

Federal Court of Appeal



Cour d'appel fédérale

Date: 20120604

Docket: A-296-11

Citation: 2012 FCA 170

**CORAM:** NOËL J.A.  
DAWSON J.A.  
STRATAS J.A.

**BETWEEN:**

**DWAYNE TURBERFIELD, LEIF SORENSEN, GLORIA LAWSON, BARRY LAWSON, DONALD COPELAND, KATHRYN COPELAND, ELMER STEINEGER, ADELLE STEINEGER, RICK BELL, DIANE BELL, EDWARD KOSTYSHYN, HELEN KOSTYSHYN, DANIEL CARLTON KANCIRUK, CHARLENE SHERRY KANCIRUK, ZACK BERNHARDT, DONALD TARRY, BEVERLY TARRY, TIM SCHMIDT, MILES TANGJERD, LISA TANGJERD, FRED CUNNINGHAM, JOANNE CUNNINGHAM, LARRY RUTSKI, MARILYN RUTSKI, JEANNE NIEBERGAL, EDWIN MILLER, GERRI MILLER, BENTE JONES, RAYMOND ORTYNSKI, JAMES ABEL, MARIE ABEL, WILMER KOLYBABA, CAROL KOLYBABA, STAN KRUPSKI, MARG KRUPSKI, OWEN KRUPSKI, GWEN KEITH, GARY MIHAICHUK, WENDY MIHAICHUK, RAYMOND MALINOSKI, COREEN MALINOSKI, KELVIN PILUKE, NORMA PILUKE, NESTOR BODNAR, CATHERINE BODNAR, WADE MILLER, DIANE MILLER, FRED DAUNHEIMER, RUTH DAUNHEIMER, NANCY SENS, GERRY ARNDT, NELSON MILLIGAN, ELIZABETH MILLIGAN, JUNE RATHGEBER, NORMAN RATHGEBER, EDGAR SWALLOW, RUTH SWALLOW, JOHN HODGES, TERRI HODGES, ALLAN KRUKOFF, CINDY KRUKOFF, PATRICK SHYMKO, JOAN SHYMKO, BERNADETTE FRANK, KENNETH KITSCH, MARGARET KITSCH, MAURICE OLSON, KATHRYN OLSON, KENNETH JOHNSON, ELOISE JOHNSON, RANDY KARIUS, CRYSTAL KARIUS, DOUG SCHICK, SHANNON SCHICK, HENRY MYTHOPHER, MAUREEN MYTHOPHER, JOSEPH DONALD HERSHMILLER, KAY HERSHMILLER, RICHARD BERNHARDT, LESLIE RATHGEBER, LORRAINE RATHGEBER, LEONARD ANTAL, LARRY ANDERSON, MIRIAM ANDERSON, RAYMOND THOMAS HERBERT, GLADYS LORRAINE HERBERT, ARTHUR JAMES GOSLING, AVIS IRENE GOSLING, EDWARD ALLAN MISH, DONALD PILLER, YVETTE PILLER, TERRILEE CRIDDLE, JASON WALL, LEANNE WALL, RONALD WILLIAM ARMBRUSTER, SHIRLEY CAROLINE ARMBRUSTER, ROBERT ANTHONY LEIBEL, KAREN DEANNE LEIBEL, JIM HOLLINGER, WENDY HOLLINGER, STEPHEN KUZEK, VERA KUZEK, GEORGINA BEST, KEN BEST,**

