Federal Court  Cour fédérale

Date: 20160923

Docket: T-2193-09

Citation: 2016 FC 1077

BETWEEN:

DAVID PIOT ON HIS OWN BEHALF AND AS A REPRESENTATIVE PLAINTIFF

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

REASONS FOR JUDGMENT

PHELAN J.

I. INTRODUCTION

[1] This is a class action involving a rental increase for cottage lots on the Sakimay Reserve and Shesheep Reserve at Crooked Lake in Saskatchewan. In 2009, the Sakimay First Nation [Sakimay] increased the rent on cottage property owned by the Plaintiff class (which will mean the whole of the certified class unless otherwise stated) up to 700% for each year of the next five year rental term.

[2] David Piot [Piot] is a representative Plaintiff on his own behalf and on behalf of all the tenants that are a party to a form of residential/recreational lease that came into use in or about 1991 [1991 Lease or Lease] pursuant to the Court's Certification Order.

[3] The landlord is the Defendant although much of the powers of administration of the land, including the lots in issue, have been devolved to Sakimay.

[4] By Order of Justice Gleason of October 11, 2013, the common issues established are:

> (a) Was the Defendant contractually obliged to negotiate with the Members prior to determining the rent, and/or prior to sending the notices to the 1991 Members for January 1, 2010 to December 31, 2014, and if so, is such an obligation enforceable in law?
>
> (b) If the answer to (a) is "yes", was the Defendant entitled to unilaterally set the rent without negotiations first having reached an impasse?
>
> (c) If the answer to (b) is "no", did the Members waive any right to negotiate by refusing to participate in negotiations or otherwise?
>
> (d) If the answer to (a) is "yes," and the answer to (b) and (c) is "no", must negotiations take place prior to this Court determining the rent, or is it within the jurisdiction of the Court to make a rental determination regardless of whether negotiations were legally required between the parties?
>
> (e) If the answer to (d) is that negotiations are not necessary, or that the Court has the jurisdiction to determine the rent, what is the appropriate methodology and/or formula for determining the rent for the land for January 1, 2010 through December 31, 2014 under the 1991 Lease?
>
> (e.1) If the answer to (d) is that the Court is not within its jurisdiction to make a rental determination, what is the appropriate methodology and/or formula for determining the rent for the land for January 1, 2010 through December 31, 2014 under the 1991 Lease?

(f) What is the application or provisional application of the appropriate methodology and/or formula to each of the 1991 Members?

II. BACKGROUND (some of the facts have been agreed to by the parties)

[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 and the southwest side of the lake on Sakimay Indian Reserve No. 74. 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.

[10] There are two current forms of lease in existence (both are standard form government drafted leases), one of which came into use in or about 1980 [the 1980 Lease] and a second which came into use in or about 1991 [the 1991 Lease]. Both Leases have provisions that allow for a rent review every five (5) years but utilize different methodologies to determine the “rent”.

[11] This trial and these Reasons concern the 1991 Lease. The 1980 Lease is the subject of a trial which was heard immediately following this trial, and the subsequent decision is reported in *Schnurr v Canada*, 2016 FC 1079.

[12] There was no negotiation of the terms of the 1991 Leases with the tenants. Canada drafted the leases currently in use and either Canada or Sakimay presented them to the tenants for execution on a "take it or leave it basis".

[13] Under the terms of the 1991 Lease, no services of any type are provided by the Defendant or Sakimay, even of the Band's own infrastructure. On the other hand, tenants pay no taxes or maintenance charges.

The responsibility for the maintenance of the Defendant's property and infrastructure (such as it is) that is not occupied by any of the tenants has, by course of conduct, fallen to the tenants.

[14] The 1991 Leases expire on the following dates:

a) 14 of the Leases end on December 31, 2018; and

b) 277 of the Leases end on December 31, 2022.

[15] All of the 1991 Leases have the same or similar rent review provisions.

[16] The assignment of any existing Lease is subject to the form of the Lease and several of the class members hold their interest by way of assignment.

[17] The Leases provide for a rent review every five (5) years. The last rent review, before the present rent review which is the subject of this litigation, occurred in 2005. The land values were based on the value of off-reserve fee simple land without taking into account a "Reserve Factor".

[18] Given the issues between the two appraisal experts, it is noteworthy that the last time a market derived rate of return was applied was in 1989.

[19] The critical provision of the 1991 Lease is Clause 2.01:

> 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.

[20] Sometime in 2009 Sakimay retained the services of B.R. Gaffney & Associates Ltd. [Gaffney], a Saskatchewan based appraisal organization, to conduct an appraisal of all the lots. As indicated earlier and shown below, the appraisal proposed a significant rent increase for the 1991 Lease tenants (as it did for the 1980 Lease tenants).

[21] Gaffney had done appraisals on behalf of Sakimay for several five (5) year rental periods. While the various reports were put in evidence, no one from Gaffney, including Mr. Clements who did the 2009 appraisal, was called to speak to that appraisal. The Defendant made no

attempt to justify the appraisal as representing fair market value. Instead, in this litigation, they relied on the appraisal of their expert, Duncan Bell.

[22] The history of rent setting since 1980 was set out in Exhibit 57 of the Common Book of documents as follows:

- 1980-84 – rent was based on an appraisal by Crown appraisers;
- 1985-89 – rent was based on an overall 15% increase established by Sakimay Chief and Council without any appraisal;
- 1990-94 – rent was based on a Gaffney appraisal;
- 1995-99 – rent was based on a 5% increase established by Sakimay Chief and Council without any appraisal;
- 2000-04 – rent was based on a Gaffney appraisal and any increase in rent was adopted by Sakimay Chief and Council; however, if the appraisal indicated a decrease in rent was appropriate, the particular rent was left at the 1999 level;
- 2004-09 – rent was based on a Gaffney appraisal but no decrease in rent would be recognized and in such instance the rent would remain the same as in the previous five year period; and
- 2009-14 – rent was based on a Gaffney appraisal.

[23] Despite the obligation in the Lease to have rent determined by the fair market, Sakimay refused to implement any decrease even where justified by an appraisal.

