SAMMARTINO v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

(1971), 22 D.L.R. (3d) 194 (also reported: [1972] 1 W.W.R. 24)

British Columbia Court of Appeal, Davey C.J.B.C., Bull and McFarlane JJ.A., 19 October 1971

(On appeal from judgment of British Columbia Supreme Court, **supra** p.428)

Taxation - Exemption from taxation - Imposition of tax on occupier in respect of land and improvements - Whether occupier of Crown lands on Indian reserve lands taxable by Province - Taxation Act (B.C.), s.4(1) - Public Schools Act (B.C.).

Appellant, a non-Indian in occupation of certain Indian reserve lands held in trust by the Crown for the use and benefit of the Okanagan Band of Indians by virtue of a lease from a member of the band, which lease did not comply in certain respects with the provisions of the *Indian Act*, R.S.C. 1952, c.149 (now R.S.C. 1970, c.I-6), was taxed under the *Taxation Act*, R.,S.B.C. 1960, c. 376, and the *Public Schools Act*, R.S.B.C. 1960, c. 319, as "occupier" of the lands and brought an action for a declaration that the Acts were *ultra vires* in so far as they purported to legislate, first, in respect of the appellant's liability to taxation as an occupier, secondly, with respect to Indian lands, a field reserved for the Parliament of Canada under s.91(24) of the *B.N.A Act, 1867*, and thirdly, in respect to the taxation of Crown lands. On appeal from a judgment upholding the validity of the Acts, *held* (McFarlane, J.A., dissenting in part), the appeal should, subject to a declaration that the *Public Schools Act* does not impose a tax on an occupier, be dismissed.

Section 204(1) (am. 1968, c.45, s.30) of the *Public Schools Act* which directs that all the provisions of the *Taxation Act* apply to the assessment of taxes imposed under the *Public Schools Act* does not import the taxes imposed under the *Taxation Act* and, therefore, the question as to the liability of an occupier of land to taxes imposed under the *Public Schools Act* must be determined by reference to the *Public Schools Act* which, unlike the *Taxation Act*, does not specifically provide that a tax is exigible against an "occupier" of lands. Further, although the lease was not in compliance with the provisions of the *Indian Act* the appellant was in actual use and possession of the lands and they were "simply occupied" within the meaning of the *Taxation Act*. The words "occupier" or "simply occupied" as used in the *Taxation Act* cannot, as the appellant contended, be modified by the words "lawful" or "lawfully" respectively.

[*Re Simon Fraser University and District of Burnaby* (1968), 1 D.L.R. (3d) 427, 66 W.W.R. 684; *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*, [1921] 1 K.B. 64; *Canadian Eagle Oil Co., Ltd.* v. *The King*, [1946] A.C. 119, 114 L.J.K.B. 451; *Toronto Transit Commission* v. *City of Toronto* (1971), 18 D.L.R. (3d) 68; *Bentley et al*. v *Peppard* (1903), 33 S.C.R. 444, refd to]

Constitutional law - Validity of legislation - Application of provincial tax legislation to occupier of Indian reserve lands - Whether taxation of Crown lands - Public Schools Act (B.C.), s.204(1)- Taxation Act (B.C.), s.4(1).

Where a provincial statute imposes a tax on an occupier of Crown land in respect of the land and improvements thereon, its application to a person in occupation of Indian reserve lands under a lease does not constitute a tax on Indian lands contrary to s. 91(24) of the *B.N.A Act*, *1867*, or to s.125 of that Act. In either case the taxes are levied on the appellant personally as an occupier and with respect to his occupation and are accordingly within the legislative authority of the Province.

[*Smith* v. *Rural Municipality of Vermilion Hills* (1914), 20 D.L.R 114, 49 S.C.R. 563, 6 W.W.R. 841; affd 30 D.L.R. 83, [1916] 2 A.C. 569, [1917] 1 W.W.R. 108; *City of Vancouver* v. *Chow Chee*, [1942] 1 W.W.R. 72, 57 B.C.R. 104; folld; *District of Surrey et al*. v. *Peace Arch Enterprises Ltd. et al*. (1970), 74 W.W.R. 380, distd]

APPEAL from a judgment of Wootton, J., dismissing an action for a declaration that the *Taxation Act* (B.C.) and the *Public Schools Act* (B.C.) are *ultra vires*.

L. Page, for appellant.
D. Sigler, Q.C., for respondent.

DAVEY, C.J.B.C.: ---I would allow the appeal in part for the reasons given by my brother Bull.

