Federal Court of Appeal  Cour d'appel fédérale

Date: 20190325

Docket: A-408-16

Citation: 2019 FCA 53

CORAM: **PELLETIER J.A.**
STRATAS J.A.
DE MONTIGNY J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

and

DAVID PIOT ON HIS OWN BEHALF AND AS A REPRESENTATIVE PLAINTIFF

Respondent

and

SAKIMAY FIRST NATION

Intervener

Heard at Regina, Saskatchewan, on November 29, 2017.

Judgment delivered at Ottawa, Ontario, on March 25, 2019.

REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A.
DISSENTING REASONS BY:	STRATAS J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. INTRODUCTION

[1] Her Majesty the Queen in Right of Canada appeals from the decision of the Federal Court

reported as 2016 FC 1077 (Reasons). In that decision, the Federal Court dealt with a dispute between a number of lessees of land (the lessees) located on the territory of the Sakimay First Nation (Sakimay) and Her Majesty the Queen (the Crown) and Sakimay. The dispute centered on the appropriate rent for the lessees' recreational property pursuant to a five-year rent review clause in their 20 year lease. While the Federal Court decided a number of issues, this appeal focuses on the appropriate methodology or formula for determining the fair market value of the land under the 1991 lease between January 1, 2010 and December 31, 2014.

[2] The Federal Court heard expert evidence regarding the appropriate valuation methodology from two appraisers: Mr. Thair, who was retained by the lessees, and Mr. Bell, who was retained by the Crown. The Crown alleges several errors in the Federal Court reasons, flowing from the Court's statement that it is "in no position" to reach its own conclusions on specific valuation factors and that it is to accept "which of two competing views it prefers": Reasons at para. 93. The lessees rely on the standard of review, arguing that the Federal Court did not err in law nor fall into palpable and overriding error.

[3] For the reasons that follow, I find that the Federal Court did fall into palpable and overriding error in its treatment of some of the evidence, including the expert evidence. As a result, I would quash its judgment and return the matter to it to determine the rents in accordance with the judgment that I would issue.

II. THE FACTS

[4] There are two forms of lease in dispute between lessees of Sakimay's land and Sakimay: the 1991 lease which is in issue in this appeal and the 1980 lease which is in dispute in the related appeal, *Joanne Schnurr on her own behalf and as representative plaintiff v. Her Majesty the Queen, and Sakimay First Nation.* The Federal Court's reasons in that case are cited as *Schnurr v. Canada*, 2016 FC 1079. This Court's reasons for that appeal are being released at the same time, as 2019 FCA 54.

[5] The basic facts can be found in the Federal Court's reasons (at paras. 5-9):

> [5] The properties leased by the tenants are individual lots located at or near the shores of Crooked Lake in the Qu'Appelle Valley of southeastern Saskatchewan. The leased lots in issue are located on the northwest side of the lake on Shesheep Indian Reserve No. 74A [the Shesheep Reserve] and the southwest side of the lake on Sakimay Indian Reserve No. 74 [the Sakimay Reserve]. Most land on the north side of Crooked Lake is privately owned, while none of the lots on the south side of the lake are privately owned. Most of the south side of Crooked Lake is uninhabited, with Grenfell Beach being the only development.
>
> [6] On the north side of Crooked Lake, most of the lots are leased and there are very few privately owned fee simple lots that are undeveloped. The Defendant as landlord (through Sakimay) has 265 lots available for rent on the north side, of which 194 lots have been rented since 1951. Of the lots rented, 165 are in the form of the 1991 Lease. These lots are located on Shesheep Indian Reserve No. 74A and sometimes referred to as "Indian Point". For approximately 37 years, the cottage owners have been represented by an unincorporated association known as the Shesheep Cottage Owners Association [SCOA].
>
> [7] There are 285 lots that have been subdivided and are available for lease on the south side, of which 129 have been rented by the Defendant to tenants over the past 65 years. Of these 129 lots, 124 are subject to the 1991 Lease form. These lots located on Sakimay Indian Reserve No. 74A are referred to by the cottage owners as "Grenfell Beach". The tenants on the south side have been represented for approximately 29 years by an unincorporated association known as the Grenfell Beach Association or Grenfell Beach Cottage Owners Association [GBCA]. Only one of these tenants has opted out of these proceedings.

> [8] Beginning in 1951, Sakimay surrendered portions of Sakimay Indian Reserve No. 74 and Shesheep Indian Reserve No. 74A to Her Majesty the Queen in Right of Canada [Canada] for leasing purposes. The existing surrenders/designations are to expire in or about 2024.
>
> [9] While the leases have been administered by the Defendant, in and about 1995 the Defendant delegated certain administrative responsibilities to Sakimay. These aspects of the administration of the leases were then operated by Sakimay through the Sakimay Land Authority.
>
> For all intents and purposes, and from the Plaintiff's perspective, Sakimay is the "landlord" subject to little, if any, supervision by Canada.

[6] The distribution of lessees as between Sakimay's two reserves and the two forms of lease in issue is shown in the following table:

	1980 Lease	1991 Lease	Total
Shesheep Indian Point	29	165	194
Sakimay Grenfell Beach	5	124	129
Total	34	289	323

[7] As can be seen, there are 323 leases in issue in the two appeals: 289 leases are the 1991 leases that are the subject of this appeal and 34 leases are the subject of the *Schnurr* appeal.

[8] The leases are for a term of 20 years. However, the rent is fixed for five-year periods. Clause 2.01 of the 1991 lease deals with the setting of the rent at the conclusion of each five-year period:

> 2.01 …The annual rent shall be reviewed at five (5) year intervals. The rent for each succeeding five (5) year period hereof shall be as determined by the parties hereto in consultation with the Sakimay Band Council at least thirty (30) days prior to January first of the five (5) year period in question to determine the rent

> for that five (5) year period. The Tenant shall be advised in writing by registered mail of the determination. The rent shall be based on the fair market value of the land. In the event the parties hereto fail to reach agreement on the amount of the rent for any given year, the Minister shall set the rent payable for that year subject to final determination by the Federal court [sic] under due process of law. Upon determination by the Federal court [sic] any adjustment in rent shall be by way of an additional payment or rebate.

[9] The operative statement in this clause is "The rent shall be based on the fair market value of the land." As a result, the setting of the rent for a given five-year period is founded upon an appraisal of the leased lands.

[10] In 2009, Sakimay retained B.R. Gaffney and Associates to do an appraisal for the 2010-2014 renewal period. That appraisal recommended very significant increases in lease rates, in the range of 625% for lakefront lots and 545% for back lots: see the table at para. 28 of the Reasons. Sakimay adopted the recommended rates by way of a band council resolution and advised the lessees.

[11] Predictably, rent increases of this magnitude provoked a reaction on the part of the lessees. On December 12, 2009, they issued their statement of claim. Mr. Thair, Mr. Bell, and others were retained for the purposes of the litigation. No one from B.R. Gaffney and Associates was called at trial to testify regarding its appraisal report.