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KRUEGER, BOB MILLER, RENEE MILLER, MARK BELL, KELLY SANHEIM, BRANDY RAMSTAD, BO HALLBORG, DALE BRACKEN, TERESA BRACKEN, PERRY SLOBODZIAN, RODNEY WAYNE BORK, CHERYL KIM BORK, DENNIS OTTENBREIT, KEVIN SELAND, BRANDI OTTENBREIT, DARCY GETTEL, WENDY GETTEL, GARNET GETTEL, SHAWNA GETTEL, TERRY THREFELL, SANDRA STRADESKY, BARRY BRODA, ANNETTE BRODA, CARL MIELKE, ELIZABETH ANN PARLEY, VICTOR LEWIS GREENLAW, JAMES EDWARD SAMUEL GORMAN, JANET ELAINE GORMAN, DONALD ANDREW EWACHOW, DEBRA BERNICE EWACHOW, HARRY HERBERT URZADA, SHANE OTTENBREIT, JACKIE OTTENBREIT, TIM STOLL, SHERRY STOLL, KIM POWERS, LORIE KURTZ, TREVOR SANFTLEBEN, ANGELLA PINAY, KENNETH NEULS, HEATHER NEULS, BRIAN PETRACEK, JEAN PETRACEK, RICHARD JONES, BERNICE JONES, JAMIE GORCHYNSKI, LISA GORCHYNSKI, LAWRENCE LANSBERRY, PAUL SCHAUERTE, SHARON SCHAUERTE, RODNEY MOHR, DONNA MOHR, PAUL GREGORY, RICHARD FEHLER, DONALD KENNETH JOHNSTON, DALE DERBY, KELLY DERBY, BILL SLUSER, LINDA SLUSER, RUTH SHARON CLAXTON, GEORGE CAMPBELL HOBSON, MARY MARGARET HENRY, WILLIAM DOUGLAS ROBINSON, RODERICK HACK, LINDA HACK, CLIFFORD ASHFIELD, TOMMY SUGDEN, MAXINE SUGDEN, TREVOR REEVE, JOYCE REEVE, BARRY LOUIS HODGSON, BARBARA ANN HODGSON, TERRENCE TODD BONNOR, SHELLY WILLIAMS, LYLE HISLOP, LOIS HISLOP, JAMES EDMUND EMKE, MIKE FITZGERALD, DAVE THOMLINSON, CAROL THOMLINSON, CARLA SALESKI, MARC SALESKI, DIANNE BLACKWELL, ROBERT MURRAY THOMLINSON, MARGO DENISE THOMLINSON, DUSTIN RICHARD WILLIAM McCULLOUGH, SOPHIE BUZASH, GLENN BUZASH, RICHARD DIMLER, MARCIA DIMLER, HENRY THOMAS LUKER, DOREEN LUKER, MURRAY RICHTER, DANNY DUNN, KAREN DUNN, JOHN JAMES BUITENHUIS, FAYE BUITENHUIS, BEATRICE ELLEN WINDJACK, JORDON BOKHORST, CATHIE BOKHORST, DAVID WILLIAMSON, SANDRA WILLIAMSON, WILLIAM THOMAS BLAIR HEXTALL, ROCHELLE DELEE DOBNI, LARRY STRADESKI, LUCILLE STRADESKI, WILLIAM JOHN AMY, GWENDOLYN LEE AMY, CORY BORSA, SHAWNA BORSA, CLAYTON PILLER, CANDICE PILLER, WENDY FITZ-GERALD, RICHARD BRIAN HACK, MARY ANN HACK, DELL CLINE, JAMES YULE, LORI YULE, JULIA HACK, JACK LINFORD, BRENDA LINFORD, ELWYN HECTOR MACLEAN, VIOLET ROSE MACLEAN, JOHN CROZIER, STELLA CROZIER, MARGARET AMY, GRANT THIRY, DOROTHY THIRY, NANCY NORMA HEXTALL, BRIAN ALFRED HODGSON, JACK ANDREW HEXTALL, KIMBERLY GAY HEXTALL, TREVOR CROZIER, CARLA CROZIER, PATRICK MCCARTHY, LORNA MCCARTHY, BRIAN EDGAR HARDY, GLORIA LYNNE HARDY, WILLIAM KENT, COLLEEN KENT, RUTH PEKRUL, RONALD ALEXANDER FORREST, MARGARET ANNE FORREST, BERNIE PATRON, RUTH PATRON, WENDY LEE SCHLAMP, TERRENCE REEVE, LYNNE REEVE, DELL CARMEN FOLEY, ELIZABETH NAKONESHNY, BLAIR NAKONESHNY, CHRIS NAKONESHNY, VELMA COLE, MELVIN COLE, MERVIN COLE, CARMEN COLE, DEREK COLE, REGAN COLE, LINDSEY COLE, JOAN HAYLOCK, LAWRENCE

