

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Anoroc Holdings Ltd. v. 585582 B.C. Ltd.*,
2026 BCCA 76

Date: 20260224
Docket: CA50176

Between:

**Anoroc Holdings Ltd., Leslie Alexander Darts, Nadine Donata Darts,
Michael John MacDonald, Denise Frances Heck, 0836999 B.C. Ltd.,
CMG Ventures Inc., George Matic, K-Systems Holdings Ltd., Agnes Froese,
Ernest Elburn Froese, Nathan Morden, William John Warrellow,
Colleen Kathleen Warrellow, Noor Damji, 818635 Alberta Ltd., Danica Sariyski,
Danielle Powell and Jeffrey Kotowsky, Kathryn Maria Jones,
Daniel Kenneth Jones, David Gregory Krestanovich, Gail Eileen Krestanovich,
Dorota Julia Huntley, 0700985 BC Ltd., Murray Kenneth Rundle,
Steve Hammer, Melissa Hammer, Steve Kitney and Joanne Kitney**

Appellants
(Petitioners)

And

585582 B.C. Ltd.

Respondent
(Respondent)

Before: The Honourable Justice Fleming
The Honourable Justice Riley
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated
September 4, 2024 (*Anoroc Holdings Ltd. v. 585582 B.C. Ltd.*, 2024 BCSC 1632,
Vancouver Docket S231431).

Counsel for the Appellants: W.J. McMillan
J.E. Les

Counsel for the Respondent: S.W. You

Place and Date of Hearing: Vancouver, British Columbia
September 23, 2025

Place and Date of Judgment: Vancouver, British Columbia
February 24, 2026

Written Reasons by:

The Honourable Justice Fleming

Concurred in by:

The Honourable Justice Riley

The Honourable Justice MacNaughton

Summary:

The appellants challenge a decision regarding the validity of a restrictive covenant registered against their residential strata lots in a building operated as a resort hotel. The identical covenant registered against another strata lot in the building was declared void in 585582 B.C. Ltd. v. Anderson, 2015 BCCA 261, on the basis that it lacked certainty. The chambers judge rejected the appellants' arguments based on Anderson and the doctrines of stare decisis, issue estoppel and abuse of process and found the Covenant to be sufficiently certain.

Held: Appeal allowed. The chambers judge erred in finding no abuse of process. Further, the chambers judge made reversible errors in her alternative exercise of discretion to not apply the doctrine that involved failing to engage with the governing framework.

Reasons for Judgment of the Honourable Justice Fleming:

Introduction

[1] This appeal concerns the validity and enforceability of a restrictive covenant registered against most of the residential strata lots (“Unit” or “Units”) at Cove Lakeside Resort (“Resort”) in West Kelowna, BC (the “Covenant”). The Covenant bars a Unit from being rented to the public except through a rental pool agreement between the owner and the rental manager.

[2] Each appellant owns a Unit that is subject to the Covenant. The Resort consists of 150 Units and four commercial strata lots. The respondent, 585582 B.C. Ltd., owns the commercial lot that comprises the front desk of the Resort, which it leases to Cove Lakeside Resort Inc., the current rental manager (“Rental Manager”).

[3] In *585582 B.C. Ltd. v. Anderson*, 2015 BCCA 261 [*Anderson*], this Court found the Covenant, registered against a Unit owned by Tor Anderson, to be void for lack of certainty.

[4] After *Anderson*, the respondent discharged the Covenant registered against 17 Units at the request of their owners. The respondent then refused to discharge the Covenant registered against the appellants’ Units. The Covenant remains registered against 132 Units, including those belonging to the appellants.

[5] Relying on *Anderson*, the appellants brought a petition seeking to cancel the Covenant against their Units. Among other things, the appellants argued *Anderson* was binding, and that the Covenant was unenforceable based on any one of the doctrines of *stare decisis*, issue estoppel or abuse of process.

[6] In opposing the petition, the respondent adduced and relied on a disclosure statement attaching drafts of the Covenant and a rental pool agreement that was not in evidence in *Anderson*.

[7] In reasons indexed at 2024 BCSC 1632, the chambers judge dismissed the petition, rejecting the appellants' arguments about *stare decisis*, issues estoppel and abuse of process and finding the Covenant to be sufficiently certain ("Reasons").

[8] Advancing the same arguments on appeal, the appellants' primary grounds rest on the chambers judge's treatment of abuse of process.

[9] For the reasons that follow, I would allow the appeal based on those primary grounds.

Background

[10] The Resort was constructed to be operated as a hotel, to the extent that the owners were not occupying their Units. The developer, Okanagan Land Development Corp. ("OLDC"), contemplated a rental manager operating a unified rental management system (the "Rental Pool") with rental revenues funding the hotel services, by way of rental pool agreements between each owner and the rental manager. To ensure owners only rented their Units through the Rental Pool, OLDC entered into the Covenant with itself as owner of the front desk unit and as owner all the Units. Pursuant to the terms of the Covenant, OLDC was the transferor and a prospective purchaser of a Unit was the transferee.

[11] OLDC registered the Covenant against all Units at the land title office on August 4, 2006.

[12] The material terms include:

ARTICLE 2

- 2.1 **Rental Use.** The Transferor, for itself and its successors and assigns, covenants and agrees with the Transferee that the Unit shall not be used as or occupied for Rental Use and that no Registered Owner will permit its Unit to be used as or occupied for Rental Use except in accordance with each of the following:
 - (a) this Covenant; and
 - (b) if rented to the Public, the Rental Pool Management Agreement.
- 2.2 **Optional Placement in Rental Booking System.** Registered Owners may place their Unit in the Rental Booking System at any time by

entering into the Rental Pool Management Agreement and may withdraw from the Rental Booking System upon the notice and under the terms set out in the Rental Pool Management Agreement.

- 2.3 **Exclusive Rental Booking System.** No Unit will be placed in any rental booking system other than the Rental Booking System operated by the Rental Manager, both as defined in this Covenant.
- 2.4 **No Private Rentals.** Registered owners shall not make private rental arrangements whether their Unit is or is not placed in the Rental Booking System.

