Court File No. 36478

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

Musqueam Indian Band

APPELLANT

AND:

Musqueam Indian Band Board of Review, Assessor for the Musqueam Indian Band, and Shaughnessy Golf and Country Club

RESPONDENTS

AND:

Council for the Advancement of Native Development Officers

INTERVENER

APPELLANT'S FACTUM IN RESPONSE TO THE FACTUM OF THE RESPONDENT, ASSESSOR FOR THE MUSQUEAM INDIAN BAND
(Pursuant to R 29(4) and 35(4) of the *Rules of the Supreme Court of Canada*)

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Introduction

1. In its factum, the Respondent Assessor for the Musqueam Indian Band ("Assessor") seeks to uphold the judgment appealed from on grounds not relied on in the reasons for judgment of the British Columbia Court of Appeal. Accordingly, the Appellant Musqueam Indian Band ("Band") provides this factum in response pursuant to Rules 29(3), 29(4) and 35(4) of the *Rules of the Supreme Court of Canada.*

Several Grounds Advanced by the Assessor are not Contained in the Court of Appeal's Reasons for Judgment

A. The Notion that the Taxing Authority Placed the Restriction

2. At paragraphs 36, 37 and 111 of its factum, the Assessor submits that the use restriction in the Lease was placed on the Property by the "taxing authority itself, the Crown." In this way, the Assessor argues that cases such as *Canadian National Railway Company v Vancouver (City)*[1] are comparable.

3. The Assessor cites no authority for the statement that, in 1958, the federal Crown was the "taxing authority." This statement is not correct. As noted by the Respondent Shaughnessy Golf and Country Club ("Club") in its factum: "When the Lease was signed in 1958, property taxes on the reserve were governed by provincial legislation."[2] The application of provincial property tax legislation to the Musqueam Indian Reserve #2 (the reserve on which the Property is situated) was upheld in 1941 by the British Columbia Court of Appeal in *Vancouver (City) v Chee*.[3]

B. Subsection 25.1(2)(b) of the Bylaw

4. At paragraph 46 of its factum, the Assessor submits that subsection 25.1(2)(b) of the Bylaw deals with valuation and makes it clear that the permitted use of a property is a pertinent consideration for the Assessor to consider when determining the actual

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[1] *Canadian National Railway Company v Vancouver (City)* [1950] 2 WWR 337 (BCCA) (**Book of Authorities of the Respondent, Assessor of the Musqueam Indian Band ("RBA"), Tab 6**).
[2] Factum of the Respondent Shaughnessy Golf and Country Club ("**Club's Factum**") at para 3, see also para 22.
[3] *Vancouver (City) v Chee*, [1941] BCJ No 12, 57 BCR 104 (BCCA) (**See within Tab A**).

value of a property. In response, the Band submits that subsection 25.1(2)(b) is simply a provision that states that October 31 is the effective date that must be used to determine what are the permitted uses that may be considered for the valuation of a property in that assessment year. It does not say how valuations are to be carried out by the Assessor; that instruction is contained in section 26.

5. The Band submits that subsection 25.1(2)(b) of the Bylaw does not confer an independent basis on which the Assessor is free to consider any restriction, without regard to the requirement in subsection 26(1) that such consideration must not conflict with a valuation based on a fee simple interest located off reserve, or the requirement in subsection 26(3.2) that only restrictions placed by the Band may be considered.

C. Cases Decided Under Subsection 19(5) of the Provincial *Assessment Act*

6. The cases cited by the Assessor at paragraphs 38-44 of its factum are distinguishable; they are based on subsection 19(5) of the British Columbia *Assessment Act*, which provides as follows:

> If the land and improvements are liable to assessment under section 26 [assessment of land the fee of which is in the Crown], 27 [exempt land held by occupier liable to assessment] or 28 [assessment of land the fee of which is in the municipality], the assessor must include in the factors that he or she considers under subsection (3), any restriction placed on the use of the land and improvements by the owner of the fee.[4]

7. However, the Band's intention was to depart from the changes made to the provincial legislation in 1985 in what is now subsection 19(5). The Band's intention, as reflected in its 1996 Amendment, reflects the general principle of assessment law that it is the unencumbered fee simple interest, and not only the interest of the occupier, that is to be valued. This general principle applied at the time the Lease was signed in 1958 when the Club agreed to pay property taxes[5] and still applies to lands in British

[4] *Assessment Act*, RSBC 1996, c 20, s 19(5), Appellant's Factum ("**Band's Factum**"), Tab B, at 89.
[5] **Band's Factum** at para 31.

