Federal Court  Cour fédérale

Date: 20170518

Docket: T-1912-15

Citation: 2017 FC 509

BETWEEN:

GEOFFREY W. HODGSON, MICHELLE E. MURPHY, SCOTT HARRIS, CHANTAL HARRIS, BRENT W. POIRIER, LARA F. SHECTER, JEFFREY T. BANNARD, CHRISTINE L. BANNARD, JOHN E. D. CAMERON, THERESA M. ALLEN, JENNIFER L. SCHECTER (A.K.A. JENNIFER L. SHECTER), JEFFREY N. BALIN, JOHN I. CHRISTENSEN, STEPHEN B. COULSON, STEFANIA G. CICCONE, CRISTINA M. CICCONE, WAN H. JUNG, KUEI S. FU, HENRY SCHROEDER, JERRY JANES, DIANA JANES, JIN MA, ESTATE OF HERBERT M. M. LEWIS (DECEASED), JOHN W. WHITEFOOT, SHEILA M. WHITEFOOT, DONALD A. COOKE, KAREN L. COOKE, WONG L. LEE, MAN-LOONG LEE, MARILYN J. ROSS, WILLIAM T. ZIEMBA, JAMES R. THOMPSON, ANN B. THOMPSON, YUM C. LAU, IRENE LAU, HELEN C. L. TING, SHAVIV BEN NERIAH, SUSANA G. BEN NERIAH, CHI J. LIU, KEE L. SZE, ALI SHAH, FIKRIYE SHAH, KHI Y. TJIN,YUNG C. LIU, LISA A. RAGOSIN, MIRIAM G. WEINSTEIN, SHAUNA L. LORE, PATRICIA LAI, LUKE A. LAI, JEAN M. PATTON, SHEILA W. PATTON, BARBARA J. PATTON, PAMELA A. PATTON, BRUCE R. BAILEY, LISA J. BAILEY, JUDITH F. EYRL, LI Q. WANG, ZHE M. YAN, QIN ZHANG, HELENA KAN, FRANCESCO L. PICCONE, MARIA C. PICCONE, ANTHONY W. L. LO,

CYNTHIA LEE, NIK D. KELAVA, MARY J. KELAVA, HAN XIA, SEUK J. JANG, SEONG I. HAN, YUNG H. LIU, CAROLYN RENDLE, PREIANATHAN ARMOGAM, AMELIA F. M. HENRIKSEN, GEOFFREY LEE DESIGN & CONSTRUCTION LTD., ROBERT J. RIVINGTON, AGNIESZKA RIVINGTON, MARGARET A. C. NIELSEN, KWAN Y. LIU, AMY W. C. LIU, NICOLE L. FUNK, NORMAN D. FUNK, MIRA V. MODI, CHARLES H. SHNIER, WILLIAM V. Y. SHEN, HAPPY C. Y. SHEN, ROSS LOUKAS, GEORGIA LOUKAS, SILVIA B. NEGRONI, LAURA T. NEE, YIRK L. SO, SAU Y. SO, MOHAMED R. M. LUTHFY, SITHIE R. LUTHFY, STEPHEN D. SHAW, ELIZABETH J. L. CLARKE, JI S. LIM, CHOON M. LIM, LILY R. ENG, CAROL M. S. LAI, DONG H. KIM, HYE M. KIM, ALLAN T. OKABE, SUZANNE A. OKABE, TAMARA BELL, PAUL-SONG WU, LI ZHOU, CHRISTINE YIM HUNG SIU, YIN TAT HO AND WALEED SUKKARIE

Plaintiffs

and

MUSQUEAM INDIAN BAND AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendants

and

KIMBERLEY LAWSON, CHESTER LAWSON, CHERYL BURDICK, DANIEL P, ROYER, XIE SHI WANG (A.K.A. XUE SHI WANG), WILLIAM NORMAN KING, ROSALIND RAE FORD

Third Parties

REASONS FOR JUDGMENT

MACTAVISH J.

[1] By this action the plaintiffs seek the determination of the "fair rent" to be paid annually by lessees of 69 lots in Musqueam Park, a housing development located on Musqueam Indian Reserve No. 2 in southwest Vancouver, for the 20-year period commencing June 8, 2015. According to the relevant leases, the annual "fair rent" for each lot is to be calculated at 6% of the "current land value" immediately before June 8, 2015.

[2] The Supreme Court of Canada has held that the nature of the interest in land that is to be valued in accordance with the rent review provisions of the Musqueam Park leases is that of a hypothetical fee simple interest in the lands in question. Consequently, the principle issue to be determined in this action is the value of a fee simple interest in the Musqueam Park lands in an unimproved and unserviced state as of June 7, 2015.

I. Background

[3] I do not understand there to be any dispute as to the following facts, which are largely taken from a statement of facts that has been agreed to by the plaintiff leaseholders and the defendant Musqueam Indian Band (MIB). While not a party to the agreed statement of facts, counsel for Her Majesty the Queen in right of Canada (Canada) has confirmed that Canada does not dispute the facts set out below. The Third Parties (who are the leaseholders of the remaining six residential lots in Musqueam Park) have not participated in this action.

[4] On February 17, 1960, the MIB surrendered approximately 40 acres of land situated on Musqueam Indian Reserve No. 2 to Canada for the purpose of leasing the land. In accordance with the provisions of the *Indian Act*, R.S.C. 1952, c. 149, Canada accepted the surrender for this purpose on April 20, 1961.

[5] On June 8, 1965, Canada entered into a "Master Agreement" with the Musqueam Development Company Limited (the Company). The Company is unrelated to the MIB. Under the terms of the Master Agreement, the Company was required to subdivide and service the surrendered reserve land. The land was then split into two parcels which are described as Parcels B and G in the Master Agreement.

[6] In 1965, Parcel G was subdivided into 69 single-family lots (Lots 1 to 69) and one multi-family lot (Lot 70). Lot 70 is not at issue in this proceeding. Parcel B was subdivided in 1972, when 6 additional single-family lots were created (Lots 7l to 76). A table setting out the lot numbers, civic addresses and size in square feet of each of the lots at issue in this case is attached as Appendix "A" to this decision.

[7] Once the Company had subdivided and serviced the lots, Canada delivered leases to the Company in its favour for each of the 75 lots (the Leases). Other than the description of the individual lot to which each Lease pertains, there are no material differences in the provisions of the Leases, each of which was for a 99-year term. In consideration of a lump sum payment and annual rent to be paid to Canada on behalf of the MIB, the Company then assigned each Lease to individual tenants who would then have a residence built on their leased lot. Since then, the Leases have, from time to time, been re-assigned to new tenants.

[8] Initially, the tenants paid their annual rent to the MIB through Canada. However, in 1980, the Crown transferred management authority over the lands to the MIB, so that the Band now receives the rent payments directly.

[9] Annual rents were established by the Leases for each lot in Parcel G for the first 30 years of the lease term: that is, from June 8, 1965 to June 7, 1995. The rents were as follows:

a. An average of approximately $298 for each year of the first ten years of the term of the Leases;

b. An average of approximately $343.75 for each year of the second ten years of the Lease terms; and

c. An average of approximately $375 for each year of the third ten-year term of the Leases.

[10] The annual rent and lease period for each lot in Parcel B varied slightly as a result of the later commencement date of those Leases.

[11] The Leases provided that rents were to be reviewed after the first 30 years of the Lease terms, and every 20 years thereafter. The rent review provisions of the Leases are contained in subsections 2(2) to 2(4) of the Leases. They state that:

> (2) The rent for each year of the three succeeding twenty (20) year periods and for each year of the final nine (9) year period of [the] term hereof, shall be a fair rent for the land comprised in each of such leases negotiated immediately before the commencement of each such period. In conducting such negotiations the parties shall assume that, at the time of such negotiations, the lands are:
>
> (a) unimproved lands in the same state as they were on the date of this agreement;
>
> (b) lands to which there is public access;
>
> (c) lands in a subdivided area, and
>
> (d) land which is zoned for single-family residential use,
>
> and the foregoing assumption[s] shall also be made in the case of any determination of the rent pursuant to the provisions of subparagraph (3) hereof.
>
> (3) In the event the Minister and the Lessee or its assignees cannot reach agreement on the rents to be paid in any of the succeeding periods as provided in subparagraph (2) above, the question shall be determined under the authority of paragraph (g) of [….] subsection (1) of Section 18 of the Exchequer Court Act.
>
> (4) An annual clear total rental which represents six percent (6%) of the current land value, calculated at the time of

> renegotiation, and on the basis set out in subparagraph (2) hereof, shall be regarded as a "fair rent" for the purposes thereof.

[12] The first time that the rents came up for negotiation under the terms of the Leases was in 1995. While the per lot annual rent demands varied, on average, the MIB demanded an annual rent of approximately $36,000 per year for each lot. The lessees did not accept this demand, and the parties were unable to come to an agreement as to an appropriate rent increase for the 20-year period commencing June 8, 1995.

[13] Consequently, in 1996, the MIB commenced an action in this Court, as the successor to the Exchequer Court. By its action, the Band sought an order setting the annual "fair rent" for each of the 75 lots for the period from June 8, 1995 to June 7, 2015 (the 1996 action).

II. The Litigation Surrounding the 1995 Rent Increase

[14] The 1996 action proceeded through three levels of court, culminating in a decision of the Supreme Court of Canada in 2000. Given that the findings made by various Courts are central to this case, I will review the decisions relating to the 1996 action in some detail.

A. *The Federal Court's Decision*

[15] The trial of the MIB's action took place in June of 1997, before Justice Rothstein, who was then a judge of this Court. His decision is reported as *Musqueam Indian Band v. Glass* (1997), 137 F.T.R. 1, [1997] F.C.J. No. 1339 (*Glass* FC).

[16] Justice Rothstein observed in *Glass* FC that title in Indian reserve lands is generally inalienable, and that a Band may not sell or otherwise encumber reserve lands except by surrendering the land to the Crown. While surrender permits the land to be held in fee simple, it

irrevocably strips the property of its character as ‘land reserved for Indians’. As the lands at issue in the 1996 action had been surrendered to the Crown for leasing purposes and not for sale, Justice Rothstein found that it would be inappropriate to value them as if they were held in fee simple. Rather, he concluded that “for rent renegotiation purposes, the estate and tenure [to be valued] is a 99-year leasehold” interest in reserve land: *Glass* FC at para. 38.

[17] Because of the difficulties in determining the current value of the Musqueam Park land, Justice Rothstein started his analysis by looking to the value of neighbouring non-reserve lands. The appraisal experts appearing before Justice Rothstein agreed that the average fee simple value of comparable off-reserve lots in June of 1995 was $600,000. Using this figure as his starting point, Justice Rothstein then discounted the value of the lands at issue by 50%, because of the long-term leasehold nature of the interest in the property, and what he described as “Indian reserve features”. This led him to arrive at an average land value of $300,000 per lot: *Glass* FC at para. 86.

[18] The MIB argued at trial that taking the Indian reserve status of the Musqueam Park lands into account in arriving at the current land value of the lots in question was discriminatory, and contravened section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. According to the MIB, considering the inalienability of reserve lands “unfairly devalues reserve land and wrongly perpetuates the historic disadvantage and discrimination against Indians and their land”: *Glass* FC at para. 41.

[19] Justice Rothstein acknowledged that “the approach to valuation has been a sensitive issue in this case”: *Glass* FC at para. 41. However, he rejected the MIB’s discrimination argument,

concluding that land in Musqueam Park has a lower value than neighbouring fee simple property, not because of discriminatory considerations but because of the market. He further concluded that the lower value was "not significantly related to the leasehold aspect", as the experts had testified that there was "no discernable difference between the value of leasehold and freehold interests" at the start of a long-term lease: *Glass* FC at para. 57. Rather, the difference between the value of Musqueam land and neighbouring fee simple land off the reserve was attributable to what he called the "Indian reserve feature[s]" of the land: *Glass* FC at para. 57.

[20] According to Justice Rothstein, "Indian reserve features" were "factors that might negatively affect the value of a long-term leasehold interest in land on an Indian Reserve": *Glass* FC at para. 43. These factors included uncertainty regarding property assessment and taxation, publicized unrest on several Indian reserves in the Province, and the inability of non-Natives to stand for election to the Reserve's governing body, the Indian Band Council, which meant that non-Native residents had no vote on matters such as planning, zoning or taxation. Ministerial approval was, moreover, required for certain sales, mortgages or construction. Finally, although the City of Vancouver was providing services such as garbage pick-up, sewer, police and fire services to the Musqueam Park properties under contract, permanent arrangements for the provision of these services had yet to be finalized: *Glass* FC at para. 44.

[21] Justice Rothstein arrived at his 50% discount rate by comparing the value of pre-paid leasehold properties in Salish Park (another residential development on Musqueam Indian Reserve No. 2 close to Musqueam Park) with that of properties on the west side of the City of Vancouver. He determined that Salish Park lots sold for approximately half of what comparable west side properties were going for, accepting the opinion of an appraiser that the difference in

value was attributable to the fact that the Salish Park properties were located on the Musqueam Reserve. Justice Rothstein was further satisfied that the 50% discount rate was transportable to the Musqueam Park properties, giving him an average land value of $300,000 per lot.

[22] Having arrived at an average land value of $300,000 per lot, Justice Rothstein next had to address "whether and to what extent servicing costs should be deducted from the serviced land value in Musqueam Park to comply with the prescribed assumption in paragraph 2(2)(a) of the Lease". This provision states that in arriving at the current market value of the Musqueam Park properties for rent review purposes, the lands are to be considered as if they were "unimproved lands in the same state they were in on the date of this agreement". Justice Rothstein had to determine which "agreement" was being referred to in the Leases. This was important, as the lands were serviced by the time that the Leases were entered into, but were unserviced at the time that the Master Agreement was signed on June 8, 1965.

[23] Justice Rothstein concluded that the agreement that was referred to in the Leases was the Master Agreement, with the result that the parties were required to assume that the land was unserviced for rent review purposes: *Glass* FC at para. 96. Consequently, Justice Rothstein concluded that that all servicing costs had to be deducted from the current value of serviced lots in Musqueam Park: *Glass* FC at para. 101.

[24] Although the annual rent set under the Leases for the twenty-year period commencing June 8, 1995 differed among the 75 lots, depending upon their size and other characteristics, the result of Justice Rothstein's decision was that the average annual rent for lots in Musqueam Park for the period from June 8, 1995 to June 7, 2015 was determined to be approximately $10,000 per lot.

B. *The Federal Court of Appeal's Decision*

[25] The Federal Court of Appeal allowed the appeal from Justice Rothstein's decision, in part: *Musqueam Indian Band v. Glass*, [1999] 2 F.C. 138, [1998] F.C.J. No. 1893 (*Glass* FCA). The Court disagreed with Justice Rothstein as to the nature of the property interest to be valued, finding that he had erred in focussing on the nature of the lessees' interest in the land rather than the value of the land itself. Consequently, the Federal Court of Appeal found that the "current land value" meant the value of a freehold interest in the land, rather than the value of a 99-year leasehold interest in the lands in Musqueam Park.

[26] The Court further found that because the interest to be valued was a fee simple, and not a leasehold interest in land on the Reserve, Justice Rothstein had erred in imposing a 50% percent reduction to account for the "Indian reserve features" of the land: *Glass* FCA at para. 75.

[27] According to the Federal Court of Appeal, the reference to the "current land value" in the Leases meant that the Band was entitled to receive 6% of the fee simple value of the land as annual rent, and that the hypothetical fee simple value of the average lot was thus $600,000.

C. *The Supreme Court of Canada's Decision*

[28] The principal issue before the Supreme Court of Canada was whether the phrase "current land value" in the Leases meant the value of the land as reserve land (as the lessees contended) or, as the Band argued, the value of fee simple title to similar land off-reserve, absent factors associated with its reserve status: *Musqueam Indian Band v. Glass*, 2000 SCC 52 at para. 5, [2000] 2 S.C.R. 633 (*Glass* SCC).

[29] In a split decision, eight of nine judges agreed that in the absence of any contrary indications in the Leases, the term "current land value" in the rent review provisions of the Musqueam Park Leases referred to the fee simple value of the property, rather than its leasehold value: *Glass* SCC at paras. 9 and 35. Justice Bastarache was, however, of the view that the "current land value" should be calculated on the basis of a leasehold interest in the Musqueam Park lands, as the land at issue was in fact leasehold land on a reserve. In his view, this approach was consistent with the parties' intentions: *Glass* SCC at para. 61.

[30] Writing for three other judges, Justice Gonthier noted that, as it is used in the real estate context, the term "value", "generally means the fair market value of the land, which is based on what a seller and buyer, 'each knowledgeable and willing,' would pay for it on the open market": *Glass* SCC at para. 37. He further noted that the economic rationale for determining rent as a percentage of land value is that fixing rent 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": *Glass* SCC at para. 40, quoting *Revenue Properties Co. v. Victoria University* (1993), 101 D.L.R. (4th) 172 (Ont. Div. Ct.), at p. 180.

[31] According to Justice Gonthier, rents thus represent the true return on the market value of the land, reflecting the fact that the lessor could sell the land at its current land value and reinvest the proceeds at market rates of interest, if the lands were not subject to a long-term lease. Valuing the Musqueam Park land at its freehold value is thus consistent with an interpretation of the Leases that sees the rent review clause as an attempt to generate an annual fair market return

on a capital asset: *Glass* SCC at para. 40. Chief Justice McLachlin (writing for four judges) came to a similar conclusion: *Glass* SCC at para. 10.

[32] According to Justice Gonthier, valuing the Musqueam Park lands at their freehold value did not, however, lead to the Federal Court of Appeal's finding that the freehold value of land outside the Reserve should be used to determine the rent. That is because the capital asset that is at issue is reserve land surrendered for leasing, and not reserve land that had been surrendered for sale. Moreover, the Musqueam Park Leases did not specify that off-reserve land values should be used in the rent review formula.

[33] While recognizing that there is no such thing as freehold title to reserve lands, Justice Gonthier nevertheless held that a hypothetical fee simple value could be assessed and used in the rent review calculation: *Glass* SCC at para. 35. According to Justice Gonthier, in the absence of an actual market for fee simple reserve lands, the hypothetical to be used to establish market value should reflect the land in its actual circumstances, and should not change the nature of the land appraised.

[34] That is, the value of a hypothetical fee simple interest in land on the Reserve should reflect the legal restrictions on land use and market conditions, as opposed to restrictions on use found in the Leases. One cannot, however, simply assume that "… market conditions are the same for reserve land as for off-reserve land", and one cannot simply transpose fee simple off-reserve values to the Musqueam Park lands: *Glass* SCC at para. 46. Consequently, Justice Gonthier directed the parties to look to market evidence in the future in order to value a hypothetical fee simple interest in land located on the Musqueam Reserve: *Glass* SCC at para. 48.

[35] It will be recalled that Justice Rothstein had found as a fact that the fee simple value of comparable lands off of the Reserve was $600,000 on average, a figure that had been accepted by experts for both sides. This finding had not been disturbed by the Federal Court of Appeal, and the $600,000 average lot value for off-reserve comparables was also accepted by the majority of the Supreme Court.

[36] Five judges, including Justices Gonthier and Bastarache, further accepted that it was appropriate to apply a discount to the current market value of the Musqueam Park properties to reflect the fact that the lands in Musqueam Park were on a reserve. In coming to this conclusion, Justice Gonthier noted that the assessment of the value of a property had to reflect market conditions affecting the property in question, and that the legal environment on a reserve also had to be taken into account when determining the value of the land: *Glass* SCC at para. 48.

[37] Justice Gonthier recognized that the fact that there is no actual market for the freehold properties governed by the Leases creates difficulties in arriving at the current market value of the properties in question, as reserve lands would lose their reserve features as soon as they were surrendered for sale. However, the majority of the Supreme Court nevertheless held that the hypothetical value of fee simple title to reserve land could be determined by adjusting the off-reserve value to take into account the actual features of the land and of the market: *Glass* SCC at para. 49.

