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2011 CarswellBC 2232, 2011 BCCA 345

Greater Vancouver (Regional District) v. British Columbia

Greater Vancouver Regional District, Appellant (Plaintiff) and Her Majesty The Queen In Right Of The Province Of British Columbia, Block F Land Ltd., Block K Land Ltd., and Musqueam Indian Band (also known as Musqueam Nation or Musqueam First Nation) on its own behalf and on behalf of its Members, Respondents (Defendants)

British Columbia Court of Appeal

Bennett J.A., Levine J.A., Newbury J.A.

Heard: June 15, 2011
Judgment: August 15, 2011
Docket: Vancouver CA037150

Proceedings: Affirmed, 2009 CarswellBC 1114, [2009] B.C.W.L.D. 3917, [2009] B.C.W.L.D. 3918, [2009] B.C.W.L.D. 3920, [2009] B.C.W.L.D. 4047, 97 L.C.R. 1, 2009 BCSC 577, 60 M.P.L.R. (4th) 98 (B.C. S.C.)

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M.A. Morellato, Q.C., for Defendant, Block F Land Ltd., Block K Land Ltd., Musqueam Indian Band (also known as Musqueam Nation or Musqueam First Nation) on its own behalf and on behalf of its Members

Subject: Civil Practice and Procedure; Constitutional; Property; Public

Civil practice and procedure.

Statutes.

***Newbury J.A.*:**

1 One of the well-known rules that guide Canadian judges in the interpretation of statutes is that wherever possible, the court should strive to give meaning and effect to every word used in an enactment. As stated in *Maxwell on the Interpretation of Statutes* (12th ed., 1969), "It is a principle of statutory interpretation that every word of a statute must be given meaning: 'A construction which would leave without effect any part of the lan-

guage of a statute will normally be rejected." (See also *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388 at 408; *R. v. Kelly*, [1992] 2 S.C.R. 170 at 188; *Hosseini v. Oreck Chernoff*, 1999 BCCA 386, 65 B.C.L.R. (3d) 182, at para. 27.) Courts are also directed by statute that every enactment "must be construed as being remedial, and must be given such fair, large and liberal construction as best ensures the attainment of its objects." (*Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8.)

2 It is unusual, therefore, to encounter a provision in a provincial statute that the Province itself argues is merely "aspirational", is not binding, and should be given no legal effect, not only as a matter of interpretation, but as a matter of substantive law. The provision in question is s. 3(c) of the *Local Government Act*, R.S.B.C. 1996, c. 323. It states:

> 3. The relationship between regional districts and the Provincial government in relation to this Act is based on the following principles:
>
> . . . . .
>
> (c) notice and consultation is [*sic*] needed for Provincial government actions that directly affect regional district interests ...

3 The interpretation of s. 3(c) arises in the context of a larger challenge by the plaintiff, the Greater Vancouver Regional District (the "GVRD" or the "District"), to the constitutional validity of the *Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act*, S.B.C. 2008, c. 6 (the *"Reconciliation Act")*. By that Act, the Province implemented a "Reconciliation Agreement" with the Musqueam First Nation by transferring certain park lands owned by the District to two companies designated by the Musqueam. The District submits that the *Reconciliation Act* is *ultra vires* the British Columbia Legislature "by reason that it is, in pith and substance, a law in relation to 'Indians and Lands reserved for the Indians'." It will argue at trial that the vesting of the park lands in the recipient companies is void *ab initio* or that alternatively, the companies and the Musqueam Nation hold any interest in the lands on constructive trust for the GVRD's benefit. The District seeks declarations to this effect and substantive relief not relevant to this appeal.

4 As far as s. 3(c) of the *Local Government Act* is concerned, the District alleges at paras. 20-3 of its statement of claim that the Province carried out the transfer of the park lands without notice to or consultation with the District. Thus it sought in its prayer for relief:

> b) a declaration that the enactment of the Act without adequate notice by British Columbia violated s. 3 of the *Local Government Act*;
>
> c) a declaration that the enactment of the Act without adequate consultation by British Columbia violated s. 3 of the *Local Government Act* ...

Although not expressly stated in the pleading, the District's position was that the consequence of such 'violation' was that the *Reconciliation Act* and the transactions carried out thereunder were invalid.

5 In October 2008, the Province applied under R. 19(24) of the (then) *Supreme Court Rules* to have paras. 20-3 of the pleading and the foregoing paras. (b) and (c) of the prayer for relief struck out as disclosing no reas-

onable cause of action. It took the position that the "statement of principle" in s. 3(c) does not create a right, or even a reasonable expectation, that could form the basis of an order declaring the *Reconciliation Act* invalid.

6 The chambers judge in the court below agreed, concluding that:

> ... it was not the intention of the British Columbia legislature that one subsection buried within a part of a statute (that is not a constitutional statute) titled "Purpose, Principles and Interpretation" have the mandatory binding effect contended for by the plaintiff. I would not ascribe to that section the meaning contended by the plaintiff. It is not a mandatory provision; rather, it should be interpreted as part of the preamble to the statute and a provision that expresses the aspirations of the government consistent with the legislative objectives of the *Local Government Act*. [At para. 30; emphasis added.]

She therefore granted the relief sought under R. 19(24).