Columbia if the land is not held by the Crown, an exempt fee-simple owner, or a municipality.[6]

8. A related principle is that only restrictions that run with the land and are binding on future purchasers are relevant for the purposes of tax assessment.[7]

9. The effect of subsection 19(5) of the provincial *Assessment Act* was to limit these principles in the case of those lands held by the Crown, exempt owners or municipalities. Justice Loo summarized the effect of subsection 19(5) as follows in *Assessor of Area #09 − Vancouver v UBC Property Trust:*

> Under section 19(5), a restriction on use must be taken into account when the land and improvements are assessed under s. 27, which requires that the land be entered in the assessment roll in the name of the occupier, *whose interest must be valued* at the actual value of the land and improvements. In other words, the property is valued in the context of the highest and best use that the occupier can make of the property in accordance with the restrictions imposed by the fee simple owner. [emphasis in original][8]

10. By focusing on the interest of the occupier and not the fee simple owner, subsection 19(5) constitutes an exception to the long established principles of assessment law that it is the entire fee simple interest, not just that of the occupier that is to be assessed, and that only restrictions that run with the land and that are binding on future purchasers are applicable for purposes of tax assessment.[9]

11. Subsection 19(5) of the provincial *Assessment Act* is therefore an exceptional provision. It did not apply in 1958 when the Club agreed to pay property taxes and it does not apply to most lands in British Columbia today. The Band's decision to depart

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[6] *Standard Life Assurance Co v British Columbia (Assessor of Area No 01 − Capital)* (1997) 146 DLR (4th) 247, [1997] BCJ No 972 (BCCA) (**Appellant's Book of Authorities ("BOA"), Tab 20**).

[7] *British Columbia (Assessor of Area No. 10 - Burnaby/New Westminster) v Central Park Citizen Society,* [1993] BCJ No 2260 (BCSC) at para 25 (**BOA, Tab 6**).

[8] *Assessor of Area #09 − Vancouver v UBC Property Trust*, 2008 BCSC 822 at para 31 (**BOA, Tab 7**).

[9] The Club acknowledges the above generally accepted appraisal principles at para 20 of its factum, where it states: (a) unless otherwise specified, value is what a willing buyer would pay to a willing seller for the fee simple title or freehold, rather than a leasehold interest; and (d) other factors which may be considered at common law include…taxpayers' agreements that are not made with taxing authorities but that would bind subsequent purchasers of the land.

from subsection 19(5) as part of the 1996 Amendment cannot be seen as surprising and is consistent with the decision to value interests on the reserve as if the interest holder held a fee simple interest located off reserve, a principle that is long established and that applies to most lands in the Province.

12. Based on the foregoing, the Band submits that cases such as those cited by the Assessor[10] dealing primarily with the interpretation of provisions in assessment laws that are materially different from the Bylaw, such as subsection 26(3.2) (now subsection 19(5)) of the provincial *Assessment Act*, are not relevant to interpreting the Band's Bylaw and are distinguishable on that basis.

D. Findings of Fact from *Guerin* and Placing of Use Restriction

13. At paragraph 63 of its factum, the Assessor submits that:

> In agreeing to the findings of fact in the *Guerin* decisions, including that the surrender was valid, the Band has agreed that a majority of the Band members assented to the Lease. The Band is thus deemed to have assented to the surrender of the Property by majority and thus, in the entire context of the Lease, it can rightfully be said that the use restriction in the Lease was "placed by the Band".

14. In response, the Band respectfully submits that the Assessor is confusing the Band's agreement with the findings of fact in *Guerin,* for the purposes of this stated case, with placing a use restriction in the Lease. As part of the Relevant Facts, all the parties accepted and agreed not to challenge any of the findings of fact in the *Guerin* decisions.[11] The Band is not disputing the validity of the surrender. However, the Band strongly denies that, by agreeing to the surrender, it somehow placed a use restriction or agreed with the terms of the Lease that, without its knowledge or consent, included a use restriction.

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[10] Factum of the Respondent Assessor for the Musqueam Indian Band ("**Assessor's Factum**") at paras 38-44. See also cases cited in **Club's Factum** at para 60.