BULL, J.A.: ---The appellant, a non-Indian, was at all material times in use and occupation of two lots of land situate in the Okanagan Indian Reserve No. 1, the lands of which Reserve are held in trust by Her Majesty the Queen in the right of Canada for the use and benefit of the Okanagan Band of Indians. That use and occupation was taken by the appellant under a written lease from an Indian (a member of the band) apparently made on behalf of his mother, also a member of the band, who held the lots pursuant to a notice of entitlement under the *Indian Act*, R.S.C. 1952, c.149, now R.S.C. 1970, c.I-6. The lease was not in compliance with the provisions of the *Indian Act*, and amendments thereto, in that, specifically: (a) the lots were not subject to being leased as they had not first been surrendered to Her Majesty by the band pursuant to s.37, (b) it was not made by the Minister of Indian Affairs and Northern Development for the benefit of the lessor Indian (without any surrender) under s.58(3), and (c) it was void under s.28(1) as being made by a member of a band purporting to permit, without the Minister's permission, someone other than a member of that band to occupy or use the lots. The Surveyor of Taxes for the Province of British Columbia, pursuant to the provisions of the *Taxation Act*, R.S.B.C. 1960, c.376, and amendments thereto, and of the *Public Schools Act*, R.S.B.C. 1960, c.319, and amendments

thereto, caused the two lots and improvements thereon (hereinafter called "the property" or "the lands in question") to be assessed and caused the appellant to be taxed as the occupier thereof as if he were the owner thereof. It was common ground that the property in question is situate in a rural area and not in a municipality.

The appellant commenced an action against the Attorney-General of British Columbia, and in his writ and statement of claim claimed declarations by the Court that the provisions of the *Taxation Act* and of the *Public Schools Act* were *ultra vires* the provincial Legislature in so far as they purported to (i) legislate in respect of the appellant's liability to taxation as an occupier of the lands in question, (ii) legislate with respect to Indian lands and lands reserved for Indians within the exclusive competency of Parliament under s.91(24) of the *B.N.A. Act, 1867* ("Indians, and lands reserved for Indians"), and (iii) tax Crown lands contrary to s.125 of the *B.N.A. Act, 1867* prohibiting such taxation. The appellant also claimed a declaration that the appellant was not an "occupier" within the meaning of the *Taxation Act* and the *Public Schools Act*.

The respondent Attorney-General, in turn, counterclaimed for declarations the inverse to each of those sought by the appellant. A Court order was later made permitting the appellant to act as plaintiff in a representative capacity for the numerous other non-Indian persons in like position who were occupying lands in the Okanagan Indian Reserve No.1 under leases made directly with members of the band, but not in compliance with the provisions of the *Indian Act* as above.

The facts set out in the pleadings were admitted by the parties, and the action proceeded to trial without evidence being taken on the basis that those pleadings should be treated as a case stated for the opinion of the Court under *Supreme Court Rules, 1961*, O. XXXIV, r.1 (M.R. 389). The appellant was unsuccessful, and judgment was given in favour of the respondent Attorney-General and declarations were made as claimed by him in his counterclaim, *viz*., that the relevant provisions of the *Taxation Act* and of the *Public Schools Act* were *ultra vires* the Legislature of the Province and that the appellant was an "occupier" of the property within definition of that word in those two statutes; and hence the appellant was liable to the taxation so levied by the Province within its competency.

The appellant has appealed, and, if I understand correctly, his three submissions are as follows:

A. Regardless of whether or not the *Taxation Act* imposes a valid general tax on the appellant as an "occupier" of the property, the *Public Schools Act* does not purport to impose a school tax on the appellant as such an "occupier" of such property.
B. Although the *Taxation Act* purports to impose a tax on an "occupier" of Crown lands or lands such as the lands in question held in trust for a tribe or body of Indians with respect to his interest therein, it does not impose a valid tax on the appellant as he is not such an "occupier" because he had no legal entitlement or interest in or to the lands in question, or, if he be an "occupier" he had no interest upon which a tax could be imposed.
C. That if the *Taxation Act* and/or the *Public Schools Act* purport to tax lands in an Indian reserve they are *ultra vires* the provincial Legislature to that extent.

I propose to deal with the submissions in the above order, but before so doing, I consider it advisable to deal with two preliminary matters that were raised early in the appeal, as well as to set out, for convenience, the relevant portions of the statutory provisions of the two statutes which are germane to the arguments.

