> (2) The Governor in Council may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian health projects or for any other purpose for the general welfare of the band, and may take any lands in a reserve required for such purposes, but where an individual Indian immediately prior to such taking, was entitled to the possession of such lands, compensation for such use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.
>
> [...]
>
> 28 (1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

[81] For the Subject Property to be leased, the Band needed to surrender it to the Crown. As noted by Collier J. at p. 388 of the *Guerin* trial decision, the *Indian Act*, R.S.C. 1952, c. 149, as amended by S.C. 1952-53, c. 41, S.C. 1956, c. 40, and S.C. 1958, c. 19, which governed the Band and the Subject Property: "prohibited [a band] from directly transferring its interest to a third party. A lease can only occur after a surrender. After that act, the Crown acts for the Band on its behalf."

[82] Indeed, ss. 37-41 of the *Indian Act* were found in *Leonard v. British Columbia* (1983), 144 D.L.R. (3d) 512 (B.C.S.C.) aff'd 11 D.L.R. (4th) 226 (B.C.C.A.), to "establish the method an Indian band must follow in order to lease reserve land to private individuals" (at para. 8). The Court of Appeal in *Guerin* at 700 noted the additional importance of these provisions as "ensuring certainty as to the effect of the surrender and the validity of any subsequent disposition of surrendered land". From the above, it is clear that at the time at which the Lease was agreed, the Band (i) had to surrender land to the Crown to allow a lease and (ii) could not enter into the Lease without the Crown acting on its behalf. However, the Band concedes, again, that the validity of the surrender is not at issue here.

E. The "By the Band" Clause

[83] The Band's position is that the restriction simply does not apply because it was not placed by the band. As I understand this argument, the foundation would have to be that the 1996 *Bylaw,* including its additional element that the assessor may consider restrictions placed on the use of land "by the band", meaning actually in fact by the band and not by implication. Before discussing whether the "by the band" clause can affect events before its enactment, I must determine whether that enactment effects closed transactions.

[84] In *Dikranian v. Quebec (Attorney General)* [2005] 3 S.C.R. 530 Bastarache J. for the Court was considering student loan repayment terms. The contracts had been made between the appellant and the bank and considered a particular repayment term. New legislation was enacted by Quebec moving the repayment date forward. Bastarache J. writing for the Court concluded rights created by contract vest when the contract is concluded.

[85] Bastarache J. wrote:

> 32 The principle against interference with vested rights has long been accepted in Canadian law. It is one of the many intentions attributed to Parliament and the provincial legislatures. As E. A. Driedger states in *Construction of Statutes* (2nd ed. 1983), at p. 183, these presumptions
>
> > ... were designed as protection against interference by the state with the liberty or property of the subject. Hence, it was "presumed", in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject.
>
> This had already been accepted by Duff J. in *Upper Canada College v. Smith* (1920), 61 S.C.R. 413, at p. 417:
>
> > ... speaking generally it would not only be widely inconvenient but "a flagrant violation of natural justice" to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.
>
> (See also *Acme Village School District No. 2296 (Board of Trustees of) v. Steele-Smith*, [1933] S.C.R. 47, at p. 51; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 569-70.)
>
> 33 The leading case on this presumption is *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, at p. 638, where this Court stated the principle in the following terms:
>
> > A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark* [(1890), 15 App. Cas. 384, at 388]), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.
>
> 34 The principle has since been codified in interpretation statutes.

[86] I conclude that the amendment “by the band” cannot apply, consequently to closed transactions.

[87] It is important to note additionally that, at the time the Lease was entered into, the Band did not have the lawful authority to be a signatory to a lease. The parties have agreed that when construing the facts, the Lease is binding upon the Band, despite the fact that it was entered into without the Band’s knowledge of the details of the agreement. Only the Queen by her properly authorized agent could enter

the lease on the Band's behalf. In sum, and bearing in mind the Band's position that this is not a relitigation of circumstances behind the surrender or the actions that formed the subject of the damage award for the breach of trust, I view the lease as being validly entered into by the Crown as trustee for the Band and an interest holder in the land. Consequent on that finding and the analysis of the amendment of the *Bylaw* as not having application to closed transactions, I find that the Assessor and the Board may consider the provisions in the Lease.

F. Approval by a majority of the Band

[88] Given that the Band accepts that this is not relitigation of the surrender or the Lease and given that the Band entered the agreement and is subject to the agreement, by virtue of the agreement having been entered into by the Crown on its behalf, the fact that the majority of the electors of the Band did not consent to such a restriction cannot be used as a means to argue the agreement is not in place. That issue was addressed in *Guerin* and the Lease remains in force. Furthermore I have found that the *Bylaw* is not to be applied to closed transactions. I find that the issue of whether the majority of the electors of the Band had consented to a restriction would be of no relevance accordingly in the Board's review.

[89] I find that the provisions set out in the Lease may be considered by the Board and by the Assessor in determining the highest and best use in the actual value of the Property as "a circumstance affecting the value of the land and improvements" under s. 26(3) of the *Bylaw* with the provision explained below.

[90] I also note that s. 25.1 of the *Bylaw* states that the determination of actual value is to be determined "as if on the valuation date…the permitted use of the property and of all properties were the same as on October 31 following the valuation date". Accordingly, the Assessor and the Board must consider and cannot ignore the permitted use of the property.

[91] Additionally, the golf course use restriction may be considered under s. 26(3) of the *Bylaw* as "present use" by the Assessor and consequently the Board.

G. Is the Lease's use provision a restriction?

[92] Use provisions are a "restriction" for the purposes of s. 26(3.2) by the plain reading of the *Bylaw.*

[93] There is no use of the words "restrictive covenant" in the Lease. There is also no qualification of the term "restriction" in the *Bylaw*.

[94] The Band, however, argues that the use provisions set out in the Lease are not a "restriction placed on the use of the land and improvements by the band" for the purposes of s. 26(3.2) of the *Bylaw*. The Band reasons that these provisions are not a "restriction" as that term is correctly interpreted in

accordance with *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.*, 2009 BCCA 5 [*Aquadel*]. The Band further argues that a restriction must be evidenced by clear and unambiguous language in order to be considered pursuant to s. 26(3.2) of the *Bylaw*. This reasoning is essentially the imputation of case law on restrictive covenants to the term 'restriction' under the *Bylaw.*

H. Are the Lease provisions a restriction on rent or use?

[95] According to the Band, the key term in the *Bylaw* is "actual value", meaning market value as if the Subject Property was held in fee simple. It is the position of the Band that this is set out in *Standard Life.* It submits that the Lease's golf course use provision is only a restriction on rent, and was placed by the Club (as the draft Lease was made by the Club's solicitors, rather than a restriction on the use of the property within that term's meaning in assessment law.

[96] The Band argues the provisions of the Lease on use are directly related to the provisions on rent and should be read together.

[97] The Club, in contrast, argues the restriction is a general one not limited to the terms of the rent found in the Lease.

[98] I find a plain reading of the Lease is that the restriction on use is not one related to rent alone.

[99] In *Standard Life*, reviewed above, the Court was considering s. 26 of the *Assessment Act*, wherein "actual value" means the market value of the fee simple interest in land and improvements. In that case, Hollinrake J.A. quoted *J.D. Shier Lumber Co. Assessment* (1907), 14 O.L.R. 210 (C.A.), which the Band states is a binding authority on this Court. His Lordship stated:

> [15] In *J.D. Shier Lumber Co. Assessment* (1907), 14 O.L.R. 210 (C.A.) at p. 221 this was said:
>
> > Throughout the assessment law the general principle in the assessment of land has been and is to assess the entire ownership; in other words, the fee simple, in one assessment, and not to assess separately the smaller interests which make up the whole.

His Lordship added that this case, amongst others, reflected the meaning of fee simple interest set out in s. 26 of the *Assessment Act*. The Board must be guided by a consideration of all the interests to assess the one interest that of the fee simple alone.

[100] I do not find that the use provisions in the Lease are related only to the rent provision. Plain reading of the wording in the Lease is clear. Article 5 *contains* the explicit purpose that the use of the Subject Property will be as a golf course. Article 5 reads "the demised premises only for a golf and country club, with such additional facilities as the lessee may considerable desirable".

[101] The Respondents submit that it would be difficult to conceive of circumstances where the Club would not be bound by the terms of the Lease such that it *could*, by way of example, commence construction of a subdivision on the Subject Property. It submits that the use provision of the Lease is a "restriction" relevant to assessment of the Subject Property regardless of *Aquadel*.

[102] The interrelated nature of these provisions appears, it is argued, from the wording of the rent provision in paragraph 1(b) of the Lease which limits rent to the uncleared and unimproved condition of the Subject Property "considering the restricted use to which the Lessee may put the demised premises under the terms of this Lease." It is argued that this does not simply restrict the use of the subject property but also the rent payable and thus is a restriction on rent.

[103] The Band advocates that the Lease should be read as interrelated based on the approach of the Court in *Aquadel*. In *Aquadel*, Finch C.J.B.C., for the unanimous Court of Appeal, distinguished a positive covenant, in that case that the property be a golf course, from a restrictive covenant that runs with the land and does not have a right of *cancellation*. Chief Justice Finch considered *Nylar Foods v. Roman Catholic Episcopal Corp.* (1988), 48 D.L.R. (4th) 175 (B.C.C.A.) [*Nylar Foods*]. He noted that the meaning in an agreement must be determined by assessing the document as a whole:

> [12] It is also settled law that in construing an agreement the intention of the parties must be determined from the words of the contract read as a whole…

[104] In his *review*, Finch C.J.B.C. examined the agreement as a whole. Germane to the matter before this Court, that the words "he will not use the … land for any purpose other than as a golf course" created a covenant which is "positive in substance".

[105] The fact that the use provision in *Aquadel* was a positive covenant (and thus not a restrictive covenant), according to the Band, means that there is no "restriction" on the use of land for the purpose of assessment. Accordingly, the Band's argument, as I understand it, is that because this provision is not registrable (were this to be off-reserve) as a restrictive covenant and could not be enforced against successors in title, then the Lease provision, unenforceable against future holders of title, is therefore not a restriction in use.

[106] Should there be any ambiguity, the Band argues "it should be resolved in favour of the free use of land": see *Qureshi v. Gooch*, 2005 BCSC 1584 at para. 21. In *Aquadel*, however, the Chief Justice was not considering circumstances similar to those at bar. His Lordship was not considering factors relevant to assessment. I find the case is not relevant to the present circumstances.

[107] In the present case, s. 26(3) of the *Bylaw* grants a broad scope of considerations for the purpose of assessment. It states "[t]he Assessor [and the Board] may…give consideration to present use…and any

other circumstances affecting the value of the land." In addition, s. 26(3.2) provides that: "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".

[108] It is accepted law that restrictive covenants are to be strictly construed. Madam Justice McLachlin (as she then was) in *Nylar Foods* considered the issue of whether a provision in a lease was a valid restrictive covenant. She held for the Court:

> [6] …In order to create a valid restrictive covenant, clear language is required showing unambiguously that the parties intended to create an interest in land in favour of one of them. If it is not entirely clear from the language that the parties intended to create an equity and correlative burden on the land, the restrictive covenant will be treated merely as a personal covenant between the parties who made it.

[109] The decision and reasoning in *Aquadel* is binding insofar as restrictive covenants are under consideration. However, the determination of whether the golf course *use* provision is a restrictive or positive covenant is irrelevant to the issues before the Court; rather, the Court need only determine if the provision is a "restriction" pursuant to the *Bylaw*. The term "restriction" cannot be limited to only a consideration of restrictive covenants.

[110] Respecting the interpretation of the Lease, I also find that the terms of the Lease read together do not create a restriction only on rent such that for the purposes of an assessment it would be appropriate for the Assessor or the Board to ignore the restriction.

[111] Additionally, the use term does not run with the land. It is a contractual provision of the Lease determinable at the end of the term of the Lease. However, it is nevertheless a *restriction* for the purposes of assessment to be considered by the Assessor and the Board. The Club is restricted to use the land as a golf course. That restriction may be considered for assessment even though it will not run with the land. In these circumstances it is not a positive covenant such as that found in *Aquadel*, which ran with the land and was unenforceable.

[112] I find the Board can consider the restriction in use set out in the Lease to determine the highest and best use and the actual value of the subject property. I find that the restriction in use is not part only of the rent provision in the Lease, but is expressly stated in the Lease to be the only use to which the Club can put *the* subject property.

[113] It is important to distinguish between the strict construction required to evaluate *restrictive* covenants and restrictions on the use of land for the purpose of assessment.

[114] Where it is the Crown, for example, that places restrictions on Crown land, those restrictions are to be taken into account by *the Assessor: see BC Ferries Service Inc. v. Assessor for Area 8* [2012] PAABBC 2012 0002. In that case, the regulatory and legal framework was such that the property could only be used as a ferry terminal. The Board found at para. 32:

> Our mandate is to apply the provisions of the *Assessment Act* to ensure that taxpayers are assessed on the actual value, that is to say, the market value of the fee simple interest in the land and improvements, subject to any restrictions placed on the use of them.

[115] Given that the property could only be used as a ferry port according to the lease that was a highly relevant consideration for the Board.

[116] The Property Assessment Appeal Board as cited by Madam Justice Loo in *British Columbia (Assessor of Area #09 - Vancouver) v. UBC Property Trust*, 2008 BCSC 822 [*UBC Property Trust*] at para. 30 discussed whether the term of a lease can be considered a restriction, holding:

> [30] I further find that the term of the lease is not a factor that is an appropriate consideration when valuing the land with the use restriction in the lease. Section 19(6) states that the duration of the right of a holder is not a restriction in use. Neither can the duration of the lease be used to support an opinion that the use restriction does not affect the actual value for assessment purposes.

[117] In that case, four educational institutions equally owned land that was leased solely for the purpose of "the storage of equipment and the manufacture of concrete formwork". The Property Assessment Appeal Board considered that restriction in use in arriving at assessed value. Noting the section was language was clear the court held that was not an error to consider the restriction.

[118] The Bylaw states that in "determining actual value, the Assessor may…give consideration to present use … and any other circumstances affecting the value of the land and improvements…" Clearly, the Board, as a direct consequence, must consider the Lease and its provisions which expressly state that the Lease contains the following restrictive language at paragraphs 5 and 6 as a golf club:

> 5. The lessee covenants with the lessor that it will:
>
> > (a) Use the demised premises only for a golf and country club, with such additional facilities as the lessee may considerable [sic] desirable.
> >
> > […]
>
> 6. It is specifically understood and agreed between the parties hereto that the demised premises are being leased by the lessor to the lessee for the purposes of constructing and operating thereon a golf and country club, with such additional facilities as the lessee may consider advisable. As noted by the Assessor these provisions were interpreted by the 2005 Rent Arbitration Tribunal as restrictive to the use of the land by the Club. On page 6 of that judgment, it was stated that fair rent was to be determined in accordance with the two stated conditions in the Lease:

> (1) As the demised premises were still in an uncleared and unimproved condition at the date of the determination;
>
> and
>
> (2) Considering the restricted use to which the lessee may put the demised premises under the terms of this lease.

[119] The 2005 *Rent* Arbitration Tribunal on page 6 concluded that:

> We see no justification in the wording of the lease for relegating condition (2) to an inferior and uncertain role to be given some effect by a subjective application to the market value of the land, on the basis of its highest and best use with no restrictions as to its use. In our view, if the determination of the value of the land were required as a first step in determining the "fair rent", this determination must be on the basis of the land's highest and best use having regard to the use restrictions in the lease, *i.e.* as a golf and country club.

[120] In *UBC Property Trust*, Loo J. reasoned much like Allan J. above in *Petro-Canada*:

> [29] It is not Dominion who has the opportunity to redevelop the land; it is the Appellant. There is no evidence to show that the owners would allow Dominion (as the occupier) to redevelop the land in accordance with the zoning. In fact, the evidence of the use restriction and of the short-term nature of the lease demonstrates otherwise. As in *BC Rail Partnership et al v. Area 08* (2007 PAABBC 20070004, para. 27), there is no "reasonable expectation" that the owners as the landlord would allow a use other than that.

[121] Madam Justice Loo noted in the lease between the parties the restrictions had been placed by fee simple owner. In that regard Loo J. concluded:

> [26] Section 19(5) is very clear. It is *any* restriction placed on the use of the land ... by the owner of the fee. It does not add "and supported by a provincial or federal statute." I find that the owner of the fee here placed a restriction on the use of the land. That restriction is that the land be used for storage purposes and for manufacture of concrete formwork.

[122] Accordingly, Loo J. held that the Board had properly considered the restrictions on the lease holder placed by the fee simple when assessing the highest and best use of the property. As Loo J. noted at para. 30 it was "a given" that the restriction did affect value. No one in that case was suggesting that the property could, for example, be used to develop waterfront condominiums consequently the court reasoned "the value would have to reflect the restriction on the property to some degree".

[123] In the case at bar, the Club is the occupier and the Band is the equivalent of the fee simple owner. The Federal Government on behalf of the Band imposed the restriction that the occupier Club may only use the property as a country club and golf course. That restriction is relevant to the value of the land. From this, it follows that the Board may consider the restriction in the Lease and whether there is a reasonable expectation that the Band would allow residential use of the Subject Property.