7 In its factum on appeal, the District reasserted its argument below that s. 3 established a procedural, or "manner and form", restraint, with which future legislation such as the *Reconciliation Act* must comply in order to be valid. It says this part of its case is "novel and difficult not only because no judgment has ever addressed the meaning of section 3 of the Act, but also because the distinction between mandatory and directory provisions is seldom litigated and is one to be made on consideration of a broad context." Thus the District contends the chambers judge erred in striking out the s. 3 claim before trial. As well, it argues that instead of asking whether the claim based on s. 3(c) was bound to fail for purposes of R. 19(24), the chambers judge asked and answered the substantive question of whether s. 3(c) was a manner and form requirement on its merits, effectively imposing a higher standard of persuasion than the "very low" one mandated by R. 19(24).

8 In his oral submissions in this court, Mr. Macintosh on behalf of the GVRD stated that the District wished to amend its prayer for relief to "better reflect paras. 20-3 in the statement of claim, by also seeking declaratory relief for inadequate notice and consultation". In place of paras. (b) and (c) quoted above, the District wishes to substitute:

> (b) a declaration that each of the formation of the Settlement Agreement and the enactment of the Act without adequate notice by British Columbia violated s. 3 of the *Local Government Act*;
>
> (c) a declaration that each of the formation of the Settlement Agreement and the enactment of the Act without adequate consultation by British Columbia violated s. 3 of the *Local Government Act*.

(The underlined references to the Settlement Agreement would be added by the amendment.)

9 The GVRD also sought to advance what I understood to be an alternate argument on appeal concerning declaratory relief: counsel differentiated in this court between those parts of the statement of claim that seek to have the *Reconciliation Act* declared *ultra vires* or void, and paras. (b) and (c), before or after amendment. In Mr. Macintosh's submission, even if the *Reconciliation Act* were found to be valid (and s. 3(c) of the *Local Government Act* not mandatory), the court could still grant the District a declaration that s. 3(c) had been "ignored" or "breached ... as a directory provision." Such a declaration would, he contends, have a "real impact" on the nature and extent of "rights" (to notice and consultation) said to be created by s. 3(c) and could be a "valid remedy for failure to comply with the section's requirements." This argument necessitated further written submis-

sions from all counsel. I will return to it in due course.

10 I begin, however, by reviewing in greater detail the legal context of this appeal — the District's pleadings, which of course must be assumed to be true for purposes of R. 19(24), and the statutory provisions with which we are concerned.

Legal Background

The Reconciliation Act

11 The GVRD pleads that it is the owner in fee simple of the lands that comprise the Pacific Spirit Regional Park. The Park is located within the University Endowment Lands and wraps around the University of British Columbia campus. The Park included two parcels, "Block F" and "Block K", collectively defined as the "Park Lands" in the statement of claim, which lie within the territory over which the Musqueam assert aboriginal rights and title under s. 35 of the *Constitution Act*, 1982. Evidently, Blocks F and K were sold to the GVRD by the Province in 1989, but subject to an express condition, contained in a court order, that the conveyance was "without prejudice to the aboriginal claim of the [Musqueam]": see *Musqueam Indian Band v. British Columbia*, [1989] B.C.J. No. 648 (C.A.).

12 The Band is the plaintiff under a handful of legal proceedings against British Columbia (*inter alia*), most of which have not been resolved, although the Band has succeeded in obtaining declarations that the Province failed to discharge its duty to consult with the Musqueam in connection with certain land transactions. Treaty negotiations have been proceeding for several years among the Musqueam, the Province and Canada under the aegis of the British Columbia Treaty Commission.

13 On March 11, 2008, the Musqueam and the Province entered into a "Settlement Agreement" whereby the Province agreed to transfer four parcels of land, including the Park Lands, to two companies (defendants herein) designated by the Musqueam, in exchange for the settlement of certain claims and the release of the Province, the federal Crown and their agents from such claims. The Province also paid a cash amount of $20.3 million in consideration of the transfer of the two parcels other than Blocks F and K, i.e., the land now occupied by the University Golf Club.

14 On March 31, 2008, the *Reconciliation Act* came into force. Blocks F and K were the subject of s. 3 of the statute, which provided in material part:

> 3(1) On the effective date, and despite any other enactment or law to the contrary,
>
> (a) a fee simple estate in Block F is vested in the applicable designated company free and clear of all charges other than the following:
>
> . . .
>
> (b) a fee simple estate in Block K is vested in the applicable designated company free and clear of all charges other than the following:
>
> . . .

> (2) On the effective date, Block F and Block K cease to be a regional park within the meaning of the *Local Government Act*, and, without limitation, the vestings referred to in this section take effect free of any dedication to the public.
>
> (3) On the effective date, and despite the *University Endowment Land Act*, the minister responsible for the administration of that Act may, on behalf of the government, indicate in writing his or her support for the addition of Block K to Musqueam Indian Reserve No. 2.

With respect to Blocks F and K, ss. 7(3) and 8 provided:

> 7(3) No compensation is payable to the Greater Vancouver Regional District as a consequence of the vestings referred to in section 3 and any and all claims by the Greater Vancouver Regional District in relation to the vestings referred to in section 3 are extinguished. [Emphasis added.]
>
> . . . . .
>
> 8 No legal proceeding for damages or compensation lies or may be commenced or maintained against the government, the Musqueam Indian Band or a designated company in respect of a matter referred to in section 2, 3 or 4.

Finally, s. 12 stated that in the event of a conflict or inconsistency between the *Reconciliation Act* and any other enactment, the *Reconciliation Act* was to prevail.

