

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**CHIEF ERNEST CAMPBELL, B. MARY CHARLES, NOLAN CHARLES,
ALLYSON FRASER, HOWARD GRANT, H. WADE GRANT, WENDY
GRANT-JOHN, TAMMY HARKEY, WAYNE SPARROW, NORA STOGAN,
the elected Chief and Councillors of the Musqueam Indian Band and Nation
suing on their own behalf and on behalf of all other members of the Musqueam Indian
Band and Nation, and GARDEN CITY VENTURES LIMITED PARTNERSHIP**

PLAINTIFFS

AND:

CITY OF RICHMOND

DEFENDANT

STATEMENT OF DEFENCE

1. In answer to the whole of the Statement of Claim, the Defendant City of Richmond (“Defendant” or “the City”) says that on March 18, 2005, the City entered into a Memorandum of Understanding Regarding Garden City Property (“MOU”) with the Musqueam Indian Band (“Musqueam”), Canada Lands Company CLC Limited (“CLC”) and the Department of Fisheries and Oceans.

2. The MOU sets out a plan for development of the Garden City Lands (“Lands”). That development plan included a transfer of the Lands from the federal Crown to CLC. CLC and Musqueam would then enter into a joint venture agreement under which CLC would hold a 50% beneficial interest in the Lands for the benefit of Musqueam. CLC and the City would then execute a purchase and sale agreement for transfer of the Lands to the City after which the City, the Musqueam and CLC would jointly develop the Lands.

3. When the parties entered into the MOU, all were aware that the Lands were included in the Agricultural Land Reserve (“ALR”) and as a result could not be developed unless they were

removed from the ALR. The entire development plan set out in the MOU is predicated on the assumption that the Lands would be removed from the ALR.

4. The MOU provides explicitly that the responsibility for applying to the Agricultural Land Reserve Commission (“Commission”) for the removal of the Lands from the ALR is that of CLC -- not the City. At 1(1), the MOU states “CLC will apply to the Agricultural Land Reserve Commission for the Garden City Property to be removed from the Agricultural Land Reserve.”

5. The only responsibility of the City set out in the MOU with respect to the attempts to secure removal of the Lands from the ALR was that of City staff to “recommend the application for removal” of the Lands from the ALR.

6. On or about November 28, 2005, the City, CLC, Musqueam and Garden City Ventures Limited Partnership executed a Purchase and Sale Agreement in respect of the Lands (“PSA”). The PSA was also predicated on the assumption that the Lands would be removed from the ALR and accordingly contained a non-waivable condition precedent that on or before December 31, 2006, the Lands must have been released from the ALR.

7. The PSA imposed the further obligation on the City in respect of the ALR application that in order to proceed with the purchase of the Lands “on or before December 31, 2005, Richmond City Council will have resolved . . . to recommend to the Agricultural Land Commission that the entirety of the Lands be removed from the ALR. . .”

8. The PSA makes explicit that, “Nothing contained in this Agreement will fetter the discretion of Richmond City Council (nor any official of the City of Richmond) whether or not to take any action or make any decision contemplated in this Agreement.”

9. The MOU and PSA created limited obligations on the part of the Defendant, which the Defendant has fulfilled. In the alternative, any obligations on the part of the Defendant in respect of the Lands arising out of the MOU or the PSA that remained outstanding as of January 2009 were terminated when the CLC and Musqueam agreed to sell the Lands to the City for \$59,170,000 “free and clear of all encumbrances.”

The City Fulfilled its Obligations under the MOU and PSA

10. The obligation of City staff to recommend the application for removal of the Lands from the ALR was fulfilled. On June 24, 2005 a City staff report to the City's General Purposes Committee recommended that the City approve CLC's application to apply for removal of the Lands from the ALR and on November 28, 2005, the City Council did in fact resolve to authorize CLC's ALR exclusion application.

11. Following this recommendation, the City's obligations under the MOU and the PSA with respect to removal of the Lands from the ALR were fulfilled.

