Court File No. _____

IN THE SUPREME COURT OF CANADA
(On Appeal from the British Columbia Court of Appeal)

BETWEEN:

Musqueam Indian Band

APPLICANT
(Appellant)

AND:

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

RESPONDENTS
(Respondents)

MEMORANDUM OF ARGUMENT
OF THE APPLICANT MUSQUEAM INDIAN BAND
(Pursuant to s. 40 of the *Supreme Court Act*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The question of public importance in this case concerns the ability of a First Nation to exercise and rely upon its express governance authority in relation to the use, assessment and taxation of its reserve lands.

2. The property in question ("Property") is occupied by the Shaughnessy Golf and Country Club ("Club") pursuant to a lease with Canada ("Lease"). At risk is the recognition and interpretation of an amendment made by the Musqueam Indian Band ("Musqueam" or "Band") to its assessment bylaw, and its application to 162 acres of prime residential land located on the Band's Indian Reserve #2 ("IR 2").

3. The amendment in question is found in s. 26 of the *Musqueam Indian Band Property Assessment* Bylaw, PR-96-01 ("Bylaw") and it states that restrictions "placed...by the band," as opposed to third parties, may be considered in determining the Property's "actual value" for taxation purposes.

4. In the instant case, the British Columbia Court of Appeal erred by reading in words to Musqueam's Bylaw and thus disregarding the Bylaw's plain language and the Band's clear legislative intent, thereby undermining the Band's governance authority and taxation jurisdiction.

5. The Court of Appeal also erred in basing its decision on findings contrary to the agreed facts of the stated case, as it relates to the supposed determination of the Band to place a restriction on the use of the Property. This led it to make a fundamental error of law that a taxation authority's knowledge of the use proposed by an interest holder constitutes the placing of a restriction by that authority for assessment purposes.

6. The proposed appeal is rooted in the aftermath of this Court's decision in *Guerin v The Queen*[1] ("*Guerin*"). In *Guerin*, this Court found that the Crown had breached its

[1] Notice of Stated Case, Schedule D - *Guerin v The Queen*, [1984] 2 SCR 335 ("Schedule D: *Guerin* SCC"), Application Record ("**AR**"), **Vol. II, Tab 4(d), pp. 343-403**.

fiduciary duty in entering into the Lease on terms not agreed to by the Band. This Court upheld the damage award ordered by Justice Collier of the Federal Court (Trial Division). That award was based on equitable fraud, since the instructions of the Band were willfully ignored, and the Court endeavoured to put the Band in the position it would have been in if the Lease had not been signed.

7. Notably, the Band was not compensated for any losses of tax revenue in relation to the Property. The Band was not, at the time of this Court's decision in *Guerin*, exercising its taxation jurisdiction.

8. Eight years after this Court's decision in *Guerin*, the Band began to exercise its real property taxation jurisdiction on its reserves. The Band enacted (and has since amended) assessment, taxation, expenditure and annual rates bylaws that have all been approved by the Minister, including the Bylaw at issue.

9. The Band now seeks to have its Bylaw interpreted like all other assessment and taxation laws: that is, in accordance with its plain language, consistent with the drafter's intention. This interpretation and application will give the Band, and its taxpayers, certainty in managing their affairs. Instead, the Court of Appeal interpreted the Bylaw in a way that leads to unpredictability, and hampers Musqueam's ability to realize its goals of self-government over the use, management and taxation of its reserve lands.

B. The Property, the Lease, and the *Guerin* Decision

10. The following facts are uncontested and form part of the stated case.

11. In 1957, the Band surrendered 162 acres of land on IR 2 to Canada to lease on terms "most conducive to the welfare of the Band and its people."[2] The Band did not place any other conditions or restrictions on the surrender.[3] Under s. 38(2) of *the Indian Act* SC 1951, c 29 in force at that time, it could have done so.

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[2] Notice of Stated Case, Schedule B - *Guerin v The Queen*, [1982] 2 FC 385 ("Schedule B: *Guerin* FCTD"), p. 391, **AR, Vol. II, Tab 4(b), p. 222**.
[3] Schedule B: *Guerin* FCTD, pp. 391, 407, 410, 413, 417, **AR, Vol. II, Tab 4(b), pp. 222, 238, 241, 244, 248**.

12. In 1958, Canada entered into a Lease with the Club.[4] The Lease provides that the Club will use the Property only for a golf and country club, with additional facilities as the Club considers desirable.[5] In addition, in the Lease, the Club covenants to pay rent and taxes on the Property.[6] The Lease is otherwise silent on assessment and taxation.

13. The initial rent paid by the Club was based on an assessed value showing the highest and best use of the Property as being prime residential.[7] That is, the rent amount initially tied to the Property was highest and best use as prime residential land.

14. Although Canada entered into the Lease as a fiduciary on behalf of the Band, the Band did not sign the Lease, was not aware of its terms, and did not receive a copy of the Lease until 1970.[8] The Lease expires in 2033.