[13] Relevant definitions in the Covenant included:

“Rental Booking System” means the rental management system of the Rental Manager ... chosen by the Transferor for the initial term and thereafter by the Transferee ...;

“Rental Pool Management Agreement” means the agreement made between the Registered Owner and the Rental Manager setting out the terms by which the Rental Manager, upon request by the Registered Owner will manage and make the Unit available for Rental Use, as may be amended by mutual agreement from time to time;

“Rental Manager” means the rental manager operating the Rental Booking System;

[14] Later, OLDC transferred ownership of the front desk unit to the respondent.

[15] Derek Tretheway was a director of OLDC and the sole director of the respondent until his death in May 2015.

[16] Before the Covenant was registered, or any Units were sold, on May 31, 2005, OLDC filed an amended disclosure statement for the Resort with the Ministry of Finance (“Disclosure Statement”).

[17] The chambers judge found the Disclosure Statement set out the key terms of the Covenant and a rental pool agreement (that became the original rental pool agreement) and attached forms of each as schedules. She identified the form of the rental pool agreement as including in relevant part:

- (1) the mechanism for calculating the owner’s and rental manager’s respective shares of the rental revenues and the split percentage of 60/40 in favour of the owners;

(2) the Unit owner's responsibilities, including the requirement to notify a proposed purchaser of the existence and substance of the rental pool agreement; and

(3) the rental manager's right to terminate.

[18] The chambers judge also set out Article 2.8:

Termination by the Manager

The Manager may, on or before the date which is 90 days before the end of the initial Term or any of the renewal terms[,] give the Owners written notice that the Manager does not wish to renew all and not less than all of the rental pool management agrees for the Development (including this Agreement) and, in such event, this Agreement and all such rental pool management agreements will terminate at the end of the then current term. The Manager reserves the right to terminate the agreement if fewer than 75 of the Strata Lots are entered in the Rental Pool for a period of more than 90 days consecutively.

[19] The Rental Pool began operating in 2007 and incurred significant operational losses.

[20] *Anderson* sets out that, due to operational losses, the initial day-to-day manager was removed: at para. 14. In 2008, the Rental Manager produced a new rental pool agreement, effective July 1, 2008, which increased the management fee from 40% to 50%, reducing to 50% the owners' share of the rental revenue ("New Rental Pool Agreement"). Owners wishing to rent their Units were required to sign the New Rental Pool Agreement. The Rental Manager terminated the rental pool management agreements with those who refused to sign. As a result, they could not participate in the Rental Pool.

[21] The Reasons describe these circumstances somewhat differently. They do not mention an initial manager being removed. Instead, the chambers judge found the Rental Manager proposed the Rental Pool be shut down outside of peak season, the revenue percentage split be adjusted to 50/50, or a new rental manager, willing to accept the existing 60/40 revenue split, take their place. A majority of the owners participating in the Rental Pool approved the change in the split and signed the New

Rental Pool Agreement. For those who did not sign the New Rental Pool Agreement, their original rental pool agreements were terminated, pursuant to the termination term in those original agreements, there being less than 75 Unit owners in the original rental pool.

[22] The Reasons also set out that the New Rental Pool Agreement included the change in the revenue split to 50/50 for the period of July 1, 2008 to December 31, 2010; the Rental Manager could terminate the New Rental Pool Agreement any time after September 10, 2010, with 90 days notice; in September 2010, 91 owners agreed to continue with the 50/50 revenue split and the Rental Manager continued to operate the Rental Pool on that basis.

[23] The chronology of events in the Reasons go no further than this.

[24] Returning to *Anderson*, it also explains that the purchase of the Unit registered in Mr. Anderson's name completed in November 2006. He did not sign a rental pool agreement. After unsuccessfully attempting to sell his Unit in late 2008 or early 2009, he rented it privately.

[25] The respondent sued Mr. Anderson and sought an injunction. He counterclaimed seeking a declaration that the Covenant was void on the basis that it was not negative in substance, did not concern the land, and lacked certainty.

[26] The case proceeded to a summary trial.

[27] The evidence included: the original rental pool agreement and the contract of purchase and sale signed by Mr. Anderson's brother, which acknowledged he received a copy of the Disclosure Statement. The evidence did not include the Disclosure Statement itself. Nor was it referred to in the pleadings, the summary trial application, or the application response.

[28] In support of his claim that the Covenant was void for uncertainty, Mr. Anderson asserted the Covenant did not attach or refer to a specific form of rental pool agreement, describe the terms of any agreement, or provide the identity

of the Rental Manager. Instead, the terms and conditions of the Rental Pool Management Agreement were subject to the “whim of a non-covenanting party”.

[29] In asserting the Covenant was not void for lack of certainty, the application response indicated the terms of the rental pool agreement need not be set out in the restrictive covenant because entering the agreement is not a fundamental term to the restrictive covenant.

[30] The summary trial judge concluded the Covenant was certain on the basis that having to look outside the Covenant to understand the rental terms did not make it void for lack of certainty. A prospective purchaser would see the Covenant unequivocally prohibited private rental of the Unit and be alerted to the rental pool agreement, which they could review.

[31] This Court disagreed with the judge’s interpretation of the certainty of the Covenant and allowed Mr. Anderson’s appeal.

[32] In his factum, Mr. Anderson asserted that no rental pool agreement existed when the Covenant was registered. The respondent did not respond to this assertion.

[33] Writing for the Court, Justice Tysoe started his analysis with a discussion of the certainty requirement:

[21] One of the requirements of a restrictive covenant is that its terms must be clear. As Mr. Justice Taggart stated in *Newco Investments Corp. v. British Columbia Transit* (1987), 1987 CanLII 2662 (BC CA), 14 B.C.L.R. (2d) 212 at 224 (C.A.):

Covenants such as these which run with the land must be clearly and distinctly stated so that present and future owners may know with precision what obligations are imposed upon them.

[34] Justice Tysoe considered two authorities involving restrictive covenants held to be void for uncertainty: *Newco Investments Corp. v. British Columbia Transit*, 14 B.C.L.R. (2d) 212, 1987 CanLII 2662 (C.A.) and *Sekretov and City of Toronto (Re)*, [1973] 2 O.R. 161, 1973 CanLII 712 (C.A.).