I. Interpretation of Provisions affecting Aboriginal Rights

[124] If there is any ambiguity in the correct interpretation of the *Bylaw*, it is argued by the Band, that ambiguity must be resolved in favour of the Band: see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85. In that case, Iacobucci J. sets out:

> [49] That s. 83(1)(a) [of the *Indian Act*] should be given a broad reading is clear from an application of the principle in [*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29], as explained by La Forest J. in [*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85], at p. 143:
>
> > ... it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them ... .
> >
> > At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.
> >
> > [Emphasis in Original]

[125] In the present case, there was no ambiguity as to whether the Lease may be considered *as* a restriction. Further, Mr. Justice Iacobucci is clear in his reasoning that this interpretive principle does not mean automatic acceptance of a given construction is required of the Court because it is favourable to the aboriginal parties. I find this interpretive principle does not affect the Court's conclusions in the present case. I also note parenthetically that this principle may not have been contemplated by the Supreme Court of Canada for application to legislation drafted by an aboriginal band. However, that issue is not for this Court to determine.

J. Does the Assessor have discretion to consider relevant assessment factors?

[126] I now turn to the Assessor's discretion aspect of the question, both under the Band's *Bylaw* and under the provincial *Assessment Act*, which the Band *Bylaw* substantially follows.

[127] The Band argues the Assessor and the Club rely on the exercise of the assessor's discretion to reduce the actual value of the land from its highest and best *use* to an incorrect assessment based on a restriction in the Lease regarding the golf and country club use. The Band argues that it would be a wrong exercise of discretion to do so and to extend the wording of s. 26(3) of the Band's *Bylaw* to conduct an assessment in this manner. It is argued this would conflict with the paramount duty of the Assessor to assess the property on the basis of the market value of a fee simple interest. In this regard, the Band argues its *Bylaw* is materially different from the *Assessment Act*.

[128] The Assessor notes that under the provincial legislation, the Assessor has a duty to consider a restriction placed by the fee simple owner if the lands in question are owned by the Crown or another

owner who is exempt from paying property taxes. This is not discretionary - the bylaw instructs this consideration at subsection 26(3) by stating to consider “any other circumstances affecting the value of the land”. It follows, argues the Assessor, that it does not matter whether a given restriction is a restrictive covenant or a restriction on use. It is a restriction that can and should be considered.

[129] An assessment is a highly fact-driven exercise. Here, there is some factual evidence, as found in the Lease that there is a restriction on the use of the property.

[130] I find the restriction in use in the Lease may be considered by the Board in its assessment of the Subject Property. It would be in contradiction to the *Bylaw* to ignore all the relevant circumstances and instead confer on the Board a discretion to do otherwise.

IV. Summary

1. Can the Musqueam Indian Band Board of Review consider the restriction in use set out in the Lease in determining the highest and best use and the actual value of the Subject Property?

2. Based on the Facts determined by the Board, in exercising its powers under ss. 4 1(2) of the *Bylaw* to either confirm or alter the assessment by the Assessor of the interest of the Club in the Subject Property:

(a) (i) Does the principle of general law relating to strict construction of restrictive provisions relating to use of land apply to the words “any restriction placed on the use of the land and improvements by the band” in ss. 26(3.2) of the *Bylaw*?

(ii) As a matter of correct legal interpretation, are the use provisions in the Lease a “restriction” for the purposes of ss. 26(3.2) of the *Bylaw* in light of the decision of the British Columbia Court of Appeal in [*Aquadel*]?

[131] The answer to Questions 1 is “yes”. The Board can consider the restriction in use set out in the Lease to determine the highest and best use and the actual value of the subject property pursuant to s. 26(3). This consideration is not subject to any limitations. The Board may also consider that the restriction in use pursuant to s. 26(3.2).

[132] With regard to Question 2(a)(i), the word in the Bylaw is “restriction” not “restrictive covenant”. The strict construction given to those terms is not applicable to a restriction for the purpose of assessment. The answer to 2(a)(i) is “no”

[133] In respect of Question 2(a)(ii), I find that *Aquadel* does not apply to this matter as the issue here does not turn on the meaning of restrictive covenants as was the situation before the Court in *Aquadel*. The word in the *Bylaw* is simply “restriction” plainly read. Consequently, the answer to Question 2(a)(ii) is, “yes”, and the use provisions in the Lease are to be considered as a restriction by the Board.

2(b) As a matter of correct legal interpretation, can the words "any restriction placed on the use of the land and improvements by the band" in s-s. 26(3.2) of the Bylaw *apply to a restriction placed by another party such as the Club or Canada or a judge?*

[134] I have determined that the amendment to the *Bylaw* inserting the words "by the band" does not apply to closed transactions. The "by the band" clause is therefore inapplicable to the present circumstances.

[135] "[P]laced on the use of the land and improvements by the band" in ss. 26(3.2) of the *Bylaw* could not apply to a restriction placed by the Club because the Club is governed by the terms of the Lease entered into on the Band's behalf.

[136] The question asking whether a restriction placed on use of the land by "Canada" I understand to mean something placed by the Government of Canada. I have already addressed the issue of the Crown acting on behalf of the Band in signing the lease.

[137] To the extent the above question asks me to address any hypothetical scenario beyond those facts, I decline to answer on the basis of a lack of factual context and further would require the Court to speculate on what facts could result in a restriction. The Court of Appeal's reasoning in *Tele-Mobile Company v. British Columbia*, 2013 BCCA 216 is apt to this problem in respect of declaratory statements where none are required.

[138] The answer to this question cannot be considered in the absence of context. I find that to be the case with reference to the placement of a restriction by a Judge or party such as the Club as well. In the circumstances, as there is no context or factual background to that question, I decline to answer this question.

2(c) Can the words "any restriction placed on the use of the land and improvements by the band" found in s-s. 26(3.2) of the *Bylaw* be correctly interpreted to apply in circumstances where it is not proven that the majority of the electors of the Band have consented to such a restriction?

[139] I find that this question is posed without sufficient factual basis. If it is posed in relation to events preceding the Lease this would then involve a reconsideration of the issues already resolved in the Band's favour in *Guerin* which all parties were in agreement was not being re-litigated. Accordingly, I decline to answer this question.

2(d) Do subsections 26(3) and 26(3.2) of the Bylaw require the Assessor to give consideration to the factors described in section 26(3) including any restriction placed on the use of the land or improvements by the band for the purposes of s-s. 26(3.2) or do those subsections confer a discretion to do so?

[140] If the answer is that those subsections confer a discretion to give consideration to those factors (including a restriction) but do not impose a requirement to do so:

(i) Does the discretion have to be exercised reasonably and in the light of all the relevant circumstances?

(ii) Is the discretion subject to the exception and the proviso in s-s. 26(3) that such consideration must not conflict with the requirement in subsections 26(1), (2) and (6) that land and improvements shall be assessed at their actual value meaning the market value of the fee simple interest in the land and improvements as if the interest holder held a fee simple interest located off reserve?

[141] In response to question 2(d), I find that the *Bylaw* directs the Board to consider all of the enumerated provisions in s-s. 26(3) and (3.2) including "any other circumstances affecting the value of the land and improvements" and restrictions. No discretion is conferred.

[142] Actual value is an objective term. The determination of actual value is fact-driven, but there is a proper conclusion to be reached. In order to reach that conclusion, the Board must consider any restrictions on the property which affect that actual value. As such, there is no discretion as to whether to consider the factors listed if relevant.

[143] The Board may consider **any** of the enumerated items. To ignore the enumerated factors would not accord with the *Bylaw* and would be in error.

[144] That would not be an exercise of discretion and would rather constitute an error disregarding the express provisions of the statute. If a factor is applicable, the Board must consider it. Discretion does not mean the Board would have the ability to ignore a factor. The answer to 2 d. is "yes" and the consideration is not discretionary.

2(e) Would the Board misinterpret section 26 of the *Bylaw* by applying subsections 26(3) or 26(3.2) of the *Bylaw* so as to restrict the highest and best use of the Subject Property to golf and country club use?

[145] The Board must consider all of the relevant factors set out in the applicable *Bylaw* to determine actual value. The Board in considering this will have to consider highest and best use in light of the considerations in the case law and the plain reading of the *Bylaw* as discussed above. The Board would not be misinterpreting s. 26 by applying subsections 26(3) and 26(3.2).

V. Conclusion

[146] In conclusion, I find the assessment of the subject property is to be conducted in accordance with the answers to the questions noted above where answered. The Board is to consider the restriction of the Lease when assessing highest and best use.

[147] This matter will be remitted to the Board for consideration in light of the answers to Questions 1, 2(a)(i) and (ii), 2(d), and 2(e). I decline to answer Question 2(b), and 2(c).

[148] If the Parties are unable to agree as to costs, they may arrange to speak to costs or make an application in writing by contacting the Registry within 60 days of this judgment.

"Maisonville J."

APPENDIX A

AGREED FACTS

(1) An appeal has been brought by the Musqueam Indian Band (the "Band") with respect to the assessment for the 2011 assessment roll by the British Columbia Assessment Authority (the "Assessor") acting as assessor under the *Bylaw* of 162 acres of land located on Musqueam Indian Reserve #2 (the "Subject Property") leased to and occupied by the Shaughnessy Golf and Country Club (the "Club").

(2) On January 22, 1958, a lease was entered into between Her Majesty the Queen in right of Canada (the "Crown") and the Club, under its former name of Shaughnessy Heights Golf Club, to lease the Subject Property for 75 years (the "Lease"). It was effective as of January 1, 1958 and has not been terminated or amended and remains in effect.

(3) The Band did not sign the Lease and did not receive a copy until 1970. The Crown entered into the Lease as a fiduciary on behalf of the Band which had surrendered the Subject Property for lease under the *Indian Act*. The Lease is attached as Schedule A.

(4) The Club was incorporated in October 1915 pursuant to the *Benevolent Societies Act*. It is now a society under the *Society Act*. Its essential corporate purpose is recreational. The 1915 Declaration of the Club sets out the purposes of the Club as "social intercourse, mutual helpfulness, mental and moral improvements and rational recreation." The 1915 Declaration has not been amended.

(5) The Club has occupied the Subject Property pursuant to the terms of the Lease continuously since 1958. The Club has never asked to use the Subject Property for any purpose other than a golf and country club, and has always operated in accordance with the Lease. The Club has continuously paid either to the Crown on behalf of the Band or to the Band, annual rent pursuant to the Lease since 1958.

(6) In 1975, the Band commenced an action (*Guerin v. The Queen*) in the Federal Court (Trial Division) with respect to the Lease. ... Each of the parties have accepted and agreed not to challenge any finding of fact in any of these decisions. The Club was not a party to this litigation but representatives of the Club were witnesses. The three levels of decision in "*Guerin*" are attached as schedules B, C, and D respectively.

(7) A draft lease dated October 17, 1957 contained a use restriction in the same wording as in the Lease (except for a typographical error). It was probably prepared by

the solicitors for the Club and not provided to the Band. A copy of the draft lease is attached as Schedule E.

(8) In 1988, the Band commenced a further action (*Grant v. Her Majesty the Queen in Right of Canada as represented by the Minister of Indian and Northern Affairs and the Shaughnessy Golf and Country Club*) with respect to the Lease, also in the Federal Court (Trial Division) reported as *Musqueam Indian Band v. Canada*, [1990] 2 F.C. 351 (T.D.). The action was struck out by Joyal J. under Rule 419 of the Federal Court Rules without a trial. The decision o['Joyal, J. is attached as Schedule F. The Band's Statement of Claim in "*Grant*" is attached as Schedule G.

(9) Subsequent to the *Guerin* and *Grant* decisions, the amount of rent to be paid pursuant to the lease has been established by arbitration or by agreement. The Band and the Club entered into a Memorandum of Agreement made December 6, 1990. The terms of the Memorandum of Agreement are set out in Schedule H. The decision in a rent arbitration in 2005 is attached as Schedule I.

(10) Under s. 83 of the *Indian Act*, the band has jurisdiction over property taxes on its reserve lands and passed the *Bylaw*. A copy of the *Bylaw* is attached as Schedule J.

(11) The Assessor has valued the Subject Property on the basis that its highest and best use is as a golf and country club.

(12) Pursuant to the provisions of the *Bylaw*, the Band has made a complaint to the Board against the valuation on the grounds that the Assessor was in error in valuing the Subject Property on the basis set out in paragraph 12 and has sought an alteration in the valuation to a highest and best use that does not restrict the use to that of a golf club pursuant to the use restrictions in the Lease (the "Use Restrictions") and has raised questions as to the proper interpretation of the *Bylaw*.

(13) The Board has determined to submit questions of law to the Supreme Court of British Columbia for the opinion of the Court pursuant to section 80(1) of the *Bylaw*.

FINDINGS OF FACT FROM THE GUERIN DECISIONS

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

Supreme Court of British Columbia Action No. S124733 (Vancouver Registry)

Collier J. of the Trial Division of the Federal Court of Canada made the following findings of fact (page numbers and paragraph references refer to the report of the decision at [1982] 2 F.C. 385 attached as Schedule B to the Notice of Stated Case):

"This action is brought by the Chief and Councillors of the Musqueam Indian Band on their own behalf and, in effect, for the whole Band." [p. 388, g]

"At the material times, the legislation governing Indians, Indian bands and Indian lands was the *Indian Act* R.S.C. 1952, c. 149, as amended by S.C. 1952-53, c. 41; S.C. 1956, c. 40; S.C. 1958, c. 19. [p. 388, i]

"In British Columbia, there was an Indian Commissioner for B.C. At the relevant times in this matter, William S. Arneil held that position. He died in 1971. Under him was a District Superintendent. One of the key figures in the matters giving rise to this litigation was Frank Earl Anfield. He had succeeded one H.E. Taylor as District Superintendent in 1954

or 1955. Anfield's position was sometimes described as Officer in Charge of the Vancouver Agency. He died on February 23, 1961." [p. 389, b-e]

"In 1955 the reserve contained 416.53 acres. The Band at that time numbered 235." [p. 389, h]

"The Vancouver Indian Affairs Branch recognized the reserve was a valuable one, and that it had potential. Anfield reported to Arneil on October 11, 1955 (Ex. 5), in part as follows:

> The future of the valuable Reserve, situated within the charter area of the City of Vancouver, is of paramount concern to the Indians as well as others. Applications are on file for the acquisition by sale and lease of large areas of the unused, as well as the used portions of this Reserve, but it is practically impossible to get into any workable negotiations until this problem of individual land holdings is settled once and for all." [p. 389, i-j; p. 390, a]

"In a later report to Arneil on September 17, 1956 (Ex. 9) Anfield suggested a detailed study be made of individuals' land requirements on the reserve, the requirements for band purposes (such as halls, schools, etc.) and the extent of unrequired land. He recommended not just an expert land value appraisal be made, but a land use planning survey "... aimed at maximum development providing long term revenue for the Band ...". He went on:

> It seems to me that the real requirement here is the services of an expert estate planner with courage and vision and whose interest and concern would be as much the future of the Musqueam Indians as the revenue use of the lands unrequired by those Indians. It is essential that any new village be a model community. The present or any Agency staff set up could not possibly manage a project like this, and some very realistic and immediate plans must be formulated to bring about the stated wish of these Musqueam people, the fullest possible use and development for their benefit, of what is undoubtedly the most potentially valuable 400 acres in metropolitan Vancouver today.

He then referred to a possible leasing of a low-lying area to the City of Vancouver for sanitary fill purposes. He continued:

> Such an operation would fill the low lying areas of about 150 acres to a level comparable to the rest of the Reserve. If any new village were located at the west end of the Reserve, the lease rentals would, if paid in advance, cover a considerable portion of the cost of moving. There would then be left for lease development some 300 acres of land levelled: another potential "British Properties"; as adjacent and unfearful of an Indian Reserve as is its famous counterpart in West Vancouver. Procedure to bring this result to pass would appear to be as follows:
>
> 1. To have the Band approve at Band fund cost an expert land use survey development plan, with valuation appraisal. (It is conceivable that this would be undertaken at cost by the U.B.C. or some large real estate corporation).
>
> 2. To secure from the Band, a resolution requesting (a) the location and development of a new village site of approximately 100 acres; (b) submission of documents for the surrender for leasing of all lands unrequired for such village site, to be approximately 316 acres, with all revenues to go to Band funds.

> 3. To advise all presently interested parties in land use on this Reserve that the unrequired areas, when defined and surrendered, will be publicly advertised for lease use and that such advertisement will not likely be within twelve months." [p. 390, d-j; p. 391, a-c]

"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.

But 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. A lease was in fact formally entered into on January 22, 1958 between the defendant and the golf club. The Band alleges that a number of the terms and conditions of the eventual lease are different than those they were told about before the surrender vote; that some of the lease terms were not disclosed to them at all. These matters are asserted against the defendant in support of the claim of failure to exercise the requisite degree of care and management as a trustee." [p. 391, c-g]

"In 1956 the golf club became interested in obtaining land for a new site. Its operation at that time was at 33rd Avenue and Oak Street in Vancouver. It leased its golf course land there from the C.P.R. The lease was to expire in 1960. The indications were it would not be renewed. The land was too expensive to purchase. The golf club began to explore, among other prospects, the possibility of obtaining land on the Musqueam Reserve." [p. 392, a-c]

"There were others interested, as well, in acquiring land interests in the reserve. A representative of a well-known Vancouver real estate firm made, in February 1956, inquiries of Indian Affairs officials in Ottawa. Interest was expressed by the firm in a long-term lease on certain land in Capilano Indian Reserve No. 5 in West Vancouver, and in securing land on the Musqueam Reserve. The real estate firm was also aware of the golf club's interest. (See Exs. 7 and 8.) That firm's interest, in some kind of development, continued throughout 1956. Anfield and Ameil knew of this. (See Exs. 15 and 16.)