15. In 1975, the Band commenced the *Guerin* action in the Federal Court (Trial Division) with respect to the Lease.[9] A key finding made by Justice Collier in *Guerin* was that the Property was a "prime piece of residential property" and, moreover, that its highest and best use was "as prime residential, not as a golf course."[10] Furthermore, the Court concluded as a matter of fact that the Band would not have signed the Lease if it had been apprised of its terms.[11]

C. Musqueam's Jurisdiction to Assess and Tax

16. In December 1990, following amendments to the *Indian Act*, RSC 1985, c I-5, the Band assumed jurisdiction over property assessment and taxation on its reserve lands under s. 83(1) of that Act.[12] The Band passed the original version of the *Musqueam*

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[4] Notice of Stated Case, Relevant Facts ("Facts"), para. 2, **AR, Vol. II, Tab 4, p. 207**.
[5] Notice of Stated Case, Schedule A - Lease dated January 22, 1958 ("Schedule A: Lease"), **AR, Vol. II, Tab 4(a), pp. 211-214.**
[6] Schedule A: Lease, **AR, Vol. II, Tab 4(a), pp. 211-214**.
[7] Schedule B: *Guerin* FCTD, p. 395-401, 403-405, 418, **AR, Vol. II, Tab 4(b), pp. 226-232, 234-236, 249.**
[8] Facts, para. 3, **AR, Vol. II, Tab 4, p. 207**; *Musqueam Indian Band Board of Review v Musqueam Indian Band*, 2015 BCCA 158 ("Court of Appeal Decision"), para. 2, **AR, Vol. I, Tab 2(c), p. 102**.
[9] Facts, para. 6, **AR, Vol. II, Tab 4, pp. 207-208**.
[10] Schedule B: *Guerin* FCTD, p. 432, **AR, Vol. II, Tab 4(b), p. 263**.
[11] Schedule B: *Guerin* FCTD, pp. 413, 418, 430, **AR, Vol. II, Tab 4(b), pp. 244, 249, 261**.
[12] Facts, para. 10, **AR, Vol. II, Tab 4, p. 208**; Court of Appeal Decision, para. 4, **AR, Vol. I, Tab 2(c), pp. 103-104**.

Indian Band Assessment By-Law, 1991, By-law No. 1991-1 ("Original Bylaw").[13] On March 11, 1996 the Band approved amendments to the Original Bylaw, and passed the current version of the Bylaw.[14] The Band appointed the BC Assessment Authority ("Assessor") to conduct appraisals in accordance with the provisions of the Bylaw.[15]

17. The amendments made to the Bylaw in March 1996 closely followed the Band's signing of the Framework Agreement on First Nations Land Management ("Framework Agreement") in February 1996.[16] The Framework Agreement gave First Nations the option of exercising control over their land and resources, through developing land codes and making laws regarding the management and use of their reserve lands, including the choice of whether to place restrictions on the use of reserve lands and the degree of such restricted uses.[17]

18. In 1999, Parliament enacted the *First Nations Land Management Act*, SC 1999, c 24 ("FNLMA") ratifying and bringing the Framework Agreement into effect.[18] The FNLMA provides that a First Nation may, in accordance with its land code, enact laws respecting the development, protection, management, zoning, use and possession of its land.[19] After the enactment of the FNLMA, the Band began a process of community engagement, capacity building, and negotiations with Canada with the aim of preparing a Land Code.[20] On December 3, 2012 Musqueam's members approved its Land Code.[21]

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[13] *Musqueam Indian Band Board of Review v Musqueam Indian Band*, 2013 BCSC 1362 ("BC Supreme Court Decision"), para. 21, **AR, Vol. I, Tab 2(a), pp. 17-18**; Court of Appeal Decision, para. 4, **AR, Vol. I, Tab 2(c), pp. 103-104**.
[14] Notice of Stated Case, Schedule J - *Musqueam Indian Band Property Assessment Bylaw*, PR-96-01 ("Schedule J: Bylaw") **AR, Vol. III, Tab 4(j), pp. 520-591**; BC Supreme Court Decision, para. 17, **AR, Vol. I, Tab 2(a), p. 13.**
[15] Affidavit of Allyson Fraser sworn June 11, 2015 ("Fraser Affidavit"), para. 25, **AR, Vol. III, Tab 5(b), p. 600**.
[16] BC Supreme Court Decision, para. 17, **AR, Vol. I, Tab 2(a), p. 13.**
[17] Framework Agreement on First Nation Land Management, ss. 18.1-18.2, **AR, Vol. I, Tab 3, pp. 189-193**.
[18] Court of Appeal Decision, para. 26, **AR, Vol. I, Tab 2(c), p. 110.**
[19] *First Nations Land Management Act*, SC 1999, c 24, ss. 18(1) and 20, **AR, Vol. I, Tab 3, p. 185-188.**
[20] Fraser Affidavit, para. 20, **AR, Vol. III, Tab 5(b), p. 599.**
[21] Court of Appeal Decision, para. 26, **AR, Vol. I, Tab 2(c), p. 110.**

19. The central provision at issue in this case is s. 26 of the Band's Bylaw, which is one of the provisions that was amended in 1996. Section 26 deals with valuation for the purposes of assessment and the relevant subsections provide as follows:

> 26. (1) In this bylaw "actual value" means the market value of the fee simple interest in land and improvements as if the interest holder held a fee simple interest located off reserve.
>
> ...
>
> (3) In determining actual value, the assessor may, except where this bylaw has a different requirement, give consideration to present use, location, original cost, replacement cost, revenue or rental value, selling price of the land and improvements and comparable land and improvements both within and without the reserve, economic and functional obsolescence, the market value of comparable land and improvements both within and without the reserve, jurisdiction, community facilities and amenities, and any other circumstances affecting the value of the land and improvements provided such considerations do not conflict with subsection (1).
>
> ...
>
> (3.2) The assessor may include in the factors that he considers under subsection (3), any restriction placed on the use of the land and improvements by the band.[22]

20. In particular, in 1996, the wording of s. 26(3.2) of the Bylaw was changed from:

> ...any restriction placed...by an interest holder
>
> to
>
> ...any restriction placed...by the band.