[11] Notice of Stated Case, Relevant Facts ("Facts") at para 6 (**Appellant's Record ("AR"), Vol II, Tab 8 at 2-3**).

15. In this regard, the Band relies on Justice Collier's findings of fact in *Guerin* where he noted that the provision limiting future rent to golf course use:

(a) was "not before the surrender meeting";

(b) "not subsequently brought before the Band Council or the Band for comment or approval"; and

(c) had probably been prepared by the solicitors for the Club.[12]

Justice Collier also stated: "In my view, the surrender of October 6, 1957, imposed on the defendant [Crown], as trustee, a duty…to lease to Shaughnessy Golf Club on these conditions: …(d) Future rental increase to be negotiated for each new term; no provisions regarding arbitration or the manner in which the land would be valued…" (emphasis added).[13]

E. Alleged Abuse of Process

16. At paragraphs 64-70 of its factum, the Assessor argues that in *Guerin* the Band was compensated for any potential loss of tax revenue relating to the Property and that "to pursue an assessment appeal that seeks to ignore the legal restriction that is contained in the Lease between the Crown and the Club is an abuse of process."[14] Importantly, and in stark contrast to the Assessor's allegation, the Chambers Judge and the Court of Appeal both noted and accepted the Band's assertion that this stated case was not a re-litigation of *Guerin*.[15]

17. The amount of $10 million awarded in *Guerin* was solely for breach of trust as stated by Justice Collier: "There will be a declaration that the defendant was in breach of trust and the plaintiffs have incurred damage as a result."[16] The action was against

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[12] Schedule B: *Guerin* FCTD at 404, 407 (**AR**, **Vol. II, Tab 8b at 32, 35**); See also Relevant Facts at para 7 (**AR, Vol. 2, Tab 8 at 3**).
[13] Schedule B: *Guerin* FCTD at 417-418 (**AR**, **Vol. II, Tab 8b at 45-46**).
[14] **Assessor's Factum** at paras 64-70.
[15] Supreme Court Decision at paras 37, 39, 40, 42, 71 **(AR, Vol 1, Tab 1 at 21, 22, 32)**; Court of Appeal Decision at para 3 **(AR, Vol. 1, Tab 3 at 100)**.
[16] Schedule B: *Guerin* FCTD at 443 (**AR**, **Vol. II, Tab 8b at 71**).

the federal Crown for breach of trust and "the Club was not a party to this litigation."[17] The Band did not then have power to levy property taxes[18] and it would not be until 1988 that it would acquire that power. There was no claim or discussion in the litigation with respect to property taxes payable by the Club or the correct method of assessment.

18. In light of the above, clearly there is no abuse of process in the Band exercising its power to appeal the assessment of the Property. The Band is not re-litigating *Guerin*.

F. Assessor's Considerations of Actual Value

19. At paragraphs 76-84 of its factum, the Assessor submits that the Band has not provided any evidence that the Assessor has not valued the Property at "actual value" according to section 26 of the Bylaw. The Assessor goes on to argue that there are a number of considerations that must affect the assessment of the Property and that the Assessor is permitted to consider such factors under the Bylaw.

20. In response, the Band emphasizes that this is a stated case brought by the Musqueam Indian Band Board of Review ("Board") setting out several questions of law for the determination of the British Columbia Supreme Court based on the Relevant Facts.[19] The factors discussed by the Assessor at paragraphs 76-84 of its factum may or may not be relevant to a subsequent hearing by the Board, which will take place once it has received direction from this Court on the issues engaged, and questions posed, in the stated case.

21. The current stated case and its appeal is not the place for the parties to produce evidence that will be presented before the Board following this appeal. This appeal is about how the questions of law posed in the stated case are to be answered. It is inappropriate for the Assessor, at this stage, to speculate on the factors or "other circumstances" the Assessor may have considered in determining actual value. There

[17] Facts at para 6 (**AR, Vol. II, Tab 8 at 2-3**).
[18] **Club's Factum** at para 21.
[19] Notice of Stated Case (**AR, Vol. II, Tab 8 at 1**).

is simply no evidence at this stage from the Assessor on how he/she developed his/her opinion.