[35] The balance of his analysis included:

[26] ... the covenant prohibits the rental of a unit to the public unless it is done in accordance with the “Rental Pool Management Agreement”, defined as an agreement between the owner of the unit and the rental manager setting out the terms by which the rental manager will manage the unit and make it available for rental use. The form of the agreement is not attached to the covenant, nor is it incorporated by reference into the covenant. Indeed, the agreement did not even exist at the time of the creation of the covenant. Rather, it is an agreement that must be negotiated between each owner of a strata lot and the rental manager.

[27] There is no certainty with respect to the terms of the Rental Pool Management Agreement and, as a result, there is a lack of certainty in the covenant itself. By looking at the covenant registered against a unit, a successor in title to the unit cannot determine the terms by which the unit may be rented to the public.

[28] If an owner of a unit and the rental manager are unable to negotiate the terms of a rental pool management agreement, there is no independent mechanism by which the terms can be established. Similar to *Newco Investments*, the covenant has no provision for arbitration in the event the parties cannot agree. A central aspect of the covenant constitutes an agreement to agree, which is itself unenforceable.

[29] The summary trial judge was of the view the covenant had sufficient certainty because a prospective purchaser of a strata lot would know from the covenant that there is a rental pool management agreement in place and would be able to look elsewhere to see its terms. In my opinion, that does not create certainty because it requires a successor in title to look outside the covenant to determine all of the terms related to the restricted use of the strata lot. In addition, although as a matter of practice the rental manager may offer the same terms of a rental pool management agreement to all the owners of the condominium units, it is under no legal obligation to do so. It could agree to charge different management fees to different owners. There is uncertainty until a successor in title actually enters into a rental pool management agreement with the rental manager.

[30] There is not even true certainty when an owner enters into a rental pool management agreement with the rental manager because, as demonstrated by the change of the management fee from 40% to 50% of the room rental revenues, the rental manager effectively has the ability to unilaterally change the terms on which the units can be rented to the public. This is similar to *Sekretov* in the sense that the use of an owner’s unit can be affected by the whim of the rental manager expressed at some future time.

[31] The respondents argue there is certainty because a successor in title will know that the unit cannot be rented to the public unless the owner participates in the rental pool and that the essence of the certainty is the bar on private rentals. In my opinion, that does not create certainty. If there are to be restrictions on the use of a strata lot, a successor in title is entitled to know the specifics of the restrictions, and it is not sufficient for the covenant to refer in general terms to a rental pool without any reference to the terms and

conditions applicable to it and without an independent mechanism for the terms and conditions to be established in the event the successor in title and the rental manager are unable to agree on them.

[36] *Anderson* was distinguished in *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 [*Whistler*]. Along with a challenge to related by-laws, the appeal concerned a rental pool covenant registered by the Municipality to further its “warm bed policy”, which sought to maximize the number of public beds available to tourists. The covenant required the Cascade Lodge unit owners to place their units in a Municipality-approved rental pool and limited owners’ use of their units. A disclosure statement summarized the terms of the rental pool and attached a copy of the covenant. The disclosure statement also stated that the developer had entered into an arrangement to manage the rental pool at the Cascade Lodge.

[37] The Court in *Whistler* emphasized that unlike *Anderson*, the covenant did not require the owner of a unit to enter into a rental pool agreement. Addressing *Anderson*, Tysoe J.A. wrote:

[108] ...[T]he appellants’ submission is based on an overly broad interpretation of *Anderson*. It does not stand for the proposition that, unless the covenant sets out all of the terms of a rental pool arrangement, it is vague or uncertain. Instead, it stands for the proposition that a covenant will be unenforceable if it requires an owner of property wishing to rent out their unit to first enter into an agreement with a third party having unknown terms and if there is no mechanism for settling the terms of the agreement.

[38] Justice Tysoe concluded the *Whistler* covenant was not vague or uncertain. In addition to not requiring unit owners enter into a rental pool agreement, there was no uncertainty in the covenant’s restrictions which simply required the units to be placed in a rental pool approved by the municipality and provided a mechanism for the municipality to monitor and enforce its substantive terms.

[39] Both *Anderson* and *Whistler* were considered in *Kent v. Panorama Mountain Village Inc.*, 2021 BCCA 332, which also concerned a rental pool covenant registered against strata units in a building at a ski resort. The covenant prohibited the units, and those in other buildings, from being rented to the public except through a rental management system operated by the manager of the system.

When the units were being marketed to the public, the developer filed a disclosure statement as required by the *Real Estate Act*, R.S.B.C. 1996, c. 397. The disclosure statement described the developer's intention to operate the buildings as condominium hotels and attached a draft rental pool agreement. Under the legislation, the developer was also required to provide a copy of the statement to prospective purchasers. But as in *Anderson*, the covenant did not include an independent enforcement mechanism.

[40] Shortly after the respondents bought a number of units, they signed a rental pool agreement with the developer and joined the rental management system. Later, they terminated the agreement and a subsequent agreement, and began renting their units privately, before bringing a petition to cancel the covenant under s. 35 of the *Property Law Act*, R.S.B.C. 1996, c. 377 [PLA] on various bases including that it was void for uncertainty.

[41] The chambers judge's conclusion that the covenant lacked certainty was overturned on appeal.

[42] Justice Voith, writing for the Court, noted that *Anderson* had been distinguished in several other cases including *Whistler*, because the Covenant required owners to execute a rental pool agreement on terms that were not attached to the Covenant, incorporated by reference or had "in any fashion been established and were thus necessarily uncertain": at para. 48.

[43] Most importantly, in distinguishing *Anderson* again, Voith J.A. found that the *Kent* covenant did not refer to any form of rental pool agreement. He identified the language in the *Kent* covenant as materially different and closer to the language in the *Whistler* covenant. Both the *Kent* and *Whistler* covenants unambiguously required owners to place their units in a rental pool and did not refer to a rental agreement or to the actual terms under which the rental pools were to be operated: at para. 49.

