

**SUPREME COURT OF CANADA**

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| **Citation:** Musqueam Indian Band *v.* Musqueam Indian Band (Board of Review), 2016 SCC 36, [2016] 2 S.C.R. 3 | **Appeal heard:** April 26, 2016  **Judgment rendered:** September 9, 2016  **Docket:** 36478 |

Between:

Musqueam Indian Band

Appellant

and

Musqueam Indian Band Board of Review,

Assessor for the Musqueam Indian Band and

Shaughnessy Golf and Country Club

Respondents

- and -

Council for the Advancement of Native Development Officers

Intervener

**Coram:** McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 34) | Brown J. (McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner and Côté JJ. concurring) |

Musqueam Indian Band *v.* Musqueam Indian Band (Board of Review), 2016 SCC 36, [2016] 2 S.C.R. 3

Musqueam Indian Band Appellant

v.

Musqueam Indian Band Board of Review,

Assessor for the Musqueam Indian Band and

Shaughnessy Golf and Country Club Respondents

and

Council for the Advancement of Native Development Officers Intervener

**Indexed as: Musqueam Indian Band *v.* Musqueam Indian Band (Board of Review)**

2016 SCC 36

File No.: 36478.

2016: April 26; 2016: September 9.

Present: McLachlin C.J. and Cromwell, Moldaver, Karakatsanis, Wagner, Côté and Brown JJ.

on appeal from the court of appeal for british columbia

*Aboriginal law — Indian reserves — Taxation — Property assessments — Assessment of leased reserve lands for taxation purposes — Indian Band surrendering portion of reserve lands to Crown for lease to third party — Lease restricting use of lands to golf and country club — Whether applicable Band property assessment by‑law allows assessor to consider use restriction under lease in determining value of lands for taxation purposes — Musqueam Indian Band Property Assessment Bylaw, PR‑96‑01, s. 26(3.2).*

Since 1991, the Musqueam Indian Band exercises jurisdiction over taxation of reserve lands under the *Musqueam Indian Band Property Assessment Bylaw*. In 1996, Musqueam amended s. 26(3.2) of the Bylaw to allow an assessor to consider “any restriction placed on the use of the land and improvements by the band” in determining the value of property for taxation purposes, instead of restrictions imposed by “an interest holder”. In 1957, Musqueam surrendered a portion of its reserve lands to the Crown for lease to the Shaughnessy Golf and Country Club. As the lease restricts the use of the lands to a golf and country club, the assessor for Musqueam consistently assessed the value of the lands based upon this use for tax assessment purposes. In 2011, Musqueam challenged this assessment before a board of review, claiming that the lands should be valued as residential land and that the use restriction in the lease had not been placed “by the band”, since the lease was between the Crown and the Club. The Board of Review stated a case to the British Columbia Supreme Court. Both the chambers judge and the Court of Appeal held that the assessor could take the use restriction into account.

*Held*: The appeal should be dismissed.

As the courts below concluded, the Bylaw permits the assessor to consider the use restriction in the lease between the Crown and the Club in determining the value of the demised reserve lands for assessment purposes. Resolving this issue is a matter of interpreting s. 26(3.2) of the Bylaw, which entails discerning its meaning by examining its terms in their entire context and in their grammatical and ordinary sense, in harmony with the Bylaw’s scheme and objects. Here, the plain wording of s. 26(3.2), read in light of its purpose and context, grants the assessor the discretion to consider the use restriction in establishing the value of the leased lands for tax assessment purposes.

Musqueam’s arguments — that the 1996 amendment to the Bylaw was intended to account for the powers it acquired under the Framework Agreement on First Nation Land Management, and that the term “placed . . . by the band” bars consideration of the lease with the Club since the lease was concluded with the Crown — are not persuasive. The only relevant substantive change to s. 26(3.2) of the Bylaw made by the 1996 amendment was to narrow the range of restrictions on use which an assessor is expressly permitted to take into account, from those imposed by an interest holder (which would include a lessee) to those imposed only by Musqueam itself. Furthermore, while it is true that the lease was between the Club and the Crown, the Crown’s intervention was necessitated by the *Indian Act* which provided at the material time that reserve lands could not be leased without first being surrendered to the Crown. The Bylaw must be read in light of this statutorily mandated Crown role. While the surrender document makes no mention of the lease or the Club, the context in which the surrender occurred and the lands were demised clarifies that Musqueam intended that the lands be leased to the Club. Given that context, the use restriction in the lease was placed “by the band”.