G. The Assessor's Discretion

22. At paragraphs 85-100 of its factum, the Assessor argues that the Band is taking issue with the Assessor's discretion under the Bylaw. The Band does not dispute that subsections 26(3) and 26(3.2) of the Bylaw confer a discretion on the Assessor. The Band has sought a positive answer to Question 2(d) asking if the Assessor has a discretion under those subsections to give consideration to the factors described in subsection 26(3), including any restriction placed on the use or the land or improvements by the band for the purposes of subsection 26(3.2). The Band has also sought a positive answer to Question 2(d)(i) asking whether such discretion has to be exercised reasonably and in the light of the relevant circumstances.[20] To this extent, the Band agrees with the Assessor.

23. However, the Band has also sought a positive answer to Question 2(d)(ii) asking whether the discretion is subject to the exception and proviso in subsection 26(3); that is, that such consideration must not conflict with the requirement in subsections 26(1), (2) and (6) that land and improvements shall be assessed at their actual value, meaning the market value off the fee simple interest in the land and improvements as if the interest holder held a fee simple interest located off reserve.[21] The Assessor ignores this key requirement and, in doing so, distorts the correct application of section 26 and the proper basis of valuation.

H. Allegations of Inequity, Unfairness and the Band's Maliciousness

24. At paragraphs 100 and 105 of its factum, the Assessor argues that the Band's approach to the assessment of the Property would be "inequitable" to the Club and suggests that the Band is seeking to legislate in "unfair and malicious ways."

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[20] **Band's Factum** at para 107.
[21] **Band's Factum** at para 107.

25. The Band submits that there is nothing inequitable, unfair or malicious in these proceedings. This is unseemly. Rather, this appeal is about the proper interpretation of section 26 of the Bylaw. That said, in response to the Assessor's suggestions, the Band submits that the history of the taxation of the Property, from 1958 when the Lease was granted to today, reveals no inequities or unfairness or maliciousness. In particular:

(a) From 1958 to 1985 (a period of 27 years), the Property was assessed based on the "actual value of the land" or its highest and best use, without regard to any restriction, as this was what the provincial assessment regime required;[22]

(b) From 1986 to 1996 (a period of 10 years), the Property was assessed with regard to the restriction in use, consistent with the amendments made to the provincial *Assessment Act* in 1985. In 1996, the Band decided to depart from this language and approach in its own Bylaw; [23]

(c) From 1997 to 2010 (a period of 13 years), the Property was assessed with regard to the restriction in use, despite the fact that the 1996 Amendments provided that only restrictions "placed by the band" were to be considered in determining actual value. [24] While it was open to the Band to challenge the Property's assessment during this period and to insist that the Bylaw, properly applied, meant only restrictions the Band placed on properties could be taken into account, it did not pursue this type of challenge at this time, as was its prerogative. In the result, the Club received the benefit of a lower assessment and thus lower taxes during this time period; and

(d) From 2011 to today (a period of over 5 years), the Club has had notice of the Band's challenge to the assessment of the Property, on the basis that under a proper interpretation and application of section 26 only restrictions

[22] **Club's Factum** at paras 21 and 23.
[23] **Club's Factum** at para 21.
[24] **Club's Factum** at para 21.

> "placed by the band" are to be taken into account for assessment purposes.

26. The Band submits that this history reveals that for 27 years the Property was assessed based on its highest and best use (without regard to any restriction), and for 23 years the Property was assessed based on a restricted use. In the last five years, the Band has sought to ensure that the Property is assessed in accordance with the amendments made to the wording of section 26 of the Bylaw, wording that is consistent with generally accepted appraisal principles. There is no unfairness, inequitable treatment, or maliciousness in these circumstances. The Band is simply attempting to assert its taxation authority as it is entitled to do at law.

I. Suggestion that the Band is the Successor to the Crown

27. At paragraphs 101-111 of its factum, the Assessor submits that "the two parties to the Lease are the Crown and the Club. In the circumstances of this dispute, the Band is the successor to the Crown. Therefore, viewed in this manner, the Band is the party to the Lease and the use restriction was placed by the Band." This conclusion is said to flow from international legal concepts and subsections 16(2) and 16(3) of the *First Nations Land Management Act* ("FNLMA").

28. The Assessor relies, at paragraph 104 of its factum, on the decision of the International Court of Justice ("ICJ") in *Case Concerning the Gabcikovo-Nagymaros Project*,[25] where the ICJ held that Slovakia was bound by a treaty as the successor to Czechoslovakia upon the division of that state into Slovakia and the Czech Republic. Even assuming that the decision applies as part of Canadian domestic law, Canada has not ceased to exist as a separate entity and the Band is not a successor to it. The decision can clearly be distinguished on that basis and is not relevant.