The witness, C.E. Kelly, testified. I accept his evidence. From 1955 to 1957 he tried to work out some kind of arrangement with Indian Affairs officials, particularly Anfield, to develop lots on the reserve for housing. He suggested long-term lease arrangements. When he mentioned he would be willing to discuss it with the Band Councillors, he was told by Anfield not to; to deal only with the Indian Affairs personnel." [p. 392, d-h]

"The witnesses from the Band called on behalf of the plaintiffs all testified they were never told of any interest, or proposals for development, other than that evinced by the golf club. I accept their evidence" [p. 392, i-j]

"I have indeed, carefully scrutinized and considered the testimony of the Band members, Councillors, and Chiefs and former Chiefs. I have kept in mind that Mr. Anfield is not here to present what, the Crown suggests, is an opposite version. I do not agree there would necessarily have been, if Mr. Anfield and Mr. Arneil were alive, an opposite version. I found the Band members to be honest, truthful witnesses. They did not, in my assessment, conjure up the key evidentiary matters disputed by the defendant. Nor, in my view, was their evidence based on hindsight and reconstruction. On some matters, which I will later refer to, the Band members' testimony is, on analysis, supported by other evidence.

I therefore accept the plaintiffs' evidence as given by the various Band members who were called as witnesses." [p. 393, e-i]

"By October 1956, the Band seemed to be in agreement with the general idea that unrequired land should be leased. (See Exs. 9 and 11). The Band Council authorized a land appraisal to be done. It was to be paid out of Band funds. The Indian Affairs Branch requested the appraisal be [394] done by personnel of the *Veterans' Land Act* administration. The Superintendent of Reserves and Trusts wrote (Ex. 13):

> This Reserve consists of some 416 acres and is located in the southwest section of the City of Vancouver and immediately opposite lands held by the University of British Columbia. It will be realized from this that the Reserve is situated in an area of comparatively high valued land and no doubt has considerable potential revenue for the Band if properly managed.

A Mr. Alfred Howell did the appraisal. His report is dated December 28, 1956. Howell was a qualified appraiser as to land values. But he was not a land use expert as recommended by Anfield in Exhibit 9. The Band was not given a copy of the Howell report. They did not see one until after this litigation started. But some of the contents of Howell's report were given to the Band Councillors and Band. I shall refer later to that evidence.

Howell, for valuation purposes, divided the reserve into four areas. An area of 220 acres (including the 162 acres eventually leased to the golf club) was classified as "First Class Residential Area". The other major area was low-lying land of approximately 157.5 acres. It is not necessary to describe that or the other two areas. Howell used the comparative approach for the top 220 acres. He arrived at a figure of $5,500 per acre, a total of $1,209,120. The low-lying land he valued at $625 per acre." [p. 393, i and p. 394, a-g]

Even before the appraisal was carried out, Ameil and Anfield had met with City of Vancouver officials in connection with the leasing of the low lands to the City of Vancouver. Ameil and Anfield, at that meeting, had in mind, as well, leasing 150 acres to the golf club at "...a figure of say $20,000 to $25,000 a year." (See Ex. 12.) In a later letter, dated February 5, 1957, Arneil referred to a "contemplated" meeting with city and golf club officials in respect of long-term leases of land. [p. 394, g-i]

"The documentary evidence at trial showed that meetings and discussions indeed took place between Anfield and Mr. R.T. Jackson and Mr. E.L. Harrison. Jackson was the president of the golf club in 1956, and the early part of 1957. Harrison was on the board of directors and succeeded Jackson as president some time in 1957.

The following is a summary of those meetings and discussions:

Exhibit 19 is a copy of a letter dated February 13, 1957, from Anfield to Jackson. The letter indicates the appraisal report had been received; the area in which the golf club was interested was zoned residential; that area was appraised at more than $5,000 an acre; on the basis of a possible rental of 150 acres, at a minimum of 5%, the annual rental would be $37,500. A hand written note by Anfield, dated two days later, indicates the letter was withdrawn. Instead, the matter, including the appraisal values, was discussed with Jackson and Harrison and the Director of the *Veterans'Land Act*. Part of the note appears to me to read: "appraisal values reviewed - Shaughnessy Golf Club to review situation and advise further."

I note here that the golf club was, at this stage, being given information as to the appraised value of the lands. But the Band, according to the members who gave evidence and whose testimony I have accepted, was, at that time, given no information." [p. 395, c-j]

“On April 1, 1957, Anfield wrote Jackson (Ex. 21). ... The rest of Anfield’s letter went on to refer to a discussion with Mr. Howell as to certain areas outlined on Harrison’s cardboard sketch. Anfield advised the average value of $5,500 per acre could not be reduced. He said “... (Howell) ... thinks that we would be well advised to stand on the basis of $5500 per acre value, capitalized at 6% to determine the rental right across the line” ...

On April 4, 1957 Harrison, now the president of the golf club, wrote Anfield. This is a very important document. I set it out in full:

Dear Sir:

Re: Musqueam Indian Reserve No. 2

Following our discussion yesterday, I am writing to set out the terms which I would be prepared to place before our members for their consideration as a basis for leasing part of the above Indian Reserve. These terms are as follows:

1. The area to be leased comprises approximately 160 acres of the Indian Reserve and is in the location discussed at our meeting yesterday.

2. We are to have the right to construct on the leased area a golf course and country club and such other buildings and facilities as we consider appropriate for our membership.

3. We will require a right-of-way over the part of the Reserve lying between Marine Drive and the leased area to give such convenient access as we need.

4. The initial term of the lease will be for the period of fifteen years commencing May 1st, 1957, and the club will have options to extend the term for four successive periods of fifteen years each, giving a maximum term of seventy-five years.

5. The rental for the first “fifteen years” of the term of the lease will be $25,000.00 per annum to be paid in advance on the anniversary date each year of the execution of the lease, the first payment of $25,000.00 to be made as soon as the lease has been prepared, executed and delivered.

6. The rental for each successive fifteen year period of the term will be determined by mutual agreement between your Department and the club and failing agreement, by arbitration pursuant to the “Arbitration Act” of the Province of British Columbia, but the rental for any of the fifteen year renewal periods shall in no event be increased or decreased over that payable for the preceding fifteen year period by an amount more or less than 15% of the initial rent as set out in 5 above.

7. The amount of rent to be paid for each successive fifteen year period shall be determined before we are required to exercise our option to extend for that period.

8. We will pay all taxes assessed against the leased area.

9. We will pay the reasonable cost of relocating on other parts of the Reserve, any Indian houses presently on the leased area.

10. At any time during the term of this lease, and for a period of up to six months after termination, we will have the right to remove any buildings and other structures constructed or placed by us upon the leased area, and any course improvements and facilities.

If you would advise me of your approval of these general terms by Monday, April 8th, I could arrange with our Directors to call a special meeting of the membership in the immediate future.” [p. 396, b-397, e]

“On April 7, 1957 there was a Band Council meeting. The evidence before me is that Mr. Anfield arranged practically all of the Band Council meetings and full Band meetings of

the Musqueam Band. It was Anfield's practice to preside at those meetings. He frequently kept the minutes. In the case of this meeting there are two sets of minutes. One set was kept in handwriting by Andrew Charles Jr. (Ex. 23). He was a member of the Band. He was 25 years old at the time. The other set of minutes was kept by Anfield. His practice appears to have been to have them typed at a later date." [p. 397, e-h]

"I have compared the two sets of minutes. Anfield's are in a little more detail but the two sets cover, in substantially the same way, the items of business discussed in respect of the reserve. Charles Jr. noted that Anfield had advised the highest possible appraisal market sales value of the reserve was $1,346,000. Charles Jr. noted also that Anfield had "submitted" a formal application by the golf club to lease 160 acres. The initial term of the lease was to be for 15 years commencing May 1, 1957. The club was to have options to extend the term for four successive periods of 15 years. The Charles Jr. minutes do not record the proposed annual rental." [p. 397, i-j- p. 398, a]

"Anfield's minutes read as follows (Ex. 24):

> 2. Superintendent then placed before Council the application of Shaughnessy Golf Club of Vancouver for a long term lease of approximately 160 acres of land as outlined generally on the McGuigan survey plan at a rental for the first lease period of 15 years of $25,000.00 per year, with options for four additional 15-year periods <u>on terms to be agreed upon</u>. [My underlining.Collier J.]" [p. 398, b]

"Both sets of minutes recorded that Council passed a resolution approving the lease of unrequired lands to Shaughnessy Golf Club and the submission to the Band as a whole of surrender documents in respect of the 160 acres." (p. 398, c]

"The evidence on behalf of the plaintiffs is that not all of the terms of the Shaughnessy proposal were put before the Band Council at that meeting. William Guerin said copies of the proposal were not given to them. He did not recall any mention of $25,000 per year for rental. He described it as a vague general presentation with reference to 15-year periods. Chief Edward Sparrow said he did not recall the golf club proposal being read out in full.

I accept the evidence of William Guerin and Chief Sparrow on this point. The minutes by Charles Jr. and Anfield suggest, to me, only a general indication was given of the proposal by the golf club to lease approximately 160 acres for an initial term of 15 years, with options for additional 15-year periods. I note the Charles Jr. minutes record the exact words of term 4 of the golf club proposal. If the other terms, including rent, had been read out, I am sure Charles Jr. would have recorded them. I note the Anfield minutes on this point conclude with the words '... on terms to be agreed upon'." [p. 398, d-i]

"On April 11, 1957, Ameil wrote W.C. Bethune, the Superintendent of Reserves and Trusts, in Ottawa. That letter could not be found. But the Superintendent's reply to Ameil dated April 24, 1957 became Exhibit 26. Bethune questioned the adequacy of the $25,000 annual rental for the first 15 years. At an investment return of five to six per cent, he said the rental value would be somewhere between $250 to $300. Using Bethune's figures, the rental value per acre would have been between $40,000 and $48,000 per year for the first 15 years. The golf club proposal, for 150 acres, meant an investment return of approximately 3%. Bethune suggested to Arneil the matter should be discussed with Howell, and his opinion be obtained as to what Howell felt the Indian Affairs Branch could expect to obtain on leasing this area for a long term, as contemplated by the golf club.

Anfield then discussed the matter with Howell. He gave him copies of Bethune's letter. Anfield formally wrote Howell on May 16, 1957. He asked for Howell's written opinion as to whether the $25,000 per year rental for the first 15 years was "just and equitable". He

pointed out that in a long-term lease of 75 years it was conceivable the expected rate of return might not exceed 5%.

Howell was not given all the details of the Shaughnessy proposal. He did not know of term 6 where rent increases or decreases for the 15-year renewal periods were limited to 15% of the initial rent of $25,000, or $3,750. Nor was he made aware the golf club proposed to have the right, at any time during the term of the lease, or up to 6 months after termination, to remove any buildings or improvements.

I digress slightly. The original Shaughnessy proposal provided for the rent for each successive 15-year period to be mutually agreed upon. Failing agreement, the matter was to be decided by arbitration. There was no stipulation in the April 4 proposal, as in the lease ultimately entered into, that on arbitration the rent would be determined as if the land were in an uncleared and unimproved condition, and restricted to use as a golf course. The Shaughnessy proposal provided, as I read it, the rent could never be increased or decreased by more than $3,750 per year in any of the successive 15-year periods." [p. 398, j; 399, a-j]

"Howell replied to Anfield on May 23, 1957 (Ex. 33). He had re-checked his values in respect of the high land on the reserve. He pointed out the true test of value would be to offer the area on the market for development, and see what offers resulted. ... He went on to justify the reduction of the rate of return to 3%...." [p. 400, a-b]

"Howell...went on to point out a golf course would enhance the value of the surrounding reserve property." [p. 400, c]

Howell gave evidence at trial. He said he approved, in 1957, the 3% return rate for the reasons given in his letter: the then bond rate was 3.75%; the golf club was not a financial risk; the improvements would revert to the Band. In cross-examination, he said if he had known the improvements would not revert to the Band, he would have recommended a rate of return of 4 to 6%. He had assumed, in giving his opinion to the local Indian Affairs officials, renegotiation of the rent would be based on the improved condition of the land and on the highest and best use principle. He expressed shock at the ultimate limiting 15% clause, which found its way into the lease which was signed." [p. 400, f-h]

"Howell was, in my view, an honest witness. I accept his evidence as set out in the previous paragraph. I am satisfied he would not have expressed the opinion he gave in Exhibit 33 if he had had all the facts before him." [p. 400, i]

"Howell's letter was forwarded to Ottawa with the request that surrender documents for lease purposes be prepared for submission to the Musqueam Band. On June 13, 1957, the Director of Indian Affairs in Ottawa recommended to the Deputy Minister the golf club's offer should be accepted. The Director expressed the view the annual rental was satisfactory; but no lease would be issued until an acceptable surrender was received from the Musqueam Band. The Deputy Minister gave his approval." [p. 400, j–p. 401, b]

"On July 3, 1957, Bethune forwarded the surrender documents and other relevant material to Arneil. He said to Arneil he would like to see the 15% limitation, set out in the golf club proposal, removed. He suggested succeeding rentals should be established by mutual agreement, or failing that, by arbitration." [p. 401, b-e]

"On July 12 Chief Sparrow and Anfield had a conversation. The Chief had asked for certain figures in respect of the reserve valuation. On July 16, 1957 Anfield wrote Chief Sparrow in reply. Anfield advised the total appraised value of the reserve was $1,360,000. He set out the different values for the various categories of land in the reserve. He [Anfield] went on:

> The golf club people are applying for 162 acres on the highland. This at $5500.00 an acre shows a valuation of $891,000.00 and the offer of $25,000.00 per year rental for the first ten year period in which the golf club will have to spend almost a million dollars of capital funds works out at an investment of 3%, which is considered by the appraiser to be a very high return for such land use.
>
> For your information the investment value of land on which large structures are placed goes between 5 and 6% and it is our appraiser's frank opinion that an investment of 3% for golf club purposes having in mind that the land in its improved state will eventually revert to the Band is considered a very satisfactory return.

The reference to the 10-year period was incorrect. At a Band Council meeting on July 26, Chief Sparrow pointed out the Shaughnessy proposal was for 15-year terms. Anfield wrote a letter correcting the error.

Anfield's advice as to Howell's opinion on rate of return is, in my view, an overstatement. The Band was never given a copy of Howell's letter of May 23, 1957. Nor was the Band told, at that time, the golf club proposed to have the right to remove any improvements made to the lands." [p. 401, c-i]

"A Band Council meeting was held on July 25, 1957 at the reserve. Mr. Anfield presided. For the Band Council there was Chief Sparrow and Councillor Gertrude Guerin. She is the mother of the present Chief Delbert Guerin. Charles Jr., the secretary of the Band Council, was late. Anfield recorded the minutes." [p. 401, j- p. 402, a]

"The leasing of the 162 acres was discussed at length. One of the problems was that a number of Band members claimed improvements in the area, and in other areas of the reserve. Certificates of possession had not been issued to those claimants. It was undoubtedly a difficult problem. Several alternative solutions were discussed. The Council passed a resolution that a general meeting of the electors of the Band be held on August 23, 1957. (This date was later changed.) The purpose of that meeting was to consider and vote on the surrender to the Crown of the 162 acres.

There was further discussion on the proposed lease to the golf club. The two Band Councillors were of the opinion the review periods should be at 10-year intervals, rather than 15." [p. 402, a-d]

"On September 9, 1957 the Band Council passed a resolution that the rental valuation, in respect of the proposed lease, be "reviewed and renegotiated" with the golf club." [p. 402, e]

"On September 27, 1957 there was a Band Council meeting held at the reserve. Chief Edward Sparrow and Councillors Gertrude Guerin and William Guerin attended. From the Department of Indian Affairs there was Anfield and a William Edward Grant. Grant was described as "officer in charge - Vancouver agency"." Grant gave evidence at the trial. He joined the Indian Affairs Branch in 1950 at Vanderhoof, B.C. In the latter part of June 1957, he was transferred to the regional office in Vancouver. He filled a new post, that of Relieving Indian Superintendent. His duties were to fill in for other superintendents in British Columbia who were ill, or on vacation, or otherwise absent from their regular duties. At about the same time (July 1957) Mr. Anfield was promoted to Assistant Indian Commissioner of British Columbia. Another member of the Department of Indian Affairs, W.A. Anderson, was also present at this Council meeting. [p. 402, f-j]

"Mr. Harrison and Mr. Jackson of the Shaughnessy Golf Club came to this meeting. The secretary, Mr. Heina attended as well." [p. 403, a]

“In the presence of the golf club representatives, Chief Sparrow stipulated for 5% income on the value of the 162 acres. That amounted to approximately $44,000 per annum. The figure of $44,000 or $44,550 had actually been calculated by Councillor William Guerin. The golf club people balked at that figure....