12. After the CLC's initial application for removal of the Lands from the ALR was rejected in September 2006, the City did not have any obligation to take further action in respect of assisting the CLC in securing removal of the Lands from the ALR.

13. In cooperation with CLC and Musqueam, the City nevertheless agreed to assist CLC, as agent for Musqueam and the Garden City Ventures Limited Partnership agent, in making a second application for removal of the Lands from the ALR by the City appearing as the "applicant of record" on a Block Application.

14. In answer to paragraphs 23 and 25 and to the whole of the Statement of Claim, the City denies that it "undertook to act on behalf of the Plaintiffs and the CLC" or "assumed and exercised responsibility and control" in respect of the Block Application. To the contrary City staff made clear to CLC in an August 2007 letter relating to the Lands that by agreeing to be the applicant on record for the Block Application it did not "imply that City Staff will lead the Garden City exclusion process." At all times, the CLC retained responsibility for and control of the Block Application.

15. City Council resolved on February 25, 2008 to endorse the Block Application and committed significant resources to preparing the Block Application. But these were not required under the terms of the MOU or the PSA. Rather, these actions were taken in cooperation with CLC and Musqueam and do not constitute assumption of any new obligation on the part of the City.

16. Despite the efforts of the CLC, the City and the Musqueam, on February 12, 2009 the Block Application was rejected by the Commission.

17. The MOU and the PSA were both predicated on the CLC's successful application for removal of the Lands from the ALR.

18. When the CLC was unable to exclude the Lands from the ALR, the PSA was rendered "null and void" and of no further force or effect under its terms on January 1, 2009.

19. Following the termination of the PSA on January 1, 2009, the City no longer had any enforceable obligations relating to removal of the Lands from the ALR under the MOU or the PSA.

If the City had any remaining Obligations under the MOU and PSA in January 2009, those obligations merged with the Agreement to Transfer of the Lands Completed on March 31, 2010.

20. Even if any enforceable obligations on the part of the City towards the Musqueam had existed in respect of the Lands after January 1, 2009, these obligations were terminated when the Musqueam and CLC accepted the City's offer to purchase the land free and clear of all encumbrances as all outstanding agreements in respect of the Lands merged with the agreement to transfer the lands.

21. From time to time, the City, CLC and Musqueam had discussions about the future of the Lands. Following the termination of the PSA on January 1, 2009, these discussions continued, including in a June 18, 2009 meeting in which counsel for Musqueam asked the City whether it had any particular proposal in respect of the Lands and resolving all outstanding issues between the parties.

22. Another meeting took place on October 15, 2009 between the City, CLC and Musqueam. At that meeting, the City presented to Musqueam and CLC a letter dated that same day containing an offer to purchase the Lands from CLC and Musqueam for \$59,170,000, with no conditions and "free and clear of all encumbrances."

23. By letter dated November 13, 2009, CLC and Musqueam requested that Defendant's offer remain irrevocable and open for acceptance by Musqueam and CLC until January 31, 2010,

that the Defendant would accept title subject to the “No Development Covenant” registered at the Land Title Office in favour of Defendant and that “*unless* the City Offer is accepted, the City Offer and this letter are acknowledged to be without prejudice to any rights and remedies of Musqueam and CLC under or in relation to the MOU and the PSA” (emphasis added).

24. By letter dated November 25, 2009, Defendant agreed to the requests set out in the November 13, 2009 letter, subject to the right of the City to revoke the offer on 72 hours notice.

25. By letter dated January 19, 2010, Musqueam and CLC accepted the Defendant’s offer to purchase the lands and delivered executed copies of Land Title Act Form A, Freehold Transfer, sufficient to transfer registered title to the Lands to the Defendant. The Form A executed by the CLC is subject to the implied covenants set out in the *Land Transfer Form Act*, and the City pleads and relies on such Act.

