Court File No. 36478

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)

APPLICANT MUSQUEAM INDIAN BAND'S REPLY TO THE RESPONSE OF THE RESPONDENT SHAUGHNESSY GOLF AND COUNTRY CLUB

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1. In its memorandum, the Club has consistently mischaracterized the Band's submissions and failed to engage with the three issues of public importance the Band has raised, namely: (1) the proper approach to interpreting First Nations' assessment and taxation bylaws; (2) the relevance (if any) of a taxation authority's knowledge of the use of lands proposed by the interest holder; and (3) the relevance (if any) of a decision not to challenge an assessment in previous years. Instead the Club appears to have taken the opportunity to re-argue the proposed appeal on its merits, and to cast unfortunate aspersions on the Band's motivations in challenging the assessment and seeking leave to appeal.

A. The Case is about First Nations' Exercise of Self-Government through Assessment and Taxation and Highlights an Inconsistency in the Law

2. In reply to the whole of the Club's memorandum and in particular to paras. 1-2, the Band submits that the proposed appeal is unmistakeably a case about the exercise and implementation of Aboriginal self-government. As this Court has repeatedly said, the power to assess and tax interests on reserve is one of the most important powers Bands have as the governments of their lands.[1]

3. In enacting and amending its assessment bylaw as well as its taxation bylaw the Band was exercising its right as the government of its lands. Through the 1996 amendment to its Bylaw, the Band clearly stated that only restrictions placed by it are to be considered for assessment purposes. In other words, the Band legislated that it must have decided on, and consented to, the restricted use of its lands in order for such a restriction to be taken into account for assessment and taxation purposes.

4. Through its interpretation of the Band's Bylaw, the Court of Appeal circumscribed the Band's governance rights, ignoring the clear and express language that only restrictions placed by the Band itself may be considered in assessments. The Court of Appeal viewed the restriction in the Lease as one that had been "placed by the band"[2] although the agreed facts stated that the "the Band did not sign the Lease and did not

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[1] *St. Mary's Indian Band et al v Cranbrook (City)*, [1997] 2 SCR 657, para. 24; *Osoyoos Indian Band v Oliver (Town)*, 2011 SCC 85, para. 50

[2] *Musqueam Indian Band Board of Review v Musqueam Indian Band*, 2015 BCCA 158 ("Court of Appeal Decision"), para. 28, **AR, Vol. I, Tab 2(c), p. 111**

receive a copy until 1970," and that the draft Lease containing the use restriction "was probably prepared by the solicitors for the Club and not provided to the Band."[3] Ironically, the Court of Appeal interpreted the Bylaw as allowing consideration of restrictions placed "by or on behalf of the band"[4] and therefore applied a restriction not placed by the Band. The Court of Appeal thus used its view of the facts and interpretation of the Bylaw to limit the Band's power to determine the method of assessment and taxation of its reserve lands. The Band respectfully submits that it is not for the Court to alter and limit the Band's governance decisions. For this and other reasons set out in its June 12th memorandum, the Band sought leave to appeal to this Court.

5. In specific reply to para. 2 of the Club's memorandum, in making this proposed appeal and relying on its unquestioned jurisdiction to assess and to tax, the Band has not "cheapen[ed]" the concept of self-government as the Club asserts. Instead, the Band is seeking clarity on how its legislative intention and governance authority can be realized and honoured on the ground.

6. In addition to engaging Aboriginal self-government rights, the proposed appeal highlights an inconsistency that is developing in the law. In particular, bylaws and statutes governing the assessment and taxation of lands that are held for the benefit of First Nations are being interpreted in different ways, seemingly on the basis of who enacted them. Words have been read into the Band's bylaw, thereby undermining the Band's clear and plain language, but words have not been read into the Province's statute, thereby upholding the Province's clear and plain language. In reply to para. 49, the Band submits that the law in this area is not settled, and while the current inconsistency may not have risen to the level of an epidemic, First Nations and their taxpayers require this Court's guidance in this area.

B. Principles of Statutory Interpretation

7. In paras. 19-22 the Club misstates the Band's argument. The Band is not arguing that the Bylaw should be interpreted differently than other assessment and taxation statutes, but rather that when the words of a First Nation's assessment or

[3] Notice of Stated Case, Relevant Facts, paras. 3 and 7, **AR, Vol. II, Tab 4, pp. 207-208**
[4] Court of Appeal decision, para. 29, **AR, Vol. I, Tab 2(c), p. 111**

taxation bylaw are precise and clear (as here) they should be given their plain and ordinary meaning. This approach will lead to consistency and predictability for First Nation governments and their taxpayers, and also similar treatment to provincial laws.

8. At para. 24, the Club argues that if what the Court of Appeal did was read in words to s. 26(3.2) this would have been "entirely appropriate." Yet the Club points to no authority to support such an interpretive approach. Clearly such an approach would be inconsistent with *Musqueam v British Columbia (Assessor of Area #09)* which dealt with "the interpretation of words in a statute, the meaning of which appears to be clear."[5]

C. Historical Background

9. It is trite law that in interpreting an act, the Court should consider the words of the act in context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the act, and intention of the legislating body. Given this, in reply to paras. 25-26, the Band submits that the timing of the 1996 amendment is relevant. The Band's arguments regarding legislative intent and historical context were properly made before the courts below, and if leave is granted, may be considered by this Court.