21. The 1996 amended continues to apply today. In determining actual value, the Assessor may consider any restriction "placed...by the band."

D. Procedural History

22. In or about January 2011, the Band received the 2011 Property Assessment notice ("Notice") for the Property. The Notice stated that the assessment was conducted in accordance with the Bylaw, and it listed the Property's assessed value as

[22] Schedule J: Bylaw, s. 26, **AR, Vol. III, Tab 4(j), p. 537.**

$16,210,000 (of which $10,508,000 was for land, and $5,702,000 was for buildings).[23] This is an assessed value of approximately $100,000 per acre. The Assessor valued the Property on the basis that its highest and best use is as a golf and country club.[24]

23. By way of comparison, also, in or about January 2011, the Band received the Notice for Block K, the parcel of land adjoining the Property, which the Band acquired through an interim reconciliation agreement with the Province.[25] Block K comprises approximately 40 acres of unimproved forested land.[26] Being outside the reserve and within the University Endowment Lands, Block K is assessed in accordance with the provincial *Taxation (Rural Area) Act*, RSBC 1996, c 488 ("TRAA"). The Notice listed Block K's assessed value as $78,900,000.[27] This is an assessed value of approximately $1,972,500 per acre.

24. In late January 2011 the Band brought a complaint to the Musqueam Indian Band Board of Review ("Board") on the basis that the Property had not been assessed at its actual value as required by s. 26 of the Bylaw.[28]

25. The Board stated a case to the British Columbia Supreme Court setting out several questions of law for the court's determination.[29] The questions focused on whether, under s. 26 of the Bylaw, the Assessor could consider the restriction in use contained in the Lease in determining the Property's actual value and highest and best use. This involved considering whether the restriction in the Lease was "placed...by the band" as per s. 26(3.2) of the Bylaw. The Band argued that the restriction in the Lease to golf course use was not "placed...by the band" but rather was placed by the Crown, in circumstances amounting to equitable fraud; a finding made by this Court in *Guerin*.

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[23] Fraser Affidavit, para. 27, Exhibit B, **AR, Vol. III, Tab 5(b), pp. 600, 604**.
[24] Facts, para. 11, **AR, Vol. II, Tab 4, p. 208**.
[25] Fraser Affidavit, paras. 21-22, 29, **AR, Vol. III, Tab 5(b), pp. 599, 600**.
[26] Fraser Affidavit, Exhibit A, **AR, Vol. III, Tab 5(b), p. 603**.
[27] Fraser Affidavit, para. 29, Exhibit C, **AR, Vol. III, Tab 5(b), p. 600, 605**.
[28] Facts, para. 12, **AR, Vol. II, Tab 4, p. 208**; Court of Appeal Decision, para. 1, **AR, Vol. I, Tab 2(c), p. 102**.
[29] Notice of Stated Case, **AR, Vol. II, Tab 4, pp. 206-210**.

26. The Notice of Stated Case included facts as agreed by the parties ("Agreed Facts"). As part of the Agreed Facts, the parties accepted and agreed not to challenge any of the findings of fact in the *Guerin* decisions.[30]

27. The British Columbia Supreme Court concluded that the restriction on use contained in the Lease could be considered in determining the Property's actual value and highest and best use.[31]

28. The Band appealed to the British Columbia Court of Appeal. The Court of Appeal held that the exclusive use of the Property as a golf and country club, required by the terms of the Lease, was a "restriction" that was "placed...by the band" within the meaning of s. 26 and could be considered in determining the Property's actual value for assessment purposes under the Band's Bylaw.[32]

PART II - QUESTIONS IN ISSUE

29. This leave application raises the following issues of public importance that warrant granting leave to appeal to this Court:

(1) What is the proper approach to interpreting First Nations' assessment and taxation laws and bylaws? Musqueam respectfully submits that the Court of Appeal erred in reading words into its Bylaw, contrary to both the plain language of the provision and Musqueam's clear intention.

(2) What is the relevance, for assessment purposes, of a taxation authority's knowledge of the proposed use of lands? Musqueam respectfully submits that the Court of Appeal erred in holding that the Band's knowledge of the fact that the Property was proposed to be used as a golf course also meant that the Band itself effectively placed a restriction on use for tax assessment purposes.

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[30] Facts, para. 6, **AR, Vol. II, Tab 4, pp. 207-208**.
[31] BC Supreme Court Decision, para. 146, **AR, Vol. I, Tab 2(a), p. 54**.
[32] Court of Appeal Decision, paras. 31-32, **AR, Vol. I, Tab 2(c), p. 111-112**.

