SC 541 Musqueam Indian Band et al v AA09 & PAAB

Link to Property Assessment Appeal Board Decision

Quick Link to Stated Case #541 (BCCA)

MUSQUEAM INDIAN BAND,
BLOCK F LAND LTD. and
BLOCK K LAND LTD.
v.
ASSESSOR OF AREA 09 – VANCOUVER SEA TO SKY REGION and
PROPERTY ASSESSMENT APPEAL BOARD

SUPREME COURT OF BRITISH COLUMBIA (S101648) Vancouver Registry

Before the HONOURABLE MR. JUSTICE N. SMITH
Date and Place of Hearing: June 24, 2010, Vancouver, B.C.

M. Morellato, Q.C. and L. Pence for the Appellants
R.B.E. Hallsor for the Respondents

***Property Held in Trust – Exemption – Section 15(1)(h) of the* Taxation (Rural Area) Act**

The properties that are the subject of this appeal were transferred from the Province to two companies owned by the Musqueam Indian Band ("Musqueam") and are held in trust by those companies for Musqueam. The properties at issue are not reserve lands and are unoccupied.

Musqueam and the companies appealed the property tax assessments for the subject properties to the Property Assessment Appeal Board ("the Board"). The Board found that although all of the requirements for exemption in section 15(1)(h) had been met, it was bound by the decision of this Court in Westbank Indian Band Development Co. *v.* British Columbia (Assessor of Area #19 – Kelowna) *[*Westbank*] to hold that the section did not operate to exempt from taxation non-reserve lands owned by a corporation set up by an Indian Band which held those lands in trust for the Indian Band.*

Musqueam and the companies appealed.

HELD: Appeal Dismissed.

Before dealing with the issues raised by the Stated Case, this Court first had to determine whether it should apply a standard of correctness or one of reasonableness. This Court considered Young Life *v.* Assessor of Area 8 et al *in making its decision and found that the proper standard of review was correctness.*

On the issue of whether the properties were exempt from taxation, this Court found that the Board was bound by the Westbank *decision and did not err in concluding the properties were taxable.*

Reasons for Judgment September 7, 2010

[1] On March 11, 2008, the Province of British Columbia and the Musqueam Indian Band (the "Musqueam") entered into a Reconciliation, Settlement and Benefits Agreement that provided, among other things, for certain properties to be transferred from the Province and held in trust for the Musqueam.

Pursuant to that agreement, property was transferred to two companies owned and controlled by the Musqueam. The question before the Court is whether those properties are exempt from property taxes.

[2] The properties are located within the University Endowment Lands, adjacent Vancouver. Pursuant to the *University Endowment Land Act,* R.S.B.C. 1996, c. 469, assessment of property for taxation purposes is governed by the *Taxation (Rural Area) Act,* R.S.B.C. 1996, c. 448, s. 15(1)(h) of which reads:

> 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;

[3] The properties at issue are not reserve lands and are unoccupied. The Musqueam and the companies that hold the property (Block F Land Ltd. and Block K Land Ltd.) appealed property tax assessments to the Property Assessment Appeal Board (the "Board"). The Board found the properties were not exempt from taxation. Although it found that all of the requirements for exemption in s. 15(1)(h) appeared to have been met, the Board said it was bound by the decision of this Court in *Westbank Indian Band Development Co. v. British Columbia (Assessor of Area #19 - Kelowna),* [1991] B.C.J. No. 2501 (S.C.) [*Westbank*]*,* to hold that the section does not operate to exempt from taxation non-reserve lands owned by a corporation.

[4] The Musqueam and the two companies now appeal by way of a Stated Case, pursuant to Rule 33A of the *Rules of Court* and s. 65 of the *Assessment Act,* R.S.B.C. 1996, c. 20. The Stated Case poses four separate questions, but all of them raise the same basic question of whether the Board erred in law in reaching its conclusion.

Standard of Review

[5] Before dealing with the issues raised by the Stated Case, I must first determine whether, in reviewing the Board's decision, this Court should apply a standard of correctness or one of reasonableness. In *Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 190, the Supreme Court of Canada said that the first consideration in determining the standard of review is whether the jurisprudence has already decided the appropriate standard of review for the particular tribunal and question at issue.

[6] The Respondent Assessor argues that the appropriate standard of review is reasonableness, relying on *Weyerhaeuser Company Ltd. v. Assessor of Area No. 04 - Nanaimo Cowichan,* 2010 BCCA 46 [*Weyerhaeuser*]*.* There, the issue was the classification of certain property for taxation purposes and the Board was interpreting classification regulations made under the *Assessment Act.* The Court of Appeal said the following at paras. 46 and 47:

> [46] ... The Board deals with reviewing assessment decisions made by a review panel. Their job specifically entails applying regulations to fact situations to determine if a review panel made the appropriate decision under the *Assessment Act.* Thus, interpreting and applying assessment regulations is within the Board's specialized realm of expertise.
>
> [47] Since the Board was not determining legal questions of general importance to the legal system as a whole, but rather interpreting a regulation promulgated under their own constating statute, the standard of review in this case is reasonableness.

[7] The Applicants rely on *Young Life v. Assessor of Area #8 et al,* 2005 BCSC 1079, which involved the same section of the *Taxation (Rural Area) Act* at issue here. In that case, the question was whether the

properties at issue were “places of public worship” under s. 15(1)(d) or places used for “activities that are of demonstrable benefit to all members of the community” under s. 15(1)(q). The Court said that interpretation of the definitions in the relevant statutory provisions and the application of any general legal principles were purely matters of law to be decided on a standard of correctness.

[8] I agree with the Applicants that the issues here are not comparable to those in *Weyerhauser.* Although the Board’s decision involved an application of the statutory exemption to the facts, the crux of the issue is one of statutory interpretation: does the statutory exemption include non-reserve properties held in trust for a tribe of Indians by a corporation? The Board was also interpreting prior decisions of this court and considering the application of the common law principle of *stare decisis.* Those are pure questions of law.

[9] I find that the standard of review in the interpretation of s. 15(1) was settled by this court in *Young Life.* Even if it was not, application of the factors set out in *Dunsmuir* to this case favours a standard of correctness. In particular, the *Assessment Act* does not contain a privative clause and the appeal provisions are restricted to questions of law; the questions at issue are questions of law involving statutory interpretation of the application of the principle of *stare decisis* - areas where the courts and not the tribunal have particular expertise. The resolution of this issue may also have importance to the determination of future cases. For all those reasons, the proper standard of review is correctness.

Did the Board Err in Finding that the Exemption did not Apply to the Properties?