**HAYLOCK, SHARON DON, RODERICK THOMPSON, MARILYN HEMBROFF,  
HARVEY LAMMER, DAWN LAMMER, DOUG LAMMER, ETHEL ELMA BOX,  
KENNETH MILTON BOX, LYLE PATRICK BOX, LLOYD THOMAS BOX, KENNETH  
ANTHONY SPERLIE, GWENDOLYN BETTY SPERLIE, MARGARET YULE, KELLY  
PUSCH, BRENDA LYNN PUSCH, GARY SEIER, DAVID HAHN, LOUISE MURRAY,  
LYNN URSCHEL, ELINOR RELF, JO-ANNE RELF ECKSTEIN, WILFRED SCHICK,  
VALERIE SCHICK, ALLAN BLAKLEY, GEORGE LESLIE BLAKLEY, SHIRLEY  
HELEN BLAKLEY, LAURELLE PAULA PACHAL, MARTHA JOANNA HASSLER,  
BARRY HASSLER, RAYE HASSLER, DAVID PIOT, LAUREL IRVING-PIOT,  
LAWRENCE LEIR, CARMEN DAYMAN, CHRYSTAL SCHLAMP, DALLAS GRANT  
PILLER, CAROL ANN PILLER, GARRY COLE, GAIL COLE, MELODIE COLE,  
DENISE BODE, DEVAN SPERLIE, CLIFFORD JAMES CLARKE, MONICA ANNE  
CLARKE, CHERIE MAE CHARTIER, WENDY MAKSYMCHUK, BOYD DAYMAN,  
RICHARD THOLL, BEVERLY THOLL, LYLE KRUEGER, KAREN KRUEGER,  
LANDON PILLER, MILES HACK, PAULA LEONARD, DWAYNE LEONARD, BERT  
FRANK BESPLUG, HOLLY VERONICA BESPLUG, ROBERTA MARY FRENCH,  
STEVEN KLOTZ, SHANNON KLOTZ, NORMAN GENTES, MARY JANE GENTES,  
KEVIN BENNETT, LORI BENNETT, LLOYD JONES, DAWN JONES, SHIRLEY  
NEULS, GEORGE THOMSON, DARLA MULLOCK, GERRY MULLOCK, JAMES  
MOORE, DAVID WAY, JUDITH McLEOD, DEBBIE ADAMS, JASON FISCHER, STEVE  
LINDSKOG, DONNA LINDSKOG, JEAN MCKAY, DONALD MCKAY, JOANN MCKAY,  
KIM REEVE, MIKE HORVEY, DIANE MCLEOD, CHRIS FREI, LESLIE FREI, JASON  
EISWERTH, WARREN WADE EMKE, TERRILYN ROCHELLE EMKE, KIM NAGEL-  
ZELLER, TERRY ZELLER, JACQUELINE MOORE, LAUREN CSADA, KEVIN CSADA,  
BRIAN TENNANT, and AUDREY TENNANT**

**Appellants**

**and**

**HER MAJESTY THE QUEEN IN  
RIGHT OF CANADA**

**Respondent**

Heard at Regina, Saskatchewan, on June 4, 2012.

Judgment delivered from the Bench at Regina, Saskatchewan, on June 4, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

DAWSON J.A.

Federal Court of Appeal



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CLARENCE LIPINSKI, HEATHER LIPINSKI, JOSEPH BRODA, THERESA BRODA, THOMAS COOK, MARGARET COOK, ARNOLD GEIB, LINDA URRY, SCOTT SIMPSON, GLENDA KOLYNCHUK SIMPSON, KIM TUBMAN, CHARLENE TUBMAN, GREGORY KOHNEN, VICKI KOHNEN, SHEILA KATHRYN ROBERTON, JOHN CRAIG HUBBARD, SHIRLEY KARIUS, KEVIN KARIUS, KEN KARIUS, KELLY KARIUS, DARRYL ALVIN SCHNEIDER, JOY LEANN SCHNEIDER, DENNIS WALDBAUER, CAROL WALDBAUER, GREGORY STEVEN BANOW, MICHELLE LEE-ANN BANOW, LARRY VELESTUK, DARYL VELESTUK, FRANCIS MARY CHRISTIE, LOWELL WADE CHRISTIE, JASON CHRISTIE, GUY MESSIER, LINDA MESSIER, CLIFF PANKOSKI, BRIAN PILLER, SHARON PILLER, EDWIN WELKE, MARIE WELKE, DONALD ANDERSON, SHERRY ANDERSON, KEVIN BELL, CATHERINE BELL, GORDON ERHARDT, VIVIAN ERHARDT, RANDY SCHRAMM, DAWN SCHRAMM, ROBERT JAMES BAKKE, LORNA BAKKE, AARON SPARVIER, RENEE SPARVIER, KEVIN CHEYNE, LOIS CHEYNE, DAVID GRODECKI, BONNIE GRODECKI, VIVIAN LALONDE, JOHN LUTZ, JUDY LUTZ, HERBERT WALDBAUER, ELSIE WALDBAUER, RICHARD LINDSAY, SHARON LINDSAY, JOYCE LEBRETON, GERRY FINCATI, FRAN MILLER, RODNEY RUTHERFORD, GREG HODGSON, JOHN MASEREK, SUSAN MASEREK, GRANT HERBERT, KIM HERBERT, ROBERT FUCHS, HELEN FUCHS, DON KISTNER, TRINA KISTNER, RANDY KADUHR, BRENDA KADUHR, GARY KITZUL, CHRISTINE KITZUL, NORMAN ULMER, JEAN ULMER, CLIFF DALES, MARION DALES, BEN APPELL, FAYE APPELL, WAYNE SCHNURR, JOANNE SCHNURR, TOM PILLER, TOM LINK, DEBBIE LINK, JIM DAUNHEIMER, BEV DAUNHEIMER, BRIAN REEVE, SANDRA REEVE, GEORGE ANTHONY BRODA, LENARD GERHARDT, LORETTA GERHARDT, VAN BOT, GLEN KITSCH, ADOLF KURTZ, LOUISE KURTZ, LARRY PETERSON, BRENDA PETERSON, CHERIE PETERSON, WARD CONACHER, CHRYSA PETERSON, JARET TAYLOR, MURRAY FORREST, ROSE FORREST, LORNE SKRYPNYK, KATHY SKRYPNYK, LAWNIE SKRYPNYK, MICHAEL SKRYPNYK, KYLE CONRAD, MARJORIE ALICE FRANK, LYNN TORLEN, RAYMIE REESE, DAVID GERHARDT, DALLAS DAVISON, LINDSAY OROSZ, MIRANDA OROSZ, LARRY ENGEL, GAIL ENGEL, NORMAN SENS, JANE SENS, CHRIS MILLER, ERNEST ILUK, AUDREY JOAN ILUK, DONALD DEVEREAUX, TIMOTHY DEVEREAUX, DON MCKAY, DARLENE MCKAY, BOB MACNAB, WARREN WALCHUK, CHERYL WALCHUK, PAUL NELSON, NANCY NELSON, GARNET EXNER, DARLENE EXNER, DENNIS BOEHNART, SCOTT MUNRO, MARSHA MUNRO, JON BOYLE, KRISTEN BOYLE, DANIEL DOMBROSKI, DARLENE DOMBROSKI, SCOTT MILLER, DERICK WOLFE, BRETT HERBERT, MELISSA HERBERT, JOSEPH SANTOS, TRACY SANTOS, MYLES NELSON, EVELYN NELSON, CURTIS ZAZULA, RONALD BENDER, AUDREY BENDER, DARREN RICHARD DIXON, LANA NADINE DIXON, MARCO RICCI, CINDY STREET, TERRA BURRELL, CHRIS BURRELL, GREG SINGER, GRANT SINGER, KATERI SINGER, RON HACK, JEAN HACK, ANDY RAMSTAD, ELOISE RAMSTAD, KEVIN HALLBORG, AUDRA HALLBORG, TRENT RUDE, MARLENE TRUDGEON, CASTON GAREAU, SHARON KOHLRUSS, TAMMY PETERSON, TODD RUSSELL, JASON RAMSTAD, KYLE KRUEGER, BOB MILLER, RENEE MILLER, MARK BELL, KELLY SANHEIM, BRANDY RAMSTAD, BO HALLBORG, DALE BRACKEN, TERESA BRACKEN,

