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WHY NATIVE LANDS ARE WORTH LESS THAN FREEHOLD

A REVIEW & ANALYSIS OF THREE RECENT HIGH COURT RULINGS

Most writings on land within indigenous societies link land's importance to the community. Some authors advocate indigenous people have a spiritual or sentimental attachment to the land, unlike non-native westerners, and therefore, spiritual values cannot be ignored when valuing native lands.

However, High Courts in Canada (in *Musqueam Indian Band v. Glass* [2000 SCC 52 File 27154]) and New Zealand (in *Valuer-General v. Managtu Incorporation and Others* [CA219/96]) recently ruled that customary land is less valuable than freehold lands, whilst the Tongan Court of Appeals (in *Loto'a Havea v. Kingdom of Tonga, Appeal No. 5/2000 & 6/2000*) refused to recognise the concept of an open market value, as it was not appropriate for Tonga's land tenure system. Interestingly, in the New Zealand case, it was the customary landowners that sought such ruling, whilst the lessees of lands returned to the customary owners by government brought the Canadian case.

These cases are reviewed and analysed in respect to current valuation practices; questioning if a neoteric approach needs to be taken by the appraisal industry in native title valuations.

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INTRODUCTION

Customary or native land is considered the land belonging to indigenous peoples before and after colonisation by another sovereign.¹

Customary land is often communal or familial land that is owned by the current clan / family members and their future heirs.

Most writings on land within indigenous societies link lands importance to the community and advocate that customary land is not an economic commodity in the sense understood by western societies and further proffer that this spiritual, cultural and or sentimental value distinguishes customary land from the western view of land'.²

However, Suzuki argues that property also holds a special cultural or spiritual place in western societies and gives various examples of such.³ Boydell and Small also recognise that land holds a special place in all societies, but further elaborate that Pacific island countries are set apart due to the significant amount of customary land holdings.⁴

Suzuki further notes that spiritual value does not add economic value to the property, whilst others advocate indigenous people's spiritual values cannot be ignored⁵ when valuing native lands.

Land rights are manmade social definitions that exist to serve the needs of the people.⁶ In the western countries, land-rights developed over time and continue evolve. As customary land often does not ascribe to individual property rights, it may be inappropriate to use appraisal methods developed to assessing individual property rights in the context of communal property rights or state property rights.⁷

Contemporary market value definitions are predicated on transferability of ownership and informed willing sellers and buyers, which tend not to be present for customary lands. Thus, should / can appraisers estimate market value for land that does not exist in an open market?

Bannerman discusses that valuation of customary lands should reflect the dynamics of the evolving local aspects of land tenure and not remain static. Thus, he argues that traditional valuation methods from developed countries are not entirely appropriate for countries that primarily consist of customary lands. He also qualifies that using non-traditional valuation methodology for customary lands is not to be implied as a rejection of methods by the profession.⁸

However, two commonwealth high courts have recently ruled that customary land is less valuable than freehold land. In *Valuer-General v. Managtu Incorporation and Others*⁹ the New Zealand Court of Appeal concluded that the determination of the value must consider the legal constraints on alienability and that it is a task of the valuer to determine what a hypothetical purchaser would be

¹ Charters 1988

² Bannerman & Ogisi 1994

³ Suzuki 1990

⁴ Boydell & Small 2001

⁵ Bannerman 1993; Whipple 1997

⁶ Crocombe 1968

⁷ Bannerman & Ogisi 1994

⁸ Ibid.

⁹ *Musqueam Indian Band v. Glass* [2000 SCC 52 File 27154]

willing to pay for the owner's estate or interests in land.

In a second Commonwealth high court ruling, the Supreme Court of Canada in *Musqueam Indian Band v Glass*¹⁰ held that the fee simple values of off-reserve land could not be transposed to reserve land.

The decisions of these cases could impact future compulsory purchases, compensation for past takings, and tax ratings of customary lands in Commonwealth Countries. These two important high court cases, along with a third one from Tonga, are summarized below, and subsequently followed with an overview of the valuation issues used for valuing customary lands in Canada and New Zealand.