III. THE DECISION UNDER APPEAL

[12] The matter came before the Federal Court as a class action in which a number of common issues were certified. The Federal Court dealt with a number of those issues at paragraphs 33-90

of its Reasons. These determinations are not the subject of appeal. The only issues on appeal have to do with the appropriate methodology for determining the rent for the relevant period and its application to the facts of this case.

[13] The Federal Court noted at paragraph 102 of its Reasons that the parties generally agreed on the broad outlines of the methodology but disagreed on the application of that methodology.

[14] The Federal Court began its analysis by noting that the determination of the appropriate methodology turned largely on the appraisal report the Court adopted. It observed that the Crown had invited it to "address the detail in each report and…to adopt its expert's view or substitute its own opinion": Reasons at para. 92. But the Court held that it should not interfere to that level because it did not have the necessary expertise. It concluded, as noted earlier, that its findings of fact would depend entirely upon which of the competing experts' views it accepted: Reasons at paras. 92-93, 101.

[15] The Court preferred the evidence of Mr. Thair to that of Mr. Bell, "on the basis of [Thair's] strength, persuasiveness, consistency, logic and knowledge of the subject properties": Reasons at para. 98. The Court referred to other factors to justify its preference for Mr. Thair's evidence, including Mr. Bell's poor performance under cross-examination, Mr. Thair's greater familiarity with the Saskatchewan real estate market, and Mr. Thair's multiple visits to both the properties in issue and the "comparables": Reasons at paras. 98-100,114.

[16] The Court described with approval Mr. Thair's statement of the methodology for determining the rent (at para. 102):

- Estimate the value of the subject lots (on a hypothetical fee simple basis) by way of comparison of off-Reserve fee simple land sales;
- Apply adjustments to reflect the on-Reserve factors affecting the subject lots in comparison to the off-Reserve fee simple lots; and
- Apply and conclude a Rate of Return … to the on-Reserve lot values to determine annual rental rates.

[17] The Court noted that the parties agreed that this approach was in line with that established by the Supreme Court in *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633 (*Musqueam*) and applied in a series of cases since then.

[18] Like the lease in issue in *Musqueam*, Clause 2.01 of the 1991 lease requires rent to be set on the basis of the fair market value of the land. The Federal Court observed that in *Musqueam*, the Supreme Court held that "land" in the lease did not refer to off-reserve land but rather to the "hypothetical fee simple" in on-reserve lots. However, since there is no fee simple in reserve land *qua* reserve land, there is no direct market data as to the price that a willing buyer would pay a willing seller for a bare lot located on Sakimay's land.

[19] The Court then set out guidelines drawn from *Musqueam* which were advanced by the lessees in their memorandum of law, and which it adopted in its analysis: Reasons at para.112.

[20] Accepting the general methodology for rent determination put forward by the parties, the Court analyzed three main elements: the value of the hypothetical fee simple, the reserve factor,

and the rate of return. In each case, the Court did not examine the particulars of Mr. Thair's analysis. Rather, the Court justified its preference for Mr. Thair's conclusions on the basis of his characteristics and credibility or on the basis of weaknesses in Mr. Bell's evidence.

[21] Dealing first with the value of the hypothetical fee simple, the Court observed that Mr. Thair and Mr. Bell had both come to very similar values. Mr. Thair concluded that the relevant value was $1,800 per frontage foot for lakefront lots while Mr. Bell came to a value of $1,890, a difference of 5%. The Court then discussed the frailties of Mr. Bell's evidence on this issue, including the fact that there was an inconsistency between the reasoning in his report and his testimony on cross-examination. In the end, the Court accepted Mr. Thair's estimate of the value of a hypothetical fee simple of the lots in question.

[22] The Court then addressed the adjustment for the reserve factor. Mr. Thair calculated the reserve factor using two methods. In the first, Method A, he compared lease rates at four on-reserve recreational properties, including Indian Point and Grenfell Beach, to lease rates at two off-reserve properties. This comparison showed a 21% difference in the lease rates between on-reserve and off-reserve recreational properties.

[23] Using a second method, Method B, Mr. Thair derived rates of return for off-reserve lands which yielded an off-reserve rate of return of 1.6%. He then did a similar calculation for a number of on-reserve lands which produced an on-reserve rate of return of 0.9%. The difference between these two rates (1.6 - 0.9 = 0.7) is approximately 43% of the off-reserve rate of return (0.7/1.6 x 100), which is the reserve factor generated by Method B.

[24] The reserve factor which Mr. Thair settled upon was 32%, which is the average of the reserve factors produced by Method A and Method B.

[25] At trial, the Crown criticized Mr. Thair's selection of properties for analysis, his failure to perform a time-trend analysis and his use of provincial park rates of return, which the Crown alleged were unduly depressed due to political considerations. The Court rejected the criticism and found that Mr. Thair knew the strengths and weaknesses of the data points he selected, and applied his professional judgment to them. The Court was satisfied that Mr. Thair had "cogent and compelling reasons for relying on the data": Reasons at para. 135.

[26] The Federal Court then criticized Mr. Bell's analysis which resulted in a reserve factor of 6.25%. It noted Mr. Bell's concession that his methodology was not based on market data. Mr. Bell considered factors such as mortgage issues, political concerns and taxation and servicing, which he had considered in another case in which he testified and in which his opinion was accepted: *Morin v. Canada*, 2002 FCT 1312, 226 F.T.R. 188 (*Morin FC*). He assigned a percentage discount to each of those factors and then aggregated the discounts to arrive at a reserve factor. The Court found that Mr. Bell's approach injected an unwarranted degree of subjectivity into the analysis. The Court concluded that Mr. Thair's report presented a more compelling assessment which was both factually and legally consistent: Reasons at paras. 138-140.

[27] The last issue that the Federal Court considered was the rate of return: the rate to be applied to the fair market value of the hypothetical fee simple to determine the appropriate rent.

The higher the rate of return selected, the higher the rent. Mr. Bell proposed a historical rate of 4.5%; Mr. Thair proposed 1.6%.

[28] The Federal Court rejected the 4.5% rate because it was not based on market data and was apparently established at a time of significantly higher interest rates. The Court preferred instead the method of determining the market-determined rate adopted by Mr. Thair and another expert, Mr. Dybvig. That method consists of dividing the rental rate by the value of the asset. Mr. Thair invoked this methodology in adopting the rate of return in provincial parks and in calculating the rate of return at a privately owned resort at Marean Lake, Saskatchewan.

[29] Mr. Thair considered the rate of return at provincial parks of 1.92% to be a market rate because provincial parks represent 50% of the resort market; indeed, the Sakimay properties compete with those in provincial parks. Mr. Thair dismissed the argument that the provincial park rate was politically dictated, observing that it was the market rate no matter how it came about: Reasons at paras. 153-154. As for Marean Lake, Mr. Thair calculated that the rate of return was 1.2%. Mr. Thair's conclusion on the rate of return was the average of these two rates. The Court commented that Mr. Thair understood the differences between Crooked Lake and Marean Lake. Thus, the Court found that "Thair had cogent and compelling reasons for his conclusions based on facts which he understood": Reasons at para. 156.

