Federal Court  Cour fédérale

Date: 20160923

Docket: T-227-13

Citation: 2016 FC 1079

BETWEEN:

JOANNE SCHNURR ON HER 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 by tenants of the Sakimay and Shesheep Reserves at Crooked Lake, Saskatchewan, disputing a rental increase and seeking a rental determination pursuant to Clause 2.01 of the Tenants' Leases – known as the 1980 Leases. The rental increase imposed was up to 700% for each year of the next five-year rental term.

[2] Joanne Schnurr [Schnurr] is the representative Plaintiff on her own behalf and on behalf of all the Tenants that are a party to a form of recreational/residential lease that came into use in 1980.

[3] There was a companion class action involving other tenants at Crooked Lake who were party to a 1991 Lease (the Piot Action; Court File No. T-2193-09) [*Piot*].

[4] While the jurisdictional issues in this action are different than in *Piot v Canada*, 2016 FC 1077, and the basis for lease calculation is arguably different, the principal experts and much of their respective rationale for their opinions on rental amounts are the same. So much so that the Defendant attached as part of its Memorandum of Argument significant amounts of its argument in *Piot*.

[5] Therefore, the Court incorporates its findings in *Piot*, where applicable, as if set out herein. This is particularly so in respect of the choice of opinions of Steven Thair for the Plaintiff and Duncan Bell for the Defendant and the Court's reasons for adopting as more persuasive the opinion of Thair.

[6] The clause in issue reads as follows:

> 2.01 The annual rent for the ensuing five (5) year period commencing on the first day of January, 1985, shall be fixed and determined by the Minister in an amount which, in the opinion of the Minister, represents the fair market rental value of the land for the purpose herein permitted as at the date of such review, but excepting thereout and therefrom the value of any permanent improvements erected by the Tenant on the land during the term. The Minister shall endeavour to make such determination at least

> ninety (90) days prior to commencement of the ensuing five (5) year period in question and shall give the Tenant notice by registered mail of such determination. The annual rent so determined and fixed by the Minister shall be paid on the date such notice is given, or on the commencement date of the ensuing five (5) year period, whichever shall be later, and thereafter in advance on the first day of January in each and every year of the five (5) year period; PROVIDED HOWEVER that in the absence of or pending such determination the Tenant shall continue to pay the rent in the same amount, on the same dates in each year as during the preceding five (5) year period. If the Notice is given after the ensuing five (5) year period in question has begun, any deficiency in the current year's rent shall be forthwith paid by the Tenant to the Minister. If the Tenant disagrees with the amount of rent so fixed by the Minister, and if the Tenant has paid all rents currently due, including any increase thereof determined as aforesaid and if the Tenant is not in default under any covenants of the Lease, the Tenant shall have the right within sixty (60) days from the date of the Notice of such determination to refer the matter of the Federal Court of Canada pursuant to Section 17(3) of the Federal Court Act [*sic*] for determination of the rent for the ensuing five (5) year period in question on the above basis, provided that any monies for rent received by the Minister prior to the determination of the rent by the Court shall be part payment and shall not be construed to have fixed or determined or otherwise affected the determination of the rent for the ensuing five (5) year period in question. PROVIDED FURTHER that after determination by the Federal Court aforesaid any amount paid by the Tenant with respect to the ensuing five (5) year period in question shall be adjusted in accordance with such determination by way of rebate or additional payment.
>
> The Tenant shall pay "on account" the rental as determined by the Minister. After determination by the said Court, the amount paid by the Tenant "on account" as rental shall be adjusted in accordance with such determination by way of rebate or additional payment.

[7] Madam Justice Gleason in her Order dated January 23, 2013, set out the specific issues in common and no party has advanced any other issues. Those issues are:

- Question 1: Were the representative plaintiff and other Class Members entitled to institute this action under the terms of the 1980 Leases, despite not having paid

the increased rent before the action was instituted, in circumstances where the rent increase was set out in notices sent to them by the Sakimay First Nations [Sakimay] in late November 2009?

- Question 2: If the answer to Question 1 is "No", does the conduct of Sakimay and/or the defendant – in providing the members of the class (or their predecessors) with documents that contemplate commencing payment of the increased rent after January 1st – entitle the Class Members to relief from the strict requirements of the 1980 Leases, through relief from forfeiture or application of the doctrines of waiver or estoppel?
- Question 3: What is the appropriate methodology or formula under the 1980 Leases for determining the fair market rental value of each of the Class Members' leased properties for the period from January 1, 2010 to December 31, 2014?