[38] The majority of the Supreme Court further noted that the legal interest in the Salish Park properties was a leasehold, and not a freehold interest, whereas the task for the Court was to identify the hypothetical fee simple value of the lands at issue. Consequently, the Court found that Justice Rothstein had erred in discounting the land to reflect its leasehold features: *Glass*

SCC at para. 52. The majority was, however, satisfied that this error did not significantly affect the market value of the Musqueam Park land, as the experts agreed that there was no discernable difference between the value of leasehold and freehold interests in land at the start of a long-term lease.

[39] The majority further noted that the 50% discount rate had not been disputed by the parties before the Supreme Court, and no submissions had been made on this issue. The majority accepted that the uncertainties that had been identified by Justice Rothstein were reflected in the 50% reduction in the value of properties in Musqueam Park. Because the current market value of the Musqueam Park lands was 50% less than the value of comparable off-reserve properties, it followed that the rent for the 20-year period in issue had to be based on this discounted value.

[40] While the Supreme Court did not disturb Justice Rothstein's finding regarding the 50% discount rate, the majority was nevertheless careful to note that the market may respond differently in the future, and that "[i]t will be a question of fact what, if any, discount should be applied" in the future: *Glass* SCC at para. 52.

[41] All nine of the judges were in agreement insofar as the issue of servicing costs was concerned. The question before the Supreme Court was whether "unimproved" meant simply without buildings, or whether it meant without services as well. If it was the latter, some amount had to be deducted from the "current land value" in order to notionally return the land to its unserviced condition: *Glass* SCC at para. 54.

[42] The Supreme Court determined that the plain meaning of the phrase "unimproved lands" was "unserviced lands", and not just lands without buildings: at para. 55. Consequently, the cost of servicing the land had to be deducted from the current market value of the property.

[43] The result of the Supreme Court of Canada's decision was to affirm Justice Rothstein's finding that that the average annual rent for lots in Musqueam Park for the period from June 8, 1995 to June 7, 2015 should be set at approximately $10,000 per lot.

III. The 2015 Rent Negotiation

[44] In early 2015 the Leaseholders, through their representative the Musqueam Park Leaseholders Association (MPLA), met with representatives of the MIB in an effort to negotiate, on a without prejudice basis, the annual "fair rent" for the Musqueam Park properties for the period from June 8, 2015 to June 7, 2035. Despite negotiating in good faith, the parties were unable to reach an agreement with respect to the rents to be paid for the twenty-year period in question.

[45] On May 8, 2015 the MIB issued a written Notice of Rent to each of the Leaseholders advising that rents for the period from June 8, 2015 to June 7, 2035 would be increased to amounts ranging from $58,543 to $146,743 *per annum*. The average proposed new rent was approximately $80,000 per year for each lot, representing an eightfold increase in the average annual rent from that which had been determined to be the "fair rent" for the period from June 8, 1995 to June 7, 2015.

[46] The Leaseholders did not accept the MIB's proposed rent increase, and despite further without prejudice negotiations between the MIB and the MPLA, the parties were unable to

resolve the dispute through negotiation. Consequently, in accordance with the terms of the Leases, the plaintiff Leaseholders commenced these proceedings in this Court on November 12, 2015.

[47] In the meantime, pending determination of the annual "fair rent" by this Court, each Leaseholder has continued to pay the annual rent set in accordance with the decision in *Glass* SCC to the MIB, subject to such future adjustment as may be necessary after the determination by this Court of the annual "fair rent" that should be payable from June 8, 2015 to June 7, 2035.

IV. The Issues

[48] The parties agree that there are two issues that require resolution in this action. They are:

1. Which of the appraisal experts' methodologies should be adopted as having achieved the task set by the Supreme Court in *Glass* SCC of determining the market value of a hypothetical, fee simple, on-reserve lot, without improvements and without servicing?

2. What servicing costs have to be deducted from the value of hypothetical fee simple on-reserve lots in order to arrive at the value of the lots as unimproved lands in the same state as they were on the date of the Master Agreement, that is, without improvements and without servicing?

[49] Insofar as the first issue is concerned, the plaintiffs submit that once I make a finding as to which of the two appraisers' evidence is more reliable, it follows that I should accept that appraiser's estimate of the current market value of the Musqueam Park lands. The plaintiffs contend that I should not substitute my own opinion on specific issues, as appraisal techniques

are outside the Court's expertise: *Piot v. Canada*, 2016 FC 1077 at paras. 92 and 93, [2016] F.C.J. No. 1042.

[50] That said, I understand the plaintiffs to agree with the MIB that my analysis of the expert evidence does not require an "all or nothing" approach, and that it is indeed open to me to accept the evidence or arguments of one side on some issues, and the evidence or arguments of the other side on other issues. I agree that this is open to me in considering the task at hand.

V. The Expert Evidence

[51] The plaintiffs and the MIB each called a real estate appraisal expert to testify as to the "current market value" of a hypothetical fee simple interest in the lands at issue in this proceeding. The plaintiffs called Larry Dybvig as their appraisal expert, whereas the MIB called Lonnie Neufeld as their expert. Both individuals were qualified as experts in land appraisal and the determination of ground rent.

[52] The plaintiffs also called Nancy Hill to testify on their behalf. Ms. Hill was qualified as an expert in civil engineering and the costing of municipal infrastructure, and she provided evidence as to the cost of servicing the Musqueam Park lands. Mr. Neufeld also provided evidence on the servicing cost issue, although the MIB abandoned most of his evidence on this issue prior to the commencement of the trial.

[53] Although represented by counsel throughout the trial, Canada called no evidence, nor did it cross-examine any of the other parties' witnesses or make any submissions in this matter. As noted earlier, none of the Third Parties participated in this proceeding.

[54] Insofar as the appraisal evidence is concerned, Messrs. Dybvig and Neufeld took fundamentally different approaches in attempting to arrive at the current market value of a hypothetical fee simple interest in the Musqueam Park lands. Each of these approaches will be discussed below.

A. *Mr. Dybvig's Approach to Valuation*

[55] In explaining his approach to valuation in his initial appraisal report, Mr. Dybvig noted that depending on the nature of the available data, a number of different approaches can be taken to value land that is vacant and suitable for development.

[56] Mr. Dybvig acknowledged in cross-examination that the direct comparison approach is the preferred method to use, where comparable sales are available. This approach is based on the principle of substitution, according to which it is to be expected that a prudent purchaser will not pay more for a property than the cost of acquiring an equally desirable substitute property that is available under similar terms and conditions.

[57] The direct comparison approach requires research and a comparative analysis of transactions involving essentially similar properties and market conditions. In this case, Mr. Dybvig says that comparable sales would have been recent sales of on-reserve properties in the Musqueam Park community that were held in fee simple and had the same highest and best use as the properties being valued. Comparable properties would also be similar in size and shape to the properties in issue, and would also be subject to similar land use controls.

[58] According to Mr. Dybvig, the location of the subject lands on a reserve complicates the analysis in this case. The direct comparison approach cannot be used here, he says, as there are

no actual sales of fee simple reserve lands that could be used to determine the current market value of the Musqueam Park properties. This is because reserve lands are never held in fee simple, and the interest to be valued is thus a hypothetical one.

[59] Although there were other approaches that could have been used to ascertain the value of hypothetical fee simple lots on the Musqueam Reserve, Mr. Dybvig asserts that most of these approaches would require that a number of adjustments be made in order to arrive at a fee simple on-reserve value, making the results of the valuation exercise less reliable.

[60] Mr. Dybvig specifically considered whether regard should be had to freehold sales of properties located on Vancouver's west side in valuing the Musqueam Park properties. He determined that there were several reasons why this would not be appropriate.

[61] First, Mr. Dybvig found that the market on the west side of Vancouver was not behaving the same way that it was in either Musqueam Park or Salish Park. It will be recalled that Salish Park is another subdivision located on the Musqueam Reserve, just south of Musqueam Park, which shares many attributes with Musqueam Park. There are 154 lots in Salish Park, and the development was created by 99-year prepaid leases in or around 1970.

[62] Mr. Dybvig noted that prices were escalating rapidly in the freehold marketplace on the west side of Vancouver in June of 2015, with the value of the lots outstripping the relative value of the homes located on them. This imbalance led to the phenomenon of "economic" or "external obsolescence", which has resulted in many homes on Vancouver's west side that were not otherwise physically or functionally fully depreciated being bought as "tear downs".

[63] That is, the significant and rapid increase in land values on the west side of Vancouver, coupled with the virtual unavailability of vacant lots in the area, has led to lots with habitable 40- or 50-year-old homes on them being purchased for large sums of money. Because the homes on the lots are of a quality and/or size that no longer matches the value of the land, the homes are being demolished soon after the completion of the sale, and are being replaced by larger homes. This phenomenon was not, however, being observed in either Salish Park or Musqueam Park. The absence of "tear downs" in these two communities suggested to Mr. Dybvig that the highest and best use of the land continues to be the homes already located on it.

[64] Mr. Dybvig further noted that any comparison between the value of a hypothetical fee simple interest in land on a reserve and that of an actual fee simple interest in land off-reserve would first require the determination of the value of an "on-reserve" interest. Once that value was known, undertaking the additional step of determining the value of a comparable fee simple property off-reserve would be superfluous or redundant.

[65] In Mr. Dybvig's view, the most important and most difficult factor in valuing the Musqueam Park properties is the on-reserve fee simple nature of the interest to be valued. This is because on-reserve and off-reserve land values vary "for reasons on which [he] could only speculate", and the variance can differ from location to location.

[66] Because of the absence of clear market data with which to make the appropriate market-based adjustments from off-reserve sales to on-reserve values, Mr. Dybvig was of the view that it would be fundamentally unreliable to use transactions involving properties on the west side of Vancouver as his comparable sales, and accordingly, he did not use them. Instead, he selected

the approach that he says provided the most market-based information and required the fewest adjustments.

[67] Mr. Dybvig looked at recent sales of properties in Salish Park as the best source of comparable sales to be used in valuing the Musqueam Park lots. Salish Park properties share many features with Musqueam Park lots in terms of the nature, layout and quality of the neighbourhood. Both subdivisions are adjacent to the Shaughnessy Golf & Country Club, and average lot sizes in Salish Park are similar to those in Musqueam Park. Consequently, the Salish Park sales met all of Mr. Dybvig's criteria for sales to be comparable, with one exception: the nature of the interest in the land in question.

[68] As is the case with Musqueam Park properties, Salish Park properties are not held in fee simple. However, unlike the lots in Musqueam Park (where rent is paid on a periodic basis), occupants of Salish Park properties hold prepaid leasehold interests in their lots, with 58 years remaining on the term of the Leases as of the June 7, 2015 valuation date. This difference does not present a problem in valuing the properties, however, as Mr. Dybvig and Mr. Neufeld agreed that property appraisers can readily determine the appropriate "leasehold to freehold" adjustment to control for this factor through a market analysis.

[69] With this in mind, Mr. Dybvig utilized a three-step approach involving an extraction analysis to arrive at the current market value of a hypothetical fee simple interest in the Musqueam Park lands.

(1) Mr. Dybvig's First Step: Isolating the "On-reserve" Value of an Interest in Land

[70] Mr. Dybvig's first step was to isolate the "on-reserve" value of an interest in land. To do this, he analyzed 21 sales in the Salish Park subdivision that occurred in the three years preceding the June 7, 2015 valuation date, adjusting for time where necessary.

[71] To adjust for time, Mr. Dybvig plotted his 21 Salish Park sales on a graph to determine whether there was a demonstrated relationship between the date of sale and the price achieved. This analysis showed that notwithstanding the significant increase in the value of homes in Vancouver in the last few years, there was little relationship between the date of sale and the sale price when it came to homes in Salish Park.

[72] Mr. Dybvig also analyzed three paired sales from his cohort of 21 comparables. By comparing the sale price of very similar Salish Park properties that were sold at different times, Mr. Dybvig was able to confirm that there had been little, if any, change in value that would require an adjustment to sale prices to reflect market conditions in Salish Park in the three years leading up to the June 7, 2015 valuation date.

[73] This analysis gave Mr. Dybvig the market value of 58-year prepaid leasehold interests in improved lots of various sizes that were actually on the Musqueam Reserve. It is important to note that because the Salish Park properties were on the Musqueam Reserve, it was not necessary for Mr. Dybvig to determine whether any "on-reserve discount" should be applied to the value of the Musqueam Park properties relative to the values of the Salish Park properties.

(2) Mr. Dybvig's Second Step: Determining the Depreciated Value of the Improvements on the Salish Park Properties

[74] As the Salish Park sales related to properties that had single family homes on them, the second step in Mr. Dybvig's analysis involved using the land extraction method to remove the contributory value of the depreciated cost of the buildings from the overall value of the property for each of his 21 Salish Park sales. This left Mr. Dybvig with what he says is direct market evidence of the value of subdivided and serviced vacant building lots on the Musqueam Reserve, with 58 years left to run in the term of prepaid leases.

[75] To estimate the depreciated cost of the buildings on the Salish Park properties, Mr. Dybvig started by using a Marshall and Swift computer program. Marshall and Swift is a construction costing guide used by real estate appraisers. The Marshall and Swift program allowed Mr. Dybvig to input specific information to identify the parameters of construction for each home, including matters such as the nature of the construction, the type of flooring, and whether the house was a split level or had a basement. The program then provided Mr. Dybvig with a median market-based replacement cost of $190 per square foot, or an average of $196 per square foot for the homes that were situated on each of the 21 Salish Park properties.

[76] Mr. Dybvig then looked to the local construction market to test the reliability of the $196 average per square foot replacement cost figure that he had arrived at using the Marshall and Swift program. To do this, Mr. Dybvig contacted three builders who focused their construction activities on the west side of Vancouver. Two of the builders reported construction prices in a range of between $200 and $350 per square foot, while the third builder reported construction costs starting a $400 per square foot. These rates were much higher than the $196 per square foot average cost calculated by Mr. Dybvig using Marshall and Swift.

[77] Had Mr. Dybvig adopted the construction costs provided by west side builders, it would have assisted the plaintiffs by reducing the value of the underlying interest in the land. He did not, however, believe that the cost of constructing new high quality homes on the west side of Vancouver reflected the quality of the homes that were located in Salish Park. As a result, he looked to other markets that he thought more accurately reflected the quality of homes in Salish Park to "confirm what the market actually recognizes for the value of new homes", analyzing a number of new home sales in North Vancouver, South Surrey, White Rock and Burnaby.

[78] From this analysis, Mr. Dybvig determined that the per square foot cost of new homes in these neighbourhoods was, on average, slightly higher than the replacement cost (as new) that he had identified through his Marshall and Swift analysis for Salish Park.

[79] Because he was being conservative in his approach to value, Mr. Dybvig decided not to increase his per square foot construction cost in determining the value of each of the Salish Park homes as if they were new. Rather, he used the data from these comparable neighbourhoods to confirm that the $190 median and $196 average construction cost that he had derived from his Marshall and Swift analysis was supported by market data. Mr. Dybvig then calculated what it would cost to replace the improvements on each of the 21 Salish Park properties.

[80] Having estimated the replacement cost of the improvements on each of the 21 Salish Park properties, Mr. Dybvig then determined the depreciated value of these improvements in order to determine how much the improvements contributed to the sale price in each of his 21 sales.

[81] The average Salish Park home was 38 years old in June of 2015. Mr. Dybvig noted that Marshall and Swift states that the typical life expectancy of a single family residence is between

60 and 70 years, depending on the quality of the construction. The Salish Park homes would thus have suffered some physical depreciation as a result of their age. Mr. Dybvig further observed that home styles have changed over the last 40 years, and that while current homes often have open-concept kitchen, dining and living rooms, homes built in the 1970s typically had closed-off rooms. Consequently, the old-fashioned design style of the Salish Park home would give rise to some degree of functional obsolescence.

[82] To determine the depreciated value of the homes on the 21 Salish Park properties, Mr. Dybvig looked to the age of each home, its appearance, whether the home was in its original condition or had been renovated, and if so, when. He did this by driving by each home in order to observe its current condition, and by looking at the 20-odd colour photographs that were available for each home on the MLS real estate listing service. These photos, Mr. Dybvig says, provided substantial evidence of the current condition of each home and the nature of the renovations, if any. In some cases, Mr. Dybvig also spoke with the realtor involved in the transaction to confirm information about condition of the properties.

[83] Based upon this analysis, Mr. Dybvig determined the contributory value of the improvements on the 21 Salish Park properties to range from $58 to $145 per square foot, with a "central tendency" in the order of $108 per square foot. The average depreciation rate applied was 45%.

[84] Mr. Dybvig then conducted a market analysis to confirm the reasonableness of his estimate of the depreciated value of the improvements on the Salish Park properties. He looked at 16 sales in 2015 in North Vancouver, with the age and size of the homes being virtually identical to those of the Salish Park homes. Mr. Dybvig says that North Vancouver is a good

comparator, as homes there are of a similar age and quality to the homes in Salish Park. Through this analysis, Mr. Dybvig determined that the contributory value of the homes in North Vancouver was in the same range as the contributory value of the homes in Salish Park, thereby corroborating the depreciation estimates that he had used.

[85] Mr. Dybvig's attention then returned to the 21 sales of properties in Salish Park. After making minor adjustments for time, he was able to determine the value of 58-year prepaid leasehold lots on the Musqueam Reserve without improvements, but with servicing. The residual land value of these lots ranged from $450,173 to $901,269, with a per square foot price ranging from $54 to $90 per square foot.

[86] To value the Musqueam Park lots, Mr. Dybvig selected a representative or "Benchmark" property in Musqueam Park - one that shared a number of the attributes present in the Salish Park comparables. He then assigned it a market value based upon the foregoing analysis.

[87] The majority of Musqueam Park lots are essentially rectangular in shape, and they range in size from 8,779 square feet to 27,094 square feet, with an average size of 12,143 square feet and a median size of 11,924 square feet. Lot 36, located at 8 Semana Crescent in Musqueam Park, (the Benchmark Lot) is an interior lot, rectangular in shape and located on a low-traffic quiet street - attributes that it shares with the majority of the Salish Park comparables. The Benchmark Lot is 9,610 square feet, whereas the majority of the Salish Park lots are between 9,000 and 10,000 square feet in size.

[88] After adjusting for time, Mr. Dybvig was able to determine that the on-reserve value (on a price per square foot basis) of the Benchmark Lot, valued as if it were subject to a 58-year

prepaid leasehold interest in the land, would be $70 per square foot. By multiplying the 9,610 square foot size of the Benchmark Lot by the $70 per square foot land value, Mr. Dybvig determined that the value of the Benchmark Lot, valued as if it were subject to a 58-year prepaid leasehold interest in land that was unimproved, but serviced, was $672,700.

(3) Mr. Dybvig's Third Step: Calculating the Leasehold to Freehold Adjustment

[89] By this point in his analysis, Mr. Dybvig had isolated the value of his Benchmark Lot in Musqueam Park, valued as if it were subject to a 58-year prepaid leasehold interest in the land. Because the valuation exercise required the valuation of an on-reserve freehold interest in land, Mr. Dybvig then had to use market evidence to ascertain the difference in market value between a 58-year prepaid leasehold interest in land and a fee simple interest in the same land in order to isolate a 'leasehold to freehold factor' (the "leasehold to fee simple adjustment").

[90] Mr. Dybvig and Mr. Neufeld agree that if the leases for the Salish Park properties still had 99 years to go in their terms, the prices that the lots commanded would reflect the value of fee simple on-reserve land almost perfectly, as a 99-year leasehold interest will approximate the market value of a fee simple interest in the same land. However, as the Salish Park leases only had 58 years left in their terms as of the June 7, 2015 valuation date, a leasehold to fee simple adjustment was necessary.

[91] Mr. Dybvig and Mr. Neufeld also agree that appraisers routinely use market analyses to determine the appropriate adjustment to convert leasehold to freehold values. To do this, Mr. Dybvig says that an appraiser has to analyze sales of prepaid leasehold properties and compare the prices that these properties achieve to sales of freehold properties that are as similar

as possible to the leasehold properties, but are held in fee simple. This allows the appraiser to isolate the percentage difference in value.