[30] As a result, the Federal Court decided that the appropriate methodology or formula for determining the rent for the relevant period was the method used by Mr. Thair.

IV. STATEMENT OF ISSUES

[31] In its Memorandum of Fact and Law, the Crown raises seven issues. Upon closer examination, these fall into three categories.

[32] First, the Crown alleges that the Federal Court erred in its treatment of the expert evidence of the appraisers when it decided that its role was to choose between the two appraisers, as opposed to examining the evidence of both and coming to its own conclusions of fact. Second, the Crown raises a number of issues related to determining the reserve factor. Finally, it raises another group of issues related to determining the rate of return.

V. STANDARD OF REVIEW

[33] The decision under appeal is a decision of the Federal Court rendered after a trial. The standards of review are those set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*): correctness for questions of law and extricable questions of law and palpable and overriding error for questions of fact or mixed fact and law.

[34] The Crown argues that this case comes within the principle laid out in *Ledcor Construction Ltd. v. Northridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, namely, that the correctness standard applies to the interpretation of contracts of adhesion. This is a shift from the Supreme Court's finding in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 49-55, [2014] 2 S.C.R. 633, in which it was held that the interpretation of contracts was a question of mixed fact and law to which deference is owed unless an extricable question of law can be found.

[35] This issue arises primarily in the construction of the rent review clause in each of the leases. In this case, the issue is largely resolved by *Musqueam* where the lease used language which is substantially the same as the language used in this lease. The issue is more significant in the *Schnurr* appeal and will be discussed in more detail in the reasons in that appeal.

VI. ANALYSIS OF THE GROUNDS OF APPEAL

A. *Treatment of expert evidence*

[36] The Crown alleges the following error:

- The trial judge erred by concluding that he was required to choose and rely solely on one of the expert opinions rather than exercising his own independent judgment to determine the appropriate methodology.

[37] The Federal Court's stated reasons for preferring and accepting Mr. Thair's conclusions appear to be based on factors other than the Court's own assessment of his reasoning and the soundness of his conclusions. The factors upon which the Court relied were set out earlier in these reasons, at paragraph 15. This calls for an examination of a trial court's role with respect to expert evidence.

[38] In *R. v. J.-L.J.*, 2000 SCC 51 at para. 56, [2000] 2 S.C.R. 600, the Supreme Court summarized the purpose of expert evidence as follows:

> The purpose of expert evidence is thus to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an act of informed judgment, not an act of faith.

[39] More recently, in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 18, [2015] 2 S.C.R. 182 (*White Burgess*), the Supreme Court pointed out the risk inherent in the use of expert evidence and the objective which must be kept in mind:

> The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence" (citations omitted). The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion (citations omitted). The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: (citations omitted).

[40] In the case of a trial by judge alone, the trier of fact is the trial judge and so, it is the trial judge who must undertake "an effective and critical assessment of the evidence."

[41] As early as 1994, the Supreme Court sounded a warning which is particularly relevant to this case:

> There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.
>
> *R. v. Mohan*, [1994] 2 S.C.R. 9 at p. 24, 114 D.L.R. (4th) 419 (*Mohan*).

[42] The passage from *Mohan* is relevant because of what the Federal Court wrote at paragraphs 92-93 of its reasons:

> This issue largely turns on which appraisal expert's report should be adopted by the Court. The Defendant has, in a substantial part of its argument, invited the Court to address the detail in each report and, at times and if necessary, to adopt its expert's view or substitute its own opinion on specific issues.
>
> This is not an instance where the Court should, or could, interfere to that level. The Court is in no position, in part because it does not have the expertise, to

> conclude on specific valuation factor - what, for example, the Reserve Factor should be.
>
> These matters are subject to expert reports and result in a finding of fact, once the Court has accepted which of two competing views it prefers.

[43] On the basis of this passage and others in the Federal Court's reasons, the Crown argues that the latter fell into the error of deferring to the experts and "acting as referee in deciding which expert to accept." This is the very error which the Supreme Court identified in *Mohan*.

[44] On the other hand, Mr. Piot argues that it is not unusual in appraisal cases for the Court to adopt the methodology of one expert over that of the other as the basis for its conclusions. In support of his submission, Mr. Piot points to cases such as *Southpark Estates Inc. v. Canada* [sub. nom. *Villa Beliveau v. Canada*], 2006 FCA 153, 348 N.R. 122, *Crosson v. Canada*, 2000 CanLII 16565 (FCA), 265 N.R. 112, and *Morin v. Canada*, 2005 FCA 52, 332 N.R. 109 (*Morin FCA*). In each of these cases, however, the trial judge examined in detail the elements supporting the appraiser's choice of methodology: see *Villa Beliveau Inc. v. R.*, 2004 TCC 701 at paras. 2-5, 7-28, 43-55, [2004] T.C.J. No. 558, *R. v. Crosson*, 169 F.T.R. 218, [1999] F.C.J. No. 889 at paras. 72-99 and *Morin FC* at paras. 74-94.

[45] The examples cited by Mr. Piot do not persuade me that that the assessment of appraisal evidence is an all-or-nothing proposition, as he suggested. This Court said the opposite as long ago as 1979 in *Connor v. R.*, [1979] 79 D.T.C. 5256 (FCA) (*Connor*) at para. 4 of its reasons:

> It is trite to say that the Trial Judge is the trier of fact and he is thus entitled to accept or reject, in whole or in part, any of the evidence adduced before him. In this case he accepted some of the evidence but *he rejected in all cases the methods, at least in part, whereby the experts arrived at their valuations*. He was entitled to do so […] (my emphasis)

[46] The Federal Court's statement of its role in relation to the expert evidence was an error of law. When considering opinion evidence, trial judges remain the triers of fact and must come to their own conclusions based upon their own assessment of the evidence. They cannot simply defer to the experts on the ground that they lack the expertise to decide the factual question in issue.

[47] Trial judges must satisfy themselves as to the aptness of the methods of analysis chosen by experts and on the soundness of the conclusions they reach. The trial judge must be in a position to "accept or reject, in whole or in part, any of the evidence adduced before him": *Connor*, quoted above. For an example of this kind of analysis, one need look no further than the Federal Court's decision in *Aird v. Country Park Village Properties (Mainland) Ltd.*, 2004 FC 551, 251 F.T.R. 161.

[48] Admittedly, this is easier to do in some cases than in others. The greater the degree of complexity, the greater the difficulty of breaking down the components of an expert's evidence. Nonetheless, trial judges must satisfy themselves that the opinions expressed by the experts are a reliable basis upon which to make their findings: *R. v. Gibson*, 2008 SCC 16 at para. 58, [2008] 1 S.C.R. 397. While there is no doubt that the preparation of the appraisals tendered in this case required the exercise of skill and judgment, the basic concepts involved are not so difficult that the Court cannot understand them.