II. BACKGROUND

[8] There was some agreement as to facts and others established in evidence, a summary thereof follows.

[9] The property leased by the Tenants are individual lots located at or near the shores of Crooked Lake, Saskatchewan. Crooked Lake is located in southeastern Saskatchewan in the Qu'Appelle Valley.

The relevant leased lots are on the northwest side in Shesheep Indian Reserve No. 74A and the southwest side in Sakimay Reserve No. 74. Most of the north side of Crooked Lake is

privately owned. However, none of the lots on the south side of Crooked Lake are inhabited except for the development at Grenfell Beach.

[10] Of the 285 lots available for lease on the south side of Crooked Lake, 129 have been rented by the Defendant to the Tenants over the past 65 years. Five (5) of these lots are subject to a 1980 form of lease. These lots are located on Sakimay Indian Reserve No. 74 and are referred to as Grenfell Beach. The Tenants with cottages on the south side of Crooked Lake have been represented for about 29 years by an unincorporated association – the Grenfell Beach Association or the Grenfell Beach Cottage Association [GBA]. None of the 1980 Lease Tenants have opted out of these proceedings.

[11] There are few privately owned lots on the north side of Crooked Lake that have not been developed. The Defendant and through it, the Sakimay First Nation [SFN], have 265 lots available for rent on this north side of which 194 lots have been rented since 1951.

[12] Of the lots rented, 29 are subject to the 1980 Lease located on Shesheep Indian Reserve No. 74A – sometimes referred to as Indian Point. These 29 are in addition to the 5 lots on the south side referred to in paragraph 10.

For approximately 37 years, the cottage owners have been represented by the unincorporated association referred to as the Shesheep Cottage Owners Association [SCOA].

[13] Of the 34 1980 Leases, 30 expire on December 31, 2018, two on December 31, 2019 and a further two on December 31, 2020.

[14] The Defendant is the landlord under written leases flowing from various surrenders/designations beginning about 1951 – which are set to expire around 2024.

[15] Although the 1980 Leases are with the Defendant, in 1995 the Defendant delegated, pursuant to sections 53 and 60 of the *Indian Act*, RSC 1985, c I-5, various administrative responsibilities over the leases and leased land to SFN, through its Sakimay Land Authority. This administrative responsibility includes the determination of the rent the SFN wishes to charge, the collection thereof, the acceptance of any assignment, sublease or mortgage.

For all intents and purposes and from the Plaintiff's perspective, SFN is the landlord subject to little, if any, supervision from Canada.

[16] The 1980 Leases are a standard form lease which was not negotiated with the Tenants (or any predecessor thereof) but were drafted by the Defendant and presented to the Tenants for execution. They were presented to the tenants on a "take it or leave it" basis. Many of the Plaintiffs in the class acquired their leases through assignments.

[17] The 1980 Leases are for the base land without an obligation to pay taxes and without any obligation to provide services. The evidence establishes that no services of any type are provided for the SFN's own infrastructure and property. All maintenance of the Tenant's property (including empty lots), roads and other infrastructure has been undertaken by existing Tenants.

[18] The 1980 Lease provides for a rent review every five (5) years. The rent review in question occurred in late 2009 to be effective for the next five-year period commencing in 2010.

[19] The Defendant set the rent for the 2010-2015 period at approximately 700% greater than had been set in the previous period of 2005-2009.

The central issue in this litigation is the appropriate rent for the period January 1, 2010 to December 31, 2014.

[20] Clause 2.01 of the 1980 Lease required the Minister to fix the rent for each five-year period "in an amount which, in the opinion of the Minister, represents the fair market rental value of the land …" (underlining for emphasis). The Minister is to exempt out from the "fair market rental value", any Tenants' permanent improvements.

[21] The Minister is to endeavour to make the rental determination 90 days prior to the commencement of the next five-year rental period – in this instance, 90 days prior to January 1, 2010.

The Minister was also required to provide the Tenants with notice by registered mail of the rental amount. The 1980 Lease provided (subject to an exception not relevant here) that payment was due on January 1 of the new rental period and each year thereafter.

