Federal Court of Appeal | Cour d'appel fédérale

Date: 20110503

Docket: A-446-09

Citation: 2011 FCA 148

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
SEXTON 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

BROKENHEAD FIRST NATION, 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 February 22, 2011.

Judgment delivered at Ottawa, Ontario, on May 3, 2011.

REASONS FOR JUDGMENT BY: NADON J.A.

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

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110503

Docket: A-446-09

Citation: 2011 FCA 148

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
SEXTON 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

BROKENHEAD FIRST NATION, 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

REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision ("Reasons") of Campbell J. (the "Judge"), 2009 FC 982, [2009] 4 C.N.L.R. 30, dated September 30, 2009, wherein he held that the government of Canada ("Canada") had breached its duty to consult the respondents when it decided to transfer the Kapyong Barracks (the "Barracks"), situated in the city of Winnipeg, Manitoba, to Canada Lands Company Ltd. ("CLC"), a non-agent Crown corporation, pursuant to Treasury Board's *Policy on*

the Disposal of Surplus Real Property (the "Policy") as amended by the *Directive on the Sale or Transfer of Surplus Real Property* (the "Directive").

[2] The main issue in this appeal is whether Canada had a duty to consult the respondents before deciding to transfer the Barracks to CLC and, if so, whether Canada had discharged that duty.

The Facts

Background:

[3] In 1871, the aboriginal bands of Manitoba and Canada signed *Treaty No. 1*. Pursuant thereto, the aboriginal bands agreed to give up their title to the land that now comprises the province of Manitoba in exchange for Canada setting aside a certain amount of land for their exclusive use: 160 acres per family of five. This provision has come to be known as the "per capita provision". For reasons which are not relevant to the determination of this appeal, Canada did not fulfill its end of the bargain.

[4] The land claims of five of the respondents were found to be valid by Canada. Hence, in the 1990s, Canada signed treaty land entitlement ("TLE") agreements with these respondents to rectify its failure to fulfill the per capita provision: in 1994 with the Long Plain First Nation ("Long Plain"), in 1995 with the Swan Lake First Nation ("Swan Lake"), in 1996, with the Roseau River Anishinabe First Nation ("Roseau River") and in 1997, the Brokenhead Ojibway Nation ("Brokenhead") negotiated its claim through the Treaty Land Entitlement Committee of Manitoba

Inc. (“TLEC”). That year, TLEC executed the *Manitoba Treaty Land Entitlement Framework Agreement* (the “Framework Agreement”) with Canada. Pursuant thereto, Brokenhead signed its separate TLE Agreement in 1998. In 2008, Peguis First Nation (“Peguis”) signed its Agreement with Canada.

[5] Each of these agreements entitled the aforementioned bands to acquire private land and to acquire provincial “Crown land” – defined as land that is owned by or under the administration and control of Manitoba and is situated within the Province of Manitoba – on a priority basis to fulfill their treaty land entitlement. The right to acquire land on a priority basis essentially amounts to a right of first refusal with respect to the category of land to which the right relates. The nature and extent of this priority is described in the respondents’ agreements with Canada. The priority does not, however, give any of the respondents an entitlement to acquire the land because all of the agreements specify that land will be transferred only on a willing buyer/willing seller basis.

[6] The type of arrangement made with each of the respondents varies. With respect to the respondents Long Plain, Swan Lake and Roseau River, their agreements provide for a specific amount of funding from Canada so as to allow them to purchase land to meet their outstanding entitlements. These agreements do not provide for the acquisition of surplus federal land and make no mention, other than in the case of the Agreement with Roseau River, of land under the administration and control of Canada. As to Roseau River’s Agreement, it provides at clause 4.12 that it may purchase land under the administration and control of Canada at fair market value.

[7] With respect to the respondents Brokenhead and Peguis, their agreements allow them to select a specified amount of unoccupied provincial Crown land and "other land", which includes surplus federal land, and stipulate that Canada will provide an amount of funding for their use in the purchasing of that land. The agreements with Brokenhead and Peguis further provide that these respondents are entitled to notice from Canada whenever the federal Crown intends to dispose of certain "surplus federal land" – defined for Brokenhead in the Framework Agreement at subclause 1.01(88), and for Peguis at subclause 1.01(82). Both provisions are identical and read as follows:

> **"Surplus Federal Land"** means any "federal real property", as defined in the *Federal Real Property Act*, excluding any "real property" as defined in the *Federal Real Property Act* to which the title is vested in a "federal crown corporation" as defined in section 83 of the *Financial Administration Act*, that is:
> (a) within the Province of Manitoba;
> (b) determined by a "minister", as defined in the *Federal Real Property Act*, who has the "administration", as defined in the *Federal Real Property Act*, of that "federal real property", to no longer be required for the program purposes of that "minister's" department;
> (c) determined by that "minister" to be available for sale; and
> (d) made available by that "minister" to any "other minister" of Canada for a transfer of administration in accordance with any then existing policies or directives of the Treasury Board of Canada;

[8] Both of these agreements set out the process for the respondents to acquire surplus federal land. However, to repeat, the agreements do not provide the respondents with an entitlement to acquire the land, but allow them to acquire such land on a willing buyer/willing seller basis. As an example of this is clause 3.05(2) of the Framework Agreement which provides that "Other Land", which includes surplus federal land, may be purchased by a First Nation "on a 'willing buyer/willing seller' basis".

[9] There are no agreements with the last two respondents. The claim of the respondent Sagkeeng First Nation ("Sagkeeng") remains outstanding, with Canada awaiting further submissions and evidence in respect of the claim. As to the claim of the respondent Sandy Bay Ojibway First Nation ("Sandy Bay"), Canada and the Indian Claims Commission have rejected it on the ground that Sandy Bay's treaty land entitlement has already been fulfilled.

The Barracks:

[10] The Barracks are comprised of two units. One unit covers 159.62 acres of land and includes the operational section of an armed forces base centrally-located within the city of Winnipeg. The other unit covers 61.78 acres of land and includes the married quarters area of the base. Canada says that a decision has been made only with respect to the operational section of the base.

[11] On April 12, 2001, a news release from the Department of National Defence ("DND") announced that the Barracks were being closed. At some point following this announcement, the Department of Indian and Northern Development ("DIAND") received notice from DND that the Barracks would be declared surplus.

[12] Shortly after the closure announcement, Brokenhead and Long Plain expressed interest in the Barracks.

[13] Effective July 1, 2001, Treasury Board enacted the Policy which governs the disposal of surplus federal real property. The Policy divided surplus property disposal into two categories:

routine and strategic. All property falls into the first category unless it has an especially high market value or is "sensitive" – in which case it becomes "strategic". The respondents did not seek judicial review of the Policy.

[14] In November 2001, Treasury Board decided that the Barracks would be disposed of through the "strategic" process. As a result of this designation and pursuant to the Policy, the Barracks were no longer available to those of the respondents who were entitled to purchase that land on a priority basis. The end result of the strategic disposal process is that the property will be assessed and then transferred to CLC, a federal non-agent Crown corporation which disposes of property for the federal government. The respondents also did not challenge this decision.

[15] In August 2002, Long Plain informed Canada that it remained interested in the Barracks. In September 2002, Canada informed Long Plain that disposal of the Barracks would take place pursuant to the strategic disposal process.

[16] On December 4, 2002, DIAND sent a letter to each of the respondents notifying them that the Barracks would be dealt with as a strategic disposal and that, as a result, their interest therein would not be considered on a priority basis.

[17] In response to DIAND's letter, Brokenhead and Long Plain indicated to Canada that they remained interested in the Barracks.

.

[18] In January 2003, Brokenhead initiated the dispute resolution provisions of the Framework Agreement, arguing that the Barracks should not have been removed from the scope of its Agreement with Canada.

[19] In March 2003, DIAND asked Long Plain and Brokenhead – the two respondents that had expressed interest in the Barracks – for specific information with regard to the amount of land each was interested in acquiring, the proposed purchase price for that land and the proposed use for any land purchased.

[20] Brokenhead and Long Plain subsequently continued to express interest in the Barracks and held several meetings with DIAND. After February 2004, Canada received no further communication from any of the respondents with respect to the Barracks until September 2007.

[21] On November 1, 2006, Treasury Board issued the Directive amending the Policy, which provided that Canada should consider the possible effects of declaring a property to be strategic on any relevant aboriginal rights or claims.

.

[22] On September 5, 2007, the respondents wrote to DIAND, advising that they were laying claim to the Barracks as part of their unfulfilled treaty land entitlements. More particularly, the respondents' claim was premised upon a claim of aboriginal title, not only to the Barracks, but to the entire city of Winnipeg. However, by the time of the hearing before the Judge, the respondents'

claim was not as broad in that they asserted only a right to be consulted by Canada in respect of reserve land promises made to them pursuant to the per capita provision in *Treaty No.1*.