15 As contemplated by the Act, the Minister of Aboriginal Relations and Reconciliation issued B.C. Reg. 71/2008 affirming the effective date of the Act as April 14, 2008 and vesting Block F in the defendant Block F Land Ltd. and Block K in the defendant Block K Land Ltd. Each of these companies is controlled by the defendant Musqueam Band.

16 As mentioned above, the GVRD alleges in its pleading that the Province did not provide adequate notice or adequately consult with it with respect to the Settlement Agreement or the *Reconciliation Act*, and that such failure constitutes a breach of s. 3(c) of the *Local Government Act*.

Local Government Act

17 The District's pleadings do not provide any information regarding the circumstances surrounding the enactment of s. 3 of the *Local Government Act*. However, it appears the predecessor of s. 3 was first enacted in 1998 as s. 4 of the *Municipal Act*, R.S.B.C. 1996, c. 323 by the *Local Government Statutes Amendment Act*, 1998, S.B.C. 1998, c. 34. The preamble to the amending Act referred to a protocol that the Province had entered into with the Union of British Columbia Municipalities in 1996, which had:

> (a) recognized local government as an independent, responsible and accountable order of government,
>
> (b) established principles to form the basis of the relationship between the Provincial and local orders of government, and
>
> (c) provided for the formulation of individual sub-agreements.

The preamble continued:

AND WHEREAS the Province of British Columbia and the Union of British Columbia Municipalities entered in the Sub-Agreement on a New Legislative Foundation for Local Government on October 3, 1997 that establishes the intent of the Province to build a new legislative foundation for local government and the 9 principles for developing and maintaining that legislative foundation;

AND WHEREAS the provisions in this Bill are a significant phase in the reform process intended to establish this new legislative foundation.

18 Section 1 of the *Municipal Act* as amended purported to recognize that "local government" is an "independent, responsible, and accountable order of government within its jurisdiction" and stated the purposes of the Act as follows:

(a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities,

(b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and

(c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities.

19 Section 2 set forth four purposes of local governments, and s. 3 stated that the powers conferred on local governments by the Act "are to be interpreted broadly in accordance with the purposes of the Act ... and of local government, subject to the specific limitations and conditions" established by or under the Act. Then followed s. 4, which pronounced principles on which the "relationship between local governments and the provincial government in relation to this Act is based ...". These included the principle, in para. (c) of s. 4, that "notice and consultation is needed for provincial government actions that directly affect local government interests".

20 In 2003, what had become the *Local Government Act* was further amended by the *Community Charter Transitional Provisions, Consequential Amendments and Other Amendments Act, 2003*, S.B.C. 2003, c. 52, s. 162. By that Act, the "principles" previously in s. 4 were moved to s. 3 and the references previously made to "local governments" were changed to refer to "regional districts". I reproduce here ss. 2 and 3 of the current Act in their entirety:

Purposes of Regional Districts

2 Recognizing that regional districts are an independent, responsible and accountable order of government within their jurisdiction, the purposes of a regional district include

(a) providing good government for its community,

(b) providing the services and other things that the board considers are necessary or desirable for all or part of its community,

(c) providing for stewardship of the public assets of its community, and

(d) fostering the current and future economic, social and environmental well-being of its community.

Principles for Government Relations

3 The relationship between regional districts and the Provincial government in relation to this Act is based on the following principles:

(a) cooperative relations between the Provincial government and regional districts are to be fostered in order to efficiently and effectively meet the needs of the citizens of British Columbia;

(b) regional districts need the powers that allow them to draw on the resources required to fulfill their responsibilities;

(c) notice and consultation is needed for Provincial government actions that directly affect regional district interests;

(d) the Provincial government recognizes that different regional districts and their communities have different needs and circumstances and so may require different approaches;

(e) the independence of regional districts is balanced by the responsibility of the Provincial government to consider the interests of the citizens of British Columbia generally.

Section 4 contained the "broad powers" provision previously in s. 3, but was augmented by ss. (2), dealing with specific powers. The Preamble to the 1998 amending Act was not carried forward.

The Judgment Appealed From

21 The reasons of the chambers judge below are indexed as 2009 BCSC 577. She began by describing the factual background and the terms of the *Reconciliation Act*. She stated the question before her thus:

Consequently, the question before me is whether, assuming the province did not give notice nor consult with the GVRD concerning the *Musqueam Reconciliation Act*, non-compliance with s. 3(c) of the *Local Government Act* has the effect of invalidating the enactment of the *Musqueam Reconciliation Act*? [At para. 13.]

22 She described the GVRD's position that s. 3(c) of the *Local Government Act* constitutes a "self-imposed procedural restraint" or "manner and form" requirement that precludes the Legislature from enacting any legislation that affects the interests of a local government until it has been notified and consulted. (Para. 14.) She then reviewed various passages from Professor Peter Hogg's text, *Constitutional Law of Canada* (5th ed., supp.) concerning manner and form restraints on legislative power, and made brief reference to the leading cases, *R. v. Mercure*, [1988] 1 S.C.R. 234; , [1991] 2 S.C.R. 525 and *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721. The Province argued that s. 3 of the *Local Government Act* is "ordinary" rather that "constituent" or constitutional legislation and that the language of s. 3 is "policy-oriented, directive legislation". The chambers judge continued:

It is argued that s. 3 does not create stand-alone substantive statutory duties, like those in the two bilingual reference cases mentioned above; rather, these provisions are interpretive or directive type statements. It is further argued that if this legislation was intended to be a manner and form requirement like *Mercure*, the effect of the legislation would have to be much clearer, that is, framed in imperative language rather than

the vague language used. [At para. 23.]