[49] An example of the Federal Court's error appears at paragraph 142 of its Reasons during its discussion of the reserve factor. It declined to make a factual finding itself, preferring instead to adopt one expert's view of the matter:

> While the Reserve Factor at [32%] may appear high and some other number approaching 25% may seem more reasonable, it is not for the inexpert judge who is relying on expert evidence to come up with his or her own Reserve Factor. The judge does not have the data, tools, training or experience to reach a substitute number.

[50] It was the Federal Court's role to make a reasoned judgment as to what the reserve factor should have been. This passage shows that, for the reasons which it expressed, it declined to do so. The consequences of this approach are manifested in the Court's treatment of the reserve factor and the rate of return.

B. *The determination of the reserve factor*

[51] The Crown argues that the Federal Court erred in accepting that the reserve factor exclusively worked to decrease the valuation of reserve lands as opposed to one that could increase or decrease the valuation. As a result, the Crown argues that the Federal Court erred in refusing to accept Mr. Bell's evidence on the reserve factor. Mr. Bell proposed a downward adjustment to the reserve factor for the absence of taxation of the leased lands. A downward adjustment of the reserve factor would have resulted in an upward adjustment of the value of the leased land. Such an adjustment was accepted in *Morin FC* (aff'd *Morin FCA*) and *St. Martin v. Canada (Ministry of Indian Affairs and Northern Development)*, 2001 FCA 205, 273 N.R. 134 (*St. Martin*).

[52] In both of these cases, the reserve factor is referred to as a discount factor (see *Morin FC* at paras. 29-32, 47-50, *St. Martin* at paras. 24-29). To that extent, these cases undermine the Crown's basic premise that the reserve factor is not always a downward adjustment.

[53] When discussing the 50% discount for reserve lands applied at the trial level (*Musqueam Indian Band v. Glass*, [1997] F.C.J. No. 1339 (QL), 137 F.T.R. 1) (*Musqueam FC*), the Supreme Court said that while it would not disturb the trial judge's conclusion on the amount of the 50% discount (as it was not in dispute by the time the case reached the Supreme Court), it did not follow that any land on any reserve would be subject to that discount. The Supreme Court found that it was a question of fact what, if any, discount should be applied: *Musqueam* at para. 52.

[54] The point that reserve land is not inherently worth less than non-reserve land is made perhaps even more clearly in *Musqueam FC*. At the start of its analysis of the value of the Musqueam Park lots, the Federal Court wrote the following (at para. 42):

> …I cannot, without analysis of the market evidence, rule out that fee simple off-reserve values cannot be used to help determine current land value in Musqueam Park. If it is demonstrated by market data that the subject land has an actual current value comparable to the value of fee simple land, it would be wrong to ignore fee simple data. If, on the other hand, market evidence reveals that the actual current value of land on the Musqueam Indian Reserve is not comparable to off-reserve fee simple land, it would be artificial and not consistent with the words of the leases to value the Musqueam Park land equivalent to those fee simple values.

[55] In my view, there is no presumption that reserve land is worth less than non-reserve land. If it is the case that any adjustment to the value of reserve lands is strictly a function of market valuation, then one cannot know if there is to be an upward or downward adjustment, or any adjustment at all until one has done a market evaluation. This is why the Supreme Court

observed that it will be a question of fact what, *if any*, discount should be applied to reserve land. It is also why the Federal Court reasoned in *Musqueam FC* that it could not arrive at a valuation of the Musqueam lands without knowing how the market valued them relative to off-reserve land.

[56] It follows from this that, if the value of on-reserve land is to be determined by market data, it is an error to make adjustments to values of reserve land which are not attributable to market data. Even though the Federal Court's decision in *Musqueam FC* contained a detailed discussion of factors which were thought to affect the value of reserve land, when it came time to assign a value to the land, only market values were used. The factors referred to at paragraphs 44, 51, 52, 54 and 55 of *Musqueam FC* were explanatory only; they were not intended to predict the value of the land. The 50% reduction which was arrived at in *Musqueam FC* was arrived at by comparing the difference between the sale prices of comparable long-term leases of on-reserve land and fee simple sales of off-reserve land and subtracting the difference ($305,000) from the value of the Court's choice of the hypothetical fee simple ($607,000) which gave a 50% (more or less) discount. No discount value was assigned to individual factors which were thought to have contributed to the diminished valuation of reserve lands.

[57] One must not read too much into the Supreme Court's comment at paragraph 53 of its reasons in *Musqueam* that the trial judge accepted the evidence of professional appraisers "that uncertainty lowered the market price of the Musqueam lands." Both the appraisers and the Supreme Court knew that the market valued the reserve lands at less than the surrounding lands. Whether the difference was caused by uncertainty of one kind or another, while reasonable on its

face, was not verifiable. The fact that there was a difference in market value certainly was verifiable and it is on that basis that the Supreme Court decided as it did.

[58] I recognize that appraisers routinely make adjustments to market data to account for differences between comparable properties to arrive at an opinion of value of the subject property. The distinction between those adjustments and the adjustments being proposed here is that subjective adjustments to the reserve factor are inherently problematic. A reserve factor is open to the challenge, as it was in *Musqueam FC* and as it is here, that it is discriminatory. As a result, care must be taken to reduce subjective elements in the quantification of the reserve factor. The best way to do that is to proceed on the basis of market data.

[59] As a result, I agree with the Crown that the reserve factor does not invariably result in a downward adjustment of the value of reserve land. On the other hand, I disagree with the Crown's submission that the reserve factor should be determined on the basis of a subjective opinion rather than on market data (i.e. how on-reserve lands fare in the market compared to off-reserve lands). To that extent, this ground of appeal fails.

[60] The Crown raises two other issues concerning the reserve factor:

- The trial judge erred by accepting new 2008-2009 leases on the Sakimay reserve as an appropriate comparable despite the evidence that Sakimay intentionally kept new leases at the 2004 lease rate.
- The trial judge erred by confusing and conflating two different time-trend adjustments and, as a result, accepting the method adopted by Mr. Thair.

[61] These grounds of appeal relate to the choice of comparables in the reserve factor analysis. Appraisers undertake a time-trend analysis when comparing transactions occurring at different times to account for changes in the market during the interval between transactions. In this case, the Crown alleges that Mr. Thair did not do a time trend analysis of the lease rates which he used in his calculation of the reserve factor. In particular, the Crown alleges that the use of lease rates from leases concluded in the 2008-2009 period at Indian Point/Grenfell Beach was an error because those lease rates were deliberately set at 2004 levels. Without a time-trend analysis to bring those lease rates up to 2009 levels, their use understated on-reserve lease rates.