[44] Also describing the uncertainty of the *Anderson* Covenant as “patent”, Voith J.A. reviewed other distinguishing features, including the rental pool or rental booking system in *Anderson* having no independent existence. Instead, its terms were necessarily coupled to the rental pool agreement.

[45] Justice Voith’s interpretation of the *Kent* covenant was informed by the disclosure statement and its attachments as part of the factual matrix, although he found the terms were clear. He also relied on the disclosure statement, and its attachment, in concluding as a matter of commercial reality, that purchasers (original and successors in title) would understand what their obligations would be if they purchased a unit and wished to rent it out.

Reasons

[46] As in *Anderson*, *Whistler* and *Kent*, the appellants’ petition in this case sought to cancel the Covenant pursuant to s. 35(2) of the *PLA*, which provides that various instruments, including a restrictive covenant, may be cancelled if invalid or unenforceable. Among other things, the appellants argued *Anderson* was binding and the Covenant was unenforceable based on the doctrines of *stare decisis*, issue estoppel and abuse of process, and s. 35(5) of the *PLA* which provides: “[a]n order binds all persons, whether or not parties to the proceedings or served with notice”. Substantively, the appellants argued the Covenant was invalid for lack of certainty.

[47] After reviewing the background facts, the chambers judge discussed *Anderson* and later decisions applying or distinguishing it including *Whistler* and *Kent*.

[48] Her analysis began with *stare decisis*. The chambers judge concluded that applying *Anderson* did not mandate the same result, because the factual records in the two cases were different: “I disagree that the facts of *Anderson* and this case are identical”: at para. 53. The chambers judge identified the key difference as the Disclosure Statement, attaching forms of the Covenant and the rental pool agreement, which was not before the courts in *Anderson*. She also noted the finding

in *Anderson* that “the agreement did not even exist” when the Covenant was created. Another difference the chambers judge pointed to was Mr. Anderson had never signed a rental pool agreement, but in this case, some of the appellants had signed and some had not.

[49] Turning to issue estoppel and abuse of process, the chambers judge reviewed and applied the legal principles of the issue estoppel doctrine. She did not discuss the abuse of process doctrine, apart from characterizing abuse of process as closely related to issue estoppel, and highlighting the common underlying principles—judicial economy, consistency, finality and the integrity of the administration of justice.

[50] The chambers judge decided that issue estoppel and abuse of process did not apply.

[51] Regarding abuse of process, she concluded: “I am not convinced that to allow this case to be litigated would constitute an abuse of process by undermining the underlying principles of the doctrine”: at para. 71. There is no discrete analysis in support of this conclusion.

[52] The analysis of issue estoppel, however, includes the relevant finding that the question to be answered is not the same as in *Anderson*: “In *Anderson*, the issue was whether the Restrictive Covenant could be enforced against Mr. Anderson’s Unit based on the factual matrix before the Court in that proceeding. The factual matrixes are not the same in this case as I have already explained”: at para. 70.

[53] In the alternative, the chambers judge exercised her residual discretion not to apply either doctrine. In her view, it would not be in the interests of justice to prevent the case from being considered on its merits “in light of the fact that there existed evidence that was not before the chambers judge and the Court of Appeal in *Anderson*”: at para. 72. Identifying “those facts” as significant, the chambers judge found they may impact whether the Restrictive Covenant was enforceable as against the appellants.

[54] On the question of why the Disclosure Statement was not part of the record in *Anderson*, the chambers judge said the only explanation, provided by the current director of the respondent, Sam Tretheway, was that his father Derek Tretheway (the respondent's former director and a director of OLDC), was undergoing cancer treatment when *Anderson* was being litigated and did not have much time to devote to the legal proceedings.

[55] In dealing with her residual discretion, the chambers judge also recited a passage from *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [CUPE], that discussed the discretionary "factors" that prevent issue estoppel and abuse of process from operating unfairly or unjustly.

[56] The chambers judge went on to note that in *Anderson*, the issue of the Covenant's enforceability was raised in the counterclaim. She also found the consequence of one Unit not participating in the rental pool was vastly different from 27 units not participating, outlining the respondent's evidence about the impact on the Resort.

[57] Turning to the merits, in deciding on the validity (and enforceability) of the Covenant based on certainty, the chambers judge found this case more akin to *Kent* than *Anderson*, given that the Disclosure Statement and its attachments were part of the factual matrix that informed the interpretation. She reasoned that the fact that the form of the Rental Agreement was not attached to the Covenant itself did not render it void for uncertainty. Buyers were not entering an "agreement to agree" nor were the terms unknown. Therefore, as in *Kent*, the absence of an independent mechanism for resolving terms was not fatal to the Covenant's enforceability: at para. 92. Further, unlike in *Anderson*, she also found the Rental Manager could not unilaterally change the terms of the rental pool agreement. Instead, the Rental Manager could propose new terms or terminate the agreement with notice.

[58] Finally, and again in the alternative, the chambers judge determined to exercise the discretion granted by s. 35 of the *PLA* and refuse to cancel the Covenant, based on her view that it would be inequitable to render the Covenant

void: at para. 107. Balancing the interests of the parties, she concluded that cancelling the Covenant would have broader negative practical and operational consequences for the Resort. She also found it would be unjust to other Unit owners who bought into the Resort on the understanding that it would function with a single rental pool system.

On Appeal

[59] The appellants assert the chambers judge made a number of reversible errors in refusing to cancel the Covenant. Based on the whole of the appellants’ submissions, I would frame the issues related to the abuse of process doctrine as follows:

- (1) Did the chambers judge err in law or principle by identifying as different the issues in *Anderson* and in this case and concluding, as a result that the abuse of process doctrine did not apply; and
- (2) In her alternative exercise of residual discretion, did the chambers judge make reversible errors in deciding not to apply the doctrine in favour of permitting re-litigation, by misdirecting herself and or giving no weight to relevant factors.

Standard of Review

[60] Although the parties at times characterized the first issue as a question of mixed fact and law, the Supreme Court of Canada has made it clear whether there is an abuse of process, is a question of law: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at para. 30 [*Abrametz*].