23 The Court considered that ss. 2(a) and (d) of the *Local Government Act* were "statements of goals to which regional districts aspire"; that s. 3 stated "five principles to foster good relations between the province and the regional districts" and that paras. 3(b), (d) and (e) "could not be construed as manner and form requirements". With respect to 3(c) in particular the chambers judge observed:

> ... The section is vague as to who should consult with whom, or when, and whether and how notice is to be given, or if both notice and consultation are always required. What is clear from the cases cited above and the text of Prof. Hogg, is that for a statutory provision to operate as a manner and form requirement to limit future legislative acts, the enactment must be explicit in so doing. Further, it is usually only constitutional or quasi-constitutional legislation, such as language rights legislation, or human rights codes, or parliamentary procedural legislation, that is likely to operate as manner and form requirements. [At para. 29.]

24 Finally, she concluded:

> ... it was not the intention of the British Columbia legislature that one subsection buried within a part of a statute (that is not a constitutional statute) titled "Purpose, Principles and Interpretation" have the mandatory binding effect contended for by the plaintiff. I would not ascribe to that section the meaning contended by the plaintiff. It is not a mandatory provision; rather, it should be interpreted as part of the preamble to the statute and a provision that expresses the aspirations of the government consistent with the legislative objectives of the *Local Government Act*.
>
> The plaintiff argues that this case is novel and complex and should not be decided under R. 19(24)(a). In my view difficult questions of law, even if they are complex or novel, may well be decided under this rule if on a proper analysis of the law it is plain and obvious that the claim cannot succeed. In my view, for the reasons given above, this claim cannot succeed and it is quite proper to so decide the question under R. 19(24)(a) ...
>
> For these reasons I would not interpret s. 3(c) as being a mandatory requirement that binds the legislature and on which the plaintiff can sue for the province's failure to give notice and to consult. It is clear that this part of the plaintiff's claim cannot succeed. [At paras. 30-2.]

In the result, the Court granted the Province's application to strike paras. 20-3 of the District's statement of claim and subparas. (b) and (c) of the prayer for relief.

On Appeal

25 In its factum, the GVRD asserted the following error on the part of the court below:

> The appellant respectfully submits that the chambers judge erred in striking our paragraphs 20-23 of the Statement of Claim and paragraphs (b) and (c) of the prayer for relief.

26 It is seldom helpful for an appellant simply to state in Part 2 of its factum that the order of the court below was erroneous. From the "Argument" portion of the District's factum (as augmented by its further written submissions), however, I take the following issues as arising on this appeal:

> 1. Did the chambers judge fail to take the correct approach under R. 19(24) by addressing the District's case

on its merits insofar as s. 3(c) of the Act was concerned, rather than considering only whether (this part of) the case was bound to fail?

2. Assuming the pleadings remain as they now stand or are amended as counsel proposes, did the chambers judge err in finding that s. 3(c) does not constitute a "manner and form" restraint but was instead "part of the preamble" to the *Local Government Act* that "expresses [only] the aspirations of the government"?

3. If s. 3(c) does not impose a mandatory restraint, could declaratory relief nevertheless be available to the GVRD to the effect that the Province's (assumed) failure to notify or consult with the District "violated" s. 3(c), or is it plain and obvious such relief would not be granted?

Rule 19(24)

27 The GVRD contends that the chambers judge below failed to apply the familiar "plain and obvious" test to the application before her under R. 19(24). The District cited various cases which frame the test in different ways: in *Minnes v. Minnes* (1962) 39 W.W.R. 112, Tysoe J.A. asked whether the statement of claim disclosed some question fit to be tried by a judge or jury; Norris J.A. in the same case asked whether the pleadings, with such amendments as might reasonably be made, disclosed a "proper case to be tried"; in *DuMont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279, Wilson J. for the Court equated the test with whether the outcome of the case was "beyond reasonable doubt"; in *Hunt v. Carey Inc.*, [1990] 2 S.C.R. 959, she referred both to the "plain and obvious" test and to whether the plaintiff had "some chance of success"; and in *Pearson v. Boliden Ltd.*, 2002 BCCA 624, 222 D.L.R. (4th) 453, this court asked whether the plaintiff's pleadings disclosed a "triable issue". (See also *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15). However, little is gained by pointing out these semantic differences, and I am content to use the "plain and obvious" or "bound to fail" formulations.

28 The District's argument that the chambers judge applied the wrong test is based mainly on para. 2 of her reasons, where she stated that the question raised by the motion was "whether in enacting the *Local Government Act* ... the British Columbia legislature bound itself to give notice to, and consult with, regional districts, where the actions of the provincial government directly affect regional district interests ...", and para. 13, where as seen above, she described the question as whether non-compliance with s. 3(c) of the *Local Government Act* had the effect of invalidating the enactment of the *Reconciliation Act*.