[10] The Board was clearly of the view that, on a plain reading of the words, all of the constituent elements of s. 15(1)(h) were met in this case and that the properties should be exempt from taxation. However, the Board said that it was prevented from reaching that conclusion because it was bound by the *Westbank* case.

[11] *Westbank* was also an appeal by way of Stated Case from a decision of the Board (known then as the Assessment Appeal Board). As in this case, the lands at issue were not reserve lands and they were held in trust for the band by a corporation. Holmes J. upheld the Board’s decision that the subject lands did not fall within the exemption set out in s. 13(1)(h) (now s. 15(1)(h)) of the *Taxation (Rural Area) Act).*

[12] The Applicants argue, first, that the Board was not bound to follow *Westbank* because the comments relating to s. 13(1)(h) in *Westbank* were *obiter dicta.* I cannot accept that submission. Although Holmes J. dealt first with the issue of the Assessor’s standing, he went on to discuss and consider essentially the same issue as here. He weighed arguments from both sides on this issue, considered the relevant case law on the matter, and came to a conclusion. It is clear that the finding about s. 13(1)(h) was the *ratio decidendi* of the case.

[13] The Applicants next submit that the Board failed to distinguish *Westbank* from the facts of this case. I do not find any relevant factual distinction. As in this case, the lands in *Westbank* were not reserve lands, vested in Her Majesty, or surrendered to the Crown, and they were owned by a corporation held in trust for the benefit of (in the somewhat obsolete language of the statute) “a tribe or body of Indians”. The Applicants argue that Holmes J. did not discuss or consider the existence of a trust. Although it seems that this factual issue was not specifically canvassed, it is clear that the court was talking about lands held in trust for the Westbank Indian band. The trust was described in detail in the Board’s decision in that case, which was part of the Stated Case record before the court.

[14] The Applicants’ third argument is that the Board should have departed from the principle of *stare decisis* in this case to find that it was not bound by *Westbank.* The principle of *stare decisis* is an aspect of the rule of law. In essence, it means that a decision of a higher court acts as binding authority on a lower court within the same jurisdiction. The principles underlying the doctrine include the need to ensure that the law is certain, consistent, and predictable, as well as the need to promote the efficient use of judicial resources.

[15] In this case, the Board is an inferior tribunal. The *Westbank* decision was given by a superior court. Decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, unless the facts are distinguishable from those of the previous case: *R. v. Lindsay,* 2003 BCSC 1203. I cannot agree that it was an error of law for the Board to follow a case from a higher court directly on point. It would have been a clear error for the Board to do otherwise.

[16] The Applicants submit in the alternative that even if the Board was bound by *Westbank,* this Court is not bound to follow it. The Applicants urge this Court to reconsider what they argue is the "failed reasoning" of *Westbank.*

[17] Although the term *stare decisis* is generally used in reference to the relationship of higher courts to lower courts, the principle also applies to courts at the same level in the same jurisdiction. However, courts at the same level are not as tightly bound by the principle. A judge may depart from the principle of *stare decisis* if certain criteria are met: (a) where the decision cannot stand with a subsequent decision of a higher court; (b) where it is shown that some binding authority was not considered; or (c) where the decision was an unconsidered one given in exigent circumstances without the opportunity to consult authority fully: *Re Hansard Spruce Mills Ltd.,* [1954] 4 D.L.R. 590 (B.C.S.C.) [*Hansard Spruce Mills*].

[18] The Applicants argue that these criteria are met in the following ways: the approach in *Westbank* to statutory interpretation is not consistent with subsequent Supreme Court of Canada decisions; the judgment failed to consider relevant binding authority; and it is not reflective of constitutional values or of the present social and political realities in the province.

[19] As a starting point, Holmes J. considered and cited Supreme Court of Canada authority for the modern approach to statutory interpretation: *Stubart Investments Limited v. Her Majesty the Queen,* [1984] 1 S.C.R. 536. The approach he considered - that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" - was the approach used by courts at the time and is still the prevailing approach used today: see for example, *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54. Holmes J. also found that cases regarding interpretation of taxation statutes were not helpful in *Westbank* because what was at issue was an exemption portion of the *Act,* not the taxing section.

[20] The Applicants argue that Holmes J. failed to consider relevant binding authority set out in *R. v. Nowegijick,* [1983] 1 S.C.R. 29. In that case, the Supreme Court of Canada dealt with statutory interpretation of a taxation exemption provision in s. 87 of the *Indian Act,* R.S.C. 1970 c. I-6. The Supreme Court of Canada found that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

[21] In *Westbank,* Holmes J. discussed *Nowegijick,* but through the context of another case in which it was cited. He declined to apply the principle in *Nowegijick* because he found that to argue that provincial legislation was "related to Indians" would "fly in the face of the constitutional impediment of [the Province's] ability to legislate in that regard". Therefore, I do not agree that Holmes J. failed to consider *Nowegijick.* He considered it and found that it was not applicable.

[22] Holmes J. also considered and followed what appeared to be the only previous case dealing with the same statutory provision, *Northwest - Prince Rupert Assessor, Area No.* 25 *v. N &V Johnson Services Ltd.,* [1988] 4 C.N.L.R. 83 (B.C.S.C.) [*Northwest - Prince Rupert*]. That case concerned reserve land that had been leased to a corporation whose individual shareholders were also band members. Southin J. (as she then was) found that there was no evidence of a trust. The Court of Appeal agreed and also rejected a further submission that the court should "lift the corporate veil" to find that the land was "occupied by Indians" based on the identity of the corporation's shareholders.

[23] In the course of her reasons, Southin J. also referred to s. 87 of the *Indian Act,* which read:

> 87. (1) Notwithstanding any other Act of the Parliament of Canada or any Act of the legislature of a province, but subject to subsection (2) and to section 83, the following property is exempt from taxation, namely:
>
> (a) the interest of an Indian or a band in reserve or surrendered lands; and
>
> (b) the personal property of an Indian or band situated on a reserve.
>
> and no Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (a) or (b) or is otherwise subject to taxation in respect of any such property.

[24] Referring to the same *Assessment Act* provisions at issue in this case, Southin J. then said:

> Bearing in mind the course of the relationship between the indigenous and non-indigenous population of British Columbia since British Columbia joined Confederation in 1871, I am of the opinion that the legislative purpose in enacting the exemptions was not to benefit Indians but to observe the perceived limits of the province's legislative authority. To put it another way, I am of the opinion that the legislature intended to tax to the boundary of the area protected by s. 87 of the *Indian Act* and its predecessors.