[61] *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 24 [*Re Cliffs*], similarly established whether the related doctrine of *res judicata* should have applied is a question of law, reviewable on a standard of correctness. The only exception recognized in *Re Cliffs* relates to the exercise of discretion not to apply the principle “even if the circumstances of [the] case fell within its ambit”: at para. 24. See also *Continental Appraisals Ltd. v. Air Touch Communications Ltd.*, 2024 BCCA 304 at

para. 36; *Bollhorn v. Lakehouse Custom Homes Ltd.*, 2024 BCCA 192 at para. 45; *Klassen v. British Columbia (Minister of Public Safety and Solicitor General)*, 2021 BCCA 294 at para. 23; *Glover v. Leakey*, 2018 BCCA 56 at paras. 22–25.

[62] I am satisfied that the standard of review that applies to the first issue is correctness, given the question of whether the court is being asked to re-litigate the same issue is central to whether there is an abuse of process.

[63] Regarding the second issue, where an abuse of process is found but the court exercises its discretion not to apply the doctrine. As *Re Cliffs* indicates, that decision is discretionary. Entitled to deference on appeal, a discretionary decision will be reversible only where the court misdirected itself, gave no or insufficient weight to relevant considerations, made a palpable and overriding error of fact, or came to a decision that is so clearly wrong as to amount to an injustice: *Stephens v. Altria Group, Inc.*, 2021 BCCA 396 at para. 4; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

Abuse of Process Framework

[64] The doctrine of abuse of process engages the court's inherent power to prevent the misuse of its process in a way that would bring the administration of justice into disrepute or be manifestly unfair to a party: *CUPE* at para. 37. This broad concept is unrestrained by the specific requirements of issue estoppel or *res judicata*. Characterized instead by its flexibility, the abuse of process doctrine has been applied in a variety of contexts. In the re-litigation context, abuse of process precludes re-litigation where allowing it would violate principles such as judicial economy, consistency, finality and the integrity of the administration of justice: *CUPE* at paras. 35–37; *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4 at paras. 33–35; *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at paras. 39–40; and *Abrametz* at paras. 33–36.

[65] *CUPE* clarified the doctrines of issue estoppel, collateral attack and abuse of process and provided clear guidance on the application of the abuse of process doctrine to re-litigation. The Supreme Court of Canada underscored that the doctrine

is available in civil cases to preclude re-litigation by plaintiffs and defendants alike, noting a defendant may be quite pleased to have another opportunity to litigate an issue decided against them: at para. 50.

[66] Justice Arbour, writing for the majority, identified the integrity of the adjudicative process as the primary focus of the abuse of process doctrine, explaining:

[51] ...Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[52] In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. ...

[67] Justice Arbour held that re-litigation carries serious detrimental effects and should be avoided unless the circumstances dictate that re-litigation is in fact necessary to enhance the credibility and effectiveness of the adjudicative process as a whole: at para. 52. On this point, Arbour J. acknowledged there may be instances where re-litigation will enhance rather than impeach the integrity of the judicial system and set out three examples:

- (1) the first proceeding is tainted by fraud or dishonesty;
- (2) fresh, new evidence, previously unavailable, conclusively impeaches the original results; or
- (3) fairness dictates that the original result should not be binding in the new context”

CUPE at para. 52

[68] Further, Arbour J. affirmed the discretionary factors that prevent issue estoppel from operating unjustly or unfairly are equally available with respect to abuse of process:

[53] ... There are many circumstances in which the bar against relitigation ... would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55).

[69] This is the passage from *CUPE* that is included in the Reasons.

[70] *CUPE* involved a recreation instructor who was convicted of sexually assaulting a child under his supervision and was fired post-conviction. He grieved the dismissal and, in a subsequent labour arbitration, testified the assault did not occur. The arbitrator ruled his criminal conviction was admissible but not determinative and concluded the employee had been dismissed without cause.

[71] Dismissing the union's appeal, the Court held the union was not entitled to re-litigate the issue decided in the criminal proceeding. Justice Arbour characterized the arbitrator's decision to essentially re-litigate the conviction as a "blatant abuse of process": at para. 56.

[72] In *Petrelli v. Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at para. 72, Justice Groberman aptly described the doctrine of abuse of process recognized in *CUPE* as robust: at paras. 52, 72.

[73] Since *CUPE*, appellate courts have applied abuse of process in a range of circumstances, involving different forms of re-litigation. The jurisprudence has continued to emphasize that both the administration of justice and fairness are at its heart.

Did the Chambers Judge Err in Concluding the Abuse of Process Doctrine did Not Apply?

[74] The appellants challenge the chambers judge’s conclusion that the doctrine did not apply, based on her view the issue in *Anderson* and in this case was not the same. They say this reasoning reflects an error in principle that involved conflating the issue with differences in the evidence. They argue that instead of engaging with the *CUPE* principles, the chambers judge confined herself to the requirements for issue estoppel, and the differences in the evidence. Ignoring that abuse of process focuses primarily on the integrity of the adjudicative function, the appellants say, the chambers judge failed to recognize the obvious affront to adjudicative integrity that arose here. The respondent asked her to decide that the Covenant, which this Court in *Anderson* determined was uncertain and therefore invalid and unenforceable, is valid and enforceable, thus invoking the serious detrimental effects of re-litigation that arise from inconsistent decisions.

[75] The respondent acknowledges that litigating the same issue twice constitutes an abuse of process, but asserts the chambers judge correctly found the issue in this case was different than in *Anderson*, because the evidentiary record and the factual matrix, which properly informs the interpretation of the Covenant, now includes the Disclosure Statement.

[76] The respondent suggests a similar conclusion was reached in *Petrelli*, where this Court overturned the chambers judge’s finding of an abuse of process based on relitigating the issue in *Bahry v. Lindell Beach Holiday Resort Ltd.*, 2009 BCSC 632. *Bahry* and *Petrelli* involved different plaintiffs. Each had purchased a “holiday home” or trailer unit, sited in the defendant’s trailer park. In *Bahry*, the plaintiffs alleged that municipal bylaws prohibited use of the park for holiday homes and were successful in seeking rescission of their contract with the defendant on the basis that the defendant violated municipal bylaws by operating a holiday park without the necessary approvals.