29. In the alternative, even if the case had some application, it would mean, at most, that the Band would become a party to the Lease on the division of Canada. It would not mean that the Band placed a use restriction in the Lease in 1958.

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[25] International Court of Justice, September 25, 1997 (**RBA Tab 10**).

30. The Assessor also quotes subsections 16(2) and 16(3) of the FNLMA as authority for the statement "the Band assumes many of the rights and obligations of the Crown with regard to agreements that the Crown entered into on the Band's behalf, including the Lease."[26] However, those subsections make the assumption of the Crown's rights and obligations conditional on "the coming into force of a land code." No land code has yet come into force with respect to the Band,[27] but even if the Band's land code had come into force, it would mean, at most, that the Band would become a party to the Lease on the coming into force of the land code. It would not mean that the Band placed a use restriction in the Lease in 1958.

Conclusion

31. The Band respectfully submits that, for the reasons set out above, the additional grounds set out in the Assessor's factum that were not relied on in the Court of Appeal's reasons for judgment do not justify its decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, in the Province of British Columbia, the 11th day of April, 2016.

Maria Morellato, Q.C. James I. Reynolds Leah Pence

[26] **Assessor's Factum** at para 107.
[27] Court of Appeal Decision at para 26 (**AR Vol A, Tab 3, at 107**).

Table of Authorities

Case Name:

Vancouver (City) v. Chee

Between
The City of Vancouver, and
Chow Chee

[1941] B.C.J. No. 12

[1942] 1 W.W.R. 72

57 B.C.R. 104

5 C.N.L.C. 46

British Columbia Court of Appeal
Vancouver, British Columbia

Sloan, O'Halloran and McDonald JJ.A.

Heard: November 20 and 24, 1941.
Judgment: December 12, 1941.

(10 paras.)

Taxation -- Indian Reserve -- Lands -- Lease within Reserve to Chinaman -- Taxation of lessee's interest -- Exemptions -- Construction of statutes -- B.N.A. Act, Sec. 125 -- R.S.C. 1927, Cap. 98 -- B.C. Stats. 1921 (Second Session), Cap. 55; 1937, Cap. 82, Sec. 5.

Musqueam Indian Reserve No. 2 is situate within the boundaries of the city of Vancouver. Andrew Charlie, an Indian who held five acres of land within the Reserve, entered into a written agreement with the defendant whereby he would surrender the five acres to the Department of Indian Affairs for the purpose of the granting by the Department to the defendant a permit to occupy and cultivate the five acres from the 1st of April, 1936, until the 31st of March, 1937, at a rental of $250 a year, to be paid to the Department on behalf of Andrew Charlie. The defendant entered into possession and raised agricultural products for sale. Under the Vancouver Incorporation Act, 1921, as amended by section 5 of the Vancouver Incorporation Act, 1921, Amendment Act, 1937, the city assessed the interest of the defendant, and in 1939 levied a tax against him in the sum of $34.75. The tax not

having been paid, the city brought action in December, 1940, for the amount of the taxes with interest and costs. It was held on the trial that the Vancouver Incorporation Act, 1921, and the 1937 amendment authorizing the taxation of interests in Dominion lands held by persona occupying them under permits of the Department of Indian Affairs are not in contravention of the provisions of section 125 of the British North America Act, 1867, and are intro vires of the Provincial Legislature. For the purpose of the collection of taxes so levied the Provincial Legislature may authorize their recovery by personal action against persons so occupying such lands.

Held, on appeal, affirming the decision of ELLIS, Co. Ct. J., that the land is occupied by a Chinaman under an agreement made with an Indian of the Reserve through the Indian Department, and hence the occupant by virtue of the Vancouver Incorporation Act, 1921, and the 1937 amendment of said Act, may be assessed and taxed. The land itself is not subject to the tax nor to any lien in respect thereof. As to the validity of the Provincial statute the matter is concluded by the decision on which the learned trial judge relied, Smith v. Vermilion Hills Rural Council, [1916] 2 A.C. 589.