[23] In November 2007, Treasury Board approved the transfer of the Barracks to CLC for development and disposal outside of the scope of the agreements.

[24] On January 25, 2008 the respondents commenced an application for judicial review of the November 2007 Treasury Board decision to transfer the Barracks to CLC, seeking a declaration that Canada had a legal duty to consult and accommodate them before disposing of the Barracks.

The Federal Court Decision

[25] The Judge allowed the respondents' judicial review application. First, he rejected Canada's argument that the release provisions of its agreements with the respondents relieved it of any obligation to the respondents arising from *Treaty No.1*. In the Judge's view, the duty to consult the respondents arose from subsection 35(1) of the *Constitution Act, 1982* and, consequently, could not "be the subject of contracting out". At paragraphs 23 and 24 of his Reasons, the Judge expressed his opinion in the following terms:

> [23] In my opinion, the release does not affect Canada's continuing obligations in the implementation of the First Nations' Treaty right to land, and, in particular, it does not affect Canada's obligation to meet its duty to consult. The duty to consult arising from the principle of the honour of the Crown, as well as Canada's constitutional and legal duty to First Nations pursuant to s. 35 of the Constitution Act, 1982, cannot be the subject of contracting out.
>
> [24] Therefore, in its dealings with the Applicant First Nations, and in particular with the Brokenhead and Peguis First Nations, I find that Canada had a duty to consult.

[Emphasis added]

[26] Second, the Judge refused, in effect, to consider Canada's alternative argument that if a duty to consult existed, then Canada had discharged this duty. The Judge stated that Canada's alternative argument was one "which I cannot take seriously", adding that "[i]t is not credible to take the position in law that a very serious action is not required [i.e. the duty to consult the respondents] and to conduct yourself accordingly and then argue that, if it is required, it was accomplished": Judge's Reasons at paragraph 27. This led the Judge to find that although Canada had engaged in "some dialogue" with the respondents regarding the disposition of the Barracks, Canada had no intention of engaging in meaningful consultation: Judge's Reasons at paragraph 28. Thus, in the Judge's view, there was no basis to support Canada's alternative argument and he dismissed it.

[27] Third, the Judge dealt with Canada's decision to transfer the Barracks to CLC. He found that that decision triggered a duty to consult with Brokenhead and Peguis: At paragraphs 36 and 37, he wrote as follows:

> [36] In the present case, the Kapyong Barracks will be placed out of the reach of the Brokenhead and Peguis First Nations as surplus lands if a transfer takes place to the Canada Lands Company. Therefore, the draw-back in decision-making must be to the point in time just before the decision was taken to transfer the Kapyong Barracks to the Canada Land Company. It is at this point in the decision-making continuum that meaningful consultation must take place.
>
> [37] There is no doubt that Canada understood that acting on the Treasury Board Directive would have a profound and adverse impact on the ability of the Brokenhead and Peguis First Nations' ability to acquire federal land, and, in particular, federal land that might be used to meet its valid interest and ambition to create an urban reserve. Thus, I find that the intention by Canada to transfer the

> Kapyong Barracks to the Canada Land Company triggered a duty to consult the Brokenhead and Peguis First Nations before the intention was carried out in the form of a decision. In my opinion, having made this decision without lawful consultation, Canada's decision to act on the Treasury Board Directive is unlawful and a failure to maintain the honour of the Crown.

[28] Fourth, having found that Canada had violated its duty to consult, the Judge fashioned a remedy. Specifically, he made the following declaration:

> … I declare that:
>
> Canada had a legal duty to consult on its decision to dispose of surplus federal lands at Kapyong Barracks and Canada did not meet that duty; and, in particular,
>
> Canada acted contrary to law by failing to meet the mandatory legal requirement of consultation with the Brokenhead and Peguis First Nations before the making of the November 2007 decision to transfer the surplus lands at Kapyong Barracks to the Canada Lands Company pursuant to the Treasury Board Directive on the Sale or Transfer of Surplus Real Property; and, as a result,
>
> The November 2007 decision is invalid.
>
> I award cost of the present Application to the Applicant First Nations.