10. In reply to para. 27, the Band submits that it is not surprising that a month after the Framework Agreement was entered into, the Band amended its Bylaw. This was done in reasonable anticipation and preparation for what would one day be the reality of First Nations land management. It would be wrong to frustrate the Band's intention by using hindsight, as argued by the Club. The fact that it took Parliament three years to ratify the Framework Agreement is irrelevant. In addition, it is acknowledged that the Band required time to develop and consult on its land code, but this does not undermine the fact that, by 1996, the Band was forecasting the direction it would be heading with regard to the use of its reserve land, and amended its Bylaw accordingly.

11. In reply to paras. 35-37, the Band submits that the Club is engaging in pure and unsubstantiated speculation that the Minister would have withheld approval if he had known of the Band's interpretation of s. 26(3.2) of the Bylaw. The fact is that the Minister approved both the 1991 Bylaw, and its 1996 amendments. There is no

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[5] *Musqueam First Nation v British Columbia (Assessor of Area #09)*, 2012 BCCA 178, para. 1

challenge to the Bylaw's validity – the parties agree it was validly approved and enacted. The sole question is its interpretation and application. In addition, there is no requirement for a First Nation to put its interpretation of its bylaw before the Minister at the time it seeks approval.

12. At para. 42 the Club says the Band is seeking a "departure from more than 50 years of valuation in respect of the Property." This is in error. In reality, the Property has, for over 50 years, been valued on the basis that its highest and best use is as prime residential.[6] In December 1956, Howell appraised the Property for the Indian Affairs Branch as "First Class Residential." Howell's appraisal report was received by the Club by February 1957.[7] Howell's value of $5,500 per acre formed the basis of the original rent agreed by the Club.[8]

D. Differences from the Provincial Assessment Law

13. In reply to paras. 2, 12 and 13, the Band submits that s. 26(3.2) of the Bylaw is notable not for its similarity with the provincial assessment law, but rather for its departure from it. Whereas s. 19(5) of the provincial law requires the assessor to take into account restrictions placed by "the owner of the fee," the Band's Bylaw only allows the assessor to consider restrictions placed "by the band." The Band chose wording that differed from the provincial law, as it was entitled to do as the government of its land. The Band is seeking to have this explicit choice respected and implemented.

14. In reply to para. 17, the Band agrees that the wording of its 1991 Bylaw, which referred to "restrictions placed by an interest holder of the land," was unsatisfactory. This is precisely why the Band chose to legislate that neither restrictions placed by an interest holder of the land, nor those placed by the Crown, could be taken into account and that only restrictions placed "by the band" could be considered. As noted above, it is an agreed fact that the restriction contained in the Lease was "probably prepared by the solicitors for the Club."[9] Therefore, if the Assessor were to consider this restriction

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[6] Schedule B: *Guerin* FCTD, pp. 394, 432, **AR, Vol. II, Tab 4(b), pp. 225, 263**
[7] Schedule B: *Guerin* FCTD, pp. 394-395, **AR, Vol. II, Tab 4(b), pp. 225-226**
[8] Schedule B: *Guerin* FCTD, p. 432, **AR, Vol. II, Tab 4(b), p. 263**; see also *Musqueam Indian Band Board of Review v Musqueam Indian Band*, 2013 BCSC 1362, pp. 57, 61, 63, **AR, Vol. I, Tab 2(a), pp. 61, 65, 67**
[9] Notice of Stated Case, Relevant Facts, para. 7, **AR, Vol. II, Tab 4, p. 208**

in determining the Property's actual value he would, in essence, be considering a restriction placed by an interest holder of the land and not "by the band." Moreover, this would amount to allowing the lessee Club to reduce the assessed value of the Property (and its tax burden) by restricting its own use of the land.

E. Policies of the First Nations Tax Commission

15. In reply to paras. 31 to 34, the Band submits that the FNTC's policies which were passed more than 10 years after the Minister approved the amendments to the Bylaw have no relevance to the proposed appeal. In any event, the portions of the Assessment Policy on which the Club relies do not support its argument that First Nations' bylaws must be consistent with provincial laws, or that notice is required of a First Nation's intention in amending its bylaw. Section 3.0 of the Assessment Policy simply provides that First Nations' bylaws "typically" contain provisions similar to those used in the province, and must contain provisions as set out in s. 3.1 to 3.11. The Bylaw in question does contain such provisions. In addition, s. 1.1 of the Assessment Policy simply provides that taxpayers should have sufficient notice of the First Nation's intention to assume taxation jurisdiction. The Band has exercised taxation jurisdiction for nearly 25 years. The Club has had notice and been aware of the Bylaw for decades.

16. There is no requirement for the Band to give its taxpayers notice of its interpretation of its Bylaw, or its view on how the Bylaw is to be applied in any given circumstance. The proper process is for a person who is of the opinion that there is an error in the assessment roll, including an error in the assessment of actual value, to make a complaint to the Board of Review under s. 41 of the Bylaw. The Band followed this route and the Club received notice of the complaint in the ordinary course and has fully participated in the hearing of the complaint and its appeal. The Club's arguments on notice are, with respect, misplaced.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of August, 2015.

Maria Morellato, Q.C.	"Jim Reynolds" James Reynolds	Leah Pence

TABLE OF AUTHORITIES