(3) What is the relevance of an interest holder's decision not to challenge an assessment in previous years? Musqueam respectfully submits that the Court of Appeal erred in holding that the Band's failure to challenge the assessment of the Property in previous years was of significance in considering the proper interpretation and application of the Bylaw.

PART III - LEGAL ARGUMENT

A. The Public Importance of the Issues Raised

30. Leave to appeal is granted on a discretionary basis when this Court is of the opinion that the case involves, *inter alia*, a question that is by reason of its public importance, or the importance of any issue of law, one that ought to be decided by this Court.[33] Alternatively, leave may be granted if the legal issue is, for any other reason, of such a nature or significance as to warrant a decision by this Court.[34]

31. Indicia of such questions include whether the question is germane to the disposition of the case, whether the issue was properly raised in the courts below, whether the court below failed to follow the law on a settled point, whether the case raises constitutional issues or Aboriginal rights, whether the case involves one or more novel or undecided points of law, whether the case involves interpretation of laws that exist in several jurisdictions, and whether the issues raised are of national dimension.[35]

32. The proposed appeal raises issues regarding the interpretation and application of First Nations' own laws governing land use on reserve and its attendant assessment and taxation. Musqueam submits that the Court of Appeal failed, *inter alia*, to apply long standing principles of statutory interpretation to give meaning to the Band's Bylaw.

33. Further, the Court of Appeal's decision creates a situation where First Nations' laws are subject to different rules and interpretive approaches than the laws of federal or provincial governments. Such an approach interferes with and leads to uncertainty

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[33] *Supreme Court Act*, RSC 1985, c S-26, s. 40.
[34] *Ibid.*
[35] Justice John Sopinka (speech delivered 10 April 1997) reprinted in Eugene Meehan et al, *Supreme Court of Canada Manual: Practice and Advocacy*, loose-leaf (consulted on 3 June 2015), (Aurora, ON: Canada Law book, 1996), ch 3 at 3-2 to 3-4.

regarding the exercise of First Nations' self-government, and raises issues of importance to First Nations and taxpayers living on reserves that are of a national dimension and warrant consideration by this Court.[36]

34. The decision has implications beyond just Musqueam and its taxpayers, and has the potential to affect the 129 First Nations who are currently exercising their taxation authority and have established property tax regimes pursuant to the *Indian Act* and the *First Nations Fiscal Management Act*, SC 2005, c 9 ("FMA"), as well as those who are contemplating doing so, and for their taxpayers.[37]

35. Property taxes are intended to provide an independent and predictable source of revenue that First Nations can invest in their communities to build infrastructure, attract investment, promote economic growth and be self-reliant. The exercise of taxation jurisdiction is closely tied to land management and is a requirement for effective self-government and economic development for all First Nations.[38]

36. Clarification and guidance from this Court on how First Nations' assessment and taxation laws are to be interpreted and applied will assist in resolving any uncertainty that has arisen as a result of the Court of Appeal's decision.[39] The resolution of these issues will have far-reaching legal, economic, and political implications.[40] This case will shape the degree to which, if any, courts will be permitted to "read in" language that is not there in relation to assessment and taxation laws that apply to reserve lands.

B. The Intent of s. 83(1)(a) of the *Indian Act* and the Importance of Taxation to First Nations

37. Section 83(1)(a) of the *Indian Act* provides Bands with the authority to make bylaws for the assessment and taxation of a very broad range of interests in reserve

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[36] Fraser Affidavit, para. 34, **AR, Vol. III, Tab 5(b), p. 601**; Affidavit of Clarence T. (Manny) Jules sworn June 4, 2015 ("Jules Affidavit"), paras. 17-19, **AR, Vol. III, Tab 5(a), p. 595**.
[37] Jules Affidavit, paras. 12-13, 17, **AR, Vol. III, Tab 5(a), pp. 594-595**.
[38] Fraser Affidavit, paras. 39-41, **AR, Vol. III, Tab 5(b), p. 602**; Jules Affidavit, para. 15, **AR, Vol. III, Tab 5(a), p. 594**.
[39] Jules Affidavit, para. 20, **AR, Vol. III, Tab 5(a), p. 595**.
[40] Fraser Affidavit, paras. 34, 41, **AR, Vol. III, Tab 5(b), pp. 601-602**.

lands.[41] Section 83(1)(a) is to be given a broad reading, consistent with the policies and aims it seeks to promote.[42] These policies and aims include: promoting the development of Aboriginal self-government;[43] respecting and enabling First Nations jurisdiction over real property taxation on reserve, and promoting economic development through the application of real property tax revenues.[44]

38. This Court has consistently recognized the importance of taxation powers to First Nations' self-governance. In *St. Mary's Indian Band v Cranbrook (City)*, and again in *Osoyoos Indian Band v Oliver (Town)*, this Court acknowledged that taxation powers are "[o]ne of the most important by-law powers that bands need" to "defray their costs as the government of that land."[45]

39. The Court of Appeal's decision, if allowed to stand, would impair Musqueam's ability to realize its aims of self-government and to derive needed revenue from its land as it is empowered to do in making choices about how its reserve lands are to be used and assessed for taxation purposes. The decision also impacts on other First Nations who have passed taxation and assessment laws pursuant to s. 83(1)(a) of the *Indian Act* or the FMA, whose laws would be subject to a similar interpretative approach, and could see their specific intentions animating their laws disregarded. In this way, the decision, which deals with the interpretation and application of a law passed under s. 83(1)(a) runs counter to the very objectives of s. 83(1)(a).

