Resettling Musqueam Park: Property and Difference in Postcolonial Legal Cultures

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Introduction

“I worked hard all my life and paid taxes and saved money, and now I find myself facing bankruptcy and committing what they call civil disobedience. It’s so unfair.”

“We don’t lack compassion. It’s just a business deal.”

Throughout the late 1990s, a controversial Vancouver property dispute dominated the Canadian political imagination. In 1995, land rents in a local community were set to increase by more than five thousand percent annually, increases that tenants argued would displace them from their homes and lead them to financial ruin. The landlords countered that despite the tenants’ claims to the contrary, the increases were legitimate, not only reflective of property values in the area but also perfectly legal.

Participants’ racial identities figured largely in the dispute. While the landlords employed color-blind discourse, arguing that the dispute was nothing more than a “private contract matter,” the tenants appealed to the government and the courts to protect them from what they characterized as “apartheid” and “ethnic cleansing by fiscal means.” A series of local and national newspaper editorials in support of the tenants critiqued the perceived avarice of the landlords and challenged the legitimacy of the rent increases, insisting that their ultimate effect was “to discriminate on the basis of race.” Supporters of the landlords, while less visible, challenged claims of racial discrimination, arguing
Instead: “The fact is that it is a commercial dispute, not a racial dispute.” As the case wound its way through the federal court system, the two sides of the dispute became increasingly polarized. After five years of court battles, the Supreme Court of Canada ruled in late 2000, finding in favor of the tenants in a split 5 to 4 decision.

In a strange reversal of more familiar roles, the landlord in this case was the Musqueam Indian Band, a First Nation with just over a thousand registered members, and three urban reserves around Vancouver. The tenants, more commonly known as leaseholders, were a group of seventy-three affluent non-Indian homeowners living in Musqueam Park, a residential subdivision located on reserve land leased from the Band. The leaseholders owned their homes, but not the underlying land on which they were located. Instead, they held 99-year leaseholds to the land, originally negotiated in 1965 by the federal government on the Band’s behalf. For the first thirty years of the leases, the leaseholders paid small fixed annual rents. The leases specified, however, that in 1995 the method for calculating annual rents was to change. Rather than fixed rents, the Band and the leaseholders were directed to negotiate a “fair rent” based on six percent of the “current land value” of the property. The leaseholders argued that because of its nature as ‘Indian land,’ as land that was collectively owned and inalienable, Musqueam Park was not analogous to neighboring fee simple land, and consequently should not be appraised as such. The Band disagreed, arguing that the common law practice supported their contention that “current land value” reflected the price that the land would get if it were to be sold on the open market. Thus, the legal crux of the dispute was how properly to appraise the value of the land in order calculate the new rents. In Glass, the Supreme Court upheld an earlier federal decision that argued that because of its location on reserve
land, Musqueam Park should be appraised at fifty percent of the value of similarly situated fee simple land. Following the arguments of the leaseholders, the majority found that leasehold reserve land and its conditions of inalienability and collective ownership constituted a *sui generis* category of property.

Between 1995 and 2000, the battle over rents in Musqueam Park reverberated across Canada. Emerging at a time when many First Nations were battling for legal recognition of their rights to land, to resources, and to self-determination, issues involving indigenous peoples were perceived to be particularly threatening by many non-indigenous Canadians, especially in the province of British Columbia. Within this context, the leaseholders argued that they were not only victims of unscrupulous profiteering on the part of the Band, but also of reckless government policies willing to sacrifice the rights of ‘ordinary’ citizens in a wrong-headed and discriminatory attempt to bring closure to the longstanding claims of indigenous peoples. In this context, debates about “fair rent” and “current land value” exceeded the boundaries of the courtroom, often becoming deeply racialized debates about *what* and *who* were fair and valuable.

Ideas of property and ownership not only structure Canadian legal and economic systems, but also are central cultural metaphors through which citizens articulate entitlement and belonging. By examining the conceptions of property deployed in this case, I explore not only why this case provoked such fervent and widespread controversy, but also why and how the Musqueam claim ultimately failed in the Supreme Court. More specifically, how did the legal discourse in *Glass* work to re-inscribe reserve land as fundamentally different, as “Indian land,” and in many ways inimical to capitalism and profit-making? On its surface, the dispute in Musqueam Park seemed to
be a rather routine dispute about leases, rents, and real estate, yet a deeper analysis reveals not only the centrality of property in the organization of Canadian settler imaginaries but also how terms of cultural difference operate in novel and unexpected ways at this historical moment.