[25] In *Westbank,* Holmes J. described that statement as possibly *obiter,* but "if it is *obiter* I approve and rely on it as being a correct analysis of the matter". When the Court of Appeal upheld Southin J.'s decision in *Northwest - Prince Rupert,* it referred to, but did not comment on, her analysis of the legislative intent behind what is now s. 15(1)(h) of the *Taxation (Rural Area) Act.*

[26] Returning to the *Hansard Spruce Mills* criteria, although the decision in *Westbank* was given orally, it is a considered decision of this Court that did not fail to consider any binding authority and is not inconsistent with any subsequent authority.

[27] There is a further basis upon which a judge of this Court may decline to follow an earlier judgment of the Court, although it has, until recently, been rarely used: if the prior judgment is clearly or palpably wrong. This test was set out in *Cairney v. Queen Charlotte Airlines Limited and MacQueen* (1954), 12 W.W.R. 459 (B.C.S.C.) where Wilson J. said:

> No suggestion has been made to me that the authorities bearing on the question were not considered by Fisher, J. There is no subsequent judgment by any member of this court or by any higher court which would suggest that Fisher, J. reached a wrong conclusion. There is no suggestion that his judgment is palpably wrong in that it displays a patent error as to law or as to the facts upon which his statement of law is based.

[28] Wilson J. was also the judge in *Hansard Spruce Mills,* in which he referred to *Cairney* but did not include the "patently wrong" criterion. This may be because a "palpable" error will often be the result of one or more of the other factors.

[29] The "patently wrong" test was applied by Goepel J. in *McCready v. Nanaimo (City),* 2005 BCSC 762. *McCready* dealt with interpretation of legislative provisions governing a sale of property for unpaid taxes and the jurisdiction of a city council to set aside such a sale. Goepel J. declined to follow a previous decision which he said was patently wrong, but which he also said failed to consider relevant Court of Appeal and Supreme Court of Canada authority.

[30] In *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235, the Supreme Court of Canada referred to a number of dictionary definitions of the word "palpable":

The *New Oxford Dictionary of English* (1998) defines “palpable” as “clear to the mind or plain to see” (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as “so obvious that it can easily be seen or known” (p. 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as “readily or plainly seen” (at 1399).

[31] In *Westbank,* Holmes J. applied an interpretation of what is now s. 15(1)(h) that was not his alone, but one that was first stated by Southin J. and referred to without comment by the Court of Appeal. I confess to having some difficulty with that interpretation. I agree with the Board that the requirements for exemption in s. 15(1)(h) appear, on a plain reading, to have been satisfied. It is also not clear to me why the legislature would need to enact a tax exemption that only applied to properties already exempt by operation of the *Indian Act* - an exemption that the legislature had no constitutional authority to rescind or limit.

[32] However, to characterize the interpretation placed on the statute by Holmes J. and Southin J. as palpably wrong would, in the circumstances, merely be a rationalization for substituting my own view for theirs. That is precisely what the principles of *stare decisis* and judicial comity prevent me from doing.

[33] If *Westbank* was wrongly decided, it must be left to the Court of Appeal to say so. On the basis of the law that I am bound to apply, I must answer the questions posed by the Stated Case in the negative and hold that the Board did not err in any of its conclusions.

SC 541 Cont Musqueam Indian Band et al v AA09 and PAAB

MUSQUEAM INDIAN BAND,
BLOCK F LAND LTD. and
BLOCK K LAND LTD.
v.
ASSESSOR OF AREA 09 – VANCOUVER SEA TO SKY REGION and
PROPERTY ASSESSMENT APPEAL BOARD

BRITISH COLUMBIA COURT OF APPEAL (CA038459) Vancouver Registry

Before the HONOURABLE MADAM JUSTICE NEWBURY, the HONOURABLE MADAM JUSTICE KIRKPATRICK, and the HONOURABLE MR. JUSTICE HINKSON
Date and Place of Hearing: October 28, 2011, Vancouver, B.C.

M.A. Morellato, Q.C. & L.E. Pence for the Appellant
R.B.E. Hallsor for the Respondent Assessor of Area 09
J.L. Owen for the Respondent Intervenor, Attorney General of British Columbia

Exemption – Section 15(1)(h) of the* Taxation (Rural Area) Act – *Held "in trust"

The lands in issue were held in trust for the appellant Band by the appellant companies, and are subject to taxation, unless exempted under section 15(1)(h) of the Taxation (Rural Area) Act*. The issue before the Property Assessment Appeal Board ("the Board") was whether the exemption found in section 15(1)(h) of the* Taxation (Rural Area) Act *applied to the lands in issue. The Board determined that certain lands owned by the appellant companies were not exempt from taxation, the appellants appealed by way of stated case to the British Columbia Supreme Court but were unsuccessful. This appeal was brought with leave from the dismissal of the appeal by stated case.*
HELD: Appeal Allowed.
This Court found that the lands in question were held "in trust" by "another person" (the appellant companies), for "a tribe of Indians" (the Musqueam) and were unoccupied. Viewed in the context of the Act *as a whole, within the legislative scheme of which it is a part, and in its historical context, this Court*

concluded that on a natural reading of section 15(1)(h), it applied to the land in issue and that by the operation of that subsection, the lands in issue were exempt from taxation under the Act*.*

Reasons for Judgment May 1, 2012

Written Reasons by:
The Honourable Mr. Justice Hinkson

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick

Reasons for Judgment of the Honourable Mr. Justice Hinkson:

[1] This appeal involves the interpretation of words in a statute, the meaning of which appears to be clear.

[2] The Property Assessment Appeal Board ("Board") determined that certain lands owned by the appellant companies were not exempt from taxation (reasons indexed at 2010 PAABBC 20091957). The appellants appealed by way of stated case to the British Columbia Supreme Court but were unsuccessful. The reasons of the Chambers Judge are indexed at 2010 BCSC 1259. This appeal is brought with leave from the dismissal of the appeal by stated case.

Background

[3] The lands in issue are held in trust for the appellant Band by the appellant companies, and are subject to taxation, unless exempted under the *Taxation (Rural Area) Act*, R.S.B.C. 1996, c. 448 [*Act*]. The issue before the Board was whether the exemption found in s. 15(1)(h) of the *Act* applied to the lands in issue.