[92] Mr. Dybvig looked at four sets of paired sales which compared properties held as long-term prepaid leasehold interests to comparable properties in the immediate vicinity that were held in fee simple, providing photographic evidence and additional detail to demonstrate the similarity of the properties. This exercise allowed Mr. Dybvig to isolate the difference in value between a long-term leasehold interest in land and one held in fee simple.

[93] Mr. Dybvig's first set of transactions involved properties located in North Vancouver. He looked at the sales of six leasehold strata townhouses where the remaining term of the leases was 43 years, comparing the prices they commanded to the sale price of six freehold townhouses in the immediate vicinity. The units were similar in age, size, design, style and location. Although each group of properties had minor advantages and disadvantages over the other group, in Mr. Dybvig's view, these differences essentially canceled each other out. The result of this analysis suggested that the leasehold to freehold adjustment where the remaining term of the lease was 43 years was 1.11.

[94] A second paired sale analysis involved the sale of eight leasehold and eight freehold units in three- and four-storey buildings located in the southeast area of the City of Vancouver. In addition to considering the sales data for these transactions, Mr. Dybvig also interviewed a realtor who specialized in properties in that area. This allowed him to identify some of the relevant market premiums and penalties, which he set out in his report. While there were minor differences between various pairs of sales insofar as characteristics such as view, size, orientation, and location were concerned, Mr. Dybvig was able to adjust for these differences.

This left him with a leasehold to freehold adjustment of less than 5%, where there was more than 90 years to go on the term of the leases governing the leasehold properties.

[95] Mr. Dybvig's third group of sales involved 14 paired sales of units in eight- and 11-storey buildings located in the False Creek area of Vancouver, where the leasehold properties had 33 years to go in the term of the leases. His analysis concluded that the average leasehold to freehold adjustment for these properties was 1.11, while the median was 1.14.

[96] The final group of paired sales involved five sets of sales of single family homes in southeast Vancouver, where the leases governing the leasehold properties had 75 years to go in their terms. Mr. Dybvig's analysis found that the average leasehold to freehold adjustment for these properties ranged from 1.04 to 1.10, with the majority being 1.08.

[97] Based upon this analysis, Mr. Dybvig concluded that a leasehold to freehold adjustment of 1.10 would be appropriate in this case. There was, however, one additional consideration that he took into account in arriving at his final conclusion regarding the leasehold to freehold adjustment.

[98] That is, Mr. Dybvig also considered the possible valuation implications of the fact that the tenants of leasehold strata properties located within municipalities in British Columbia may be entitled to reimbursement for the market value of the improvements on the properties they occupied at the expiry of the term of the lease. Mr. Dybvig explained that there is evidently some question as to how the value of these "reversionary interests" should be determined.

[99] Mr. Dybvig estimated that a reversionary interest might be worth as much as 5% of the value of a property. He then undertook a discounted economic analysis of this reversionary value

in his reply report, and concluded that its present value was somewhere between approximately 1.8 and 3.6% of the value of the property in question. This analysis was not challenged by the MIB in their cross-examination of Mr. Dybvig, nor was it commented on by Mr. Neufeld in his testimony in trial. Factoring the value of a reversionary interest into the equation gave Mr. Dybvig a leasehold to freehold adjustment factor of 15%, or a multiplier of 1.15.

(4) Applying Mr. Dybvig's Analysis to the Musqueam Park Properties

[100] Having completed his three-step analysis, Mr. Dybvig then applied his 1.15 multiplier to the value of the Benchmark Lot, which, it will be recalled, was $672,700 for a lot subject to a prepaid lease with 58 years to go on the term of the lease, without improvements but with servicing. This gave him $774,000 (rounded) as the value of the Benchmark Lot valued as a hypothetical fee simple, on-reserve lot without improvements but with servicing.

[101] To ascertain the value of the 68 other Musqueam Park lots occupied by the plaintiffs, Mr. Dybvig compared his $774,000 value of the Benchmark Lot to the assessed value of the lot. The BC Assessment Authority had determined that the Benchmark Lot was worth $1,861,000. This comparison told Mr. Dybvig that the actual market value of the land was 41.57% of its assessed land value.

[102] It is true that for tax purposes, the British Columbia Assessment Authority values the leasehold properties in both the Musqueam Park and Salish Park subdivisions as if they were held in fee simple, and were off-reserve. This valuation fiction is the result of Musqueam Assessment Bylaw dated March 11, 1996. This Bylaw defines "actual value" as meaning "the market value of the fee simple interest in land and improvements as if the interest holder held a fee simple interest located off reserve". However, it was not the absolute amount of the assessed

value that was important to Mr. Dybvig at this point in his analysis, but rather its relationship to the market value of the property, valued as if it were a freehold interest in the land.

[103] Mr. Dybvig, who, it will be recalled, is a member of the British Columbia Provincial Assessment Appeal Board, considered the Assessment Authority's allocation of the land values for the plaintiff Leaseholders' 69 lots in Musqueam Park to be reasonably proportional to one another. As a result, he was able to calculate the value of the remaining 68 lots by calculating 41.57% of the assessed value of each lot.

[104] This gave Mr. Dybvig the market value of each of the plaintiffs' Musqueam Park lots, valued as unimproved, but serviced land, held in fee simple and on-reserve. Mr. Dybvig's valuation of the individual lots is set out as Appendix 2 to his first appraisal report (Exhibit P-4).

(5) The Cost of Servicing

[105] Once he had determined the current market value of a hypothetical fee simple interest in serviced but unimproved land on the Musqueam Reserve, Mr. Dybvig then had to deduct the cost of servicing the subdivision in order to arrive at its "current market value" in an unimproved and unserviced state. Relying on reports prepared by Nancy Hill of AECOM (the plaintiffs' engineering expert), Mr. Dybvig then removed the cost of servicing and the related development and financing costs from the value of Musqueam Park land. This left Mr. Dybvig with the value of each of the subject lots valued as hypothetical fee simple interests in unserviced and unsubdivided land on the Reserve.

[106] Mr. Neufeld also provided evidence on the cost of servicing question. However, shortly before the commencement of the trial, counsel for the MIB stated that they were withdrawing Mr. Neufeld's evidence relating to the cost of servicing the Musqueam Park properties.

[107] While I will address Ms. Hill's evidence in greater detail further on in these reasons, suffice it to say that having withdrawn Mr. Neufeld's evidence on the servicing cost issue, there was little real dispute between the parties as to the cost of servicing the Musqueam Park subdivision.

[108] To remove the cost of servicing (as well as the related development and financing costs) from the value of the Musqueam Park land, Mr. Dybvig applied what is known as a 'subdivision residual analysis'. This is the method that developers typically utilize to determine the price to be paid for raw land that is yet to be serviced.

[109] Mr. Dybvig deducted selling costs (principally real-estate commissions) and an anticipated developer's profit from the value of the serviced lands. He also deducted the hard costs of subdivision design and development, as well as associated soft costs. Mr. Dybvig's cost estimate included a sum for the provision of rain gardens as part of the storm water management system, and a deduction equal to 10% of the serviced land value, which represented a payment in lieu of land being for a dedicated park**.** These are the only two elements of the cost of servicing analysis that are still disputed by the MIB. Mr. Dybvig's application of the subdivision residual analysis is otherwise no longer contested following the MIB's withdrawal of Mr. Neufeld's critique of it.

[110] According to Mr. Dybvig, the resulting residual balance represents the amount that is attributable to the value of the raw land in Musqueam Park. To account for the fact that this amount was only attributable to the land three years after the valuation date (that is, after accounting for the time spent on subdivision approval, infrastructure construction and the actual sale of the lots as serviced lots), Mr. Dybvig then applied a discount rate in order to arrive at a final value for the land as of the valuation date.

[111] Mr. Dybvig concluded that the value of the 40-acre parcel of land in Musqueam Park as fee simple on-reserve property, without improvements or servicing was $26,550,000 as of the valuation date. This represented roughly the mid-point between the residual land value Mr. Dybvig determined applying an unleveraged present value of cash flow ($26,849,113) and his conclusion using a leveraged present value of cash flow ($26,277,974).

[112] Mr. Dybvig then compared his $26,550,000 overall value of the Musqueam Park land to the British Columbia Assessment Authority's assessed values for the same property. This comparison gave Mr. Dybvig a 17.459% ratio that he could then apply to each of the 69 lots belonging to the plaintiff Leaseholders.

[113] Mr. Dybvig provided the Court with a schedule that sets out the value for each of the plaintiff Leaseholders' lots valued as if they were fee simple, on-reserve lots without improvements and without servicing. According to Mr. Dybvig, the "current market value" of the plaintiffs' lots ranges from a low of $274, 979 to a high of $542,800, as of the valuation date.

[114] Mr. Dybvig also calculated the "fair rent" for the period from June 8, 2015 to June 7, 2035 for each of the plaintiff Leaseholders' lots in Musqueam Park. He did this by applying the

6% formula found in the rent review provisions of the leases to the "current market value" of each plaintiff's lot as of the valuation date. This resulted in an average annual rent of approximately $21,151 per lot.

[115] Mr. Dybvig's schedule setting out the valuation and rent for each of the 69 lots occupied by the plaintiff leaseholders is attached as Appendix "B" to these reasons.

B. *Mr. Neufeld's Approach*

[116] Mr. Neufeld took a fundamentally different approach to Mr. Dybvig in valuing the Musqueam Park lands – one that led him to a very different conclusion as to their market value as of the June 7, 2015 valuation date. Before discussing Mr. Neufeld's approach to value, however, it is first necessary to address the nature of his instructions.

(1) Mr. Neufeld's Instructions

[117] The mandate given to Mr. Neufeld was not made entirely clear during the trial. It appears from an email from Jim Reynolds (the MIB's General Counsel) to Mr. Neufeld, and from evidence from the examination for discovery of the MIB's Band Manager, Doug Raines, that the Deloitte's firm had prepared a report for the MIB addressing "the west side fee simple values without any discount for reserve factors". All that Mr. Neufeld was asked to do was to "consider what discount, if any, should be made in 2015 for reserve factors". A subsequent letter of instructions asked Mr. Neufeld to also provide an opinion on the servicing costs to be deducted from the value of the serviced land.

[118] Although the email from the Band's counsel stated that a copy of the Deloitte's report had been sent to Mr. Neufeld, he testified that he did not recall ever having seen it. The Deloitte's report was not in Mr. Neufeld's file, nor was it provided to the Court.

[119] Mr. Neufeld's letter of instructions asked that he address "what if any reductions should be made to the fee simple value of off-reserve, unimproved, single-family residential lots in the vicinity of Musqueam IR No. 2 which are comparable to those found in Parcel A (Musqueam Park), Musqueam IR No. 2, in order to account for Indian reserve factors in accordance with the relevant provisions of the leases as interpreted by Gonthier J. in the Supreme Court of Canada decision in *Glass*". This clearly suggests that Mr. Neufeld's only mandate was to address: (1) whether the value of the Musqueam Park lands should still be discounted for "on reserve factors", and (2) the cost of servicing the land.

[120] Notwithstanding the restricted nature of Mr. Neufeld's initial mandate, his reports nevertheless address the current market value of a hypothetical fee simple interest in the Musqueam Park lands, as unserviced and unimproved property. It was never made clear to the Court whether Mr. Neufeld did this on his own initiative, or whether his instructions changed or evolved at some point during the pre-trial process. Indeed, counsel for the MIB agreed that the evidence regarding the scope of Mr. Neufeld's mandate was something of a "black hole".

(2) Mr. Neufeld's Approach to Value

[121] Mr. Neufeld started his analysis by reviewing the different methods of valuation. He noted that the direct comparison approach "best applies in the valuation of property types that frequently trade in the open marketplace". In Mr. Neufeld's view, the direct comparison

approach was the appropriate method of valuation to be used in this case, given the type of property at issue.

(3) Mr. Neufeld's Application of the Direct Comparison Approach

[122] Because his task was to value single-family lots held in fee simple without improvements or servicing, Mr. Neufeld examined the market for vacant lots on the west side of Vancouver, which, he says, gave him an appropriate indication of fee simple value in what he calls the "normalized market", that is, the off-reserve market. This value would then potentially have to be adjusted to take into account the fact that the properties being valued are on a reserve.

[123] In looking to the west side of Vancouver for his comparable sales, Mr. Neufeld observed that there are many similarities between the Musqueam Park properties and those on the west side of Vancouver. Musqueam Park is in a very desirable location adjacent to Vancouver's upscale west side, and, like the west side of Vancouver, Musqueam Park is in the catchment area for many of Vancouver's best private schools. It is also close to the University of British Columbia.

[124] Mr. Neufeld acknowledged that a "very significant proportion" of residential sales on the west side of Vancouver are effectively lot sales, as purchasers frequently demolish newly-purchased homes in order to construct new residences on the site. Mr. Neufeld did not look to west side sales of lots with homes on them, however. He explains this decision on the basis there would be a "lack of clarity" as to whether these transactions were "true lot sales", or whether an adjustment would have to be made to the sale price to reflect the value of improvements on the properties in order to arrive at the value of the land.

[125] By looking only at sales of vacant land, Mr. Neufeld says that he did not have to estimate and deduct the depreciated value of improvements in order to determine the value of the land. Nor did he have to identify the appropriate leasehold to freehold adjustment, as the transactions already involved the sale of freehold interests in land. Mr. Neufeld would, however, have to consider whether an adjustment was necessary to take the on-reserve location of the Musqueam Park properties into account.

[126] To this end, Mr. Neufeld says that he identified 11 properties on the west side of Vancouver that were sold as vacant land, although, as it turns out, some of the properties actually had houses on them. While he says that he looked at 11 sales, Mr. Neufeld only provided data for 10 of them, and he failed to provide a satisfactory explanation as to why data relating to the 11th sale was left out of his analysis.

[127] Mr. Neufeld's 10 sales all took place between January of 2014 and April of 2016, and involved lots varying in size from 4,125 square feet to 39,204 square feet, with an average size of 13,715 square feet. Adjusting for time, Mr. Neufeld found that the properties had a weighted average price of $201.07 per square foot as of the valuation date.

[128] Mr. Neufeld noted that the Musqueam Park lots ranged in size from 8,779 square feet to 27,007 square feet, with most of the lots being between 12,000 and 13,000 square feet, and an average lot being 12,148 square feet in size. Mr. Neufeld observed that all other things being equal, corner lots will command a higher price than inside lots, and lots backing onto greenbelt areas, such as the Shaughnessy golf course, will command higher prices over those without a scenic view.

[129] Rather than try to value each of the lots in Musqueam Park, Mr. Neufeld did what Mr. Dybvig did and identified a typical or "benchmark" lot, whose value could be adjusted to reflect the circumstances of each individual lot. Mr. Neufeld concluded that his Benchmark Lot would be 12,000 square feet in size, and would occupy an inside location (that is, not a corner lot). Unlike Mr. Dybvig, however, Mr. Neufeld did not identify a specific lot in Musqueam Park as his Benchmark Lot.

[130] Mr. Neufeld stated that that lots between 10,000 and 12,000 square feet in size should be valued at the same per square foot price as his Benchmark Lot. However, lots that were less than 10,000 square feet in size would be valued at a 20% higher per square foot price, as Mr. Neufeld says that smaller lots tend to command a higher per square foot price. Lots over 12,000 square feet would similarly be discounted by 20%, on the basis that larger lots command a lower per square foot value. Mr. Neufeld did not, however, provide any market data to support the size of these adjustments.

[131] Mr. Neufeld indicated that he would also accord a 5% premium to lots backing onto the Shaughnessy golf course, and that a 10% premium would be accorded to corner lots. As was the case with the adjustments for size, no market-based analysis was provided by Mr. Neufeld, to justify the size of his adjustments for location.

[132] Mr. Neufeld then looked at the size of each of the Musqueam Park lots. Using his average land value of $200 per square foot, Mr. Neufeld then purported to make the adjustments discussed in the preceding paragraphs to give him the value of each lot, valued as vacant land. I say that Mr. Neufeld "purported" to make adjustments for things such as lot size, location and

views because, as will be discussed further on in these reasons, Mr. Neufeld did not in fact make the adjustments that he stated were required in a number of cases.

[133] After completing his analysis using the direct comparison approach, Mr. Neufeld arrived at current market values for vacant, but serviced, Musqueam Park lots ranging from $2,106,960 to $4,321,120, as of the valuation date.

(4) The Appropriateness of Applying an "On-reserve" Discount

[134] As was noted earlier, by using sales of vacant lots on the west side of Vancouver as his comparable sales in his direct comparison analysis, Mr. Neufeld did not have to estimate and deduct the depreciated value of the improvements on the west side properties in order to determine the value of the underlying land. He also did not have to adjust leasehold values to fee simple values, as he based his analysis on sales of vacant land that was held in fee simple. Mr. Neufeld did, however, have to consider whether an adjustment was appropriate to reflect the on-reserve location of the Musqueam Park properties.

[135] In examining the question of whether an "on-reserve" adjustment or discount was appropriate in this case, Mr. Neufeld started by observing that Justice Rothstein had been of the view that, in 1995, the value of the Musqueam Park properties had to be discounted by 50% to take their on-reserve status into account. Mr. Neufeld noted that in so doing, Justice Rothstein considered a number of factors, including the uncertainty related to property taxation and the unrest on reserves in British Columbia. Justice Rothstein also had regard to the inability of non-Indians to stand for election to the Musqueam Band Council or to vote on issues such as planning, zoning or taxation. He also considered the requirement for ministerial approval for certain mortgages, sales or construction, and the fact that there was no permanent arrangement in

place for services such as police, fire and garbage collection to be provided by the City of Vancouver.

[136] In assessing whether a discount should still be applied to the Musqueam Park properties to reflect their "on-reserve" status, Mr. Neufeld noted that Musqueam Park was a high-end subdivision that enjoyed a full range of municipal services provided by the City of Vancouver, the continuity of which was now assured by a servicing agreement between the MIB and the City. Mr. Neufeld also had regard to crime statistics produced by the Vancouver Police Department which, he says, indicated that the Musqueam Park neighbourhood had the lowest incidence of certain types of crime of any neighbourhood in the entire city.

[137] While noting that it was still true that non-Native residents could not stand for election to the Band Council, Mr. Neufeld observed that Musqueam Park residents who were Canadian citizens could run for office in the City of Vancouver, and could thus influence future discussions with the MIB with respect to the Musqueam Park lands. He also noted that planning and zoning matters are governed by the terms of the Lot Leases.

[138] In these circumstances, Mr. Neufeld was of the view that "it would be difficult to justify or rationalize any grounds for a discount on this basis". Consequently, he did not include any discount for the "on reserve" status of the Musqueam Park lands in valuing the properties.

[139] After reviewing Mr. Dybvig's initial report in this matter, Mr. Neufeld prepared a responding report in which he used market data to confirm his conclusion that no on-reserve discount was required to properly arrive at the fee simple on-reserve value of the Musqueam Park properties. To this end, Mr. Neufeld examined two sets of paired sales involving a

comparison of home sales in townhouse projects in North Vancouver on land that was subject to long-term prepaid leases, with some homes purportedly being on a reserve and others being off-reserve. I again say "purportedly", because it was revealed through the cross-examination of Mr. Neufeld that both townhouse developments were in fact on the same reserve.

[140] Mr. Neufeld's second paired sale comparison involved sales of units in apartment complexes that were subject to long-term prepaid leases, where some units were on a reserve and others were indeed not on a reserve.

[141] From this analysis, Mr. Neufeld concluded that there was, at most, a 5% difference in value between properties on- and off-reserve, with the bulk of the evidence suggesting a 1% differential. Mr. Neufeld also concluded that the market evidence showed that there was no hesitation on the part of purchasers in buying residences on First Nations land. Consequently, Mr. Neufeld stated that there is no justification for a 50% reduction in value, as was the case in 1996, or the 67% discount that Mr. Neufeld says Mr. Dybvig applied as of 2015.