APPEAL by defendant from the decision of ELLIS, Co. Ct. J. of the 14th of June, 1941, in an action by the city of Vancouver to recover the sum of $34.75 and interest, being the amount of rates and taxes due the city from the defendant. The Musqueam Indian Reserve No. 2 is an Indian Reserve at the mouth of the North Arm of the Fraser River and within the boundaries of the city of Vancouver, and has an area of about 392 acres. The title to said lands being in His Majesty the King in the right of the Dominion of Canada, and is subject to and administered under and in accordance with the provisions of the Indian Act. Andrew Charlie, an Indian belonging to the band occupying certain land on the Reserve, executed a document which was also executed and renewed by or on behalf of the Superintendent General of Indian Affairs in accordance with the provisions of the Indian Act, whereby Andrew Charlie agreed to surrender five acres of his land to the Department of Indian Affairs for the purpose of the granting by the Department of Indian Affairs to Chow Chee (a Chinaman) a permit to occupy and cultivate said five acres for a period from April 1st, 1936, to March 31st, 1937, on a rental to be paid to the Department of Indian Affairs on behalf of Andrew Charlie of $45 per acre, and an additional $25 for the use of the houses. Acting under the Vancouver Incorporation Act, 1921, as amended by section 5 of the Vancouver Incorporation Act, 1921, Amendment Act, 1937, the city assessor in the year 1938 and in the year 1939 for the first time levied a tax on persons other than Indians occupying land on the Reserve, and in particular assessed the right or interest of the defendant in the lands referred to and levied a tax against the defendant in the sum of $34.75. The taxes claimed were settled, imposed and levied by a by-law of the city passed during said year. The defendant uses the land rented by him as a truck-gardener. He does not hold the land for a commercial purpose and the Reserve is not occupied by any one in an official capacity. The rent is received by the Department, and after deducting a certain percentage is sent to Andrew Charlie.

The appeal was argued at Vancouver on the 20th and 24th of November, 1941, before SLOAN, O'HALLORAN and MCDONALD, JJ.A.

Mellish, for appellant: The question is whether the city has the right to levy a tax on the Indian Reserve. Both the Province and the Dominion were notified of this appeal. It is submitted that certain sections of the Act are ultra vires of the Province. The Reserve was allotted to the Indians in 1879. South Vancouver was incorporated in 1892 and Point Grey in 1897. They were amalgamated in 1899. Under the Indian Act from early times the Indians and Indian lands were within the jurisdiction of the Dominion and were for the benefit of the Indians. The Indiana have their own government. Although the Reserve is within the geographical boundaries of the city the band occupies the field that would otherwise be occupied by the city. The Dominion Government holds the land for the benefit of the Indians. The land in question in this case is surrendered to Chow Chee who pays rent, the rent is delivered to the Department and the Department pays it to the Indian who was the owner. The city's Incorporation Act was passed in 1921 and amended in 1937. Chow Chee is a farmer and does not come within the words "commercial purposes." Under the Act costs are limited to $10.

P.J. McIntyre, on the same side: They base their authority on the amendment in the Vancouver Incorporation Act, 1921, Amendment Act, 1937, Cap. 82. Section 5 amends section 46 of the 1921 Act. The property can only be taxed if held for "commercial purposes." The Provincial Government has no authority to give the city the right to tax Indian lands: see section 91(24) of the British North America Act, 1867, as to the class of subjects allotted to the Dominion. Under section 4 of the Indian Act the Minister of Mines has control and management of the lands and property of the Indians, and under sections 102, 103 and 104 Indian lands are not liable to taxation. In relation to overlapping rights the Dominion prevails: see Attorney General for Canada v. Attorney General for British Columbia, [1930] A.C. 111, at p. 118; Madden v. Nelson and Fort Sheppard Railway, [1899] A.C. 626. Indians and Indian lands are withdrawn from the Provincial Government: Bee Clement's Canadian Constitution, 3rd Ed., 679; Rex v. Hill (1907), 15 O.L.R. 406; Rex v. Cooper (1925), 35 D.C. 457; Rex v. Edward Jim (1915), 22 B.C.R. 106; Re Kane, [1940] 1 D.L.R. 390; Smith v. Vermilion Hills Rural Council, [1916] 2 A.C. 569; City of Montreal v. Attorney General for Canada, [1923] A.C. 136, at p. 138; City of Halifax v. Fairbanks' Estate, [1928] A.C. 117. The right to tax is limited to property used for "commercial purposes." Unless he comes under subsection (3a) of section 46 as enacted by Cap. 82, Sec. 5, B.C. Stats. 1937, there is no assessment. It must be an interest in rateable land. This man was not using the land for "commercial purposes." He was a farmer and farming is not included in that term. The costs are limited to $10 under the County Courts Act: see Kirkland v. Brown (1908), 13 B.C.R. 350; Shipway v. Logan (1915), 21 B.C.R. 595; Reigate Corporation v. Wilkinson, [1920] W.N. 150; B. Wood & Son v. Sherman (1917), 24 B.C.R. 376.