[24] On October 8, 2009, by Band Council Resolution, Sakimay set the rental rate for January 1, 2010 to December 31, 2014, without the involvement of the tenants or their respective associations.

[25] As the Band Council Resolution indicated, the rent review was based on the Gaffney appraisal of June 30, 2009 with a 7.5% rate of return adjustment to the leasehold values.

[26] As discussed later, in November 2009 legal counsel for the Plaintiff sought to engage the Defendant and/or Sakimay in what he describes as "negotiation of the rental rate". A meeting was scheduled for November 26, 2009, with the apparent intention of discussing the new rate but the meeting was cancelled by the Plaintiff's representative without explanation.

[27] By December 1, 2009 (30 days before the new rate was to take effect), there was no agreement between the Plaintiff and the Defendant and/or Sakimay as to the new rent.

[28] To understand the magnitude of the increase, it is useful to set out a chart (agreed to by the parties) indicating whether front lots or back lots are involved (there is a recognized difference in value between lots which front the lake and those which do not), the front end load fee, the rental rate for 2008/09, the disputed rent set by Sakimay for 2010-14 and an indication of whether the respective lots have, since commencement of the lease, been improved by the construction or placement of a dwelling:

Sakimay Indian Reserve No. 74

Lessee	Lot (Back = B Front = F)	Front End Load Fee	2008 and 2009 Rental Rate	2010 Rental Rate	Developed (Yes/No)
Cheri Chartier	159 B	$2,000	$366	$1,998	Yes
Wendy Maksymchuk	171 B	$2,000	$350	$1,890	No
Dwayne & Paula Leonard	262 B	$2,000	$307	$1,674	Yes
Warren Emke	267 F	Unknown	Unknown	$5,346	No
Devan Sperlie	153 B	$2,000	$297	$1,620	No

Shesheep Indian Reserve No. 74A

Lessee	Lot (Back = B Front = F)	Front End Load Fee	2008 and 2009 Rental Rate	2010 Rental Rate	Developed (Yes/No)
Marjorie A. Frank	99-18 B	$2,000	$351	$1,755	Yes
Raymie Reese	99-20 B	$1,500	$351	$1,755	Yes
Garnet & Shawna Gettel	222 B	$2,000	$268	$1,677	Yes
Darcy & Wendy Gettel	221 B	$2,000	$238	$1,490	Yes
Terry Threlfell	223	$2,000	$328	$2,052	No
David Gerhardt	99-22 B	$2,000	$319	$1,593	Yes
Curt Novak	172 F	$10,000	$556	$3,475	Yes
Denis & Celine Ottenbreit	173 F	$10,000	$556	$3,475	Yes
Kevin Selland & Brandi Ottenbreit	174 F	$10,000	$573	$3,580	Yes
Harry Urzada	241 F	$10,000	$1,511	$9,445	Yes
Shane Ottenbreit & Jackie Ottenbreit	242 F	$10,000	$1,625	$10,157	Yes
Sandra Stradcski	224 B	$2,000	$298	$1,863	Yes

Lessee	Lot (Back = B Front = F)	Front End Load Fee	2008 and 2009 Rental Rate	2010 Rental Rate	Developed (Yes/No)
Angela Pinay	247 F	$10,000	$1,118	$6,986	Yes
Ken & Heather Neuls	248 F	$10,000	$1,118	$6,986	Yes
Brian & Jean Petracek	249 F	$10,000	$1,084	$6,772	Yes
Dallas Davidson	99-23 B	$2,000	$281	$1,404	Yes
Lori Dale Kurtz	245 F	$10,000	$1,133	$7,079	Yes
Cindy Street & Marco Ricci	130 F	$10,000	$727	$4,544	No
Mark Bell	142 B	$3,000	$784	$4,704	No
Kelly Sanhiem	143 B	$3,000		$4,776	No
Angela & Trevor Gordon	129 F	$10,000	$727	$4,544	No
Brandy Ramstad & Bo Hallborg	158 B	$1,500	$426	$2,129	No
Shantelle Arsenault	123 F	$3,000	$757	$4,556	No
Lynn Torlen	99-19 B	$2,000	$351	$1,755	No
Brett Herbert	120 B	$2,000	$306	$1,539	No
Melissa Herbert	121 B	$2,000	$356	$1,782	No
Scott Miller	99-21 B	$2,000	$319	$1,593	No
Tracy & Joseph Santos	122 F	$6,000	$869	$5,216	No
Chris Miller	99-28 B	$2,000	$445	$2,214	No
Lawnie & Michael Skrypnyk	99-16 B	$2,000	$351	$1,755	No
Kyle Conrad	99-17 B	$2,000	$351	$1,755	No
Lindsay & Miranda Orosz	99-24 B	$2,000	$351	$1,755	No
Drew Orosz	117 B	$2,000	$373	$1,863	No

Lessee	Lot (Back = B Front = F)	Front End Load Fee	2008 and 2009 Rental Rate	2010 Rental Rate	Developed (Yes/No)
Michael Orosz	119 B	$2,000	$335	$1,674	No
Randolph Johnston	114 B	$2,000	$409	$2,043	No
Michael Waschuk	219 B	$2,000	$298	$1,400	No
Kristen Ryan	220 B	$2,000	$298	$1,490	No
Holly Orosz	99-25 B	$2,000	$351	$1,755	No
Scott Miller	113 B	$2,000	$386	$1,928	No
Tim & Sherrie Stoll	243 F	$10,000	$1,312	$8,197	No
Trevor Sanftleben	246 F	$10,000	$1,118	$6,986	No
Kimberley Powers	244 F	$10,000	$1,148	$7,173	Yes

[29] Against this background, the Plaintiff takes the position that the Defendant did not have the authority to set the rental rate for the five (5) year period of January 1, 2010 to December 31, 2014 without "good faith negotiations having taken place and failing".

[30] In the absence of this prerequisite, the Plaintiff contends that the Minister did not have the power (nor did Sakimay operating under delegated authority) to set the rental rate. As a consequence, the rental notices are invalid and the rental rate must remain the same as the previous rental rate.