The first matter deals with the appellant's submission that the relevant sections of the two statutes should be construed as the *Public Schools Act* stood prior to certain amendments thereto assented to on April 6, 1968 [*Public Schools* (*Amendment*) *Act*, 1968 (B.C.), c.45]. The main reason given was that only the 1968 tax assessments were before the Court at the trial, although their admission as exhibits was only over the strong objections of counsel for the Attorney-General. The respondent vigorously opposed that submission to us. The Court having indicated its view that there were no good grounds for confining the argument to the statute as it stood before April 6, 1968, the appellant did not press his submission but he did not abandon it. The Court's view was based on the following factors. The writ was issued and the pleadings delivered after the amendment came into force, and nowhere was it suggested in the pleadings (which in effect became a stated case) that the assessments impugned were those made before the amendment, or that the declarations sought had reference only to early years. In fact, to the contrary, all references were to the statutes "and amendments thereto". The point was not taken in the Court below, and the learned trial Judge, properly in my opinion, dealt with the *Public Schools Act* as it stood amended at the time of trial in February, 1970. Accordingly, in this judgment reference to that statute will be to it as it stood after 1968 at the time of the trial.

The second matter deals only with the appellant's first submission set out in "A", *supra*. During the appellant's argument on that submission, the Court pointed out that the relief claimed in the writ of summons and statement of claim (as well as the converse claims in the counterclaim) did not cover the matter of the *Public Schools Act* by its terms not purporting to impose a school tax on an "occupier" of such lands and improvements as the lands in question. Only declarations that the relevant portions of the two statutes were *ultra vires* the provincial Legislature and that the

appellant was not an occupier" were sought. Both counsel agreed that the point had been argued in the Court below and was rejected, perhaps indirectly, by the learned trial Judge in the course of his reasons for judgment. The formal judgment made no reference to the point, although it was covered in the appellant's notice of appeal and in both factums filed. Counsel for the respondent Attorney-General advised the Court that in any event the Crown was desirous that the matter be considered by the Court. In result, both parties agreed to an amendment to the relief claimed in the statement of claim and in the counterclaim, and an amending order was made *nunc pro tunc*.

For easy reference, I set out now various provisions of the *Taxation Act* and the *Public Schools Act* which are to be considered, omitting, in some instances, portions thereof that are irrelevant to the issues or proper construction:

Item
No.

(1) *Public Schools Act*, s. 2(1), defines *owner* as:

> "owner" means,
> (b) with respect to real property in a rural area, an owner as defined in the *Taxation Act*;

(2) *Taxation Act*, s. 2, defines *owner* as:

> "owner," when used in respect of any land, improvements, or minerals claim, means the registered owner, or, in case a certificate of purchase or agreement for the sale of the land or mineral claim has been registered, means the registered holder of the last registered certificate of purchase or agreement for sale; and in case a Crown grant has been issued and has not been registered, means the grantee named therein;

(3) *Public Schools Act*, s.2(1) ["occupier" enacted 1962, c.54, s.2(*b*)], defines *occupier* as: "occupier" means an occupier as defined in the *Taxation Act*;

(4) *Taxation Act*, s.2, defines *occupier* as:

> "occupier" means the person in possession of land of the Crown which is held by him under any homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application to purchase, easement or other record from the Crown, or which is simply occupied;

(5) *Taxation Act* proves for the imposition of taxation as follows:

(i) 4(1) To the extent and in the manner provided in this Act, and for the raising of a revenue for Provincial purposes,
(c) every occupier of Crown land shall be assessed and taxed on the land and the improvements thereon held by him as an occupier.

(ii) 25. Every person shall be assessed and taxed annually on his land and the improvements thereon in the assessment district in which the land is situate . . .

(iii) 26(1) Subject to subsections (2) and (3), land and the improvements thereon shall be assessed and taxed in the name of the owner.
(3)Where land belonging to the Crown in right of the Province or in right of Canada is held under any homestead entry, pre-emption record, lease, licence, agreement for sale, accepted application for purchase, easement, or otherwise, or where land is held in trust for a tribe or body of Indians and occupied by a person not an Indian in other than an official capacity, the land, together with the improvements thereon, shall be assessed, and the occupier thereof shall be taxed as if he were the owner of the land and improvements; but no assessment or taxation in respect of land so held or occupied shall in any way affect the rights of Her Majesty in the land.

(iv) The following, *inter alia*, is exempt from such taxation (s.24(i)):
(*i*) Land and the improvements thereon vested in or held by Her Majesty or held in trust for Her Majesty, either in right of Canada or of the Province, or held in trust for the public uses of the Province; and land and the improvements thereon vested in or held by Her Majesty or any person in trust for or for the use of any tribe or body of Indians, and either unoccupied, or occupied by some person in an official capacity, or by the Indians:

(6) The *Public Schools Act* provides with respect to taxation as follows:

(i) 197(6) On or before the twentieth day of April in each year the Minister [Minister of Education] shall send to each Board [of Trustees of a school district] a notice setting forth
(*a*) the grants authorized under this Act with respect to the annual budget of the Board;
(b) the assessed values of land and improvements in the school district as certified under the *Assessment Equalization Act*; and
(c) the amounts to be raised by taxation and to be requisitioned from each constituent part of the school district.