**Cases Cited**

**Referred to:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Vancouver Assessor, Area 9 v. Bramalea Ltd.* (1990), 52 B.C.L.R. (2d) 218; *Petro‑Canada Inc. v. Coquitlam Assessor, Area No. 12* (1991), 61 B.C.L.R. (2d) 86; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *British Columbia (Assessment Commissioner) v. Ryan*, [1979] B.C.J. No. 1966 (QL); *Burnaby/New Westminster Assessor, Area No. 10 v. Central Park Citizen Society* (1993), 86 B.C.L.R. (2d) 24; *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, 155 B.C.A.C. 1; *Guerin v. The Queen*, [1982] 2 F.C. 385.

**Statutes and Regulations Cited**

*Assessment Act*, R.S.B.C. 1979, c. 21.

*Assessment Act*, S.B.C. 1974, c. 6.

*Assessment and Taxation (Miscellaneous Amendments) Act, 1985*, S.B.C. 1985, c. 20, s. 5.

*Indian Act*, R.S.C. 1952, c. 149, s. 37.

*Indian Act*, R.S.C. 1985, c. I‑5, s. 83(1)(a).

*Interpretation Act*, R.S.C. 1985, c. I‑21, s. 12.

*Musqueam Indian Band Assessment By‑law* (1991), s. 26(3.2).

*Musqueam Indian Band Property Assessment Bylaw*, PR‑96‑01, ss. 1(1) “band”, 26(1), (3), (3.2).

**Agreements**

Framework Agreement on First Nation Land Management, 1996 (online: http://labrc.com/wp-content/uploads/2014/03/Framework-Agreement-Amendment-5.pdf).

**Authors Cited**

Appraisal Institute of Canada. *The Appraisal of Real Estate*, 3rd Canadian ed. Vancouver: Sauder School of Business (Real Estate Division), 2010.

British Columbia. Legislative Assembly. *Official Report of Debates of the Legislative Assembly (Hansard)*, 3rd Sess., 33rd Parl., May 3, 1985, p. 5934.

Eaton, J. D. *Real Estate Valuation in Litigation*, 2nd ed. Chicago: Appraisal Institute, 1995.

APPEAL from a judgment of the British Columbia Court of Appeal (Bauman C.J.B.C. and Lowry and Goepel JJ.A.), 2015 BCCA 158, 76 B.C.L.R. (5th) 285, 370 B.C.A.C. 239, 635 W.A.C. 239, [2015] 12 W.W.R. 421, [2015] B.C.J. No. 696 (QL), 2015 CarswellBC 964 (WL Can.), setting aside in part a decision of Maisonville J., 2013 BCSC 1362, [2013] B.C.J. No. 1672 (QL), 2013 CarswellBC 2336 (WL Can.). Appeal dismissed.

*Maria Morellato*, *Q.C.*, *James I. Reynolds* and *Aaron Wilson*, for the appellant.

No one appeared for the respondent the Musqueam Indian Band Board of Review.

*R. Bruce E. Hallsor* and *Greer Jacks*, for the respondent the Assessor for the Musqueam Indian Band.

*John J. L. Hunter*, *Q.C.*, and *Ludmila B. Herbst*, *Q.C.*, for the respondent the Shaughnessy Golf and Country Club.

Written submissions only by *Avnish Nanda*, for the intervener.