As a further consequence, the Plaintiff says that this Court has no jurisdiction to set the rate but has asked the Court to set a provisional rate in the event of an appeal and to select its expert Steven Thair's methodology.

[31] The Defendant's position is that there was no obligation to negotiate the rent – the provision amounting to no more than an "agreement to agree". It also claims that any right to negotiation was waived by the actions of the tenants. Lastly, if this Court has jurisdiction to set the rental rate, it should adopt the methodology of its expert Duncan Bell.

III. ISSUES

[32] The common issues to be answered were set forth by Justice Gleason and are reproduced in paragraph 4 of this decision.

[33] The Plaintiff's issues may be addressed as:

- What obligations in Clause 2.01 precede the Minister's right to set the rent thereunder?
- Is Clause 2.01, in particular the condition preceding the Minister's rent setting, an agreement to agree and therefore void for uncertainty?
- Have the tenants waived whatever pre Ministerial rent setting rights they may have had?
- Are the rental notices void?
- What methodology for determining rent should the Court apply (assuming it has such jurisdiction)?

A. *Clause 2.01 Obligations*

[34] Contract interpretation is objective in nature – what a reasonable person would have understood the words and expressions to mean.

[35] In carrying out this function, the Court presumes the parties to have meant what they said and must have regard for the context of the words in two aspects:

- The context of the entire document as recognized in *Eco-Zone Engineering Ltd v Grand Falls–Windsor (Town)*, 2000 NFCA 21 at 7, 103 ACWS (3d) 722, wherein the Court stated that "… rarely is it truly possible to interpret a document without any knowledge of the context …"; and
- The factual matrix or surrounding circumstances. This matter must also be addressed objectively and should only be used to clarify the parties' intentions addressed in the contract.

[36] The basic principle is that unless there is ambiguity in the construction of the words in the contract after referring to the context of the documents and the surrounding circumstances, then the plain meaning of the words should be applied. It is only after an ambiguity continues to exist in the meaning of the words, or the words are contradictory or have multiple meanings, that the court should then resort to rules of construction to interpret a contract.

[37] The Supreme Court in *Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129 at 55, 161 DLR (4th) 1, confirmed this principle that there is no need to consider extrinsic evidence where language used by the parties is "clear and unambiguous on its face".

[38] This decision also addressed how such ambiguity may be resolved in adopting the quote from the Federal Court of Appeal:

> 41 …any consideration of whether this interpretation would promote a "sensible commercial result" must be accorded only a "tertiary status", behind the "primary" rule of interpretation -- the objective analysis of the actual words used by the parties -- and the application of the *contra proferentum* [*sic*] doctrine to interpret any ambiguity against the drafting party. …

[39] The *contra proferendum* rule has application in the instant case as the leases were a form of adhesion contract where ambiguity is to be construed against the drafter.

[40] Also of relevance to this matter is the principle that in limited circumstances, a court may hear evidence of the subsequent actions of the contracting parties in order to interpret the terms of the contract. The examination of post-contract actions may be appropriate where there is ambiguity in the contract.

[41] The Court reiterated this rule as early as *Adolph Lumber Co v Meadow Creek Lumber Co* (1919), 58 SCR 306 [*Adolph Lumber*]. In that case, the Court held that where it was impossible to determine what the parties really intended certain language to mean, the court has the "right and the duty, as by their subsequent conduct the parties have themselves put a construction upon the contract, to adopt and apply that as the proper construction" (at 307).

The ratio of the *Adolph Lumber* case was applied more recently in *Arthur Andersen Inc v Toronto Dominion Bank* (1994), 17 OR (3d) 363 (Ont CA), leave to appeal to SCC refused, [1994] 3 SCR v.

[42] Turning to the scheme of Clause 2.01, it is not particularly unique and its general structure is not difficult to discern. In *St Martin v Canada (Minister of Indian Affairs and Northern Development),* [1998] FCJ No 1031, 81 ACWS (3d) 529 [*St Martin*], rev'd 2001 FCA 205 on other grounds (the appeal concerned the appraisal evidence and not ACJ Richard's (as he then was) contract interpretation), the Court dealt with a similarly (but not identically) worded provision. Both parties here rely on this case but for different reasons.

[43] Justice Richard described the rental rate setting process thus:

> [42] The lease contemplates that the parties will seek to reach agreement on the fair market rent before the seven year period. It is only if they fail to reach agreement that the Minister shall make the determination. It is only if the lessee disagrees with the Minister's determination of the rent that the matter may be referred to the Trial Division of the Federal Court of Canada. In the meantime, the lessee must continue to pay the annual rental determined by the Minister.

[44] While the Plaintiff argues that the last sentence of the above quote is *obiter* and that Justice Richard did not have the benefits of the cases cited by the Plaintiff in its Memorandum, I cannot agree. There is nothing to suggest that it is *obiter*. Justice Richard was describing how the scheme worked, including the payment aspect.

[45] If it was *obiter*, then I adopt it because it is more consistent with the wording of the provision at issue than the notion that tenants could put off payment for years while the litigation worked its way through the courts. The benefits of the land belong to Sakimay and the Defendant and, absent wording to suggest payment of the new rent is held in abeyance, the Minister's determination of rent is operative until this Court holds otherwise.

[46] In the present circumstances, I conclude that Clause 2.01 is ambiguous as to the meaning and operation of the pre-conditions to the exercise of Ministerial rent setting. It is unclear how the parties themselves are to determine the rental rate.

[47] The ambiguity in Clause 2.01 arises from its absence of detail as to how the process of rent determination is to occur. It is redundant to have a requirement that the tenant be advised by mail of a rental determination in which it has had an active role in negotiation.

[48] The operation of Clause 2.01 is further complicated by the Order in Council P.C. 1995-1832 which effectively devolved management, including initial rent setting, to Sakimay. This altered the dynamic from a tripartite process, involving the Minister, to a bilateral process which put Sakimay front and centre and left the Minister with residual authority and specific power to set the rent in the event of dispute. The Lease has thus been altered by operation of law and both Sakimay and the Plaintiff are governed by that subordinate legislation.