MUSQUEAM INDIAN BAND V GLASS

Within Canada, the Indian Act (R.S. 1985, c. I-5)¹¹ defines the relationship between Indians and the federal government,¹² including land tenure issues. For valuing customary or Indian land, Lowry¹³ identifies four distinct classes. These distinct classes or markets, surrendered land, unsurrendered land, rentals of reserve lands, and acquisitions of right-of-ways, are explained in more detail below.

Surrendered lands are lands purchased through the outright sale of reserve lands through a specific and complicated process.¹⁴ The process

requires the Band¹⁵ to voluntarily surrender all vested land rights in the particular parcel to the Crown, which may subsequently sell the land. Once the Crown sells the land, the land is given a clear title, subject to the usual Crown land sales restrictions. Surrendered lands are sold within the normal real estate or property market and are comparable to other freehold¹⁶ sales in the local market, provided there are no claims against the land by the respective band.¹⁷

Unsurrendered lands are restricted to transfer only between band members. The Indian Act provides for granting lawful possession of individual land parcels to individual band members within the band's reserves.

The Indian Act allows leasing of reserve and unsurrendered lands to non-band members, albeit through the Crown (somewhat similar to the surrendering of land). Once fully approved for leasing, land is 'offered on the open market and compete(s) for tenants in the same market as those of landowners off the reserve'.¹⁸ As these are unsurrendered lands, they can be only sold to other band members.

In *Musqueam Indian Band v Glass* [2000] SCC 52 File 27154, the facts of this case were that the Band surrendered part of their reserve land in trust to the crown in 1960; not to make it freehold or general

¹⁰ Ibid.

¹¹ viewable online at the Canadian Department of Justice site <http://laws.justice.gc.ca/en/I-5/text.html>

¹² Canada 2001

¹³ Lowry 1987

¹⁴ Ibid.

¹⁵ Defined in the Indian Act R.S. 1985, c. I-5 as 'a body of Indians (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, (b) for whose use and benefit in common, moneys are held by Her Majesty, or (c) declared by the Governor in Council to be a band for the purposes of this Act;'

¹⁶ Also known as the fee simple estate in some states

¹⁷ Lowry 1987

¹⁸ Lowry 1981

land, but for the sole purpose of leasing. In 1965, the Crown entered into an agreement with the Musqueam Development Company for development by providing infrastructure and amenities such as roads, sewer and water supply; thus enabling individuals to build houses on the subdivided lots. The Crown later leased out the individual lots for 99-years with initial rents of \$300- 400 per annum.

Rent was to be payable annually, with the first reassessment after thirty-years, and subsequently at intervals of roughly 10 years thereafter. Rent was to be based on six-percent of the 'current land value'.

Initially, the Crown collected the rent from the leaseholders and transferred the funds to the Band. In 1980, the Crown turned over management authority to the Band, who then began collecting rent payments directly from the lessee.

In 1995, upon the first rental reassessment, the Musqueam band notified the leaseholders of increases in annual payments up to \$38, 000 per year. The following year, the Musqueam band took their case to the Federal Court to approve the increased lease payments.

The question arose as to the interpretation of the word 'current land value' in the agreement. In the Federal Court at Trial Division Justice Rothstein decided that the value of the word 'current land value' was the value of freehold land of same size less 50%. The reason given by the trial judge for the lower value of Musqueam Reserve was not because of discriminatory considerations, but because of the market where

Musqueam land had lower value than a neighbouring fee simple.

The Federal Court of Appeal then questioned the same issues. The Court of Appeal, however, found that 'current land value' referred to the value of the land held in fee simple with no reduction for the 'Indian reserve factor'. This was based on the reason that the Trial Court had misjudged by looking at the interests of the lessees as opposed to the focusing on the value of the land. The land was capable of being converted to general land at any time if it was surrendered to the crown.

The Court of Appeal further held that the valuation of the market value of aboriginal land should be made in the same manner as any other land. It held that discounting the value of the aboriginal land on the basis of their *sui generis* interest in their own land was irrelevant. The Court of Appeal judge concluded that the hypothetical fee simple value of the average lot was \$600,000 and that 'current land value' referred to the value of fee simple.

The case then came before the Supreme Court. Supreme Court Justice Bastarache stated that the 'current land value' was meant to be calculated as a leasehold land, including its status as reserve land. This meaning was the one that best reflected the description of the land and was consistent with the intention of the parties. 'The location of the land and its status as reserve land had an important impact on its value. In this case the land was not in fee simple and to treat it as such would be wrong.'