29 Without more, these formulations of the issue might be of concern. At the same time, however, the chambers judge referred at para. 15 to the District's argument that the question of whether s. 3 creates a "manner and form" requirement is a "novel and complex issue and ought not to be resolved by way of R. 19(24)". She said essentially the same thing at para. 31, near the end of her legal analysis, observing that difficult questions of law, even if they are complex or novel, "may well be decided under this rule if on a proper analysis of the law it is plain and obvious that the claim cannot succeed." On this point, she cited *Kripps v. Touche Ross & Co.* (1992) 94 D.L.R. (4th) 284, 69 B.C.L.R. (2d) 62 (C.A.); *Pearson v. Boliden*, *supra*; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2008 BCSC 419, 82 B.C.L.R. (4th) 362 and *McMurray v. Marshall*, 2005 BCSC 961, 47 B.C.L.R. (4th) 127. Based on the reasons she had given, she concluded that "It is clear that this part of the plaintiff's claim cannot succeed."

30 Reading the reasons as a whole, and considering that the caselaw decided under R. 19(24) is well-known, I am satisfied the chambers judge did apply the correct test. Nor was the issue an unsuitable one to be dealt with under R. 19(24). The determination of whether s. 3(c) is substantive or procedural, or mandatory or directive,

does not require evidence of the "history and goals" intended to be served by the *Local Government Act*, or of the "respective effects of the provision being mandatory or directory, such as what consultation of regional districts would entail, how it would affect the relationship between the Province and Regional Districts and how it would impact on the legislative process", as the District contends. "Evidence" of this kind would be purely speculative and would in my view not assist with the core question of the legislative intent and effect of s. 3.

31 Being satisfied the question before the court below was one of law that could be decided on the assumed facts set out in the District's pleadings, I would not accede to this ground of appeal.

'Manner and Form' Requirement?

32 The District's original submission as stated in its factum was that s. 3(c) established a manner and form restraint on its legislative enactments, with which future legislation (including the *Reconciliation Act*) had to comply *to be valid* — in other words, that notice to and consultation with regional districts were conditions of the validity of "Provincial government actions that directly affect regional district interests" and that enacting the *Reconciliation Act* was one such 'government action'.

33 The District relied on a small body of Canadian law dealing with so-called "manner and form" restraints on the legislative powers of governments. The phrase "manner and form" (which originates in colonial legislation) is used to differentiate such *procedural* requirements from restraints on the "content, substance or policy" of legislation (see Hogg, *supra*, at 12-11). Restraints of the latter kind are not permitted to interfere with the authority of government to repeal, amend or pass legislation. As Professor Hogg writes:

> Not only may the Parliament of a Legislature, acting within its allotted sphere of competence, make any law it chooses, it may repeal any of its earlier laws. Even if the Parliament or Legislature purported to provide that a particular law was not to be repealed or altered, this provision would not be effective to prevent a future Parliament or Legislature from repealing or amending the "protected" law. The later law, though in conflict with the protecting provision, would unhesitatingly be upheld by the courts. Where two laws of the same legislative body are inconsistent, the general rule is that the later is deemed to impliedly repeal the earlier. In political terms, the rationale of this rule is clear. If a legislative body could bind itself not to do something in the future, then a government could use its parliamentary majority to protect its policies from alteration or repeal. This would lay a dead hand on a government subsequently elected to power in a new election with new issues. In other words, a government while in office could frustrate in advance the policies urged by the opposition. [*Supra*, at 12-8 - 12-9.]

On the other hand, laws that prescribe the "manner and form" in which legislation must be enacted have been upheld — albeit mainly in the constitutional or quasi-constitutional context, and mainly with respect to requirements relating to voting majorities for the passage of laws: see *Attorney-General for New South Wales v. Trethowan*, [1932] A.C. 526 (J.C.P.C.) and *Bribery Commissioner. v. Ranasinghe*, [1965] A.C. 172 (J.C.P.C.] at 196-97, cited in *R. v. Mercure*, *supra*, at 277-80.

34 The interplay between impermissible restraints on legislative authority on the one hand and manner and form requirements on the other is illustrated by *Re Canada Assistance Plan*, *supra*, which tested the efficacy of a provision in the *Canada Assistance Plan*, R.S.C. 1970, c. C-1, to the effect that cost-sharing agreements under the Plan could be amended only with the mutual consent of the parties. British Columbia challenged a proposal announced in the federal budget to cap the growth of transfer payments under the *Plan* to British Columbia, Alberta and Ontario. The Supreme Court was asked whether such a law would constitute a unilateral amendment

without the required consents, or whether the federal government was constrained from introducing a bill that would defeat the provinces' legitimate expectations created by the terms of the *Plan* and the agreements thereunder.

35 On the first question, the Court noted that Canada's obligation to pay amounts under the Plan arose from s. 3(1)(a) of the statute, which provided that "Canada agrees ... to pay to the province of British Columbia the contributions or advances ... that Canada is authorized to pay to the province under the Act and the Regulations". In the analysis of Sopinka J. for the Court, this referred to:

> ... contributions or advances under s. 5 of the *Plan*, an instrument that is to be construed as subject to amendment. This is the effect of s. 42(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which states:
>
> > 42(1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.
>
> In my view this provision reflects the principle of parliamentary sovereignty. The same results would flow from that principle even in the absence or non-applicability of this enactment. But since the *Interpretation Act* governs the interpretation of the *Plan* and all federal statutes where no contrary intention appears, the matter will be resolved by reference to it.
>
> It is conceded that the government could not bind Parliament from exercising its powers to legislate amendments to the *Plan*. To assert the contrary would be to negate the sovereignty of Parliament. [At 548; emphasis added.]