[49] Therefore, I conclude that it is unclear how this process was conducted.

[50] The process requires the initial rental be determined 30 days prior to the start of the next five year term, but it has no timeline for the interaction between Sakimay and the tenants. There is no suggestion that it involves the type of negotiation which the Plaintiff demanded in November 2009 involving submissions, document disclosure and negotiations, which the Plaintiff described as "negotiation to the point of exhaustion".

[51] Against this kind of ambiguity, it is appropriate for the Court to take into consideration the parties' post contract conduct as per *Adolph Lumber*.

[52] The evidence establishes that from 1991 to 2009, the rate setting process did not involve discussions or negotiations. The Defendant/Sakimay retained an appraiser and put a rate to the tenants, and that ended the matter because there were no disputes.

[53] I conclude that the parties accepted that Sakimay would, on its own, set a rental rate. The tenants never acted as if this rental rate determination required their involvement.

What follows from this initial rate setting is a different matter and raises questions of waiver and estoppel.

B. *Duty to Negotiate*

[54] As discussed later, although by conduct the parties established that the initial rent "determination" was to be unilateral rather than bilateral, there is no evidence that the tenants gave up their right to have some input or discussion with the landlord <u>in good faith</u> before rent was finally determined prior to December 1 in the relevant year.

[55] What is at issue here is that tenants' right. The Lease is silent on this process and gives no specific right to the type of negotiation foreshadowed by the letters of November 17, 2009 of tenants' counsel, seeking a form of production of documents and effectively taking the position (at least before this Court) that the tenants had a right to negotiation to "exhaustion" – presumably of the subject matter of negotiations, if not of the individuals.

[56] The Plaintiff has described the negotiations as "good faith" negotiations, almost akin to the "duty to consult" found in Crown-First Nations relationships. There is nothing in the language of the Lease or in the prior expectations or prior conduct of the parties to suggest support for this elevated duty.

[57] There is no suggestion that Sakimay has to accede to, or even respond to, the tenants' position. At bare minimum, however, Sakimay could reasonably be expected to hear the tenants on their concerns.

[58] In that regard, Arlene Antel on the SCOA e-mailed Sakimay on November 3, 2009, requesting a meeting with Chief and Council concerning a large increase in their "lease fees". It was ultimately agreed that the meeting would be held on November 26, 2009.

[59] On November 5, 2009 (two days after SCOA's request for a meeting), Sakimay indicated to GBCA that Chief and Council wished to meet with their representatives on November 25, 2009 (one day before the meeting with SCOA).

[60] In the interim, SCOA retained counsel. On November 17, 2009, counsel wrote to the Minister, the Department's Saskatchewan Regional Office and Sakimay Land Authority indicating a desire to negotiate or discuss the setting of the rental rate. In that letter, counsel requested the methodology used in setting the three (3) previous five year term rental rates, all supporting documents and all working documents and other relevant documents related to the setting of rent for the period commencing January 1, 2010. The production was to be complete within 10 days of the date of the letter.

[61] These documents were not supplied before this litigation.

[62] On November 20, 2009, SCOA wrote to Sakimay to inform it that they would not attend the November 26, 2009 meeting "for unforeseen reasons".

[63] With respect to the GBCA, while they at first informed Sakimay that David Piot would attend the November 25, 2009 meeting, a day before the meeting GBCA advised that Piot would not attend.

[64] While Piot testified that he did not want to go to the meeting alone and that the meeting had nothing to do with the rent increase, Elizabeth Parley's evidence was that she had discussed the rent increase with Piot in early November.

[65] Given the relatively few tenants affected by the rent increase, the magnitude of the increase, the obvious concern to both Associations and Piot's clear knowledge of the rental

increase, I conclude that his memory about the purpose of the November 25, 2009 meeting is faulty.

[66] Piot knew, as the GBCA knew (or ought to have known), that the November 25 meeting was to discuss the rental increase. Anything less would be wilful blindness.

[67] The respective Associations cancelled their requested meetings with Sakimay without justification or explanation. The setting of the date for delivery of "production of documents" asserted by counsel to a date after the scheduled meeting provides no excuse for cancellation of the meeting and appears to be an artificial deadline.

[68] Therefore, the tenants refused to exercise whatever rights they had to "negotiate" or to "discuss" the rental rate before the due date.

[69] There is nothing in the Lease nor are there any implied terms that support the Plaintiff's production demands, nor does the absence of such document production justify cancellation of either meeting with Sakimay.

C. *Agreement to Agree*

[70] The Defendant has taken the position that Clause 2.01 is nothing more than an "agreement to agree". As such, the clause is vague and uncertain, and thus unenforceable.

[71] It is difficult to accept that the Defendant, as drafter of the Lease, now takes the position that it never intended to create enforceable rights. This is an appropriate instance for the imposition of the *contra proferendum* rule. The Defendant cannot take the benefit of the "defect" which it created.

[72] More importantly, this is not an "agreement to agree". It is a rent arbitration clause with a clear and certain framework under which rent may be fixed.

[73] I agree with the Plaintiff that two leading cases on this matter are *Empress Towers Ltd v Bank of Nova Scotia* (1990), 73 DLR (4th) 400 (BC CA) [*Empress*] and *Mannpar Enterprises Ltd v Canada*, 1999 BCCA 239, 173 DLR (4th) 243.

[74] In *Empress*, the lease set out a renewal based on prevailing market rental as agreed between the landlord and tenant. If there was no such agreement on market rental, the lease would end.

[75] While the renewal clause is different from the one at issue here, the B.C. Court of Appeal described three categories of lease renewals:

a) The first category is where the rent is simply "to be agreed". That clause is usually void for uncertainty;

b) The second category is where the lease is to be established by a stated formula but no machinery is provided for applying the formula to produce the rental rate. In

those cases, the courts will provide the machinery and find the contractual obligations to be unenforceable; and

c) The third category is where the formula is set out but is defective, and the machinery is provided for applying the formula to produce the rental rate. In those cases, the machinery may be used to cure the defect in the formula. Those cases will be found to have contractual obligations that are enforceable.