26. By way of Confirmation and Direction dated January 19, 2010, Garden City Ventures Limited Partnership and the Musqueam confirmed their approval to the transfer and sale of the Lands by CLC, in CLC’s capacity as the trustee for Musqueam’s undivided 50% beneficial interest in the Lands.

27. On March 31, 2010, the City transferred \$59,170,000 to CLC’s solicitor on his undertaking to disburse the sale proceeds to CLC and Musqueam in the manner that CLC and Musqueam have directed and instructed. The transfer of the Lands from CLC on behalf of itself and as trustee for the Musqueam and Garden City Ventures Lands was completed on March 31, 2010. Any surviving obligations from the MOU and/or PSA merged with the agreement to transfer the Lands.

Specific Admissions

28. Except as expressly admitted in this Statement of Defence, the Defendant denies each and every allegation in the Statement of Claim.

29. The Defendant admits paragraphs 3 – 7, 12, 13, 16 – 17, 27, 52, 59, 60 and 73 of the Statement of Claim.

30. In answer to paragraphs 1-2 of the Statement of Claim, the Defendant says that it has no knowledge of the identity or status as Indians of the individual Plaintiffs.

31. In answer to paragraph 8 of the Statement of Claim, the Defendant admits that the *Agricultural Land Commission Act*, S.B.C. 2002 c. 36 restricts the development of land within the Agricultural Land Reserve.

32. In answer to paragraph 10 of the Statement of Claim, the Defendant admits that the MOU provides that the CLC is to make application to the Commission for the removal of the Lands but denies that the Defendant later undertook this obligation.

33. In answer to paragraph 11 of the Statement of Claim, the Defendant admits that the provisions quoted at paragraphs (a) – (f) are contained in the MOU.

34. In answer to paragraph 15 of the Statement of Claim, the Defendant admits that the MOU provides that the federal Crown will transfer the Lands to CLC and that CLC and Musqueam will enter into a Joint Venture Agreement under which CLC will agree to hold an undivided and registered 50% beneficial interest in the Lands in trust for Musqueam.

35. In answer to paragraph 14 of the Statement of Claim, the Defendant denies that the MOU created contractual obligations and denies that there was an implied term in the MOU not to do anything that would hinder the removal of the Lands from the ALR.

36. In answer to paragraph 18 of the Statement of Claim, the Defendant admits that the PSA contained a covenant of co-operation but denies that Defendant agreed to employ commercially reasonable efforts to remove the Lands from the ALR and says that the covenant of cooperation was “[w]ithout fettering the discretion of any member of Richmond City Council nor any official of the City of Richmond.”

37. In answer to paragraph 19 of the Statement of Claim, the Defendant admits that under the terms of the PSA, it agreed to recommend the release of the lands from the ALR and says that, as set out in more detail above, it did in fact recommend the release of the Lands from the ALR.

38. In answer to paragraph 21 of the Statement of Claim, the Defendant denies that it had contractual obligations to use commercially reasonable efforts to remove the Lands from the

ALR and says that the PSA was null and void under its terms as of January 1, 2009, because the ALR Release Condition was not satisfied prior to December 31, 2008.

39. In answer to paragraph 22 of the Statement of Claim, the Defendant admits that CLC had made an application to the Commission regarding the Lands prior to entering the PSA but says that the Commission rejected the application on September 8, 2006.

40. In answer to paragraph 24 of the Statement of Claim, the Defendant admits that it submitted a Block Application to remove the Lands from the ALR.

41. In answer to paragraphs 25-26 of the Statement of Claim, the Defendant denies that it assumed and exercised responsibility and control over the Block Application and says that at all material times the CLC maintained responsibility and control over the Block Application.

42. In answer to paragraph 28 of the Statement of Claim, the Defendant admits that the Block Application contained an assessment of community need.