He went on to state that in the case of 'reserve land' the highest form of individual property possible was a 'long-term lease' and not a fee simple. Therefore the total value of the land should be the value of the lease and the reversion rights, and that the value of

a land should reflect the 'legal restrictions on the land, including the legal regime that affected the use of the land' and the rights and privileges of the leaseholders.

The words 'current land value' is the value of the reserve land. Although the band could surrender the land for sale and convert it to general land, that has not occurred, and maybe the Band never wants to do such. The asset that is held by the Band is 'reserve land' and it has to face the 'realities of the market' that treats the value as value of freehold land in reserve and not freehold land in fee simple. Thus, the Supreme Court held that fee simple values of off-reserve land could not be transposed to reserve land.

The main difficulties in assessing the value of the Musqeam land was that there was no actual market for the value expressed in the leases and that as soon as reserve land is surrendered for sale it is no longer reserve land. There was no such thing and could never be a fee simple in reserve land. To do so one must have a hypothetical value. The hypothetical value can be derived from off-reserve land by taking into account the actual features of the land and the market.

The trial judge could not use a direct comparable approach because there was no such approach available due to the lack of a market. The trial judge thus took the value of fee simple land and reduced it 50% which was believed to be the actual value of long-term leasehold interest and actual reserve features of the land.

The Supreme Court justices decided that there was no error in the Trial Judges findings on fact, and agreed that in 1995, the market value of Musqeam reserve land was 50% less than the value of land in fee simple.

VALUER-GENERAL V MANAGTU INC.

As with Canada, England recognised the existence of the indigenous people and signed the Treaty of Waitangi in 1840 with New Zealand's indigenous people, the Maori. In 1993, the *Te Ture Whenua* Maori Act recognised the significance of land to the Maori. However today, Maori lands represent only 4.7% of the total land in New Zealand.¹⁹

Maori lands are identified as Maori reserve lands, Maori customary, Maori freehold or Maori general. Reserve lands are land subject to claims by the former indigenous owners that was unfairly taken from the indigenous owners. Maori customary lands, approximately 2,000 hectares, are special or historical lands that are inalienable. Maori freehold lands are limited to alienation to family, clan or preferred of alienee. Maori general lands have unrestricted alienability, and thus are comparable to freehold lands.²⁰

In *Valuer-General v Managtu Inc.*, the main issue of this case was if alienation constraints on land have to be considered when estimating the land's value under the Valuation of Land Act 1951. The alienation constrained land in question is Maori Freehold land (Customary Land) as defined in section 129(1) of the 1993 *Te Ture Whenua* Maori Act.

¹⁹ Boyd 1995 p.10

²⁰ Ibid.p.14

High Court on Appeal held that whether a deduction in value was appropriate for Maori Freehold land as opposed to the freehold land was something that a valuer should consider and the deduction amount would vary on a case to case basis. The Land Valuation Tribunal thought it was too early to decide whether the restrictions on Maori Freehold land would have any effect on the value of the land.

It is important to note that the judges from the start indicated that there would be deductions from the value of a freehold land if Maori freehold land was compared with it. The court believed from the onset that Maori freehold land is less valuable than freehold; not because it does not have sentimental value, but because it has restrictions on transfer.

In the High Court, it had been held that the definition of the land value was determined on an objective assessment of the worth of the land. However, what the hypothetical purchaser would pay for the land was determined on the marketable value of the land. The 1993 Act was a barrier to alienation as it significantly reduced the open market theory by limiting transfer within the *whanu* and *hapu*, and any sales outside of these have to be of special circumstances. The Court, however held that it would be inappropriate to make an across the board reduction in value of Maori Freehold as opposed to freehold by 30%. However, it does conclude that a reduction is needed but the discount should be determined on a case by case basis.

Court of Appeal Analysis:

The real question facing the Court of Appeal was whether constraints on the alienability of

Maori Freehold land imposed by the 1993 Act are considered when estimating the value of Maori Freehold Land. The Court held that there are three features of the statutory scheme that must be considered.