[76] In *Empress*, the B.C. Court of Appeal found that where failure to mutually agree gives rise to a right of termination, there is an implied term to negotiate in good faith.

[77] This case underscores that the nature of the process may dictate the nature of the right. Whether there is an implied term for good faith negotiations, and what that may mean, will be influenced by the ultimate consequence of a failure to agree. Where there is a third party arbiter to deal with the failure of negotiation it is reasonable to conclude that the nature of the negotiations may be less stringent than where a lease may be terminated, in part because courts wish to give full effect to a lease which is intended to continue.

[78] There are numerous cases in this Court where the Court has acted as the arbiter in rent reviews of which *St. Martin* is but one.

[79] Clause 2.01 contains all the necessary elements of an enforceable term and it is not merely an “agreement to agree”.

[80] In my view, the critical elements of a formula - comprised of rental basis (fair market value) and machinery (Ministerial setting subject to Court determination) - are what give Clause 2.01 its substantial legal effect.

[81] The Plaintiff's position overstates the first step (discussion/negotiation), which leads to an unreasonable and unintended result.

[82] The Plaintiff's position is that a defect in step 1 (which nevertheless results in a disagreement about rent) negates steps 2 and 3. The result is that Sakimay is deprived for the next five year period of the benefits of a "fair market rent". I see nothing in the evidence that suggests that this was the intended result and the plain words of Clause 2.01 do not lead to that conclusion.

D. *Waiver*

[83] As indicated earlier, waiver (or at least estoppel) arises potentially in two circumstances:

- The practice of the parties prior to 2009 was not to negotiate or discuss the new rent before the Minister set the rent.
- The lessees foreclosed their right to negotiate when they unilaterally cancelled the meetings set with Sakimay in late November 2009.

[84] Both parties rely on the decision in *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co*, [1994] 2 SCR 490, 115 DLR (4th) 478. The Court in that case made two points applicable here:

- Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party; and
- There are no hard and fast rules for what can or cannot constitute waiver; it can be done formally or informally, or inferred by course of conduct. It has also been phrased in terms of an unequivocal and conscious intention to abandon rights.

[85] The Plaintiff's evidence, and the aspect on which it relies, is that several of the tenants never read the Lease (in many cases having taken an assignment of the original lease). It is argued that since they did not know that they had a right to negotiate, it could not have been waived.

[86] A pleading of such ignorance of rights runs counter to one's right and duty to know the law and it ignores how the prior failures to exert such rights may be taken or understood by the other party.

[87] In the current circumstances, by course of conduct, the tenants have waived the right to a bilateral determination of the rent – leaving that process to Sakimay.

[88] However, as recognized by Sakimay, the tenants did not waive any right to discuss the proposed rental rate. Sakimay agreed to meet with both tenants' associations to discuss the rental rate. It is evident that Sakimay believed that the tenants had a right to some form of input.

[89] For the Plaintiff, their position suffered a fatal blow when both associations cancelled their scheduled meeting with Sakimay. By doing so, they waived any defect in the process and subjected themselves to having the rental rate imposed subject only to their rights to bring this matter before this Court.

[90] In summary, I conclude that the preconditions to this Court's jurisdiction to deal with the rental rate have been met.

Given that there is no agreement on the rental rate, it remains then to deal with the methodology to be applied to determine that rent.

E. *Appropriate Methodology*

[91] Having concluded that the Federal Court has jurisdiction to make a final determination of rent, the Court is required to answer the question: what is the appropriate methodology and/or formula for determining the rent for the land for January 1, 2010 through December 31, 2014 under the 1991 Lease?

[92] 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.

[93] 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.

[94] The Plaintiff's principal expert was Steven Thair [Thair], a Saskatchewan based appraiser. He is also an educator in appraisal methods and involved in the certification/accreditation of other appraiser candidates.

[95] Thair had extensive experience with property appraisals in Saskatchewan, including recreational property. He had no experience with aboriginal/reserve lands, but he saw this issue as similar to valuing property which has features not entirely driven by market forces. Therefore, he felt comfortable in assessing a discount which would apply to reserve land [Reserve Factor].

[96] Larry Dybvig [Dybvig] was a secondary expert called largely to critique the report of the Defendant's expert, Duncan Bell [Bell]. He is experienced in educating appraisers and in setting the standards of the Appraisal Institute of Canada.

[97] The Court did not find the criticisms of the professionalism of the experts (by either side but particularly by the Plaintiff) to be helpful. Both parties engaged in this "slagging match", but I do not find that either of the competing appraisers was misleading or unprofessional, nor did they suffer from any other stated or implied professional standards criticisms in their work.

[98] I favour the evidence of Thair over that of Bell on the basis of the strength, persuasiveness, consistency, logic and knowledge of the subject properties. I also took into account the experts' demeanor on the stand) and whether cross-examination undermined their report, as happened significantly with Bell. I recognize that few witnesses survive cross-examination unscathed, but Bell had significantly more problems than Thair in this regard.

In putting less emphasis on Bell's conclusions, I make no adverse comments or implications against Bell's professionalism or honesty.

[99] Bell is an appraiser from the Sudbury area; he had no local knowledge. It was apparent that he was brought into this case late, based on his experience with reserve land (albeit in northeastern Ontario). He had greater experience with reserve land than did Thair but far less knowledge of the local Saskatchewan market.

[100] While the differences in local knowledge will be touched on later, one significant difference that permeated the appraisal was that Bell visited the sites once, in winter, whereas Thair visited them three times in three different seasons. Thair knew the local characteristics (flooding, weeds, etc.) and he had been in and around similar properties in the Qu'Appelle Valley most of his adult life.

[101] Despite these and other qualitative differences between the two principal appraisers, there was agreement on the approach applicable to this case. Bell accepted Thair's basic approach but not the "specific methodologies" used by Thair.

[102] That approach is:

- 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 [ROR] (sometimes erroneously called an interest rate) to the on-Reserve lot values to determine annual rental rates.

[103] It was recognized by both parties that this approach conforms generally to that established in *Musqueam Indian Band v Glass*, 2000 SCC 52, [2000] 2 SCR 633 [*Musqueam*] and followed more recently in *Morin v Canada*, 2002 FCT 1312, 226 FTR 188 [*Morin*], aff'd 2005 FCA 52.