The judgment of the Court was delivered by

Brown J. —

1. Introduction
2. This appeal represents the latest stage of the difficult history shared by the Musqueam Indian Band and the Shaughnessy Golf and Country Club. As *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at pp. 345-46, records, Musqueam surrendered a portion of its reserve lands to the Crown in 1957 for lease to the Club. Because the terms obtained by the Crown were less favourable than those which had been approved by Musqueam, and because the Crown did not consult Musqueam before leasing the land on unfavourable terms, this Court held in *Guerin* that the Crown breached its fiduciary duty, and ordered it to pay compensation to Musqueam. Since *Guerin*, the lease has remained in force.
3. The issue presented by this appeal concerns the assessment, for taxation purposes, of those leased reserve lands. Musqueam exercises jurisdiction over taxation of surplus reserve lands under the *Musqueam Indian Band Property Assessment Bylaw*, PR-96-01. While s. 26(1) of the Bylaw provides that the actual value of on-reserve property is to be based on the market value of a fee simple interest located off-reserve, s. 26(3.2) allows an assessor operating under the Bylaw to consider “any restriction placed on the use of the land and improvements by the band” in determining the value of property for taxation purposes. As the lease at issue here restricts the use of the lands to a golf and country club, the Assessor for the Musqueam Indian Band has consistently assessed the actual value of the lands based upon their use as a golf and country club. In 2011, Musqueam challenged that assessment, claiming instead that the lands should be valued as residential land.
4. The narrow question to be decided, therefore, is whether the Bylaw permits the Assessor to consider the use restriction under this lease in determining the value of the lands for tax assessment purposes. Both the chambers judge at the British Columbia Supreme Court and the British Columbia Court of Appeal held that the Assessor could take the use restriction into account: see 2013 BCSC 1362 and 2015 BCCA 158, 76 B.C.L.R. (5th) 285. For the reasons that follow, I agree. The plain wording of the relevant Bylaw provisions, read in light of their purpose and context, grants the Assessor the discretion to consider the use restriction in establishing the value of the leased lands. I would therefore dismiss the appeal.
5. Overview of Facts and Proceedings
   1. Background
      1. The Surrender and the Lease
6. Before the chambers judge, the parties agreed to a series of facts, including “the findings of fact . . . from the *Guerin* decisions”[[1]](#footnote-1) (para. 11). As to those findings of fact, it suffices here to recount that, on October 6, 1957, by a majority vote, the members of Musqueam approved a surrender to Her Majesty the Queen in right of Canada (the “Crown”) of 162 acres of reserve lands; and that, on January 22, 1958, a lease of those lands was entered into between the Crown and the Club, under its former name of Shaughnessy Heights Golf Club, for a term of 75 years. The lease was effective as of January 1, 1958, and has not been terminated or amended. Musqueam did not sign the lease.
7. By the terms of the lease, the Club agreed that it will “[u]se the demised premises only for a golf and country club, with such additional facilities as the lessee may considerable [*sic*] desirable”.
   * 1. Tax Assessments of Musqueam Reserve Lands
8. Until 1991, tax assessments of Musqueam’s reserve lands were conducted under the *Assessment Act*, R.S.B.C. 1979, c. 21. After the *Indian Act*, R.S.C. 1985, c. I-5, was amended to devolve property taxation powers to bands (subject to ministerial approval), Musqueam passed the *Musqueam Indian Band Assessment By-law* in 1990, and it received ministerial approval in 1991. Section 26(3.2) of the Bylaw allowed an assessor to consider “any restriction placed on the use of the land and improvements *by an interest holder of the land*” (emphasis added). The Bylaw also provided for the appointment by Musqueam’s band council of boards of review to hear appeals of assessments of land.
9. In 1996, Musqueam amended the Bylaw to direct an assessor to assess reserve land as it would assess a fee simple interest held off-reserve: s. 26(1). At the same time, it amended s. 26(3.2) to provide that “[t]he assessor may include in the factors that he considers . . . any restriction placed on the use of the land and improvements *by the band*” (emphasis added). The Bylaw, as amended, received ministerial approval in July 1996, and Musqueam appointed the British Columbia Assessment Authority to conduct assessments thereunder in the capacity of Assessor for the Musqueam Indian Band.
10. That same year, Musqueam and 12 other First Nations signed the Framework Agreement on First Nation Land Management (online) with Canada.[[2]](#footnote-2) The Framework Agreement gave signatory First Nations, including Musqueam, the option of managing their reserve lands outside the strictures imposed by the *Indian Act*. More specifically, it allowed those First Nations to develop land codes.
11. Although the leased lands had consistently been assessed under the Bylaw as a golf and country club, Musqueam in 2011 challenged that assessment before a board of review. It argued that the use restriction in the lease had not been placed “by the band”, as required by s. 26(3.2) of the Bylaw, since the lease was between the Crown and the Club, and not between Musqueam and the Club. Musqueam said that the lands should therefore be assessed as residential property. The Club, conversely, maintained that it was open to the Assessor to consider the use restriction in assessing the lands’ value. The Board of Review stated a case to the British Columbia Supreme Court to resolve the dispute.
    1. Statutory and Bylaw Provisions
12. *Indian Act*, R.S.C. 1952, c. 149

**37.** Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

*Musqueam Indian Band Assessment By-law*, 1991

26. . . .