PERRY SLOBODZIAN, RODNEY WAYNE BORK, CHERYL KIM BORK, DENNIS OTTENBREIT, KEVIN SELAND, BRANDI OTTENBREIT, DARCY GETTEL, WENDY GETTEL, GARNET GETTEL, SHAWNA GETTEL, TERRY THREFELL, SANDRA STRADESKY, BARRY BRODA, ANNETTE BRODA, CARL MIELKE, ELIZABETH ANN PARLEY, VICTOR LEWIS GREENLAW, JAMES EDWARD SAMUEL GORMAN, JANET ELAINE GORMAN, DONALD ANDREW EWACHOW, DEBRA BERNICE EWACHOW, HARRY HERBERT URZADA, SHANE OTTENBREIT, JACKIE OTTENBREIT, TIM STOLL, SHERRY STOLL, KIM POWERS, LORIE KURTZ, TREVOR SANFTLEBEN, ANGELLA PINAY, KENNETH NEULS, HEATHER NEULS, BRIAN PETRACEK, JEAN PETRACEK, RICHARD JONES, BERNICE JONES, JAMIE GORCHYNSKI, LISA GORCHYNSKI, LAWRENCE LANSBERRY, PAUL SCHAUERTE, SHARON SCHAUERTE, RODNEY MOHR, DONNA MOHR, PAUL GREGORY, RICHARD FEHLER, DONALD KENNETH JOHNSTON, DALE DERBY, KELLY DERBY, BILL SLUSER, LINDA SLUSER, RUTH SHARON CLAXTON, GEORGE CAMPBELL HOBSON, MARY MARGARET HENRY, WILLIAM DOUGLAS ROBINSON, RODERICK HACK, LINDA HACK, CLIFFORD ASHFIELD, TOMMY SUGDEN, MAXINE SUGDEN, TREVOR REEVE, JOYCE REEVE, BARRY LOUIS HODGSON, BARBARA ANN HODGSON, TERRENCE TODD BONNOR, SHELLY WILLIAMS, LYLE HISLOP, LOIS HISLOP, JAMES EDMUND EMKE, MIKE FITZGERALD, DAVE THOMLINSON, CAROL THOMLINSON, CARLA SALESKI, MARC SALESKI, DIANNE BLACKWELL, ROBERT MURRAY THOMLINSON, MARGO DENISE THOMLINSON, DUSTIN RICHARD WILLIAM McCULLOUGH, SOPHIE BUZASH, GLENN BUZASH, RICHARD DIMLER, MARCIA DIMLER, HENRY THOMAS LUKER, DOREEN LUKER, MURRAY RICHTER, DANNY DUNN, KAREN DUNN, JOHN JAMES BUITENHUIS, FAYE BUITENHUIS, BEATRICE ELLEN WINDJACK, JORDON BOKHORST, CATHIE BOKHORST, DAVID WILLIAMSON, SANDRA WILLIAMSON, WILLIAM THOMAS BLAIR HEXTALL, ROCHELLE DELEE DOBNI, LARRY STRADESKI, LUCILLE STRADESKI, WILLIAM JOHN AMY, GWENDOLYN LEE AMY, CORY BORSA, SHAWNA BORSA, CLAYTON PILLER, CANDICE PILLER, WENDY FITZ-GERALD, RICHARD BRIAN HACK, MARY ANN HACK, DELL CLINE, JAMES YULE, LORI YULE, JULIA HACK, JACK LINFORD, BRENDA LINFORD, ELWYN HECTOR MACLEAN, VIOLET ROSE MACLEAN, JOHN CROZIER, STELLA CROZIER, MARGARET AMY, GRANT THIRY, DOROTHY THIRY, NANCY NORMA HEXTALL, BRIAN ALFRED HODGSON, JACK ANDREW HEXTALL, KIMBERLY GAY HEXTALL, TREVOR CROZIER, CARLA CROZIER, PATRICK MCCARTHY, LORNA MCCARTHY, BRIAN EDGAR HARDY, GLORIA LYNNE HARDY, WILLIAM KENT, COLLEEN KENT, RUTH PEKRUL, RONALD ALEXANDER FORREST, MARGARET ANNE FORREST, BERNIE PATRON, RUTH PATRON, WENDY LEE SCHLAMP, TERRENCE REEVE, LYNNE REEVE, DELL CARMEN FOLEY, ELIZABETH NAKONESHNY, BLAIR NAKONESHNY, CHRIS NAKONESHNY, VELMA COLE, MELVIN COLE, MERVIN COLE, CARMEN COLE, DEREK COLE, REGAN COLE, LINDSEY COLE, JOAN HAYLOCK, LAWRENCE HAYLOCK, SHARON DON, RODERICK THOMPSON, MARILYN HEMBROFF, HARVEY LAMMER, DAWN LAMMER, DOUG LAMMER, ETHEL ELMA BOX, KENNETH MILTON BOX, LYLE PATRICK BOX, LLOYD THOMAS BOX, KENNETH ANTHONY SPERLIE, GWENDOLYN BETTY SPERLIE, MARGARET YULE, KELLY