[4] The Board's conclusion is stated at para. 22 of its decision:

> The Appellants make compelling arguments that some or all of the circumstances identified above apply to the *Westbank* [*Westbank Indian Band Development Co. v. British Columbia (Assessor of Area #19-Kelowna)*, [1991] B.C.J. No. 2501 (S.C.)] decision. I am inclined to agree, with respect, that the decision does not do a thorough analysis of the appropriate approach to statutory interpretation, nor does it consider whether *Northwest Prince Rupert [Northwest - Prince Rupert Assessor, Area No. 25 v. N&V Johnson Services Ltd*., [1988] 4 C.N.L.R. 83], *supra* is distinguishable. It is difficult to reconcile the Court's interpretation with subsequent authority such as *Canada Trustco, [Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601] *supra*. While I may, with respect, disagree with the Court's distinction of *Nowegijick* [*R. v. Nowegijick*, [1983] 1 S.C.R. 29], I cannot say that the decision was given in advertence to that authority as it is referenced (although misspelled) in the reported version. While the transcript of the decision is fragmentary, I cannot say that the decision was not considered or authorities not fully consulted. Issues of whether the decision reflects the values of our Constitution are not for me to pass judgment on, as constitutional questions are outside of the jurisdiction of this Board. Likewise, while I am aware that the circumstances of this case arise in a different political and social climate with respect to the resolution of aboriginal land claims, and that the Companies come to own the Properties in trust for Musqueam as part of a settlement of certain claims, the limited jurisdiction of this Board makes it inappropriate for me to comment on whether the social, political and economic assumptions in the *Westbank* decision continue to be valid.

[5] The background facts are conveniently summarized by the Chambers Judge at paras. 1–4 of his reasons:

[1] On March 11, 2008, the Province of British Columbia and the Musqueam Indian Band (the "Musqueam") entered into a Reconciliation, Settlement and Benefits Agreement that provided, among other things, for certain properties to be transferred from the Province and held in trust for the Musqueam. Pursuant to that agreement, property was transferred to two companies owned and controlled by the Musqueam. The question before the Court is whether those properties are exempt from property taxes.

[2] The properties are located within the University Endowment Lands, adjacent Vancouver. Pursuant to the *University Endowment Land Act*, R.S.B.C. 1996, c. 469, assessment of property for taxation purposes is governed by the *Taxation (Rural Area) Act*, R.S.B.C. 1996, c. 448, s. 15(1)(h) of which reads:

> 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;

[3] The properties at issue are not reserve lands and are unoccupied. The Musqueam and the companies that hold the property (Block F Land Ltd. and Block K Land Ltd.) appealed property tax assessments to the Property Assessment Appeal Board (the "Board"). The Board found the properties were not exempt from taxation. Although it found that all of the requirements for exemption in s. 15(1)(h) appeared to have been met, the Board said it was bound by the decision of this Court in *Westbank Indian Band Development Co. v. British Columbia (Assessor of Area #19-Kelowna),* [1991] B.C.J. No. 2501 (S.C.) [*Westbank*], to hold that the section does not operate to exempt from taxation non-reserve lands owned by a corporation.

[4] The Musqueam and the two companies now appeal by way of a stated case, pursuant to Rule 33A of the Rules of Court and s. 65 of the *Assessment Act*, R.S.B.C. 1996, c. 20. The stated case poses four separate questions, but all of them raise the same basic question of whether the Board erred in law in reaching its conclusion.

[6] In addition to the background facts, the hearing before the Chambers Judge proceeded on agreed material facts including the fact that:

> In particular, the Settlement Agreement provides that, to settle certain claims and as part of the reconciliation of the Province and Musqueam, certain lands (which include the Subject Properties) were to be transferred by the Province to designated companies that were defined in the Settlement Agreement as companies controlled by Musqueam and include corporations acting as trustees for Musqueam as beneficiary. It is the practice and policy of the Land Title office that it will not register Indian Bands as fee simple owners.

[7] The Chambers Judge concluded that the Board was interpreting prior decisions of the Supreme Court of British Columbia and was considering the application of the common law principle of *stare decisis*, both questions of law. He therefore applied a standard of correctness on the appeal by stated case.

[8] He then considered the decision in *Westbank Indian Band Development Co. v. British Columbia (Assessor of Area #19-Kelowna),* [1991] B.C.J. No. 2501 (S.C.) [*Westbank*]. In that case, which I will discuss in greater detail below, Mr. Justice Holmes decided that lands held in fee simple by an Indian-

owned corporation, where those lands were not reserve, special reserve lands, nor vested in Her Majesty, were not exempt from taxation under the *Act.*

[9] The Chambers Judge below found that the Board was bound by *Westbank* as the reasoning relating to s. 13(1)(h) of the *Act* was not *obiter dicta*, and the case was not distinguishable on its facts. He also found that the Board was correct in considering itself bound by the decision based upon the principle of *stare decisis*.

[10] The Chambers Judge considered whether he was bound to follow the decision in *Westbank* and concluded that he was. At para. 26 he wrote:

> If *Westbank* was wrongly decided, it must be left to the Court of Appeal to say so. On the basis of the law that I am bound to apply, I must answer the questions posed by the stated case in the negative and hold that the Board did not err in any of its conclusions.

Issues on Appeal

[11] The issues raised by this appeal are the correct interpretation of the tax exemption in s. 15(1)(h) of the *Act* and whether it applies to the lands in question.

Discussion

a) Standard of Review

[12] As the Chambers Judge acknowledged, this Court is not bound by the prior decisions of the Supreme Court of British Columbia. A matter of statutory interpretation, such as this, is subject to review on the standard of correctness.

b) Rules of Statutory Interpretation

[13] At page 87 of his text, *The Construction of Statutes* (2nd ed. 1983), Professor Elmer Driedger wrote:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

That passage has been quoted and applied in a number of decisions of the Supreme Court of Canada, including: *Stubart Investments Limited v. Her Majesty the Queen*, [1984] 1 S.C.R. 536; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140.

[14] In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, Chief Justice McLachlin and Mr. Justice Major, writing for the Court, alluded to Prof. Driedger's view at para. 10, and observed:

> ... 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. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose

> on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[15] In *Placer Dome Canada Limited v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] 1 S.C.R. 715, Mr. Justice LeBel, for the Court, articulated the general principles to be applied to the interpretation of tax legislation, and at para. 23 stated:

> The interpretive approach is thus informed by the level of precision and clarity with which a taxing provision is drafted. Where such a provision admits of no ambiguity in its meaning or in its application to the facts, it must simply be applied. Reference to the purpose of the provision "cannot be used to create an unexpressed exception to clear language": see P. W. Hogg, J. E. Magee and J. Li, *Principles of Canadian Income Tax Law* (5th ed. 2005), at p. 569; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622. Where, as in this case, the provision admits of more than one reasonable interpretation, greater emphasis must be placed on the context, scheme and purpose of the Act. Thus, legislative purpose may not be used to supplant clear statutory language, but to arrive at the most plausible interpretation of an ambiguous statutory provision.

[16] In *R. v. Nowegijick*, [1983] 1 S.C.R. 29, the application of tax exemptions to Indians was in issue. The Supreme Court of Canada held at page 36:

> Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens.
>
> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that Indian treaties "must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians".