[62] For the reasons that follow, I find that Mr. Thair did not do a time-trend analysis for the on-reserve lease rates so that his use of the 2008-2009 Indian Point/Grenfell Beach lease rates without adjustment resulted in a systematic understatement of on-reserve values which, in turn, led to an overstatement of the reserve factor.

[63] Mr. Thair's discussion of on-reserve lease rates occurs at p. 144 of his report (Appeal Book at p. 900 – corrected version at p. 1173). In it, he compares lease rates from five on-reserve resorts: Grenfell Beach, Indian Point, Kinookimaw, Chamakese and White Bear. The Crown argues Mr. Thair's reserve factor calculation is fatally flawed because both of his calculations rest on the assumption that the Indian Point/Grenfell Beach 2008-2009 lease rates are current rates, in the sense that they represent the best rate Sakimay could obtain in those years. Carol Sangwais, Sakimay's Environment Lands and Resources Manager, testified that leases of Sakimay land concluded between 2008 and 2009 were at the 2004 lease rate so as to keep all

lease renewals on the same schedule: Appeal Book at pp. 3201-3202. This evidence was not challenged.

[64] It appears that Mr. Thair may have anticipated an objection to his use of the Indian Point/Grenfell Beach rates without adjusting them for time-trend when he wrote the following at p. 96 of his Report (Appeal Book at p. 852):

> There is nothing in the subject leases that obliges the lessor to lease vacant lots at the rate negotiated at the beginning of the lease cycle. Both parties are free to negotiate the lease rate. The leases are at the time of their signing an indication of market rent – a willing seller and a willing buyer each acting prudently in their own self-interest, with normal motivation.

[65] In response to the Crown, Mr. Piot argues that even if the Indian Point/Grenfell Beach 2008-2009 lease rates ought not to have been used (which is not conceded), the rate per front foot for on-reserve leases chosen by Mr. Thair was higher than the rates used at Indian Point/Grenfell Beach so that the error, if any, was not palpable and overriding.

[66] The Federal Court touched upon these issues when it found that Mr. Thair was well aware of the strength and weaknesses of his data points, that he applied his professional judgment to balance “these forces”, and that he had “cogent and compelling reasons for relying on the data”: Reasons at para. 135.

[67] The Crown’s argument can only succeed if the evidence establishes that there was movement in the market in the period between 2004 and 2009. As a result, it is necessary to review what Mr. Thair did and what the evidence shows about changes in the market between 2004 and 2009.

[68] Mr. Thair did a time-trend analysis early in his report when considering the fair market value of the off-reserve vacant land sales at Crooked Lake and other Qu'Appelle Lakes. He wrote that this time-trend analysis "applies to all aspects of this report – leases, fee simple sales, capitalization rates/rates of return": Thair Report at p. 57 (Appeal Book at p. 813). He concluded, on the basis of this analysis that no time-trend adjustment to fee-simple values was required. Later in his report, Mr. Thair confirmed that no time-trend adjustment to lease rates was required: Thair Report at p. 146 (Appeal Book at p. 902).

[69] Mr. Thair said that his time-trend analysis applied to lease rates. However, the data which he relied on in his time-trend analysis was limited to off-reserve fee simple sales between 2008 and 2010: Thair Report at pp. 57-62 (Appeal Book at pp. 813-818). For the purposes of this case, Mr. Thair did a review of Multiple Listing Service land sales for the period of June 1, 2008 to June 1, 2010. Mr. Thair also referred to a study which he did "previously", which suggests either a study pursuant to a different assignment or a different study concluded in the course of this assignment. That study was limited to fee simple sales for the period 2009-2010.

[70] The trial judge appears to have accepted Mr. Thair's time-trend analysis at face value: Reasons at paras. 122-124.

[71] If a comparison of on-reserve lease rates to off-reserve rates is to be used to measure the reserve factor, then the basis of the comparison must be the same on both sides. Mr. Thair's report reveals that there were time-trend issues with all but one of the comparables which he chose, as can be seen from the review of on-reserve lease rates set out below.

[72] The date as of which the lease rates were to be set was December 1, 2009: 1991 Lease at Article 2.01. As noted, the Indian Point/Grenfell Beach 2008-2009 leases were concluded at 2004 rates. The Kinookimaw rates were set in 2006: Thair Report at pp. 124-125 (Appeal Book at pp. 880-881 – corrected version at p. 1170). Meanwhile, the White Bear rates had apparently not been adjusted for 25 years: Thair Report at pp. 141-142 (Appeal Book at pp. 897-898). The rates at Chamakese were increased from $896 per year at April 1, 2004 to $1,058 per year at April 1, 2009, an 18% increase which the landlord indicated was below fair market value: Thair Report at pp. 128-129 (Appeal Book at pp. 884-885).

[73] The Chamakese rate was set within eight months of December 1, 2009. The other rates were set before that and none of these rates were adjusted to December 1, 2009. Mr. Thair's time-trend analysis does not cover the 2004-2009 period, which is the period that must be examined to appreciate the effect of setting 2008-2009 lease rates at 2004 levels.

[74] Mr. Thair's report discloses significant movement of lease rates in the 2004-2009 period. A letter from the Saskatchewan Ministry of Tourism, Parks, Culture and Sport (the Ministry) dated August 3, 2010 to Provincial Park Cottage Owners discussed the rent increases for provincial park recreational leases based on a 2008 reassessment. The letter noted that:

> Since the previous assessment base year of 2002, overall land assessments in provincial parks have almost tripled, which is consistent with market increases for recreational property throughout the province, outside of provincial parks.
>
> …
>
> It is important to note that because 2006 market value changes varied widely from park to park, some lessees will have decreases and others will face increases.
>
> (See Appeal Book at pp. 949-950.)

[75] The 2002-2006 period overlaps with the 2004-2009 period in issue here.

[76] The 18% rate increase at Chamakese noted above also occurred during the 2004-2009 period. Further, Mr. Thair reports the observation of the lessor at the Marean Lake resort that lease rates at that resort tripled between the end of 2009 and the beginning of 2013: Thair Report at p. 94 (Appeal Book at p. 850). This is outside the relevant period but it is an indication of the variability of lease rates over time.

[77] The use of unadjusted on-reserve lease rates had a material effect upon Mr. Thair's calculation of the reserve factor.

[78] Mr. Thair's calculation of the reserve factor by Method A is found at pp. 153-154 of his report (Appeal Book at pp. 909-910 – corrected version at p. 1175). He excludes the Chamakese rates from his assessment of a representative on-reserve rate and bases his conclusion largely on the basis of the Indian Point/Grenfell Beach rates. He reasons that "the subject leases [Indian Point/Grenfell Beach] are a better comparable than White Bear" and Kinookimaw, which sets an upper limit. The effect of this is that Sakimay's own rates played a dominant role in establishing the reserve factor as of December 1, 2009. This is not to say that Mr. Thair fixed the on-reserve lease rate at the Indian Point/Grenfell Beach rate. He settled upon a rate which was higher than that rate. The point is that if those rates had been adjusted upwards, the resulting rate would have been higher still.