**PUSCH, BRENDA LYNN PUSCH, GARY SEIER, DAVID HAHN, LOUISE MURRAY, LYNN URSCHEL, ELINOR RELF, JO-ANNE RELF ECKSTEIN, WILFRED SCHICK, VALERIE SCHICK, ALLAN BLAKLEY, GEORGE LESLIE BLAKLEY, SHIRLEY HELEN BLAKLEY, LAURELLE PAULA PACHAL, MARTHA JOANNA HASSLER, BARRY HASSLER, RAYE HASSLER, DAVID PIOT, LAUREL IRVING-PIOT, LAWRENCE LEIR, CARMEN DAYMAN, CHRYSTAL SCHLAMP, DALLAS GRANT PILLER, CAROL ANN PILLER, GARRY COLE, GAIL COLE, MELODIE COLE, DENISE BODE, DEVAN SPERLIE, CLIFFORD JAMES CLARKE, MONICA ANNE CLARKE, CHERIE MAE CHARTIER, WENDY MAKSYMCHUK, BOYD DAYMAN, RICHARD THOLL, BEVERLY THOLL, LYLE KRUEGER, KAREN KRUEGER, LANDON PILLER, MILES HACK, PAULA LEONARD, DWAYNE LEONARD, BERT FRANK BESPLUG, HOLLY VERONICA BESPLUG, ROBERTA MARY FRENCH, STEVEN KLOTZ, SHANNON KLOTZ, NORMAN GENTES, MARY JANE GENTES, KEVIN BENNETT, LORI BENNETT, LLOYD JONES, DAWN JONES, SHIRLEY NEULS, GEORGE THOMSON, DARLA MULLOCK, GERRY MULLOCK, JAMES MOORE, DAVID WAY, JUDITH McLEOD, DEBBIE ADAMS, JASON FISCHER, STEVE LINDSKOG, DONNA LINDSKOG, JEAN MCKAY, DONALD MCKAY, JOANN MCKAY, KIM REEVE, MIKE HORVEY, DIANE MCLEOD, CHRIS FREI, LESLIE FREI, JASON EISWERTH, WARREN WADE EMKE, TERRILYN ROCHELLE EMKE, KIM NAGELZELLER, TERRY ZELLER, JACQUELINE MOORE, LAUREN CSADA, KEVIN CSADA, BRIAN TENNANT, and AUDREY TENNANT**

