

APPENDIX A

“MARKET VALUE” ON RESERVE: MUSQUEAM INDIAN BAND V. GLASS¹ AND THE IMPLICATIONS FOR PROPERTY ASSESSMENTS

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While the Canada Supreme Court decision on the market value of leasehold land on the Musqueam reserve was for the purpose of determining leasehold payments, and not assessments for property taxes, it is useful to understand the basis of the court’s decision and its implications for assessment practices. First, the two most important aspects of the courts judgment will be explained; second, the implications of using off-reserve values to value reserve lands will be examined.

THE COURT DECISION

The most important aspect of the decision was whether or not the location of land on a reserve makes a difference in its market value. The primary difference in judge’s opinions related to two issues: first, whether restrictions on reserve leasehold lands were analogous to government restrictions on fee simple lands or analogous to restrictions contained in a lease between a private lessor and lessee, and second, what other conditions on a reserve could result in transactions between willing sellers and willing buyers at prices different from those for similar land off reserve. Each of these issues will be briefly summarized below².

RESTRICTIONS ON LAND: GOVERNMENTAL OR LEASE CONDITION?

When leasehold properties are valued it is the property that is being valued, not just the share held by the lessee. Thus one is interested in the sum of the value to the lessee and lessor and restrictions on the use of the property stipulated in the lease document itself are not taken into account in determining the property’s value. In contrast, restrictions placed on the use of the property by a government are taken into account.

¹2000 SCC 52. File No.: 27154

² The case also dealt with whether or not infrastructure improvements were part of market value for contractual payment purposes. This is not an issue with property assessments for taxation where the value of all improvements is included in the assessment.

For example, if a lease document stipulates that a property may be used for residences only, but the property is zoned for a more valuable use, the assessment may reflect the value of the more valuable use. However, if the property is zoned for residential use only by the government, even if it would be more valuable in a different use, the assessment will be based on the value of the property in residential use.

In the Musqueam case all judges understood this distinction, but some took a different view as to what was a lease restriction and what was a government restriction as Musqueam Indian Band (and the Federal government) were both the lessor and the government at the same time.

Those justices that took the position that all restrictions should be viewed as those of a lessor, concluded that the property was worth just as much as fee simple property off-reserve because the Musqueam Indian Band could, as **owner of the property**, remove it from the reserve and sell it as fee simple if it so desired. The majority of justices, however, viewed the restrictions on the sale of reserve lands as **government restrictions** to be taken into account in determining value. They concluded that the restrictions associated with reserve lands could, and in this case, did, lower its market value to below that of off-reserve fee simple properties. Their decision is correct if one views **land management as a role of the Musqueam government in its capacity as a government and not just as a simple property owner**³.

OTHER CONDITIONS AFFECTING MARKET VALUE

In addition to the issue surrounding government and lease restrictions, the trial court judge indicated that in a market of knowledgeable willing sellers and buyers, any number of conditions related to location on an Indian Reserve could influence market value. Among factors he cited were uncertainly related to property taxation, publicized unrest, and limitations on non-natives entitlement to stand for election to the reserve's governing body. Any of these factors

³Lease conditions include both those that a property owning lessor would want to include and conditions placed on the use of the property by the First Nation as First Nation's do not generally use separate land use regulations and zoning to control the use of land. Because the First Nation government can, as a government, in effect, unilaterally change lease conditions from those agreed upon initially by the lessee by using its governmental authority, lease conditions are most appropriately viewed as imposed by a government. While governmentally imposed changes can occur with off reserve lands as well, the leaseholders off-reserve are represented in the government while they are not represented in the First Nation government.

could make offers from willing buyers lower than they would be willing to make for similar properties off reserve. These factors may be regarded as very subjective as attitudes toward them differ among individuals, but all of these and other factors buyers and sellers feel are relevant to them are important determinants of market value. While they may not be explicit they all enter into identification of assessed value for property tax purposes and a majority of Supreme Court justices agreed.

Without a review of the trial court decision, it is impossible to determine whether or not the decision that undeveloped land within the Musqueam Reserve was worth 50% of the market value of land outside the reserve is the best estimate, but it is clear that a majority of the Supreme Court got it right in recognizing that government restrictions on the use of land and conditions on a particular reserve have the potential to make the market value of reserve lands different from that of fee simple lands off-reserve. It is also important to note that the Supreme Court also indicated that reserve lands could also be worth the same, or even more, than off-reserve lands, depending on conditions on the particular reserve. In summary, the Supreme Court got its urban land economics and property assessment theory right.