[79] The off-reserve lease rates were taken from Moose Mountain Provincial Park and from Marean Lake: Thair Report at pp. 94-95 (Appeal Book at pp. 850-851). The Moose Mountain rate ($10.74 per lakefront frontage foot) was set in 2006 while the Marean Lake rate ($17.90 per lakefront frontage foot) was a 2009 rate. The final rate chosen by Mr. Thair ($16.00 per lakefront frontage foot) was significantly closer to the 2009 rate than the 2006 rate.

[80] Based on the evidence of substantial increases in lease rates in recreational properties in the 2004-2009 period, I am satisfied that the use of unadjusted Indian Point/Grenfell Beach 2008-2009 rates in the reserve factor calculation made the resulting reserve factor wholly unreliable. Mr. Thair's Method A calculation wholly understated the value for on-reserve lease rates and, as a result, significantly overstated the reserve factor. As a result, I find that the Federal Court fell into palpable and overriding error in not setting the Method A calculation aside.

[81] The Crown alleges that Method B for the calculation of the reserve factor should also be disregarded because of its reliance on the Indian Point/Grenfell Beach lease rates. Method B, which Mr. Thair called the "Embedded Reserve Factor Methodology", consisted of calculating a rate of return by dividing the lease rate for on-reserve properties by the value/purchase price of a comparable off-reserve property. This is an adaptation of the formula for calculating a rate of return: the income produced by a property is divided by the value/purchase price of the property. The result is the rate of return. In general terms, the lower the lease rate relative to the purchase price, the lower the rate of return. The rate of return calculated in this fashion can then be compared to the rate of return for off-reserve rental properties to produce a reserve factor.

[82] After having conducted this analysis of embedded rates of returns at four on-reserve locations, Mr. Thair summarized his results in the table which appears at p. 170 of his report (Appeal Book at p. 926 – corrected version at p. 1178). That table shows the calculated rate of return for seven comparables, ranging from .5% to 2.4%. Mr. Thair then discards the highest (two values) and lowest values leaving for consideration four values:

Index #	Location
2b	1.3% for the Kinookimaw/Regina Beach lakefront pair
3	1.2% for the White Bear/Moose Mountain backrow pair
4a	.8% for the Grenfell-Indian Pt/Crooked Lake backrow pair
4b	.9% for the Grenfell-Indian Point/Crooked Lake lakefront pair

[83] Mr. Thair concludes his analysis by selecting a rate of 0.9%, relying on Indexes #2b, #3, #4a and #4b. As shown above, 0.9% is the calculated embedded rate of return for the Grenfell-Indian Point/Crooked Lake lakefront pair. It is not entirely clear why Mr. Thair says that his choice is based upon all four Index #'s reproduced above because the average of those values is 1.05 %. It is clear that the Indian Point/Grenfell Beach lease rates played a significant role in this conclusion. To the extent that those rates were understated, the calculated rate of return will also be understated and the resulting reserve factor overstated.

[84] As a result, the Method B calculation of the reserve factor is also unreliable because it is based on Indian Point/Grenfell Beach lease rates which, on a balance of probabilities, understated the on-reserve rate of return. The Federal Court fell into palpable and overriding error when it failed to set the Method B calculation aside.

[85] The grounds of appeal with respect to the use of Indian Point/Grenfell Beach lease rates, which were not adjusted for time-trend, succeed.

[86] I now turn to the last three issues which all deal with the rate of return.

C. *The rate of return*

[87] Here, the Crown alleges three errors:

- The trial judge erred by interpreting the rent review provisions in the lease applicable to the 1991 class members as providing for a rate of return lower than the amount that Sakimay would have received if the land was sold and the proceeds invested at market rates of interest.
- The trial judge erred in accepting as a proper comparable the rate of return applied to Saskatchewan provincial park leases when that rate of return was intentionally reduced by the government for policy reasons.
- The trial judge erred by interpreting the rent review provision in the lease applicable to the 1991 class members, particularly the rate of return, as being determined solely by the use of the property as a leasehold resort property.

[88] I shall deal with these in turn.

[89] The lease provides that the rent shall be "based on the fair market value of the land." The lease does not provide any further guidance as to how the rent is to be set.

[90] I conclude that a fair construction of the lease is that the rent must have some relationship to the fair market value of the land. This is suggested by the rationale for rent review clauses which the Supreme Court articulated in *Musqueam*. That rationale, it will be recalled, was that

such clauses reflect "the fact that the lessor could sell the land at its current land value and reinvest the proceeds at market rates of interest, if not subject to a long-term lease": *Musqueam* at para. 40.

[91] Nothing in this requires that the appropriate rate of return be fixed by reference to the rates of return earned on comparable land. Nor does the reference to market rates of interest require that the rate of return be fixed by market rates of interest.

[92] The Supreme Court's reference to market rates of interest cannot be taken as a statement that any rate of return which is lower than market rates is prohibited. In my view, the Supreme Court's reference to market rates of interest simply means that the latter is an indicator of a fair return, not an absolute measure of fairness. Money-market rates and land values do not always move in the same direction or with the same speed. We know, for example, that the unprecedented rise in home prices in certain metropolitan areas has occurred during a period of historically low interest rates.

[93] In the discharge of its obligations under the lease, the Federal Court must fix the rent on the basis of the fair market value of the land, having regard to the rates of return on land and market interest rates. However, it is not bound by one of these factors to the exclusion of the other.

[94] As a result, I reject the Crown's submission that we should intervene because the Federal Court erred in accepting a rate of return that was arguably less than current market rates of

interest. I see no error of law in the Federal Court's ruling in this regard, nor am I persuaded that there is any palpable and overriding error.

[95] I turn now to the Federal Court's decision to accept as a proper comparable the rate of return applied to Saskatchewan provincial park leases. As mentioned above, the Crown submits that this rate was an inappropriate comparable because it was intentionally and artificially reduced by the government for policy reasons.

[96] The rate of return used to set provincial park leases was set out in the letter from the Ministry referred to earlier in these reasons. The introductory paragraph of that letter noted that the Ministry had completed consultations with the Saskatchewan Provincial Parks Cabin Owners Association and that a lease fee adjustment had been developed and approved by the government. After noting that property assessments had increased significantly, the letter went on to say:

> In response to the total 2006 base year land assessments being almost triple the previous 2002 assessments, the multiplier used to calculate the lease fees has been reduced from the previous 5.26% down to 1.92%
>
> …
>
> The calculation of the new land lease fee is based on:
>
> > The total assessed value of the land only, not including buildings, which is multiplied by the 2010 "Multiplier" of 1.92 per cent;
> >
> > The minimum land lease fee is $500;
> >
> > For those with land lease fee decreases, the full decrease will be applied immediately in 2010;
> >
> > For those whose land lease fees are increasing, the increase will be staged up four years to a maximum increase of $300 per year; and

The maximum land lease fee increase will be $1,200 over four years.