(The British Columbia counterpart to s. 42(1) of the federal *Interpretation Act* is found at s. 15(1) of the *Interpretation Act*, R.S.B.C.1996, c. 238.)

36 The Province's second argument in *Re Canada Assistance Plan* sought to surmount the sovereignty difficulty by differentiating between Parliament and the executive branch of the federal government. The Province contended that although the doctrine of legitimate expectations could not constrain Parliament from passing a bill, it could constrain the Minister of Finance or any other member of the government from introducing a bill into Parliament. (See Hogg, *supra*, at 12-9.) Again, the Court rejected this argument, reasoning that:

> Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. Such expectations might be created by statements during an election campaign. The business of government would be stalled while the application of the doctrine and its effect was argued out in the courts. Furthermore, it is fundamental to our system of government that a government is not bound by the undertakings of its predecessor. The doctrine of legitimate expectations would place a fetter on this essential feature of democracy. I adopt the words of King C.J. of the Supreme Court of South Australia, *in banco*, in *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389, at p. 390, a case strikingly similar to this one:
>
> > Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations.

> While the statement deals with contractual obligations, it would apply, a *fortiori* to restraint imposed by other conduct which raises a legitimate expectation.
>
> A restraint on the Executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself. [At 559-60; emphasis added.]

37 Last, the Court considered an argument advanced by the Native Council of Canada and the United Native Nations of British Columbia ("NCC") to the effect that "even a sovereign body can restrict itself in respect of the 'manner and form' of subsequent legislation." (At 561.) In the NCC's submission, the federal government *had* so constrained itself by requiring that any subsequent legislation altering the *Plan* have the consent of the affected province or provinces. Again, however, the Court rejected this argument, noting first that any "manner and form" provision in an "ordinary" statute must overcome the clear words of s. 42(1) of the *Interpretation Act*, quoted earlier, which require that federal enactments be interpreted in accordance with the principle of parliamentary sovereignty. The sections of the *Plan* relied on revealed no such intention. It was "no coincidence", Sopinka J. noted, that when the court had found "manner and form restrictions, the instrument creating the restrictions has not been an ordinary statute". This had been the case in *R. v. Drybones*, [1970] S.C.R. 282 with respect to the *Canadian Bill of Rights*, S.C. 1960, c. 44, and *Mercure*, *supra*, with respect to bilingual obligations under the *North-West Territories Act*, R.S.C. 1886, c. 50. In his analysis, both pieces of legislation were of a "constitutional nature". (Cf. Hogg, *supra*, at 12-17, fn. 59.) Sopinka J. stated:

> It may be that where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form. But where a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bind itself in the future. [At 563; emphasis added.]

Further, the Court suggested that a provision requiring the consent to legislation of a particular kind could not be regarded as a "manner or form of lawmaking" but would, in the words of King C.J. in *West Lakes Ltd.*, *supra*, instead amount to a "renunciation *pro tanto* of the lawmaking power." (At 397-98, quoted by Sopinka J. at 564; see also *Newfoundland v. Nfld. Assn. of Provincial Court Judges*, 2000 NFCA 46, at para 531.).

38 It was likely this reasoning on which the chambers judge relied in the case at bar when she noted at para. 29 of her reasons that if a statutory provision is to operate as a manner and form requirement, it must be explicit, and that "it is usually only constitutional or quasi-constitutional legislation ... that is likely to operate as manner and form requirements." The District contends on appeal that it is "insufficient" in the context of R. 19(24) to rule out s. 3(c) as a manner and form requirement simply by observing that such requirements are "usually" found in constitutional or quasi-constitutional legislation. Further, the *Local Government Act* provides a framework for local governments, establishing regional districts as an "independent, responsible and accountable order of government within their jurisdiction" as described in s. 2 of the Act. In this sense, the District suggests, it may be seen as a piece of legislation that, if not constitutional, is something close to it.

39 I agree that whether or not section 3 of the *Local Government Act* is constitutional or quasi-constitutional legislation may not be determinative of whether the District's case is bound to fail. In this regard, I note Professor Hogg's opinion that it is "reasonably clear" a legislative body "may be bound by self-imposed [as opposed to constitutional] procedural (or manner and form) restraints on its enactments" (*supra*, at 12-11). The author notes that various federal and provincial laws 'redefining' or 'changing the nature' of the legislative *process* have been upheld, or accepted without challenge. For example, he says:

> ... five provinces have abolished their upper houses by ordinary legislation, and a province without an upper house could establish one. The Parliament or a Legislature could add other elements to the legislative process, either for all statutes or just for particular kinds of statutes. For example, the federal Parliament could provide that a law to abolish the office of Auditor General must first be approved by a referendum of voters, or a provincial Legislature could provide that a law altering the constituencies for elections must be passed by a two-thirds majority in the legislative assembly. These "manner and form" laws, which purport to redefine the legislative body, either generally or for particular purposes, are binding for the future. A law which purported to disregard these hypothetical examples of manner and form laws, for example, by purporting to abolish the office of Auditor General without a prior referendum, or to alter the provincial electoral law by a simple majority, would be held to be invalid by the courts. Thus, while the federal Parliament or a provincial Legislature cannot bind itself as to the substance of future legislation, it can bind itself as to the manner and form of future legislation. [At 12-12; emphasis added.]