At one stage at this meeting, the golf club representatives were asked to step outside. The Band Council and the Indian Affairs personnel then had a private discussion. Anfield expressed the view the demand of $44,550 was unreasonable. After considerable discussion the Band Council agreed on a suggested figure of $29,000: they would recommend that amount to the Band as a whole. The golf club representatives were then brought back into the meeting. The figure of $29,000 was put to them. They said they would recommend it to their board of directors.” [p. 403, b-t]

“William Guerin testified the Councillors agreed to $29,000 because it was their understanding the first lease period was 10 years; subsequent rental negotiations would be every 5 years; the Band Council felt it could negotiate for 5% of the subsequent values.

Grant’s recollection of the meeting is substantially the same as the version I have recounted. There are some discrepancies on minor details. It was Grant’s recollection the $29,000 figure came from Anfield. He said Anfield advised the Council to go ahead with the lease and in 10 years demand a healthy increase from the golf club. It was Grant’s further recollection that some limitation on maximum rent increases, put forward by the golf club, was discussed. He said the Band Council objected to this; Anfield said he would relay that view to the Department of Indian Affairs. Grant’s testimony, which I accept, was that the Band Council reluctantly accepted the $29,000 figure.” [p. 403, g-j; p. 404]

“On Sunday afternoon, October 6, 1957, there was a meeting of members of the Band at the reserve. This was what has been termed the “surrender meeting”.” [p. 404, a]

“According to Grant, Anfield had, at this meeting, a copy of a draft lease between the Crown and the golf club. It was Grant’s recollection that Anfield made notes on the draft lease during the meeting. The draft was not an exhibit at trial. Grant may have been mistaken. The first draft lease submitted as an exhibit is dated October 17, 1957. It was apparently prepared by the golf club’s solicitors. But Mr. Mcintosh, the solicitor, testified he drafted a lease in August or September of 1957. He thought it might form a basis for discussion in respect of the final lease terms. He had discussions with either Anfield or Arneil in respect of that first draft lease.” [p. 404, e-g]

“I am satisfied from reading the Grant and Charles Jr. notes, and from the evidence of Chief Sparrow, Charles Jr., William Guerin and Grant that the extent of the information imparted at the meeting, regarding the proposed surrender and lease, was as follows: the golf club wanted to lease 162 acres; the value of the land in question was $5,500 an acre. The original proposal had been a lease of 150 acres at $25,000 a year; the golf club had requested additional land; an increase to $29,000 per year had been obtained. The lease proposal was for 75 years, with renewal periods of 15 years. The owners of improved land within the proposed golf course area would receive 50% of the rental earnings; the remainder would be distributed among members of the Band as a whole. In the first 10 years, that would amount to $132,400 for those owners of improved land, and a similar amount for the Band as a whole. The meeting was told of the proposed 15% limitation on rental increases.” [p. 404, h- p. 405, a]

“The following facts are in my opinion clear, and I make these findings:

> (a) Before the Band members voted, those present assumed or understood the golf club lease would be, aside from the first term, for 10-year periods, not 15 years.

> This is clear from the evidence of Chief Sparrow, William Guerin, Charles Jr., and Grant. Support can also be found in the notes kept by Charles Jr., and Grant. Anfield's own pre-meeting notes (Ex. 50) state "... the Council have asked that the periods be 10 years instead of 15 years." Two newspaper items, published the day following the surrender meeting, referred to "a 10-year agreement" (Ex. 54) and "29,000 for the first 10 years" (Ex. 55). Chief Sparrow testified the newspaper reports, attributing this information to him, were correct...
>
> (b) Before the Band members voted, those present assumed or understood there would be no 15% limitation on rental increases.
>
> > Anfield's pre-meeting notes read as follows: "... the Department do not wish this put in ...". I have already referred to Charles Jr.'s notes and Grant's evidence on this point. On the draft lease (Ex. 60) Anfield's note in respect of the 15% limit, reads "not satisfactory to dept. or Indians".
> >
> > There was no information given as to the method of negotiating future rental increases. The original golf club proposal (Ex 22) merely provided for succeeding rentals to be agreed upon, or to be determined by arbitration.
> >
> > I am satisfied that, at the time of the vote, the Indian Affairs personnel and the Band were against any 15% rental limitation; the Band voted on the basis there would be no such limitation.
>
> (c) The meeting was not told the golf club proposed it should have the right, at any time during the lease and for a period of up to six months after termination, to remove any buildings or structures, and any course improvements and facilities..."

Chief Sparrow, William Guerin and Charles Jr., all testified they understood from Anfield, either at the surrender meeting or a Council meeting, all improvements would, on the expiration of the lease, revert to the Band. Grant testified the surrender meeting was told that the Band could keep all improvements made on the golf course land. [p. 405, e-i; 406, c-j]

"There are two other terms of the lease ultimately entered into on January 22, 1958 (Ex. 78) which were the subject of considerable testimony.

One was the method of determining future rents. Failing mutual agreement, the matter was to be submitted to arbitration. The new rent was to be the fair rent as if the land were still in an uncleared and unimproved condition and used as a golf club. The other term gave the golf club the right at the end of each 15-year period to terminate the lease. Six months' prior notice was all that was required. There was no similar provision in favour of the Crown.

These two matters were, I find, not before the surrender meeting. They were not in the original golf club proposal (Ex. 22). They first appeared in the draft leases, after the surrender meeting. But the two terms were not subsequently brought before the Band Council, or the Band, for comment or approval." [p. 407, a-e];

"I return to what went on at the surrender meeting.

The surrender documents (Ex. 53) were read out. The first portion provided for the surrender to the Crown of the 162 acres. The remainder was as follows:

> TO HAVE AND TO HOLD the same upon Her said Majesty the Queen, her Heirs and Successors forever in trust to lease the same to such person or persons, and upon such terms as the Government of Canada deem most conducive to our Welfare and that of our people.
>
> AND upon the further condition that all moneys received from the leasing thereof, shall be credits to our revenue trust account at Ottawa.
>
> And We, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof.

A vote was taken. Forty-three members voted. There were 41 votes for the surrender and 2 against it. Another vote was then taken in respect of payment of 50% of revenue to individual owners. Twenty-five members voted in favour, and 3 against.

It is to be noted that the surrender (Ex. 53) is in very wide terms. The key words are "in trust to lease". There is no mention of the proposed lease to the golf club." [p. 407 f-j; p. 408, a]

"On October 24, 1957, [the Indian Agent] wrote on behalf of Ameil (Ex. 63) to Ottawa. He attached a draft lease prepared by the solicitors for the golf club." The draft provided for 5 terms of 15 years each. Anfield said:

> There has been discussion with the Indians that this term should be reduced, possibly to 10 year periods. In this regard it should be stated that it is going to take 3 years to get this site into operable condition, in addition to which the Club is going to have to make a million dollar investment in a Club House and the cost of constructing and perfecting the golf course. It would hardly seem fair to expect a review of rentals, presumably upward, in as short a space of time as 10 years and we are inclined to recommend that the 15 year period is fair and equitable." [p. 408, c-t]

"In respect of the 15% limitation on rental increases he wrote as follows:

> It is noted the draft lease includes an escalator clause limiting increase and decrease to 15% of the rental in the previous rental period. The Department, in their letter dated July 3, 1957, are obviously not happy about the inclusion of such a clause and this matter was discussed at very considerable length last summer with the Directors of the Shaughnessy Golf Club. They point out that they are not a commercial firm but a Club, with a limited membership and it is of the utmost importance that the total financial encumbrance over the lease period be reasonably secured. They are very definitely against the suggestion contained in the Department's letter aforementioned; that review of rentals be subject to agreement and, if necessary, by arbitration. They feel that any such course could be fatal in their overall planning. Having this in mind they submitted to us an opinion by Mr. Douglas W. Reeve, obtained by the Club, and a copy of this document is attached herewith. This report purports to present the considered views both of Mr. Reeve and of the Club Directors; with particular reference to whether or not this escalator clause, with its limitation of 15%, should be contained in the lease. The Directors point out to the Department in their request, that this 15% limitation be retained; that they will be turning back to the Musqueam Indian Band property of terrific value and with vast

> improvements, and they also stressed the point that a vital factor in this entire project is the stability of the Club in its overall financial undertaking of the project." [p. 408, f- p. 409, a]

"Mr. Mcintosh testified the 15% limitation of rent increase caused the most difficulty in negotiations with the Indian Affairs Branch. The Branch did not want any such clause. The golf club wanted it in all renewals. A compromise was reached providing a 15% limitation in respect of the first renewal. That compromise, according to Mr. Mcintosh, came as a result of a meeting with Harrison, Jackson and Arneil." [p. 409, a-b]

"Neither the views expressed in Anfield's letter (Ex. 63) nor a copy of the letter containing them, nor a copy of the draft lease were given to the Band Council or Band.

Put baldly, the Band members, regardless of the whole history of dealings and the limited information imparted at the surrender meeting, were never consulted. But it was their land. It was their potential investment and revenue. It was their future." [p. 409, c-e]

"On November 25, 1957, Bethune wrote to Arneil (Ex. 66). He enclosed two copies of a lease prepared in Ottawa. The third paragraph of the letter was as follows:

> There is, however, one item that I would like you to seriously consider, namely the provision of paragraph three which provides for the cancellation of this lease at the end of any fifteen year period. This clause has been retained merely for the purpose of discussion. It seems paradoxical if the club wants a seventy-five year lease to insert the clause permitting them to cancel it after only fifteen years. On consideration you may come to the conclusion that the Indians have nothing to lose even if the lease is cancelled after the first fifteen years." [p. 409, e-g]

"The evidence indicates that a copy of this letter was given to Mr. Grant [the Assistant Indian Agent] and to Mr. Mcintosh, the golf club's solicitor, but not to the Band." [p. 409, h]

"I make this comment at this stage. The evidence adduced by the plaintiffs is to the effect Anfield had no discussions with the Band Council, or the Band, following the surrender meeting. None of the documents or letters passing between the golf club and Indian Affairs were given to the Band Council or the Band. There were discussions among Anfield, Ameil and golf club officers, including the solicitors, in respect of the lease terms. The solicitor assumed all matters discussed [410] were being communicated to the Band. Neither the chief nor the Band Council were part of those discussions nor were they advised of them.

I accept that evidence adduced on behalf of the plaintiffs." [p. 409, c-j and p. 410, a]

"There are, I think, three explanations. None are exonerations. The surrender did not specify that any lease was to be made with the golf club. Nor did it provide that any ultimate lease, whomever with, had to be approved by the Band or the Band Council. The probabilities are the Indian Affairs people took the view they were, by the terms of the surrender, free to negotiate for the best possible terms, without the necessity of consulting the Band." [p. 410, a-c]

"The practice today, and for the last ten years or so, contrasted with the practice in the 1950s and 1960s, was set out in the evidence of Poupore and others. Bands are now encouraged to obtain their own land appraisals and legal advice; not so earlier. There was testimony before me, which I accept, that the Musqueam Band Council had asked for their own appraisers and lawyers, but Anfield had told them those matters would be looked after by the Indian Affairs Branch. In the present era, bands are encouraged to attach key conditions to surrender documents. That was usual in the past. Proposed

leases are now given bands for their study. That was not the former practice. Now, bands are given copies of documents affecting their lands. In Anfield and Letcher's time, bands were not usually given copies of documents. Nor was it the practice to see they had free access to departmental records." [p. 411, d-g]

"The surrender of the lands was accepted by the defendant by Order in Council dated December 6, 1957." [p. 411, i-j]

"On January 9, 1958 a Band Council meeting was held." [p. 412, a]

"Letcher read a letter regarding the golf club lease. It indicated the renewal periods were 15 years instead of 10. Chief Sparrow pointed out the Band had demanded 10-year periods. William Guerin said the Council members were flabbergasted to learn about the 15-year terms. William Guerin testified Letcher said the band was "stuck" with the 15-year terms. I accept Guerin's evidence. The Band Council then passed a resolution that it agreed the first term should be 15 years, but insisted the renewal terms be set out at 10-year periods. The lease was finally signed on January 22, 1958. A copy was not given to the Musqueam Band or the Band Council." [p. 412, a-d]

"At this stage I shall set out the essential terms of the lease of January 22, 1958:

> 1. The term is for 75 years, unless sooner terminated.
>
> 2. The rent for the first 15 years is $29,000 per annum.
>
> 3. For the 4 succeeding 15-year periods, annual rent is to be determined by mutual agreement, or failing such agreement, by arbitration
>
> > ... such rent to be equal to the fair rent for the demised premises as if the same were still in an uncleared and unimproved condition as at the date of each respective determination and considering the restricted use to which the Lessee may put the demised premises under the terms of this lease....
>
> 4. The maximum increase in rent for the second 15-year period (January 1, 1973 to January 1, 1988) is limited to 15% of $29,000, that is $4,350 per annum.
>
> 5. The golf club can terminate the lease at the end of any 15-year period by giving 6 months' prior notice.
>
> 6. The golf club can, at any time during the lease and up to 6 months after termination, remove any buildings or other structures, and any course improvements and facilities." [p. 412, e-j]

"Grant [The Assistant Indian Agent] said the terms of the lease ultimately entered into bore little resemblance to what was discussed at the surrender meeting.

I agree.

Chief Edward Sparrow, William Guerin and Andrew Charles Jr. were present and voted at the surrender meeting of October 6, 1957. They testified they would not have voted to surrender the 162 acres if they had known the ultimate terms of the lease entered into between the defendant and the golf club.

I accept their evidence. I found them to be honest, credible witnesses. Their testimony was not seriously affected, in my view, by hindsight.

I have already set out my findings as to what the members of the Band knew, and did not know, at the time of the surrender vote. 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 162 acres if they had known all the terms of the lease of January 22, 1958.

I so find." [p. 413, a-f]

"The defendant, through the persons handling this matter in the Indian Affairs Branch, knew, early on, the defendant was a potential trustee in respect of any land which might be leased to the golf club. At a meeting of April 7, 1957, the Band Council had passed a resolution (drawn presumably by Mr. Anfield) as follows:

> That we do approve the leasing of unrequired lands on our Musqueam I.R. 2 and that in connection with the application of the Shaughnessy Golf Club, we do approve the submission to our Musqueam Band of surrender documents for leasing 160 acres approximately as generally outlined on the McGuigan survey in red pencil: and further that we approve the entry by the said applicant for survey purposes only pertinent to said surrender: said surveys to be at the applicant's cost and risk entirely." [p. 417, c-e]

"I have said the Crown knew, at that stage, it was a potential trustee. It knew of the intent of the Band to surrender the lands. The resolution, set out above, does not refer to an unqualified surrender for leasing to anyone. The whole implication of the resolution is that the contemplated surrender was for purposes of a lease with the golf club on terms." [p. 417, f-g]

"The Indian Affairs Branch, from then on, did not give, on the evidence before me, any realistic consideration to leasing the 162 acres to any other interested party. From April 7, 1957 on, all discussions with the Band Council were confined to the proposed lease of those particular lands to the golf club." [p. 417, h-i]

"In my view, the surrender of October 6, 1957, imposed on the defendant, as trustee, a duty as of that date, to lease to Shaughnessy Golf Club on these conditions:

> (a) A total term of 75 years.
>
> (b) The rental revenue for the first 15 years to be $29,000.
>
> (c) The remaining 60 years of the lease to be divided into six 10-year terms.
>
> (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.
>
> (e) No 15% limitation on rental increases.
>
> (f) All improvements on the land, on the expiration of the lease, to revert to the Crown." [p. 417, j- p. 418, a-c]

"The defendant, through the personnel and officials of the Indian Affairs Branch, breached her duty as a trustee. The 162 acres were not leased to the golf club on the terms and conditions authorized by the Band. Substantial changes were made, as can be seen in the final lease document. In respect of those changes, no instructions or authorization were sought by the defendant, as trustee, from the Band, the cestui que trust. Band approval ought to have been obtained. There was a duty on the defendant, through her personnel, to do so." [p. 418, c-e]

"I have already found the probabilities are the Band members would not have, if all the terms of the lease of January 22, 1958 had been before them, surrendered the 162 acres." [p. 418, f]

"The defendant, is, therefore, liable for breach of trust." [p. 418, g]

“Andrew Charles Jr. testified he asked Superintendent Letcher, a number of times, for a copy of the golf club lease. He said he was told the Band was not allowed to have a copy of the lease. In those years, and until the late 1960s, it was not the practice, as I have related, of the Indian Affairs Branch to give Band Councils copies of documents. All that Superintendent Letcher could say was he could not recall being asked for a copy of the lease.” [p. 418, j; p. 419, a]

“I accept the evidence, led on behalf of the plaintiffs that despite requests for copies of the lease, they were unsuccessful in obtaining a copy until March 1970.” [p. 419, b-e]

“The defendant led some evidence to try and establish that certain Chiefs or Councillors of the Band knew, or ought to have known, the terms of the lease, at least as early as 1963 or 1964. This evidence came from the witness John F. Ellis.” [p. 419, f]

“In 1960 Ellis was in the real estate business. He represented a syndicate, which ultimately became Musqueam Recreations Ltd. It was interested in obtaining land for the development of a golf driving range and a par 3 golf course.” [p. 419, g]

“Negotiations between the Band and Musqueam Recreations Ltd. went on for over three years. The Band, at some stage, decided to surrender the land sought. There were approximately 58 acres (ultimately) involved.” (p. 419, i-j]

“In rebuttal to the evidence of Ellis, the plaintiffs called Gertrude Guerin, who was Band Chief in 1962, and Robert Point, who was a Councillor in 1962 and secretary in 1963. Chief Willard Sparrow and John Sparrow (the latter, according to Ellis, had attended some meetings with Willard) died some years ago. Mrs. Guerin and Point testified that, in the discussions in respect of the Musqueam Recreations Ltd. lease, no mention was made by anyone of the terms of the Shaughnessy lease.