**Appellants**

**and**

**HER MAJESTY THE QUEEN IN  
RIGHT OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Regina, Saskatchewan, on June 4, 2012)**

**DAWSON J.A.**

[1] This is an appeal from an order of the Federal Court, rendered on August 8, 2011 in Court File T-2193-09, which certified an action as a class action. The appeal is brought by the members of the class. For the reasons which follow, we are of the view that the appeal should be allowed because the Judge failed to give reasons for the order he made.<sup>1</sup>



The Facts

[2] In the 1950s the Sakimay First Nation surrendered a portion of its reserve lands that abutted Crooked Lake, Saskatchewan for the purpose of having the government of Canada develop and then lease the land as cottage lots. In 1995, the Minister of Indian Affairs and Northern Development delegated certain authority to the Band Council and Chief of the Sakimay First Nation. As a result, the Sakimay First Nation received the authority to enter into and administer leases granted in respect of the land surrendered by the First Nation.

[3] The appellants are lessees or assignees under a form of lease referred to as the 1980 Lease in respect of cottage lots located on land surrendered by the Sakimay First Nation.

[4] The 1980 Lease contains a rent adjustment clause which allows the rent to be adjusted every five years for an ensuing five-year term. One such five-year term expired on December 31, 2009.

[5] Prior to December 31, 2009, between November 28 and November 30, 2009, Lease or Permit Rent Notices were mailed to the appellants by the Sakimay First Nation. The notices set out the annual rent for the ensuing five-year term and stated that the rent was due on January 30, 2010. Accompanying correspondence advised that the annual rent was due and payable on January 1 of each year. Another enclosure stated that the rent could be paid by April 1, 2010, subject to a \$50 late administration charge, and that payments received after April 1, 2010 would be assessed a \$100 late administration charge (appeal book, pages 183-186).

[6] The 1980 Lease allows tenants to refer to the Federal Court any dispute concerning the amount due under the lease within 60 days of receipt of a rent increase notice (clause 2.01, appeal book, page 130). The appellants filed a statement of claim challenging increased rental rates on December 29, 2009.

[7] Clause 2.01 of the 1980 Lease also provides (underlining added):

(...) 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 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.

[8] In their statement of claim the appellants sought the following relief:

- a) A declaration as to the Defendant holding the legal rights and responsibilities in the said Leases;
- b) A declaration that the purported rental notices for the 1991 Leases submitted by the Defendant to the Plaintiffs for 2010 are invalid, void or are otherwise of no force or effect;
- c) A declaration that the Defendant lacked the jurisdiction to set the rental rates applicable to the Plaintiffs for the 1991 Leases;
- d) An injunction prohibiting the Defendant from setting the annual rental rates for the Plaintiffs under the 1991 Leases until such time as all conditions precedent have been satisfied;

- e) A declaration by this Honourable Court setting the rental rates or a formulation for setting the rental rates applicable to the Plaintiffs and Defendant for the years 2010 through to 2014, inclusive;
- f) An order for costs in favour of the Plaintiffs;
- g) Such further and other relief as counsel may advise and this Honourable Court may allow.

[9] In its statement of defence and its amended statement of defence, the Crown put in issue the appellants' right to ask the Federal Court to determine the amount of the rent. The Crown asserted that some, if not all, of the appellants had not paid all rent currently due as required by clause 2.01 of the 1980 Lease.

[10] In their reply to the statement of defence the appellants asserted that in the event they were in default there was a waiver of strict compliance by virtue of the payment options provided to them allowing for payment post-dating the commencement of their action.

[11] In their amended reply to the amended statement of defence, the appellants asserted that any breach of the 1980 Lease was caused by the defendant. They further asserted that if they were in default, they were entitled to relief from forfeiture as a result, among other things, of the following:

- i) The 1980 leases required Her Majesty the Queen to provide the Plaintiffs subject to a 1980 lease with its rental determination no less than 60 days and not more than 90 days prior to January 1, 2010 and it failed to do so;
- ii) Not all 1980 tenants received the 2010 rental notices prior to commencement of the within action;
- iii) The rental notices that were mailed to 1980 tenants were dated approximately one month subsequent to their issuance and, given the 60 day limitation period found in the 1980 leases, left the Plaintiffs subject to the 1980 leases little time to meet strict compliance;

- iv) The Plaintiffs under the 1990 leases believed there to be tentative arrangement between the Plaintiffs and Her Majesty the Queen, or their representatives, regarding an interim rental arrangement in January, 2010, which was subject to ratification, and ratification failed in or about April, 2010;
- v) Her Majesty the Queen, or their representatives, had not in the past enforced strict compliance with payment due dates;
- vi) Her Majesty the Queen, and its representatives, refused inquiries from the Plaintiffs when requested to provide a copy of a lease to which they were subject, thereby preventing the Plaintiffs subject to a 1980 lease from determining their legal obligations;
- vii) Her Majesty the Queen, or its representatives, provided the Plaintiffs subject to 1980 leases with a variety of payment options, including payment options both before and after January 31, 2010, with options to pay interest and/or service charges. The Plaintiffs subject to 1980 leases say that they have complied with one of those payment options.