[77] The Petrellis then brought an action seeking to rescind their contract. The defendant's statement of defence asserted the Petrelli unit could be sited in the park as a legal non-conforming use of the land under the *Local Government Act*, R.S.B.C. 1996, c. 323, and specific provisions of the bylaws.

[78] The chambers judge granted the Petrellis' application to strike the defendant's pleading as an abuse of process. Noting the contracts were identical, the judge concluded the "illegal nature of the siting was determined in *Bahry* and ought not to be re-litigated in this action": at para. 52.

[79] On appeal, the defendant challenged the judge's ultimate conclusion and his finding that the issue of legal non-conforming use had been raised, argued, considered and determined in *Bahry*: at para. 29.

[80] Satisfied there was no basis for the finding, this Court held the doctrine of abuse of process by re-litigation did not arise. In *obiter*, Groberman J.A. considered how the doctrine might apply if the issue of legal non-conforming use had been before the court in *Bahry*:

[73] If the issue of legal non-conforming use had been before the court in *Bahry*, it is arguable that relitigating it ... would amount to an abuse of the court's processes. Before accepting that argument, however, a court would have to reach the conclusion, based on evidence, that the legal status of the Petrelli unit is the same as that of the Bahry unit. Reaching that conclusion might not be as straightforward as it might appear at first glance. Because the legality of a non-conforming use may depend on its precise location and extent, a minor difference in the siting of the two units could conceivably allow one to constitute a legal non-conforming use of land even though the other was not.

[81] This reasoning seems to address more than the question of whether the same issue of legal non-conforming use was previously litigated. But Groberman J.A. also makes the point that the underlying issue of the legal status of each unit may be different. For the issue of legal non-conforming use to be same in each case, the legal status of the units would have to be found to be same, but that finding might turn on the individual circumstances related to each unit. In other

words, deciding the issue of the legal non-conforming use might depend on separate factual inquiries.

[82] In my view, *Petrelli* does not lend support to the respondent's assertion the chambers judge did not err in identifying the issues as different in this case.

[83] Only the evidence of the factual matrix of the Covenant is different here, due to the absence of the Disclosure Statement (and its attachments) from the record in *Anderson*. There is no suggestion that the issue in the two cases, whether the Covenant was uncertain and therefore void and unenforceable, would be any different if the Disclosure Statement had been adduced in *Anderson*.

[84] Deciding the issue turns on the interpretation of the Covenant. Restrictive covenants are largely interpreted according to the principles of contract interpretation: *Kent* at paras. 21–22. Factual matrix evidence, or evidence concerning what the contracting parties knew or ought to have known at the time of contracting, is no doubt relevant to the interpretive exercise. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 59. The factual matrix is considered in interpreting the words of the contract, but must never be allowed to overwhelm those words. Instead, the goal of examining factual matrix evidence is to deepen the understanding of the contracting parties' objective intentions as expressed in the contract: *Sattva* at para. 57.

[85] For every Unit, including Mr. Anderson's, the Covenant was formed when it was executed by OLDC as owner of the front desk unit and all the Units.

[86] According to the principles of contract interpretation then, the prospect of reaching a different interpretation of the Covenant's certainty, would depend on the role of the Disclosure Statement in deepening the understanding the objective intentions of OLDC and the prospective purchaser of the Unit (although there was no transferee when the Covenant was formed or registered) as expressed in the words of the Covenant.

[87] Deciding whether a restrictive covenant is sufficiently certain also invokes the purpose of the certainty requirement—so that original purchasers and successors in title may know with precision what obligations are imposed upon them. *Anderson, Whistler* and *Kent* reflect this other use of factual matrix evidence, in determining the question of certainty. Justice Voith identified the disclosure statement and its attachments in that case as relevant in “various ways”. He considered that, in addition to being part of the factual matrix evidence that directly informed the covenant’s interpretation, the disclosure statement and its attachment were also relevant to deciding, as a matter of commercial reality, what the original purchasers and successors in title would have understood about their obligations under the covenant if they wished to rent out their units: at para. 66.

[88] Considering the Disclosure Statement (and the related evidence about its filing and being publicly available) in both ways, does not change the fact that the issue in both cases is whether the Covenant is valid and enforceable on the basis of certainty.

[89] Simply put, the respondent relies on the Disclosure Statement for its potential to generate a different answer to the same issue decided in *Anderson*, precisely what re-litigation abuse of process is intended to prevent. The chambers judge’s framing of the issue conflates or confuses the issues decided in *Anderson*, and raised by the respondent in this case, with a difference in the evidence. It was this framing of the issue that led the chambers judge to conclude the doctrine of abuse of process was not engaged.

[90] Respectfully, this conclusion reflects an error in law. In my view, because the issue was the same, relitigating that issue was an abuse of process.

Did the Chambers Judge Err in Her Alternative Exercise of Residual Discretion?

[91] The appellants take the position that an abuse of process involving re-litigation may be permitted in “exceptional circumstances where fairness requires”. In this case, they argue, there was no basis upon which the chambers judge could

have validly exercised her discretion to permit re-litigation. Instead of engaging with the discretionary factors in accordance with the *CUPE* framework, the appellants say the chambers judge erred by ignoring relevant factors and misapplying the new evidence and the minor stakes “exceptions”.

[92] Denying any reversible error, the respondent asserts the chambers judge’s refusal to apply the doctrine was rooted in an assessment of all circumstances, in compliance with *CUPE* and *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44. *Danyluk* characterized the discretion to refuse to give effect to issue estoppel as necessarily case specific and dependent on the entirety of the circumstances. The Court also identified the list of discretionary factors as open, based on the objective of ensuring that issue estoppel promotes the orderly administration of justice but not at the cost of a real injustice in a particular case: at para. 67.