Firstly is the 'subject matter of the valuation'. For Maori Freehold Land the subject of the valuation is the 'owners estate or interest' in the land and not the land itself. It is not the same as the valuation of a pure fee simple.

Secondly, the valuation is made on the 'statutory premise that the owner will sell its estate or interest in the land.' The assumption is that there is a 'bona fide seller', and neither the buyer nor seller is anxious. This has to be considered.

Thirdly, the 'land value is the sum which the owner's estate might realise if offered for sale on reasonable terms of a bonafide seller.'

The 1993 Act puts significant constraints on the sale of Maori Freehold land, and in particular where the sale is to a purchaser who wishes to change the status of the Maori freehold land to general land. There is preferred class of alienees who have priority. And most crucially, any agreement of the owners is subject to the contingency that the Maori Land Court may in the exercise of its powers and responsibilities refuse to confirm the alienation, or refuse to change the status of the land.

The Court of Appeal concluded that the determination of the land value must consider the legal constraints on alienability. It is not a question of law, but a question of fact of what is the effect of those restrictions on the saleable value of the estate or interest in the Maori Freehold land. It is a task of the valuer to determine what a hypothetical

purchaser would be willing to pay for the owner's estate or interests in land.

The Court of Appeal concluded that a discount of 30% was inappropriate because it was an error in the valuation approach. In reaffirming the approach taken by the High Court, the Court of Appeal laid down some guidelines for valuation in New Zealand for Maori Freehold Land.

- Valuation has to be on a case to case basis. This is because restricted alienability has an effect on valuation and restricted alienability is subjected to the following:
 - nature and size of property,
 - historical connection of the owners with the land,
 - membership of the preferred class of alienees and the resource available to fund the purchase, and
 - the Statutory role of the Maori Land Court in relation to property, and the prospect of obtaining confirmation of an outside sale from the Court.
- Finally the Court concluded that valuers needed to weigh the considerations in a sensible and practical way to reach what may be a robust and imprecise judgment.

LOTO'A HAVEA V KINGDOM OF TONGA²¹

Tonga's land tenure system is quite different than that of Canada and New Zealand, having itself never being colonized. Tonga remains a

²¹ *Loto'a Havea v. Kingdom of Tonga, Appeal No. 5/2000 & 6/2000*

kingdom whereby all land belongs to the Crown. All land has been divided into 42 estates, headed by nobles or titular chief nominated by the monarch. Each estate holder is obligated to distribute land among their people to become their hereditary estate.

All Tonga males (at age 16) are entitled up to 3.34 hectares agricultural land plus one residential / town allotment of approximately 1,000 square metres. The Land Act prohibits the land holders from entering into any agreement for profit or benefit except as provided with the Act. Non-Tongans can only acquire land through leases with approval by the government cabinet. Although prohibited, there is a regular market of 'illegal' transactions in exchange for a 'gift' of money to the current land holder.²²

In *Loto'a Havea v Kingdom of Tonga*, the main issue of this case was a tortious claim by the landholder against the State for damage caused to his land mainly through excavation. A valuer valued the damage done to the land at \$170,000.

However, in its decision, Justice Finnigan of the Supreme Court comments 'a unique opportunity was offered to the Court by the plaintiff in this case to develop the law governing valuation of land for the purposes of assessing damages.'

The valuer of the plaintiff and the valuer of the defendant had as a fundamental step in their valuation process the concept of freehold land as a tradable commodity in an open market. Tonga does not have an open market nor is there any sale of freehold land. What is being sold in Tonga is the *right to occupy land*. This is also known as the *right of*

²² Moala 2002

access to land. These values of the various types and areas of land differ depending on locality and area.

Justice Finnigan expressly states on page 4 of his judgment that the 'importation of the concept of 'freehold land' is unacceptable in Tonga.' The Tongan concept of land ownership is a right to occupy and use the land. This land 'ownership' is subject to the Lands Act and the approval of Cabinet.

The court clearly states that the freehold system is not accepted in Tonga, 'neither would the innovative scheme known as market value' be appropriate. There is 'no free exposure to the market,' and the 'Court acknowledges that it has no power to create such a market or system of value.'