(7)On or before the first day of May in each year, the Board of each school district shall, by by-law, adopt the annual budget and therein levy upon all taxable land and improvements within the school district according to the assessed value thereof a rate to provide the total of the amounts under clause (*c*) of subsection (6) . . . . [rep. & sub. 1968, c. 45, s. 27]

(ii) 198(1) All amounts required to meet the annual budget of a Board, other than amounts provided by way of grants from the Province . . . shall be raised by taxation in the constituent parts of the school district.

(2)Notwithstanding any other Act, all moneys required to be raised for school purposes by taxation in any . . . rural area shall be levied on the assessed value of land and seventy-five per centum of the assessed value of improvements within the . . . rural area, and every person shall be taxed on the assessed value of his taxable land and seventy-five per centum of the assessed value of his taxable improvements. [rep. & sub. 1968, c. 45, s. 28]

(iii) 199(2) . . . the Provincial Surveyor of Taxes . . . shall cause to be prepared and rendered upon each assessed owner in the . . . rural area (if any) comprised within the school district a tax demand notice or a taxation notice . . . [rep. & sub. 1968, c. 45, s. 28]

(iv) 201. For the raising of a revenue for Provincial purposes to meet in part the expenditures of the Province for school purposes under this Act, all land and improvements within a rural area which does not form any part of any school district shall be assessed and taxed annually, and every owner of such land and improvements shall be taxed at a rate of not less than . . .

(*v*) 204 (1) Subject to the provisions of this Act, all the provisions of the *Taxation Act* apply to the assessment, levy, collection, and recovery of all taxes imposed under this Act in a rural area of a school district, and to the addition of interest to such taxes when delinquent, in like manner as to taxes imposed under the *Taxation Act*; and all such taxes when levied shall, for all purposes of the *Taxation Act*, be deemed to be Provincial taxes imposed and assessed under that Act, and upon collection or recovery shall be accounted for as such. [am. 1968, c. 45, s. 30]

(vi) There is, *inter alia*, the following exemption from taxation:

207. Subject to the provisions of this Act, property in a rural area of a school district exempt from taxation under the *Taxation Act* is also exempt from taxation under this Act, except as provided in clauses (*a*) to (*d*) :---

I come now to the questions raised by the appellant's three submissions to this Court, as set out above.

A. Does the Public Schools Act purport to impose a school tax on the appellant even if he be an "occupier" as defined in that statute and the taxation Act?

The learned trial Judge held, in effect, that the provisions of s. 204(1) of the *Public Schools Act* (item 6(v) above) brought into effect for the levy of school taxes under that Act the taxing provisions of the *Taxation Act*, which by both s.4(1) (item 5(i) above) and, particularly, s. 26(3) (item 5(iii) above) clearly imposes a general tax on the appellant as an "occupier", not being an Indian or in an official capacity, of lands held in trust for a tribe or body of Indians. Counsel for the respondent Attorney-General submitted that that view is the proper one and stressed that the taxing provisions of the *Public Schools Act* should not be read alone as containing a code for school taxation, but together with the *Taxation Act* and *Assessment Equalization Act*, R.S.B.C. 1960, c.18, to form an over-all real property taxation code. He endeavoured to establish by reference to the various provisions of each statute that the intent was clear that each should be read in the light of the others, not only with respect to procedural matters but with respect to the imposition of the incidence of tax and the proper construction of the provisions of each.

On the other hand, the appellant argued that s.204(1) merely incorporates in, or makes applicable to, the *Public Schools Act*, all the machinery which is set out so fully in the *Taxation Act* for the assessment of value, the assessment or levy of a tax when the rate is struck as well as all the procedures for collection and recovery of taxes imposed.

It is apparent that the problem is one of statutory construction and the application to such construction of the proper fundamental rules of interpretation. At one time it was thought that taxation statutes should be "strictly" construed (as opposed to a beneficial construction) against the fiscus. I think the cases establish that now the distinction has largely eroded, and that the same general and proper rules of construction apply to all statutes. One fundamental rule is that referred to by Tysoe, J.A., in giving the judgment of this Court, in *Re Simon Fraser University and District of Burnaby* (1968), 1 D.L.R. (3d) 427, 66 W.W.R. 684, when at p. 430 he said:

> . . . a statute is to be expounded "according to the intent of them that made it". If the words of the statute are in themselves precise and unambiguous no more is necessary than to expound those words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature.