[93] Returning to the Reasons, as I read them, the chambers judge considered two circumstances in deciding it was not in the “interest of justice to prevent this proceeding to be considered on its merits”: at para. 72. First, she discussed the fact that evidence existed that was not before the courts in *Anderson*. She found “those facts” were significant and “may have an impact” on whether the Covenant is “enforceable as against the petitioners”: at para. 72. The chambers judge also discussed the relative stakes in the two proceedings, based on their relative consequences. In her view, the consequence of one Unit, compared to 27 units, withdrawing from the rental pool would have vastly different financial and practical impacts on the Resort.

[94] Again, *CUPE* identified fresh or new evidence—that is, previously unavailable evidence that conclusively impeaches the original result, as an instance where re-litigation will enhance, rather than impeach, the integrity of the judicial system.

[95] The appellants argue the chambers judge erred in relying on the Disclosure Statement to justify relitigating the Covenant in two ways. First, although it was not before the courts in *Anderson*, it did not satisfy any aspect of the new evidence factor. Second, the chambers judge failed to consider whether fairness to the

respondent required the court to accept the Disclosure Statement and rehear the issue decided in *Anderson* based on the low stakes “exception” under *CUPE*.

New Evidence Factor

[96] The appellants submit the respondent provided no evidence in this case that could have supported a finding that the Disclosure Statement was unavailable, or unknown, to the respondent when *Anderson* was litigated. The only evidence, provided by Mr. Tretheway, was that his father’s cancer treatment meant he did not have much time to devote to the proceedings. Clearly this evidence does not establish the Disclosure Statement was unavailable. Nor did the chambers judge make a finding to this effect.

[97] The appellants also argue the respondent’s position in this case about the certainty of the Covenant is premised on prospective purchasers having access to the Disclosure Statement because it was filed and publicly available. Therefore, they had notice of the terms of the rental pool agreement. It follows that the respondent must have been at least aware of the Disclosure Statement since its filing and could have adduced it.

[98] I agree with all of these points. On the evidence, Mr. Thethway’s father was a director of OLDC and the sole director of the respondent until his death in 2015. Further, the chambers judge’s view and reliance on the Disclosure Statement as part of the factual matrix in interpreting the Covenant, supports this conclusion, because this means she accepted the respondent knew or ought to have know about the Disclosure Statement.

[99] Other aspects of the Reasons—the recitation of the background facts, the references to differences in the evidence and to the judge’s treatment of the “only explanation” for the Disclosure Statement not being in the record in *Anderson*—also indicate to me that the chambers judge accepted that the Disclosure Statement was simply not adduced.

[100] Apart from the *CUPE* quotation, the Reasons do not refer to the new evidence factor, or its requirements in relying on the Disclosure Statement. I am satisfied that the chambers judge erred in not considering or applying this part of the new evidence factor in *CUPE*, given it was not evidence that was new or unavailable to the respondent.

[101] Her acceptance of the Disclosure Statement despite finding it *may* have an impact on the enforceability of the Covenant, as opposed to the much higher threshold—that it would conclusively impeach the result—the other aspect of the new evidence factor in *CUPE*, reveals the same flaws.

[102] The fact that the chambers judge went on to conclude the Covenant was sufficiently certain based on her substantive interpretation, does not undermine her finding of the potential, as opposed to conclusive, impact of the Disclosure Statement on the result in *Anderson*. Although not discussed in the Reasons, the finding appeared to rest on an application of general principles of contract interpretation and the treatment of *Anderson* in subsequent authorities.

[103] I say this recognizing that in *Whistler* and in *Kent*, the unknown, or not yet established terms of the rental pool agreement played a role in distinguishing *Anderson*. But even with the Disclosure Statement and its attachments, the language of the Covenant remains materially different, and other distinguishing features and aspects of the uncertainty analysis in *Anderson* would seem to be unaffected. For example, it remains the case that the Covenant—unlike the covenants in *Whistler* and *Kent*—requires each owner wishing to rent their Unit to enter a rental pool agreement with the Rental Manager who is under no *legal* obligation to offer the same terms to all the owners.

[104] Although the Rental Manager may and has done so as a matter of practice, as Tysoe J.A. noted in *Anderson*, it could agree to charge different management fees to different owners. Thus, until a successor in title actually enters into an agreement with the Rental Manager, uncertainty remains as to the terms.

Minor Stakes Factor

[105] *CUPE* identifies an “inadequate incentive to defend” as underlying this factor.

[106] In part, the appellants argue that it is clear the respondent strategically decided in *Anderson* not to adduce the Disclosure Statement in defending the Covenant as certain. By the time of the *Anderson* litigation, they say it was no longer in the respondent’s interest to adduce the Disclosure Statement because the rental pool agreement then in place stipulated a 50/50 rental revenue split instead of the 60/40 split stipulated in the draft agreement attached to the Disclosure Statement. It was only after the appellants alleged in their petition (as Mr. Anderson had in his factum) there was no form of rental pool agreement when the Covenant was registered, that the respondent asserted that OLDC filed the Disclosure Statement with the Ministry of Finance on May 31, 2005.

[107] The Reasons do not indicate whether the appellants made this argument below. Although the argument is relevant to the minor stakes factor, the appellants do not appear to assert the chambers judge erred by failing to consider it. In any event, I cannot say a strategic decision is the only inference to be drawn from the Disclosure Statement’s absence from the record in *Anderson*. Further, the appellants’ repeated assertion during the appeal hearing that the Disclosure Statement was publicly available after it was filed on May 31, 2005, might also suggest Mr. Anderson ought to have been aware of it.

[108] Turning to other aspects of their argument, the appellants acknowledge, and I agree, that because fairness drives the minor stakes factor, fairness could provide a principled reason for a less stringent approach to relying on the Disclosure Statement in the exercise of discretion. The question becomes whether the stakes were low enough in *Anderson* such that fairness dictates the original result should not be binding.

[109] The Reasons do not appear to deal specifically with whether the stakes in the *Anderson* proceeding were too low to generate a full and robust response, meaning the incentive to defend was inadequate, or the underlying and broader question of

whether fairness dictates the original result should not be binding. Instead, the chambers judge briefly discussed the relative consequences of cancelling the Covenant. Her key finding was that the financial and practical consequences for the Resort of one versus 27 Units withdrawing from the rental pool would be vastly different.