I accept their evidence.” [p. 421, c-e]

“I find the Band and its members were not aware of the actual terms of the Shaughnessy lease, and therefore of the breach of trust, until March of 1970.” [p. 422, d-e]

“I have already found the conduct of the Indian Affairs Branch personnel amounted to equitable fraud; that the plaintiffs did not have actual or constructive knowledge of the real terms of the golf course lease until March 1970; that the plaintiffs cannot, on the evidence and in the circumstances here, be said to have been guilty of lack of due diligence in not ascertaining the lease terms sooner.” [p. 429, b-e]

“The Indian Affairs Branch personnel in entering into the golf club lease acted, in my opinion, honestly. There was no deliberate or wilful dishonesty towards the Band. But the personnel, and ultimately the defendant, did not act reasonably in signing the lease without first going back to the Band. I cannot see that it would be fair to excuse the defendant.” [p. 430, a-c]

DAMAGES [p. 430, d]

“I have found, as well, the probabilities are the Band, if it had known the terms of the lease of January 22, 1958, would not have voted, on October 6, 1957, to surrender the lands to be leased to the golf club.” [p. 430, e]

“One of the most difficult questions for decision looms, in view of my factual findings, at the outset of the enquiry into damages. If the plaintiffs had, in effect, turned down the lease of January 22, 1958, what, likely, would have occurred?” [p. 430, i]

“There are a number of possibilities, some of which were canvassed in evidence, some in argument, and some in neither.” [p. 431, a]

“One possibility, not discussed in evidence or argument, was further negotiation and agreement between the golf club and the Band, through the Indian Affairs Branch. The

defendant called Mr. Mcintosh, Mr. Jackson. Mr. Harrison, Mr. Pipes and Mr. Gillespie. I shall refer to those gentlemen, collectively, as the golf club witnesses. I conclude, from their evidence, it was unlikely the golf club would have agreed to deletion of the 15% limitation on increase of rent in the second 15-year period, or to any reduction in the rental terms from 15 years to 10. I also think it unlikely, based on the evidence of Mcintosh, the golf club would have relinquished its proposal to have the right to remove improvements at any time the lease came to an end. Nor do I think the golf club would have agreed to negotiations and arbitration for future rental based on the highest and best use of the land." [p. 431, a-e]

"The chief witness for the plaintiffs on the question of damages was Mr. A.G. Oikawa. He is a real estate appraiser, and consultant in matters relating to real estate evaluation, marketing studies and feasibility studies.

The defendant, in respect to evaluation of the 162 acres, called Mr. W. Palmer, Mr. K.W. Behr and Mr. D.D. Davis.

Palmer is the manager of the appraisal division in Vancouver of A.E. Lepage Western Limited. He is also senior vice-president and chief appraiser of the national appraisal operations of that organization. Behr is an appraiser with the A.E. Lepage organization. Davis is an experienced real estate appraiser. He has been in the real estate business with Ker & Ker Ltd. for over forty years. That company is one of the larger real estate companies in Vancouver.

Oikawa, Palmer, Behr and Davis were in agreement on one important point: the 162 acres was, in 1957 and 1958, and still is, a prime piece of residential property in the City of Vancouver. All four appraisers agreed the highest and best use for this property, from 1958 to the present is as prime residential, not as a golf course." [p. 431, f-j; p. 432, a-b)

"I have earlier concluded a lease to the Shaughnessy Heights Golf Club could not have been entered into on the terms approved by the Band in October 1957:

> (a) $29,000 per year for the first rental period;
>
> (b) renewal on a negotiated rental basis every succeeding 10 years, without any restriction on the basis on which the land would be valued;
>
> (c) no 15% limitation on any increase in rent for the second 10- year term;
>
> (d) at the termination or expiration of the lease, all improvements would revert to the Band." [p. 433, g-j]

All of the above points to one conclusion. Davis put it this way:

> Knowing what we know today, with the tremendous increase in land values and higher interest rates, all of the foregoing points out to the fact that based upon the years 1968, 1973 and 1978, the rental being obtained from Shaughnessy Heights Golf Club is far too low. However, in 1958 we were not aware of any of these facts, and the writer would have to conclude, thinking as to how we did in 1958, that this is a reasonable lease.

My problem, unfortunately, is not whether the present golf club lease is reasonable or not. It is to determine the amount of loss suffered on the basis a golf course lease would probably not have been entered into." [p. 435, b-e]

"After a lengthy consideration of the evidence I have concluded the 162 acres would have, at some stage, been successfully marketed as prepaid, 99-year leasehold lots for

single family, and eventually, multi-family use. As to that kind of development, I accept the opinion of Oikawa over the others.

But I am not persuaded the area would have necessarily been developed in 1958, or as quickly as Oikawa opined. One must keep in mind the Band, in 1957 and 1958, was trying to market, on a leasehold basis, more than the 162 acres. There were, according to Howell, 220 acres of prime residential land available." [p. 436, g-j]

"Some of that land, excluding the 162 acres, has since been developed on a 99-year leasehold basis. A 40-acre development, known as Musqueam Park, began at the northeast comer of the golf course in 1965. This development was on a 99-year lease basis, but not prepaid. The majority of the houses were built in 1967 and 1968." [p. 437, a]

"In 1971 and 1972 another area, called Salish Park, was developed. The land is on a prepaid, 99- year lease basis." [p. 437, b]

"I have no doubt the success of the Musqueam Park and Salish Park developments was contributed to, to some extent, by the presence of the golf course. I do not accept the view, advanced by the Crown and some of its witnesses, that it was largely responsible for the success of those two areas. Nor do I accept the view, propounded by some of the defendant's expert witnesses, that large areas of this kind (220 acres) could not be successfully developed, on a residential leasehold basis, without the existence of some kind of golf course, or other attracting amenities." [p. 437, c-e]

"In my view, the area would probably have been well on the road to full development, on a residential leasehold basis, by approximately 1968 to 1971." [p. 437, g-h]

"I turn now to quantum." [p. 437, i]

"The plaintiffs put forward, in argument, four suggested approaches for the calculation of damages." [p. 437, j]

"The first was to determine the loss of reasonable economic rent to the band from 1958 to the expiry of the lease in 2033. I do not propose to set out the details of this calculation. The estimate was a minimum damage loss of approximately 45 million dollars. This method presupposes Oikawa's rental income of $97,080 per year as of 1958, and his estimates for 1968, 1973 and 1978. The calculation (I am oversimplifying it) then uses the differences between those figures and the golf club rental figures to the date of trial. Estimates are then made as to future loss.

I find only limited assistance in this method. It assumes the land could have produced, in the market, the rental returns indicated from 1958 on. But my finding is, as earlier set out, it was unlikely that return could have been reached as early as 1958. This approach also assumes the golf club lease will be in effect until 2033. That may not be a realistic assumption.

The second method is a variation of the first, with certain other factors taken into consideration. The total figure, under this approach, is again approximately 45 million dollars. It is subject to the same comments as I made in respect of the first method.

The third suggestion for estimating quantum is based on the loss to the Band on the assumption the land should, and would have been, in 1958, developed on a residential, prepaid, 99-year lease basis. The reversionary interest is, as well, estimated. The damage calculation is estimated at approximately 53 million dollars.

The fourth approach is "... to determine the loss to the band of the opportunity to develop the land ..." as of the date of trial. It is the difference between what the Band has received under the present lease, and what it could receive from the date of trial to 2033, based on the highest and best use, as put forward by Oikawa, plus the value of the reversionary

interest. It assumes the land having sat undeveloped until the date of trial. The estimated damages, under this suggested method, are approximately 71 million dollars." [p. 438, a-j]

"I make this comment. None of these suggested approaches are completely unrealistic. The calculations, based on acceptance of all the plaintiffs' evidence as to damages, are, to my mind, relatively conservative.

But, as I have indicated, none of these approaches take into account a very realistic contingency: in 1988, or at a later rental review period, the golf club may decide, because of the obviously high rent in sight, to terminate the lease. The agreement gives it the right to do so.

I cannot accept the damage loss estimates calculated by the plaintiffs." [p. 439, a- c]

"Even though damages may be difficult, or almost impossible of calculation, if a court is satisfied damage or loss has indeed been sustained, then a court must assess damages as best it can, even if it involves guess-work." [p. 440, a]

"I assess the plaintiffs' damages at $ 10,000,000." [p. 441, e]

"In considering the amount to be awarded, I experimented, during my deliberations, with various approaches. I did so in the hope I could eventually set out some, even perhaps vague, mathematical basis for coming to this sum. But I found myself unable to set out a precise rationale or approach, mathematical or otherwise. The dollar award is, obviously, a global figure. It is a considered reaction based on the evidence, opinions, the arguments and, in the end, my conclusions of fact." [p. 441, f-g]

"I shall set out, however, for the parties, factors and contingencies I have had in mind. The list is not exhaustive:

> (a) The difficulty in determining when the 162 acres would have been developed, in what way, and at what monetary return. This, on the basis the present lease would never have been consummated.
>
> (b) The contingency that the area might not, even today be satisfactorily developed, or providing a realistic economic return.
>
> (c) The astonishing increase in land values, inflation, and interest rates since 1958, and the fact no one could reasonably, in 1958, have envisaged that increase.
>
> (d) The counter-factor to (c) is that those same tremendous increases must be taken into account in any damage award.
>
> (e) The possibility the present lease will remain in effect until its expiry in 2033.
>
> (f) The very real contingency, in my view, the lease may be terminated at a future rental review period.
>
> (g) The monies which the plaintiffs have received to date under the present lease, and what might be received in the future if the lease remains.
>
> (h) The value of the reversion of the improvements, whether at the end of prepaid, 99-year e residential leases, or at the end of the golf club lease." (p. 441, h-1; p. 442, a-e]

"I cannot classify the actions of Anfield, Arneil and the officials in Ottawa, as oppressive, arbitrary, or high-handed. I have already found against any allegations of dishonesty, moral fraud, or deliberate, malicious concealment. The Indian Affairs Branch personnel thought they had the right to negotiate the final terms of the lease without consultation with the Band. I have found, in effect, they did not have that right. That finding does not

convert their actions into oppressive or arbitrary conduct, warranting punishment by way of exemplary damages." [p. 443, d-f]

"The damages are assessed at $10,000,000." (p. 443, h]

Le Dain J. of the Federal Court of Appeal, Heald J. and Culliton D.J. concurring, made the following findings of fact (page numbers refer to the report of the decision at [1983] 2 F.C. 656 (C.A.) attached as Schedule C to the Notice of Stated Case):

"The respondents sue on their own behalf and on behalf of all past, present and future members of the Band." [p. 662, a]

"The Musqueam Indian Band is a "band" within the meaning of the Indian Act, R.S.C. 1970, c. I-6, and the Musqueam Indian Reserve No. 2 is a "reserve" within the meaning of the Act." [p. 662, a-b]

"In a memorandum to Ameil on October 12, 1956, Anfield reported on a meeting with officials of the City of Vancouver concerning the possibility of leasing the 184 acres in "the lower land area" of the reserve to the City for garbage-disposal purposes. He also referred to the possibility of a lease of the "upper level" of 232 acres to the Shaughnessy Golf Club..." [p. 665, b-e]

"The appraisal of the Musqueam Reserve was made by Alfred Howell, an appraiser with the*Veterans' Land Act* Administration. Howell was a qualified appraiser, but not a land-use expert.

His report dated December 28, 1956 characterized the upper land, on which the golf club was eventually located, as a first-class residential area and put a value on it of $5,500 per acre. The total value of $1,360,000 placed on the land assumed a rate of return of 6%." [p. 666, a-b)

"In 1957 Anfield pursued discussions with R.T. Jackson, then president of the Shaughnessy Golf Club, and E.L. Harrison, a director of the club who succeeded Jackson as president during that year, concerning the possibility of a lease of the upper level Musqueam land to the club." [p. 666, h)

"In a letter to Jackson on April, 1957 Anfield said:

> Whilst the appraiser has committed himself to a statement that there might be a diminution in rental values on the yellow bordered area, he points out, and insists that we keep very much in mind the fact that he has arrived at his overall figure of $5500.00 per acre value for the 220 acres lying above the 125 ft. contour as an average value, and he feels that if we start cutting down from this average value of $5500.00 per acre we are going to end up with considerably less than the real value of the acreage of land. He does not feel that he should commit himself to a reduction by percentages or dollars, and thinks that we would be well advised to stand on the basis of $5500.00 per acre value, capitalized at 6% to determine the rental right across the line." [p. 667, d-g]

"On April 4, 1957, Harrison, who had become the president of the Shaughnessy Golf Club, wrote to Anfield setting out as follows the terms which he was prepared to place before the members of the club as the basis for a lease of land in the reserve:

> 1. The area to be leased comprises approximately 160 acres of the Indian Reserve and is in the location discussed at our meeting yesterday.

> 2. We are to have the right to construct on the leased area a golf course and country club and such other buildings and facilities at we consider appropriate for our membership....” [p. 667, i-j]

“On April 7, 1957 there was a meeting of the Band Council at which Anfield for the first time informed members of the Band of the negotiations with the golf club. He did not circulate a copy of the club’s proposal nor read it out in full. He referred to it in general terms stating that it was a proposal to lease land in the reserve for fifteen years with an option to renew for additional periods of fifteen years on terms to be agreed upon.” Minutes of the meeting were written by Andrew Charles Jr., the Band secretary, and by Anfield. The Charles minutes contain the following statement with reference to the proposed lease to the golf club: [p. 668, f-j]

> Mr. Anfield also submitted to the council a formal Application to Lease 160 acres on the Musqueam I.R. No. 2 from the Shaughnessy Heights Golf Club. The initial term of the Lease will be for the period of fifteen years commencing May 1st, 1957, and the Club will have options to extend the term for four successive periods of fifteen years each, giving a maximum term of seventy-five years.

“The Anfield minutes contain the following reference to the proposed lease:

> 2. The Superintendent then placed before Council the application of Shaughnessy Golf Club of Vancouver for a long term lease of approximately 160 acres of land as outlined generally on the McGuigan survey plan at a rental for the first lease period of 15 years of $25,000.00 per year, with options for four additional 15 year periods on terms to be agreed upon.” [p. 669, a]

“The Charles and Anfield minutes record that the following resolution was passed by the Band Council:

> That we do approve the leasing of unrequired lands on our Musqueam I.R. 2 and that in connection with the application of the Shaughnessy Golf Club we do approve the submission to our Musqueam Band of surrender documents for leasing 160 acres approximately as generally outlined on the McGuigan survey in red pencil: and further that we approve the entry by the said applicant for survey purposes only pertinent to said surrender: said surveys to be at the applicants [sic] cost and risk entirely.” [p. 669, g-h]

“On April 24, 1957 Bethune wrote to Ameil concerning the proposed lease to the golf club. He acknowledged receipt of a letter of August [sic] 11, 1957 with enclosures. The letter from Ameil could not be found, but it is clear from Bethune’s letter that he had received a copy of the golf club’s proposal. Bethune’s letter, which expressed concern about the adequacy of the proposed rent of $25,000 per annum for the initial period of fifteen years, reads as follows:

> Re: The Shaughnessy Heights Golf Club application to lease-
> Musqueam I.R. #2
>
> I wish to acknowledge receipt of your letter and enclosures of the 11th of April, 1957, relative to an application received from the above to lease approximately 160 acres of reserve land at a consideration of $25,000.00 per annum for the first fifteen years. The matter of survey has been discussed with the Surveyor General’s office and instructions are going forward to the Surveyor Mr. D.J. McGuigan.

> The proposition put forward by the Golf Club has its relative merits but after reviewing the appraisal from the rental stand-point, we have some doubt as to whether the amount offered for the first term is adequate. The club, as you will note from their application, intend using 160 acres of the best residential land which consists of only 220 acres in all. The lease proposes to tie up this area for a period of 75 years.
>
> The appraisal, as you will note, indicates that the area to be leased has a net value of $5,500.00 per acre and considering that we should receive 5 to 6 per cent investment return on the land the rental value per acre should be somewhere between $250.00 to $300.00 per annum. The offer made by the club amount [sic] to $156.00 per acre per year which is considerably lower than what we should expect. ..." [p. 669, i-j; 670; a-e)

"On May 23, 1957, Howell wrote a letter to Anfield in which he expressed the opinion that a return of 3% on the value which he had placed on the upper land would in all the circumstances be a fair and equitable one, and he recommended the acceptance of the proposed lease to the golf club. Because of the influence which this opinion appears to have had on the decision to lease the land to the club it should be quoted in full. It reads as follows:

> On first reading your letter it occurred to me that perhaps I had put too high a valuation on the high land of the reserve. A study of values obtaining throughout the City of Vancouver reassured me on this point, but nevertheless, the true test would be to offer the area on the market for development and see what offers result.
>
> However, accepting the appraised value as being correct, it remains to consider whether the present offer, which gives a 3% return on the appraised value can be considered fair and equitable. ..." [p. 671, e-i]
>
> ... In addition to that, the property is ideally suited for the project, and while this may not be the highest and best use of the land, it is one which is in keeping with the whole area, some part of which must be dedicated for recreational purposes. The establishment then of the golf course will enhance the value of all the surrounding property, particularly the remaining high land on the reserve. Sewers and water mains to supply the club house will pass and be available to this land." (p. 672, c-d]

"... Nor, of course, was he aware of the condition that ultimately found its way into the lease that the land would be valued for purposes of rental increase as unimproved, cleared land which could be used only for a golf course. This was confirmed by Howell's testimony at the trial. He agreed that the 15% limitation on rental increase was a "shocking" provision. He adhered to his original opinion that the highest and best use of the land was for residential purposes, and that this should be the basis of valuation for calculation of rental after the initial term." [p. 673, a-c]

"On July 16, 1957 Anfield wrote to Chief Sparrow in response to a request by the Chief for certain figures concerning the valuation of the reserve. Anfield stated that the total appraised value of the land was $1,360,000. He then made the following statements with respect to the proposed lease:

> The golf club people are applying for 162 acres on the highland. This at $5500.00 an acre shows a valuation of $891,000.00 and the offer of $25,000.00 per year rental for the first ten year period in which the golf club will have to spend almost a million dollars of capital funds works out at an investment of 3 per cent, which is considered by the appraiser to be a very high return for such land use.