[97] The Crown's principal argument is that the provincial park rate of return is not a market rate as the provincial government deliberately lowered the rate of return in order to offset a rapid increase in the assessed value of recreational properties. According to the Crown, Mr. Piot's own witness, Mr. Dybvig, conceded that the provincial park rate would not be indicative of market rates: Memorandum of Fact and Law at para. 58.

[98] Mr. Piot rejects the Crown's argument with respect to the provincial park rate of return essentially on the ground that it was used in setting the lease rate in approximately 50% of all cottage lots in Saskatchewan and that there was no evidence that it was a subsidy.

[99] The Federal Court accepted Mr. Thair's and Mr. Dybvig's evidence that "the appropriate market determined method to obtain a [Rate of Return] is to divide the rental rate by the value of the asset": Reasons at para 149. The Court also accepted Mr. Thair's rationale for finding the provincial parks' rate to be relevant. It was a rate that was in the market, no matter how it came about and there was no evidence that it was some form of largesse.

[100] The difficulty is that, accepting Mr. Thair's description of a market-determined method to obtain a rate of return, the provincial park lease rate was not *obtained* by dividing the lease rate by the value of the provincial park lots. It was chosen as a way *to set* provincial park lease rates and to keep them from rising too precipitously following a rapid increase in the value of recreational properties in Saskatchewan.

[101] Furthermore, the question of whether the provincial park lease rate was politically motivated or a form of government largesse is a red herring. The rationale for reducing the rate from 5.26% to 1.92% is set out in the Ministry's letter. It is clear that the Ministry's objective in setting the rate as it did was to moderate the rate of increase in provincial park lease rates. Why it did so does not change anything. The better question is how the provincial government settled on 1.92% as opposed to some other rate.

[102] The statement in the Ministry's letter that "government revenues will increase only by inflationary amounts" (Appeal Book at p. 949) suggests that the rate of return may have been pegged at the inflation rate (or some variant thereof). Such a rate would not reflect a money-market rate of return.

[103] A table prepared by Mr. Bell at p. 1845 of the Appeal Book summarizes various rates in use in financial markets which were put into evidence by Mr. Lansink, another appraiser retained in this matter. That table sets out the following information:

5 year GIC rate	1.94%
5 year conventional mortgage rate	5.58%
5 year stock dividend rate	3.0% to 3.6%
Dividend yield Canadian Banks	4.0% to 4.5%
Saskatchewan Provincial Parks	1.92%

[104] Not all of these rates are relevant. The notion that a lessor should be put in the same position as though it could sell its land and invest the proceeds at current market rates presumes that the lessor is an investor and not a borrower. To that extent, rates such as the five-year

mortgage rate are irrelevant. The remaining rates include a five-year GIC rate and two dividend rates. The latter are more generous than the GIC rate but they are not market rates of interest.

[105] Given that lease rates are fixed for a five-year period, the use of locked-in five-year GIC rates as a rate of return on five-year leases is not unreasonable. The fact that the provincial park rate is below market rates to the extent of .02% is not enough to make it a non-market rate.

[106] The real problem with the provincial park rate, from Sakimay's point of view, is that it is less than the rate Sakimay was able to realize in the past, which was between 4 and 5 percent. The difficulty with market based rates is that they change over time, and not necessarily in the same direction as land values. December 2009 was immediately after the meltdown of financial markets in 2008 as a result of the sub-prime mortgage debacle. Interest rates hit historic lows. Sakimay is living the flip side of the situation which occurred in the late 1970's when interest rates skyrocketed. The only way to avoid this possibility is to contract for a fixed rate of return which eliminates downside risk but also forecloses upside opportunities.

[107] Thus, there is a rationale for accepting the provincial government rate of return: it is effectively a money-market rate, not simply a rate in the market, as urged by Mr. Thair. As a result, I am not persuaded that the Federal Court committed a palpable and overriding error in accepting the provincial park rate of return.

[108] To be clear, this does not mean that Mr. Thair's ultimate conclusion on rate of return is beyond review. It simply means that the use of the provincial parks' rate of return in the

calculation is not a palpable and overriding error. I will have more to say about this in my discussion of the remedy to be provided to the Crown/Sakimay as the successful appellant.

[109] The last rate of return issue is the Federal Court's decision to take into account the use of the property as a leasehold resort property. The Crown challenges this. The Crown's argument is based upon a passage from *Musqueam* in which the Supreme Court says that rent review provisions such as this one require a determination of the value of land as a freehold interest: *Musqueam* at paras. 35-36. The Crown argues that Mr. Thair valued the land as a leasehold interest because the only comparables which he chose for his off-reserve rate of return were leasehold properties i.e. the provincial park rate and the Marean Lake rate of return.

[110] The Crown's challenge rests on a misunderstanding of the difference between the estate to be valued and the use of the land. At pp. 39-40 of his report (Appeal Book at pp. 795-796), Mr. Thair discusses the notion of most probable use or highest and best use. In his discussion of the 1991 leases, Mr. Thair recognizes that there is no restriction on the use of the land in the lease. Nonetheless he concludes that:

> Given each parcel's location around a lake, and the proven demand in Southern Saskatchewan for cottage sites and related amenities, there is no question that the most probable use – and by and large the most profitable use – would be for most lots to be developed with single family dwellings.

[111] Once Mr. Thair made that determination, then the choice of appropriate comparables was limited to recreational properties suitable for single family dwellings. Doing so was consistent with the Appraisal Institute Standards and ensured that the land was valued at its most valuable use. This was not a question of the type of interest being valued but a question of which use

produced the highest value. Thus, I reject the appellant's submission on this point. There is neither legal error nor palpable and overriding error.

D. *Summary*

[112] The Federal Court erred in law in its approach to the expert evidence in this case. That error manifested itself in various ways, notably in its acceptance of expert evidence about the reserve factor calculation. As a result, I would allow the appeal.

VII. REMEDY

[113] The Crown asks that this Court either make the decision the Federal Court should have made or return the matter to the Federal Court to be redetermined on the proper principles.

[114] This Court has, in the past, expressed its view as to when matters should be returned to the Federal Court for redetermination:

> The Federal Court is more experienced and adept in fact-finding than is this Court. Allowing it to re-determine the matter makes sense where the case is factually complex and factually voluminous, the Federal Court has seen the witnesses and has developed views on their credibility, and the result is uncertain and factually suffused: (citations omitted).
>
> *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161 at para. 157, 483 N.R. 275.

