other side of that transaction. There is no conferral of jurisdiction or powers which flow through these instruments to CLC. To the contrary, the source of CLC's jurisdiction and powers are its own articles of incorporation. If and when CLC should decide to dispose of the lands in question it requires no further approval of the Governor in Council, nor is it subject to the *Treasury Board Policy*.

[84] Finally, I conclude that CLC's mandate, which as Justice Phelan indicated, has its source in the federal Crown, cannot be construed as a source of power or jurisdiction pursuant to s. 2 of the Act. The mandate is described in the document entitled "Canada Lands Company Limited, Corporate Plan Summary, 2003-2004 to 2007-2008" in section 2.1 (p. 63, CLC Record vol. 1) and states that CLC shares the same purpose or principal goal in its policy mandate as its parent company which was laid out by the government in 1995 and reconfirmed in 2001. It indicates that

"[CLC] also maintains a commitment to environmental sustainability in its projects, respects heritage considerations and remains sensitive to First Nations land claims issues". The fact that CLC adheres broadly to these guiding principles can in no way be interpreted as a conferral of powers or jurisdiction.

[85] Thus, I am unable to conclude that this Court has jurisdiction over CLC. In such circumstances, I do not find it necessary to decide if CLC is an agent of the Crown bound by its honour to consult with the applicants.

[86] For these reasons, the present application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT ORDERS that the present application for judicial review is dismissed with costs.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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