. . .

(3.2) Where the [land] and improvements are liable to assessment . . ., 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.

*Musqueam Indian Band Property Assessment Bylaw*, PR-96-01

26.(1) In this bylaw “actual value” means the market value of the fee simple interest in land and improvements as if the interest holder held a fee simple interest located off reserve.

. . .

(3) In determining actual value, the assessor may, except where this bylaw has a different requirement, give consideration to present use, location, original cost, replacement cost, revenue or rental value, selling price of the land and improvements and comparable land and improvements both within and without the reserve, economic and functional obsolescence, the market value of comparable land and improvements both within and without the reserve, jurisdiction, community facilities and amenities, and any other circumstances affecting the value of the land and improvements provided such considerations do not conflict with subsection (1).

. . .

(3.2) The assessor may include in the factors that he considers under subsection (3), any restriction placed on the use of the land and improvements by the band.

* 1. Judicial History
     1. Supreme Court of British Columbia (Maisonville J.)

1. The chambers judge concluded that the Assessor could consider the use restriction in the lease. Applying the reasoning in *Vancouver Assessor, Area 9 v. Bramalea Ltd.* (1990), 52 B.C.L.R. (2d) 218 (C.A.), and *Petro-Canada Inc. v. Coquitlam Assessor, Area No. 12* (1991),61 B.C.L.R. (2d) 86 (S.C.), she concluded that an assessment based on the highest and best use of land should account for what is legally permitted (para. 63 (CanLII)). As to Musqueam’s argument that the restriction was imposed by the Crown and not “by the band”, she noted that s. 37 of the *Indian Act*, R.S.C. 1952, c. 149 (which governed the leasing of reserve lands at the time of the lease between the Crown and the Club), provided that only the Crown could lease reserve lands, which necessitated that Musqueam first surrender them to the Crown (paras. 80-82). The lease with the Club, then, was entered into by the Crown “as trustee for the Band” (para. 87), by virtue of which Musqueam itself should be taken as having entered into the agreement (para. 88). In that light, and on a plain reading of the Bylaw, the use restriction in the lease qualifies as a restriction imposed by Musqueam, which may be taken into account by the Assessor (para. 92).
   * 1. Court of Appeal of British Columbia (Bauman C.J.B.C. and Lowry and Goepel JJ.A.)
2. While the Court of Appeal allowed Musqueam’s appeal in part so as to vary certain answers to the questions presented in the stated case (which have no bearing on the issues before this Court), it agreed with the chambers judge that the Assessor could consider the use restriction in the lease in assessing the value of the lands. The Assessor’s discretion to consider a restriction on use is limited only by the condition that it be “placed . . . by the band” — which condition is met here (para. 14).
3. This conclusion, the Court of Appeal added, is affirmed by the pertinent legislative history. The Bylaw, as originally enacted in 1990, “largely paralleled” the provisions of the *Assessment Act*, which had been amended in 1985 to allow use restrictions to be considered in assessing tax-exempt lands (para. 15). The important distinction between the Bylaw and the *Assessment Act*, however,was that the former allowed for consideration of restrictions imposed by “an interest holder”, whereas the latter pertained to restrictions imposed by the owner (para. 19). This left open the possibility under the Bylaw that a lessee of reserve lands, as an “interest holder”, could unilaterally reduce the actual value for assessment purposes (thereby reducing its tax burden) by restricting its own use of the land. The 1996 amendment to s. 26(3.2) of the Bylaw substituting “by the band” for “by an interest holder” was designed to bring that provision into closer conformity with the *Assessment Act* by precluding a lessee of reserve lands from unilaterally reducing its tax burden by imposing restrictions on use, while allowing an assessor to take into account use restrictions that are imposed upon the lessee by Musqueam itself (para. 21).
4. Further, in the Court of Appeal’s view, the fact that the Crown — and not Musqueam — had entered into the lease with the Club did not preclude the Assessor from accounting for the lease’s use restriction as having been placed “by the band”. While, in the circumstances (which included Musqueam’s decision to surrender the property to the Crown for lease to the Club), the Crown was “clearly acting ‘on behalf of’ [Musqueam] in entering into the lease”, it is not necessary to go so far as to read the words “on behalf of” into s. 26(3.2) to establish that the use restriction was a restriction placed “by the band” (para. 28). Rather, Musqueam itself “placed the restriction on the Club’s use of the property when it surrendered the property to the Crown” (para. 28). Moreover, to interpret s. 26(3.2) as requiring Musqueam to act directly — that is, without the intervening role of the Crown — in placing the restriction on the lands would render the provision meaningless, since Musqueam could have acted only through the Crown (para. 29).
5. Analysis
6. I have already referred to the narrow question presented by this appeal, being whether the Bylaw permits the Assessor to consider the use restriction imposed upon the Club under the lease. It bears observing that no party contests Musqueam’s power to tax or to manage its reserve lands. Those powers clearly subsist. The issue before this Court goes only to the permissible effect, if any, of a specific provision of the Bylaw on the assessment of the actual value for the purposes of taxation by Musqueam of the reserve lands leased to the Club.