Legal scholar Carol Rose argues that claims to ownership must be understood as culturally-specific narratives in which “the would-be ‘possessor’ has to send a message that others in the culture understand and that they find persuasive as grounds for the claim asserted” (1994: 25). The controversy surrounding Musqueam Park and the Court’s ultimate decision in Glass demonstrate that the Band’s claim, articulated in a capitalist idiom of private property and equality, was not especially persuasive in the cultural context of settler Canada. But why were the Band’s claims to sameness under the law unsuccessful? And further, what is ‘the nature of Indian land,’ and why is it less valuable than other forms of property?

**Resettlement and the Idiom of Difference**

Although not originally an indigenous rights case, Glass was transformed into one, creating a precedent that could have potentially profound effects for how reserve land is understood and valued in the future. In light of increasing economic development and burgeoning non-Indian populations on reserves and reservations across North America, I suggest that the court’s conception of the nature of Indian land has the effect of a 21st century resettlement. Like its 19th century precedent, 21st century resettlement works to make non-Indian settlement on Indian land easier.

Not only was the clash over Musqueam Park a high-profile dispute, revealing some of the deep cleavages extant in Canadian society, but it was also a significant
decision in Canadian law, marking a profound moment in indigenous legal history. During the past thirty years, many indigenous claims, both in legal and extra-legal spheres, have been articulated using an idiom of difference. The idiom of difference refers to self-conscious, explicitly cultural claims that emphasize the idea of epistemological distance between indigenous and settler cultures. Within this context, the notion of cultural difference has been particularly useful in pointing out assumptions embedded in ostensibly neutral institutions such as law and revealing the power inequities inhering in them. Yet the idiom of difference takes on a novel role in Glass.

In order to understand the particular significance of this case, two key points must be articulated. First, the legal claims made by the Musqueam Indian Band in Glass were not based on traditionally “indigenous” legal concerns in Canada (e.g., treaty rights or Aboriginal title) nor were they expressions of “indigenous difference.” (Macklem 2001: 4). Second, the Court’s decision in Glass relied on unquestioned, and often contradictory, notions of property to construct “the nature of Indian land.” Missing from this account, however, was any sustained discussion of the role of colonialism in creating the legal, cultural, and economic conditions out of which Glass emerges. In Glass, the Band articulated its claim in terms of commensurability, in the capitalist idiom of Canadian property law, seeking legally to maximize its profit in Musqueam Park. In contrast to other First Nations’ claims in recent Supreme Court cases, the Musqueam did not go before the Court to seek legal recognition of their difference, but rather asked it to recognize their sameness before the law. Yet the leaseholders contended, and the Supreme Court ultimately agreed, that indigenous difference was a key part of the nature of “Indian land,” and thus fundamental to the legal resolution in Musqueam Park. Thus a
particular irony emerges: the rhetoric of indigenous difference was mobilized not by the Musqueam themselves but rather by the leaseholders and ultimately adopted by the Supreme Court.

**Background to the Dispute in Musqueam Park**

Like many other large west coast cities, Vancouver experienced a booming property market during the 1980s and 1990s. This boom resulted in much higher property values throughout the metropolitan area, but especially on the city’s affluent west side where Musqueam Park is located. Despite this sharp rise in property values, the original 1965 leases dictated that leaseholders in Musqueam Park would pay fixed rents for the first thirty years; thus, leaseholders were protected from sharp increases in land rents. Although the value of their homes matched pace with the city’s boom, leaseholders paid the Band on average between $298 and $375 per lot per year from 1965 through 1995.

Because of its location, size, and status, Musqueam Park had in the years preceding 1995 been an attractive and sought-after residential area in the very competitive Vancouver housing market. Described by a federal judge as “one of the most attractive and desirable locations in Vancouver,” the subdivision sits on approximately forty acres of Musqueam Indian Reserve No. 2 in the affluent southwest part of the city. It consists of seventy-five relatively large lots zoned for single-family residences, ranging in size from approximately 8600 to 27,000 square-feet. It is centrally located, in close proximity to several golf courses, and adjacent to the largest green space in the city, the beautiful Pacific Spirit Regional Park. Prior to 1995, houses regularly sold for hundreds of thousands of dollars. Yet, missing from this description of
Musqueam Park is an account of how such a desirable and valuable residential space emerges on Indian land. In the following sections, I give a brief socio-historical account of the development of reserve land in British Columbia and outline its implications for the Supreme Court’s decision in *Glass*.

**Property of the White People Forever: Race and Property in British Columbia**

Race profoundly structures Canadian society, yet there are discursive conditions which severely limit discussion of these issues. For instance, it is a longstanding myth, oft-reproduced in history textbooks, news media, and other sources, that Canada has been gentler with the indigenous peoples now encompassed by its boundaries than have other nation-states, most notably the U.S. While this myth has been debunked, or at the very least problematized, in academic and activist literatures, it is nevertheless prevalent in public discourse and still frames the reception of many First Nations’ claims.