(5) Mr. Neufeld's Application of the Land Extraction Method

[142] Mr. Neufeld also used the land extraction method as what he called a "check on value" in determining the current market value of the Musqueam Park properties. This was the approach to value used by Mr. Dybvig, and, like Mr. Dybvig, Mr. Neufeld looked to the Salish Park development for his comparables. In so doing, Mr. Neufeld observed that Salish Park was developed along "highly similar lines" to Musqueam Park, although the Salish Park properties had smaller lots and were marketed on the basis of prepaid leases, whereas Musqueam Park lots were marketed on the basis of annual lease payments.

[143] While utilizing the method himself as a "check on value", Mr. Neufeld nevertheless asserted that the use of the land extraction method is problematic, and he is critical of Mr. Dybvig for having used it as his sole valuation method in valuing the Musqueam Park properties. According to Mr. Neufeld, the land extraction method may lead to misleading values, as it is difficult, if not impossible, to accurately determine the depreciated value of improvements.

[144] Mr. Neufeld also asserted that the homes and the lots in Salish Park are significantly smaller than those in Musqueam Park. While it is true that some of the lots and homes in Salish Park are smaller than those in Musqueam Park, there are also large lots and large homes in Salish Park that are comparable in size to those in Musqueam Park, and the median house size in Salish Park is similar to that in Musqueam Park. Moreover, as Mr. Dybvig noted, to the extent that the lot sizes in Salish Park are somewhat smaller than those in Musqueam Park, this difference could easily be accounted for by choosing a benchmark lot that is closer to 10,000 square feet in size.

[145] Noting that there had been a "steady stream" of sales in Salish Park, Mr. Neufeld looked to seven sales of properties in the development that took place in 2015. He then had to arrive at a depreciated value for the homes on the properties in question. According to Mr. Neufeld, the "most appropriate technique" would have required him to undertake a detailed depreciated cost estimate for each house, which, he says, would be difficult to do without having first inspected the interior of the properties in question. Mr. Neufeld further says that accurate information with respect to each house would be difficult to obtain, and that some houses were still in their original condition, while others had been renovated to a high standard.

[146] In order to arrive at a depreciated value for each of the Salish Park houses, Mr. Neufeld used what he called "a default approach", looking at the value of the homes as assessed by the British Columbia Assessment Authority as of July 2015. Mr. Neufeld says that these values emanated from "an unbiased source", and he used these values as a "general proxy" for the depreciated value of the improvements. Mr. Neufeld recognized that this method could result in an under- or over-estimation of value in particular cases, but he stated that it was nevertheless an "overall reasonable technique" to use.

[147] Applying the land extraction method to the seven Salish Park sales, Mr. Neufeld concluded that the adjusted leasehold value for the underlying land was between $78.98 and $135.95 per square foot, with a weighted average of $108.96 per square foot.

[148] Because the Salish Park properties are on the Musqueam Reserve, Mr. Neufeld agreed with Mr. Dybvig that no adjustment had to be made to reflect the on-reserve status of the Musqueam Park properties, but that a "leasehold to freehold adjustment" still had to be made to take the fact that the Salish Park properties were subject to prepaid leases into account.

[149] To ascertain the appropriate size of his leasehold to freehold adjustment, Mr. Neufeld stated that "we have reviewed a number of leasehold transactions and related them to otherwise comparable fee simple transactions to ascertain a pattern of discounts over various leasehold terms". Mr. Neufeld did not include the data he relied upon in his report, but stated that it was available in his file.

[150] What Mr. Neufeld did do in his report was to plot the results of this analysis on a graph, which, he says, shows a clear relationship between the length of the remaining term of the lease

and the percentage of fee simple value that would be appropriate. Mr. Neufeld states that this analysis indicated that properties subject to prepaid leases with 60 years to go in the term of the leases would be worth 80% of the value of comparable property held in fee simple. This is equivalent to a 1.25 premium when moving from a prepaid leasehold to freehold. It will be recalled that Mr. Dybvig determined that a 1.15 leasehold to freehold adjustment was appropriate.

[151] When Mr. Neufeld applied his 1.25 leasehold to freehold adjustment to the Salish Park sales, he arrived at an adjusted fee simple lot price of $98.73 to $169.94 per square foot, with a weighted average of $136.20 per square foot. He stated that the Musqueam Park subdivision was generally of superior quality to Salish Park, however, and that it occupied a more prominent location off Southwest Marine Drive. As a result, Mr. Neufeld stated that Musqueam Park properties would likely achieve higher prices than would properties in Salish Park.

[152] That said, Mr. Neufeld was of the view that his analysis of the Salish Park sales "does serve to set a lower end point for the subject valuation", and that the Musqueam Park properties would thus "achieve a value in excess of $170.00 per sq. ft". It will be recalled that Mr. Neufeld arrived at an average land value for the Musqueam Park properties of $200 per square foot, using the direct comparison approach.

(6) The Cost of Servicing

[153] The Lot Leases contemplate the Musqueam Park lots being valued as if they were in an unserviced state. Consequently, Mr. Neufeld estimated the cost of servicing the Musqueam Park properties so that this cost could be deducted from the value of the lands to arrive at a value of the Lots in an unserviced state.

[154] Shortly before the commencement of the trial, however, counsel for the MIB stated that they were withdrawing Mr. Neufeld's evidence regarding the cost of servicing the Musqueam Park properties (save and except on the issue of the need to dedicate lands in Musqueam Park for use as a park). The MIB also abandoned Mr. Neufeld's critiques of the opinions expressed by Ms. Hill. This leaves Ms. Hill's evidence as to the cost of servicing largely unchallenged by the MIB, with a couple of minor exceptions which will be discussed further on in these reasons.

[155] It must, however, be kept in mind that Mr. Neufeld's estimate of the cost of servicing was factored into his analysis in arriving at his assessment of the "current market value" of the Musqueam Park properties, and his determination of the "fair rent" for the Lots.

(7) Mr. Neufeld's Calculation of the "Fair Rent"

[156] Using his average land value of $200 per square foot, less his pro-rated cost of servicing the properties, Mr. Neufeld arrived at what he says is the current market value of a hypothetical fee simple interest in the Musqueam Park properties in an unserviced state. According to Mr. Neufeld, the Musqueam Park Lots were worth between $1,930,063 and $3,776,929, as of the valuation date.

[157] **C**alculating the "fair rent" for each lot at 6% of its market value in an unserviced state as of the valuation date, Mr. Neufeld arrived at "fair rents" for the Musqueam Park properties ranging from $115,804 to $226,616 per annum.

VI. Analysis

[158] The appraisal experts are far apart in their estimates of the current market value of the Musqueam Park properties in an unserviced state, and the "fair rents" that flow from those

values. Mr. Dybvig's analysis resulted in an average annual "fair rent" of approximately $21,151 per lot, which would represent an average annual increase of approximately $11,000 per lot. In contrast, Mr. Neufeld's analysis arrived at "fair rents" for the Musqueam Park properties ranging from $115,804 to $226,616 *per annum*.

[159] Both the plaintiffs and the MIB were harshly critical of their opponents' appraisal expert, impugning both their competence and their professional integrity in their cross-examinations and submissions.

[160] The plaintiffs submit that Mr. Neufeld's work was remarkably careless, superficial and incompetent. They say that he was utterly lacking in professional objectivity and independence, and that he abandoned his role as an impartial expert whose responsibility it was to assist the Court. According to the plaintiffs, Mr. Neufeld did not undertake a careful, independent market analysis, but instead set out to find data that he believed would fit his client's position, thereby acting as an advocate for the MIB. Mr. Neufeld's oral testimony was described by the plaintiffs as being both "embarrassing" and "disastrous". As a consequence, the plaintiffs submit that Mr. Neufeld's evidence should not be given any weight.

[161] Similarly, the MIB alleged that Mr. Dybvig's evidence was unreliable, and that he had excluded a relevant approach to value for reasons that were "false and misleading". The MIB further contends that Mr. Dybvig made "false claims" that there was a "lack of data" regarding the question of whether there should be a discount for "on-reserve factors", and that his approach to the discount issue was "outrageous".

[162] According to the MIB, Mr. Dybvig was not only "at best disingenuous", but he intentionally sought to mislead the Court by suggesting that there was no way to measure the market difference between on- and off-reserve land, and that, therefore, such an analysis did not have to be undertaken. This allowed Mr. Dybvig to avoid any reference in his analysis to the high-priced fee simple market for residential properties on the neighbouring west side of Vancouver. The MIB contends that Mr. Dybvig deliberately ignored this data because he and his client both knew that it would be inconsistent with the conclusion that his client wanted to reach - namely, a very low estimate of the current market value of the Musqueam Park properties.

A. *Why the Evidence of Mr. Dybvig is to be Preferred to that of Mr. Neufeld*

[163] As this Court has noted in previous rent review cases, land appraisal is not an exact science: *Glass* FC at para. 92. Indeed, as one judge colourfully put it, "this area of real estate appraisal is perhaps as far from an exact science as astrology is from the science of astronomy": *Rodgers v. Canada (Minister of Indian Affairs and Northern Development)* (1993), 74 F.T.R. 164 at para. 28, as cited in *Morin v. Canada*, 2002 FCT 1312 at para. 42, aff'd 2005 FCA 52.

[164] That said, as will be explained below, I have a number of reasons for concluding that the evidence of Mr. Dybvig is to be preferred to that of Mr. Neufeld.

(1) The Relative Qualifications of the Two Experts

[165] My first reason for preferring the evidence of Mr. Dybvig to that of Mr. Neufeld relates to the relative qualifications of the two experts.

[166] Mr. Dybvig and Mr. Neufeld are both Accredited Appraisers of the Appraisal Institute of Canada, and each is an experienced real estate appraiser with years of experience in the

Vancouver market. Neither side challenged the qualifications or expertise of the opposing expert, and Mr. Dybvig and Mr. Neufeld were both qualified as experts in "land appraisal and the determination of ground rent".

[167] That said, in addition to his professional experience as a real estate appraiser, Mr. Dybvig also has a great deal of academic experience, and, unlike Mr. Neufeld, Mr. Dybvig appears to occupy something of a leadership position within the profession.

[168] Mr. Dybvig is a senior member of various professional organizations in the United States and the United Kingdom, including the International Valuations Standards Council. This is an organization that represents some 70 professional evaluation organizations throughout the world, whose mandate is to develop and promulgate standards for professional appraisal practice, particularly with regard to the requirements of financial industries.

[169] More importantly, Mr. Dybvig has, since 1992, also been the editor-in-chief of, and a technical contributor to the Canadian edition of the *Appraisal of Real Estate*. I understand both sides to agree that this book is the leading English-language text on the appraisal of real estate in the world. The Canadian edition of the book is used by both the Appraisal Institute of Canada and the University of British Columbia, where Mr. Dybvig has served as a consultant to the Appraisal Institute of Canada's Appraisal program at UBC since 1996. Mr. Dybvig has also reviewed a number of texts published by the American Appraisal Institute.

[170] In addition to his academic roles, Mr. Dybvig has also been a member of the British Columbia Assessment Authority since 2012. In this capacity, he is called upon to adjudicate disputes regarding property tax assessments. He has also been actively involved with the

Appraisal Institute of Canada, volunteering on national and provincial committees, including the Institute's Professional Standards Committee. This Committee promulgates standards for professional appraisers in Canada, which are known as the Canadian Uniform Standards of Professional Appraisal Practice (or CUSPAP) standards.

[171] In contrast, Mr. Neufeld's CV discloses that he is a member of the Real Estate Institute of British Columbia and a Director and past President of the Mortgage Investment Association of British Columbia. His CV also states that he is a member of "NAIOP", which I understand to be the National Association of Industrial and Office Properties.

[172] Based on this, I am satisfied that Mr. Dybvig's qualifications are superior to those of Mr. Neufeld.

(2) The Level of Care Taken in Each Expert's Analysis

[173] As will be explained below, Mr. Neufeld showed a lack of care in his analysis, which raises serious concerns as to the reliability of his evidence. I have no such concerns with the evidence of Mr. Dybvig.

[174] Mr. Dybvig's analysis was careful and transparent and was, moreover, backed up by market data. His analysis showed rigour and a depth of understanding of the data and its application to the valuation exercise at issue in this action. His evidence concerning his methodology and his conclusions was also largely undamaged in cross-examination.

[175] In contrast, the work of Mr. Neufeld was sloppy and full of errors. He failed to make adjustments that he said needed to be made, he made errors as to the nature of the properties that he was considering, and parts of his analysis were both subjective and superficial.

[176] A simple example of Mr. Neufeld's carelessness is the fact that he says in his first report that his research had uncovered 11 sales of lots on Vancouver's west side, the details of which are set out in a table immediately below that statement. The table only refers to 10 properties, and Mr. Neufeld never explained what happened to the missing 11th property.

[177] A far more significant example of Mr. Neufeld's sloppiness related to his failure to make the adjustments that he had said were required in assessing the value of the Musqueam Park properties.

[178] It will be recalled that rather than try to value each of the lots in Musqueam Park, Mr. Neufeld identified a typical or "Benchmark" lot whose value could be adjusted to reflect the various circumstances of each individual lot. He concluded that the Benchmark Lot would be 12,000 square feet in size, and would occupy an inside location (that is, not be a corner lot).

[179] According to Mr. Neufeld, Musqueam Park lots that were between 10,000 and 12,000 square feet in size would be valued at the same $200 per square foot price as his Benchmark Lot. However, lots that were less than10,000 square feet in size would be valued at 20% over the base per square foot price, based on Mr. Neufeld's assertion that smaller lots tend to command a higher per square foot price. For the same reason, lots over 12,000 square feet in size would be discounted by 20%. Mr. Neufeld also stated that he would accord a 5% premium to lots backing on the Shaughnessy golf course, and that a 10% premium would be accorded to corner lots.

[180] Not only did Mr. Neufeld fail to provide any market data to support the size of any of these adjustments, he also failed to apply the very methodology that he stated was required in a number of cases. For example, no adjustment was made for size with respect to lots in

Musqueam Park that were between 12,000 and 16,000 square feet in size. The only lots that were given a size adjustment by Mr. Neufeld were those over 17,000 square feet in size. At the same time, lots that were between 10,000 and 11,000 square feet were accorded the 20% premium that Mr. Neufeld says should only apply to lots under 10,000 square feet in size.

[181] When these errors were drawn to Mr. Neufeld's attention in the course of his cross-examination, he suggested that his baseline $200 per square foot value should have been applied to lots between 10,000 and 14,000 square feet in size, rather than the 10,000 to 12,000 square foot range referred to in his report. This explanation does not, however, explain why Mr. Neufeld only started applying his 20% discount to properties that were over 17,000 square feet in size, and not to lots that were between 14,000 and 17,000 square feet. Nor does it explain why Mr. Neufeld applied the 20% premium to lots that were between 10,000 and 11,000 square feet in size.

[182] Also troubling is the fact that Mr. Neufeld did not apply the adjustments that he says were required in a consistent manner. For example, he stated that a 10% premium should be accorded to corner lots in Musqueam Park. He did not, however, adjust for corner lots when he was analyzing his west side lots sales, although he conceded that he had access to the information necessary to make such adjustments.

[183] Similarly, Mr. Neufeld stated that he would accord a 5% premium to Musqueam Park lots that backed onto the Shaughnessy golf course to account for the lots' scenic views. He made no adjustment, however, to the value of one of his 10 west side lots that had an unobstructed view of the Fraser River, an attribute that he conceded in cross-examination would attract an even greater

premium than would backing onto a golf course. Nor did Mr. Neufeld adjust the value of his west side comparables to take differences in zoning into account.

[184] A further example of Mr. Neufeld's sloppiness relates to his analysis of the admittedly difficult question of whether the value of the Musqueam Park properties should be discounted to take the fact that they were located on the Musqueam Reserve into account. Mr. Neufeld agreed that this was a central issue in this case, and indeed, it was the only issue that he was originally asked to consider.

[185] It will be recalled that Mr. Neufeld concluded that no adjustment for the "on-reserve factor" was required as of the valuation date. He says that his conclusion on this point was confirmed by his market analysis of two sets of paired sales of properties in North Vancouver. The purpose of this exercise was to compare sale prices in two otherwise similar developments in the same neighbourhood, both being properties that were subject to long-term leases, with one being located on a reserve, and the other off-reserve. This comparison should have helped Mr. Neufeld ascertain whether there was a difference in value, depending on whether or not the property was located on a reserve.

[186] To this end, Mr. Neufeld looked at sales of homes in a townhouse project on Windcrest Drive in North Vancouver, which was on the Tsleil-Waututh Reserve. He compared the prices commanded by these homes to the sale prices of townhomes on nearby Roche Point Drive, which Mr. Neufeld identifies as being located off-reserve. There were 81 years left to run on the leases on the Windcrest Drive properties, and 79 years to run on the Roche Point Drive leases.

[187] Mr. Neufeld observed that off-reserve homes on Roche Point Drive were worth approximately 10% more than the Windcrest Drive homes located on the Tsleil-Waututh Nation. However, he went on to find that the difference in the prices commanded by the two sets of properties was explained by the fact that the Roche Point Drive homes were of a more traditional design, which, he says, would be considered to be more desirable than the less traditional Windcrest Drive properties, leaving no material difference in the value of homes in the two locations. This, of course, supported Mr. Neufeld's thesis that there was no need for a discount to reflect "on-reserve factors" affecting the value of the Musqueam Park properties.

[188] It is not at all surprising that Mr. Neufeld did not identify a material difference in the prices commanded by otherwise similar townhouse properties in North Vancouver because *both properties* were in fact located on the Tsleil-Waututh Reserve.

[189] Mr. Neufeld acknowledged that the question of the appropriateness of an "on-reserve discount" was a central issue that was of extremely high importance in this case, and he admitted in cross-examination that he had been "careless" in his analysis on this point.

[190] Mr. Neufeld explained his error by stating that the MLS listings for the Windcrest Drive properties indicated that they were prepaid leaseholds, and that this had led him to assume that the properties were located on a reserve. However, the MLS listings for the Roche Point Drive properties stated that these properties were also subject to prepaid leases. Mr. Neufeld was unable to explain why the fact that the Windcrest Drive properties were prepaid leaseholds told him that the homes were on First Nations land, but the fact that the Roche Point Drive properties were prepaid leaseholds did not cause him to check to see if the properties were also located on a

reserve. This is particularly surprising, given that Mr. Neufeld apparently knew that Roche Point Drive passed over both First Nations and North Vancouver lands.

[191] While not necessarily the result of carelessness on Mr. Neufeld's part, the second set of paired sales that he used in determining whether there should be an adjustment for the "on-reserve" factor is also problematic. Mr. Neufeld sought to compare the price of homes in a long-term strata development called "Destiny", which is located on a First Nations reserve, to homes in three off-reserve strata developments. According to Mr. Neufeld, this comparison provided further support for his conclusion that no on-reserve discount is appropriate in this case. It is obvious, however, from the most cursory of examinations that this paired sales exercise did not involve true "apples to apples" comparisons.

[192] The on-reserve "Destiny" project is a new, high quality, state-of-the-art development in a quiet location surrounded by green space and water features. It is near the water, with some of the units having views of Burrard Inlet. The Destiny development has many modern amenities that purchasers would find attractive, including a large fitness centre, a large common lounge with full kitchen and dining room, private meeting rooms and 1,600 square feet of outdoor terrace space. It also has a theatre that can be booked for movie parties. The units themselves have fireplaces, high ceilings, wall to wall windows, oversized balconies and wood laminate floors.

[193] In contrast, the off-reserve Bowron Court and Ostler Court properties were 27 and 22 years old respectively, as of the valuation date, and Mr. Neufeld makes no adjustment for the age of the units. They also lack most of the attractive features and amenities that are present in the Destiny project. The off-reserve homes on Mount Seymour Parkway are newer, but are located

on a four-lane arterial highway, and Mr. Neufeld made no adjustment for traffic. The quality of finishes, layout and design in the Mount Seymour Parkway project are also inferior to those in the Destiny project.