7. Resolving this issue is a matter of interpreting s. 26(3.2) of the Bylaw, which entails discerning its meaning by examining its terms in their entire context and in their grammatical and ordinary sense, in harmony with the Bylaw’s scheme and objects: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. Having been enacted under Musqueam’s delegated authority under s. 83(1)(a) of the *Indian Act*, the Bylaw must be given “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.
8. All parties agree that the context in which the Bylaw was enacted includes the statutory history of the *Assessment Act*. From its enactment in 1974[[3]](#footnote-3) until 1985, assessment of property in British Columbia, both on- and off-reserve, was based upon the “actual value of the land”, without consideration of use restrictions. In 1985, the Act was amended to direct the assessor to consider “any restriction placed on the use of the land and improvements by the owner of the fee”.[[4]](#footnote-4) This amendment was passed in response to the decision of the British Columbia Supreme Court in *British Columbia (Assessment Commissioner) v. Ryan*,[1979] B.C.J. No. 1966 (QL), which held (at para. 14) that “the assessment of leasehold interests in Crown lands must be based on the actual value of the lands and improvements as if such lands were owned in fee-simple by the occupier rather than merely being leased”. The driving concern, then, behind the 1985 amendment was to avoid the unfairness that would otherwise result from imposing upon a lessee a tax burden based on a value associated with a use to which, by reason of use restrictions contained in the lease, the lessee could never put the demised land. This is confirmed by the Minister of Finance’s explanation on second reading that the amendment “specifies that properties held under a Crown lease . . . are to be assessed at their value for those uses permitted by the lease”: British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 3rd Sess., 33rd Parl., May 3, 1985, at p. 5934.
9. Musqueam and the respondents agree that the Bylaw, as originally enacted in 1991, permitted an assessor to take into account the terms of the lease restricting the Club’s use of the lands to a golf and country club. And, indeed, nothing changed with respect to the lands’ assessment when Musqueam assumed property taxation powers — that is, they continued to be assessed as a golf and country club. The parties differ, however, on the significance of the 1996 amendment to s. 26(3.2) of the Bylaw. The Club and the Assessor agree with the Court of Appeal’s reasoning on this point. That is, they say that, by moving from allowing an assessor to consider restrictions placed “by an interest holder” to restrictions imposed “by the band”, Musqueam was merely precluding a lessee from unilaterally lowering the assessed actual value of leased land by crafting a more restricted use. Musqueam, however, contends that the 1996 amendment was intended to account for the powers it acquired under the Framework Agreement to develop land codes.
10. Musqueam also advances two arguments that draw a link between the amended wording of s. 26(3.2), and ss. 26(1) and 26(3) of the Bylaw. Section 26(1) defines “actual value” as 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”. Section 26(3) lists various factors that an assessor may take into account, along with “any other circumstances affecting the value of the land and improvements provided such considerations do not conflict with subsection (1)”. Section 26(3.2) expressly provides that the factors which may be taken into account under s. 26(3) include “any restriction placed on the use of the land and improvements by the band”. Musqueam argues, first, that the “restriction” in s. 26(3.2) is subject to s. 26(3)’s condition that it “not conflict with subsection (1)”. That is, consideration of use restrictions under s. 26(3.2) must not derogate from s. 26(1)’s direction that actual value be determined on the basis of the market value of an off-reserve fee simple interest. Musqueam’s second argument draws from the text of s. 26(3.2) permitting an assessor to consider, among the factors considered under s. 26(3), any “restriction” on use placed “by the band”. In Musqueam’s submission, this refers only to restrictive covenants placed by Musqueam itself, and not by the Crown acting on its behalf.
11. The grammatical and ordinary meaning of the text of s. 26(3.2) of the Bylaw supports the Club’s and the Assessor’s submissions. Aside from the direction inserted into s. 26(1) to an assessor to assess reserve lands as a fee simple interest held off-reserve, the only relevant substantive change to the Bylaw made by the 1996 amendment was to narrow the range of restrictions on use which an assessor is expressly permitted by s. 26(3.2) to take into account, from those imposed by an interest holder (which would include a lessee) to those imposed only by Musqueam itself. The irresistible conclusion to be drawn from that text, read in light of the legislative history of the *Assessment Act*, is that the 1996 amendment to s. 26(3.2) was designed to address the very mischief which the Court of Appeal says drove its enactment.
12. Further, I find none of Musqueam’s arguments to be persuasive.