[104] Having established the basic general methodology which must be tailored to the relevant provisions of the governing document (in this instance, Clause 2.01 of the Lease), the obligation of the appraiser as prescribed by the Canadian Uniform Standards of Professional Appraisal Practice [CUSPAP] is to follow these steps:

a) Complete a comprehensive inspection of the subject properties and gain a thorough understanding of the characteristics of the surrounding area;

b) Make a thorough inquiry of the actions of market place participants to obtain market derived data that might be relevant to answering the appraisal question in issue;

c) Make such inquiries and investigations as may be necessary to satisfy the professional appraiser that the comparables being used are, in fact, comparable;

d) Once these data sets of the actions of lawyers, sellers, landlords and tenants involving comparable properties are obtained, it is then the obligation of the professional appraiser to explore different appraisal techniques that are available in the toolbox of appraisal theory and practice that might assist the appraiser in answering the ultimate question;

e) The professional appraiser is also required by the CUSPAP standards to use as many appraisal methodologies as possible to arrive at the answer to the inquiry from different approaches so that the most accurate market derived determination of the ultimate issue is obtained; and

f) Once the professional appraiser develops a series of indicators from the various approaches, the appraiser is then required to make a reasoned reconciliation of the indicators to obtain the best estimate of the answer to the ultimate issue.

[105] The land in question contains an immediate restriction in that, pursuant to the relevant surrenders, the land was surrendered for leasing purposes. The land consists of bare land lots without improvement, although most tenants have put one or more buildings and other improvements on the lots. These improvements are irrelevant for the description purpose, but factor into value since the tenant has his or her improvements “at risk” when the lease ends.

[106] The Lease provided that rent was to be based on the value of the lot, not on the value of land within a municipality abutting the Reserve. This was an error made by Bell.

[107] The operative provision of the Lease is that rental determination is based on "fair market value of the land". The majority in *Musqueam* determined that the market value of "land" referred to in its leases does not refer to fee simple off reserve land, but rather to the value of "hypothetical fee simple" lots on reserve land.

That approach in *Musqueam* is, on its facts, similar to the instant case and applicable here.

[108] Also, as in *Musqueam*, the difficulty in determining the value of land was due to the absence of data: there was no direct data establishing the price that a willing purchaser would pay a willing seller for a bare unimproved lot located at either Reserve.

[109] There are several important factual differences between the *Musqueam* situation and the present case, and one of them is an important area of dispute between the experts. In *Musqueam*, the ROR was fixed by agreement; here, the ROR was to be fixed by market data as of about December 1, 2009.

[110] These contextual differences, whether in *Musqueam*, *Morin*, *St. Martin* or any other appraisal decision, underscore that the appraisals and the Court's conclusion are driven by the specific facts and expert opinions. Precedents offer guidance and consistency in approach but are not templates or predetermined calculations/results.

[111] The above comment applies to the choice of expert evidence relied upon. The evidence of Bell was accepted and favoured in *Morin*. That conclusion was based on the facts before the trial

judge including any opposing appraisals, which was apparently not an issue in *Morin*. It is not inconsistent with precedent for this Court to favour Thair's opinion over that of Bell simply because Bell's opinion was favoured in the *Morin* decision.

[112] That said, Justice Gonthier on behalf of the majority in *Musqueam* set out a number of guidelines which were advanced by the Plaintiff in its Memorandum of Law, which I adopt and repeat from the Plaintiff's Memorandum.

> Mr. Justice Gonthier, in delivering the majority judgment in *Musqueam*, set forth a number of guidelines for use by courts and appraisers in making future market derived rental determinations of both the hypothetical fee simple and the rate of return. These were the following:
>
> a) The reference to "land" in the lease was a reference to the unimproved lot that was being leased to the tenant;
>
> b) Therefore when the value of the "land" is referred to as an element of the rental determination in the lease, it is a reference to the value of the lot "on reserve" and not the value of a fee simple lot "off reserve";
>
> c) In order to use of the value of an "off reserve" fee simple as the value of the "on reserve" lot, the lease must expressly state this to be the case such as in *Rodgers v Canada*, or *Devil's Gap Cottages (1982) Ltd. v Canada*;
>
> d) "Value" in real estate law means the fair market value of the land, which is based on what seller and buyer, "each knowledgeable and willing," would pay for it on the open market;
>
> e) Market value generally is the exchange value of land, rather than its use value to the lessee. Land (the subject property) is valued without regard to the tenant's interest in it and the specific terms of the lease are not relevant when determining "fair market value of the leased premises as bare land";

f) Fixing of rent for long-term leases as a percentage of the market value of the land is a formula by which a conservative investor expects to receive, in return for accepting a modest return on his investment, a maximum of certainty and a minimum of risk. The rent represents the true return on the market of land. It represents the fact that the lessor could sell the land at its current value and reinvest the proceeds at a market interest rate.

g) The capital asset being leased is land that has been surrendered for leasing and not land that has been surrendered for sale. The nature of the capital asset being leased is a therefore [*sic*] reserve land and not fee simple land;

h) The value must reflect the legal restrictions on the land and the market conditions. The market may respond differently to on reserve land than it does to off reserve land. To give effect to the leases, the land value in a rent review clause must pertain to the actual land in question and not other land that is off reserve;

i) To determine land value, whether as vacant or as improved, the appraiser (unless otherwise instructed by the lease) considers the highest and best use that is "legally permissible, physically possible, financially feasible and maximally productive." Legal impediments include private restrictions, zoning, building codes, non-zoning land use controls and environmental regulations;

j) Off reserve values of land cannot be transposed as a value of on reserve land. As soon as reserve land is surrendered for sale, it loses its reserve features. There can therefore be no such thing as fee simple title on reserve land. To approximate it, one must use a hypothetical value. The value of a reserve lot can be determined by adapting the off reserve value to take into consideration the features of the land and the market activity of economic participants;

k) In order to determine the hypothetical value of on reserve land the court viewed the market forces between buyers and sellers regarding a comparable property involving a 99 year prepaid lease, for which 78 years remained on the lease term. Notwithstanding that