In Canada, as in other postcolonial nations, the racial categories of white and Indian have been mutually constitutive.

Unlike the U.S., however, it is very rare in public discourse in Canada to speak overtly about race in reference to either indigenous peoples or whites; rather, “culture” is the preferred term used to evoke specific kinds of difference, often effacing the racialized (and gendered) dimensions of Canadian society, and thus limiting critical intervention in larger questions about racism and equality. Building on the work of earlier critical race theorists, Sherene Razack calls this process “culturalization,” arguing that in these circumstances “[c]ulture then becomes the framework used by white society to pre-empt both racism and sexism” (1998: 60).

Concepts of race have a long history in British Columbia, and while these concepts have been by no means monolithic or necessarily coherent, they have been
nevertheless consistently premised on settler assertions of difference from, and superiority to, indigenous peoples. At the time of early resettlement during the mid-19th century, British colonial officials envisioned their westernmost colonies in racial terms by imagining them as spaces for white resettlement, the creation of which would require the formation of sharp legal and spatial divisions between indigenous and white populations. The racialized legacy of these divisions is still apparent today in the province. Paul Tennant argues that despite an increased racial tolerance in the province since the late 1940s, “the pejorative image of the Indian long held by Whites still underlies provincial government policy,” and whiteness is still publicly evoked by settler British Columbians, especially in controversies over land (1990: xi-xii). Thus, an examination of this legacy provides a necessary interpretive context for understanding both the Glass decision and the controversy surrounding it.

An oft-cited fact about BC’s racial history is that a series of treaties negotiated with indigenous peoples on Vancouver Island in the 1850s stated that the purchased land would become “property of the White people for ever.” This assertion locates, in early colonial law, the desire for difference among white settler populations in BC, a desire intimately linked with notions of race and of property, and one which has been present throughout BC’s history. Tennant points out that from the early days of resettlement until the postwar era, “Whites in the province were eager to distinguish themselves from non-Whites” in part as a way of protecting their political and material interests (1990: xi). While these distinctions were organized and expressed in a variety of ways, they were especially manifest in the racial, spatial, and legal dimensions of property.11

*Musqueam Park*
The legal and political foundations of Musqueam Park were laid early, as early as the Royal Proclamation of 1763. In the Proclamation, the British Crown codified the concept of Indian title, distinguishing it from other types of property recognized in common law. As Paul Tennant points out, Indian title differed in three important ways from the typical British fee simple title granted to white settlers, and these differences “sharply curtailed the freedom of the Indians to do as they wished with their lands” (1990: 11). First, Indian title would be held collectively as opposed to individually. Second, unlike fee simple land, Indian land could not be bought or sold on an open market; rather, it could only be transferred to the Crown. Finally, Indian title was recognized rather than created by the Crown, and was thus considered to be a codification of “aboriginal arrangements” predating European colonization (ibid.).

In part because the Royal Proclamation recognizes these pre-existing arrangements, scholars have read it as an essential legal document in the articulation and protection of indigenous rights in Canada and elsewhere (e.g., Harring 1998; Slattery 1985). For instance, Brian Slattery argues that under the terms of the Proclamation, “aboriginal peoples hold continuing rights to their lands except where those rights have been extinguished by voluntary cession,” and thus “the Indian interest constitutes a legal burden on the crown’s ultimate title until surrendered” (1985: 122; cited in Tennant 1990: 11). Such arguments have been central to indigenous land claims throughout the former British empire. This is particularly so in the province of British Columbia where most of the land was appropriated neither through purchase nor conquest, violating recognized European law about the acquisition of property.12
Despite the seemingly progressive nature of decisions like *Delgamuukw* and *Mabo*,¹³ the Canadian Supreme Court’s decision in *Glass* demonstrates the serious limitations of European legal categories like Indian title; namely, the arguments which produce decisions recognizing Indian title are the very same arguments which severely limit what the Musqueam and other First Nations can do with reserve land. The application of legal concepts like *inalienability* to create a *sui generis* category of *leasehold reserve land* become a part of an essentialist legal discourse that works to devalue the nature of Indian land.

Described by Harris as “the province’s most basic colonial spaces,” BC’s reserves were established between 1850 and 1938, and currently comprise less than one half of one percent of the province’s land base. Because the reserve system emerged over a long period of time, under the direction of different colonial regimes, its development was not monolithic; yet for nearly a century, the establishment of Indian reserves was a key element of the colonizing project in BC. The relegation of indigenous peoples to a mere fraction of their traditional territories enabled European settlers to appropriate the majority of land in the province for their own use as well as to exert greater control over resistant indigenous populations. Reserves were not, however, simply manifestations of self-interested economic or political policy; they were also legally circumscribed spaces of segregation, premised on the inferiority and radical difference of indigenous peoples.