> For your information the investment value of land on which large structures are placed goes between 5 and 6 per cent and it is our appraiser's frank opinion that an investment of 3 per cent for golf club purposes having in mind that the land in its improved state will eventually revert to the Band is considered a very satisfactory return." [p. 674, d-g]

"The Trial Judge made the following observations on these statements [at page 401]:

> The reference to the 10-year period was incorrect. At a Band Council meeting on July 26, Chief Sparrow pointed out the Shaughnessy proposal was for 15-year terms. Anfield wrote a letter correcting the error.
>
> Anfield's advice as to Howell's opinion on rate of return is, in my view, an overstatement. The Band was never given a copy of Howell's letter of May 23, 1957. Nor was the Band told, at that time, the golf club proposed to have the right to remove any improvements made to the lands. [p. 674, g-i]

"On July 25, 1957 there was a Band Council meeting to discuss the proposed surrender and lease to the golf club. The minutes of the meeting, written by Anfield, contain the following statement:

> The Council got back to a discussion of terms for the proposed lease to Shaughnessy Golf Club. Both Councillors present were of the opinion that review period should be at ten year intervals including the initial period rather than fifteen year periods. They will convey this information to the Directors when they meet with the Council." [p. 674, j- p. 675, a]

"On September 9, 1957 the Band Council resolved that the proposed amount of rent for the initial term of the lease should be reviewed and renegotiated with the golf club." [p. 675, d]

"On September 27, 1957 there was a Band Council meeting attended by representatives of the golf club. Chief Sparrow, Gertrude Guerin and William Guerin were the members of the Council present. Anfield and William Grant, officer in charge of the Vancouver agency, attended for the Department. The golf club was represented by Harrison, Jackson and the secretary, Reina." [p. 675, g-h]

"On October 6, 1957 there was a meeting of the Band to vote on the surrender of the land for the purpose of a lease to the golf club." [p. 676, f)

"The surrender, which was approved by a vote of 41 to 2, reads as follows:

> KNOW ALL MEN BY THESE PRESENTS THAT WE,
>
> the undersigned Chief and Councillors of Musqueam Band of Indians resident on our Reserve Musqueam Indian Reserve number two in the Province of British Columbia and of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby surrender unto Her Majesty the Queen in right of Canada, her Heirs and Successors forever, ALL AND SINGULAR, that certain parcel or tract of land and premises, situate, lying and being in Musqueam Indian Reserve number two in the Province of British Columbia containing by admeasurement 162 acres, be the same, more or less, and being composed of:
>
> The whole of Parcel "A" containing by admeasurement 162 acres more or less as shown on a plan of survey made by D.J. McGuigan, D.L.S. and B.C.L.S. dated the 18th day of May, 1957, or as said parcel may be

> shown on a final plan of survey for recording in the Indian Affairs survey records at Ottawa.
>
> TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever 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.
>
> AND upon the further condition that all moneys received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.
>
> AND WE, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof." [p. 679, a-g]

"After the surrender meeting a draft lease was prepared by the solicitors for the golf club. On October 24, 1957 Anfield wrote to the Department in Ottawa enclosing the draft lease. With reference to the proposed 15-year terms, he said:

> There has been discussion with the Indians that this term should be reduced, possibly to 10 year periods. In this regard it should be stated that it is going to take 3 years to get this site into operable condition, in addition to which the Club is going to have to make a million dollar investment in a Club House and the cost of constructing and perfecting the golf course. It would hardly seem fair to expect a review of rentals, presumably upward, in as short a space of time as 10 years and we are inclined to recommend that the 15 year period is fair and equitable." [p. 679, i-j - p. 680, a]

"With reference to the proposed 15 per cent limitation on rental increases, he said:

> It is noted the draft lease includes an escalator clause limiting increase and decrease to 15 per cent of the rental in the previous rental period. The Department, in their letter dated July 3, 1957, are obviously not happy about the inclusion of such a clause and this matter was discussed at very considerable length last summer with the Directors of the Shaughnessy Golf Club. They point out that they are not a commercial firm but a Club, with a limited membership and it is of the utmost importance that the total financial encumbrance over the lease period be reasonably secured. They are very definitely against the suggestion contained in the Department's letter aforementioned; that review of rentals be subject to agreement and, if necessary, by arbitration. They feel that any such course could be fatal in their overall planning. Having this in mind they submitted to us an opinion by Mr. Douglas W. Reeve, obtained by the Club, and a copy of this document is attached herewith. This report purports to present the considered views both of Mr. Reeve and of the Club Directors; with particular reference to whether or not this escalator clause, with its limitation of 15 per cent, should be contained in the lease. The Directors point out to the Department in their request, that this 15 per cent limitation be retained; that they will be turning back to the Musqueam Indian Band property of terrific value and with vast improvements, and they also stressed the point that a vital factor in this entire project is the stability of the Club in its overall financial undertaking of the project." [p. 680, b-f]

“On December 6, 1957 the surrender was accepted by Order in Council P.C. 1957-1606, which reads as follows:

> His Excellency the Governor General in Council, on the recommendation of the Acting Minister of Citizenship and Immigration, pursuant to section 40 of the Indian Act, is pleased hereby to accept the attached surrender dated the sixth day of October, 1957, of a certain portion of Musqueam Indian Reserve Number Two, in the Province of British Columbia, more particularly described in the surrender, it having been duly assented to by the electors of the Musqueam Band of Indians in the said Province, in accordance with the provisions of the Indian Act, in order that the lands covered thereby maybe leased.” [p. 681, h-j]

“The lease with the golf club was made on January 22, 1958.” [p. 682, d]

“A copy of the lease was not given to the Band Council or the Band. Andrew Charles, on behalf of the Band, requested a copy of the lease on several occasions, but was refused. The Band, in spite of their request, were unable to obtain a copy of the lease until March 1970.” [p. 683, b-e]

“It is important to keep in mind that this is an action which is based on breach of trust and only on breach of trust. It is not an action to set aside a surrender, and a disposition of surrendered land pursuant thereto, on the ground of fraud or nonfulfillment of the conditions of the surrender. It is not an action for negligence in the exercise of statutory authority with respect to the disposition of land in a reserve. It is not an action for rectification of the terms of a surrender of land in a reserve.” [p. 687, d-f]

“In response to an order by the Trial Division for particulars of the trust “upon which it is alleged that the Musqueam Band surrendered the land described in paragraph 5” of the amended statement of claim, the respondents furnished the following particulars:

> The trust was created on or about October 6th, 1957, by a surrender document which surrendered one hundred sixty-two acres of Musqueam Indian Band reserve lands to Her Majesty the Queen in the Right of Canada, in trust, for the Musqueam Indian Band. The terms of the Trust were oral and were to the effect that the lands were to be surrendered to Her Majesty The Queen so that these lands could be leased to the Shaughnessy Heights Golf Club for the purposes of a golf course on certain lease terms to be incorporated into a Lease between Her Majesty Queen Elizabeth The Second and the Shaughnessy Heights Golf Club.” [p. 688, c-f]

“...the Trial Judge found, as alleged by the respondents in their particulars, that a trust was created by the surrender of October 6, 1957 and that its terms were oral.”[p. 696, e)

“No doubt there was an understanding that the lease would be with the golf club.” [p. 701, a]

Wilson J., Dickson J., and Estey J. of the Supreme Court of Canada made the following findings of fact (page numbers refer to the report of the decision at [1984] 2 S.C.R. 335 attached as Schedule C to the Notice of Stated Case):

> “WILSON J.”

“The appellant, Delbert Guerin, is the Chief of the Musqueam Indian Band, the members of which are descended from the original inhabitants of Greater Vancouver. The other appellants are Band Councillors. In 1955 there were 235 members in the Band and they lived on a reserve located within the charter area of the City of Vancouver which contained approximately 416.53 acres of very valuable land.” [p. 339, j- p. 340, a]

“The subject of the litigation is a lease of 162 acres of the reserve land entered into on January 22, 1958 on behalf of the Band by the Indian Affairs Branch of the federal government with the Shaughnessy Heights Golf Club as lessee.” [p. 340, a-b]

“We are fortunate, however, in having very careful and extensive findings by the learned trial judge ...” [p. 341, b-e]

“There can be little doubt that by the mid ‘50s the Indian Affairs Branch was well aware that the appellants’ reserve was a very valuable one because of its location. Indeed, offers to lease or buy large tracts of the reserve had already been received. We know this from a report dated October 11, 1955 made by Mr. Anfield who was in charge of the Vancouver agency at the time to Mr. Ameil the Indian Commissioner for British Columbia. Both these men are since deceased which is unfortunate since Mr. Anfield played a lead role in the impugned lease transaction. In a later report to Mr. Arneil, Mr. Anfield suggested that a detailed study should be made of the Band’s requirement of its reserve lands so that the surplus, if any, could be identified and turned to good account for the Band’s benefit. He suggested that not only should they obtain an appraisal of land values but that a land use planning survey should be prepared aimed at maximum development in order to provide long-term revenue for the Band. He continued:

> It seems to me that the real requirement here is the services of an expert estate planner with courage and vision and whose interest and concern would be as much the future of the Musqueam Indians as the revenue use of the lands unrequired by these Indians. It is essential that any new village be a model community. The present or any Agency staff set up could not possibly manage a project like this, and some very realistic and immediate plans must be formulated to bring about the stated wish of these Musqueam people, the fullest possible use and development for their benefit, of what is undoubtedly the most potentially valuable 400 acres in metropolitan Vancouver today.

Mr. Anfield went on to speak in terms of “another potential ‘British Properties”‘ and suggested that all parties interested in the land should be advised that the land not required by the Band for its own use, when defined and surrendered, would be publicly advertised.” [p. 341, e-j; p. 342, a-c]

“About this time the Shaughnessy Heights Golf Club was looking for a new site. Its lease from the Canadian Pacific Railway was due to expire in 1960 and the club had been told that it would not be renewed. The club turned its attention therefore to the Musqueam Reserve. At the same time an active interest in the reserve was being displayed by a representative of a prominent Vancouver real estate firm on behalf of a developer client interested in a long-term lease. Although his contact had been directly with the Indian Affairs Branch in Ottawa, Messrs. Arneil and Anfield were both aware of it. Indeed, when he suggested to them that he meet with the Chief and Councillors of the Band to try to work out some arrangement, he was told by Mr. Anfield not to do so but to deal only through Indian Affairs personnel. That he followed this advice is made clear from the evidence of the Band members who testified. They were told of no interest in their land other than that expressed by the golf club.” [p. 342, d-h]

“The learned trial judge dealt specifically with the issue of the credibility of the members of the Band because he was very conscious of the fact that neither Mr. Arneil nor Mr. Anfield was alive to testify. He found the Band members to be “honest, truthful witnesses” and accepted their testimony. [p. 342, i-j]

“The Band agreed that its surplus land should be leased and authorized a land appraisal to be made and paid for out of Band funds. In fact the appraisal was done by Mr. Howell of the Veterans Land Act Administration. Although he was a qualified appraiser, he was

not a land use expert. He divided the reserve for valuation purposes into four areas, the first of which included the 162 acres leased to the golf club. This area comprised 220 acres classified by Mr. Howell as “First Class Residential area” and valued at $5,500 per acre making a total of $1,209,120. The other three areas which were all low lying he valued at $625 per acre. The Band was not given a copy of his report and indeed Mr. Arneil and Mr. Anfield had difficulty getting copies.” (p. 343, a-c]

“On April 7, 1957 the Band Council met, Mr. Anfield presiding. The trial judge found that the golf club proposal was put to the Chief and Councillors only in the most general terms. They were told the lease would be of approximately 160 acres, that it would be for an initial term of fifteen years with options to the club for additional fifteen year periods and that it would be “on terms to be agreed upon”. In fact the rent that had been proposed by the club was $25,000 a year for the first fifteen years with the rent for each successive fifteen-year period being settled by mutual agreement or failing that by arbitration. However, under the proposal the rent for the renewal periods was subject to a ceiling increase of 15 per cent of the initial rent of $25,000.

The learned trial judge found that when Mr. Bethune, the Superintendent of Reserves and Trusts in Ottawa, was advised of the $25,000 rental figure he questioned its adequacy and suggested to Mr. Ameil that he consult with Mr. Howell, the appraiser, as to what a proper return on the 160 acres would be. Unfortunately, Mr. Howell was not given all the facts. He was not told of the 15 per cent ceiling on rent increases. He was not told that the golf club would have the right to remove all improvements on termination of the lease although he was told that the club proposed to spend up to a million dollars in buildings and improvements on the leased land. Mr. Howell therefore recommended acceptance of the golf club’s offer stating: “These improvements will revert to the Band at the end of the lease” and “the Department will be in a much sounder position to negotiate an increase in rental in fifteen years’ time when the club will have invested a considerable amount of capital in the property, which they will have to protect.” Mr. Howell testified at trial that he would not have recommended acceptance of the golf club’s offer had he known that the improvements would not revert to the Band and that the rental on renewal periods was subject to a 15 per cent ceiling increase.

Mr. Howell’s letter was forwarded to Ottawa with the request that surrender documents be prepared for submission to the Band and this was done. It is interesting to note, however, that in the letter forwarding the surrender documents Mr. Bethune indicated to Mr. Ameil that he would like to see the 15 per cent ceiling on rent removed and rent for subsequent periods established either by mutual agreement or by arbitration.” [p. 343 g-j; p. 344 a-i]

“A Band Council meeting was held on July 25, 1957 again with Mr. Anfield in the chair. There was further discussion of the proposed lease to the golf club and two Councillors expressed the view that the renewal period should be at ten year intervals rather than fifteen. It was at this meeting that the resolution was passed to hold a general meeting of Band members to consider and vote on the surrender of the 162 acres to the Crown for purposes of the lease. The meeting of the Band was held on October 6, 1957 but prior to that there was another meeting of Councillors on September 27, 1957. Mr. Harrison and Mr. Jackson of the Shaughnessy Golf Club attended this meeting and Mr. Anfield, who had in the interval been promoted to Assistant Indian Commissioner for British Columbia, was there along with a Mr. Grant who was described as “Officer in charge-Vancouver Agency”. In the presence of the golf club representatives Chief Sparrow took issue with the $25,000 per annum rental figure and stipulated for something in the neighbourhood of $44,000 to $44,500 per annum. The golf club representatives balked at this and they were asked to step outside while the Band Council and the Indian Affairs personnel had a private discussion.” [p. 344, j- p. 345, a-e]

“Mr. Anfield expressed the view that the $44,000 figure was unreasonable and suggested $29,000 to which the Councillors agreed on the understanding that the first lease period would be for ten years and subsequent rental negotiations would take place every five years. Mr. Grant testified that Mr. Anfield advised the Council to go ahead with the lease at the $29,000 figure and in ten years demand a healthy increase from the golf club. Mr. Grant also testified that the Council objected to any ceiling on future rental and Mr. Anfield said that he would convey their concern to the Department of Indian Affairs. On that basis the Council, according to Mr. Grant, reluctantly accepted the $29,000 figure.

At the meeting of the Band on October 6, 1957 (“the surrender meeting”) Chief Sparrow was present along with the Councillors and members. Mr. Anfield presided as usual. The learned trial judge made specific findings as to what occurred at the meeting and I reproduce them from his reasons:

> (a) Before the Band members voted, those present assumed or understood the golf club lease would be, aside from the first term, for 10-year periods, not 15 years.
>
> (b) Before the Band members voted, those present assumed or understood there would be no 15% limitation on rental increases.
>
> (c) The meeting was not told the golf club proposed it should have the right, at any time during the lease and for a period of up to 6 months after termination, to remove any buildings or structures, and any course improvements and facilities.
>
> (d) The meeting was not told that future rent on renewal periods was to be determined as if the land were still in an uncleared and unimproved condition and used as a golf club.
>
> (e) The meeting was not told that the golf club would have the right at the end of each 15- year period to terminate the lease on six-month’s prior notice.