> a prepaid leasehold interest on a comparable was being valued, this was the best evidence available as to the value that buyers and sellers placed on a hypothetical fee simple interest for on reserve land. The "Reserve Factor" is always a question of fact to be determined by the actions of market participants (buyers and sellers, landlords and tenants) in bona fide transactions;
>
> l) The "Reserve Factor" is largely "uncertainty" that is perceived by market participants, buyers and sellers, landlords and renters and is reflected in their market activities. Whether the perception of uncertainty is justified or not is of little consequence because it is the reaction to uncertainty that affects the actions of market participants, which then determines the Reserve Factor;
>
> m) The value of improvements should be deducted from the value of the hypothetical fee simple on reserve lot before applying a rate of return, as it is not appropriate for the tenant's rent to be paid on the current value of improvements paid for by the tenant.
>
> [footnotes omitted]

F. *Estimated Land Value*

[113] The first step in the appraisal process is the examination of the subject properties and surrounding neighbourhoods – the Qu'Appelle Valley resort properties.

[114] The Court has already raised the significant difference between Thair's actions in this regard and those of Bell. In addition to visiting the subject properties several times, Thair did the same for the comparables. He determined what to examine and how often, and he took his own pictures of the properties. He had a strong grasp of the facts related to both the subject properties and the comparables.

[115] For whatever reason, Bell did not match Thair in this important and foundational exercise. He used a significant amount of the ground work of Blaise Clements from Gaffney, including Clements' comparables, to such an extent that the description errors in Clements' work were repeated in Bell's work.

[116] The photographs used by Bell of the relevant properties were not representative of the lake levels and properties. His belief that they were a fair representation of the properties was directly contradicted by Parley, for which Bell had no reasonable explanation.

[117] Thair found that the fee simple off-reserve comparables had a value of $1,800 per front foot. He also found that comparable sales had a time trend and that resort properties in the province tended to have a wide variance.

Clements had come to similar conclusions in the 2009 appraisal but he did not testify and his reports came in largely as background.

[118] As between Thair and Bell, there were strikingly similar base values for off-reserve comparables:

Estimated Land Values	**Thair**	**Bell**
Waterfront per front foot	1,800	1,890
Non-waterfront per front foot	700	690

[119] The numbers are deceptively parallel. While the numeric values are essentially the same, they were arrived at in different ways and, in Bell's case, with inconsistent explanations.

[120] Bell initially concluded that off-reserve land factoring in a time trend resulted in a value of $2,478.79 at the comparable Round Lake. In his Report, Bell then reduced the frontage foot value to $2,100 per front foot for the off-reserve comparables because Round Lake was superior to the Crooked Lake properties.

When questioned about his time trend calculation, Bell testified that the reduction from $2,478 to $2,100 arose from his concern that the time trend calculation was too high and not that the adjustment was due to quality issues.

[121] This is one of several inconsistencies in Bell's testimony and underscores the uncertainty of Bell's valuation approach and the validity of his own time trend analysis.

[122] Time trend was an issue between the experts. Bell did not ignore the factor but took it into account in a "qualitative sense". Dybvig used a regression analysis of the sales Clements had supplied to Bell and found a time adjusted off-reserve value of $2,140 per front foot. Bell was not sufficiently satisfied with the data to make such a calculation.

[123] However, even using Dybvig's values, there is a $338 per front foot separation from Bell's $2,478 figure. Bell dismissed the issue by suggesting that in the end he and Dybvig were in sync and removed from Thair. However, as noted earlier, Bell's adjustment down from $2,478 was not a time adjustment matter.

[124] This inconsistency in response is troubling. I prefer Thair's analysis as it is even more conservative than Dybvig's, and Dybvig had a far less extensive knowledge of the properties and markets.

[125] It is also difficult to reconcile Bell's off-reserve value of $1,890 per front foot calculation in his April 2013 Review Report of Thair's analysis with his own $2,100 per front foot calculation in his expert opinion report of February 2013. It is inconsistent to give one value in rebuttal and a different value in the principal report.

[126] Therefore, I have no hesitation in accepting Thair's off-reserve fee simple rate of $1,800 per front foot despite Bell's criticism and confusing alternate calculations.

G. *Reserve Factor*

[127] In addition to the time trend matter, another principal area of expert disagreement is the calculation of the Reserve Factor. Thair calculated the Reserve Factor as 34%, and Bell calculated it at 6.25%.

[128] *Musqueam* sets out that a Reserve Factor may be applicable but it is not mandated: it is a "question of fact what, if any, discount should be applied" (at para 52, Gonthier J). The determination of whether and how much the land value should be discounted is determined by the market.

[129] Thair analysed the “market” and its perception of a lessening in value due to land being on a reserve in two aspects.

[130] Firstly, Thair compared lease rates from lakefront and back row leases at reserve land at Indian Point, Grenfell Beach and White Bear to off-reserve leases at Marean Lake and at provincial parks. From this, Thair concluded the existence of a downward adjustment of 25%.

[131] Secondly, Thair reviewed capitalization rates and rates of returns through a comparison of returns on lands off-reserve to returns on-reserve. This led to an off-reserve rate of 1.6%. Then Thair reviewed rental properties at Kinookmaw, Regional Beach, Buena Vista, Chitek Lake, White Bear Lake, Kenosee, Grenfell and Crooked Lake to determine an on-reserve return rate of 0.9%.

[132] From a comparison of these two rates, Thair concludes that this results in a 43% downward adjustment.

[133] Thair reconciled the two results of 25% and 43% and concluded a Reserve Factor of 34%.

[134] The Defendant criticizes Thair’s use of properties, failure to perform a time trend adjustment (already discussed) and use of a provincial park rate which the Defendant says is a “politically induced” rate.

[135] Thair was well aware of these strengths and weaknesses of his data points, and he applied his professional judgment to balance these forces. That is the very function of the expert. He had cogent and compelling reasons for relying on the data.

[136] Thair's approach was to examine market forces and conduct exactly as indicated in the *Musqueam* decision.