[17] This principle of construing the words of a statute in the sense in which they would naturally be understood by the Indians was further discussed in *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] 2 C.N.L.R. 355, 184 O.A.C. 84. The Ontario Court of Appeal concluded at paras. 93–94:

> 93 None of the *Nowegijick, Mitchell* or *Matsqui Indian Band* cases suggests that this interpretive principle applies to the construction of statutory provisions of general application, like s. 309(1) of the *Act*.
>
> 94 As well, we do not understand the interpretive principle formulated in *Nowegijick* to mandate the expansive interpretation of laws of general application where such a reading is not otherwise warranted. Were it otherwise, as the trial judge observed, laws of general application concerning corporations could be interpreted so as to create one form of statutory regime for aboriginals and another form of statutory regime, concerned with the same subject matter, for non-aboriginals. *Nowegijick, Mitchell* and *Matsqui Indian Band* do not dictate or support such an outcome. To the contrary, as observed by the Supreme Court in *Nowegijick* at p. 36: "Indians are citizens and, in affairs of life not governed by treaties or the *Indian Act*, they are subject to all of the responsibilities, including payment of taxes, of other Canadian citizens."

[18] Although the *Act* is legislation of general application, the section to be interpreted, s. 15(1)(h), applies only to Indians. In my view, the modern rule of statutory interpretation must guide the interpretation of the exemption. The words chosen by the drafter should be taken within the context of the statute as a whole within the statutory framework of which it is a part, and in its historical context, and in those contexts the chosen words should be given their natural meaning. As neither the parties nor the Intervenor[1] assert that there is any ambiguity or any doubtful expressions in the words chosen, the interpretive rule formulated in *Nowegijick* has no application.

c) The Interpretation of s. 15(1)(h) of the *Act*

i) The *Westbank* decision

[19] In *Westbank*, the Board concluded that lands owned in fee simple by the Westbank Indian Band Development Company were neither reserve lands nor special reserve lands, nor were they vested in Her Majesty in that they had not been surrendered to the Crown. As such, the Board concluded that the lands did not fall within the purview of s. 13(1)(h) (now s. 15(1)(h)) of the *Act,* and were subject to taxation. On the appeal by stated case, Holmes J. agreed with the Board's conclusions.

[20] In upholding the decision of the Board, Holmes J. adopted what he described as a contextual approach given to the section in a previous authority, *Northwest Prince Rupert Assessor, Area No. 25 v. N & V Johnson Services Ltd.* [1988] 4 C.N.L.R. 83, and assumed that the legislative intent of the provision was to tax to the boundary of the area protected by s. 87 of the *Indian Act*. Section 87 of the *Indian Act* exempts the interest of an Indian or a band in reserve lands or surrendered lands and the personal property of an Indian or a band situated on a reserve from taxation.

[21] *Northwest Prince Rupert,* involved lands which were owned by a corporation and located on a reserve. Madam Justice Southin concluded:

> Bearing in mind the course of the relationship between the indigenous and non-indigenous population of British Columbia since British Columbia joined Confederation in 1871, I am of the opinion that the legislative purpose in enacting the exemptions was not to benefit Indians but to observe the perceived limits of the province's legislative authority. To put it another way, I am of the opinion that the legislature intended to tax to the boundary of the area protected by s. 87 of the *Indian Act* and its predecessors.
>
> That being so, I see no reason why the words in issue should not be taken in their natural meaning. A corporation is not an Indian although there is nothing to prevent the legislature from saying if it chooses to do so that corporations wholly owned by Indians are to be considered Indians for the purpose of assessment and taxation.

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[1] Despite the spelling in the style of cause, I have adopted "intervenor" spelled as such, in this judgment. As the Court noted in *Kitimat (District) v. Alcan Inc*., 2006 BCCA 562:

> Paul R. Muldoon, in his text *Law of Intervention: Status and Practice*, Aurora: Canada Law Book Inc., 1989, at page 3, notes the following with respect to the proper spelling of intervenor: Typically, the debate has centred around whether the proper spelling is "intervenor" or "intervener". In *Pitzel et al. v. Children's Aid Society of Winnipeg*, [1984] 5 W.W.R. 474 at pp. 477-8, 29 Man. R. (2d) 297, 45 C.P.C. 313 (Q.B.), the Court reviewed the various spellings of the term "intervenor". The Court concluded: "From this variety of usage, it appears that either a number of usages are acceptable or no one has yet emerged as the correct and acceptable one in Canadian law."

As the Court of Appeal Rules refer to "intervenor", that spelling is adopted.

[22] The decision of Southin J., as she then was, was upheld by this Court ((1990), 73 D.L.R. (4th) 170) on the basis that there was no evidence of any trust. The reasoning with respect to the legislative jurisdiction underlying the exemption in what was then s. 13(1)(h) of the *Act* was not considered. In the result, *Northwest Prince Rupert* does not address the essence of s. 15(1)(h) of the *Act*; which exempts from taxation lands held in trust for or for the use of a tribe or body of Indians.

[23] Holmes J. did not resolve the inconsistency between what Southin J. described as the intention to tax to the boundary of the area protected by s. 87 of the *Indian Act* with the plain language of the legislation. Nor was his attention directed to ss. 92(2) and 125 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3. The former gives the Province certain power over some direct taxation, and the latter precludes taxation over lands or property belonging to Canada or any Province. Section 125 has, however, been interpreted as permitting the taxation of non-Indian occupiers of reserve land, such as corporations: see *Derrickson v. Kennedy*, 2006 BCCA 356. Thus the existence of federal legislation does not necessarily preclude the exercise of provincial legislative authority. I will return to s. 125 of the *Constitution Act, 1867* in my discussion of redundancy, below.

[24] The conclusion in *Northwest Prince Rupert* that "the legislative purpose in enacting the exemptions was not to benefit Indians" is difficult to reconcile with the wording of s. 15(1)(h) of the *Act*, which can only apply to Indians. There was no suggestion that the lands in question were "held in trust for or for the use of a tribe or body of Indians", and Southin J. overturned the finding of the Board that the lands were held "in trust" by a corporation for two individuals who were Indians.

[25] The reasons for judgment in *Westbank* make no reference to any trust obligation between the land owner and any Indians. The appellants contend that the case was wrongly decided but say that in any event, the decision is not binding because there is no reference in the decision to the lands in issue being held in trust.

[26] In my view, the reliance placed on *Northwest Prince Rupert* by the Court in *Westbank* was unwarranted and, as I will explain below, it erred in finding that s. 13(1)(h) of the *Act*, as it then was, did not operate to exempt from taxation lands owned in trust for a tribe or body of Indians.