While early land policies in BC recognized Indian title and focused on purchasing land from indigenous peoples in order to establish settlement, later policies shifted, denying the existence of Indian title and appropriating much indigenous land through the creation of reserves. By the time the two colonies became the province of British
Columbia in 1866, and by the time the province was incorporated into the Dominion of Canada in 1871, European (mainly British) settlement was well underway and was having a profound effect on indigenous populations.

Land was of central concern to settlers in the province, and the creation of the reserve system enabled them to appropriate large tracts of indigenous territory for individual settlement as well as for economic activities such as mining and agriculture. Settler British Columbians while often holding different aspirations for the land were nevertheless deeply invested in concepts of private property. Whether seeking to settle and farm, to participate in land speculation, or to develop the land in keeping with the demands of industrial capitalism, settlers generally did not question their entitlement to what they perceived as the “wasteland” and “wilderness” of BC.¹⁴

Further, property was a central organizing metaphor for colonial ideology. Historically, private property was considered to be exclusive to Europeans, and it was widely believed that indigenous peoples either had a very primitive understanding of property, or had none at all. Colonizers justified the appropriation of indigenous territories by asserting that these lands were either uninhabited or underused. Yet, as both legal scholar Peter Fitzpatrick (2000) and historian Patricia Seed (2001) point out, even when confronted with contradictory evidence (i.e. indigenous agrarians), colonists either ignored this evidence or they reconstructed concepts and laws which continued to relegate indigenous peoples to lower forms (or as “outside” of political society and property). As Seed suggests:

Those taking others’ property needed to see a clearly defined boundary between themselves and the others to justify seizing assets belonging to those others. If
the line dividing the two were indistinguishable, then the colonizer’s certainty about their right to seize resources might vanish, or at least become open to question (2001: 116).

Thus concepts of private property themselves evolved in relation to these kinds of colonial encounters and the presumed inferiority of indigenous peoples. Echoes of these colonial encounters reverberate in the dispute over Musqueam Park. Despite the Band’s claims to sameness in the form of common law real estate practices and the desire for profit, the Court imposes a radical alterity on reserve land, and this radical alterity ultimately provides justification for the Court’s discounted rents.

**When the Excluded Re-enters: Property, Race, and the Terrain of Difference in a Settler Society**

In ascribing what is excluded to the colonized, peasants, and other incommensurables, not only must their difference to what emerges be fabricated and asserted but also their similarity to what is within must be denied.

--Peter Fitzpatrick, *Laws of the Postcolonial*

In attempting to redress both the historic and contemporary injustices wrought by colonialism, indigenous peoples in Canada, and throughout the world, have sought legal remedies in settler courts. A wide body of literature has demonstrated the serious limitations placed on indigenous peoples when they are required to articulate their claims in the institutions and language of their colonizers. These works analyze the complex terrain of law and its relationship to postcolonialism, demonstrating how epistemologically distinct claims made by indigenous peoples have been managed by settler courts. This literature examines the evocation of difference in legal cases
involving indigenous peoples, especially the use of difference as critique. In this sense, indigenous claims are used to defamiliarize the familiar, and to point out some of law’s fundamental assumptions.

Some scholars have further argued that the articulation of indigenous claims in settler courts produces conditions of incommensurability. The argument goes that because indigenous epistemologies (including concepts of identity, land, and time) are fundamentally irreconcilable with the terms of European modernity, their legal encounter inevitably “highlights a problem inherent in the post-modern condition—the confrontation between two irreconcilable systems of meaning produced by two contending cultures” (Torres and Milun: 2000: 52). While others have challenged such arguments, asserting that they fail to take into consideration the deeply political postcolonial conditions that influence how these self-consciously cultural assertions are made, concepts of indigenous difference have nevertheless been powerful rhetorical tools both for critiquing settler courts and for articulating claims in them.

Yet these types of analyses cannot account for what happened in Musqueam Park. The Band did not make its claims through the idiom of indigenous difference, but rather through attempted participation in the private sphere of Canadian capitalism while the only group to make self-consciously cultural (qua racial) assertions was the leaseholders. Ironically, the dominant rhetoric of opposition to indigenous claims in Canada usually operates “by emphasizing the liberal-democratic ideals of individualism, private property, and equality for all” (Bateman 1997: 61). In this instance, however, the Band’s claims were commensurable with these liberal-democratic ideals. I argue that this
commensurability created a need for a different kind of oppositional discourse, (or, in this case, an oppositional discourse of difference). ¹⁹

The Musqueam Band’s commensurable claims confound notions of indigenous difference, notions that are central both to settler identity and to associated concepts of property. This commensurability was deeply unsettling to the leaseholders and other settler Canadians. In his discussion of the concept of discovery in law, Peter Fitzpatrick thematizes the legal construction of difference and thus offers a way to read the dispute in Musqueam Park:

This construction [of an Other] involves that which is acceptable or within the identity being created in its difference to that which is unfit and excluded. Looked at in reverse, if the excluded were to reenter, as it were, then the identity would disintegrate… (1999:55).