The Issues

[29] The appeal raises the following issues:

1. Did a duty to consult arise? If so, with respect to which of the respondents?

2. If there was a duty to consult, what is the content of the duty here?

3. Given the content of the duty, did Canada's actions discharge that duty?

4. Was Brokenhead required to pursue the dispute resolution process contained in its Agreement?

5. If Canada did not discharge the duty, what is the appropriate remedy?

Analysis

[30] As I indicated at the outset of these Reasons, the issue at the heart of this appeal is whether Canada had a duty to consult the respondents and, if so, whether it breached its duty of consultation when it decided to transfer the Barracks to CLC. Because of my view that the reasons given by the Judge for concluding as he did are inadequate in that they do not allow for meaningful appellate review, I would allow the appeal and return the matter to a judge of the Federal Court, other than Campbell J., for redetermination of the issues.

[31] In so concluding, I am mindful that "[s]erious remedies such as a new trial require serious justification": *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 at paragraph 22 [*Sheppard*], and that the Judge's Reasons are 23 pages long. However, as this Court has held, "adequacy of reasons is not measured by the pound": *Ralph v. Canada (Attorney General)*, 2010 FCA 256, 410 N.R. 175, at paragraph 18.

[32] Recently, in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 [*R.E.M.*], the Supreme Court of Canada addressed the issue of adequacy of reasons when it said that reasons must be read in their whole context, which includes the evidentiary record and the submissions of counsel: at paragraph 55. The Supreme Court also said that reasons are especially crucial in circumstances – such as in the present matter – where there are both difficult questions of law before the court and a confusing evidentiary record: *ibid*. Ultimately, reasons must be intelligible insofar as they establish a "logical

connection between the evidence and the law on one hand, and the verdict on the other": at paragraphs 35, 41.

[33] The purpose for this minimal standard is to permit meaningful appellate review. At paragraph 11 in *R.E.M.*, the Chief Justice, writing for a unanimous Supreme Court, explained the need for adequate reasons so as to allow for effective appellate review:

> [11] …
>
> 3. … A clear articulation of the factual findings facilitates the correction of errors and enables appeal courts to discern the inferences drawn, while at the same time inhibiting appeal courts from making factual determinations "from the lifeless transcript of evidence, with the increased risk of factual error": M. Taggart, "*Should Canadian judges be legally required to give reasoned decisions in civil cases?*" (1983), 33 U.T.L.J. 1, at p. 7. Likewise, appellate review for an error of law will be greatly aided where the trial judge has articulated her understanding of the legal principles governing the outcome of the case. Moreover, parties and lawyers rely on reasons in order to decide whether an appeal is warranted and, if so, on what grounds.

[34] I am of the opinion that this Court cannot, in the present matter, perform its appellate function. As a result, I am satisfied that the case should be remitted back to another judge of the Federal Court.

The Problems with the Reasons:

[35] The beginning of the Judge's Reasons is adequate. He first describes the background context of the case: at paragraphs 1 to 6. He then establishes that correctness is the proper standard of review: at paragraph 7. Next, he reviews some of the relevant jurisprudence pertaining to the honour of the Crown, the principle of reconciliation, and the duty to consult: at paragraphs 8 to 16.

However, with respect, the remainder of the Judge's Reasons is rife with uncertainty and contradiction. I see at least eight problems, six of which bear on the adequacy of his reasons and two of which reveals a different kind of error.

[36] First, it is unclear to which respondents Canada owes the duty of consultation. At paragraph 17, the Judge says that it was agreed that "only the Brokenhead First Nation and the Peguis First Nation are directly affected" by Canada's decision to transfer the Barracks. But, at paragraph 24 he finds that Canada owed a duty to consult to all the respondents. Then, at paragraph 36, he reiterates that Brokenhead and Peguis are specifically affected by the transfer decision and, at paragraph 37, he finds that Canada's decision to transfer the Barracks to CLC "triggered a duty to consult the Brokenhead and Peguis First Nations before the intention was carried out in the form of a decision". Finally, in his Order he says that "Canada had a legal duty to consult on its decision … [and] did not meet that duty", going on to state that "in particular", Canada had failed "to meet the mandatory legal requirement of consultation" with Brokenhead and Peguis. He then concludes by awarding costs to all of the respondents.

[37] While it is possible to infer from the Judge's Reasons that he meant that Canada owed a duty only to Brokenhead and Peguis, it is equally possible to read his Reasons as signifying that Canada owed a duty to all of the respondents. This lack of clarity, in my view, presents two problems.

[38] First, it violates the rule that "[t]he terms of [an] order must be clear and specific. [A] party needs to know exactly what has to be done to comply with the order": *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at paragraph 24. As a result of the Judge's lack of clarity, Canada is left in the position of being ordered to consult, but being unsure with whom it must consult.