[27] I conclude that the view that what was intended in the *Act* was to tax to the boundary of the area that was protected by s. 87 of the *Indian Act* in *Northwest Prince Rupert* was *obiter dicta,* and that its reasoning must be restricted to cases where the lands in question are not held in trust for the use of a tribe or body of Indians.

ii) Redundancy

[28] Section 2(1) of the *Indian Act*, R.S.C., 1985, c. I-5 defines a "reserve" as follows:

> (a) ... a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and
>
> (b) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 and the regulations made under any of those provisions, includes designated lands;

[29] The appellants contend that, had the Legislature intended to exempt only those lands protected by s. 87 of the *Indian Act* from the application of the *Act*, it would have included the word "reserve" in s. 15(1)(h). They say that the fact that the Legislature chose not to do so suggests it did not intend to restrict the application of the section to only reserve lands, otherwise s. 15(1)(h) would be superfluous and redundant in light of s. 87 of the *Indian Act*.

[30] Section 87 of the *Indian Act* provides:

> Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:
>
> (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (b) the personal property of an Indian or a band situated on a reserve.

[31] Neither reserve lands nor surrendered lands are legally owned by Indians. Rather, they are owned by "Her Majesty in right of Canada" for the benefit of Indians. As such, reserve lands are exempt from taxation pursuant to s. 125 of the *Constitution Act, 1867.*

[32] The provisions of s. 87 of the *Indian Act* have been interpreted as applying only to property on reserves. In reasons that concur with the disposition of the case by the majority, La Forest J. concluded at p. 131 in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85:

> In summary, the historical record makes it clear that ss. 87 and 89 of the *Indian Act*, the sections to which the deeming provision of s. 90 applies, constitute part of a legislative "package" which bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base.
>
> It is also important to underscore the corollary to the conclusion I have just drawn. The fact that the modern-day legislation, like its historical counterparts, is so careful to underline that exemptions from taxation and distraint apply only in respect of personal property situated on reserves demonstrates that the purpose of the legislation is not to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold, and deal with property in the commercial mainstream on different terms than their fellow citizens. An examination of the decisions bearing on these sections confirms that Indians who acquire and deal in property outside lands reserved for their use, deal with it on the same basis as all other Canadians.

[33] Thus the exemption in s. 15(1)(h) is not required in order to exempt Indian-held property on reserves from taxation. There must be some other purpose for the subsection. The Assessor contends that the purpose is to ensure that a non-Indian entity holding property <u>on reserve</u> in trust for a tribe or body of Indians is not exempt from taxation.

[34] The Assessor contends that the words of s. 15(1)(h) add to the exemption found in s. 87 of the *Indian Act* because they ensure that land on a reserve held by a non-Indian entity "in trust for a tribe or body of Indians" is exempt from taxation. The Assessor further contends that this adds to the exemption in s. 87 of the *Indian Act* while observing the limits of the provincial authority by honouring the legislative purpose underlying that section of the *Indian Act*, as required by s. 88 of the *Indian Act*.

[35] This contention ignores, however, the reference to "the interest of an Indian or band in reserve lands" in s. 87(a) of the *Indian Act.* That reference renders the addition of s. 15(1)(h) unnecessary if its object was as contended for by the Assessor.

[36] In my opinion, the argument that the exemption in s. 15(1)(h) should be restricted to reserve lands, when considered in the context of the title of the *Act*, and in the context of s. 15(1) as a whole, is insupportable. The title of the Statute being the *Taxation (Rural Area) Act*, labels it in a simple and straight-forward way as legislation with the purpose of taxing <u>rural areas</u>. Rural areas are, in the simplest

of terms, all areas not in a municipality. Section 15(1)(a) exempts "land and improvements in a municipality" from tax under the *Act* as they are taxed under their own municipal taxing schemes, for example the *Vancouver Charter*, S.B.C. 1953, c. 55. The *Act*, in light of its basic purpose of taxing rural areas, must find its application in rural areas. Without specific wording restricting the application of s. 15(1)(h) exclusively to reserve lands, I can see no reason to do so.

[37] In my opinion, the exemptions in s. 15(1) are worded in such a way as to be comprehensive in their description of property exempt for taxation under the *Act*. The exemptions, including those for "places of public worship", "land used exclusively for a public cemetery", and numerous others, may create some potential overlap with property which may or may not be already exempt by the operation of other legislation, for example either the *Indian Act*, or s. 125 of the *Constitution Act, 1867*. For example, the subject matter of s. 15(1)(g):

> land and improvements vested in or held by Her Majesty, or held in trust for Her Majesty in right of Canada or of British Columbia, or held in trust for the public uses of British Columbia;

is already, to a certain extent, exempted by s. 125 of the *Constitution Act, 1867* in that Crown lands are not subject to taxation. However, land "held in trust for the public uses of British Columbia" may not necessarily be Crown lands, yet would still be exempt based upon the words of this provision. While there may be some overlap with tax exemptions created by other legislation, this should not affect the interpretation of the exemption as set out in the *Act*. The same reasoning applies to s. 15(1)(h).

[38] The Intervenor, the Attorney General of British Columbia, disagrees with both the appellants and the Assessor. The Intervenor contends that the approach to be employed in the interpretation of the subsection is to consider the language chosen by the drafter rather than the term "reserve" found in the federal legislation. Employing that perspective, the Intervenor contends that for the exemption in s. 15(1)(h) to apply, the land and improvements must be vested in or held by Her Majesty or another person on behalf of Her Majesty. The Assessor also argues that the exemption should be limited to only certain persons as trustees.

[39] I am unable to accede to this proposition. As I will explain below, the words "another person" cannot, in my view, be read as modified only by the words "on behalf of the Crown".

iii) The Statute as a Whole and in its Historical Context

[40] The purpose of the *Act* is to raise revenue for the Province, as is contemplated by s. 91(24) of the *Constitution Act, 1867*. Section 2 of the *Act* provides:

> (1) As provided in this Act, and for raising a revenue for Provincial purposes,
>
> (a) property in British Columbia is subject to taxation,
>
> (b) every owner must be assessed and taxed on his or her property, and
>
> (c) every occupier of Crown land must be assessed and taxed on the land and improvements on it held by him or her as an occupier.
>
> (2) A person assessed and taxed may appeal as provided in this Act and the *Assessment Act*.
>
> (3) Taxes levied under this Act relate to the calendar year in which the levy is first made and are based on the assessed values of land and improvements as confirmed by a review panel.

[41] Unlike the Nisga'a Nation (who are exempted under 2. 2.1 of the *Act*), the Musqueam have no taxation agreement with the Provincial government.

[42] The parties agree that the *Act* is part of an overall legislative scheme for the assessment of land for property tax purposes. That scheme is said by the Assessor to include the *Assessment Act,* R.S.B.C. 1996, c. 20. Assuming, without determining, that this is correct, I am unable to accept that the wording of the *Assessment Act* assists in the interpretation of s. 15(1)(h) of the *Act*. The *Assessment Act*, as its name implies, deals with the assessment of property values, but it does not deal with taxation or exemption from taxation. It is the *Act* that addresses those matters.