[137] Bell, on the other hand, conceded that his Reserve Factor methodology was not based upon market behaviour. He did not try to obtain the type of data examined by Thair.

[138] In Bell's case, he examined, as he had in *Morin*, specific factors:

- mortgage issues;
- political concerns; and
- taxation and servicing.

These may be factors leading to downward adjustment but the litmus test for these factors is whether they or other "reserve concerns" are reflected in the market.

[139] The difficulty with Bell's approach is that it injects an unwarranted degree of subjectivity into the analysis. The discussion of whether absence of taxes more than offsets absence of services supplied by Sakimay disclosed a significant degree of Bell's own view that he does not obtain services commensurate with taxes he paid.

[140] With respect, the fact that Bell's methodology was followed in *Morin* does not mean it must be followed here. There appears to be some grave doubt about the competing appraiser in *Morin*.

[141] In the present case, this Court had a more compelling and factually and legally consistent assessment in Thair's Report.

[142] While the Reserve Factor at 34% 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.

[143] On this issue specifically, I again accept Thair's conclusions.

H. *Rate of Return*

[144] The last major point of contention is that of the ROR. Bell concludes that it should be 4.5%, and Thair concludes that it should be 1.6%.

[145] Bell relies on an historical rate of 4.5%, a rate which was based in 1989, developed by Gaffney and applied consistently thereafter without any evidence that true market rates were considered from time to time.

[146] As pointed out by the Plaintiff's experts, the 4.5% rate was developed when interest rates and rates of return were comparatively high. For example, the Bank of Canada overnight interest rate declined over the period of 1989 to 2009 from 14% per annum to 2% per annum.

[147] Bell appears to have simply followed Gaffney's template of 4.5% independent of significant analysis.

[148] At paragraph 40 of *Musqueam*, cited by both parties, the Supreme Court said:

> … "the fixing of rent for long term leases as a percentage of the market value of the land is a formula by which a conservative investor expects to receive, in return for accepting a modest return on his investment, a maximum of certainty and a minimum of risk" (*Revenue Properties*, *supra*, at p. 180). The rent represents the true return on the market value of the land. "It reflects the fact that the lessor could sell the land at its current land value and reinvest the proceeds at market rates of interest, …" …

[149] I accept the methodology favoured by Thair and Dybvig (and adopted in the 1989 Gaffney Appraisal) that the appropriate market determined method to obtain a ROR is to divide the rental rate by the value of the asset.

[150] Thair used two indicators of this amount in the Saskatchewan resort market. Bell did not look at the local resort market.

[151] In looking at local markets, Thair rejected a City of Saskatoon rate of 4.6%. While criticized by the Defendant, Thair did so because the city rate did not reflect the rates for resort property. I find this to be a reasoned response.

[152] Thair favoured the evidence of 1.92% ROR for provincial parks. He did so because provincial parks constitute 50% of the resort market and therefore the Sakimay leases compete with these provincial lands. He also concluded that the rate was relevant because it was based on consultations with the Saskatchewan Provincial Park Cabin Owners Association and as such it arose from a form of negotiation between Lessor and Lessees.

[153] The Defendant attempted to undermine this comparator because it was a "derived" rate designed to dampen the effect of rapid rise in land values which would have produced a ROR in 2006 of 5.26%. The Defendant also suggested, without evidence, that this was more of a "political" settlement than a market driven result.

[154] Thair advanced a reasonable basis for finding the rate to be relevant: it was a rate that was in the market no matter how it came about. The suggestion of artificiality ignores the market power of the participant government and lessees. There is no evidence that the rate was some form of government largesse.

[155] Finally, Thair took into account the 1.2% ROR at Marean Lake. He understood the differences between the Crooked Lake situation and that of Marean Lake.

[156] As stated earlier, Thair had cogent and compelling reasons for his conclusions based on facts which he understood. I therefore accept his conclusions in this regard as well.

[157] There were other points of contention, more minor and less relevant, that need not be addressed.

[158] As indicated, I accept that the appropriate methodology is that used by Thair.

[159] There may be further calculations and issues flowing from this Decision. Therefore, the Court retains jurisdiction to address any issues arising from this Decision.

IV. CONCLUSION

[160] For these Reasons, the Court answers the common questions as follows:

a) Was the Defendant contractually obliged to negotiate with the Members prior to determining the rent, and/or prior to sending the notices to the 1991 Members for January 1, 2010 to December 31, 2014, and if so, is such an obligation enforceable in law?

Answer: In the specific circumstances arising in this case, no.

b) If the answer to (a) is "yes", was the Defendant entitled to unilaterally set the rent without negotiations first having reached an impasse?

Answer: Not applicable.

c) If the answer to (b) is "no", did the Members waive any right to negotiate by refusing to participate in negotiations or otherwise?

Answer: Yes – any obligation to negotiate or discuss rental increase was waived for the period in issue.

d) If the answer to (a) is “yes,” and the answer to (b) and (c) is “no”, must negotiations take place prior to this Court determining the rent, or is it within the jurisdiction of the Court to make a rental determination regardless of whether negotiations were legally required between the parties?

Answer: Not applicable.

e) If the answer to (d) is that negotiations are not necessary, or that the Court has the jurisdiction to determine the rent, what is the appropriate methodology and/or formula for determining the rent for the land for January 1, 2010 through December 31, 2014 under the 1991 Lease?

Answer: The Court has jurisdiction to determine the rent.

e.1) If the answer to (d) is that the Court is not within its jurisdiction to make a rental determination, what is the appropriate methodology and/or formula for determining the rent for the land for January 1, 2010 through December 31, 2014 under the 1991 Lease?

Answer: Not applicable.

f) What is the application or provisional application of the appropriate methodology and/or formula to each of the 1991 Members?

Answer: The method adopted by the Plaintiff’s appraiser.

[161] As suggested by the Plaintiff, there will be no award of costs.

[162] As this matter is governed by the Court's class action proceedings, the Court also remains available to resolve issues as between members of the class and/or counsel.

"Michael L. Phelan"
Judge

Ottawa, Ontario
September 23, 2016

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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