It is, of course, not open to narrow the operation of a taxing statute, once its meaning has been ascertained by the application of the ordinary rules of construction. But if it is not shown by the words used that a tax is imposed, then the strict construction must be given in the sense "that

there is no room for any intendment, and regard must be had to the clear meaning of the words" : see 36 Hals., 3rd ed., p. 416, para. 633. As was said by Rowlatt, J., in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*, [1921] 1 K.B. 64 at p. 71, and approved by Viscount Simon in *Canadian Eagle Oil Co., Ltd*. v. *The King*, [1946] A.C. 119, 114 L.J.K.B. 451 (H.L.) : "There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." If the imposition of tax is not shown by clear and unambiguous words, and there remains doubt, the construction should be in favour of the subject. I think that it was in the sense of the foregoing that Spence, J., in giving the judgment of the Supreme Court of Canada in the recent case of *Toronto Transit Commission* v. *City of Toronto* (1971), 18 D.L.R. (3d) 68, said at p. 72:

> It will be seen that the taxing provision is contained in the first lines of s. 4 and, of course, one need not cite authority for the proposition that the taxing provision must be strictly construed.

I approach the search for the proper construction in the light of the foregoing.

It must be first considered whether or not the imposition of tax on an occupier has been transported into the statute by s.204(1). It is my opinion that the answer lies in the clear words and clear phrasing of s.204(1), which must govern. To my mind, it is plainly shown that a distinction is made between taxes *imposed* under the *Taxation Act* and those imposed under the *Public Schools Act*. The provisions of the *Taxation Act* are to be applied only to "all taxes imposed under" the *Public Schools Act* "in like manner as to taxes imposed under the *Taxation Act*". It is clear that the *Taxation Act*, *inter alia*, specifically imposes liability for general tax on an occupier (as defined) of Crown lands or lands reserved for Indians as well as an owner of property. Section 204(1) does not state or infer that taxes imposed under the *Taxation Act* shall be deemed to be taxes imposed under the *Public Schools Act* or that the taxes imposed under the latter Act shall be those or the same as those imposed under the *Taxation Act*. All the enumerated provisions of the *Taxation Act* have application *only* to taxes imposed under the *Public Schools Act* by its own provisions. To conclude that the application of provisions of one statute to "taxes imposed" by another should be construed as importing into, or adding to the latter the "taxes imposed" by the former, is, in my respectful view, akin to hoisting oneself by one's bootstraps. It follows that what school taxes are imposed under the *Public Schools Act* must be defined before the enumerated provisions of the *Taxation Act* apply thereto.

Therefore, in my view, the liability for school tax of an "occupier" must be found within the *Public Schools Act* itself. The question to be determined is, does that statute impose school tax on an "occupier" as defined therein, which, as I have indicated, is the same as that in the *Taxation Act*. The scheme and incidence of school taxation appear in ss.197(6) and (7) and 198 (items 6(i) and (ii)) as construed in the light of ss.199 (2) and 201 (items 6 (iii) and (iv) above). The first subsection provides for the ascertainment of the amount to be raised by school taxes, and the next requires each Board of School Trustees to levy a tax on "all taxable land and improvements" in the district on the basis of a rate fixed by it. At this stage there is no provision as to who is liable for the tax levied with respect to such "taxable land and improvements". Then s. 198 follows, which, after enacting that the required amounts shall be raised in the district by taxation, provides that with respect to a rural area those requirements shall be levied on the whole or a portion (as the case may be) of the assessed value of the real property, and "*every person* shall be taxed on . . . the assessed value of his taxable land and seventy-five per centum of the assessed value of *his* taxable improvements". (My emphasis.) Although in the *Taxation Ac*t it was apparently felt necessary to specifically provide that a tax was exigible against an occupier of Crown lands under ss.4(1) and 26(3) (items 5(i) and 5(iii) above) as well as to the general liability for tax against "every person . . . on his land and the improvements thereon" under s.25 (item 5(ii) above), no similar provision appears in the *Public Schools Act*. It is obvious that the reason that it was necessary to specifically provide for taxation against the occupier of Crown lands personally is that a valid tax could not be imposed by the Legislature on Crown lands and improvements, as mentioned in detail later in this judgment. The word "occupier" was defined identically in both statutes, but was not used at all in the *Public Schools Act*. It is hard to understand that if the Legislature intended to tax an occupier as defined in the Act, it would not have clearly said so instead of patently ignoring that class completely. The result, in my view, is that the *Public Schools Act* does not purport to tax an occupier (as defined) of Crown or Indian lands. Support for that view is given by the language of s. 199 (item 6(iii) above) which follows immediately after s.198 (which imposes the school tax) and provides that a demand or taxation notice shall be sent to each assessed *owner* in a rural area in a school district and by that of s.201 (item 6 (iv) above) which provides for assessment for school taxes of every *owner* in a rural area outside a school district. As l have indicated, "owner" is defined (s.2 of each of the *Taxation Act* and *Public Schools Act* - see items (1) and (2) above) and with respect to a rural area means a registered owner or a grantee of an unregistered Crown grant, and does *not* include an "occupier" as defined in both statutes. Should ss.197(7) and 198(2) (items 6(i) and (ii) above) be construed as broad enough,