[22] The evidence establishes that it had become the practice of SFN to provide the Tenants with a rental notice and/or letter accompanying the rental notice which set the due date for payment of rent at or about the end of January of the next year.

[23] That practice was followed in regard to the 2010 rental determination with the sending of three separate documents received by each 1980 Tenant. The first was a rental notice for 2010

providing a due date for payment of January 30, 2010. The second was an accompanying letter to the rental notice which indicated a due date of January 1, 2010. The third was a letter that provided a due date of January 31, 2010.

[24] Consistent with past practice, it had become the practice of Tenants to pay before January 31 of the following year. Schnurr described the situation as a "grace period" to January 31.

There is no serious challenge to the evidence that the parties had accepted this practice in lieu of the strict terms of the Lease.

[25] The 1980 Lease provided that the Tenant – if disagreeing with the rental amount fixed – had 60 days from the date of notice of the rental determination to refer the matter to the Federal Court.

[26] In this case, the notice was undated but one of the accompanying letters was dated November 9, 2009. However, it was not mailed to the Tenants until approximately the last day of November or early December 2009.

[27] Importantly for this litigation is the fact, accepted by the Defendant and established in evidence, that all 1980 Tenants had paid their rent up to and including the calendar year January 1, 2009 to December 31, 2009, prior to receiving a rental notice for the calendar year January 1, 2010 to December 31, 2010.

Litigation under Clause 2.01 was commenced on December 29, 2009, as detailed later, at a time when all 1980 Tenants were current with their rental obligations.

[28] This uncertainty about the date of notice caused the Tenants (or more realistically, their counsel) concern as to the expiry of the limitation period of 60 days to commence an action in the Federal Court.

[29] Matters were further complicated by the practice of the Defendant and/or SFN not to provide those Tenants, who had lease assignments, with a copy of their lease. This adversely impacted Tenants trying to determine whether they were governed by the 1991 Leases (the subject of the *Piot* litigation) or the 1980 Leases.

[30] The details of the attempts to "negotiate" the rent are outlined in the *Piot* decision. The issues surrounding the claimed "right to negotiate" is not a factor in this litigation.

[31] However, a court proceeding was commenced on December 29, 2009, as Court File No. T-2193-09. This action was on behalf of all various tenants of the Defendant/SFN, both those under the 1991 Lease and the 1980 Lease. Other Tenants sought to be added to the proceedings, such that a certification application was brought by David Piot as the representative plaintiff.

[32] Near J. (as he then was) decided that Piot should be the representative plaintiff for the 1991 Tenants but a different representative plaintiff was required for the 1980 Tenants. By Order of August 8, 2011, Schnurr was designated as the representative plaintiff for the 1980 Tenants.

That Order was set aside by the Federal Court of Appeal and ultimately replaced by the Certification Order of Gleason J. (as she then was).

[33] The Plaintiff here requests that the Court determine the rental rate applicable to the 1980 Tenants for the period January 1, 2010 to December 31, 2014. In Gleason J.'s order setting the common questions, she did not set out that the Court determine the amounts per individual 1980 Tenant but that the Court determine the applicable methodology or formula. This is largely a choice between the experts' opinions.

[34] The Court will retain jurisdiction to deal with any post judgment issues including but not limited to individual 1980 Tenant calculation issues.

[35] As indicated in the common issues, the Defendant has challenged the 1980 Tenants' right to seek a court determination of rent on the grounds that the 1980 Tenants (or some of them) have not paid the 2010 rent before the commencement of the action on December 29, 2009.

The Plaintiff disputes that the 1980 Lease requires such 2010 payment before the commencement of the action in 2009.

[36] The Plaintiff also raises, by way of alternative, that such a requirement has been waived by the Defendant, or the Defendant is estopped from raising the requirement given past conduct or finally that the Plaintiff is entitled to the equitable relief of forfeiture from any such payment obligation.

Gleason J. set this common issue as an alternative in the event that the Plaintiff was required to make the 2010 payment before commencing this action.

III. ISSUES

[37] The issues to be resolved at this stage have been set out in paragraph 7 of these Reasons.

IV. ANALYSIS

A. *Jurisdiction*

[38] The first common issue relates to the jurisdiction of this Court to determine the new rent despite some or all of the Class not paying the increased rent before instigating this legal action on December 29, 2009.