[39] Second, the lack of clarity prevents this Court from performing its appellate review function. This Court must determine whether it was appropriate for the Judge to make the Order he made. However, because the meaning of the Order is unclear, this Court is "unable to determine whether the decision is vitiated by error": *Sheppard* at paragraph 28.

[40] A second related source of uncertainty is the Judge's failure to adequately distinguish between the different circumstances of the respondents as disclosed in the record and argued at the hearing. Long Plain, Swan Lake and Roseau River all have signed TLE agreements with Canada that do not give them an explicit priority right to surplus federal land. Brokenhead and Peguis have signed agreements with Canada containing provisions that specifically give them a priority right to surplus federal land. Sagkeeng has not yet signed any agreement with Canada. With respect to Sandy Bay, it has also not signed an agreement with Canada, since Canada has rejected its claim.

[41] The case, then, reveals at least four arguably different circumstances that may result in the different respondents having different consultation rights, if any. The Supreme Court has held that more detailed reasons are required where the Judge must "resolve confused and contradictory

evidence on a key issue": *R.E.M.* at paragraph 44, citing *Sheppard* at paragraph 55.6. The Judge has failed, in my respectful view, to provide sufficient reasons to resolve this confusing evidence. As a result, we cannot discern what his views are with respect to the possible outcome arising from these different circumstances.

[42] A third source of uncertainty results from the Judge overlooking Canada's description of the Barracks. As I indicated earlier, the Barracks are comprised of two units, i.e. the old operational section of the base and the married quarters area of the base. Canada claims that it has made a decision only with respect to the former. This crucial fact is not mentioned anywhere in the Judge's Reasons. As a result, it is unclear whether his Order covers only the operational section of the base or the entire base.

[43] A fourth source of uncertainty is the Judge's failure to analyze the importance, if any, of the three distinct decisions made by Canada concerning the Barracks. In paragraph 31 of his Reasons, the Judge notes that Canada made three different decisions: its April 2001 decision to declare the Barracks to be surplus federal land; its November 2001 decision to declare the Barracks to be subject to the strategic disposal process; and its November 2007 decision to transfer the Barracks to CLC. While it was helpful for the Judge to delineate these different decisions, he failed to explain what impact, if any, the three decisions had or have on the respondents' rights. This failure by the Judge also precludes us from properly reviewing the correctness of his decision.

[44] Fifth, the Judge indicated at paragraph 32 of his Reasons that the Policy at issue, released in 2001, was amended in 2006 by the Directive. However, what he does not indicate is that the Directive required Canada to consider the possible effects of declaring a property to be strategic on aboriginal rights or claims. Given that the Directive was issued in 2006, it may have affected the Agreement which Peguis signed that same year. It may also have affected Treasury Board's November 2007 decision to transfer the Barracks to CLC. However, since the Judge made no findings whatsoever with regard to these crucial facts, nor did he provide any analysis in regard thereto, again we are left entirely in the dark about the effects, if any, of the amendment to the Policy.

[45] Sixth, Canada argues that Brokenhead began and then wrongfully abandoned the dispute resolution mechanism contained in its Agreement with Canada. There is a general rule, with exceptions, that a party must exhaust the administrative remedies available to it before commencing an action or an application for judicial review: *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2010 FCA 61, 400 N.R. 367, at paragraph 4. The Judge was no doubt aware of this rule, yet he made no finding one way or another as to what impact, if any, the dispute resolution mechanism available to Brokenhead had on its ability to claim relief from the courts. Again, effective appellate review is impossible because the Judge has not made any findings with respect to this important issue.

[46] I now turn to two other errors that do not relate to the adequacy of the Judge's reasons but reveals a further problem with his approach.

[47] At paragraph 27 of his Reasons, the Judge chastises Canada for arguing first that the duty to consult did not exist in the circumstances and, alternatively, if a duty to consult did exist, Canada had fulfilled this duty. As noted above, the Judge found that Canada's position is "not credible".