Neither (d) nor (e) were in the original golf club proposal and first appeared in the draft lease following the surrender meeting. They were not brought before the Band Council or the Band at any time for comment or approval. The Band voted almost unanimously in favour of the surrender.” (p. 345, e-j; p. 346, a-e]

“After the surrender there was considerable correspondence between Mr. Anfield and personnel in the Indian Affairs Branch in Ottawa particularly over the more controversial provisions of the lease but none of this correspondence was communicated to the Band Council nor were they given a copy of the draft lease which would have drawn these controversial provisions to their attention. The trial judge states at p. 409:

> Put baldly, the band members, regardless of the whole history of dealings and the limited information imparted at the surrender meeting, were not consulted.
>
> But it was their land. It was their potential investment and revenue. It was their future.” [p. 347, a-d]

“The learned trial judge accepted that the Chief, the Councillors and the Band members were wholly excluded from any further discussions or negotiations among the Indian Affairs personnel, the golf club officers and their respective solicitors with respect to the terms of the lease. The trial judge found an explanation, although not a justification, for this in the possibility that Indian Affairs personnel at the time took a rather paternalistic attitude towards the Indian people whom they regarded as wards of the Crown.” [p. 347, d-f]

“I turn now to the essential terms of the lease as entered into in January 22, 1958 as described by the learned trial judge at p. 412:

1. The term is for 75 years, unless sooner terminated.

2. The rent for the first 15 years is $29,000 per annum.

3. For the 4 succeeding 15-year periods, annual rent is to be determined by mutual agreement, or failing such agreement, by arbitration

> ... such rent to be equal to the fair rent for the demised premises as if the same were still in an uncleared and unimproved condition as at the date of each respective determination and considering the restricted use to which the Lessee may put the demised premises under the terms of this lease ...

4. The maximum increase in rent for the second 15-year period (January 1, 1973 to January 1, 1988) is limited to 15% of $29,000, that is $4,350 per annum.

5. The golf club can terminate the lease at the end of any 15-year period by giving 6 months’ prior notice.

6. The golf club can, at any time during the lease and up to 6 months after termination, remove any buildings or other structures, and any course improvements and facilities.” [p. 347, g-j- p. 348, a-b]

“Mr. Grant stated in evidence that the terms of the lease ultimately entered into bore little resemblance to what was discussed and approved at the surrender meeting and the learned trial judge agreed. He found that had the Band been aware of the terms in fact contained in the lease they would never have surrendered their land.” [p. 348, b-e]

“The appellants base their claim against the Crown in deceit as well as in trust. They were unsuccessful on this aspect of their claim at trial but have raised it again on appeal to this Court. While the learned trial judge found that the conduct of the Indian Affairs personnel amounted to equitable fraud, it was not such as to give rise to an action for deceit at common law. He found no dishonesty or moral turpitude on the part of Mr. Anfield, Mr. Arneil and the others. Their failure to go back to the Band and indicate that the terms it had approved were unobtainable, their entry into the lease on less favourable terms and their failure to report to the Band what those terms were all flowed, he found, from their paternalistic attitude to the Band rather than from any intent to deceive them or cause them harm.” [p. 356, a-d]

<u>The Measure of Damages</u> [p. 356, j]

“The breach of trust undoubtedly cost the Band something because they are fixed with a lease which is worth substantially less than the one they surrendered their land to receive. But against what is their loss to be measured if not against the value of the lease they expected to get?

The learned trial judge reviewed the evidence adduced by experts as to what would have been a fair return from a golf club lease over the period from 1958 to the date of trial based on the capital value attributed to the land over that period by these experts. This method of assessment made it clear that the golf club lease actually entered into did not yield a fair return. The learned trial judge, however, rejected the concept that the Band’s loss was the difference in value between a “fair and reasonable” lease and the actual lease. He said, at p. 435:

My problem, unfortunately, is not whether the present golf club lease is reasonable or not. <u>It is to determine the amount of loss suffered on the basis a golf course lease would probably not have been entered into.</u> I have outlined the evidence, on this one aspect of

value, merely to illustrate, among other things, the remarkable increase in value of this and other land since 1957 and 1958. [Emphasis added by Wilson J..]

In other words, just as he had found that the lease the Band wanted would not have been entered into and therefore the value of that lease could not be used in assessing the Band's damages, he likewise found that no golf club lease would have been entered into, presumably on the basis that a so-called "fair" lease could not have been obtained. The value of the land in 1957 and 1958 and its increase in value subsequently made use as a golf course uneconomic.

The trial judge therefore moved to other potential uses and concluded on the evidence that the 162 acres would at some point of time have been successfully marketed as pre-paid ninety-nine year leasehold lots for residential development. He found, however, that such a development would not have got underway for some years following the date of the golf club lease. Time would have been required for planning, for tenders and for negotiation. Moreover, development might have [359] been slow at first. However, based on the evidence before him as to economic, business and population trends, real estate values, housing accommodation demand and raw land shortages over the period 1958 to 1973, he concluded that the area would probably have been well on the way to full development on a residential, leasehold basis by 1968 to 1971. He noted in passing that this type of development had taken place on other parts of the reserve and he made due allowance for the fact that those developments were probably assisted by the presence of the golf course." [p. 357, j; 358, a-j; 359, a-b)

"Based then on the possibility that this type of development might have taken place on the 162 acres and applying the anticipated return from such development against the return from the golf club lease, the learned trial judge came up with a global assessment of $10 million. He acknowledged that this figure could not be mathematically documented but stated, at p. 441, that it was "a considered reaction based on the evidence, the opinions, the arguments and, in the end, my conclusions of fact". However, he did go on to set out the various factors and contingencies that he had taken into account in reaching his assessment. He did not allocate percentages to these contingencies." [359, c-f]

"It seems to me that what the trial judge was doing once he rejected the value of a golf club lease (either the one the Band authorized or one which could be described objectively as "fair") as the value against which the Band's loss was to be measured was to put a value as of the date of trial on the Band's lost opportunity to develop the land for residential purposes and assess the Band's damages in terms of the difference between that figure and the value of the golf club lease." [p. 359, g-i]

"What the Crown did, therefore, was to commit the Band to an unauthorized long-term lease which deprived it of the opportunity to use the land for any other purpose." [p. 360, b]

"DICKSON J."

"The question is whether the appellants, the Chief and Councillors of the Musqueam Indian Band, suing on their own behalf and on behalf of all other members of the Band, are entitled to recover damages from the federal Crown in respect of the leasing to a golf club of land on the Musqueam Indian Reserve." [p. 364, h]

"The Crown does not attack the findings of fact made by the trial judge. The Crown simply says that on those facts no cause of action has been made out. The following summary of the facts derives directly from the judgment at trial. Musqueam Indian Reserve (No. 2) in 1955 contained 416.53 acres, situated within the charter area of the City of Vancouver. The Indian Affairs Branch recognized that the reserve was a valuable one, "the most potentially valuable 400 acres in metropolitan Vancouver today". In 1956

the Shaughnessy Heights Golf Club was interested in obtaining land on the Musqueam Reserve. There were others interested in developing the land, although the Band was never told of the proposals for development." [p. 365, g-j - p. 366, a]

"On April 4, 1957, the President of the golf club wrote to Mr. Anfield, District Superintendent of the Indian Affairs Branch, setting forth a proposal for the lease of 160 acres of the Indian Reserve, the relevant terms of which were as follows:

> 1. The club was to have the right to construct on the leased area a golf course and country club and such other buildings and facilities as it considered appropriate for its membership.
>
> 2. The initial term of the lease was to be for fifteen years commencing May I, 1957, with the club to have options to extend the term for four successive periods of fifteen years each, giving a maximum term of seventy-five years...." [p. 366, a-d]

"On April 7, 1957 a Band Council meeting was held. Mr. Anfield presided." [p. 366, g]

"At the meeting the Band Council passed a resolution which the trial judge presumed to have been drawn up by Mr. Anfield. The relevant part of the resolution reads:

That we do approve the leasing of unrequired lands on our Musqueam I.R. 2 and that in connection with the application of the Shaughnessy Golf Club, we do approve the submission to our Musqueam Band of surrender documents for leasing 160 acres approximately as generally outlined on the McGuigan survey in red pencil." [p. 366, j - p. 367, a-b]

"At trial Mr. Howell said that if he had known the improvements would not revert to the Band, he would have recommended a rate of return of 4 to 6 per cent. He expressed shock at the 15 per cent clause. He had assumed that at the end of the initial term the rental could be renegotiated on the basis of "highest and best use" without any limitation on rental increase." [p. 368, a-b)

"(d) On September 27, 1957 a Band Council meeting was held at the reserve, attended by members of the Band Council, Mr. Anfield, two other officials of the Department of Indian Affairs and representatives of the golf club." [p. 368, c]

"Mr. Grant, officer in charge of the Vancouver agency of the Department of Indian Affairs, testified that there was "absolutely no question that the vote was for a specific lease to a specific tenant on specific terms" and that the Band did not give Mr. Anfield "authority to change things around"." [p. 368, h]

"(e) On October 6, 1957, a meeting of members of the Band was held at the reserve, the so called "surrender meeting". The trial judge made these findings: (i) those present assumed or understood the golf club lease would be, aside from the first term, for ten-year periods, not fifteen years; (ii) those present assumed or understood there would be no 15 per cent limitation on rental increases; (iii) the meeting was not told that the golf club had proposed that it should have the right to remove any buildings, structures, course improvements and facilities." [p. 368, i-j; p. 369, a]

"The trial judge found further that two matters which subsequently found their way into the lease were not even put before the surrender meeting. They were not in the original golf club proposal. They first appeared in draft leases, after the meeting. The first of these terms was the method of determining future rents; failing mutual agreement, the matter was to be submitted to arbitration; the new rent would be the fair rent as if the land were still in an uncleared and unimproved condition and used as a golf club. The second term gave the golf club, but not the Crown, the right at the end of each fifteen-year period to

terminate the lease on six month's prior notice. These two terms were not subsequently brought before the Band Council or the Band for comment or approval." [p. 369, b-e]

"The surrender, which was approved by a vote of forty-one to two, gave the land in question to Her Majesty the Queen on the following terms:

> TO HAVE AND TO HOLD the same unto Her said Majesty the Queen, her Heirs and Successors forever 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.
>
> AND upon the further condition that all moneys received from the leasing thereof, shall be credited to our revenue trust account at Ottawa.
>
> AND WE, the said Chief and Councillors of the said Musqueam Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done, in connection with the leasing thereof." [p. 369, f-i]

"(f) On December 6, 1957 the surrender of the lands was accepted by the federal Crown by Order-in-Council P.C. 1957-1606, "in order that the lands covered thereby may be leased"." [p. 369, j – p. 370, a]

"(g) On January 9, 1958, a Band Council meeting was held. A letter was read regarding the proposed golf club lease." [p. 370, a]

"(h) The lease was signed January 22, 1958. It provided, *inter alia*:

> 1. The term is for 75 years, unless sooner terminated.
>
> 2. The rent for the first 15 years is $29,000 per annum.
>
> 3. For the 4 succeeding 15-year periods, annual rent is to be determined by mutual agreement, or failing such agreement, by arbitration
>
> > .., such rent to be equal to the fair rent for the demised premises as if the same were still in an uncleared and unimproved condition [and used as a golf course.]
>
> 4. The maximum increase in rent for the second 15-year period (January 1, 1973 to January 1, 1988) is limited to 15% of $29,000, that is $4,350 per annum.
>
> 5. The golf club can terminate the lease at the end of any 15-year period by giving 6 months' prior notice.
>
> 6. The golf club can at any time during the lease and up to 6 months after termination, remove any buildings or other structures, and any course improvements and facilities." [p. 370, d-h]

"The Band was not given a copy of the lease, and did not receive one until twelve years later, in March 1970.

(i) Mr. Grant testified that the terms of the lease ultimately entered into bore little resemblance to what was discussed at the surrender meeting. The judge agreed. He found that the majority of those who voted on October 6, 1957 would not have assented to a surrender of the 162 acres if they had known all the terms of the lease of January 22, 1958." [p. 370, i-j; p. 371, a]

"Prior to the surrender the Band had also been given to understand that a lease was to be entered into with the Shaughnessy Heights Golf Club upon certain terms, but this understanding was not incorporated into the surrender document itself." [p. 387, i-j]

"When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed." [p. 388, i]

"ESTEY J."

"On the facts here, there is no issue but that the Indian Band had determined to exercise their interest in the land through the medium of a lease to the golf club." [p. 393, g]

SC 552cont Musqueam Indian Band Board of Review v Musqueam Indian Band (BCCA)

Musqueam Indian Band Board of Review
v.
Musqueam Indian Band

BRITISH COLUMBIA COURT OF APPEAL (CA041156) Vancouver Registry

Before the HONOURABLE CHIEF JUSTICE BAUMAN, the HONOURABLE MR. JUSTICE LOWRY, and the HONOURABLE MR. JUSTICE GOEPEL
Date and Place of Hearing: March 5, 2015, Vancouver, B.C.

M. Morellato, J.I. Reynolds and L. Pence for the Appellant
R.B. E. Hallsor, G.M. Jacks, J.J.L. Hunter and L.B. Herbst for the Respondent

Valuation of property on leased reserve land

Appeal from an order answering questions posed in a case stated by a tax assessment review board arising out of the 2011 assessment of the actual value of a property on the reserve land of an Indian Band which was leased in 1958 to be used as a golf and country club. The Band surrendered the property to the Crown which in turn leased it to the golf club for 75 years. The Club covenanted to pay the taxes which, since 1991, were payable to the Band. The underlying issue was whether under the provisions of the Band's assessment by-law, passed in 1996, the use for which the property was leased was a "restriction placed on the use of the land and improvements by the Band", such being the basis on which the property had until 2011 been assessed. The questions were answered such that the issue was resolved in favour of the use permitted by the lease being considered in assessing the actual value of the property.

HELD: *Application for Leave to Appeal Granted*
Appeal allowed to the limited extent of altering some of the answers to the questions. The use of the property as a golf and country club was a "restriction" that was "placed by the Band" within the meaning of the applicable provisions of the by-law.

Reasons for Judgment April 17, 2015

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Goepel

[1] The Shaughnessy Golf and Country Club has, for more than 50 years, operated its golf course in Vancouver on a leased property consisting of 162 acres of reserve land belonging to the Musqueam Indian Band. In that time, it has paid property taxes, first to the City of Vancouver, and then, since 1991, to the Band, based on the assessed value of the property as a golf course. The Band appealed the 2011 assessment in a complaint to the Musqueam Indian Band Board of Review, contending the assessed value of the property is its value as residential land. The tax implications are enormous, and it is not evident why, after so many years of the property being assessed as it has been, the Band chose to appeal the assessment for that year on the basis advanced. Before rendering any decision, the Board stated a case to the Supreme Court seeking, in broad terms, a determination of whether the use as a golf course for which the lease provides could properly be considered in assessing the value of the property. The court held that it could. The Band appeals the court's order to that effect.

The Lease

[2] The property was leased to the Club in 1958 for 75 years. The Band determined to exercise its interest in the property by leasing it to the Club for the construction of a golf course. By virtue of the nature of Aboriginal interest in reserve land, the Band could not then, nor can it now, lease reserve land. Acting through its representative council, the Band surrendered the property to the Crown in accordance with ss. 37 to 41 of the *Indian Act*, S.C. 1951, c. 29. The surrender was "in trust to lease the [property] 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". The Crown then entered into the lease with the Club. The lease provides the property is to be used "only for a golf and country club, with such additional facilities as the lessee may [consider] desirable". The Club covenanted to "pay rent and to pay taxes". The Band was not made aware of the specific terms of the lease and did not see a copy of it until 1970.

[3] In 1975 the Band commenced an action against the Crown for damages for breach of fiduciary duty in entering into the lease on financial terms that differed from those represented to

the Band. The Band succeeded in its action and was awarded $10 million in damages: *Guerin v. The Queen*, [1982] 2 F.C. 385 (T.D.), which was ultimately upheld by the Supreme Court of Canada: [1984] 2 S.C.R. 335. The action is significant now only to the extent that the agreed facts of the stated case pertaining to the surrender and lease of the property are drawn from the findings of fact in the decisions.

The By-Law

[4] Prior to 1991, the property was assessed under the *Vancouver Charter*, S.B.C. 1953, c. 55, and, later, the *Assessment Act*, S.B.C. 1974, c. 6; R.S.B.C. 1979, c. 21. As a consequence of amendments to the *Indian Act*, R.S.C. 1985, c. I-5, the Band assumed jurisdiction over assessment and taxation. Section 83(1) of the amended Act permitted all bands to make by-laws for the taxation of reserve land subject to the approval of the Minister [presently the Minister of Aboriginal Affairs and Northern Development]. The Band passed its first property assessment by-law in 1990 and obtained ministerial approval in 1991: *Musqueam Indian Band Assessment By-Law, 1991*, By-law No. 1991-1. The by-law was amended in 1996: *Musqueam Indian Band Property Assessment Bylaw*, PR-96-01. The amended by-law governs the 2011 assessment and in material respects provides:

> 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.
>
> (2) The assessor shall determine the actual value of land and improvements and shall enter the actual value of the land and improvements within each named reserve in the assessment roll.
>
> (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).
>
> (3.1) …
>
> (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.

(3.3) The duration of the interest of an interest holder, or the right of an interest holder or any other person to terminate that interest, is not a restriction within the meaning of subsection (3.2).