The specific question is:

> Were the representative plaintiff and other Class Members entitled to institute this action under the terms of the 1980 Leases, despite not having paid the increased rent before the action was instituted, in circumstances where the rent increase was set out in notices sent to them by the Sakimay First Nations [Sakimay] in late November 2009?

[39] The relevant part of Clause 2.01 reads:

> The annual rent so determined and fixed by the Minister shall be paid on the date such notice is given, or on the commencement date of the ensuing five (5) year period, whichever shall be later, and thereafter in advance on the first day of January in each and every year of the five (5) year period; PROVIDED HOWEVER that in the absence of or pending such determination the Tenant shall continue to pay the rent in the same amount, on the same dates in each year as during the preceding five (5) year period. If the Notice is given after the ensuing five (5) year period in

> question has begun, any deficiency in the current year's rent shall be forthwith paid by the Tenant to the Minister. If the Tenant disagrees with the amount of rent so fixed by the Minister, and if the Tenant has paid all rents currently due, including any increase thereof determined as aforesaid and if the Tenant is not in default under any covenants of the Lease, the Tenant shall have the right within sixty (60) days from the date of the Notice of such determination to refer the matter of the Federal Court of Canada pursuant to Section 17(3) of the Federal Court Act [*sic*] for determination of the rent for the ensuing five (5) year period in question on the above basis, provided that any monies for rent received by the Minister prior to the determination of the rent by the Court shall be part payment and shall not be construed to have fixed or determined or otherwise affected the determination of the rent for the ensuing five (5) year period in question. PROVIDED FURTHER that after determination by the Federal Court aforesaid any amount paid by the Tenant with respect to the ensuing five (5) year period in question shall be adjusted in accordance with such determination by way of rebate or additional payment.

[40] As a fact, the 1980 Tenants had paid all rents due before the commencement of this action and there is no evidence that such Tenants were not otherwise in default of any covenant of the Lease.

The Defendant acknowledged as much in paragraph 14 of their Memorandum of Fact and Law.

[41] The Defendant's position is that even though the rent increase was not due at the time that the action commenced, the increase became due and payable (in effect accelerating the rent) before the Plaintiff could exercise their right to bring this action. They rely on the words "any increase thereof as determined aforesaid."

The Defendant contends that it is an unreasonable interpretation to permit the Plaintiff to commence the action while current in their rent and then be in arrears thereafter while the litigation continues.

[42] With respect, the issue of being in arrears or otherwise non-compliant with the Lease during the litigation process is a separate matter from that of whether the Plaintiff can challenge the landlord's rental increase. There is nothing in the Lease to suggest that non-compliance (including rent payments) during the ongoing term vitiates the right to proceed in this Court. The landlord has its remedies under the Lease to deal with non-compliance including presumably termination.

[43] The Defendant's interpretation is that amounts which are not yet due must be paid before the Tenant has the right to seek legal redress. The Defendant would read the phrase as accelerating as due the rent which is being challenged.

[44] The structure of Clause 2.01 does not assist the Defendant's interpretation.

[45] The due date for payment of rent is:

a) The rent for the first year of the Lease is due on execution of the Lease.

b) The rent for the years 2 through 5 of the Lease is due on January 1st of each year.

c) In the second and subsequent five-year period, rent is due on January 1 of each year if the Minister determines the rent and delivers a rental notice to the Tenant prior to January 1st of the next ensuring five-year period. It is the Minister's obligation to endeavour for this to occur.

d) If the Minister failed to make a determination before January 1st of the next ensuring five-year period, then a *status quo* rental payment is due on January 1st of the next ensuring five-year period.

e) If the post-January 1st rental determination is higher than the *status quo* payment, then the difference between the *status quo* payment and the new rental determination (a "stub amount") is due upon receipt of the notice of the new rental determination during the first year of that determination. In the succeeding four years of that five-year term, the new rental amount is due on January 1st of each year.

[46] In the current circumstances, prior to filing in the Federal Court, all 1980 Tenants were current with the payment of rent for 2009 and for all preceding years. Because the rent determination by the Minister occurred prior to January 1, 2010, the payment of 2010 rent under the wording of the Lease was not due. It became due no earlier than January 1, 2010 – and arguably later given the series of correspondence which suggest the amount is not due until January 30 or 31, 2010.