[110] I accept that financial or practical consequences could provide a basis for drawing inferences about the relative stakes in *Anderson* and in this proceeding. But *CUPE* clearly requires more than this. Applying the minor stakes factor involves considering the stakes in each proceeding with a view to determining whether fairness dictates that the original result should not be binding.

[111] Reasons for judgment must be read holistically, functionally and contextually, which, among other things, means in the context of the record and most importantly here, the procedural history. Applying this approach, I recognize the number of appellants in this case would indicate the stakes are higher in an immediate sense. But I cannot identify a sound basis for concluding the respondent's incentive to defend in *Anderson* was inadequate or minor enough that fairness to the respondent would dictate relitigating the Covenant's certainty based on different—rather than new or previously unavailable—evidence that may have resulted in a different outcome.

[112] Instead, the record and the procedural history indicate the *Anderson* proceedings involved meaningful if not significant stakes. Plainly the respondent was motivated to enforce the Covenant and incentivized to defend it against Mr. Anderson. The respondent brought an action because he was renting his Unit outside the Rental Pool. Mr. Anderson's counterclaim and summary trial application attacked the validity and enforceability of the Covenant on a number of grounds including uncertainty. After his application was dismissed, he successfully appealed to this Court. Both parties were represented by counsel throughout.

[113] The appellants point out that in *Anderson* the respondent raised the same negative impacts from cancelling the Covenant that it raised in this case, which demonstrates an understanding that what was at stake was much more than preventing the rental of one Unit outside the Rental Pool.

[114] This point aside, it strikes me as almost obvious that the respondent's incentive to defend would have encompassed at least some concern about the impact of an unsuccessful outcome on the status of the Covenant for the other 149 Units. Given the identical restrictive covenant was registered against every other Unit, the clear words of the Covenant, and the importance of the words to its interpretation, I am not able to accept the respondent would not have been alive to this concern.

[115] The appellants go on to assert there is no other reason in principle for accepting and relying on the Disclosure Statement, which fails to meet any aspect of *CUPE*'s threshold for new evidence, in refusing to apply the abuse of process doctrine.

[116] I agree, appreciating the factors set out in *CUPE* are *examples* of circumstances that dictate re-litigation is necessary to enhance the integrity of the judicial system or where fairness dictates the original result should not be binding. Based on *Danyluk*, the examples are part of an open-ended list of factors that may be relevant to the exercise of discretion in any given case. But the other example in *CUPE*, fraud and dishonesty tainting the first proceeding, like the new evidence and minor stakes factors, point to a rigorous threshold for other circumstances. A rigorous threshold also accords with the robust abuse of process doctrine and *CUPE*'s articulation of the exercise of discretion as grounded in the recognition that re-litigation carries serious detrimental effects on the integrity of the judicial system that should be avoided: at para. 52.

[117] One of those serious detrimental effects is inconsistent results, which as *CUPE* provides, will on its own, undermine the credibility of the entire judicial process, thereby diminishing its authority and the aim of finality: at para. 51.

This was also the serious detrimental effect to be avoided here, given the respondent's attempt to re-litigate the same issue decided in *Anderson*.

[118] I understand the chambers judge was concerned by the absence of the Disclosure Statement from the evidence in *Anderson* and the fact that, had it been available, it might have informed the previous interpretation of the Covenant, perhaps leading to a different result. However, there has been no suggestion that the absence of the Disclosure Statement reflected dishonesty, let alone fraud, or the absence itself raised a fairness concern. Based on all of the circumstances, the robust *CUPE* framework and its recognition of the effect of inconsistent results on the integrity of the judicial process, I cannot see how the missing Disclosure Statement could provide a principled basis for concluding that relitigating the same issue was necessary to better protect the integrity of the judicial process.

[119] Respectfully, I conclude that the chambers judge's exercise of discretion not to apply the abuse of process doctrine reveals reversible errors. I would categorize the errors as giving no or insufficient weight to relevant considerations or errors in principle related to failing to engage with or apply the *CUPE* framework.

Disposition

[120] Considering all of the circumstances in this case, I conclude that the respondent's attempt to re-litigate the issue of whether the Covenant was uncertain, and therefore void and unenforceable, was an abuse of process and there was no principled basis for the chambers judge's alternative exercise of discretion not to apply the doctrine.

[121] The errors I have found are sufficient to allow the appeal.

[122] The reversible errors in the chambers judge's exercise of discretion leads to the question of an appropriate remedy. I am satisfied it is feasible and in the interests of justice for this Court to conduct the necessary reassessment rather than remitting the matter to the Supreme Court for a re-hearing: see *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 135.

[123] The discretion to refuse to give effect to an abuse of process is case specific and dependent on the entirety of the circumstances. My analysis of the chambers judge's exercise of residual discretion explains why the Disclosure Statement cannot satisfy the new evidence factor and fairness does not dictate that re-litigation is necessary based on the Disclosure Statement under the minor stakes factor, according to *CUPE*. I have indicated why in my view there are no other circumstances that could dictate that re-litigation of the issue of the Covenant's certainty is necessary based on the Disclosure Statement or that fairness dictates the original result should not be binding, including the unfortunate reality that the Disclosure Statement was not adduced in the *Anderson* proceedings.

[124] Addressing one last basis for the chambers judge's order dismissing the petition, in the alternative she declined to cancel the Covenant under s. 35 of the *PLA*, which she identified as granting the court a broad discretion not to cancel a charge on land, if cancelling would be unjust or inequitable. I can see no justification for exercising that discretion in light of the holding in *Anderson* that the Covenant was void for uncertainty and therefore unenforceable, and I have concluded re-litigation of that same issue is an abuse of process and there are no circumstances that could provide a basis for refusing to give effect to that abuse of process.

[125] In the result, I would allow the appeal, quash the order dismissing the petition, grant the orders sought in the petition related to cancelling the Covenant as a charge against the properties registered in the names of the appellants and described in Schedule “A” to the petition, and declare the Covenant void and unenforceable against the appellants.

“The Honourable Justice Fleming”

I AGREE:

“The Honourable Justice Riley”

I AGREE:

“The Honourable Justice MacNaughton”