[12] While the parties agreed in principle that the action could proceed as a class action, they could not agree upon the wording of the certification order. The appellants therefore moved before a judge of the Federal Court for an order certifying the action as a class action.

[13] The respondent Crown, at paragraph 19 of its memorandum of fact and law, lists the pleadings and submissions that were before the judge on the appellants' motion for certification and

I reproduce the list:

- April 21, 2010 – (Canada) Statement of Defence
- June 24, 2010 – (Appellants) Memorandum of Fact and Law in Support of Certification
- July 15, 2010 – (Appellants) Reply to Canada's Statement of Defence
- October 22, 2010 – (Canada) Memorandum of Fact and Law Opposing Certification

- November 29, 2010 – (Canada) Amended Statement of Defence
- January 12, 2011 – (Canada) Supplemental Memorandum of Fact and Law
- January 26, 2011 – (Appellants) Supplemental Memorandum of Fact and Law
- January 27, 2011 – (Appellants) Amended Reply to Canada’s Amended Statement of Defence
- April 26, 2011 – (Canada) Draft Certification Order
- April 26, 2011 – (Appellants) Draft Certification Order

[14] To this we would add that also before the Judge were the statement of claim and the affidavits filed by the appellants and the respondent Crown in respect of the motion for certification. Of this material, only the pleadings and the two affidavits are contained in the appeal book filed on this appeal.

#### The Decision of the Federal Court

[15] Notwithstanding the volume of material before the Court and the dispute between the parties as to the proper terms of the certification order, the Judge gave no reasons for his decision. Instead, the parties advised, he simply adopted the terms of the draft certification order provided by the Crown.

[16] On this appeal the appellants challenge paragraphs 5 and 6 of the certification order which state:

5. The relief claimed by or from the 1980 Members is:
  - (a) The Court determine the rental rate applicable to them under the 1980 Leases, or assignments thereof, for the period of January 1, 2010 through December 31, 2014.
  - (b) In the event that the 1980 Members were contractually obliged to pay the entire rent set by the Defendant prior to commencing the action, the 1980 Members rely on relief from forfeiture, waiver, and/or estoppel by virtue of the payment options provided to them allowing for payment post-dating the commencement of this action.
  
6. The common questions of law or fact for the 1980 Members are as follows, and questions (a) to (c) below are to be heard and determined prior to determining question (d) below:
  - (a) Were the 1980 Members contractually obliged to pay in full the rent set by the 2009 notice of the 2010 calendar year prior to commencing this action, in order for the Court to determine their rental rate for the January 1, 2010 to December 31, 2014 period?
  - (b) If the answer to (a) is “yes”, did the Defendant waive strict compliance with the contractual obligation in (a) by the wording of the 2009 notice, which allowed payment of the 2010 rents by January 30 or 31, 2010, thereby entitling the 1980 Members who paid by these dates to have the Court determine the rental rate for the January 1, 2010 to December 31, 2014 period?
  - (c) If the answer to (a) is “yes”, is the Defendant estopped from relying on the contractual obligation in (a) by the wording of the 2009 notice, which allowed payment of the 2010 rents by January 30 to 31, 2010, thereby entitling the 1980 Members who paid by these dates, to have the Court determine the rental rate for the January 1, 2010 to December 31, 2014 period?
  - (d) If the answer to (a) is “yes”, can the 1980 Members rely on relief from forfeiture from the contractual obligation in (a) by the wording of the 2009 notice, which allowed payment of the 2010 rents by January 30 or 31, 2010, thereby entitling the 1980 Members who paid by these dates, to have the Court determine the rental rate for the January 1, 2010 to December 31, 2014 period?
  - (e) Based on the determination of the analysis above which 1980 Members are in default of an obligation to pay the 2010 rent, and

which are entitled to have the Court make a rental determination for the January 1, 2010 to December 31, 2014 period?

- (f) If the answers above result in the Court determining the rent for any of the 1980 Members, what is the appropriate methodology and/or formula for determining the fair market values for January 1, 2010 through December 31, 2014 under the 1980 Lease?
- (g) What is the application of the appropriate methodology and/or formula to each of the 1980 Members who is entitled to have the Court determine the fair market rental value?