The system of land valuation identified by the court as suitable in Tonga is the *highest and best use*. It has to be noted that the court considered only one other case in Tonga as there had been only one other case *i.e.* the case of *Mokofisi v The Kingdom of Tonga* C111/88, an unreported decision of Justice Webster delivered on 13 June 1989. The land in this case was valued based on evidence of exchanges of land for money.

It was acknowledged by the Court that land in Tonga does have a market value as was determined in the case of *Mokofisi*. The occupancy of pieces of land changes hands for money.

Interestingly, the judge identifies the chief value of the land as its cultural value because of it being the person's link with the land of his birth, and his place of refuge as his right if he

chose to return to Tonga. The assessment of damages is based on what the value of the land would have been before the damage occurred and how much value has been lost.

MAJOR ISSUES OF THE CASES

One of the most interesting findings of the first two cases is that in the New Zealand case, it was the customary landowners that sought such ruling, whilst the Canadian case was brought by lessees of leased customary lands. However, both courts found that customary lands are worth less than if it were freehold, but both courts rejected a blanket discount rate.

In both cases, the land in dispute was land partially 'westernised' where neither case was over customary, unsurrendered or reserve land, nor were they land comparable to freehold land (e.g. Maori general in NZ or surrendered land in Canada).

Direct Sales Comparison

Both courts noted the difficulty in using direct market comparison for valuing such lands, but such has been the practice for sometime in both the United States and Canada for lands that have restricted alienation to members within the indigenous community.

Lowry notes one lesser challenge facing the valuer is the use of non-traditional rental agreements of sharecropping, percentage of gross sales, or throughput charges. A greater challenge is the 'measurement of the effect of lease terms or surrender conditions that generate contracts markedly different from the norm of the region'.²³

²³ Lowry 1981

Thus, sales of leased reserve land (leased to non-members) often sell at substantial discounts when compared to freehold lands with similar lease structures.²⁴

Cultural or Spiritual Value

In all three cases, cultural or spiritual value was not an underlying issue; however, the judge in the Tongan case identifies the chief value of the land as its cultural value because of it being the person's link with the land of his birth, and his place of refuge as his right if he chose to return to Tonga.

Although the judge did not embark on it, the question that arises is *what value would the judge have allocated to the land had the land lost its cultural value* due to a total depletion of the land, probably in the place where the plaintiff was raised? Would the figure reflect the cultural value, which becomes irreplaceable?

Compensation for Legal or Illegal Takings

For over a century, colonial governments have been paying compensation for legal and illegal taking of customary lands. In Canada, specific claims are actions against the government for past government errors and omissions in the taking of native lands, legally and illegally, often without compensation to the landowners.²⁵ Maori Reserve lands are land subject to claims by the former indigenous owners that was unfairly taken from the indigenous owners.

The appraisal challenge arising from these claims is to complete retrospective valuations

based on the date of taking. If the land was not legally surrendered to the Crown at the time of taking, the appraiser may also have to complete a current estimated value of the land as if unimproved, plus estimate the net loss of use since the taking.²⁶

As with all private property, government often needs to acquire property for public purposes, which is often done through eminent domain powers to compulsory acquire and expropriate land for public purposes, such as roadway, schools, etc. Effectively government acquires the same rights if the land is expropriated from private freeholder or from native lands. Thus, should government pay the same amount regardless? Should they pay the native land owner less (assuming native land is worth less due to alienability restrictions) than private freeholders? Or should government pay more for native land due to it having spiritual or cultural value to the indigenous people?

That leads to the question of is there any loss in spiritual or cultural value if road crosses a small part of native land? Or if the original group of indigenous land owners becomes extinct, does their land no longer have any cultural or spiritual value?

Or in countries where virtually all land remains in customary ownership (i.e. most small island Pacific Island countries), where do you find sales of freehold properties to even make a deduction in value? Or on the flip side, in several countries such as Samoa and Fiji, limited freehold lands brings a premium, thus is it really appropriate to use as a basis to determine customary lands?

²⁴ Ibid.

²⁵ Howard 1989; Lane 1992

²⁶ Barney 1963; Dumfries 1997; Inch 1995a; --- 1995b; Lane 1992; Lane & Lane 1998

These cases have addressed only a small part of the issues of valuing customary lands. Thus, it will most likely take several more high court cases to provide a more lucid framework for valuing customary lands.

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