[194] Mr. Neufeld did nothing to adjust for any of the differences in the developments that he was analyzing, yet even on his own gross comparison, the less desirable off-reserve strata units on Mt. Seymour Parkway sold for 19% to 31% more than the premium strata units in the on-reserve Destiny project. Mr. Dybvig points out that if the necessary adjustments were made to deal with location, amenities, views and the age of buildings, the gap between the market value of Mr. Neufeld's comparables on- and off-reserve would become even more marked.

[195] Indeed, Mr. Dybvig's evidence was that the dissimilarity in the homes that formed the basis of Mr. Neufeld's paired sales analysis was such that no reasonable appraiser would use them and his evidence on this point was not challenged in cross-examination.

[196] Whether it was a matter of carelessness, or an attempt on Mr. Neufeld's part to put forward evidence to support his client's case, the end result is that Mr. Neufeld's evidence regarding the need for a discount to reflect the "on-reserve factor" is fundamentally undermined by the obvious dissimilarities in the properties that form the basis of his second paired sales analysis.

[197] I will address some of the other errors that were made by Mr. Neufeld when I consider the valuation methodology that was used by each of the experts. Suffice it to say at this juncture that the lack of care displayed by Mr. Neufeld in his analysis raises serious concerns as to the reliability of his evidence. I have no such concerns with the evidence of Mr. Dybvig.

(3) Independence

[198] The plaintiffs also submit that Mr. Neufeld was neither independent nor professionally objective, and that he saw himself as a conduit for arguments on behalf of his client, rather than as an independent expert. I too have concerns with respect to the degree of independence that was exhibited by Mr. Neufeld, particularly as it related to the question of whether there should be a discount for "on-reserve features".

[199] The role of an expert witness is to assist the Court through the provision of an independent and unbiased opinion about matters coming within the expertise of the witness. This duty is paramount, and overrides the obligations of the witness to the party on whose behalf the expert is called to testify. The evidence of an expert witness should be the independent product of the expert and should not be unduly influenced, in either form or content, by the exigencies of litigation: *National Justice Compania Naviera S.A. v. Prudential Assurance Co Ltd.* (the *"Ikarian Reefer*"), [1993] 2 Lloyd's Rep. 68, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 32, [2015] 2 S.C.R. 182.

[200] The importance of these principles is reflected in the *Federal Courts Rules*, S.O.R./98-106. In order to ensure that experts understand that their primary duty is to the Court, Rule 52.2(1)(c) requires that before testifying, expert witnesses must agree to be bound by the Court's *Code of Conduct for Expert Witnesses*. This *Code* makes it clear that experts are there to assist the Court, and not to act as an advocate for a party, and that the duty of expert witnesses is to be both independent and objective. The *Code* expressly states that this duty overrides any duty the expert might owe to a party, including the party that has retained them.

[201] As was discussed earlier, Mr. Neufeld agreed that the question of whether the values of the Musqueam Park properties should be discounted to reflect "on-reserve factors" was a central issue in this case. Indeed, at one point, he agreed that the issue of the on-reserve/off-reserve adjustment was of "extremely high importance" in this case.

[202] It will also be recalled that the MIB had retained Deloitte to determine "the west side fee simple values without any discount for reserve factors", and that it asked Mr. Neufeld to consider "what discount, if any, should be made in 2015 for reserve factors". Mr. Neufeld was asked whether a discount of 50% was still appropriate, or whether there had been changes in the situation at Musqueam Park since 1995, such that no discount, or a different discount, should apply.

[203] The letter of instructions provided to Mr. Neufeld asked that he prepare a report that addressed "what if any reductions should be made to the fee simple value of off-reserve, unimproved, single family residential lots in the vicinity of Musqueam IR No. 2 which are comparable to those found in Parcel A (Musqueam Park)…in order to account for Indian reserve factors in accordance with the relevant provisions of the leases as interpreted by Gonthier, J…". It is thus clear that the MIB was looking to Mr. Neufeld to provide his expertise in addressing the issue of the "on-reserve" discount.

[204] What then did Mr. Neufeld do that led him to conclude that it was "difficult to justify or rationalize any grounds for a discount"?

[205] Mr. Neufeld's analysis of the issue of the discount for "Indian reserve factors" takes up approximately one page in his 56-page initial report. He starts his analysis by listing the factors

that would cause "hesitancy" amongst non-Natives to purchase homes on a reserve. He testified that he drew those factors from his review of Justice Rothstein's decision in *Glass* FC, that he summarized these factors in point form, and that the language in his report reflected his own "distillation" of the factors identified by Justice Rothstein.

[206] What emerged through the cross-examination of Mr. Neufeld, however, was that both his list of the "on-reserve factors" and the way that they were expressed in his report had been copied directly from the MIB's Statement of Defence. There is, moreover, other language in his opinion regarding this issue that appears to have been lifted verbatim from the MIB's Statement of Defence.

[207] Mr. Neufeld also acknowledged that his opinion reflected "in substance" the views of the MIB, as those views had been expressed to him by Jim Reynolds, the Band's General Counsel, in the email that was sent to Mr. Neufeld by Mr. Reynolds on November 25, 2015. Mr. Neufeld agreed in cross-examination that this email described Justice Rothstein's decision, "how it was interpreted, what the factors were that were referred to and today's answers to those factors". Mr. Reynolds' review of the current situation relating to the "on-reserve" factors is mirrored in Mr. Neufeld's opinion.

[208] Mr. Neufeld asserted in cross-examination that he arrived at his conclusions independently, and that the reason why he appeared to have wholly adopted the position of the MIB that a discount for "on-reserve" factors was no longer appropriate was that the MIB's view of the issues just happened to accord with his own, independent view.

[209] The difficulty with this contention is that it does not appear that Mr. Neufeld did much, if anything, in the way of independent research and analysis before arriving at the conclusion that, as of June 2015, an "on-reserve" discount to the value of the Musqueam Park properties was no longer appropriate.

[210] For example, Justice Rothstein noted that there was uncertainty in 1995 regarding the provision of municipal services to residents of Musqueam Park by the City of Vancouver, and that this uncertainty would contribute to a diminution in the value of Musqueam Park properties. In his November 25, 2015 email, Mr. Reynolds advised Mr. Neufeld that the MIB and the City of Vancouver had entered into a servicing agreement in 2013 whereby the City agreed to provide services of the same quality and quantity as were being provided to comparable neighbourhoods.

[211] Mr. Neufeld noted in his first report that Musqueam Park enjoys "the full range of municipal services" with "continuity of the services being assured by the service agreement between the MIB and the City of Vancouver". When he was asked whether it was just a coincidence that his independent evaluation came to the same conclusion as was set out in the MIB's Statement of Defence as to the relevance of the servicing agreement, Mr. Neufeld responded "[i]If they have arrived at a service agreement with the City of Vancouver to provide services to Musqueam which was not in place previously that service agreement is now in place why would I then argue that there's uncertainty regarding that issue?"

[212] It appears, however, that Mr. Neufeld simply took the MIB's word for it that any uncertainty that may previously have existed relating to the issue of servicing had been eliminated by the conclusion of a servicing agreement with the City of Vancouver. Mr. Neufeld never exercised any independent judgment on this issue, and he never actually looked at the

servicing agreement. Had he done so, Mr. Neufeld would have discovered that the agreement could be terminated by either side, with the provision of reasonable notice – a fact that Mr. Neufeld conceded in cross-examination "might give [a purchaser] pause".

[213] Mr. Neufeld further conceded that the fact that non-Aboriginal leaseholders in Musqueam Park were ineligible to run for municipal office (and would thus have no say in how the development was governed), was another matter that might give a purchaser "pause". Mr. Neufeld also did not give any consideration to the fact that the lease for the Shaughnessy golf course would be coming to the end of its term in 18 years, and that it was at least possible that the Musqueam would not renew the lease, but would use the golf course land for another purpose, thereby jeopardizing the views of some of the leaseholders.

[214] These concessions undermine Mr. Neufeld's claim that there was no longer any uncertainty that would inform the views of a hypothetical purchaser in June of 2015, who was choosing between buying a home on the west side of Vancouver, or a similar home in a hypothetical fee simple market on the Musqueam Reserve.

[215] The one thing that Mr. Neufeld did add to Mr. Reynolds' summary of the situation at Musqueam Park as of the valuation date was his reference to crime statistics produced by the Vancouver Police Department. Mr. Neufeld testified that "this is one of the metrics that [he] looked at to determine whether or not there would be continuing concern about First Nations unrest as it relates to Musqueam". These statistics indicate that, in 2015, the "Musqueam" neighbourhood had the lowest incidence of certain types of crime of any neighbourhood in the city. Although he admitted that he was not an expert in crime analysis, Mr. Neufeld agreed in

cross-examination that he cited these statistics to "help bolster" his conclusion that "it would be difficult to justify or rationalize any grounds for [an "on-reserve"] discount …".

[216] It became readily apparent from Mr. Neufeld's cross-examination, however, that the crime statistics that he cited have little probative value. First of all, the 2015 statistics would not have been available to a purchaser as of the valuation date, and the comparable statistics for 2013 and 2014 tell a somewhat different tale than the 2015 statistics.

[217] More importantly, there is no correlation in the 2015 statistical report between the number of crimes and the size of population in the neighbourhood in question. The "central business district" is listed as one neighbourhood, while "Musqueam" is listed as another. Not surprisingly, the level of crime in downtown Vancouver is much higher than the level of crime in "Musqueam", but we cannot know whether this is true on a *per capita* basis, without knowing the population of each area of the city.

[218] Mr. Neufeld appears to have understood that Justice Rothstein had provided an exhaustive list of the "Indian Reserve Features" to be considered in determining whether there should be an on-reserve discount. He then relied almost exclusively on his (and Mr. Reynolds') subjective assessment of whether any of those factors still existed in 2015.

[219] It should first be recalled that Justice Rothstein did not simply apply a subjective or qualitative assessment in determining whether properties in Musqueam Park should be subject to an on-reserve discount. He had market evidence before him demonstrating that Musqueam Park properties were worth only 50% of the value of comparable properties off-reserve. He then

identified his "Indian Reserve Features" as being considerations that might negatively affect the value of the Musqueam Park lands: *Glass* FC at paras. 40 and 43.

[220] I also do not understand Justice Rothstein to have suggested that the "on-reserve" factors that he considered in the 1995 rent review were cast in stone as the only "Indian Reserve Features" that could ever be considered in subsequent rent reviews. Rather, he simply identified certain considerations that could give rise to market uncertainty. That said, apart from the potential non-renewal of the Shaughnessy golf course lease, the plaintiffs have not identified any additional considerations that they say should have been taken into account in determining the extent to which an "on-reserve" discount was still appropriate.

[221] Mr. Neufeld also failed to follow the teachings of the Supreme Court in *Glass* SCC that, in order to determine the value of a hypothetical fee simple interest on a reserve, regard must be had to market conditions. I agree with the plaintiffs that a valuation analysis that reflects only the market value of off-reserve lands and then adjusts subjectively for a discount (or the absence of a discount) without evidence of market value to support that adjustment does not accord with the approach established in *Glass* SCC.

[222] In contrast to Mr. Neufeld's approach, Mr. Dybvig used market data largely drawn from Mr. Neufeld's own Salish comparables (applying Mr. Neufeld's 25% leasehold to fee simple adjustment) to test Mr. Neufeld's conclusion that there was no longer any reason for an "on-reserve" discount.

[223] That is, Mr. Dybvig took Mr. Neufeld's seven Salish Park comparables and grossed them up by Mr. Neufeld's 1.25 leasehold to freehold adjustment factor. This gave him adjusted sale

prices for the properties, valued as if they were held in fee simple but were located on the Musqueam Reserve. Mr. Dybvig then looked at 17 recent sales in the Dunbar area, which is immediately adjacent to the Musqueam Reserve, on the other side of Marine Drive. He compared sales of similar size lots and homes on a "matched pair" basis with the seven "fee simple" on-reserve comparables relied upon by Mr. Neufeld.

[224] This analysis demonstrated that the Salish Park properties (adjusted to their "fee simple" values) traded at an average price that was just 58% of the average price achieved by the sale of comparable properties located off of the Musqueam reserve, with a median comparison of 53%. If Mr. Dybvig had applied his own 1:15 leasehold to freehold adjustment factor instead of Mr. Neufeld's 1.25 leasehold to freehold adjustment factor, the difference in value would have been just that much greater.

[225] The plaintiffs did not advance this analysis as a basis for arriving at the value of the Musqueam Park properties, as their position on this issue is that contained in Mr. Dybvig's Initiating Report. This analysis did, however, provide corroborating evidence that these two markets, namely the west side of Vancouver and the Musqueam Reserve are simply not the same.

[226] Had Mr. Neufeld used market data to test the accuracy of his hypothesis that there was no longer any justification for an "on-reserve" discount, he would have seen that the west side of Vancouver and Musqueam Park were indeed two very different markets. Mr. Neufeld admitted that the question of whether such a difference in markets could exist between properties on the Musqueam Reserve and those on the west side of Vancouver was something "that obviously

must be explored in this matter". However, for reasons known only to Mr. Neufeld, he chose not to examine this question.

[227] Further evidence of the different dynamics at play in the two markets is found in the demonstrable presence of economic obsolescence on the west side of Vancouver, manifesting itself in the frequency of homes being bought as "tear downs". This phenomenon had not been observed with respect to the homes located on the Musqueam Reserve.

[228] All of this leads to the inescapable inference that Mr. Neufeld adopted the MIB's position that no adjustment should be made for "on-reserve factors", and then looked for information that he believed would bolster or support the Band's position. This further undermines the probative value of his evidence, and further supports my conclusion that the evidence of Mr. Dybvig is to be preferred to that of Mr. Neufeld.

(4) Methodology

[229] This takes me to the valuation methodology employed by each of the experts. Each side was highly critical of the methodology employed by the opposing appraisal expert to arrive at the current market value of the Musqueam Park properties. While I have carefully considered each of these criticisms, it is only necessary to address some of them in my analysis.

(a) *Mr. Dybvig's Use of the Land Extraction Method*

[230] It will be recalled that Mr. Dybvig used the land extraction method in arriving at the current market value for the Musqueam Park properties. He explained this choice, noting that, in his view, the "on-reserve" location of Musqueam Park was the most fundamental factor in the valuation exercise that he was asked to carry out. It is difficult to control for an "on-reserve"

factor accurately, and, as Mr. Dybvig stated, the land extraction method was "far and away the best method […] because I control for the reserve factor".

[231] Mr. Neufeld and the MIB were both very critical of Mr. Dybvig for using the land extraction method (rather than the direct comparison approach), in valuing the Musqueam Park properties. By failing to take the principles established by the Supreme Court in *Glass* into account, and by failing to follow what they call the "*Glass* Approach" (even as a backup valuation method), the MIB argues that Mr. Dybvig fundamentally misidentified the appraisal problem in this case. This led to him ignoring essential information regarding sales on the west side of Vancouver, which in turn led him to arrive at unreliable and misleading values for the Musqueam Park properties.

[232] In support of this criticism, Mr. Neufeld cites the third edition of *The Appraisal of Real Estate* text edited by Mr. Dybvig in his report critiquing Mr. Dybvig's appraisal. Mr. Neufeld quotes the text as stating that the "[D]irect comparison is the most commonly used and preferred method of valuing land." Mr. Neufeld says that Mr. Dybvig should, therefore, have had regard to the prices that were being commanded for homes on the neighbouring west side of Vancouver in his analysis.

[233] Mr. Neufeld notes that by using the direct comparison approach to arrive at the fee simple land value of the Musqueam Park properties in his own analysis, only one additional adjustment then had to be made, to adjust for on-reserve versus off-reserve locations, whereas Mr. Dybvig's use of the land extraction method required that two adjustments be made.

[234] First, Mr. Dybvig had to deduct the depreciated value of the homes in Salish Park from the sale price of the properties in order to arrive at the value of the underlying land. He then had to apply a leasehold to freehold adjustment to arrive at the fee simple values of the Musqueam Park properties. According to Mr. Neufeld, adjusting from leasehold to freehold values "is a complicated process", and that, at the very least, Mr. Dybvig should have applied the direct comparison approach using sales of properties on the west side of Vancouver as a "check on value".

[235] Mr. Neufeld asserts that the direct comparison approach that he used is a far simpler and more direct approach to value than the approach used by Mr. Dybvig. According to Mr. Neufeld, the more complex the valuation analysis, the more likely it is to be misleading.

[236] There are, however, a number of difficulties with Mr. Neufeld's position.

[237] Insofar as both Mr. Neufeld and the MIB were critical of Mr. Dybvig's use of the land extraction method as being rife with uncertainty and complexity, it bears remembering that Mr. Neufeld himself used the land extraction method as part of his own "check on value".

[238] Mr. Neufeld's reliance on the quote from *The Appraisal of Real Estate* text is also misplaced. It is true that the text states that "[d]irect comparison is the most commonly used and preferred method of valuing land". Although Mr. Neufeld puts a period after the phrase "preferred method of valuing land", that is not in fact the end of the sentence. What the full sentence says is that "[d]irect comparison is the most commonly used and preferred method of valuing land *when comparable sales are available*" [my emphasis].

[239] As Mr. Dybvig noted, one of the difficulties in valuing the Musqueam Park lands as if they were held in fee simple is the hypothetical nature of a fee simple interest in reserve lands. Appraisers are attempting to value something that does not, and cannot exist. There are no sales of fee simple, on-reserve lands that can be used for comparison purposes. Indeed, Justice Gonthier noted that the direct comparison approach to land appraisal is not available in this situation: *Glass* SCC at para. 50.

[240] Justice Rothstein came to a similar conclusion in *Glass* FC, noting that while the direct comparison approach "is to be preferred", it could not be used in this case, "unless fee simple values could be used to value Musqueam Park lots or unless there was vacant land in comparable Indian reserve property such as Salish Park". He went on to state that he had found that "it would be inappropriate to consider off-reserve fee simple values as Musqueam Park land values and there is no vacant land in Salish Park. Therefore it is necessary to resort to the land residual method": all quotes from *Glass* FC at para. 80.

[241] Although the MIB made repeated reference to "the *Glass* approach" in its written and oral submissions, the parties agree that the Supreme Court did not dictate that a particular approach to valuation had to be used in valuing the Musqueam Park properties. What is important, however, is that whatever valuation methodology is used, that it be based on market evidence: *Glass* SCC at para. 46.

[242] Justice Gonthier did observe that one way to approximate the fee simple value of reserve lands would be to adapt an off-reserve value "to take into account the actual features of the land and of the market": *Glass* SCC at para. 49. However, as Mr. Dybvig noted, examining sales on properties located on the west side of Vancouver "still doesn't get you where you need to go", as

you still "need the control for the reserve factor". It is, moreover, clear that adjusting land values to take what Justice Rothstein called "Indian reserve features" into account is fraught with difficulty.

[243] Indeed, as was explained earlier, the approach to the issue of "Indian reserve features" and the on-reserve discount that was taken by Mr. Neufeld and the MIB was highly subjective, and was not supported by market data.

[244] A different approach was taken by Mr. Dybvig. By looking at sales of comparable properties that were also on the Musqueam Reserve, and then adjusting those values from prepaid leasehold values to freehold values, Mr. Dybvig was able to arrive at values for both the Salish Park and Musqueam Park properties that did not require that an adjustment be made for "Indian reserve features". Mr. Dybvig's analysis was, moreover, not subjective, and was backed up by market data that reflected the fact that on-reserve features were already built into the values that the market assigned to the Salish Park properties.

[245] In his closing argument, counsel for the MIB was very critical of the fact that Mr. Dybvig's approach to value required the application of a "leasehold to freehold adjustment" in adjusting the value of the Salish Park properties from prepaid leasehold to freehold values. The MIB acknowledged that Justice Rothstein had accepted evidence from the Leaseholders' appraiser relating to Salish Park prepaid leasehold comparables that were adjusted to freehold values in the litigation related to the 1995 rent review. However, counsel for the MIB argued that it was appropriate to do so then, as there was 78 years left to go on the Salish Park leases, which meant that the leasehold value of the properties was equivalent to their fee simple value. He

submitted, however, that using the Salish Park comparables was no longer appropriate given that there were only 58 years left to go on the term of the prepaid leases as of the valuation date.