[47] Clause 2.01 provides only two circumstances where lease payments are due on a date other than January 1st in any given year. The first is when the Lease is signed and the second is when the Minister does not make a rental determination before January 1 of the next ensuring five-year term.

[48] The Defendant seeks to impose a third non January 1st rental date – a date immediately preceding the initiation of legal action.

The problem with the Defendant's interpretation is that there are contradictory due dates within the body of the lease – January 1st in each year and the day before a claim is filed if filed prior to January 1.

[49] As held in *Ironside v Smith*, 1998 ABCA 366 at paras 65-66, [1999] 6 WWR 256, where a contractual provision is reasonably capable of more than one construction, it will be construed against the drafting party.

The rule of *contra proferentem* is "best invoked in a situation in which one person dictates the terms of a contract to another".

[50] This rule is appropriate to use in respect of adhesion contracts – as the 1980 Lease is. (See *Zurich Life Insurance Co of Canada v Davies*, [1981] 2 SCR 670)

[51] The words "… including any increase determined aforesaid" would apply where the action is commenced in the new term to post January 1 rents to avoid the issue of whether those rents are "due" where the very issue is that the rent cannot be due because it does not reflect "fair market rental value". It covers any stub period as described. It does not otherwise accelerate a due date so as to preclude seeking relief from this Court when rental payments and the other terms of the Lease are current.

[52] The 1980 Tenants, having paid all the rent then due at the time of filing its claim in this Court, have the right to have the Court determine the rent for the next five ensuring years.

[53] As to Question 1, the answer is “Yes”.

B. *Question 2*

[54] The question is:

> If the answer to Question 1 is “No”, does the conduct of Sakimay and/or the defendant – in providing the members of the class (or their predecessors) with documents that contemplate commencing payment of the increased rent after January 1st – entitle the Class Members to relief from the strict requirements of the 1980 Leases, through relief from forfeiture or application of the doctrines of waiver or estoppel?

[55] This question is only relevant if the answer to Question 1 is negative. Having answered Question 1 in the affirmative, there is no need nor was the Court invited by the setting of the common question to engage in alternative findings which would be merely *obiter*.

[56] The question has been considered by the Court but it is unnecessary and potentially unhelpful to answer it in these circumstances.

C. *Question 3*

[57] This common question does not require the Court to set the rent either globally or by individual lot at this stage. As in *Piot*, the Court retains jurisdiction to deal with post-decision issues as may arise from these Reasons and Judgment.

[58] As in *Piot*, the principal competing appraisal opinions are Thair for the Plaintiff and Bell for the Defendant. As indicated earlier and for much the same reasons as in *Piot*, the Court has

accepted Thair's methodology and opinion – particular aspects of the two opinions are discussed later.

[59] In addition to Thair, the Plaintiff called Ben Lansink [Lansink], a real estate appraiser from London, Ontario. He had significant experience outside of London, had done work on First Nation lands but until this case had not worked in Saskatchewan. It was evident that this lack of local knowledge was the same disadvantage suffered by Bell.

[60] His opinion was helpful in its "high level" approach to valuation. He identified a key aspect of this case which is different than *Piot*.

The land was to be valued on the basis of "fair market rental value", which is not the same as calculating rent on the basis of a hypothetical fee simple interest.

[61] It was his opinion – shared by Thair – the appropriate methodology was the Direct Comparison approach which involves direct comparison with similar lands.

[62] He examined the lots at Crooked Lake over a two-day period in November, had no communication with Thair and as a licensed real estate broker, he had access to broker information on real estate. He also used provincial park information.

[63] Lansink was of the view that the Direct Comparison approach was the only one to use in accordance with significant case law.

The Appraisal Institute of Canada recommends the use of multiple approaches – the approach adopted by Thair.

[64] Bell used his own approach of comparing off-reserve fee simple sales and making a number of unsupported Reserve Factor adjustments. While Bell, in his report, indicated that a search of comparable rental data was conducted, he admitted in testimony that he did not search for lease rates at any location in Saskatchewan prior to completing his report.

[65] Thair started his analysis with the concept of most probable use of the land being that set by the 1980 Lease as a single family dwelling.