C. The Court of Appeal Erred in its Interpretation of First Nations' Assessment and Taxation Bylaws

40. Subsection 26(3.2) of Musqueam's Bylaw provides that only restrictions that are placed "by the band" can be considered for the purposes of determining actual value. The phrase "by the band" was added to s. 26(3.2) when the Bylaw was amended in 1996. The previous version had allowed the assessor to consider restrictions placed

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[41] *Osoyoos Indian Band v Oliver (Town)*, 2011 SCC 85 ("*Osoyoos*"), para. 48.
[42] *Osoyoos*, para. 49.
[43] *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3, para. 18.
[44] *First Nations Fiscal Management Act*, SC 2005, c 9, preamble, **AR, Vol. I, Tab 3, pp. 158-184**.
[45] *St. Mary's Indian Band et al v Cranbrook (City)*, [1997] 2 SCR 657 ("*St. Mary's*"), para. 24; *Osoyoos*, para. 50

"by an interest holder of the land." The 1996 amendment emphasizes that it is the Band, not the Crown or any other interest holder, who governs the use of Musqueam's reserve lands, and whose land use decisions are to be considered for assessment purposes.

41. In interpreting s. 26(3.2) of the Band's Bylaw, the Court of Appeal read in words when it reasoned as follows at para. 29:

> ... s. 26(3.2) would have to be read to mean "any restriction placed on the use of the land and improvements by or on behalf of the Band" in any event...The only interpretation that gives the section meaning is that when land is surrendered by the Band and the Crown then enters into a lease that restricts the use of the land it does so for and on behalf of the Band such that, in law, it is the Band that places the restriction on the land [underline added].

42. The Band submits that the Court of Appeal erred in disregarding the plain meaning of the words "by the band" and, instead, adopting an erroneous interpretation that requires reading in the words "by or on behalf of the band" into s. 26(3.2). This approach runs counter to the legal principle that taxation statutes are to be read in accordance with their clear and plain language.

43. In *Canada Trustco Mortgage Co. v Canada*, this Court reasoned that "when the words of a provision are precise and unequivocal, the ordinary meaning of the words play[s] a dominant role in the interpretive process."[46] This Court has also emphasized that, in the context of taxation statutes, it would introduce "intolerable uncertainty" if the clear language in a detailed taxation provision were to be qualified by unexpressed exceptions or words based on a court's view of the object and purpose of the provision.[47] It is respectfully submitted that the Court of Appeal did indeed introduce "intolerable uncertainty" into the clear language of the Bylaw by reading in the words "on behalf of the band."

44. The words in s. 26(3.2) of the Bylaw are clear and Musqueam respectfully submits that they should be given their ordinary meaning. There is no indication that

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[46] *Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, paras. 10-11.
[47] 65302 *British Columbia Ltd. v Canada*, [1999] 3 SCR 804 ("*65302*"), para. 51.

the Band intended the language of s. 26(3.2) to apply to situations where restrictions were placed on the land by others on behalf of the Band. Had the drafters intended such a situation, the Bylaw would have so provided by using the words "by or on behalf of the band." The drafter's choice not to include such words must be respected.[48] The Band specifically turned its mind to the question of who placed the restriction, and whether this mattered; the Band decided that its Assessor may only take into account restrictions that the Band itself had imposed. Again, one must consider the former wording of this provision: "...any restriction placed...by an interest holder" was changed by Musqueam to read "...any restriction placed...by the band."

45. The approach adopted by the Court of Appeal in its interpretation of the Bylaw is inconsistent, and can be contrasted, with its prior decision and interpretation of the provincial TRAA in *Musqueam First Nation v British Columbia (Assessor of Area #09)* ("Block F and K Appeal").[49] In that case, the provision at issue was s. 15(1)(h) of the TRAA which (at the time) provided as follows:

> 15(1) The following property is exempt from taxation: ...
>
> (h) land and improvements vested in or held by Her Majesty or another person in trust for or for the use of a tribe or body of Indians, and either unoccupied, or occupied by a person in an official capacity or by the Indians [underline added].

46. The Respondents in that appeal argued that the proper interpretation of s. 15(1)(h) was one where the words "on behalf of the Crown" were to be read in, such that the provision would be interpreted to read, instead, that the following properties were exempt from taxation:

> 15(1) The following property is exempt from taxation: ...
>
> (h) land and improvements vested in or held by Her Majesty or another person *on behalf of the Crown* in trust for or for the use of a tribe or body of Indians [underline and italics added].

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[48] *Placer Dome Canada Ltd. v Ontario (Minister of Transport)*, [2006] 1 SCR 715, paras 21-23; *65302*, para. 51.

[49] *Musqueam First Nation v British Columbia (Assessor of Area #09)*, 2012 BCCA 178 ("*Musqueam*").

