

SPEAKING NOTES

MEETING OF RICHMOND GENERAL PURPOSES COMMITTEE AND COUNCIL – DECEMBER 8, 2008

Jim Reynolds, General Counsel, Musqueam Indian Band

You have some material from me and from the law firm of Blakes included as Attachment 6 at pages 26 to 37 of the Staff Report before you this afternoon.¹ I do not intend to take up much of your time as I know it is limited. Also, that material largely sets out the Band's legal position on the Garden City matter. It is supplemented by the letter from Mr. Sandrin, the solicitor for Canada Lands, attached as part of Attachment 7 to the Staff Report. In addition, I spoke to Council in March at the time of the public hearing on the ALR application and anyone interested can review the Transcript of that hearing available on the website of the Commission.²

My points today are very simple and can be summarized by saying that Musqueam has every confidence:

- (1) that Richmond will honour the contracts that it has entered into and, especially the obligation in the Memorandum of Understanding to negotiate in good faith and cooperatively to give effect to that MOU; and
- (2) that Richmond will also respect a trust of which it has knowledge, namely the trust of Musqueam's 50 % undivided fee simple or freehold interest in all of the Garden City Lands and will not encourage any breach of trust by any person including the Federal Government.

Dealing with the contract point, I would like to make the following comments:

- (1) the Memorandum of Understanding dated March 18, 2005 is a legally binding contract and will remain binding on Richmond and the other parties including the Federal Government even if the City allows the current Purchase Agreement to elapse at the end of the year;
- (2) the MOU cannot be terminated unilaterally by Richmond or the Federal Government although, as Mr. Sandrin explains in his letter, Canada Lands

¹ http://www.richmond.ca/cityhall/council/agendas/gp/2008/120808_agenda.htm

² http://www.alc.gov.bc.ca/application_Status/38099/from_Richmond/Transcripts/Transcripts_Day1.pdf

and Musqueam may have the option to do so if the understandings cannot be fulfilled³;

- (3) the parties (including Richmond) agreed that, before there can be any termination by Musqueam and Canada Lands of the MOU, Richmond will meet with Musqueam and Canada Lands to discuss and negotiate alternative arrangements "in order to give effect to the spirit of this MOU, to the extent possible, in the changed circumstances"⁴;
- (4) the parties also agreed in the MOU to work "cooperatively and in good faith and [negotiate] whatever other agreements, arrangements and undertakings are required, to give effect to these understandings"⁵;
- (5) all parties agreed in the Purchase Agreement to "employ their respective commercially-reasonable efforts to expedite and complete the development approval processes described in [the] Agreement"⁶;
- (6) if the current Agreement expires, Musqueam has every confidence that Richmond will honour its contractual obligation to negotiate in good faith, cooperatively and in a commercially reasonable manner and enter into any required documents;
- (7) The new documents may include a Purchase Agreement having substantially similar terms although it should be noted that it largely protects the interests of the City rather than Canada Lands or Musqueam so the failure to do so is more of a problem for the City.

In summary, given the requirement of the MOU to work cooperatively and negotiate in good faith other agreement to give effect to the understandings of the MOU, there seems little practical point in Richmond not extending the current Purchase Agreement since, after further expense to all parties, it will likely only lead to a substantially similar Purchase Agreement.

On the trust issue, I refer you to the letters attached as part of Attachment 6 from Blakes and myself and to the Transcript of the Public Hearing. To summarize:

- (1) Musqueam has an undivided freehold or fee simple interest in every inch of the Lands equivalent to that of Canada Lands and the interest is held in trust on its behalf by Canada Lands;

³ See paragraphs 1(22) and 1(23) of the MOU.

⁴ *Ibid.*

⁵ Paragraph 1(1).

⁶ Section 3.2.

- (2) Any talk of a transfer of the Lands to the Federal Government or Richmond without Musqueam's consent is irresponsible and breaches the most basic principles of law. Musqueam is confident that the City will have nothing to do with such suggestions.

On the ownership issue, I would like to quote the City's external counsel, Mr. Keith Clark, at the public hearing in March:

"What the Musqueam have said and what CLC have confirmed is that the Musqueam currently enjoy a 50 per cent interest in the land and, as Mr. Reynolds, pointed out, the interest that they have is actually identical to the interest that I hold in my own house. My wife is the registered holder of my house. I am, because of a trust arrangement, the 50 per cent owner. The Musqueam are 50 per cent owners in a very real and recognizable way in the lands that are the subject of this discussion."⁷

Despite my letter to the Council of March 6 contained as part of Attachment 6, some people still talk about somehow transferring the Lands to the Federal Government without the Band's consent. I would like to quote from the opinion of the law firm of Blakes contained as part of Attachment 6 to the Staff Report:

"Any proposal that the Lands be transferred to any party without Musqueam's consent constitutes a breach of trust. Transferring the Lands without Musqueam's consent would also be an actionable wrong in tort for inducing breach of the contractual terms in the Joint Venture Agreement for those involved. Further, constitutional law imposes on the Crown the duty to act honourably in negotiating agreements, such as the MOU, with First Nations. Crown involvement would also constitute a breach of fiduciary duty. ;... Specific performance for the return of the Lands would also be available in such circumstances as well as compensation for related losses. Furthermore, the Band would have a strong case for an interlocutory injunction to prevent any proposed transfer."

In summary, unless and until Musqueam has given its consent, the talk of a transfer of any Lands to anyone, including the Federal Government is misleading and irresponsible and Musqueam is confident that the City will reject such nonsense.

⁷ *Supra* note 2 at page 140.