[17] The appellants seek an order:

- a) That paragraph 5(b) of the Certification Order of August 8, 2011 be set aside and replaced with relief claimed as set forth in the Amended Reply of the Plaintiffs whereby the application for relief from forfeiture, waiver and/or estoppel are not preliminarily contingent upon payment options provided to the Plaintiffs;
- b) That paragraphs 6(b), 6(c), and 6(d) of the Certification Order be set aside and replaced with relief claimed as set forth in the Amended Reply of the Plaintiffs is not preliminarily contingent upon the payment of 2010 rents by January 30 or 31, 2010;
- c) That the first paragraph of paragraph 6 of the Certification Order be set aside and replaced with an Order whereby all issues in relation to the 1980 members go to trial together and it be left to the Trial Judge to determine whether any individual issues remain outstanding following trial or whether any further subclasses are necessary for the purpose of making a decision following trial;
- d) That appropriate amendments are ordered to the Notice of Class Certification and Class Member "Opt Out" form following conclusion of this appeal.

[18] The respondent asserts a typographical error in paragraph 6 of the order. According to the respondent, paragraph 6 should read that questions (a) to (e) are to be determined prior to question (f). With that correction the respondents asked that the appeal be dismissed.

The obligation to give reasons

[19] In *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, the Supreme Court of Canada confirmed that a trial judge has no general duty to provide reasons for a decision “when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances” (paragraph 4, citing *R. v. Barrett*, [1995] 1 S.C.R. 752 at page 753).

[20] In *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, the Supreme Court of Canada reiterated that a court of appeal “considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered” (paragraph 16). At paragraph 17, the Supreme Court wrote:

These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a “watch me think” fashion. It is rather to show *why* the judge made that decision. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard*. But the description in *Morrissey* of the object of a trial judge’s reasons is apt. Doherty J.A. in *Morrissey*, at p. 525, puts it this way: “In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision” (emphasis added). What is required is a logical connection between the “what” -- the verdict -- and the “why” -- the basis for the verdict. The foundations of the judge’s decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

[21] While *Sheppard* and *R.E.M.* arose in the context of criminal prosecutions, these principles apply as well to civil cases. See, for example, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paragraph 233; *Brokenhead First Nation v. Canada (Attorney General)*, 2011 FCA 148, 419 N.R. 289.



[22] Moreover, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 43, the Supreme Court stated “it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision.”

Application of these principles to this appeal

[23] Judges of the Federal Court generally recognize the salutary nature of reasons. Equally, they recognize that in some cases detailed reasons are not required; a speaking order, where the reasons are supplied in brief preambles contained in the order, or an endorsement in an order, may be sufficient.

[24] In the present case, the Judge departed from this practice and the principles set out above. For that reason, his order cannot stand.

[25] At the outset, we would observe that the parties have not put before us either the written submissions made to the Judge or the proposed certification orders. This failure significantly hampers the ability of this Court to consider the certification order in the context of the record before the Judge. To illustrate, in the absence of the full record how is this Court to deal with the Crown’s assertion that paragraph 6 of the Judge’s order contains a typographical error?

[26] Turning to the Judge’s failure to give reasons, in their amended reply the appellants set out seven bases on which they asserted they should be relieved from forfeiture. We are unable to discern why the Judge only included one basis in paragraph 5(b) of his order. While the Crown

proffers a theory for this, in our view the record is equally consistent with the conclusion that the Judge simply failed to have regard to the appellants' amended reply.

[27] In short, nothing in the order, read in light of the record before us, demonstrates that the Judge grappled with the live issues and key arguments before him.

[28] The next matter to be considered is how such error is to be remedied. One alternative is to return the matter to the Federal Court. The other alternative is for us to act as a court of first instance and make the necessary findings of fact and determinations of law. We would decline to do so for two reasons. First, as this Court noted in *Brokenhead* at paragraph 52, that is not our usual role. Second, and more importantly, we do not have before us the record that was before the Federal Court.

[29] For these reasons, the appeal will be allowed, the order of the Federal Court Judge will be set aside, and the matter will be returned to the Chief Justice of the Federal Court so that it may be heard and determined by a different judge.

[30] Given our reasons for allowing the appeal, the parties should assume their respective costs.

“Eleanor R. Dawson”

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J.A.

1. At the conclusion of oral argument, we adjourned for two hours to consider our decision. We returned and delivered these reasons from the Bench, excluding the recitation of the uncontested facts and the quoted passages. The factual recitation was outlined and the quoted passages were referenced in our oral reasons.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-296-11

**STYLE OF CAUSE:** DWAYNE TURBERFIELD ET AL.  
v. HER MAJESTY THE QUEEN IN  
RIGHT OF CANADA

**PLACE OF HEARING:** Regina, Saskatchewan

**DATE OF HEARING:** June 4, 2012

**REASONS FOR JUDGMENT OF THE COURT BY:** (NOËL, DAWSON, STRATAS  
JJ.A.)

**DELIVERED FROM THE BENCH BY:** DAWSON J.A.

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