In the Block F and K Appeal, the Court of Appeal correctly declined to read in those words italicized above, noting that if the provincial legislature had intended the words "another person" to be so restricted, it would have included language to that effect.[50] Yet, the very same principle was not applied by the Court of Appeal in the instant case.

47. The result of the Court of Appeal's reasoning in the Block F and K Appeal as opposed to in the present case reveals a situation where the provincial legislature's choice and clear and plain language expressed in an assessment provision was respected, whereas a First Nation's choice and clear and plain language was not. This double standard in interpretive approaches does not support principles of certainty, predictability, or transparency and thereby raises an issue of public importance. Such inconsistency also does not advance the objective of reconciliation; tax assessments must be rooted in principles that are fairly and consistently applied. This too raises issues of public importance.

48. In addition, Musqueam submits that the Court of Appeal erred in inferring that the Band's reasons for amending its Bylaw in 1996 were the same as the Province's reasons for amending the provincial *Assessment Act*, RSBC 1996, c 20 years earlier. While a number of the provisions in First Nations' s. 83 bylaws are similar to those in provincial assessment laws, with changes to the wording where appropriate, there are a number of instances where First Nations, including Musqueam, have intentionally departed from provincial laws to meet their own specific and unique needs and circumstances.[51] Again, these distinctions and departures must be respected.

49. It is wrong to assume that First Nations assessment and taxation bylaws are simply mirroring the provisions of provincial assessment acts, or that First Nations' intentions in amending their laws are the same as the province's intentions. As this Court has noted, First Nations are autonomous actors, capable of making decisions concerning their interests in their reserves; their decisions must be respected and

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[50] *Musqueam*, para. 48.
[51] See John Olynyck, *Aboriginal Practice Points: First Nations real property taxation* (The Continuing Legal Education Society of British Columbia, 1990), p. 8.

honoured.[52] The Band has authority to govern its reserve lands and, has (to borrow Ruth Sullivan's words) a "mind capable of choosing goals and devising plans to achieve them."[53]

50. Patently, the issue of the respect and deference to be afforded to Band taxation decisions, as reflected in the clear and plain language of their bylaws, also constitutes an issue of public importance.

D. The Court of Appeal Erred in Disregarding the Agreed Facts from *Guerin* and Conflating Knowledge with Action

51. This Court has repeatedly emphasized the need to give effect to the "true purpose" of dealings relating to reserve land; this is specifically so when considering First Nations' intentions when surrendering land to the Crown.[54] Not only did the Court of Appeal in this case fail to give effect to the Band's true purpose in surrendering the Property, it also failed to have regard to the Agreed Facts and made findings of fact that conflict with *Guerin*.

52. The Court of Appeal stated that the Band "wished," "determined" and "deci[ded]" to exercise its interest in the Property by leasing it to the Club for the construction of a golf course.[55] It also reasoned that the Band "placed the restriction on the Club's use of the [P]roperty when it surrendered the [P]roperty to the Crown."[56] From there, the Court of Appeal concluded that the Band therefore "placed the restriction" on the Club's use of the Property.[57] This is an incorrect statement of the facts and chronology.

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[52] *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344 ("*Blueberry River*"), paras. 7, 91.
[53] Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2014), p. 269.
[54] *Blueberry River*, para. 7; *Osoyoos*, para. 43.
[55] Court of Appeal Decision, paras. 2 and 28, **AR, Vol. I, Tab 2(c), pp. 102, 110-111.**
[56] Court of Appeal Decision, para. 28, **AR, Vol. I, Tab 2(c), pp. 110-111.**
[57] Court of Appeal Decision, para. 29, **AR, Vol. I, Tab 2(c), p. 111.**

53. The Band itself did not decide to place restrictions on the Club's use of the Property. It simply had knowledge of the purpose for which the Club intended to use the Property, i.e., for a golf course. The key Agreed Facts from *Guerin* on this point are as follows:

(1) "On October 6, 1957, by a majority vote the members of the Band approved a surrender to the Crown of 162 acres of prime land. The surrender was '...in trust to lease the same to such person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people.'"[58]

(2) "It is to be noted that the surrender (Ex. 53) is in very wide terms. The key words are 'in trust to lease.'"[59]

(3) "The surrender did not specify that any lease was to be made with the golf club."[60]

(4) "...at the surrender meeting, the Band was told by [the Indian Agent] the land would be leased, on a long-term basis, to the Shaughnessy Heights Golf Club, which proposed to build a new golf course on the acreage."[61]

(5) "...the terms of the lease ultimately entered into bore little resemblance to what was discussed at the surrender meeting."[62]

(6) "The balance of probabilities is, to my mind, the majority of those who voted on October 6, 1957, would not have assented to a surrender of the

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[58] Schedule B: *Guerin* FCTD, p. 391, **AR, Vol. II, Tab 4(b), p. 222**; see also BC Supreme Court Decision, p. 55, **AR, Vol. I, Tab 2(a), p. 59**.
[59] Schedule B: *Guerin* FCTD, p. 408, **AR, Vol. II, Tab 4(b), p. 239**; see also BC Supreme Court Decision, pp. 65 and 67, **AR, Vol. I, Tab 2(a), pp. 69, 71**.
[60] Schedule B: *Guerin* FCTD, p. 410, **AR, Vol. II, Tab 4(b), p. 241**.
[61] Schedule B: *Guerin* FCTD, p. 391, **AR, Vol. II, Tab 4(b), p. 222**; see also BC Supreme Court Decision, p. 55, **AR, Vol. I, Tab 2(a), p. 59**.
[62] Schedule B: *Guerin* FCTD, p. 413, **AR, Vol. II, Tab 4(b), p. 244**; see also BC Supreme Court Decision, p. 55, **AR, Vol. I, Tab 2(a), p. 59**.