[66] Thair utilized four methods (three being Direct Comparison) to arrive at his valuation:

1) The Direct Comparison Approach directly comparing rents from other Saskatchewan on-reserve resorts and making necessary adjustments;
2) Another Direct Comparison Approach directly comparing rents from provincial parks and making necessary adjustments including a Reserve Factor adjustment;
3) Further Direct Comparison Approach directly comparing rents from privately owned resort developments and making the necessary adjustments including a Reserve Factor adjustment; and
4) Income Approach which utilized three steps:
    a) research and verify fee simple sales of off-reserve resort lots;

b) estimate and apply an appropriate capitalization rate/rate of return to convert the lump sum values of the fee simple sales to annual rental estimates; and

c) make any necessary adjustments including Reserve Factor.

[67] Further, Thair provided a highly detailed analysis for each category of property and different comparators found within that property. He used as comparators:

- off-reserve vacant land sales of lakefront property at Crooked Lake and Qu'Appelle Lake;
- lakefront fee simple sales at Crooked Lake and Qu'Appelle lakes;
- off-reserve vacant land fee simple sales – back row at Crooked Lake and other Qu'Appelle Valley lakes;
- off-reserve vacant land rates (provincial parks and private property); and
- on-reserve vacant land lease rates.

[68] Following this analysis, Thair made a series of general adjustments as well as a Reserve Factor adjustment.

[69] In terms of general adjustments, these included:

- consideration and rejection of a time adjustment; the same subject as discussed in *Piot*;
- the lakefront to back row ratio is 2.5-2.8 to 1.0;
- the absence of a services adjustment;

- the need for a negative adjustment where lots are shallower than 80 feet; and
- the need for poor vehicle and pedestrian access adjustments in respect of some lots.

[70] The Reserve Factor adjustment is the same as *Piot* which is unsurprising given the same general location and same delegated landlord. Having used two methods to arrive at the Reserve Factor which gave rates of 25% and 43%, Thair concluded the appropriate rate to be 34%.

[71] Having considered all these factors, Thair arrived at the fair market rental value of:

- lakefront: 17.60 per front foot;
- lakefront (poor access): 1.16 per front foot; and
- back row: 6.24 per front foot.

These figures take account of the Reserve Factor.

[72] Bell, in his evidence, starts with making a seasonal residential use adjustment because the roads are not maintained on a year round basis. The 1980 Lease makes no reference to a valuation of the land as a seasonal property.

[73] Bell largely repeats his analysis as done for the *Piot* case including his approach to *Musqueam Indian Band v Glass*, 2000 SCC 52, [2000] 2 SCR 633 and *Morin v Canada*, 2002 FCT 1312, 226 FTR 188, affirmed 2005 FCA 52, the application of an “interest rate” (more appropriately a “rate of return”), the Reserve Factor adjustment and the same non-reserve and reserve considerations.

[74] Bell recognized two general methods for calculating fair market rental as (1) a comparison to current lease rates and (2) applying an interest rate to the fair market value of the leased land. This latter method was the one with which the appraiser had the most experience.

[75] While Bell engaged in a Direct Comparison Approach of some kind (which Approach he acknowledged was the most reliable and valuable), it involved 13 waterfront lot sales and five non-waterfront sales rather than a comparison of leases. He made the same adjustments as he did for the 1991 Lease.

[76] In making his rental determination, he repeated his observations on the 1991 Lease but included some comments from the Appraisal Institute of Canada about judging investments. He concluded that the applicable interest rate (rate of return) is the 4.5% he had used in his 1991 Lease opinion. Therefore, his 1980 Lease opinion incorporates the same weakness identified in *Piot* in respect of the Defendant's rate of return analysis.

[77] In this proceeding, the Defendant called a real estate agent and a real estate appraiser (not as expert) to give evidence as to the increase in real estate values in Saskatchewan.

[78] The real estate agent was handicapped by having little or no knowledge of Crooked Lake values as he was more closely tied to Regina. His best "guess" was that values in the Qu'Appelle Valley increased about 200% between 2006 and 2009.

The appraiser was not yet fully qualified as an appraiser. He could provide little helpful quantification of increases but noted that by the end of 2008 the increase in real estate values had slowed down.

[79] I find that this evidence, largely anecdotal, was interesting but not compelling. It lacked the detail and analysis to assist the Court or to undermine Thair's conclusions.