To reformulate Fitzpatrick’s insight: it is not if the excluded re-enters, but rather when the excluded, in this case the Musqueam Band, re-enters. Indigenous peoples have traditionally been excluded from the liberal-democratic spheres of “individualism, private property, and equality for all,” an exclusion which allowed settler identities to be forged in opposition. The Band’s re-entry occurred when it asserted its similarity by declaring its entrepreneurial desires, and demanding a legal remedy in line with common law real estate practice.

I now shift my attention to the historical development of reserves in British Columbia, a development that is essential to understanding the courts’ contemporary invocation of the nature of Indian land. Reserves were not part of an indigenous
geography, but were rather imposed colonial constructions based on settler concepts of property and difference, forming “the basis on which a new geography of colonial settlement would be constructed and an older Native geography effaced” (Harris 2002: 17). The significance of reserves in BC must be understood not only in terms of their historical and legal development, but also in terms of their spatial dimensions. Established during the latter part of the 19th and early part of the 20th centuries, reserves were central to the colonial project, especially as they enabled large tracts of territory to come under colonial control. The legacy of the legal circumscription of these spaces persists and shaped the contours of the dispute in Musqueam Park. Historical geographer Cole Harris argues, “Discontinuous as it was, the line separating the Indian reserves from the rest became, in a sense, the primal line on the land of British Columbia” (2002: xviii). Harris’ spatial metaphor of the “primal line” is still fundamental to the landscape of BC. The Supreme Court’s interpretation of the Musqueam Park leases represents a key shift in the legal and cultural geography of this “primal line.” In Glass, the Court re-inscribes the reserve as “Indian land,” as incommensurate with Canadian common law and capitalism, not only failing to address the problematic colonial history attending this term, but also creating a new legal precedent that makes living on reserve land less threatening for burgeoning non-Indian populations.

Anthropologist Stuart Kirsch argues that a profound limitation of Anglo-American property regimes is “the assumption of alienability—the view that all forms of property are inherently convertible into other forms of property” (2001: 176). An ironic inversion of the assumption of alienability is expressed in the Glass decision; because the Court defines leasehold reserve land as inalienable, as a sui generis category, reserve
land is considered to be outside of the regular ambit of the market. It is precisely its
definition as inalienable that provides justification for the Court to deny the Band’s claim
of sameness under the law. Thus the colonial legal categories of collective ownership,
inalienability of land, and the idea of Indian title are presumed to be essential categories
inhering in the land itself and are used to justify the rent discounts in Musqueam Park.

The effacement of this colonial history was not merely incidental to the Supreme
Court’s decision, but rather constitutive of it. In other words, it is not just that the Court
neglected to give a historicized and more complete account of this case; rather, the
decision itself would not have been possible without the effacement of this history.

The Case: Musqueam Indian Band v. Glass

In 1997, the Federal Court of Canada heard Musqueam Indian Band v. Glass in
order to determine the meaning of “fair rent” and “current land value” as stated in the
leases. In this case, the Band argued that the lots in Musqueam Park should be valued as
though “for sale in the real estate market, i.e. [for] their fee simple value.” They asserted
that the Musqueam Park assessments should be based on the value of other nearby
freehold lots in southwest Vancouver, and their appraisers estimated the average value of
the unimproved land in Musqueam Park to be between $600,000 and $700,000 per lot.
Conversely, the leaseholders argued that the land should be “valued on the basis of a
leasehold interest in land on an Indian reserve,” and their appraiser estimated the average
lot to be worth $132,000. Judge Marshall Rothstein also argued that Musqueam Park lots
are “unique” (and less valuable) because they are part of an Indian Reserve and thus
subject to “uncertainties related to property taxation, native self government, servicing
and other matters.”
Rothstein ruled against the band, concluding that the value of the land could not be determined as though the land was freehold. Citing reasons such as “the Indians’ jurisdiction over the land and uncertainty relating to such matters as property taxation,” “the publicized unrest” on Indian reserves in BC, and the inability for non-Aboriginal residents to participate in Band government, the judge asserted that “it is clear that the leasehold and Indian Reserve aspects had a significant negative influence of [sic] the marketability and value of the property.” Rothstein also agreed with the leaseholders that the Band should not be compensated for the value of improvements to the land (i.e., servicing and development paid for by the leaseholders). He concluded that “current land value” for the Musqueam Park lots should be fifty percent of the fee simple value less the value of improvements, resulting in an average rent per lot per year of $10,000.