162 acres if they had known all the terms of the lease of January 22, 1958."[63]

(7) Collier J. found that the provision limiting future rent to golf course use was "not before the surrender meeting"; and "not subsequently brought before the Band Council or the Band for comment or approval."[64] He also stated: "In my view, the surrender of October 6, 1957, imposed on the defendant, 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..." [underline added][65]

Had the Band, in 1957, wished to place a restriction on the use of the Property, under s. 38(2) of the *Indian Act*, SC 1951, c 29 it could have unilaterally restricted the use by placing a condition in the surrender that a lease granted pursuant to the surrender contain a restriction on use. The Band did not do so.

54. Furthermore, the Band did not intend that the Club's use of the Property as a golf course would have any impact on the rent due, nor did it intend that the Club's use as a golf course would have any impact on taxes due. Indeed, the initial rental value was not based on golf course use but residential use. Moreover, it was not until 33 years after the surrender that the Band began exercising its jurisdiction to tax.

55. Justice Wilson of this Court explicitly stated that the Band was "fixed" with the Lease "which is worth substantially less than the one they surrendered [the Property] to receive."[66] It is illogical to suggest that the Lease the Band was "fixed" with was, at the same time, the one it had wished or decided to enter into.

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[63] Schedule B: *Guerin* FCTD, pp. 413, 418, 430, **AR, Vol. II, Tab 4(b), pp. 244, 249, 261**; Schedule D: *Guerin* SCC, p. 348 (per Wilson J.) and pp. 370-371 (per Dickson J.), **AR, Vol. II, Tab 4(d), pp. 356, 378-379**; see also BC Supreme Court Decision, pp. 68, 70, 71, 86, 90, **AR, Vol. I, Tab 2(a), pp.72, 74-75, 90, 94**.

[64] Schedule B: *Guerin* FCTD, p. 407, **AR, Vol. II, Tab 4(b), p. 238**.

[65] Schedule B: *Guerin* FCTD, pp. 417-418, **AR, Vol. II, Tab 4(b), pp. 248-249**.

[66] Schedule D: *Guerin* SCC, p. 357 (per Wilson J.), **AR, Vol. II, Tab 4(d), p. 365**.

56. The Court of Appeal wrongly equated having knowledge of a proposed use as a golf course, with having made a decision to place a restriction on the use only as a golf course. Musqueam submits that the fact that an interest holder has knowledge of a particular use is not the same as an interest holder having placed a restriction on use. In so reasoning the Court of Appeal is again, essentially, reading in words to Musqueam's Bylaw such that the language of a "restriction placed...by the band" (as included in s. 26(3.2) of the Bylaw) is taken to mean a "restriction known by the band." In doing so it effectively usurps the power to the Band to govern in relation to its taxation authority. This too gives rise to an issue of public importance.

57. Section 26(3.2) of the Bylaw, like s. 19(5) of the provincial *Assessment Act*, is clear that not all restrictions are to be considered for assessment purposes.[67] For the Bylaw, which deals with interests in Musqueam's reserve lands (i.e., land, the fee of which is in the Crown or the Band), only those restrictions the Band itself places are to be considered. For s. 19(5) of the provincial *Assessment Act*, which deals with interests in Crown or municipal lands (i.e., land, the fee of which is in the Crown or the municipality, or which is held by a person exempted from taxation),[68] only restrictions the owner of the fee itself places are to be considered. Neither the Bylaw, nor the *Assessment Act*, refer to knowledge or notice of restrictions being sufficient for such restrictions to be taken into account. Nor does the Bylaw or the *Assessment Act* contain a provision whereby knowledge of a restriction is deemed to be placement of a restriction. The Court of Appeal's errors in this regard have the potential to impact the interpretation of assessment provisions generally and thus raise questions of public importance.

58. In addition, the Court of Appeal's conflation of knowledge with decision-making in applying restrictions is inconsistent with the common law, which favours competition and free use of land. From this policy comes the rule that restrictive covenants are to

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[67] Section 19(5) of the *Assessment Act* states: "If the land and improvements are to be assessed under section 26, 27, or 28, the assessor must include in the factors that he or she considers under subsection (3), any restriction placed on the use of the land by the owner of the fee." **AR, Vol. I, Tab 3, pp. 142-157.**

[68] Section 19(5) of the *Assessment Act* makes it clear that it applies to assessments under sections 26, 27, or 28. **AR, Vol. I, Tab 3, pp. 156-157.**

be strictly construed; courts will not find a restriction in the absence of clear and unambiguous language.[69]

59. In *Nylar Foods Ltd v Roman Catholic Episcopal Corp. of Prince Rupert*, which involved the question of whether a provision in a lease was a valid restrictive covenant, McLachlin J.A., as she then was, reasoned as follows:

> The policy of the courts to favour competition and alienability leads to a strict construction of restrictive covenants: *White v Lauder Developments Ltd.* (1975), 60 DLR (3d) 419, 9 OR (2d) 363 (CA); *Kemp v Bird* (1877), 5 Ch. 549; *Ashby v Wilson,* [1900] 1 Ch 66; *Brigg v Thornton,* [1904] 1 Ch 386. This means that the court will not amplify the language which the parties have used. As stated in Brown, *Covenants Running with Land* (1907), p. 126: "A restrictive covenant as to letting or user of property will be construed strictly; the Court will not extend it on the ground of presumed intention."[70]

60. Justice McLachlin's decision in *Nylar* was applied by the British Columbia Court of Appeal in *Aquadel Golf Course Ltd. v Lindell Beach Holiday Resort Ltd.*,[71] where then Chief Justice Finch reiterated that "clear and unambiguous language" is required to establish a restriction on the use of land.[72] A similar common law rule against limiting freedom of action applies to restrictions in other areas of law such as restrictive covenants in agreements to sell businesses or in employment contracts.[73]

61. Musqueam submits that just as courts are not to extend restrictions on the basis of presumed intention, they ought not extend restrictions on the basis that knowledge of the existence of a restriction is the same as having placed that restriction. Whether a restriction was placed by an individual is a question of fact that requires an analysis of intention. In this context, knowledge is not the same as intention, and knowledge is not the same as determination.

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[69] *Nylar Foods Ltd. v Roman Catholic Episcopal Corp. of Prince Rupert*, 48 DLR (4th) 175 (per McLachlin J.A., as she then was) ("*Nylar*").
[70] *Nylar*, para. 6.
[71] *Aquadel Golf Course Ltd. v Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5 ("*Aquadel*").
[72] *Aquadel*, para. 19.
[73] *Shafron v KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, paras. 15-17.

E. The Court of Appeal Erred in Disregarding the Annual Nature of Assessments and Appeals

62. The Court of Appeal found that it was "significant" that the Band had waited until 2011 to challenge the assessment of the Property, and that it was "not evident why, after so many years of the [P]roperty being assessed as it had been, the Band chose to appeal the assessment for that year on the basis advanced."[74] In essence, the Court of Appeal found that an interest holder who does not challenge his or her assessment each and every year is estopped, limited or otherwise barred from challenging any future assessment, or that an interest holder's failure to challenge an assessment in one year will be a relevant factor in considering the merit of any future challenge.

63. This reasoning is in error. The Bylaw clearly provides that the assessment roll is to be completed on an annual basis.[75] Every year interest holders receive their assessment notices and, so long as they do so by the deadline, interest holders can make complaints or bring appeals regarding entries on the assessment roll on a year by year basis.[76] The fact that an interest holder did not make a complaint or appeal in any particular year, does not prevent the person from making a complaint or appeal in future years. The fact that the Band did not challenge the assessment of the Property until 2011 is immaterial.

64. This annual cycle is a feature of the majority of provincial and First Nation property assessment and taxation systems. Interest holders are entitled to challenge assessments each and every year. The failure to challenge or appeal an assessment in one year does not preclude and has no impact on future rights of challenge. Yet, the Court of Appeal's reasoning subverts this fundamental practice and right, and seeks to impose the limitations, laches or estoppel principles to this regime.

65. If the Court of Appeal's reasoning is applied to other assessment regimes, this will result in an untenable situation where interest holders would be required to

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[74] Court of Appeal Decision, paras. 1 and 27, **AR, Vol. I, Tab 2(c), pp. 102, 110**.
[75] Schedule J: Bylaw, ss. 2(1), 2(1.2), 10(3), **AR, Vol. III, Tab 4(j), pp. 530, 533**.
[76] Schedule J: Bylaw, s. 41, **AR, Vol. III, Tab 4(j), pp. 544-546**.

challenge assessments each and every year, so as not to bar or affect their opportunity for future challenges. This too is an issue of public importance.

F. Conclusion

66. For the foregoing reasons, the Band respectfully submits that the matters raised in these proceedings constitute significant questions of public importance, justifying granting leave to appeal to this Court.

PART IV - SUBMISSIONS CONCERNING COSTS

67. The Band seeks costs of this application.

PART V - ORDER SOUGHT

68. The Band requests an order that leave be granted, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, in the Province of British Columbia, the 12th day of June, 2015.

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PART VI - TABLE OF AUTHORITIES

PART VII - STATUTES OR REGULATIONS RELIED UPON

Assessment Act, RSBC 1996, c 20, ss. 19(5), 26–28

First Nations Fiscal Management Act, SC 2005, c 9, ss. 1–36

First Nations Land Management Act, SC 1999, c 24, ss. 18(1) and 20

Framework Agreement on First Nation Land Management (signed in 1996), ss. 18.1 – 18.2

Indian Act, 1951, c 29, ss. 1, 2, 37–38

Indian Act, RSC, 1985, c I-5, s. 83(1)(a)

Musqueam Indian Band Property Assessment Bylaw, PR-69-01 [produced in full at AR, Vol. III, Tab 4(j)]

Taxation (Rural Area) Act, RSBC 1996, c 448, s. 15(1)(h)