43. In answer to paragraph 29, the Defendant says that the Block application confirmed that the City, CLC and Musqueam had agreed to create a \$10 million Agricultural Endowment Fund and that Richmond City Council had voted to endorse spending the equivalent of \$3.75 million to top up the "interest" on the Agricultural Endowment Fund for up to 10 years while the Agricultural Endowment Fund is being built.

44. In answer to paragraphs 32-35 of the Statement of Claim, the Defendant admits that on or about November 17, 2008, the Defendant's General Manager of Planning and Development presented a report relating to the Block Application and recommending certain measures that could enhance the Block Application.

45. In answer to paragraphs 38-41 of the Statement of Claim, the Defendant says that a City election was held on November 15, 2008 and a new Council was sworn in on December 1, 2008. Defendant admits that the November 17, 2008 was re-presented to the new Council on or about December 5, 2008.

46. In answer to paragraph 44 of the Statement of Claim, the Defendant admits that it advised the Commission on or about January 20, 2009 that it had no further comment on the Block Application.

47. In answer to paragraph 46 of the Statement of Claim, the Defendant admits that on or about February 12, 2009, the Commission rejected the Block Application.

48. In answer to paragraph 54 of the Statement of Claim, the Defendant admits that the terms of the Offer (as defined in paragraph 52 of the Statement of Claim) included a purchase price of \$59,170,000.

49. In answer to paragraph 55 of the Statement of Claim, the Defendant admits that the Offer contained no conditions precedent and had a closing date that was subsequently extended by agreement to March 31, 2010.

50. In answer to paragraph 61 and the whole of the Statement of Claim, the Defendant denies that the Musqueam accepted the City's offer to purchase the Lands under duress and denies that the Musqueam suffered any losses.

51. In answer to paragraphs 62-67 of the Statement of Claim, the Defendant admits it requested the Musqueam execute a release of its rights under the MOU and PSA. Defendant says that the Musqueam letter of March 25, 2010 referenced in paragraph 66 stated that the Musqueam's understanding of the fulfillment of the MOU was based on "the City's letter of October 15, 2009 as supplemented and confirmed in subsequent correspondence."

52. In answer to paragraphs 68-72 of the Statement of Claim, the Defendant denies that any provisions in the MOU remain in full force and effect.

53. In answer to paragraph 74, 77 and 78 of the Statement of Claim, the Defendant denies it owed the Plaintiffs any fiduciary duty or in the alternative that it breached any fiduciary duty.

54. In answer to paragraphs 75-78 of the Statement of Claim, the Defendant denies it owed a duty of care to the Plaintiffs or in the alternative that it failed to meet the standard of care.

55. In answer to paragraphs 79-81 and the whole of the Statement of Claim, the Defendant denies it breached the MOU and the PSA as alleged or at all.

56. In answer to paragraphs 82-84 of the Statement of Claim, the Defendant denies that it has been unjustly enriched. Defendant says that as the Lands have not been removed from the ALR, the value of the land is the value based on the Lands being held in the ALR. The Defendant further denies the Plaintiffs have suffered any deprivation. In the alternative, there is a juristic reason to deny recovery to the Plaintiffs, namely the voluntary sale of their interests in the Lands and acceptance of the full purchase price without reservation.

No loss

57. In response to the Statement of Claim generally, the Defendant says the plaintiffs have suffered no damages.

58. The parties, including the Musqueam, agreed in the MOU that the fair market value of the Lands at the time the Lands were transferred from the Crown to CLC was \$9.54 million.

59. The \$59,170,000 paid by the City for the Lands exceeds the Lands' fair market value.

WHEREFORE the Defendants submit that the plaintiff's claim should be dismissed with costs.

Dated June 30, 2010

Hunter Litigation Chambers
Solicitor for the Defendant

The solicitors for the above-stated Defendant are Hunter Litigation Chambers Law Corporation (John J.L. Hunter, Q.C./Claire E. Hunter), whose place of business and address for delivery is 2100-1040 West Georgia Street, Vancouver, B.C. V6E 4H1.