by use of the general words "every person" and "his taxable land" and "his taxable improvements", to impose tax on an "occupier" as well as on an "owner", we would have the strange result that only the "owner" in a rural area would get a tax notice or demand under s.199 (item 6(iii) above) or be subject to the provisions of s. 201 (item 6(iv) above). It is clear that "owner" in those sections does not include an "occupier". On consideration of all the foregoing factors, I have concluded that such a construction is much too broad and not justified on the clear meaning of the language used in the statute.

It follows that in my opinion the *Public Schools Act* does not purport to impose or levy a school tax on an occupier, as defined, of Crown or Indian lands in a rural area and any such imposition of school tax on the appellant, ever if he be such an occupier, was invalid. I add that my conclusion does not necessarily apply to lands in a municipality as opposed to a rural area. Although not argued before us, the situation in a municipality might be different because the definition of "owner" in the *Municipal Act*, R.S.B.C. 1960, c.255, is applied (*Public Schools Act*, s.2(1)(*a*)) and that definition apparently includes an occupier.

B. *Although the Taxation Act purports to impose general taxes on an occupier of Crown or Indian lands, is the appellant such an occupier exigible to those taxes?*

The learned trial Judge held that the appellant was such an occupier within the definition of that word contained in s.2 of the *Taxation Act* (item 4 above) and hence under s.26(4) (item 5(iii) above) was taxable "as if he were the owner of the land and improvements". In his reasons for judgment, after referring to the agreed fact that the lease under which the appellant held possession was not in compliance with the *Indian Act* as indicated above, he said that that situation or irregularity did not deny the fact that the appellant had actual occupancy of lands held in trust as referred to in s.26(3), *supra*, and that he came within the definition of "occupier" as he was a person in possession of Crown or Indian lands which he "simply occupied". The respondent supported that view. He stressed the agreed fact that the appellant was and had been in actual possession and use of the property under the purported lease, and although the lease was void under the provisions of the *Indian Act*, the appellant was not *ipso facto* a trespasser, as he was in sole possession at least with the consent, leave and licence of the Indian entitled to possessory rights in the property.

On the other hand, the appellant's counsel strongly urged that the appellant had no legal entitlement or interest in the property and hence could not be an "occupier" because that term and even the words "simply occupied" in the definition imply the existence of some element of lawful occupation involving some legal interest. It was submitted that the authorities relied on by the learned Judge and the respondent, principally *Smith* v. *Rural Municipality of Vermilion Hills* (1914), 20 D.L.R. 114, 49 S.C.R. 563, 6 W.W.R. 841; affirmed 30 D.L.R. 83, [1916] 2 A.C. 569, [1917] 1 W.W.R. 108 (P.C.), and *City of Vancouver* v. *Chow Chee*, [1942] 1 W.W.R. 72, 57 B.C.R. 104 (both of which held that an occupier of Crown lands could be validly taxed personally in such capacity under a provincial statute), were distinguishable as the occupant in each case had some legal entitlement to an interest in the lands.

I cannot accept the appellant's submissions that because the lease was not "in compliance with the provisions of the *Indian Act*" and hence void, the lands in question were not "simply occupied" by him. No doubt proper authority could remove him at any time, but while in actual use and possession given in fact by a person who had some right to possession, he could maintain his possession against all other than those who would have a right to have him ejected. In the interim, the appellant has possession in a legal but limited sense. In *Bentley et al*. v. *Peppard* (1903), 33 S.C.R. 444, Sedgewick, J., in giving the judgment of the Supreme Court of Canada, had occasion to refer to the following "fundamental proposition", at p. 446, when he said:

> 3. Where a person without title and without right (in Canada we call him a "squatter") enters upon land, his possession in a legal sense is limited to the ground which he actually occupies, cultivates and evolves; it is a *possessio pedis*-nothing more.

I am quite unable to modify the word "occupier" as used and defined in the *Taxation Act* by the word "lawful", or to construe the plain words in the definition "person in possession of land of the Crown . . . which is simply occupied" so that they read as though the word "lawful" were inserted before "possession" and/or the word "lawfully" were inserted between "simply" and "occupied".