One might assume that Rothstein made a distinction between Musqueam Park and other adjacent settlements based on the idea that leasehold land is inherently less valuable than freehold land, in fact, he ruled that “there is no material difference” between them. Instead, the “material difference” in the value of the lots in Musqueam Park comes from “the nature of [Indian] land.”

The Band appealed Rothstein’s decision, and a three-judge panel at the Federal Court of Appeal (FCA) overturned part of Rothstein’s decision in 1998, asserting that the land should be treated as fee simple land for the purposes of determining its current value. The court argued that “there is no authority for taking into account the identity of the owner in the determination of the land value. Aboriginal land should not be treated differently from other land.” Although the appeals court agreed with Rothstein that the Band should not be awarded the costs of improvements made by the leaseholders, it did
maintain that the reference to “current land value” in the original lease was intended to mean six percent of the fee simple value of the land. The FCA held that the trial court had erred in its assessment of “current land value,” that the latter should be based on freehold land rather than on leasehold reserve land, and thus in its determination that the land should be devalued by 50%. The court argued that it was a “long-standing practice...to value the land at its fee simple value”; had the parties intended otherwise, they would have stated so in the contract. Justice Sexton also argued that this was not an atypical lease and that to link rents with the underlying value of the land “ensure[s] that the rent represents the true return negotiated by the parties on the market value of the land. It reflects the fact that the lessor could sell the land at its current land value and reinvest the proceeds at market rates of interest, if not subject to a long-term lease” (cited in SCC: 7).

**Looking through *Glass: Property, Difference, and the Nature of Indian Land***

Moreover, as a safeguard and protection to these Indian Communities, who might, in their primal state of ignorance and natural improvidence, have made away with the land, it was provided that these Reserves should be the common property of the Tribe, and that the title should remain vested in the Crown, so as to be inalienable by any of their own acts.…

--Letter from BC Governor James Douglas to Indian Superintendent I.W. Powell, 1874

The hypothetical used to establish market value in the absence of an actual market should reflect the land as it is in its actual circumstances and should not change
the nature of the land appraised. Since it has chosen not to surrender the land for
sale, the Band holds reserve land and must accept the realities of the market for
this capital asset.”

--Supreme Court of Canada, majority decision, Glass v. Musqueam Indian
Band, 2000

How should “Indian land” be understood in the specific context of assessing its
hypothetical value for the purpose of calculating annual leasehold rents? According
to the Supreme Court’s majority decision in Glass, the inalienability of reserve land was a
key factor in appraising its value, and the Band’s “choice” not to surrender the land for
sale ultimately lessened its worth. But why was the inalienability of reserve land relevant
to this kind of appraisal?

In November 2000, the Supreme Court overturned the appeals court’s decision in
a split 5-4 decision. The Supreme Court’s narrative in Glass locates the origins of the
conflict in 1960, the moment at which the Musqueam Band surrenders forty acres of IR 2
to the Crown. 23 While this certainly makes for a coherent legal narrative, it nevertheless
occludes the conditions under which the reserve comes into being. In Glass, the Court
presents a de-historicized, and consequently naturalized, vision of “Indian land” as
though legal constraints largely imposed over a century and a half of colonization are in
fact based on pre-contact ‘indigenous’ categories. This naturalization of “Indian land”
rests on prevalent settler assumptions about both cultural difference and property. The
inalienable nature of reserve land is a colonial imposition, one tied both to a civilizing
project and to a particular vision of white settlement in what became the province of
British Columbia. In *Glass* there is an de-historicized vision of “Indian land,” one which fails to account for the development of a complex legal system that First Nations had very little to do with creating. For instance, the idea that reserve land is held collectively, and thus cannot be bought and sold as fee simple land, is naturalized as though these were “indigenous” qualities inhering in the land itself while the specific historical development of Musqueam I.R. 2 remains invisible. While indigenous peoples across North America had, and continue to have, very different conceptions of territory and ownership, these conceptions should not be conflated with either the historical development or the current configuration of the reserve system in BC.24

If the Band did choose to surrender its reserve land to the Crown, it would then cease to be reserve land. Title would convert to fee simple title held by the Crown, and then the land could be bought and sold on the open market. In other words, to sell reserve land in the market requires an additional legal step, one steeped in historical and legal circumstances of colonization. As dissenting Chief Justice McLachlin points out, the “only impediment to Band’s selling its land is the leases themselves,” impediments that the majority decision states should be disregarded.25

What would happen if the Musqueam Band *did* choose to sell its land? What would that mean for its claims to territory not encompassed by current reserve boundaries? What would be the implications for its participation in the BC Treaty process? Further, how would that affect a community who defines its relationship to particular territories in cultural terms, and for whom a specific land base has been central to political organization and activism?26 The Supreme Court justices never raise, let alone answer, these questions. Thus, in *Glass*, the profound political and cultural
implications of the Band’s decision not to surrender its land to the Crown, couched in the
gle legal language of rationality and choice, have been completely effaced. The issue then
becomes whether or not the Band prefers to maintain its only legally guaranteed land
base; if so, according to the Court, it must then accept the political and economic
consequences.