McTaggart, K.C. (J.B. Roberts, with him), for respondent: There has been the power to tax since 1921. By the amendment of 1937 the situation was cleared. The new section is merely ancillary to the others. That we have the right to tax see Smith v. Rural Municipality of Vermilion Hills (1914), 49 S.C.R. 563, at p. 575. The word "commercial" only goes to the quantum: see The Attorney General of Canada v. Bailie and City of Montreal (1919), 57 D.L.R. 553; [1923] A.C. 136. It is a taxation on the interest of the tenant. They can tax an interest of an individual. We are taxing him in

personam. There is no lien or charge on the land. Section 47 of the Vancouver Incorporation Act, 1921, covers our case. As to costs, there are ordinary judgments and special judgments and this is a special judgment for which we are entitled to the costs.

McIntyre, replied.

Cur. adv. vult.

Counsel:

Mellish and P.J. McIntyre, for appellant.

McTaggart, K.C. (J.B. Roberts, with him), for respondent.

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1 **SLOAN J.A.**:-- I am in agreement with the conclusion reached by the learned trial judge and would dismiss the appeal.

2 O'HALLORAN J.A.:-- The appellant Chinese truck-gardener rents and occupies lands which form part of an Indian Reserve. In my view the fact that the occupied lands form part of an Indian Reserve does not exclude the application of City of Montreal v. Attorney General for Canada, [1923] A.C. 136, which this Court (MARTIN, C.J.B.C., MACDONALD, MCQUARRIE, SLOAN and O'HALLORAN, JJ.A.) followed on 28th April, 1939, in the unreported decision of Canadian Soaps Limited v. Vancouver Board of Assessment Appeals.

3 I would dismiss the appeal.

4 McDONALD J.A.:-- In this appeal I am in full agreement with the conclusion reached by ELLIS, Co. Ct. J. In his reasons for judgment he states the facts fully and applies the appropriate law. There is very little that I can usefully add to his judgment, but in view of the argument presented to us I shall try to make the matter a little more simple.

5 Under the Vancouver Incorporation Act, 1921, certain lands within the city are exempt from taxation, and one exemption is land held by His Majesty in trust for a band of Indians and occupied officially or unoccupied. That does not apply to the land in question for it is occupied, though not officially. It is occupied by a Chinaman under an agreement made with an Indian of the Reserve through the Indian Department, and hence the occupant by virtue of the said Act may be assessed and taxed. The land itself is not subject to the tax, nor to any lien in respect thereof.

6 Now coming to the amendment of 1937, about which so much has been said, this amendment relates only to the method of assessment of an occupant of land held for commercial purposes, and

hence to the quantum of the tax. As pointed out in the plaint the appellant was duly assessed for the year 1939, and no appeal was taken against the said assessment, but the same was duly passed and confirmed by the Court of Revision, and rates and taxes were duly imposed and levied thereon by the respondent.

7 These facts are not in dispute, and the question of the amount of the tax was not before the trial judge nor is it before us. That question was already settled by the Court of Revision. The complaint that the learned judge in his reasons made no reference to the amendment of 1937 is thus explained.

8 As to the validity of the Provincial statute, I agree with the learned judge that the matter is concluded by the decision on which he relied, Smith v. Rural Municipality of Vermilion Hills (1914), 49 S.C.R. 563; [1916] 2 A.C. 569.

9 To the contention that the lands in question would necessarily bring a lower rental, if the occupant is subject to taxation, than they would otherwise bring, and that hence the rights of an Indian would be prejudiced, the simple answer is that, even if this were material (and I think it is not), the agreement for occupation had been made, and the rental fixed, long before the assessment had been made, or the tax levied.

10 I am of opinion to dismiss the appeal with costs here and below.

Appeal dismissed.

Solicitor for appellant: A.J.B. Mellish.

Solicitor for respondent: A.E. Lord.

qp/s/qlwlh/qljcm/qlecl