In my opinion the learned trial Judge did not err when he found that the appellant was an "occupier" within the meaning of the *Taxation Act*, and hence subject to general taxes as if he were an owner of the lands in question.

C. If the Taxation Act (and/or the Public Schools Act) purports to tax land in an Indian reserve, is it ultra vires the provincial Legislature to such extent?

The learned trial judge concluded that both the *Taxation Act* and the *Public Schools Act* did not purport to tax Crown or Indian lands as such, but that the taxes levied on the appellant were levied

on him personally as an occupier pursuant to s.26(3) of the *Taxation Act*, and that, under the authority of *Smith* v. *Rural Municipality of Vermilion Hills*, *supra*, and *City of Vancouver* v. *Chow Chee*, *supra*, it was within the competency of the provincial Legislature so to do. I am in agreement with that conclusion so far as the *Taxation Act* is concerned. I venture to say nothing with respect to the *Public Schools Act*, because, I have already found in this judgment that that statute does not purport to tax the appellant as an "occupier" of Crown, or Indian lands in a rural area. It would be wrong to speculate on whether the requisite provisions of the latter statute were *intra* or *ultra vires* if they did purport to so tax - that would largely depend on the method adopted.

The appellant endeavoured to support his proposition that the taxation of the appellant as an occupier "as if he were an owner" was *ultra vires* by two submissions. First, he attempted to dispose of the *Smith* and *Chow Chee* cases, *supra*, as being distinguishable and not applicable because the judgments both were based solely on s.125 of the *B.N.A. Act 1867*: "No lands or property belonging to Canada . . . shall be liable to taxation." Secondly, regardless of s. 125, he argued that in the case at bar the lands in question were part of an Indian reserve under the *Indian Act*, and that s.91(24) of the *B.N.A. Act, 1867* provided that the Parliament of Canada should have exclusive legislative authority over "Indians, and lands reserved for the Indians". If I understood correctly, on that basis the appellant submitted that, even if the provincial statute did not actually tax Crown lands as such contrary to s.125, *supra*, the legislation was with respect to "lands reserved for the Indians". He relied on the judgment of this Court in *District of Surrey et al*. v. *Peace Arch Enterprises Ltd. et al*. (1970), 74 W.W.R. 380. In that decision it was held that certain properties forming part of "lands reserved for the Indians" but validly leased by the Crown under the *Indian Act* to developers for an amusement park were not subject to certain municipal by-laws and regulations providing for zoning and specifying building, water service, sewerage disposal and other requirements with respect to the land, and the way it could and could not be used. The Court found that the restrictions were directed to the use of the land and that the regulation of such use was an unwarranted invasion of the exclusive legislative jurisdiction of Parliament to legislate with respect to "lands reserved for the Indians".

I cannot see that that case has any application here. The Legislature has not purported to legislate in any way with respect to "lands reserved for the Indians" or their use. The tax legislation is not concerned with Indian lands but merely imposes a tax personally on an occupier thereof with respect to his occupation. In my opinion the appellant's submission is without substance and I reject it.

In result, I would vary the judgment below in view of my conclusion on the matter which was not included in the prayers of relief of either the appellant or respondent in the Court below, but which were added by amendment during the appeal. The effect is that the appellant's claim be not dismissed in its entirety but be allowed to the extent that a declaration be made in the terms of para. 1 (d) of the amended prayer for relief in the statement of claim, but limited to a rural area only. This declaration can be inserted in lieu of the present (B) of the formal judgment, the other declarations (A), (C) and (D) to stand.

McFARLANE, J.A. (dissenting in part) :---I have the advantage of having read the reasons for judgment prepared by my brother Bull. I agree with him that:

(1) Section 26(3) of the *Taxation Act*, R.S.B.C. 1960, c.376, and amendments (to 1970 [c.44]) and ss.198, 199 [rep. & sub. 1968, c.45, s.28] and 204 [am. 1968, c.45, s.30] of the *Public Schools Act*, R.S.B.C. 1960, c.319, and amendments (to 1970 [c.41]) are not *ultra vires* the Legislature of British Columbia. They do not constitute legislation in relation to Indians or the lands reserved for the Indians: *B.N.A. Act, 1867*, s.91(24). Further, neither statute purports to impose a tax on lands belonging to Canada or any Province: *B.N.A. Act, 1867*, s.125. Indeed, such lands are specifically exempt from taxation by virtue of ss.24(i) and 26(3) of the *Taxation Act* which also applies to taxes imposed by the *Public Schools Act* (s.204). If there be any doubt in interpretation, and I think there is none, it must be resolved in favour of constitutional validity on the authority of decisions such as *Re Reciprocal Insurance Legislation; Craigon v. The King; Otte v. The King*, [1924] 1 D.L.R. 789, 41 C.C.C. 336, [1924] A.C. 328 *sub nom. A.-G. Ont. v. Reciprocal Insurers*. A contention that indirect taxation is imposed was abandoned by the appellant.