Several contradictions emerge in this discourse. First, although the reserve has
been inscribed in particular ways that both create and severely limit the Band’s choices,
neither these limitations nor their origins are explored in the decision. Second, by
maintaining its land base, the Band faces serious economic loss. The choice articulated
in the Court’s majority decision is basically this: surrender the reserve to the Crown or
suffer the economic consequences of holding (leasehold) reserve land. Either way, the
Musqueam Band is legally prevented from participation in free market capitalism. Third,
if the Band were to surrender its land, would it not be the case that after surrender it
would be ineligible to collect on the leases, thus making the entire dispute a moot point?
As Chief Justice McLachlin (dissenting) asserted:

…the proposed 50 percent reduction for reserve related factors depends on the
valuation of an interest that could simply never exist. As the trial court noted,
reserve land can be converted to fee simple only by surrender to the Crown. Once
reserve land is surrendered to the Crown, it loses all the characteristics of reserve
land. Thus there can be no such thing as fee simple title to reserve land. Given
that no such interest can ever exist, it is difficult to see how it could be valued in
any principled way (9; my emphasis).
If one follows the Court’s logic, then, the only way it would accept the Band’s appraisal of Musqueam Park would be if the Band no longer held title to Musqueam Park. Thus, the majority decision rests on the evocation of specific (and logically impossible) circumstances to justify a hypothetical appraisal, an appraisal that must necessarily be seen as deeply politicized given the controversy surrounding it.

Arguably, the majority decision relies on the assumption that the Band had no desire or intention to surrender its land at that time. This would be a safe assumption. As the Band’s participation in the BC Treaty process demonstrates, it has, in fact, been trying to regain territory, not further diminish its land base through sale.

If the land were sold, it would no longer be reserve land. In other words, the only way in which the land could be sold is if the Band surrendered the land to the Crown at which point it would cease to be reserve land and would convert to fee simple land anyway. So, in other words, whether or not the Band sells the land is irrelevant to determining its current land value based on similarly situated freehold land; if they chose to surrender it, it could potentially end up in open market with one extra step (i.e. actual surrender to Crown).

Conclusion: Resettling Musqueam Park

The lots in Musqueam Park were desirable because of their location in one of the wealthiest neighborhoods in Canada and because they were undervalued. Paying less than $400 per year for land in an affluent neighborhood enabled people to purchase larger homes on larger lots for less than they would have paid elsewhere. The land was undervalued because it was Indian land, subject to the limitations imposed upon it by the federal government through legislation like the Indian Act. There is a real circularity
here. The land is desirable because it is undervalued. It is undervalued because it is Indian land. By distinguishing it as Indian land, and by arguing that it is inherently less valuable because of its “nature,” its value is diminished, thus depriving the Band of income and making it more valuable for leaseholders in Musqueam Park, reinforcing what Cheryl Harris calls a “property interest in whiteness.” In the schema outlined by Rothstein, the Musqueam Band is excluded from fully participating in the capitalist sphere; as a result, both the economic and symbolic value of Musqueam Park adheres mainly to the (non-indigenous) leaseholders.

In May 2002, a year and a half after the Supreme Court’s decision in Glass, the Native Investment and Trade Association held a national conference about investment opportunities on Aboriginal lands. The conference brochure read:

Canada’s Aboriginal people are looking for new opportunities. There is [sic] over 6.5 million acres of reserve land in Canada (much of which is yet to be developed). In addition, there is 560 million acres of land that has or is expected to pass to Aboriginal groups as treaty claims are settled. The potential for mixed-use real estate developments and sensibly capturing tourism potential has never been greater. Ensure your participation in this new era. Don’t miss this chance to learn more about the exciting new developments taking place, and the available opportunities.27

While the official version of the Canadian national anthem begins, “O Canada, our home and native land,” another version has circulated widely as a critical reminder of longstanding indigenous claims. This other arrangement, “O Canada, our home on native land,” challenges the legitimacy of European settlement and claims to ownership. While this newer formulation has, of course, been hotly contested, it nevertheless points us to a
key element in this dispute. In Musqueam Park, the leaseholders literally make their homes on what the government legally categorizes as “Indian land.” The Musqueam Park leaseholders are by no means unique in British Columbia, and represent a growing trend. According to economist Jonathan Kesselman, in the decade between 1986 and 1996, the number of non-indigenous residents living on Indian reserves in the province nearly doubled while the number of indigenous residents grew at a much slower rate (approximately 15%) (2000: 8). As of 1996, non-Indian residents outnumbered Indian ones on reserves in the Greater Vancouver area, with the former comprising approximately 65% of the population (ibid.: 120). Yet more than three-quarters of BC’s Aboriginal population live off-reserve (Urban Futures Institute: 2001).