[80] The Defendant also called an official from Saskatchewan Parks. His evidence was designed to show that the use of park land rentals was not a helpful comparison because rental increases were constrained by policy considerations particularly by a cost recovery policy.

His evidence also showed that the level of services and facilities at provincial parks were vastly superior to those governed by the 1980 Lease.

[81] The evidence was a helpful contrast but it did not undermine Thair's consideration of those properties in his overall analysis of comparable (and competing) leased lands. As outlined in *Piot*, Thair was aware of and factored into his analysis the differences and similarities between rentals at parks and those at Crooked Lake including the fact that governments do have policy issues beyond the pure commercial interests.

[82] However, there was no evidence that the provincial rates were a disguised subsidy to tenants in comparison to non-provincial lands nor was there anything to suggest that any concession to cottage owners' association was a "lower rent for votes" arrangement.

[83] In making a rental determination based upon "fair market rental value of land", the market rent for comparable lease on comparable property should be considered. (See *Pacific West Systems Supply Ltd v BC Rail Partnership*, 2004 BCCA 247, 238 DLR (4th) 724.)

[84] I can do no better than to adopt the conclusion of the late Justice Layden-Stevenson sitting in this Court when she found in *Aird v Country Park Village Properties (Mainland) Ltd*, 2004 FC 551, 251 FTR 161, that a rental rate based upon a fair market rental for the land is best determined by way of a direct comparison of rental rates found on similar properties.

[85] In assessing and selecting the appraisal methodology (and thus the appraisal report which best encapsulates the methodology), the Court is influenced by the superior knowledge (theoretical and practical) of Thair, as discussed in *Piot*. It is not simply his greater knowledge of the subject property but his greater familiarity with the Saskatchewan market and the recreational lands in the province.

[86] It is important to note that Thair was not only vastly more familiar with the Crooked Lake leased lands but he was similarly more familiar with the 26 Qu'Appelle Valley comparables. Thair was aware of the physical characteristics of the subject property, such items as water levels, lighting, sanitation access and other similar attributes. Bell was not.

[87] In addition to this approach to credibility and persuasiveness generally and as described in *Piot*, on the specifics of the 1980 Lease analysis, Thair's approach is to be favoured. It is more thorough involving a large number of comparables, from that data he took four different

perspectives – three comparative, one income. He synthesized the results, and applied expert knowledge to make adjustments from which he drew his conclusions of value.

[88] With all due respect to Bell who was operating under apparent time constraints, his approach was to take Blaise Clements' data and do some type of analysis. His analysis and data inquiries had the earmarks of a predetermined single approach.

[89] I prefer the more comprehensive and balanced approach of Thair and would apply his methodology.

[90] Therefore, Question 3 would be answered: the appropriate methodology or formula under the 1980 Leases for determining the fair market rental value of each of the Class Members' leased properties for the period from January 1, 2010 to December 31, 2014 is Thair's methodology as outlined in his expert report dated October 28, 2015.

V. CONCLUSION

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

a) Question 1: Were the representative plaintiff and other Class Members entitled to institute this action under the terms of the 1980 Leases, despite not having paid the increased rent before the action was instituted, in circumstances where the rent increase was set out in notices sent to them by the Sakimay First Nations [Sakimay] in late November 2009?

Answer: Yes.

b) Question 2: If the answer to Question 1 is "No", does the conduct of Sakimay and/or the defendant – in providing the members of the class (or their predecessors) with documents that contemplate commencing payment of the increased rent after January 1st – entitle the Class Members to relief from the strict requirements of the 1980 Leases, through relief from forfeiture or application of the doctrines of waiver or estoppel?

Answer: Inapplicable.

c) Question 3: What is the appropriate methodology or formula under the 1980 Leases for determining the fair market rental value of each of the Class Members' leased properties for the period from January 1, 2010 to December 31, 2014?

Answer: The methodology adopted by the Plaintiff's appraiser.

[92] As in the *Piot* decision, there are no costs.

[93] The Court retains jurisdiction to resolve post-judgment issues.

"Michael L. Phelan"
Judge

Ottawa, Ontario
September 23, 2016

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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David Smith David Culleton	FOR THE DEFENDANT

SOLICITORS OF RECORD:

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