[43] Prior to the addition of s. 18.1 to the *Assessment Act*, only taxable property was liable to assessment under the *Assessment Act* (see the majority reasons in *Annacis Auto Terminals (1997) Ltd. v. British Columbia (Assessor of Area No. 11 - Richmond/Delta)*, 2003 BCCA 315, 227 D.L.R. (4th) 476). Section 18.1 was then added to clarify that land that is exempt from taxation is not necessarily exempt from assessment.

[44] The Assessor points to s. 26(1) and (4) of the *Assessment Act* which read:

> (1) Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held or occupied otherwise than by, or on behalf of, the Crown, is, with the improvements on it, to be assessed in accordance with this section.
>
> ...
>
> (4) This section applies, with the necessary changes and so far as it is applicable, if land is held in trust for a tribe or band of Indians and occupied, in other than an official capacity, by a person who is not an Indian.

The Assessor contends that with what they describe as necessary changes, subsection 4 would read:

> Land, the fee of which is in the Crown, or in some person on behalf of the Crown, that is held in trust for a tribe or band of Indians and occupied, in other than an official capacity, by a person who is not an Indian.

[45] The Assessor also contends that when the *Assessment Act* is read in this way, for the reference in s. 15(1)(h) of the *Act* to "land and improvements vested in or held by Her Majesty or another person in trust" and the wording of s. 26(4) of the *Assessment Act* to be internally consistent, it must follow that the holder of the land in trust referred to in s. 15(1)(h) be the Crown or another person who is holding on behalf of the Crown.

[46] This argument makes no account for the wording of s. 26(1) of the *Assessment Act*. In that subsection are found the words "the fee of which is in the Crown, or in some person on behalf of the Crown". If the Assessor is correct that the phrase "Her Majesty" in the *Act* requires no modification, the same reasoning must surely apply to the reference to the Crown in s. 26(1) of the *Assessment Act*, being a part of the same legislative scheme as the *Act.*

[47] As the appellants point out, this contention fails to give any weight to the definitions in s. 1(1) of the *Assessment Act*. In that section, "person" is defined to include "a partnership, syndicate, association, corporation and the agent and trustee of a person". In the same section, "trustee" is defined as including:

> (a) a committee under the *Patients Property Act*,
>
> (b) an attorney under Part 2 of the *Power of Attorney Act*,

> (c) a receiver, and
>
> (d) any person having or taking on the possession, administration or control of property affected by any express trust, or having, by law, the possession, management or control of the property of a person under a legal disability.

[48] In my opinion, the argument that for s. 26 of the *Assessment Act* and s. 15(1)(h) of the *Act* to be internally consistent, the words “another person in trust” in s. 15(1)(h) must be read to include the words “on behalf of the Crown” is unconvincing. If the Legislature intended the words “another person” in s. 15(1)(h) to be restricted in the same way as “in some person” in s. 26, then it would have included “on behalf of the Crown” or “on behalf of Her Majesty” in the wording of s. 15(1)(h).

[49] Furthermore, to suggest that the *Assessment Act* is determinative of the interpretation of the *Act*, without taking into consideration the definitions of “person” and “trustee” in s. 1(1) of the *Assessment Act*, provides no assistance in the interpretation of s. 15(1)(h). Coupled with the clear differences in the provisions, (such as the requirement that there be occupation of the land in question in s. 26(4), where the land may be unoccupied in s. 15(1)(h)), this difficulty overwhelms the argument for reading anything into s. 15(1)(h) on the basis of the wording of the *Assessment Act*.

[50] Just as the reasoning in *Nowegijick* applies only when the words chosen contain an ambiguity or doubtful expressions, other principles of interpretation only apply where there is ambiguity as to the meaning of a provision: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 at para. 28. Where the provision contains no ambiguity in its meaning or in its application to the facts, it must simply be applied: *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, [2006] 1 S.C.R. 715, 2006 SCC 20 at para. 23.

[51] The Intervenor refers to s. 18 of the *Act*, which contains the following relevant provisions:

> (1) Subject to subsections (2) to (4), land and the improvements on it must be assessed and taxed in the name of the owner.
>
> ...
>
> (4) If
>
> > (b) land is held in trust for a tribe or body of Indians and occupied by a person who is not an Indian in other than an official capacity ...
>
> the land and its improvements must be assessed and the occupier taxed as if he or she were the owner of the land and improvements but the assessment or taxation in no way affects the rights of Her Majesty in the land.

[52] Relying on the words “a person ... in other than an official capacity”, the Intervenor contends that the similar words in s. 15(1)(h) reflect the notion that the Crown land that is occupied by someone other than the Crown, but on behalf of the Crown, will remain exempt from taxation. I do not accept that this is correct. It ignores the reference in s. 15(1)(h) to “land ... either unoccupied, or occupied by a person in an official capacity or by the Indians”. The occupation of the land by someone in an “official capacity”, is not a requirement for all exemptions covered by this provision. As such, it is not informative in an application of s. 15(1)(h) where the land is held by another person in trust for the use of a tribe or body of Indians and is unoccupied, as in the instant case.

[53] In *Westbank*, at para. 9, the Court commented:

> I note that in essence of what is in issue here is not really a taxing or the imposition of a taxing section of an Act. It is really the exemption portion of an Act that is in issue for interpretation and I think in that context that there is a difference.

[54] That observation takes what was then s. 13(1)(h) out of the context of the *Act* for the purpose of its interpretation. In my view that is an approach that does not comport with the modern rule of statutory interpretation, especially in light of what is discussed in para. 10 of *Canada Trustco*, mentioned above.

[55] I conclude that the drafter included the words "Her Majesty" in both subsections 15(1)(g) and (h) to clarify that the Province was not attempting to legislate in an area beyond its jurisdiction, and that on a correct interpretation s. 15(1)(h) is not restricted to reserve lands. Such a conclusion respects the presumption of coherence in the interpretation of the *Act*.

[56] Before the Reconciliation, Settlement and Benefits Agreement ("Agreement"), the Musqueam asserted Aboriginal title to the lands in issue. The historical context of the legislation must be viewed in the light of the Agreement that the Province and the Musqueam entered into on March 11, 2008. Prior to that agreement, few properties in British Columbia had been transferred from the Province and held in trust for tribes or bodies of Indians. The lands in issue could not be registered in the name of the Musqueam Band. The transfer was described in the statement of material facts on the stated case as set out above, which, for convenience I repeat here:

> In particular, the Settlement Agreement provides that, to settle certain claims and as part of the reconciliation of the Province and Musqueam, certain lands (which include the Subject Properties) were to be transferred by the Province to designated companies that were defined in the Settlement Agreement as companies controlled by Musqueam and include corporations acting as trustees for Musqueam as beneficiary. It is the practice and policy of the Land Title office that it will not register Indian Bands as fee simple owners.