13. First, while the Framework Agreement contemplated devolving new powers to restrict the use of Musqueam’s reserve lands, those powers did not necessitate the 1996 amendment to the Bylaw. Under general appraisal principles, restrictions on use of leasehold land would already have been accounted for in assessing the highest and best use: J. D. Eaton, *Real Estate Valuation in Litigation* (2nd ed. 1995), at p. 133; see also Appraisal Institute of Canada, *The Appraisal of Real Estate* (3rd Canadian ed. 2010), at pp. 12.4-12.5; *Burnaby/New Westminster Assessor, Area No. 10 v. Central Park Citizen Society* (1993), 86 B.C.L.R. (2d) 24 (S.C.), at para. 28.
14. Moreover, while the Framework Agreement signalled the possibility of change in First Nations’ land management, such change was neither immediate nor inevitable. Three years passed before Parliament enacted implementing legislation and, as the Court of Appeal observed, Musqueam’s land code was not drafted until 2012. This tends to undermine Musqueam’s claim of a link between the 1996 amendment and the Framework Agreement.
15. As to Musqueam’s argument regarding the relationship of s. 26(3.2) to ss. 26(1) and 26(3), and in particular to s. 26(3)’s condition (“provided such considerations do not conflict with subsection (1)”), that condition must be read in its entire context. It pertains to s. 26(3)’s reference to the “other circumstances affecting the value of the land”, not to all considerations which may be relevant in the tax assessment context. More particularly, the argument that ss. 26(1) and 26(3), taken together, preclude an assessor from considering under s. 26(3.2) the impact upon actual value of leasehold interests is undermined by the inclusion of factors in s. 26(3), such as “present use” or “revenue or rental value”, that would likely “conflict with subsection (1)”. That condition, therefore, is clearly intended to apply as its position within the text of s. 26(3) suggests — that is, only to “other circumstances affecting the value of the land and improvements”, and not to the other factors listed in s. 26(3) or to the additional consideration permitted under s. 26(3.2).
16. Turning to Musqueam’s argument which relies upon the text of s. 26(3.2)’s reference to a “restriction” placed “by the band”, it bears stressing that the full phrase which appears in s. 26(3.2) is “*any* restriction placed on the use of the land” (emphasis added). In my view, the grammatical and ordinary meaning of this text is not as narrow as Musqueam submits. It is simply not possible to view the term “any restriction” as exclusively descriptive of a restrictive covenant. There is nothing in s. 26(3.2) or anywhere else in the Bylaw which is remotely supportive of such a confined meaning. It must also be borne in mind that the text of s. 26(3.2) has *always* contained the term “any restriction”, which strongly suggests that the retention of that term in the amendment to s. 26(3.2) cannot be taken as having reduced the scope of restrictions that may be considered.
17. Musqueam points to two decisions from British Columbia — *Central Park Citizen Society* and *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, 155 B.C.A.C. 1. They are, however, of no assistance. *Central Park Citizen Society* concerned the common law rule that restrictions on use will be relevant to assessments only if they run with the land. *Westbank Holdings* states the criteria to be met for a restrictive covenant to exist. Neither of these authorities supports Musqueam’s submission that s. 26(3.2)’s reference to “any restriction” was intended to capture only restrictive covenants.
18. Musqueam further argues that the term “placed . . . by the band” in s. 26(3.2) bars consideration of the lease with the Club. Section 1(1) of the Bylaw defines the “band” as Musqueam. And, since the lease was concluded with the Crown (and not Musqueam), the use restriction contained in the lease was not “placed . . . by the band”. The Court of Appeal, Musqueam says, was wrong to read into s. 26(3.2) the words “on behalf of”, thereby allowing the Assessor to consider restrictions on use that Musqueam had not placed.
19. I agree with Musqueam that, if the Assessor is to consider a restriction under s. 26(3.2), it must be a restriction that was actually placed by Musqueam, and not by the Crown. That said, the legal mechanism by which reserve lands could be leased at the time this lease was granted supports the conclusion that the use restriction contained therein was in fact placed *by Musqueam* and may therefore be considered by the Assessor. While it is true that the lease was between the Club and the Crown, and not between the Club and Musqueam, the Crown’s intervention was necessitated by the *Indian Act* which, as the chambers judge noted, provided at the material time that reserve lands could not be leased without first being surrendered to the Crown. Section 26(3.2) of the Bylaw must be read in light of this statutorily mandated Crown role in taking title to reserve lands which are to be leased. Without more, the fact of that role does not preclude a finding that the use restriction in the lease was placed “by the band”. The only way Musqueam could have placed the use restriction in the lease was through the Crown’s intervention.
20. That the use restriction in the lease was placed by Musqueam, and not by the Crown, is also affirmed by the agreed statement of facts, and more particularly by the findings of fact made in *Guerin v. The Queen*, [1982] 2 F.C. 385 (T.D.), adopted by all parties for the purposes of this appeal.
21. The trial judge’s finding in *Guerin* of a breach of trust by the Crown arose from its decision to lease the lands on terms inconsistent with Musqueam’s intention. Further, he found that Musqueam’s intention was to lease the lands to the Club:

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.

. . . 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.

. . .

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. [pp. 417-18]

1. Musqueam stresses that there is nothing in the *Guerin* trial decision, the record or the surrender document that supports the conclusion that Musqueam itself placed the restriction on the use of the lands. It points in particular to the broad language of the surrender document, which mentioned neither the lease nor the Club, but simply states that the lands are surrendered in trust to the Crown to be leased “upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people” (cited in *Guerin* (F.C.), at p. 407).
2. Ironically, it was the Crown which, in *Guerin*, relied upon the broad language of the surrender document in arguing that it could lease the lands on such terms as it saw fit. Recognizing the importance of Musqueam’s intended terms and the statutory context within which the surrender was made, the trial judge in *Guerin* — as I have already noted above — specifically rejected that argument, noting that “[t]he whole implication of the resolution is that the contemplated surrender was for purposes of a lease with the golf club on terms.” The significance of these terms was also unanimously recognized by this Court (see *Guerin*, at p. 388, per Dickson J. (as he then was); p. 354, per Wilson J.; and p. 393, per Estey J.).
3. While, therefore, the surrender document makes no mention of the lease or the Club, the context in which the surrender occurred and the lands were demised clarifies that Musqueam intended that the lands be leased to the Club. It was not necessary for Musqueam to have stipulated a specific restriction on use, since it is implicit from this context that the lands would be used as a golf and country club. Given that context, the use restriction in the lease was placed “by the band”. To conclude otherwise would be to depart from the unavoidable implications of the findings of fact which supported this Court’s decision in *Guerin* to order the Crown to compensate Musqueam for its unconscionable conduct.
4. Conclusion and Disposition
5. Section 26(3.2) permits the Assessor to consider the use restriction in the lease between the Crown and the Club in determining the value of the demised reserve lands for assessment purposes. I would therefore dismiss the appeal, with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: Mandell Pinder, Vancouver.

Solicitors for the respondent the Assessor for the Musqueam Indian Band: Crease Harman, Victoria.

Solicitors for the respondent the Shaughnessy Golf and Country Club: Hunter Litigation Chambers, Vancouver; Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the intervener: Nanda & Company, Edmonton.

1. In the notice of stated case filed by the Musqueam Indian Band Board of Review, the parties were said to have “accepted and agreed not to challenge any finding of fact in any of [the *Guerin*] decisions”. [↑](#footnote-ref-1)
2. In 1997, one other First Nation also signed the Framework Agreement. [↑](#footnote-ref-2)
3. *Assessment Act*, S.B.C. 1974, c. 6. [↑](#footnote-ref-3)
4. *Assessment and Taxation* *(Miscellaneous Amendments) Act, 1985*, S.B.C. 1985, c. 20, s. 5. [↑](#footnote-ref-4)