LEGISLATING COPYING OFF-RESERVE VALUES

It can be administratively difficult to determine market values on reserve. This has led to recommendations that the First Nations simply write into their assessment bylaws that off-reserve values are to be used for valuing similar reserve properties.

Outside of the reserve context, the valuing of leasehold properties by comparing them with fee simple properties is common assessment practice. This practice generally works well as the leasehold properties are in the same government jurisdiction and subject to the same governmentally imposed restrictions as adjacent fee simple properties. This is not the case for reserve leasehold properties. Reserve leasehold properties, by virtue of being on reserve and under reserve government jurisdiction, possess different government restrictions than off-reserve properties. These differences, as well as differences in other conditions, mean that to write an assessment bylaw to require the use of values of off-reserve property for reserve properties is to abandon market value assessment as the basis for the assessment of property for taxation purposes on reserve. This abandonment has significant political and policy consequences that First Nations should be aware of. It is not a step to be taken lightly.

POLITICAL IMPLICATIONS

High leasehold values on reserve depend on users of the property trusting the First Nation government and feeling that they are treated fairly. Market values are the agreed upon approach for assessments for property taxation purposes and British Columbia is one of the leaders in this approach. The most dramatic implication of abandoning a market value approach is that lessees are going to be told that their assessments are equivalent to those of similar properties off reserve because that is what the band bylaw says, even though the Supreme Court of Canada has ruled that market values may be as much as 50% lower. The political impact of such a position will be devastating for reserve leasehold values regardless of the legality of the position.

A second implication of legislating the application of off-reserve values is that it reduces the responsibility and the incentive for the First Nation Chief and Council to manage reserve lands to make them more valued by leaseholders. Given that leaseholders cannot vote in First Nation elections, the incentive to enhance leasehold values is an important incentive that leaseholders depend on to be treated fairly. The removal of such an incentive is not good for either the First Nation council or the leaseholders. In fact, attempts to legislate artificially high market values for taxation will itself generate distrust among leaseholders have the opposite effect: leasehold lands will be viewed as less valuable by willing buyers.

The political implications of applying off-reserve assessment values for on-reserve assessments are clearly negative.

POLICY IMPLICATIONS

In addition to political implications, there are significant policy implications for applying assessments from off reserve to leasehold lands.. First is that the relationship among values assigned to different classes of property are likely to be changed because the difference between on-reserve and off-reserve values are likely to be different for different classes of property.

For example, the valuation of utilities, industry and business or rental residential properties are unlikely to differ significantly on and off reserve. This is because these properties will be valued in relation to the income they generate (capitalized value), and many occupiers will have short term lease arrangements with a head leaseholder. In contrast, owner occupied residential property is likely to have the largest difference. For homeowners, their home is often their single largest investment and they are most likely to be sensitive to the fact that they have no political voice and to any uncertainties associated with First Nation jurisdiction. Thus, using off reserve values for all properties is likely to result in equivalent assessments for non-residential property, but if there any problems on reserve, it will result in over-assessment

relative to market value for residential home owners. While such relative changes in the value of different classes of property can be adjusted through variable tax rate setting, to start out by sending residents assessment notices that they recognize are higher than market value can be assured to generate significant unnecessary protest.

THE IMPORTANCE OF BUDGET BASED TAX RATE SETTING

First Nations are now required to move to budget based tax rate setting. This move provides the opportunity to overcome all of the problems of assessments on reserve. Market based assessments and budget based tax rate setting involves assessing all properties at market value, or as close to it as is administratively feasible, with the most important factor being that properties on reserve are assessed fairly relative to one another. Then, after expenditure requirements are budgeted, the tax rates can be set to raise the necessary funds to provide the services. It does not make any difference if the assessments are lower or higher than off-reserve properties--only that the assessments fairly reflect differences among the properties on the reserve. This is because if assessments are lower, tax rates will have to be higher, or if assessments are higher, tax rates can be lower.

CONCLUSIONS

The most appropriate policy approach for First Nation taxation is to maintain a focus on market value assessments on reserve. There may be cases where off-reserve values are appropriate but there may be others where they are not. The first priority should be that market value is attempted with great effort devoted to seeing that the different assessments on reserve reflect differences among the properties on the reserve. This approach is consistent with that of the Supreme Court of Canada in defining market values on reserve, and it provides an opportunity for First Nations to manage their leasehold properties so that their values are actually higher, rather than lower, than off-reserve values. Finally, it is an approach that is consistent with assessment practices across Canada and it is one that will receive the best reception from leaseholders. Treating leaseholders fairly, in the long run, is the real way to maximize the value of reserve lands.

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