40 An interesting example of a manner and form requirement in a non-constitutional statute arose in *Canadian Taxpayers Federation v. Ontario (Minister of Finance)* (2004) 73 O.R. (3d) 621 (Ont. Sup. Ct.). There, the plaintiff sought a declaration that an Ontario statute establishing a new tax called the "Ontario health premium" was invalid on the basis that the leader of the provincial Liberal Party had signed a document promising that if his party was elected he would respect the requirement, stated in Ontario's *Taxpayer Protection Act, 1999*, that no new taxes would be introduced without the approval of Ontario's voters by referendum. After his party won the election, however, the government levied the new health tax without a referendum. It did so in two steps — first, it amended the *Taxpayer Protection Act* by creating an exception to the referendum requirement to allow the "health tax" to be introduced later in the session. Then, once the amendment had been enacted, the government introduced a second bill that levied the tax.

41 The plaintiff challenged the health premium on the bases of "manner and form" requirements, contract and negligent misrepresentation. All three challenges failed. With respect to the manner and form requirement, the Court reasoned:

> I agree with the respondents' submission that nothing in the text of the *TPA* reveals any intention or attempt by the legislature to limit its ability to amend the *TPA* in anything but the normal way. None of the prerequisites for an effective manner and form requirement are present. On the basis of parliamentary sovereignty alone the application to declare Bill 83 of no force and effect must fail. Bill 83 sought to and did amend the *TPA*. Once properly amended to add s. 2(7) to the *TPA*, it is clear that Bill 106 can be properly placed before the legislature for consideration without having to be put to a referendum. [At para. 50; emphasis added.]

The Court, then, seemed to assume that the referendum requirement was valid, but held that it applied only to amendments to federal-provincial *agreements*, not to the legislation itself. It would, the Court said, take a very clear indication in a statute, especially a non-constitutional one, before an intention on the part of the legislative body to bind itself in the future would be found. (Hogg, *supra*, at 12-19.)

42 I am not convinced that it is not open to Parliament or a provincial legislature to enact legislation that validly requires government or government officials to consult with a stated person or group before it may legislate in a particular way. At the least, I would say that attempts to enforce such a provision would not be bound to fail as a "renunciation *pro tanto* of the lawmaking power". (*Per* King C.J. in *West Lakes Ltd. v. South Australia* (1980) 25 S.A.S.R. 389, at 397-98, quoted at para. 76 of *Re Canada Assistance Plan*, *supra*.)

43 The real obstacle in my view to the GVRD's prospects of success in this case lies in the fact that s. 3(c) does not purport to create any requirement or obligation on the part of the Province. The law seems clear that any manner and form restraint must be imperative — it must not merely state a "principle" or a "need" that underlies a "relationship" as here, but must be sufficiently clear to overcome the right of the legislative body to bind itself as the manner and form of enacting future laws.

44 Sufficiently clear wording was found in the sections of the *Manitoba Act, 1870* and the *Constitution Act, 1867* which were at issue in the *Manitoba Language Rights Reference, supra*. The Court emphasized the use of mandatory terms (in particular, the word "shall") and held that the statutes imposed valid preconditions, in the form of bilingual requirements, to the enactment of legislation by the province of Manitoba. The Court observed, for example, that:

> As used in its normal grammatical sense, the word "shall" is presumptively imperative. See *Odgers' Construction of Deeds and Statutes* (5th ed. 1967) at p. 377; *The Interpretation Act*, 1867 (Can.), 31 Vict., c. 1, s. 6(3); *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28 ("shall is to be construed as imperative"). It is therefore incumbent upon this Court to conclude that Parliament, when it used the word "shall" in s. 23 of the *Manitoba Act*, 1870 and s. 133 of the *Constitution Act*, 1867, intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word "shall" would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless. See, e.g. *Re Public Finance Corp. and Edwards Garage Ltd.* (1957), 22 W.W.R. 312, p. 317 (Alta. S.C.).
>
> There is nothing in the history or the language of s. 23 of the *Manitoba Act, 1870* or s. 133 of the *Constitution Act, 1867* to indicate that "shall" was not used in its normal imperative sense. On the contrary, the evidence points ineluctably to the conclusion that the word "shall" was deliberately and carefully chosen by Parliament for the express purpose of making the bilingual record-keeping and printing and publication requirements of those sections obligatory. In particular Parliament's use of the presumptively imperative word "shall" twice in s. 23 of the *Manitoba Act, 1870* and twice in s. 133 of the *Constitution Act, 1867* contrasts starkly with its use of the presumptively permissive word "may" twice in the same sections. Section 23 provides that either English or French "may be used" by anyone in the debates of the Manitoba Legislature and that either language "may be used" by anyone in the Manitoba courts. Similarly, s. 133 provides that either English or French "may be used" by anyone in the debates of Parliament and the Legislature of Quebec, and in the courts of Canada and Quebec. [At 737-78.]

45 No such clear intention appears in the wording of s. 3(c) of the *Local Government Act*, which I set out again for convenience:

> 3. The relationship between regional districts and the Provincial government in relation to this Act is based on the following principles:
>
> . . . . .
>
> (c) notice and consultation is needed for Provincial government actions that directly affect regional district interests ...