[246] It was pointed out to counsel that Mr. Dybvig and Mr. Neufeld had both agreed that leasehold to freehold adjustments are standard adjustments that are commonly made by real estate appraisers. Indeed, the two experts were not far apart in their assessment of what the appropriate adjustment should be. Curiously, counsel for the MIB then attempted to disassociate his client from the evidence of its own expert witness, submitting that notwithstanding what Mr. Neufeld may have said with respect to this issue, making a leasehold to freehold adjustment "was impossible" to do in this case. According to counsel, it was done "completely wrong" by Mr. Dybvig. When it was noted that Mr. Neufeld had also purported to apply a leasehold to freehold adjustment in his analysis, counsel responded by stating "Yeah, and he screwed up. That's the bottom line."

[247] As was previously noted, Mr. Neufeld did indeed err in his calculation of the appropriate leasehold to freehold adjustment to be used in this case. That does not, however, take away from the fact that the experts agreed that adjusting from leasehold to freehold values is a standard appraisal technique, and I prefer the evidence of the experts to the submissions of counsel on this point.

[248] The evidence also does not support the MIB's claim that Mr. Dybvig erred in his application of the land extraction method by calculating and applying his leasehold to freehold adjustment "out of order". Indeed, Mr. Neufeld applied the same three steps in his analysis as did Mr. Dybvig, doing so in the same order.

[249] I also do not accept the MIB's argument that Mr. Dybvig erred in using "comparables" that did not have the same highest and best use as the property being valued in determining the appropriate leasehold to freehold adjustment to be applied to the Salish Park properties.

[250] In looking at strata properties in North Vancouver, Mr. Dybvig was not looking for sales of comparable properties in order to determine the value of the Musqueam Park properties. He was instead looking at the difference in value between similar properties where some properties were held in fee simple and others were subject to long-term leases. By identifying this difference in value, Mr. Dybvig was then able to determine the adjustment factor that had to be applied to the Salish Park properties in order that they could be valued as if they were held in fee simple.

[251] The MIB's argument is, moreover, somewhat puzzling, given that Mr. Neufeld himself looked to strata properties in North Vancouver in calculating his leasehold to freehold adjustment for use in this case.

[252] The degree of care taken by the appraisers and the thoroughness with which each appraiser carried out his assignment is also illustrated by the way that Mr. Dybvig and Mr. Neufeld each determined the depreciated value of the improvements on the Salish Park properties in applying the land extraction method.

[253] As was noted earlier, Mr. Dybvig and Mr. Neufeld both used the land extraction method to value the Musqueam Park properties. It was the only approach to valuation used by Mr. Dybvig, and Mr. Neufeld used it as a "check on value". The land extraction method requires

that the depreciated cost of the improvements be subtracted from the overall value of a property, to get the value of the underlying land.

[254] Justice Rothstein observed in *Glass* FC that estimating the extent of the accrued depreciation of improvements can be difficult, and that using cost tables to estimate the extent of the accrued depreciation of improvements "suffers from the weakness that it is based on assumptions, averages and estimates and is not market based". He was nevertheless satisfied that "it may be used here in deriving an order of magnitude indication of the value of Musqueam Park land": all quotes from *Glass* FC, at para. 81.

[255] It will be recalled that in order to determine the appropriate rate of depreciation for each of the 21 Salish Park properties, Mr. Dybvig looked at the age of each home, its appearance, whether the home was in its original condition or had been renovated, and if so, when. He did this by driving by each home in order to observe its current condition, and by looking at the 20-odd colour photographs that were available for each home on the MLS real estate listing service. These photos, Mr. Dybvig says, provided substantial evidence of the current condition of the home and the nature of the renovations, if any. In some cases, Mr. Dybvig also spoke with realtors involved in the transaction to confirm information about condition of the properties.

[256] In contrast, Mr. Neufeld submitted that it was difficult to estimate the depreciation attributable to each of the seven Salish Park sales that he considered, and that it was virtually impossible to use the extraction method for these sales without inspecting each home in order to determine its condition. Rather than adjusting for the actual value of the improvements, Mr. Neufeld instead used the improvement values assessed by the British Columbia Assessment Authority as a "general proxy" for the depreciated value of the improvements.

[257] Mr. Dybvig (who, it will be recalled, is a member of the British Columbia Assessment Authority's Appeal Board), explained that the Assessment Authority uses mass appraisal algorithms to determine improvement values. It seldom inspects properties, so upgrades and renovations are often not taken into account in assessing the value of improvements. More importantly, improvement values are determined by the Assessment Authority pursuant to the Musqueam Assessment Bylaw, which treats the Musqueam properties as if they were properties held in fee simple, off-reserve. These values are thus inapplicable to the land extraction exercise, which requires the removal of the actual depreciated value of the improvements from the overall value of a property.

[258] The MIB also argues that Mr. Dybvig should have invoked an "Extraordinary Limiting Condition" (ELC), and "explained and justified the necessity for same" in his analysis. In support of this contention, the MIB points to the CUSPAP standards, which provide that the exclusion of a relevant valuation approach constitutes an ELC. The MIB contends that by excluding what it calls the "*Glass* Approach" to value, Mr. Dybvig limited the scope of his work to such an extent that his analysis is not credible, given the purpose of the appraisal assignment and the intended use of the results: namely, to determine a hypothetical fee simple on-reserve value in circumstances that are the same as those in the *Glass* case.

[259] I do not accept this submission.

[260] First of all, the MIB's argument is premised on the Supreme Court having prescribed a specific approach to be used in valuing the Musqueam Park properties. However, the MIB expressly acknowledged that while the Supreme Court identified the nature of the interest in land to be valued in the rent review process, it did not state that a specific approach had to be used in

valuing the Musqueam Park properties. What the Supreme Court did require was that the valuation had to be market-based: *Glass* SCC, at para. 46.

[261] The experts also did not provide evidence supporting the MIB's argument. Mr. Neufeld was never asked whether Mr. Dybvig had erred in failing to include an ELC in his appraisals, and Mr. Dybvig specifically rejected the MIB's suggestion that an ELC was necessary here.

[262] Mr. Dybvig testified that an ELC is required "where there are usual valuation methods that would normally be undertaken that aren't undertaken, that is an extraordinary limiting condition". In this case, Mr. Dybvig considered that the direct comparison approach would "be incapable of producing as reliable analysis as the analysis that [he] did". He notes in his first appraisal report that there are six different methods that can be used to value vacant land. He applied what he considered to be the most appropriate method, and explained why other methods were not appropriate. Consequently, Mr. Dybvig says that his rejection of the direct comparison approach was not an ELC, and did not have to be disclosed.

[263] The valuation exercise that had to be undertaken in order to arrive at the current market value of the Musqueam Park for the purpose of setting the rents for the next 20 years was not a typical valuation exercise. In accordance with the teachings of the Supreme Court in *Glass* SCC, the appraisers were being asked to value something that was a legal impossibility: namely a fee simple interest in lands located on a reserve. Given that there is no such thing as a fee simple interest in reserve lands, it follows that there are no true comparables that could be used in a direct comparison analysis. Adjustments would, moreover, have to be made to whichever comparables were relied on, in an attempt to arrive at the current market value for the

hypothetical fee simple lots. Consequently, a creative approach to value was both necessary and appropriate in this case.

[264] Mr. Dybvig discussed the different approaches that can be taken in valuing vacant land, explaining why he chose to use the land extraction method and why he rejected a direct comparison approach using comparables from the west side of Vancouver. His reasons are transparent and logical, and the MIB has not persuaded me that the persuasive value of Mr. Dybvig's evidence was undermined by his failure to invoke an ELC in his appraisals.

(b) *Mr. Neufeld's Analysis of his Vancouver West Side Comparables*

[265] It will be recalled that because he was asked to value single-family lots held in fee simple without improvements or servicing, Mr. Neufeld looked at sales of vacant land on the west side of Vancouver to determine a per square foot value for unimproved lots located off-reserve. This, he says, gave him an appropriate indication of fee simple values in what he calls the "normalized market", that is the off-reserve market, which value would then potentially have to be adjusted to take into account the fact that the properties being valued were on a reserve.

[266] Mr. Neufeld acknowledged that a "very significant proportion" of residential sales on the west side of Vancouver are effectively lot sales, with homes being marketed as "tear-downs". This is evidenced by advertisements that include phrases such as "build your dream home here" or "builder's dream!". Mr. Neufeld agreed that in such cases, no adjustment would have to be made for the value of any buildings on the property. He stated that it is not always clear, however, whether a home is bought to be torn down, or whether it would be lived in after the sale closed. In this latter situation, an adjustment would have to be made to the sale price to

reflect the value of improvements on the property in question in order to arrive at the value of the underlying land.

[267] Given that his initial report was only delivered in March of 2016 – nearly a year after the valuation date, it would presumably have been open to Mr. Neufeld to drive by homes that were marketed as "tear-downs" to see if they had in fact been torn down, or were still being lived in. Mr. Neufeld did not explain why this option would not have been open to him. Indeed, with one exception, Mr. Neufeld did not drive by any of the properties that he used as comparable sales before preparing his report.

[268] Mr. Neufeld also stated that it is difficult to adjust for the depreciated value of buildings on comparable lots, and that he was able to avoid doing so by limiting his analysis to properties that were being marketed as vacant land. Even if I were to accept that Mr. Neufeld's rationale for looking only at lot sales makes some sense, the way in which he carried out his analysis raises a number of concerns.

[269] First of all, three of the properties included in Mr. Neufeld's list of 10 comparables did in fact have homes on them. He never provided a satisfactory explanation as to why he felt it appropriate to include these properties in his analysis, notwithstanding his claim that it would be too difficult to consider properties with homes on them in arriving at the current market value of the Musqueam Park properties.

[270] Moreover, Mr. Neufeld's 10 sales of purportedly vacant land took place between January of 2014 and April of 2016 – that is, after the valuation date. Mr. Dybvig testified that it is "poor practice" to rely on sales that take place after a valuation date as they did not inform the

marketplace as of the valuation date. While reliance on post-valuation date data may be necessary in some cases, it is clear from the evidence of Mr. Dybvig that, in this case, there was ample data available regarding what were effectively lot sales on the west side of Vancouver in the period prior to the valuation date.

[271] Equally troubling is Mr. Neufeld's failure to conduct any form of market analysis to justify his adjustments for time. For example, he noted that four of his 10 west side comparables involved sales taking place in the first half of 2014, and that "there would be a significant upward adjustment for the time factor as prices have been escalating significantly". He further noted that other sales took place after the valuation date, and would thus require a downward adjustment to the sale prices to reflect this fact. However, Mr. Neufeld provided no market analysis, such as a paired sales analysis, to document the size of the necessary adjustment, nor did he refer to other indicators of the state of the market such as the Home Price Index.

[272] Mr. Neufeld's 10 transactions also involved lots varying in size from 4,125 square feet to 39,204 square feet – a far cry from his 12,000 square foot Benchmark Lot. Mr. Neufeld conceded that nowhere in either his appraisal report or in his file was there any documentation to indicate the size of either upward or downward adjustments that he may have made to account for the wide variation in lot size in his 10 comparables.

[273] There were other differences between Mr. Neufeld's comparables and the Musqueam Park properties that do not appear to have been taken into account in his analysis. For example, one of Mr. Neufeld's comparables fronted on the Fraser River, and two of his comparables were on a main commercial arterial street, situated next to a number of commercial and retail

amenities. No adjustment was made to the value of these properties, however, to take these differences into account.

[274] Two adjoining properties on West 50th Avenue were each just under 40,000 square feet in size, yet no adjustment was made to reflect the large size of the lots, notwithstanding Mr. Neufeld's assertion that larger lots tend to command a lower per square foot price than smaller lots.

[275] Mr. Neufeld's West 50th Avenue properties also had subdivision potential, allowing for the construction of eight private estate homes on the site. They thus had a different highest and best use than did the Musqueam Park properties, and I agree with Mr. Dybvig that the difference in highest and best use for these properties disqualified these properties from being considered as comparables. I further accept Mr. Dybvig's statement that "no reasonable appraiser would use [them]", and that their use "borders on the absurd". Indeed, as counsel for the MIB pointed out in his cross-examination of Mr. Dybvig, the CUSPAP standards provide that, wherever possible, comparables should have the same highest and best use as the property being valued.

[276] Only two of Mr. Neufeld's 10 comparables were close to his Benchmark Lot size of 12,000 square feet, and several "comparables" bore no physical relationship to the Musqueam Park lots being valued in this case. One of Mr. Neufeld's lots was only 4,298 square feet in size, but no adjustment for size was made notwithstanding his assertion that smaller parcels of land tend to command a higher per square foot price than larger properties, and that an adjustment is required to take this into account. Moreover, no adjustments were made to the value of the four of Mr. Neufeld's 10 comparables that were corner lots, notwithstanding his claim that corner locations command a premium over interior properties.

[277] Two of Mr. Neufeld's properties were located in a commercial area on Arbutus Street. The zoning for these properties permitted the construction of duplexes, meaning that the Arbutus Street properties also had a different highest and best use than the Musqueam Park properties. However, Mr. Neufeld acknowledged in cross-examination that he made no adjustment to the value of these properties to take their development potential into account.

[278] The disparate nature of Mr. Neufeld's "comparables" is further reflected by the fact that these properties commanded a per square foot price that ranged from approximately $108 per square foot to $525 per square foot, for a 450% variance in per square foot price amongst the 10 properties. Mr. Neufeld himself had to concede that this was a "pretty dramatic range" for comparables.

[279] Having identified his 10 disparate comparables, Mr. Neufeld then engaged in an analysis that was not described anywhere in his report to arrive at a price per square foot value which, perhaps coincidentally, was virtually identical to the weighted average of his 10 "comparables". The fact that Mr. Neufeld's undocumented analysis arrived at the same value to a weighted average analysis is especially surprising in light of the 450% disparity in the price per square foot between his 10 comparables before any adjustments were undertaken.

[280] Mr. Neufeld also failed to consider a number of adjustments that would have been required to complete any meaningful analysis or reconciliation of these 10 comparables. Indeed, as I have already noted, Mr. Neufeld did not even make the adjustments that he had claimed were necessary to account for things such as corner locations and views – the adjustments that he purported to make in considering the value of the Musqueam Park lots.

[281] The search parameters that Mr. Neufeld used to locate sales of vacant land on the west side of Vancouver also did not capture properties that were clearly being marketed for their land value such as properties being described as a "builder's dream!" or properties where prospective purchasers were invited to "build [their] dream home here!" His search did, however turn up a property located on Wiltshire Street, which did not include a photograph of the home that was located on the site in the MLS listing for the property. This is evidently why Mr. Neufeld used it in his analysis.

[282] Mr. Neufeld drove by the Wiltshire Street property prior to completing his report. He observed that there was what he described as a "high-quality" and "quite a handsome home" on the lot in which the purchasers were continuing to reside long after the purchase had closed. Mr. Neufeld stated that that he had made a "qualitative" adjustment to reflect the fact that the Wiltshire Street property was located at a "prestigious address" and had a high-quality home on it that was still occupied. He provided no information, however, as to the size or nature of the adjustment that he made.

[283] As was noted earlier, Mr. Neufeld never provided a really satisfactory justification for including the Wiltshire Street property in his analysis of lot sales. He clearly stated that he was confining his analysis to sales of vacant land, and that he would not consider the numerous sales of homes on the west side of Vancouver that were marketed as "teardowns" because of the "complexity" associated with the inclusion of such properties. He could not explain, however, why he did not exclude the Wiltshire Street property from his analysis once he became aware that the property had a handsome, high-quality home on it that was still occupied well after the sale had closed. It also bears noting that the inclusion of the Wiltshire Street property in

Mr. Neufeld's analysis of his 10 lot sales had a significant impact on his analysis, increasing the weighted per square foot average value from $176 per square foot to $201 per square foot.

[284] Mr. Neufeld's list of 10 sales of vacant land included a property on Balaclava Street that also had a home on it. The BC Assessment Authority valued this home as being worth close to $250,000, which was three times the $77,200 assessed value of the "high-quality" home located on the Wiltshire Street property. Mr. Neufeld did not do a drive-by inspection of this home, yet he felt it appropriate to consider this property as if it were vacant land. Also included in Mr. Neufeld's comparables was the sale of a property on West King Edward Avenue that also appears to have also had a home on it, although Mr. Neufeld never drove by the site, and no information was thus provided for this property other than its assessed value.

[285] Mr. Neufeld asserted in his reply report that his "qualitative adjustments were clearly laid out and discussed within my report". However, he identified only three adjustments in his analysis (size, time and the fact that there was a house on the Wiltshire property). Mr. Neufeld provided no backup or discussion as to what he did to make those adjustments, nor was any such analysis to be found in his file. This makes it difficult to assess the reliability or completeness of Mr. Neufeld's analysis, or to give it any credence.

[286] The plaintiffs argue that Mr. Neufeld's choice of his 10 highly disparate "comparables", coupled with the absence of any meaningful analysis as to adjustments that had to be made to the value of the properties cannot simply be explained through carelessness or incompetence on his part.

[287] Once again, whether it was the result of carelessness or incompetence, or a desire on Mr. Neufeld's part to assist his client, the end result is the same: Mr. Neufeld's selection and analysis of his 10 west side comparables is so flawed as to result in it having little, if any, evidentiary value.

(c) *Mr. Neufeld's Size Adjustment for the Musqueam Park Properties*

[288] I have already noted the lack of care demonstrated by Mr. Neufeld in adjusting the Musqueam Park lots for size. That is, he failed to follow his own methodology in adjusting properties that were less than 10,000 square feet in size upward to take into account the fact that smaller lots tend to command a higher per square foot price. Nor did he adjust lots over 12,000 square feet downward in a consistent fashion.

[289] There is, however, a further problem with Mr. Neufeld's adjustments for size. As Mr. Dybvig pointed out, applying size adjustments in the manner described by Mr. Neufeld can lead to absurd results.

[290] By way of example, Lot 49 is an inside lot on Salish Drive that is 11,024 square feet in size. Mr. Neufeld assigned a value of $200 per square foot to this property, giving it a total land value of $2,204,800. A lot on Tamath Crescent (Lot 19) is 10,770 square feet in size - that is, it is 254 square feet smaller than the Salish Drive property. However, Mr. Neufeld assigned a 20% premium to this property, valuing it at $240 per square foot. This resulted in a total land value of $2,584,800 for the Tamath Crescent property.

[291] In other words, Mr. Neufeld's methodology led to a smaller lot being worth more than $300,000 more than a larger, but otherwise similar lot. As Mr. Dybvig observed "[t]his size

adjustment is contrary to market behavior and is incorrect. Market participants will not pay less for a larger lot than for a smaller lot, all else being equal". Mr. Dybvig further noted that adjustments for size "generally occur on a sliding scale", without the "severe cut-off" that was ostensibly applied by Mr. Neufeld.

(d) *Mr. Neufeld's Estimate of the Depreciated Value of the Salish Park Homes*

[292] As was noted earlier, Mr. Neufeld used the land extraction method as a back-up "check on value". This required him to arrive at a depreciated value for each of the Salish Park houses. Because it would be "difficult" to estimate this depreciated value, Mr. Neufeld used the BC Assessment Authority's assessed values as a "general proxy" for the depreciated value of the improvements on the Salish Park lots.

[293] Mr. Neufeld did not, however, carry out any kind of market analysis to confirm the reasonableness of those estimates. This is troubling in light of the Supreme Court's admonition in *Glass* SCC that any valuation of the Musqueam Park properties for rent review purposes must be market-based.