What distinguished Glass from many others is that the Indians involved articulated their claim in the legal idiom of Canadian capitalism, attempting to maximize profit on an investment through the application of a common real estate practice. While the outcome of this case was structured by the specific historical, legal, and political landscapes of Canada and British Columbia, it can nevertheless offer a point of departure for a more general discussion about the nature and reception of indigenous claims throughout the world in the late 20th/early 21st centuries, especially in former British colonies where issues involving land and property are paramount. As indigenous peoples continue to participate in the realm of capitalist enterprise, and as their lives are increasingly ordered by the vagaries of late capitalism, how they are legally allowed to function in this realm becomes increasingly important.

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4 Glass v. Musqueam Indian Band
8 Pacific Spirit is a 763-hectare area that includes dense forests, natural beaches, and walking and cycling paths; because of its designation as a regional park, it is also protected from further development. For photos and more information, see http://www.gvrd.bc.ca/parks/PacificSprit.htm and http://seattlepi.nwsource.com/getaways/060597/vanpix5.html.
9 There is a burgeoning literature in Canadian critical race theory that deals specifically with the racial construction of indigenous peoples, specifically the prevalent native/non-native dichotomy that is more familiar in Canadian race relations. As Schick argues, “[T]he construction of white-identified people is established through the production of Aboriginal peoples as Other” (2002: 105-6). See also Razack 2002.
10 Cited in Tennant 1990: xi.
11 These distinctions were not expressed exclusively in relation to indigenous peoples, but also to other “non-white” populations, especially Asian immigrants. See e.g., Anderson 1991; Backhouse 1999; Lambertson 1995; Mackey 1999; Roy 1989; Ward 1990.
12 See e.g.Culhane 1998; Seed 2001.
13 In late 1997, the Supreme Court recognized in the now-famous Delgamuukw decision that Aboriginal title had never been extinguished in much of the province (including the city of Vancouver). Although the implications of this decision are still unfolding, it was nevertheless considered a watershed moment in the recognition of indigenous rights in Canada and throughout the world. See Culhane 1998; see also Australia’s decision in Mabo.
16 See e.g., Denis 1997; Drummond 1997; Torres and Milun 2000.
17 See e.g., Carrillo 1998; Miller 2001; Povinelli 2002. Povinelli points out “the impossible demand” placed on indigenous peoples to “desire and identify with their cultural traditions in a way that just so happens, in an uncanny convergence of interests, to fit the national and legal imaginary of multiculturalism” (2002: 8). See also Carrillo’s critique of Torres and Milun in which she argues that “while the commentary noted that identity is negotiated and dependent on circumstance, it nevertheless conceptualizes identity as something separate and apart from social life” (1998: 46).
18 I discuss this oppositional discourse of difference in greater detail in another paper: “Property and Otherness in the Musqueam Park Dispute.”
19 As Nicholas Blomley argues, First Nations blockades can be seen as “an assertion of place, implying a Native rejection of systemic racism, territorial dispossession, and economic marginalization” directed toward the dominant society (1996: 24). A way of managing this kind of activism, however, has been to equate it with market “uncertainties,” thus framing it in terms of “marketability” and shifting the focus away from the legitimacy of the claims themselves.
21 Cited in Harris 2002: 44.
22 Glass
23 For instance, oral histories and the ethnographic record reveal that many indigenous groups in pre- and early contact periods organized their territories collectively. Nevertheless, the development of the reserve system in the province cannot be seen as a straightforward reflection of these practices. Nor is collective organization or ownership monolithic.
24 “This removes the justification for discounting the value of the land. The fact that the Band has chosen not to sell its land cannot bear on the land’s value” (9) (emphasis in original).
As Tennant and others have pointed out, that although their land base was severely diminished during colonization, indigenous peoples in British Columbia were generally not forcibly moved from one location to another.

In 1986 there were 10,285 non-indigenous residents living on BC Indian reserves compared to 37,073 indigenous residents. By 1996, the non-indigenous population had increased to 20,086 while the indigenous population only increased to 42,455.