As the chambers judge noted, s. 3(c) does not specify how much notice is required or to whom it is to be given, nor does it describe what degree and manner of consultation are "needed". The phrase "Provincial government actions" is also vague — arguably, it may refer to actions of the executive branch of government, rather than to the enactment of laws by Legislature. In any event, it is not, to quote Professor Hogg yet again, "unmistakeably addressed to the future actions of the enacting legislative body". (*Supra*, at 12-18.) Section 3(c) purports only to state a principle on which the relationship between regional districts and the Province is based (or on which the Province hopes it will be based). It does not state that no action shall be taken by the Province that directly affects "regional district interests" without notice and consultation; nor does it state that the Province shall provide notice and consult before taking any action that directly affects regional district interests. It is plain and obvious that s. 3(c) creates no legally enforceable obligation on the part of the Province that could result in the invalidity of the statute (assuming it lies within one of the heads of provincial power.)

46 At the end of the day, I agree with the written submission filed by the Province in the court below and quoted by the chambers judge at para. 24 of her reasons:

> Though manner and form requirements can exist at law ... a manner and form restriction that limits the power of the Legislative Assembly to enact legislation pending consultation with a third party must clearly be expressed. Express language is required first because the obligation to consult regarding the enactment of legislation is directly contrary to the well established rule of law that legislatures have no legal duty to consult regarding the enactment of legislation.
>
> Secondly, it must be express because such a manner and form restriction is directly contrary to the clear wording of s. 15(1) of the *Interpretation Act* ...

All of this is in addition to the fact that s. 7(3) of the *Reconciliation Act* expressly extinguishes "any and all claims by the [GVRD] in relation to the vestings" of Blocks F and K.

47 I conclude that the chambers judge did not err in finding that s. 3(c) of the *Local Government Act* could not constitute a "manner and form" restraint on the authority of the Province to enact the *Reconciliation Act*. Having said this, I do think it regrettable that the Province chose to state the "principles" it did in s. 3(c) if it did not intend them to have any legal effect. It may be that one or more regional districts have taken some comfort from s. 3(c), or have even relied on it to their detriment. Such a turn of events would be unfortunate and can do little to help develop a positive relationship between the Province and regional districts. Perhaps the technique of including aspirational goals in statutes should be reconsidered, and statements of this kind should return to preambles where they are clearly differentiated from substantive and enforceable statutory obligations.

Declaratory Relief

48 I turn finally to the question raised by Mr. Macintosh in his oral argument on the assumption that s. 3(c) does not impose a mandatory restraint on the enactment of legislation the breach of which results in its invalidity. Could declaratory relief nevertheless be available in the form sought in the District's pleadings, either in their present or in their amended form? Is it possible a court would grant the District a simple declaration, without more, that the formation of the Settlement Agreement or the enactment of the *Reconciliation Act* "violated" or "breached" s. 3(c) of the *Local Government Act*? Or, as was suggested in the course of the hearing, could a court make a simple declaration (of fact) that the Province had failed to give notice to or consult with the District before entering the Agreement or enacting the statute?

49 Counsel for the Musqueam objected strongly to our considering these questions on the bases that they were only raised on appeal, and that it is not in the interests of justice for this litigation to be protracted further. I must acknowledge, however, that this division of the Court was in part responsible for raising these questions during the hearing, which questions I see as incidental to the issues that were already under appeal. The litigation has not been unduly protracted by the District's "new" argument, and indeed will go on long after this appeal has been disposed of. Any prejudice to the parties can be largely offset by a costs order, if appropriate.

50 In arguing that the forms of declaration I have described in para. 48 are possible outcomes, the District relies strongly on R. 5(22) of the *Supreme Court Rules* (now Supreme Court Rule 20-4), which is the modern version of a rule first introduced in England in 1875 to overcome a common law rule to the contrary. Rule 5(22) provided:

> No proceeding shall be open to objection on the ground that only a declaratory order is sought, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

(See Zamir, *The Declaratory Judgment* (1962) at 10-1; *Kourtessis v. M.N.R.* [1993] 2 S.C.R. 53; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536 (C.A.) at 557-62; , 2008 BCCA 455, 85 BC.L.R. (4th) 69, at para. 12. See also the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 11(2).)

51 There is no doubt that the balance of judicial opinion is in favour of the liberal exercise of the declaratory power (*Zamir*, *supra*, at 12, citing *Dyson v. Attorney General*, [1911] 1 K.B. 410; see also Zamir and Woolf, *The Declaratory Judgment* (2002) at § 3.012). At the same time, it is also clear in Canada that a declaratory order is not available to provide an opinion that will not settle a "real" dispute between the parties. As Dickson C.J.C. stated for the majority in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441:

> ... the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen*, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. ... [At 457.]

Dickson J. also stated in *Canada v. Solosky*, [1980] 1 S.C.R. 821, in an oft-quoted passage:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue concerning the relative interests of each has been raised and falls to be determined. [At 830.]

52 Given my conclusion that s. 3(c) does not create any obligation on the part of the Province or any right on the part of the GVRD, I do not see how declaratory relief of the kind now sought by the GVRD could affect a legal interest, determine any "right" or "entitlement" of the District, or even move this proceeding along. No *legal* purpose would be served by such a declaration. As noted by L. Sarna in *The Law of Declaratory Judgments* (3rd ed., 2007), before a declaration will be granted with respect to an issue of statutory interpretation, the provision in question must "substantively and actively refer to *rights*. The court will refuse to adjudicate on preambles..." (At 137; my emphasis.) I conclude that it is plain and obvious the District could not succeed in obtaining even the limited declaration it now seeks.

Disposition

53 With thanks to all counsel, I would dismiss the appeal.

***Levine J.A.*:**

I agree:

***Bennett J.A.*:**

I agree:

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