[294] The problems created by Mr. Neufeld's use of the BC Assessment Authority's values are illustrated by reference to properties located on Staulo Crescent in Salish Park. The advertisement for one such home noted that it was approximately 5,200 square feet in size, and that it had recently undergone some $400,000 in renovations. Although the home subsequently sold for $1,580,000, the home was valued at $199,000 by the BC Assessment Authority, and that was the value that was ascribed to it by Mr. Neufeld. A second home on Staulo Crescent had also undergone some $400,000 in renovations, and that home subsequently sold for $1,520,000. This

second home was valued at $146,000 by the BC Assessment Authority, and that was the value that was ascribed to it by Mr. Neufeld.

[295] The results of Mr. Neufeld's approach are simply absurd. No one would put $400,000 of renovations into a house that would only be worth $150,000 or $200,000 after renovation. Mr. Dybvig's approach to depreciation, which required detailed consideration of the actual condition of individual homes is thus to be preferred.

(e) *Mr. Neufeld's Calculation of the Leasehold to Freehold Adjustment*

[296] It will be recalled that in his land extraction analysis, Mr. Neufeld looked to Salish Park comparables, and then adjusted the value of a 58-year prepaid leasehold interest to value a fee simple interest in the same land. Mr. Neufeld further stated in his report that in arriving at his leasehold to freehold adjustment factor, "we have reviewed a number of leasehold transactions and related them to otherwise comparable fee simple transactions to ascertain a pattern of discounts over various leasehold terms". Mr. Neufeld did not, however, include the data relied upon in his analysis in his report, although he stated that it was available in his file.

[297] When counsel for the plaintiffs asked to see Mr. Neufeld's back-up data, it became clear that the data that he relied upon for his 1.25% gross-up actually came from a report that had been prepared for another purpose in 2012, by someone else in Mr. Neufeld's office. Because this report had been prepared for another purpose, it included comparisons between industrial properties (that clearly would have no application to this case), as well as older studies that did not form part of Mr. Neufeld's file.

[298] The way in which Mr. Neufeld approached the issue of the leasehold to freehold adjustment stands in stark contrast to the careful, market-based analysis that was carried out by Mr. Dybvig in determining the appropriate leasehold to freehold adjustment to be applied in this case. Mr. Dybvig's choice of leasehold to freehold adjustment factor is thus to be preferred.

(f) *The Discrimination Issue*

[299] In its closing argument, the MIB submitted that systemic racism against Canada's Aboriginal people is a pernicious reality, and that many Canadians hold discriminatory attitudes "linking Aboriginal groups to social images, including alcohol addiction, crime, unemployment, welfare and undesirability as neighbours". The MIB notes that these beliefs "are reinforced by the historical association of involuntary racial segregation with concentrated poverty", and that "the establishment of 'Indian reserves' and inadequate investment in those reserves serve as examples of structural racism whereby socio-economic inequities and conditions of disadvantage are created and perpetuated".

[300] The MIB contends that the approach used by Mr. Dybvig in valuing the Musqueam Park lands was "pernicious", in that it sought to financially account for factors that may be discriminatory, without addressing those reasons overtly. Having reached his conclusion that the Musqueam's lands were worth significantly less than neighbouring lands that were not on the Musqueam Reserve, the MIB submits that it was incumbent on Mr. Dybvig to inquire as to *why* there was such a substantial difference in value, something that he failed to do. Indeed, Mr. Dybvig testified that he did not know why people pay the prices that they pay for properties. He just knows that they pay them.

[301] The MIB points out that Mr. Dybvig acknowledged in cross-examination that there are appraisal techniques that can be used to take detrimental conditions into account. There are a myriad of possible property impairment issues that can constitute detrimental conditions, from illegal activity, nuisance and blight, to the stigma associated with haunted houses. The MIB suggests that factors such as "neighborhood racial stigma" and the "false perception of disorder" should have been taken into account in the appraisal of the Musqueam Park lands. The MIB contends that if Mr. Dybvig believed the "on-reserve" discount was attributable to negative views of Aboriginal people, he could, and should, have applied the detrimental conditions model to account for the impact of prejudicial attitudes on the part of potential purchasers.

[302] In *Glass* FC, the MIB argued that "treating the land in Musqueam Park by having regard to its Indian reserve status is discriminatory and contrary to section 15 of the *Canadian Charter of Rights and Freedoms*": at para. 41. Justice Rothstein rejected that argument, finding that "factors affecting land value on the Musqueam Reserve do not constitute the imposition of artificial or discriminatory considerations by this Court". Rather, he said that "the marketplace values leased Indian reserve land at less than fee simple land and have provided substantive reasons, which happen to be linked to the nature of that land, as to why this occurs": para. 56.

[303] In *Glass* SCC, Justice Gonthier observed that Justice Rothstein had found that "land on the Musqueam Reserve has a lower value than neighbouring fee simple land not because of discriminatory considerations in the courts but because of the market". He further stressed that "the difference between the value of Musqueam land and neighbouring fee simple land off the reserve is attributable to the "Indian reserve feature[s]" … of the land": both quotes from *Glass* SCC at para. 28.

[304] With respect, it may not be a complete answer to an allegation of racially-based discrimination to say that the reason that Musqueam lands are worth less than neighbouring lands that are not on the reserve is “the market”, as market forces may reflect discriminatory attitudes on the part of potential purchasers who may be reluctant to purchase a home on a reserve.

[305] That said, there are two reasons why I cannot accept the MIB’s argument in this case. The first is that apart from one question put to Mr. Dybvig at the conclusion of his cross-examination (which was not answered following an objection by counsel for the plaintiffs), the first time that the issue of discrimination raised its head in this case was in the written argument that the MIB filed after all the evidence was in.

[306] Counsel for the MIB acknowledged that his client became aware that Mr. Dybvig’s valuation approach factored in what they say are discriminatory considerations when they received his initial appraisal report in late 2015. No real explanation was provided, however, as to why Mr. Neufeld could not have addressed the discrimination issue in the report that he prepared in response to Mr. Dybvig’s initial report, had the MIB felt it important to have evidence on this issue. At the same time, counsel for the MIB stated that the fact that “we caught it late” should not take away from the fact that discrimination exists.

[307] However, the plaintiffs were given no notice of the MIB’s intention to advance a discrimination argument until shortly before the final argument in this case. They thus had no opportunity to adduce evidence on this question, and it would be fundamentally unfair to the plaintiffs to consider discrimination as a factor affecting value in these circumstances.

[308] The second reason for not accepting the MIB's discrimination argument is that there is no evidence in the record before me to demonstrate whether, or to what extent, discriminatory attitudes may play a role in the value that the market attributes to Musqueam lands. Mr. Dybvig did not address this issue in his evidence, and the evidence led by the MIB was in fact to the contrary effect.

[309] As was noted earlier, Mr. Neufeld testified that there was very little difference in value between properties located on and off the Musqueam Reserve. He did not find any market or socioeconomic factors that, in his view, would lead a potential purchaser of a fee simple single-family residential lot to pay less for a lot on the Musqueam Reserve than they would pay for a similar lot in nearby neighborhoods that were not on the Reserve. Indeed, Mr. Neufeld stated that market evidence demonstrates that there is "*no hesitation*" on the part of homebuyers in purchasing residences on First Nations land. It was on this basis that Mr. Neufeld stated that there was no justification for applying an "on-reserve" discount in this case.

[310] Citing the Supreme Court's decision in *R. v S. (R.D.)*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193, the MIB urges me to take judicial notice of the discrimination faced by Canada's aboriginal people. Chief Justice McLachlin stated in that case that "[t]he reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the Charter's equality provisions. These are matters of which judicial notice may be taken": at para. 46.

[311] The MIB also notes that in *R. v. Williams*, [1998] 1 S.C.R. 1128, 159 D.L.R. (4th) 493, the Supreme Court accepted that "there is widespread bias against Aboriginal people" and that "[r]acism against aboriginals includes stereotypes that relate to credibility, worthiness and

criminal propensity". Quoting from a report prepared by the Canadian Bar Association, the Supreme Court further noted that these stereotypes reflect "a view of native people as uncivilized and without a coherent social or moral order" which "prevents us from seeing native people as equal": all quotes from para. 58.

[312] I accept that there is widespread bias against Canada's Aboriginal peoples. I further accept that it is indeed possible that discriminatory attitudes may contribute to a reluctance on the part of some people to purchase a home located on a reserve, and that this may, in turn, contribute to a diminution in the value of the homes in Musqueam Park. It may well be that in future rent reviews, there may be social science evidence to this effect, and legal arguments may then be advanced as to the implication that such evidence should have for the valuation exercise involved in setting rents for the Musqueam Park properties.

[313] However, in the absence of any evidence on this point in this proceeding, it is impossible to determine whether, or to what extent, discriminatory attitudes may play a role here. Moreover, as was noted above, it would be fundamentally unfair to the plaintiffs to consider discrimination as a factor affecting value, when they were given no notice of the argument, nor any opportunity to address it with evidence.

[314] The MIB further submits that the rent review process cannot involve an approach that would devalue Musqueam lands because of the simple fact that they are located on reserve or because of discriminatory factors, as this would be contrary to Canada's fiduciary duty, and the Honour of the Crown. I do not need to address this argument, given that the MIB has not demonstrated that the value of the Musqueam Park lands has in fact been devalued simply because they are located on a reserve, or because of discriminatory factors.

VII. The Cost of Servicing the Musqueam Park Lands

[315] The rent review provisions of the Leases provide that in negotiating new annual rents, the parties are to assume that the Musqueam Park lands are in a subdivided area that is zoned for single-family residential use. The parties are further to assume that at the time of such negotiations, the lands are "unimproved lands in the same state as they were on the date of this agreement".

[316] The Supreme Court unanimously found that the phrase "unimproved lands" meant "unserviced lands", not just lands without buildings: *Glass* SCC at para. 55. See also paras. 1, 20 and 59. Justice Gonthier further held that the cost of providing all servicing to what was bare scrub land and forest must be deducted from the market value of a hypothetical fee simple interest in a serviced lot on-reserve: *Glass* SCC at paras. 54-56.

[317] As a consequence, the parties are required to deduct the cost of servicing the Musqueam Park properties from the fee simple value of the lots, in order to arrive at the "current market value" of the lands for the purpose of the rent review exercise.

[318] Before addressing the nature and extent of the services to be deducted from the fee simple value of the Musqueam Park lots, however, it is first necessary to address the fact that Mr. Neufeld was prepared to give evidence as to the cost of servicing the properties in issue.

A. *The Inferences to be Drawn from the Fact that Mr. Neufeld Provided Evidence on the Costing Issue*

[319] As was mentioned earlier, the plaintiffs called Nancy Hill to testify as to the cost of the infrastructure necessary to service the Musqueam Park lands. Ms. Hill is a civil engineer

specializing in municipal infrastructure. Her qualifications were not challenged by the MIB, and she was qualified as an expert in civil engineering and the costing of municipal infrastructure.

[320] Mr. Neufeld also provided evidence on the servicing cost issue, although, as was discussed earlier in these reasons, the MIB withdrew his evidence on the cost of servicing issue prior to the commencement of the trial. Given that the MIB has withdrawn Mr. Neufeld's evidence to the extent that it dealt with the cost of serving the Musqueam Park lands, no reliance will be placed on his evidence regarding this question. That said, three comments must be made with respect to Mr. Neufeld's evidence on this issue, and the implications that it has for my assessment of the reliability of his evidence.

[321] My first comment is that it is troubling that Mr. Neufeld was prepared to offer what purported to be expert evidence in an area in which he clearly had no particular expertise. Mr. Neufeld is a real estate appraiser and not a civil engineer, and there is nothing in his *curriculum vitae* that would suggest that he had any expertise in the costing of municipal infrastructure. The fact that he was prepared to offer an opinion in a field that was clearly outside his area of expertise further calls into question his neutrality as an expert witness, and undermines the reliability of the evidence that he has provided that was within his field of expertise.

[322] My second concern is that Mr. Neufeld did almost nothing to inform himself as to the MIB's practices and policies regarding its community plan or the policies that it had formulated to protect its aquatic habitat. Nor did he look at the rezoning application that had been submitted by the MIB in relation to the development of another block of Musqueam land known as Block F, which was located on the University Endowment Lands. The result of this was that

Mr. Neufeld offered opinions relating to the servicing issue that were not only at odds with the expert opinion of Ms. Hill, but were also directly opposed to the views of his own client.

[323] My final concern relates to Mr. Neufeld's insistence that although he may have approached the issue somewhat differently than did Ms. Hill, his estimate of the cost of servicing the Musqueam Park properties was essentially the same as hers. Indeed, in his June 2016 reply report, Mr. Neufeld mentions on several occasions that he and Ms. Hill had arrived at roughly identical subdivision and servicing costs, with their estimates differing by just 2.5%.

[324] It is true that Ms. Hill estimated the cost of servicing the Musqueam Park lands as being $18,815,722 and Mr. Neufeld's estimate was $18,355,137. These were was not, however, "apples to apples" estimates.

[325] For example, unlike Mr. Neufeld's estimate, Ms. Hill's estimate of the cost of servicing the Musqueam Park lands did not include anything for soft costs such as financing costs and a developer's profit. When these two items are removed from Mr. Neufeld's estimate in order to compare apples to apples, Mr. Neufeld's estimate is reduced to $14,581,166 from $18,355,137. Moreover, unlike Ms. Hill, Mr. Neufeld also included the sum of $874,054 in his estimate as a "Musqueam Indian Band Administration Fee", notwithstanding that the fact that no such fee was being charged by the Band as of the valuation date. After subtracting this charge, the difference between Ms. Hill and Mr. Neufeld's estimates of the hard cost of servicing the Musqueam Park lands is between $4 and $5 million – a far cry from the 2.5% differential referred to by Mr. Neufeld.

[326] Ms. Hill's estimate also included amounts for matters such as fencing, traffic control and "mobilization" – that is the cost of transporting heavy equipment and trailers to the site, as well as the cost of hooking up temporary power and internet access. Mr. Neufeld's estimate did not account for any of these items. At the same time, Mr. Neufeld's estimate of the cost of "clearing and grubbing" the property was approximately $8.8 million, which represented more than 60% of his estimate of the 'hard' costs of servicing the property. Ms. Hill, who testified that she had never seen amounts like Mr. Neufeld's for "clearing and grubbing", estimated the cost of clearing and grubbing the property as being just under $1 million.

[327] The fact that the MIB has withdrawn Mr. Neufeld's evidence relating to the cost of servicing issue means that I do not need to choose between his evidence on this question and that of Ms. Hill. However, in light of the fundamental differences in the two estimates of the cost of servicing the Musqueam Park properties, I find that it was simply disingenuous for Mr. Neufeld to insist that his estimate of the cost of servicing the Musqueam Park properties was essentially the same as that of Ms. Hill. I further agree with the plaintiffs that Mr. Neufeld's willingness to argue points that he thinks would advance his client's position (even when they are clearly demonstrated to be without any factual foundation) is troubling, and further undermines the reliability of his evidence regarding matters that were within his area of expertise.

B. *The Legal Issue Regarding Servicing Costs*

[328] Ms. Hill's estimate of $18,815,722 represented the costs that would be incurred to service a new Musqueam Park development to be created on vacant land in June of 2015. Her estimate includes expenditures for things that would be included in a high-quality development created in

2015, but were neither required nor included when the Musqueam Park lands were developed in the 1960s.

[329] Both parties agree that in order to arrive at a value for the Musqueam Park lands in an unimproved and unserviced state, the cost of servicing the property must be deducted from the serviced value of the land. The parties also agree that it is the cost of servicing the land as of June 2015 that must be taken into account for the purpose of the rent review process.

[330] The parties disagree, however, with respect to level of services that must be factored into the cost estimate.

[331] The plaintiffs say that in accordance with the provisions sections 7 and 9 of the Master Agreement, which have been incorporated by reference into the Leases, the Court is required to estimate what it would cost in 2015 to create a high-quality residential development on the vacant Musqueam Park lands that was developed to 2015 standards. These sections provide that in developing Musqueam Park in the 1960's, the services and works were to be constructed in accordance with the applicable standards of the City of Vancouver, and that all necessary approvals and permits had to be secured "in connection with the efficient development of the said lands as a high-class residential subdivision".

[332] The MIB accepts that if a new, high-quality subdivision of 75 single-family lots was built in Musqueam Park in 2015, and if the 2015 requirements of the City of Vancouver were applied, the hard costs of servicing the land would be $18,815,722, in accordance with Ms. Hill's estimate. However, the MIB takes issue with a deduction being made for the cost of services that were not actually provided by the developer when the Musqueam Park property was

developed in the 1960s. They have not, however, adduced clear evidence as to which services were provided when Musqueam Park was originally developed. Nor have I been provided with a description of the services that were in place as of the valuation date.

[333] That said, counsel for the MIB confirmed in final argument that there are only two items relating to the cost of servicing the Musqueam Park lands that remain in dispute: Ms. Hill's inclusion of the amount of $1,438,500 for "rain gardens", and Mr. Dybvig's inclusion of an amount of $2,950,000, representing a payment in lieu of 10% of the area of the Musqueam Park lands being dedicated for use as a park. I do not understand there to be any dispute that rain gardens have never been installed in Musqueam Park, or that none of the land there has ever been dedicated for use as a park.

[334] Rain gardens are a part of current storm water management systems. They allow storm water to infiltrate the soil and plant life, thereby preventing it from entering a sewer or a storm water pipe. According to Ms. Hill, including rain gardens as part of the storm water management system for Musqueam Park would help mitigate the impact of storm water on the creek that passes through the development. Consequently she included the sum of $1,438,500 in her estimate of the cost of servicing Musqueam Park in 2015 to cover the cost of rain gardens.

[335] The second item that is in dispute relates to the need for dedicated park land in Musqueam Park, or for a payment to be made in lieu thereof. According to Ms. Hill, a City of Vancouver bylaw requires that for any current development in excess of 20 acres, a developer must either dedicate up to 10% of the land area to park land, or pay 10% of the value of the land in lieu of the park dedication. It will be recalled that Musqueam Park is slightly over 40 acres in

size. There was no requirement that lands be dedicated for a park, however, when Musqueam Park was developed in the 1960s, nor is there a park there now.

[336] Ms. Hill testified that any "high quality" development taking place in any municipality in 2015 that was consistent with "best practices" would require the dedication of park land or a payment being made in lieu thereof. However, in an attempt to keep it simple, Ms. Hill was instructed to assume that a Musqueam Park development constructed in 2015 would have the same layout as the existing development, meaning that a payment would have to be made in lieu of lands being dedicated for use as a park. Ms. Hill did not include anything in her costing estimate for such a payment, however, leaving it to Mr. Dybvig to determine the value of 10% of the Musqueam Park lands.

[337] Mr. Dybvig estimated the value of 10% of the Musqueam Park land as being $2,950,000 as of the valuation date. Consequently, he deducted that amount from his estimate of the current land value of the Musqueam Park lands to represent a payment being made in lieu of a park being created.

[338] I must thus determine whether a deduction should be made from the serviced value of the Musqueam Park lands for the 2015 cost of developing Musqueam Park to 2015 standards, or whether the deductions for rain gardens and a payment in lieu of a park should be disallowed on the basis that no such expenses were incurred when the Musqueam Park lands were developed in the 1960s or at any point prior to 2015.

[339] None of the Courts involved in the 1996 action addressed this issue. However, comments were made by both Justice Rothstein and Justice Gonthier that provide some guidance in this regard.

[340] Section 2(a) of the Leases provides that for the purposes of the rent review process, the parties are to assume that the lands were "unimproved lands in the same state as they were on the date of this agreement". The issue before Justice Rothstein in *Glass* FC was which "agreement" was being referred to in the Leases. This was important, as the lands were serviced by the time that the Leases were entered into, but were unserviced at the time that the Master Agreement was signed on June 8, 1965.

[341] Justice Rothstein concluded that the agreement that was referred to in the rent review provisions of the Leases was the Master Agreement, with the result that the parties were required to assume that the land was unserviced for rent review purposes: *Glass* FC at para. 96.