[57] Had the land been purchased by the Musqueam, it would have been capable of being sold by the appellant companies, but could not be converted into a reserve without the agreement of the federal Crown: *Musqueam Holdings Ltd. v. British Columbia (Assessor of Area #09 - Vancouver)*, 2000 BCCA 299, aff'd 2000 BCCA 299, leave to appeal refused [2000] S.C.C.A. No. 354, where this Court upheld the finding of the Court (62 B.C.L.R. (3d) 93) that an Indian Band lacked the ability to unilaterally create reserve status for land.

[58] But here the land was not purchased. It was transferred by the Province to the Musqueam pursuant to the Agreement, as implemented by the *Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act*, R.S.B.C. 2008, c. 6 [*Musqueam Reconciliation Act*].

[59] In the debate over the *Musqueam Reconciliation Act*, the Hon. M de Jong spoke for the government and confirmed more than once that the Agreement was not a treaty: British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl., 4th Sess., No. 9 (13 March 2008) at 10568. This point is set out in s. 7.03 of the Agreement, which specifically states that the

> agreement is separate and apart from the British Columbia Treaty Process and is not a treaty or land claims agreement within the meaning of sections 25 or 35 of the *Constitution Act*, 1982.

Although s. 3(3) of the *Musqueam Reconciliation Act* contemplates the conversion of the lands into a reserve at some date in the future, it is clear that at present they are not reserve lands.

[60] The events preceding the *Musqueam Reconciliation Act* also support this conclusion. As the majority explained in *Ross River Dena Band v. Canada,* 2002 SCC 54, [2002] 2 S.C.R. 773, an intention to create a reserve on the part of persons having the authority to bind the Crown is required before a reserve can

be legally created. There can be no suggestion that the Reconciliation, Settlement and Benefits Agreement evidenced such a present intention.

[61] Moreover, as the Supreme Court of Canada explained in *Wewaykum Indian Band v. Canada,* 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 15:

> Federal-provincial cooperation was required in the reserve-creation process because, while the federal government had jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property. Any unilateral attempt by the federal government to establish a reserve on the public lands of the province would be invalid: *Ontario Mining Co. v. Seybold*, [1903] A.C. 73 (P.C.). Equally, the province had no jurisdiction to establish an Indian reserve within the meaning of the *Indian Act*, as to do so would invade exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians".

iv) "Another Person"

[62] The Assessor contends that the presumption against tautology, which presumes that the legislature avoids superfluous or meaningless words precludes, the appellants' interpretation of s. 15(1)(h) of the *Act*.

[63] The Assessor contends that the appellants' interpretation cannot be correct because if it were, the phrase "or another person" would not have been modified by the inclusion of "Her Majesty", as the simple phrase "a person" would have been sufficient to give effect to the appellants' interpretation. The Assessor contends that a purposive analysis of the wording of the section requires that all of the words of the section be given meaning, and that the appellants' interpretation renders the words "Her Majesty" meaningless and assumes that those words have no purpose at all.

[64] I am not persuaded that the words "Her Majesty" in s. 15(1)(h) of the *Act* are made meaningless by the appellants' interpretation of that section. The words distinguish ownership by the Crown, in trust, from ownership by a non-Crown entity, in trust for Indians, and given that interpretation, both terms have meaning.

[65] The Assessor also contends that the statutory interpretation maxim of *ejusdem generis* requires that when a general word or phrase follows a list of specific items, the general word or phrase will be interpreted to include only items of the same class as those listed, and that the phrase "another person" in the section takes its meaning from the definition of "Her Majesty" in the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29.

[66] The difficulty with this submission is that the list that is contemplated by the maxim is absent from s. 15(1)(h) of the *Act*. In *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029 both Justice La Forest, for the majority, and Justice L'Heureux-Dubé, for the minority, referred with approval to the discussion of this principle by Professor Côté in *The Interpretation of Legislation in Canada*, Cowansville: Yvon Blais Inc., 1984. At p. 1079 Madam Justice L'Heureux-Dubé wrote:

> :... Professor Côté further cites the following passage from *Renault v. Bell Asbestos Mines Ltd.*, [1980] C.A. 370, concerning the *ejusdem generis* rule (at p. 372 of that judgment, per Turgeon J.A. for the court):
>
> > [TRANSLATION] The *ejusdem generis* rule means that a generic or collective term that completes an enumeration of terms should be restricted to the same genus as those words, even though the generic or collective term may ordinarily have a much broader meaning.

He added the following caveat, however (at pp. 244-45):

> Certain conditions must be satisfied for *ejusdem generis* to apply. According to some cases, the general expression must be preceded by several specific terms; otherwise there would be no genus permitting its restriction. But this condition is not universally respected, and its [sic] does not seem unreasonable to restrict the meaning of a broad expression even if it is preceded by only one specific term. Instead of *ejusdem generis*, the rule of *noscitur a sociis* could be invoked. Sometimes the courts have refused to apply *ejusdem generis* when a general term is preceded by only one specific term. However, such decisions have been based on ordinary principles of interpretation, and not simply on the fact that a single specific term preceded a general one.

[67] The fact that the term “Her Majesty” is defined in various ways in the *Interpretation Act* does not result in the application of the *ejusdem generis* rule where only the words “Her Majesty” are included in s. 15(1)(h) of the *Act*. As I have already concluded, the words “another person” in the section are included to distinguish ownership by the Crown, in trust, from ownership by a non-Crown entity, in trust for the Indians, and thus advance the legislative purpose of accomplishing that distinction.

[68] In my opinion the appeal must be allowed. Both of the appellant companies fall within the definition of “another person”, and they have taken possession of property which is affected by the express trust created by the Agreement of March 11, 2008.

Conclusion

[69] The lands in question are held “in trust” by “another person” (the appellant companies), for a tribe of Indians (the Musqueam) and are unoccupied. Viewed in the context of the *Act* as a whole, within the legislative scheme of which it is a part, and in its historical context, I conclude that on a natural reading of s. 15(1)(h), it applies to the lands in issue and that by the operation of that subsection, the lands in issue are exempt from taxation under the *Act*. I would allow the appeal and grant a declaration that the lands are exempt from taxation under the *Act*.

“The Honourable Mr. Justice Hinkson”

I agree:

“The Honourable Madam Justice Newbury”

I agree:

“The Honourable Madam Justice Kirkpatrick”