[48] With respect, the Judge's comments are difficult to understand, given that alternate arguments by a party are a staple of litigation and are regularly accepted by courts: *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, at paragraphs 34 and 45; *Canadian Wireless Telecommunications Assn. v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, 64 C.P.R. (4th) 343, at paragraph 17. In my view, it was an error on the Judge's part to fail to seriously consider Canada's alternative argument that its duty to consult had been fulfilled. Although the Judge went on to cursorily opine about whether Canada had fulfilled its duty, it is clear from his Reasons that he did not give the matter serious consideration, writing at paragraph 29:

> [29] There is no point in setting out the details of the past course of conduct between Canada and the Applicant First Nations over the land in question because I find that Canada admits that it believed that it did not have a duty to consult as the explanation for its actions. Be that as it may, by this decision, a new phase begins in the relationship between the Canada and the Applicant First Nations.

[49] Second, at paragraph 19 of his Reasons, the Judge says "by Article 3.04(4)(b) of the [Peguis Agreement], the Peguis First Nation is entitled to surplus federal land in similar fashion to the Brokenhead First Nation" [emphasis added]. This statement is misleading. Article 3.04(4)(b) of the Peguis Agreement says that Peguis "may" acquire surplus federal land in accordance with Article

3.09. Article 3.09(7) says that "the expression of interest in Acquiring Surplus Federal Land by Peguis … does not provide a right or create a guarantee" that the land will be available to be Acquired by Peguis" [emphasis added]. Thus, the Peguis Agreement clearly creates no entitlement to surplus federal land for Peguis, but rather gives Peguis the opportunity to purchase surplus federal land in particular circumstances. It is more accurate, as the Judge said himself in respect of Brokenhead's agreement at Paragraph 18 of his Reasons, that Peguis "can" acquire surplus federal land.

Conclusion

[50] I therefore conclude that the Judge's reasons are inadequate. They do not grapple with and attempt to resolve the difficult legal issues and the confusing evidentiary record that were before him. At paragraph 55 of her Reasons in *R.E.M.*, the Chief Justice sets forth what, in her view, appellate courts should be looking for when attempting to determine whether a judge's reasons are adequate:

> [55] The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus, the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.

[51] In my view, the Judge failed to seize the substance of the critical issues before him. He also failed to deal adequately with the evidence before him in that he did not address key aspects thereof

and did not, as a result, make any findings in regard thereto which would have allowed this Court to conduct a meaningful appellate review.

[52] The only alternative open to us, other than returning the matter to the Federal Court, would be for this Court to transform itself into a court of first instance and to make fresh findings of fact and determinations of law based on those findings. That is not our role. Consequently, I am satisfied that we are not in a position to conduct effective appellate review in these circumstances.

[53] I note in passing that following the Judge's decision there have been jurisprudential changes in aboriginal law resulting from the Supreme Court's decisions in *Rio Tinto Alcan Inc. v. Carrier Skenai Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, and *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2011] 1 C.N.L.R. 12, ("*Beckman*"), where the Court discusses when the duty to consult is triggered and how modern land claim agreements, such as those before us in the present matter, shape that duty. In particular, the Judge who redetermine the issues may wish to consider the Crown's argument about the effect of the release provisions in the Crown's respective agreements with the respondents in light of what the Supreme Court said in *Beckman* about the weight to be given to provisions in properly negotiated, sophisticated land agreements.

[54] For these reasons, I would therefore allow the appeal with costs, I would set aside the Judge's decision and I would refer the matter back to the Chief Justice of the Federal Court or to a

judge, other than Campbell J., designated by the Chief Justice for redetermination of the issues in the light of these Reasons.

"Marc Nadon"

J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
J. Edgar Sexton J.A. »

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-446-09
STYLE OF CAUSE:	HMQ ET AL v. BROKENHEAD FIRST NATION ET AL
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	February 22, 2011
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A. SEXTON J.A.
DATED:	May 3, 2011

APPEARANCES:

Jeff Dodgson Jeff Echols	FOR THE APPELLANTS
Norman Boudreau	FOR THE RESPONDENTS (EXCEPT SWAN LAKE FIRST NATION)
Jeff Rath	FOR THE RESPONDENTS (EXCEPT SWAN LAKE FIRST NATION)
Kris Saxberg Bradley Regehr	FOR THE RESPONDENT SWAN LAKE FIRST NATION

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada	FOR THE APPELLANTS
Booth Dennehy LLP Winnipeg, MB	FOR THE RESPONDENTS (EXCEPT SWAN LAKE FIRST NATION)

Rath & Company Priddis, AB	FOR THE RESPONDENTS (EXCEPT SWAN LAKE FIRST NATION)
D'Arcy & Deacon LLP Winnipeg, MB	FOR THE RESPONDENT SWAN LAKE FIRST NATION)