…

(6) Land and improvements shall be assessed at their actual value.

[5] The Band's appeal to the Board and the stated case center on s. 26(3.2).

The Stated Case

[6] The case was stated to the Supreme Court under s. 80(1) of the by-law. It poses several questions which, with the answers given by the judge who heard the matter, are set out in the Appendix to these reasons. The judge answered some of the questions and determined she could not answer others. On this appeal, it appears to be accepted there are two fundamental questions the answers to which address the basis of the challenge to the 2011 assessment of the property. Given that the only use of the property for which the lease provides is a golf and country club, and having regard for the meaning to be given to the wording of s. 26(3.2) of the Band's amended assessment by-law,

(i) is there a "restriction" on the use of the property, and,

(ii) if so, was the restriction "placed by the Band"?

[7] For reasons that were apparently not argued before her, and which the Band does not now support, the judge concluded s. 26(3.2) had no application in the circumstances (para. 134). Rather, she took the view that a restriction placed on the use of land could be considered under s. 26(3) (para. 131). However, were that to be so, s. 26(3.2) would appear to be redundant. If a restriction on the use of land and improvements is to be included with the factors that may be considered under s. 26(3), it can only be a restriction under s. 26(3.2): a restriction placed by the band.

The Restriction

[8] As subsections (1) and (6) of s. 26 of the by-law provide, the property must be assessed at its actual value, which is the market value as if held as a fee simple interest off the reserve. There is no question the lease restricts the use of the property to that of a golf and country club.

The Band, however, maintains the restriction is not a factor that can be considered in assessing the actual value of the property: it is not a "restriction" under s. 26(3.2).

[9] The Band contends that assessing the actual value of the property as restricted to being used as a golf and country club, rather than for residential development, offends a long-standing common law principle governing the assessment of the value of land for taxation purposes: it is the value of the land that is being assessed, not the owner's interest in the land. This principle is said to preclude the consideration of restrictions that are personal to the owner and which do not run with the land. Thus, a lease between owner and lessee that limits the use of a leased property is, for example, to be distinguished from what may be zoning or other statutory restrictions. The Band would appear to say a zoning restriction on the use of a property that impairs its value may be considered for assessment purposes, but even a long-term lease that might restrict the use of the property in the same way may not.

[10] The principle is said to have been recognized in this Court's decision in *Standard Life Assurance Co. v. British Columbia (Assessor of Area #01 - Capital)* (1997), 146 D.L.R. (4th) 247, 34 B.C.L.R. (3d) 346 (C.A.). There, it was held that space in a building that was leased below market value was not to be considered in assessing the actual value of the building and the land upon which it stood for taxation purposes. Importance was attached to the assessed actual value having to be the value of the legislatively prescribed fee simple interest in the land and improvements. The majority reasoned:

> [13] As I have said, in my opinion, the "fee simple interest" is comprised of the entirety of the interests in the property. This bundle of interests includes both the tenant's and the landlord's interest. Implicit in this is the principle that consideration of actual rental value is, generally speaking, not relevant to the valuation of the "fee simple interest". This is because the actual rental value is relevant only to the owner's interest in the land and buildings whereas the actual value in the *Act* is the totality of all interests in the land and buildings. The owner's interest and the tenant's interest, in principle, should reflect the market or actual value of the land and buildings. It is for this reason that I have concluded that the "fee simple interest" is, again generally speaking, the same as the owner's unencumbered interest.

[11] The Band also relies on *British Columbia (Assessor of Area No. 10 - Burnaby/New Westminster) v. Central Park Citizen Society* (1993), 86 B.C.L.R. (2d) 24 (S.C. Chambers), where below-market limitations on rent, paid by resident seniors, imposed on the owner of a

high-rise apartment building, by the terms of mortgage financing, were held not to be a consideration in assessing the actual value of the building and the land upon which it was built. The judge in that case discussed the difference between agreements that affect the value of the land and those that affect the value of the owner's interest in the land, reasoning it is the value of the land that is being assessed such that agreements personal to the owner are not to be taken into account for assessment purposes.

[12] Based on these authorities, the Band says that while the Club's interest as lessee reflects a restriction in the use of the property, it is the unencumbered value of the property that equates to what the fee simple value off the reserve would be. It is then that value – the value of the property for residential development – that must be the market and thus the actual value for assessment purposes.

[13] However, whatever common law principle may be reflected in these authorities (and those to which reference is made therein), neither involved a consideration of a statutory provision like s. 26(3.2) of the Band's assessment by-law. Further, neither was concerned with an assessment of land, the owner of which was tax exempt, nor indeed an assessment of land belonging to the taxing authority itself, as is the case here.

[14] Section 26(3.2) must supersede any common law principle that would work a result contrary to its application. It is part of the scheme of the by-law the Band had approved for the assessment of land values that are determinative of the tax revenue it derives. The word "restriction" employed in the section is limited in its meaning only by s. 26(3.3), which provides the duration of an interest or the right to terminate an interest, is not a restriction. The word is qualified in its application only by the provision in s. 26(3.2) that it must be a restriction on the use of land and improvements placed by the Band. Otherwise, as the section provides "any restriction" on the use of land is a factor an assessor may include in the factors considered under s. 26(3) in assessing actual value absent the qualification those factors carry, that they not be in conflict with s. 26(1): "actual value" means market value of the fee simple interest as if held off the reserve. Had the Band sought to further narrow the meaning or applicability of what

constitutes a “restriction” that may be considered, it could easily have done so, although approval for its by-law might then have become questionable.

[15] It is of no little significance that, while there are some understandable differences that do not appear material for present purposes, the first assessment by-law the Band passed in 1990 largely paralleled the provisions of the *Assessment Act*, R.S.B.C. 1979, c. 21, as amended by the *Assessment Amendment Act, 1984*, S.B.C. 1984, c. 11, and the *Assessment and Taxation (Miscellaneous Amendments) Act, 1985*, S.B.C. 1985, c. 20, particularly with respect to valuation. Indeed, the numbering of the sections of the by-law was the same as those of the provincial legislation.

[16] In 1985, the Legislature moved to address an unfairness the courts had recognized with respect to the assessment of the value of land and improvements held by the Crown, tax-exempt owners, or municipalities being leased to tax-paying occupiers (see *British Columbia (Assessment Commissioner) v. Ryan*, [1979] B.C.J. No. 1966 (S.C.)). Where ss. 34, 35 and 36 of the *Assessment Act* required that such be assessed at their actual value, meaning without considering any reduced value attributable to what might be said to be contractual restrictions placed on the use of the land and improvements by the owner, provision was made for assessing value taking such restrictions into account.

[17] As of 1985, s. 26(3.2) of the Act provided that, in assessing the value of land and improvements under ss. 34, 35, or 36 of the Act, the factors considered were to include any restriction on use placed thereon by the owner. (Under the current *Assessment Act*, R.S.B.C. 1996, c. 20, ss. 34, 35, and 36 are numbered 26, 27, and 28, with s. 26(3.2) now being s. 19(5)). The effect of the 1985 amendment in this regard is evident in assessment appeal decisions, at least three of which have been endorsed by the courts: *Assessor of Area #08 v. Western Stevedoring Co. Ltd.*, 2006 BCSC 509; *Vancouver Pile Driving Ltd. v. Assessor of Area #08 – Vancouver Sea to Sky Region*, 2008 BCSC 810; and *Assessor of Area #09 – Vancouver v. UBC Property Trust*, 2008 BCSC 822. In each instance, restrictions on the use of land imposed by a lease were said to be properly taken into account in assessing its value.

[18] Section 26(3.2), as well as ss. 34, 35, and 36, of the Band's 1990 assessment by-law were worded essentially the same as those of the *Assessment Act* in force at the time:

> (3.2) Where the and [*sic*] improvements are liable to assessment under section 34, 35 or 36, the assessor shall include in the factors that he considers under subsection (3), any restriction placed on the use of the land and improvements by an interest holder of the land.

[19] Rather than s. 26(3.2) providing for the consideration of restrictions placed on the use of land and improvements by an owner (as did its counterpart in the 1985 amendments to the *Assessment Act*), it provided for those placed by an interest holder of the land. The wording was unsatisfactory because it would, of course, include a lessee that could, acting unilaterally, reduce the assessed value – and thus its tax burden – by restricting its own use of the land. That was remedied by the Band in passing the 1996 by-law:

> (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.

[20] Section 26(3.2) was amended to provide for the consideration of restrictions on the use of land and improvements placed by the band. The reference to ss. 34, 35, and 36 in s. 26(3.2) was evidently considered unnecessary in the 1996 amendment.

[21] What emerges is the clear intention the Band had to have restrictions it places on the use of land and improvements taken into account for assessment purposes under its by-law in the same way contractual restrictions on the use that occupiers may make of land and improvements owned by the Crown, tax-exempt owners, or municipalities are to be considered under the *Assessment Act* in curing the unfairness recognized in the 1985 amendments to that Act.

[22] It follows that the Club's use of the property for a golf and country club for which the lease provides is a "restriction" within the meaning of s. 26(3.2) such that the first of the two questions stated above is to be answered affirmatively.

Placed by the Band

[23] It remains to consider whether the restriction in the lease on the use of the property for the development and operation of a golf course was a restriction placed by the Band. The Band maintains it was not; it was placed by the Crown.

[24] The Band contends the lease that restricts the use of the property was entered into by the Crown. Section 26(3.2) provides that it is only restrictions placed by the Band – not on behalf of the Band – that may be considered. The additional words required to make the restriction one placed by the Band cannot be read in. The words actually employed must be given their ordinary meaning and be read harmoniously with the scheme of the by-law. When the words of a provision are clear and unequivocal, the ordinary meaning plays the dominant interpretive role, citing *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10. Clear language in taxing provisions is not to be qualified by unexpressed exceptions or words based on a court's view of the object and purpose: *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804 at para. 51. There is, here, no evident intention that s. 26(3.2) would apply where restrictions were placed on the use of land by other than the Band itself.

[25] The Band says further that, had it wished, it could have placed restrictions on its surrender of the property to the Crown under s. 38(2) of the *Indian Act* but it did not do so. As indicated, the surrender was only stated to be for the purpose of leasing the property upon such terms as the Crown considered would best serve the interest of the Band.

[26] Finally, the Band maintains s. 26(3.2) was amended in expectation of it becoming able to take control of the management of its reserves, which explains why the term "placed by the Band" was employed. The basis of its expectation is said to be what is referred to as the "Framework Agreement" to which the Band became a signatory in 1996 shortly before amending its by-law. Under the agreement, the Band was to develop a land code that would be subject to ministerial approval. Legislation giving effect to the agreement was forthcoming but not enacted for three years: the *First Nations Land Management Act*, S.C. 1999, c. 24. The Band did not draft a land code until 2012 and it was not in effect when the stated case was heard the following year.

[27] Nonetheless, the Band says that going forward, from the time the by-law was amended, it was only to be restrictions placed by the Band on the use of reserve land, such as zoning restrictions, which could be considered in assessing value, although, significantly, the Band waited 15 years (until 2011) before advancing this position in respect of the annual assessments of the property. And, the contention that the restrictions for which s. 26(3.2) provides were intended to be in some way limited is at odds with the wording of the section providing that they be "any restriction".

[28] The circumstances under which the Crown and the Club entered into the lease were unusual in a legal context in that, although the Band wished to exercise its interest in the property by leasing it for the construction of a golf course, it could not do so; only the Crown could enter into a lease of the land. But the Crown could not do that without the Band first surrendering the property as it did. The Crown was clearly acting "on behalf of" the Band in entering into the lease, but it is not necessary that those words be read into s. 26(3.2) to establish the use of the property was a restriction placed by the Band. The Band placed the restriction on the Club's use of the property when it surrendered the property to the Crown. Certainly the actual wording of the surrender document could have been narrower than it was, but the broad terms on which the property was surrendered to be leased were circumscribed by the Band's decision that it be used for the use to which it has been put for over 50 years. The Crown could not have leased the property for any other use.

[29] Further, 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. If it were otherwise, the section would be meaningless because the Band cannot unilaterally restrict the use of reserve land. That must be done through the Crown. 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.

[30] The Band's contention that s. 26(3.2) was amended as it was in 1996 because of the Band's expectation of being granted the ability to restrict the use of reserve land without having

to surrender such to the Crown is difficult to accept, particularly if that is said to be the only reason for the amendment in the wording of the section. It would mean that what was a functioning provision of the by-law as passed in 1990 (that served for five years to affect the assessed value of land and improvements) was to have no effect until such time as the Band's expectations might be realized. That would not appear to be a sound basis on which to approach the interpretation to be given to the section. It is to be interpreted harmoniously with the context of the by-law as a whole when it was amended in 1996.

[31] It follows that the restriction on the Club's use of the property for a golf and country club was placed by the Band such that the second of the two questions posed above is also to be answered affirmatively.

Conclusion

[32] It can then be concluded that, by virtue of s. 26(3.2) of the Band's assessment by-law as amended in 1996, the use of the property as a golf and country club for which the lease provides is a "restriction" that was "placed by the Band" and thus may be included in the factors that may be considered under s. 26(3) in the assessment of the property's actual value in accordance with s. 26(6) as defined by s. 26(1): the market value of the fee simple interest located off the reserve, subject to the lease.

[33] While the judge concluded the restriction on the use of the property under the lease could be taken into account, albeit on a somewhat different basis, the answers to the questions posed in the case as stated vary somewhat from what the judge said they should be.

[34] The first question as to whether the Board can consider the restriction in use set out in the lease in determining the highest and best use and the actual value of the property is, as the judge considered, to be answered "yes", save that actual value may not always be the same as the highest and best use of land and improvements as, for example, when there may be no market for such use: *Southam Inc. v. (Pacific Newspaper Group Inc.) v. British Columbia (Assessor of Area No. 14 - Surrey/White Rock)*, 2004 BCCA 245. All that can be said at this preliminary stage of the Board's review is that the restriction in the use of the property may be included as one of the

factors to be considered in determining its actual value. Highest and best use falls outside of the proper parameters of the stated case.

[35] The second question consists of several sub-questions, which can be answered as the judge has done without comment save for two exceptions. The judge answered "yes" to question 2(d): whether an assessor was required to give consideration to the factors under subsections 26(3) and (3.2), both of which employ the word "may" (paras. 140-144). It should be noted her answer was not challenged on the appeal. The judge answered "no" to question 2(e): whether the Board would misinterpret s. 26 of the by-law by applying subsections 26(3) or (3.2) if they served to reduce the highest and best use (para. 145). The question is one that should not be answered at this stage for the same reason the answer to the first question is qualified.

Disposition

[36] I would allow the appeal to the limited extent of altering the answers to the questions posed as indicated and remit the stated case to the Board.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Goepel"

Appendix

Stated Case – Questions of Law [S.C. Judge's Answers]

1. Can the Musqueam Indian Band Board of Review consider the restriction in use set out in the Lease in determining the highest and best use and the actual value of the Subject Property? **[Answer: Yes]**

2. Based on the Facts determined by the Board, in exercising its powers under subsection 41(2) of the *Assessment Bylaw* to either confirm or alter the assessment by the assessor of the interest of the Club in the Subject Property:

   (a) (i) Does the principle of general law relating to strict construction of restrictive provisions relating to use of land apply to the words "any restriction placed on the use of the land and improvements by the band" in subsection 26(3.2) of the *Bylaw*? **[Answer: No]**

   (ii) As a matter of correct legal interpretation, are the use provisions in the Lease a "restriction" for the purposes of subsection 26(3.2) of the *Bylaw* in the light of the decision of the British Columbia Court of Appeal in *Aquadel Golf Course Ltd. v. Lindell Beach Holiday Resort Ltd.*, [2009] 4 W.W.R. 1, 2009 BCCA 5? **[Answer: Yes]**

   (b) As a matter of correct legal interpretation, can the words "any restriction placed on the use of the land and improvements by the band" in subsection 26(3.2) of the *Bylaw* apply to a restriction placed by another party such as the Club or Canada or a judge? **[No answer]**

   (c) Can the words "any restriction placed on the use of the land and improvements by the band" found in subsection 26(3.2) of the *Bylaw* be correctly interpreted to apply in circumstances where it is not proven that the majority of the electors of the Band have consented to such a restriction? **[No answer]**

   (d) Do subsections 26(3) and 26(3.2) of the *Bylaw* require the assessor to give consideration to the factors described in section 26(3) including any restriction placed on the use of the land or improvements by the band for the purposes of subsection 26(3.2) or do those subsections confer a discretion to do so? **[Answer: Yes and the consideration is not discretionary.]**

If the answer is that those subsections confer a discretion to give consideration to those factors (including such a restriction) but do not impose a requirement to do so:

(i) Does the discretion have to be exercised reasonably and in the light of all the relevant circumstances? **[N/A]**

(ii) Is the discretion subject to the exception and the proviso in subsection 26(3) that such consideration must not conflict with the requirement in subsections 26(1), (2) and (6) that land and improvements shall be assessed at their actual value meaning the market value of the fee simple interest in the land and improvements as if the interest holder held a fee simple interest located off reserve? **[N/A]**

(e) Would the Board misinterpret section 26 of the *Bylaw* by applying subsections 26(3) or 26(3.2) of the *Bylaw* so as to restrict the highest and best use of the Subject Property to golf and country club use? **[Answer: No]**