[342] In coming to this conclusion, Justice Rothstein noted that, amongst other things, construing the Leases as referring to the Master Agreement "accord[ed] with reality". That is, the Band provided unimproved, unserviced land, and it was the developer who paid for the cost of servicing the property. Justice Rothstein stated that he "[had] difficulty thinking that the parties intended that at rent review, the Band was to receive compensation in respect of servicing and development for which it did not pay and for which it was not responsible": both quotes from *Glass* FC at para. 95.

[343] In other words, because it was the developer that expended the funds to service the Musqueam Park lands, the cost of those services had to be removed from the value of the lands

in order to arrive at the current market value of the land in the same unserviced state that they were in as of the date of the Master Agreement.

[344] Other comments made by Justice Rothstein confirm this understanding. In his conclusion regarding the proper construction of the Leases, Justice Rothstein stated that "all servicing costs must be deducted from the current value of serviced lots in Musqueam Park *in order to return the land to the 'same state as they were on the date of this (Master) agreement*'": *Glass* FC at para. 101 [my emphasis]. See also paras. 102 and 103. Justice Rothstein did not suggest that the cost of servicing the Musqueam Park lands to 1995 standards had to be deducted from the value of the serviced lands to "return the land to the 'same state as they were on the date of this (Master) agreement'". It follows that in order to return the land to the state that it was in on the date of the Master Agreement, it was the 1995 cost of providing the services that had been provided by the developer that had to be deducted from the value of the unimproved but serviced lands.

[345] The Supreme Court of Canada unanimously adopted a similar approach to the issue of servicing costs in *Glass* SCC.

[346] In his introduction to his discussion of the issue of servicing costs, Justice Gonthier noted that the MIB was challenging Justice Rothstein's finding as to which agreement was referred to in the Leases. The MIB was also seeking a determination as to whether the word "unimproved", as it was used in the rent review provisions of the Leases, meant without buildings, or meant without services as well. Justice Gonthier stated that if it was the latter, "some amount must be deducted from the 'current land value' notionally *to return the land to its unserviced condition*": *Glass* SCC at para. 54, [my emphasis].

[347] Justice Gonthier concluded that the phrase "unimproved lands" meant "unserviced lands", and not just lands without buildings: *Glass* SCC at para. 56. In coming to this conclusion, he found that the internal coherence of the rent review provisions of the Leases supported the view that "unimproved" land meant unserviced land. He noted that the Leases were signed before any buildings were constructed on the Musqueam Park lands. As a consequence, "the word 'unimproved' would have added nothing to the phrase 'unimproved lands in the same state as they were on the date of this agreement' unless it referred to *the pre-existing servicing*": *Glass* SCC at para. 54, [my emphasis]. The other judges all concurred with this finding.

[348] It is thus clear that the question to be determined is not what it would cost in 2015 to develop and service the Musqueam Park lands to 2015 standards. The question is what deductions have to be made from the value of the unimproved, but serviced, Musqueam Park lands to return them from their current condition to an unserviced state.

[349] Justice Rothstein found that it would inappropriate to construe the Leases in a way that credited the MIB for servicing and development costs for which it did not pay, and for which it was not responsible: *Glass* FC at para. 95. The corollary to this is that deducting the cost of rain gardens and a payment in lieu of park lands in this case would penalize the MIB for costs that no one has ever incurred.

[350] As a consequence, I find that in determining the "current market value" of the Musqueam Park lands in an unimproved and unserviced state as of June 7, 2015, deductions must be made for the 2015 value of the services and development costs that were provided by the developer when Musqueam Park was developed in the 1960s. It is only by deducting the value of

these services and development costs from the current value of the property that one can notionally "return the land to its unserviced condition".

C. *The Impact of the Cost of Servicing on the Current Market Value of the Musqueam Park Lands*

[351] As noted earlier, Ms. Hill estimated the hard costs of servicing the Musqueam Park lands as being $18,815,722. Her estimate did not, however, include a number of other costs that would be incurred in developing a residential community, including, amongst other things, financing costs, selling costs, and a profit for the developers. Nor did Ms. Hill include an amount representing a payment being made in lieu of a dedicated park.

[352] Consequently, after receiving Ms. Hill's reports with respect to the hard cost of servicing the Musqueam Park lands, Mr. Dybvig prepared a supplementary report in which he undertook an analysis to remove the cost of servicing and other related costs, such as development and financing costs, as well as a developer's profit, from the value of the Musqueam Park lands as of the valuation date.

[353] Rather than reconfigure the layout of Musqueam Park, Mr. Dybvig also calculated the value of a payment being made in lieu of the creation of an actual park. According to Mr. Dybvig, 10% of the Musqueam Park lands were worth $2,950,000 as of the valuation date.

[354] When Ms. Hill's $18,815,722 cost of servicing was subtracted from Mr. Dybvig's estimated value of the serviced Musqueam Park lands, along with the $2,950,000 cash payment in lieu of dedicated park land and the other soft costs of development identified by Mr. Dybvig, he arrived at a value of $26,550,000 for the Musqueam Park lands in an unimproved and unserviced state, or an average value of $354,000 per lot.

[355] I have generally accepted Mr. Dybvig's evidence as to the value of the Musqueam Park lands as of June 7, 2015. I have, however, concluded that in calculating the cost of servicing the Musqueam Park lands in 2015, no deduction should be taken for Ms. Hill's amount of $1,438,500 for rain gardens, nor should a deduction be made in the amount of $2,950,000 in lieu of lands being dedicated for a park. Consequently, I find that the "current market value" of the unimproved and unserviced Musqueam Park land is $26,550,000 + $2,950,000 + $1,438,500, or $30,938,500 as of June 7, 2015.

[356] Before leaving this issue, I would note that the fact that I have come to this conclusion in no way undermines the credibility or reliability of either Ms. Hill or Mr. Dybvig as witnesses. Both witnesses carried out their tasks in accordance with the instructions they were given, whereas my finding as to the appropriateness of the two deductions in issue is based upon my interpretation of the relevant agreements and the jurisprudence – both being legal questions that are outside the expertise of the plaintiffs' two witnesses.

VIII. The Allocation of Value Between Lots

[357] Having arrived at a hypothetical fee simple value of $26,550,000 for the Musqueam Park lands in an unimproved and unserviced state, Mr. Dybvig then applied the 17.459% ratio he obtained by comparing his assessment of the value of his Benchmark Lot to the BC Assessment Authority's assessed value of the same property to the remainder of the plaintiffs' lots. This gave him the current market value of each of these properties.

[358] Mr. Dybvig has provided the Court with a schedule that sets out the value for each of the plaintiff Leaseholders' lots as a hypothetical fee simple, on-reserve lots without improvements and without servicing. Mr. Dybvig has also calculated the "fair rent" for the period from June 8,

2015 to June 7, 2035 for each of the plaintiff Leaseholders' lots. He applied the 6% formula found in the rent review provision of the Leases to his assessment of the "current market value" of each of the plaintiff Leaseholders' lots, as of the valuation date. Mr. Dybvig's schedule setting out the valuation and rent for each of the 69 lots occupied by the plaintiff Leaseholders is attached as Appendix "B" to these reasons.

[359] While I am satisfied that Mr. Dybvig has properly identified the relative value of the Musqueam Park lots, the values set out in Appendix "B" will have to be adjusted to reflect the fact that I have disallowed the $1,438,500 deduction for rain gardens and the $2,950,000 deduction for a park allowance from the overall value of the development.

[360] Mr. Dybvig did not provide evidence with respect to the value of the lots occupied by the Third Party Leaseholders, none of whom participated in this proceeding. The methodology used to arrive at the current market value and fair rent for each of the plaintiffs' lots should also be applied to each of these lots in order to arrive at the current market value and fair rent for the Third Party Leaseholders' lots.

[361] In the event that there is any disagreement between the parties as to the application of Mr. Dybvig's methodology as modified by these reasons, I may be spoken to.

IX. Interest

[362] The plaintiffs have continued to pay the rent set in the 1995 rent review since June 8, 2015. Consequently they will now owe a substantial amount of back rent to the MIB. The question thus arises as to whether the MIB should be entitled to pre-judgment interest on the amounts owing.

[363] I do not understand the MIB to be seeking pre-judgment interest on the amounts of unpaid rent owing by the plaintiffs. Moreover, in the 1996 action, Justice Rothstein concluded that pre-judgment interest was not payable on the differential between the previous rents and the rents set through the rent review process, as the amount of the rent to be paid is not determined until the Court makes its determination: see *Musqueam Indian Band v. Glass*, (1997), 144 F.T.R. 67 at paras. 6 and 7, [1997] F.C.J, No. 1689. I agree with Justice Rothstein's reasoning.

[364] Post-judgment interest is, however payable on the differential in rent in accordance with the provisions of section 37 of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

X. Costs

[365] If the parties cannot agree on the issue of costs, the Court will fix the costs of this action upon application by either party.

XI. The Form of the Judgment

[366] Within 21 days of the date of these reasons, counsel for the plaintiffs shall prepare a judgment giving effect to these reasons, which draft judgment shall include a table setting out the adjusted land values and "fair rent" calculation for each lot in Musqueam Park (other than Lot 70). Counsel for the plaintiffs shall seek approval as to the form and content of the draft judgment from counsel for the MIB and Canada, and then submit the draft judgment to the Court for signature. If the parties cannot agree as to the form and content of the judgment, or if one or

both parties consider it necessary to seek the Court's directions with respect to the preparation of the judgment, either side may apply to the Court for directions without delay.

"Anne L. Mactavish"
Judge

Ottawa, Ontario
May 18, 2017

Appendix "A" – Joint Book of Documents at Tab 3.

The following table summarizes the total lot size for each parcel in the 75-lot subdivision according to BC Assessment:

Lot	Address	Size (SF)
1	4179 Salish Drive	22,651
2	4151 Tytahun Crescent	11,803
3	4150 Tytahun Crescent	12,742
4	4157 Salish Drive	11,888
5	4107 Salish Drive	20,748
6	4121 Salish Drive	15,542
7	4135 Salish Drive	15,906
8	4149 Salish Drive	13,035
9	2 Halss Crescent	14,106
10	4 Halss Crescent	13,185
11	3 Halss Crescent	13,930
12	4158 Salish Drive	13,208

Lot	Address	Size (SF)
13	4166 Salish Drive	15,375
14	4172 Salish Drive	14,815
15	4180 Salish Drive	10,389
16	4192 Salish Drive	9,955
17	2 Tamath Crescent	12,623
18	6 Tamath Crescent	10,483
19	8 Tamath Crescent	10,770
20	10 Tamath Crescent	13,872
21	14 Tamath Crescent	12,464
22	12 Tamath Crescent	12,464
23	11 Tamath Crescent	12,464
24	13 Tamath Crescent	12,464
25	9 Tamath Crescent	11,924
26	7 Tamath Crescent	9,408
27	5 Tamath Crescent	9,621
28	3 Tamath Crescent	10,721
29	4210 Salish Drive	11,556
30	4230 Salish Drive	12,217
31	4250 Salish Drive	12,724
32	4270 Salish Drive	12,782
33	4290 Salish Drive	12,622
34	4 Semana Crescent	10,365
35	6 Semana Crescent	9,398
36	8 Semana Crescent	9,610
37	10 Semana Crescent	12,336
38	14 Semana Crescent	12,464
39	12 Semana Crescent	12,464
40	11 Semana Crescent	12,464
41	15 Semana Crescent	12,464
42	9 Semana Crescent	11,924
43	7 Semana Crescent	9,408
44	5 Semana Crescent	9,621
45	3 Semana Crescent	10,666
46	4310 Salish Drive	12,637
47	4330 Salish Drive	11,187
48	4350 Salish Drive	11,169
49	4370 Salish Drive	11,024
50	4390 Salish Drive	9,539
51	2 Sennok Crescent	10,634
52	6 Sennok Crescent	9,408
53	8 Sennok Crescent	9,620

Lot	Address	Size (SF)
54	10 Sennok Crescent	12,351
55	14 Sennok Crescent	12,464
56	12 Sennok Crescent	12,464
57	11 Sennok Crescent	12,464
58	15 Sennok Crescent	12,464
59	9 Sennok Crescent	11,880
60	7 Sennok Crescent	9,934
61	5 Sennok Crescent	8,886
62	3 Sennok Crescent	8,885
63	1 Sennok Crescent	11,157
64	4450 Salish Drive	10,357
65	5610 Kullahun Drive	10,535
66	5630 Kullahun Drive	9,595
67	5650 Kullahun Drive	10,647
68	5670 Kullahun Drive	12,446
69	5690 Kullahun Drive	14,112
71	4147 Tytahun Crescent	9,209
72	4133 Tytahun Crescent	8,779
73	4121 Tytahun Crescent	8,921
74	4126 Tytahun Crescent	17,373
75	4132 Tytahun Crescent	27,094
76	4144 Tytahun Crescent	9,850

Appendix "B"

Appendix 2

Unserviced Value and Contract Rent of Individual Lots

Lot	Address	Assessed Land	Unserviced %	Unserviced Value	Rent @ 6%
1	4179 Salish Drive	$ 1,997,000	17.459%	$ 348,656	$ 20,919
2	4151 Tytahun Crescent	$ 1,782,000	17.459%	$ 311,119	$ 18,667
3	4150 Tytahun Crescent	$ 2,040,000	17.459%	$ 356,164	$ 21,370
5	4107 Salish Drive	$ 2,600,000	17.459%	$ 453,934	$ 27,236
6	4121 Salish Drive	$ 2,216,000	17.459%	$ 386,891	$ 23,213
9	2 Halss Crescent	$ 2,320,000	17.459%	$ 405,049	$ 24,303
10	4 Halss Crescent	$ 2,250,000	17.459%	$ 392,828	$ 23,570
11	3 Halss Cresent	$ 2,331,000	17.459%	$ 406,969	$ 24,418
12	4158 Salish Drive	$ 2,220,000	17.459%	$ 387,590	$ 23,255
13	4166 Salish Drive	$ 2,211,000	17.459%	$ 386,018	$ 23,161
14	4172 Salish Drive	$ 2,269,000	17.459%	$ 396,145	$ 23,769
15	4180 Salish Drive	$ 1,800,000	17.459%	$ 314,262	$ 18,856
16	4192 Salish Drive	$ 1,746,000	17.459%	$ 304,834	$ 18,290
17	2 Tamath Crescent	$ 2,094,000	17.459%	$ 365,591	$ 21,935
18	6 Tamath Crescent	$ 1,946,000	17.459%	$ 339,752	$ 20,385
19	8 Tamath Crescent	$ 1,980,000	17.459%	$ 345,688	$ 20,741
20	10 Tamath Crescent	$ 2,181,000	17.459%	$ 380,781	$ 22,847
21	14 Tamath Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
22	12 Tamath Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
23	11 Tamath Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
24	13 Tamath Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
25	9 Tamath Crescent	$ 2,093,000	17.459%	$ 365,417	$ 21,925
26	7 Tamath Crescent	$ 1,843,000	17.459%	$ 321,769	$ 19,306
27	5 Tamath Crescent	$ 1,862,000	17.459%	$ 325,087	$ 19,505
28	3 Tamath Crescent	$ 1,929,000	17.459%	$ 336,784	$ 20,207
29	4210 Salish Drive	$ 1,885,000	17.459%	$ 329,102	$ 19,746
30	4230 Salish Drive	$ 1,968,000	17.459%	$ 343,593	$ 20,616
31	4250 Salish Drive	$ 2,018,000	17.459%	$ 352,323	$ 21,139
32	4270 Salish Drive	$ 2,024,000	17.459%	$ 353,370	$ 21,202
33	4290 Salish Drive	$ 2,009,000	17.459%	$ 350,751	$ 21,045
34	4 Semana Crescent	$ 1,910,000	17.459%	$ 333,467	$ 20,008
35	6 Semana Crescent	$ 1,842,000	17.459%	$ 321,595	$ 19,296
36	8 Semana Crescent	$ 1,861,000	17.459%	$ 324,912	$ 19,495
37	10 Semana Crescent	$ 2,111,000	17.459%	$ 368,559	$ 22,114
38	14 Semana Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
39	12 Semana Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
40	11 Semana Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172

Lot	Address	Assessed Land	Unserviced %	Unserviced Value	Rent @ 6%
41	15 Semana Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
42	9 Semana Crescent	$ 2,093,000	17.459%	$ 365,417	$ 21,925
43	7 Semana Crescent	$ 1,843,000	17.459%	$ 321,769	$ 19,306
44	5 Semana Crescent	$ 1,862,000	17.459%	$ 325,087	$ 19,505
45	3 Semana Crescent	$ 1,937,000	17.459%	$ 338,181	$ 20,291
46	4310 Salish Drive	$ 2,010,000	17.459%	$ 350,926	$ 21,056
47	4330 Salish Drive	$ 1,863,000	17.459%	$ 325,261	$ 19,516
48	4350 Salish Drive	$ 1,862,000	17.459%	$ 325,087	$ 19,505
49	4370 Salish Drive	$ 1,851,000	17.459%	$ 323,166	$ 19,390
50	4390 Salish Drive	$ 1,711,000	17.459%	$ 298,723	$ 17,923
51	2 Sennok Crescent	$ 1,936,000	17.459%	$ 338,006	$ 20,280
52	6 Sennok Crescent	$ 1,843,000	17.459%	$ 321,769	$ 19,306
53	8 Sennok Crescent	$ 1,862,000	17.459%	$ 325,087	$ 19,505
55	14 Sennok Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
56	12 Sennok Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
57	11 Sennok Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
58	15 Sennok Crescent	$ 2,212,000	17.459%	$ 386,193	$ 23,172
59	9 Sennok Crescent	$ 1,975,000	17.459%	$ 344,815	$ 20,689
60	7 Sennok Crescent	$ 1,861,000	17.459%	$ 324,912	$ 19,495
61	5 Sennok Crescent	$ 1,737,000	17.459%	$ 303,263	$ 18,196
62	3 Sennok Crescent	$ 1,737,000	17.459%	$ 303,263	$ 18,196
63	1 Sennok Crescent	$ 1,952,000	17.459%	$ 340,800	$ 20,448
64	4450 Salish Drive	$ 1,805,000	17.459%	$ 315,135	$ 18,908
65	5610 Kullahun Drive	$ 1,770,000	17.459%	$ 309,024	$ 18,541
66	5630 Kullahun Drive	$ 1,811,000	17.459%	$ 316,182	$ 18,971
69	5690 Kullahun Drive	$ 2,098,000	17.459%	$ 366,290	$ 21,977
71	4147 Tytahun Crescent	$ 1,623,000	17.459%	$ 283,360	$ 17,002
72	4133 Tytahun Crescent	$ 1,575,000	17.459%	$ 274,979	$ 16,499
73	4121 Tytahun Crescent	$ 1,655,000	17.459%	$ 288,946	$ 17,337
74	4126 Tytahun Crescent	$ 2,309,000	17.459%	$ 403,128	$ 24,188
75	4132 Tytahun Cresent	$ 3,109,000	17.459%	$ 542,800	$ 32,568
76	4144 Tytahun Crescent	$ 1,744,000	17.459%	$ 304,485	$ 18,269
	Minimum	$ 1,575,000		$ 274,979	$ 16,499
	Median	$ 1,980,000		$ 345,688	$ 20,741
	Average	$ 2,019,072		$ 352,510	$ 21,151
	Maximum	$ 3,109,000		$ 542,800	$ 32,568
	Total	$ 139,316,000		$ 24,323,180	$ 1,459,391

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1912-15
STYLE OF CAUSE:	GEOFFREY W. HODGSON ET AL, v MUSQUEAM INDIAN BAND AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND KIMBERLEY LAWSON, CHESTER LAWSON ET AL
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 5, 2016, DECEMBER 6, 2016, DECEMBER 7, 2016, DECEMBER 8, 2016, DECEMBER 9, 2016, DECEMBER 12, 2016, DECEMBER 13, 2016, DECEMBER 14, 2016, DECEMBER 15, 2016, DECEMBER 16, 2016 FEBRUARY 6, 2017, FEBRUARY 7, 2017, FEBRUARY 8, 2017
REASONS FOR JUDGMENT:	MACTAVISH J.
DATED:	MAY 18, 2017

APPEARANCES:

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