

# Aboriginal Law Bulletin

December 2009

Fasken Martineau DuMoulin LLP

## Where a Plan Undergoes Extensive Consultation, the Execution of the Plan May not require Further Consultation.

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On November 19, 2009, the Federal Court of Appeal upheld a finding that the Crown had fulfilled its duty to consult with respect to the disposition of lands from the former Canadian Forces Base in Chilliwack, British Columbia (“CFB Chilliwack”).

The Tzeachten First Nation, the Skowkale First Nation, and the Yakwekwioose First Nation (collectively “Tzeachten”), all members of the Sto:lo Nation challenged the disposition of lands adjacent to their reserves (the “Lands”), alleging the Crown had not fulfilled its duty to consult. The Tzeachten claimed ownership to the Lands on two grounds: (1) they were subject to specific claims on the basis that the Lands were intended to form part of two Indian reserves; and (2) the Sto:lo Nation asserted aboriginal title to the Lands.

### Background

In 1995, the Crown announced its intention to close CFB Chilliwack. Between 1995 and 2000, the Crown and Tzeachten had a number of meetings regarding the potential disposal of the Lands. Several proposals were discussed, including joint management and administration between Canada Lands Company CLC Limited (“CLC”), a subsidiary corporation of Canada Lands, and Tzeachten. In 1999,

Tzeachten proposed that the Crown buy the Lands from them at fair market value since it was their position that they were set aside as reserves in 1864. The Tzeachten also made a submission regarding the Lands to the Treasury Board, which had to approve any disposal of the Lands. The Crown and Tzeachten were unable to agree to any of the proposals.

In 2000, the Treasury Board approved the Crown’s application to dispose of CFB Chilliwack by dividing it into nine parcels. The plan contemplated the Crown immediately transferring one parcel to CLC, holding five parcels for a two-year period, and setting aside the remaining parcels for the Crown. The two-year hold period for the five parcels was created to give the Crown the opportunity to select parcels for treaty negotiations. At the end of the two years, any parcels not selected to satisfy obligations under treaty negotiations would revert back to the Treasury Board to obtain authorization to transfer to CLC.

In 2002, the Crown informed Tzeachten that the two-year hold period had expired and that the Crown treaty negotiators had advised they would not acquire any of the Lands for treaty settlement purposes.

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On August 8, 2003, the Crown informed the Tzeachten that it had authorized the sale of the remainder of Lands to CLC.

## The Appeal

Tzeachten challenged the sale of the Lands to CLC on the basis that the transfer removed land from the federal inventory available to settle either the Sto:lo treaty or the Tzeachten specific claims, which it suggested had a significant impact. The Tzeachten argued that the Crown was obliged to engage in further consultations with them after the Treasury Board approved the disposition plan in 2000, and before disposing the Lands subject to the two-year hold period. Justice Tremblay-Lamer dismissed the judicial review, finding that the Crown had consulted extensively on the adoption and implementation of the 2000 disposal strategy, at times achieving deep consultation. The transfer of the Lands in 2003 was the execution of the disposal strategy; therefore, the Crown had met its duty to consult.

The Court of Appeal upheld Justice Tremblay-Lamer's finding that the Crown had met its duty to consult. The Court agreed that the 2003 decision to transfer the Lands to CLC could not be separated from the adoption of the disposal strategy in 2000. The primary issue on appeal was whether, and to what extent, the Crown was obliged to consult with the Tzeachten during the two-year hold period. This, the Court reasoned, depended entirely on the stated purpose for the hold period, which in this case was for use in treaty settlement negotiations.

Even though the Court agreed with the Tzeachten that two years is not a realistic time in which to expect that the Sto:lo treaty could be concluded, the decision to hold back the land did not require a settlement before the Lands could be released. The hold period gave the Tzeachten the opportunity to select the Lands for treaty purposes. Since the Tzeachten took no steps after 2000 to move the treaty forward, the Court held that it would be unreasonable to require the Crown to extend the hold period.

The Court upheld the Chambers Judge's finding that the loss of the Lands is compensable, finding that it is relevant in assessing the seriousness of a potentially adverse effect of a decision on an aboriginal title claim to consider whether such adverse impact can be remedied by providing compensation or whether the lands at issue are uniquely significant in respect to an unrecognized aboriginal claim and thus not compensable. The Court agreed with the Crown that this decision does not dispose of any claim the Tzeachten may assert for compensation based on its claim to the reserves or its claim to aboriginal title. Compensation remained open as an issue for negotiation or litigation with respect to their claims.

## Conclusions

This case further defines the parameters of the Crown's duty to consult and accommodate. Where, as a result of extensive and deep consultation, a strategy to dispose of claimed lands includes a time delay to allow for further negotiations, the Crown's duty to consult is not "reset" during the delay such that it is obliged to reinitiate consultation before carrying out the original plan.

This decision also reinforces the proposition that the Crown's duty to consult does not require agreement between the parties. If good faith efforts are made to reasonably consult and consider aboriginal peoples in respect of land claims, the unwillingness of the first nation to compromise in negotiations will not vitiate the Crown's efforts to consult.

Finally, this case confirms that in determining the scope of consultation with respect to asserted aboriginal title, it is relevant to consider whether a potential infringement is compensable.

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