[115] I agree with these sentiments but I do not believe that they apply to this case. For the most part, the review required by the grounds of appeal consists of drawing conclusions from facts which are uncontested. This is not a case where the credibility of witnesses must be

reassessed or where the Federal Court has a particularly privileged position. Before us is a paper record that can be understood and appreciated without the need for witnesses. As has been pointed out by the learned author of the text *Civil Appeals*:

> *…where the evidence is predominantly documentary, an appellate court may make whatever findings are necessary in the interests of expediency and finality*. Likewise, where the issues are limited to drawing inferences from the evidence, which an appellate court is typically empowered to do, it may make the findings or conclusions that ought to have been made initially (citations omitted, emphasis added).
>
> (Donald J.M. Brown, *Civil Appeals*, looseleaf (Toronto: Canvasback Publishing, 2018-4) at 6:2230; see also *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634 at para. 33, 1995 CanLII 55 (SCC)).

[116] All parties agree on the methodology to be followed in this appeal. The Federal Court set it out at para. 102 of its Reasons:

- Estimate the value of the subject lots (on a hypothetical fee simple basis) by way of comparison of off-Reserve fee simple land sales.
- Apply adjustments to reflect the on-Reserve factors affecting the subject lots in comparison to off-reserve fee simple lots; and
- Apply and conclude a Rate of Return… to the on-Reserve lot values to determine annual rental rates.

[117] Insofar as the hypothetical fee simple is concerned, the value accepted by the Federal Court was $1,800 per waterfront frontage foot and $700 per backrow frontage foot. These are gross values, subject to adjustment for the reserve factor and other adjustments (poor access, for example). These values were not put into question in this appeal.

[118] The next issue is the reserve factor. The principle articulated and applied in *Musqueam FC* and in *Musqueam* is that any reduction in the hypothetical fee simple in reserve land due to

the reserve features of the land must be based on market data. The corollary to this proposition is that in the absence of reliable market data showing a difference in value between reserve land and non-reserve land, no adjustment for reserve factor is justified.

[119] As noted earlier, both Method A and Method B of calculating the reserve factor rely on the Indian Point/Grenfell Beach lease rates. Because of my finding that these rates were understated, I conclude that the resulting reserve factor calculations are unreliable. I am not in a position to do the time-trend analysis which should have been done and neither is the Federal Court. Is it possible to come to a reliable conclusion as to the reserve factor on the basis of the other values in Mr. Thair's analysis?

[120] The short answer to that question is no. As discussed in para. 78 above, in his Method A calculation, Mr. Thair considered the Indian Point/Grenfell Beach rates together with rates from Kinookimaw and White Bear. The Kinookimaw lakefront rate is based on a single lease while the backrow rate is a derived rate based on a ratio of lakefront to backrow rates. The White Bear rates are based on rates which have apparently remained unchanged for 25 years. It is difficult to know what probative value should be given to those rates. In his own analysis, Mr. Thair gave little weight to these rates: Thair Report at p. 155 (Appeal Book at p. 921 – corrected version at p. 1175). I see no reason to do differently.

[121] It will be recalled that the Method B analysis consisted of calculating a rate of return of on-reserve leases by dividing the lease rate by the purchase price of comparable off-reserve fee simple land. For this calculation, Mr. Thair used the same lease rates as he used in his Method A

calculation: Indian Point/Grenfell Beach (Thair Report at p. 169, Appeal Book at p. 925 – corrected version at p. 1177), White Bear (Thair Report at p. 167, Appeal Book at p. 923), Kinookimaw (Thair Report at p. 165, Appeal Book at p.921 – corrected version at p. 1176). The difficulties with all of these are the same as in the Method A calculation and for that reason, they are not a reliable basis for calculating the reserve factor.

[122] The last issue is the determination of the rate of return. In his analysis, Mr. Thair used a rate of return of 1.6% which he arrived at by averaging the provincial parks' rate of return of 1.92% and the 1.2% calculated rate of return on the list price of lots offered for sale at Marean Lake: Thair Report at pp. 161-162 (Appeal Book at pp. 917-918). The difficulty with using the Marean Lake rate of return is that it is speculative because it is based on the listing price of the lots and not the sale price. The provincial park rate, as discussed earlier, is a rate which is consistent with market rates of interest. I would not discount the provincial park rate on the basis of one speculative data point (the asking price for backrow lots at Marean Lake). The rate of return which should be used in the calculation of the rent is 1.92%, the provincial parks' rate of return. As discussed earlier, this is less than the historic rate of return which Sakimay enjoyed but is, in all the circumstances, a fair rate.

[123] Further adjustments will be required for various factors, such as poor site access. At pages 150-151 of his report (Appeal Book at pp. 906-907), Mr. Thair undertook a calculation to reflect the fact that some lots had poor access. I would adopt his calculation for this adjustment. Again, there is nothing in the record that would suggest that such an adjustment should not be made.

[124] Therefore, I would allow the appeal with costs and I would return the matter to the Federal Court with the direction that the rents under the 1991 leases be calculated on the following basis:

a) the value of the hypothetical fee simple is $1,800 per frontage foot for lakefront lots;

b) the value of the hypothetical fee simple is $700 per frontage foot for backrow lots;

c) there is no reserve factor adjustment to the hypothetical fee simple values;

d) the rate of return to be used in the calculation of the rent is 1.92% per year;

e) the lakefront to backrow ratio where a calculation is required is 2.7 to 1.0; and

f) any other adjustments shall be as calculated as in Mr. Thair's report except where such a calculation would be inconsistent with the values set out above.

"J.D. Denis Pelletier"
J.A.

"I agree
Yves de Montigny J.A."

STRATAS J.A. (Dissenting Reasons)

[125] I concur with my colleague's reasoning up until his consideration of remedy. On that, my colleague sifts through the voluminous, multifarious and challenging factual record, reaches some factual conclusions from that record, and then directs the Federal Court to follow his conclusions.

[126] Whether or not an appeal court should do that sort of thing is a discretionary matter. This Court's decision in *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 483 N.R. 275 at para. 157 sets out some factors for consideration. Based on those factors, this is the sort of case where the matter should be sent back to the Federal Court, the court with primary expertise in fact-finding. Delving into such a voluminous record and drawing specific conclusions from it is dangerous: we might be overlooking something small or subtle but, in the end, very important to the result.

[127] Here, this danger is heightened: the parties have not had an opportunity to make specific submissions on the matters my colleague adjudicates during his discussion of remedy. This is an independent reason not to get into the matter.

[128] Therefore, I would remit the matter to the Federal Court for redetermination in accordance with the principles set out in my colleague's reasons.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM A JUDGMENT OF PHELAN J. OF THE FEDERAL COURT, DATED SEPTEMBER 23, 2016, REPORTED AS 2016 FC 1077

DOCKET:	A-408-16
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v. DAVID PIOT ON HIS OWN BEHALF AND AS A REPRESENTATIVE PLAINTIFF
PLACE OF HEARING:	REGINA, SASKATCHEWAN
DATE OF HEARING:	NOVEMBER 29, 2017
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A.
DISSENTING REASONS BY:	STRATAS J.A.
DATED:	MARCH 25, 2019

APPEARANCES:

David Smith David Culleton	FOR THE APPELLANT
Kevin J. Bell	FOR THE RESPONDENT
Robert Janes, QC Estella White	FOR THE INTERVENER

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