(2) The appellant and others in the class he is authorized to represent in this litigation are occupiers of land held in trust for Indians within the meaning of the *Taxation Act*, ss.2 and 26(3), and cannot escape taxation validly imposed by asserting that their leases granted to them by Indian locatees contrary to the *Indian Act*, R.S.C. 1952, c.149 [now R.S.C. 1970, c.I-6], are null and void.

(3) The appellant and others in the class so represented are liable to general taxation imposed on them by the *Taxation Act* as "occupiers". Being "occupiers" they are subject to be taxed as owners by virtue of the *Taxation Act*, s.26(3).

I do not, however, agree with my learned brother that the members of the class which includes the appellant are free from liability for school taxes. In my opinion, school taxes are validly imposed on such persons occupying the lands in question situate in a rural district. I think the intention of the Legislature to impose school taxes on them is expressed with sufficient clarity by the *Public Schools Act* and the provisions of the *Taxation Act* which are made applicable by s.204(1) of the former statute which for convenience I again set down:

> 204(1) Subject to the provisions of this Act, all the provisions of the *Taxation Act* apply to the assessment, levy, collection, and recovery of all taxes imposed under this Act in a rural area of a school district, and to the addition of interest to such taxes when delinquent, in like manner as to taxes imposed under the *Taxation Act*; and all such taxes when levied shall, for all purposes of the *Taxation Act*, be deemed to be Provincial taxes imposed and assessed under that Act, and upon collection or recovery shall be accounted for as such.

I think this section must be interpreted in such a way as to give effect to the intention to tax these occupiers which appears with sufficient clarity from a consideration of ss.2, 4(1)(*c*), 24(*i*), 25 and 26(1) and (3) of the *Taxation Act*.

The first thing to be observed about s.204(1) is that it does not say that the provisions of the *Taxation Act* relating to the assessment, levy, collection and recovery of taxes apply. It does say that *all* the provisions of the *Taxation Act* apply to the assessment, levy, collection and recovery of *all* taxes imposed under the *Public Schools Act* in a rural area.

I am unable to conceive of anything denoted by the word "imposed", as related to taxes, which is not included in the connotation of the words "assessment, levy, collection and recovery". It follows, I think, that on a proper interpretation s.204(1) means that *all* the provisions of the *Taxation Act* apply to the imposition of all taxes "imposed under this Act", namely, the *Public Schools Act*. The phrase "imposed under this Act" should then be fairly interpreted to mean "school taxes", or more accurately, "all amounts required to meet the annual budget of a school board" or "all monies required to be raised for school taxes by taxation" to use the language of s.198(1) and (2) respectively and by s.199(1) unless a narrow or restricted meaning is given to the words "taxes imposed under this Act". It is not necessary to find elsewhere in the *Public Schools Act* itself specific provision for imposition of the tax. With respect for the contrary view, the interpretation I prefer is a reasonable and fair interpretation which gives effect to the real intention of the Legislature fairly expressed.

I think this interpretation is supported by the concluding words of s.198(2) of the *Public Schools Act*:

> . . . every person shall be taxed on the assessed value of his taxable land and seventy-five per centum of the assessed value of his taxable improvements.

It involves no misuse of language to apply the word "his" to an occupier as well as to an owner in this context. So interpreted the subsection itself imposes "school tax" on an occupier. I think, too, it is significant that the word "his" is found in like context in s.25 of the *Taxation Act* which I have already agreed applies to both owners and occupiers.

I think also the broad and liberal interpretation of the words "taxes imposed under this Act" in s.204 (1) is in full accord with the concluding portion of the subsection itself which provides that all such taxes when levied shall for all purposes of the *Taxation Act* be deemed to be provincial taxes imposed and assessed under that Act.

I cannot accept the ancillary argument that there would arise the anomaly that an owner would receive and an occupier would not receive a tax notice or demand under s.199 or the further anomaly that s.201 would apply to an owner but not to an occupier. I think this argument is answered by the provision of s.26(3) of the *Taxation Act* that the occupier "shall be taxed as if he were the owner of the land and improvements".

For these reasons I am of the opinion that s.26(3) of the *Taxation Act* and all other provisions of that Act apply so as to render the appellant and others in the class he represents liable to taxation for school purposes.

The declarations ordered by Wootton, J., the learned trial Judge, should be altered to conform with the amendments agreed at the hearing of the appeal. Subject to that variation, I would dismiss the appeal.

Appeal dismissed; judgment varied in part.