IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *No. 151 Cathedral Ventures Ltd. Dba Summerland Beach R.V. Park & Campground v. McAllister,* 2025 BCSC 177

Date: 20250203
Docket: S48526
Registry: Penticton

Between:

No. 151 Cathedral Ventures Ltd. dba Summerland Beach R.V. Park & Campground

Petitioner

And

Judith McAllister and Linda Snow

Respondents

Before: The Honourable Justice Douglas

On judicial review from: An order of the Residential Tenancy Branch, dated February 2, 2023 (RTB File No. 210071576)

Reasons for Judgment

Counsel for Petitioner:	A. Memory
Counsel for Respondents:	L.J. Mackoff
Place and Date of Hearing:	Vernon, B.C. August 8, 2024
Supplementary Joint Written Submissions Received:	November 8, 2024
Place and Date of Judgment:	Penticton, B.C. February 3, 2025

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I. OVERVIEW

[1] This is a petition for judicial review of a decision made February 2, 2023, by an arbitrator of the Residential Tenancy Branch ("RTB"). The parties have a long history of dispute resolution before the RTB, followed by petitions for judicial review in this Court.

[2] William Park is the president and a director of the petitioner, No. 151 Cathedral Ventures Ltd. ("151"), doing business as Summerland Beach R.V. Parks and Campground (the "Park"). The respondents, Judith McCallister and Linda Snow, are longstanding seasonal tenants at the Park.

[3] At issue before the RTB arbitrator was the validity of the petitioner landlord's notice to end the respondents' tenancy at the Park based on ten years' arrears of rent, allegedly pursuant to a lease that the parties signed in 2012, and the landlord first discovered in 2022. The RTB arbitrator cancelled the landlord's notice and found that the parties' 2009 lease, and not the 2012 lease, governed their tenancy agreement. The 2009 lease required the respondents to pay annual rent to the petitioner in the amount of $2,285; the 2012 lease provided that they would pay rent of $425/month (or $5,100 per year), an increase of more than 100%.

[4] The petitioner submits that the RTB decision is both patently unreasonable and procedurally unfair and therefore cannot stand. It asks that this decision be set aside and the matter remitted to the RTB for a re-hearing. The respondents describe this petition as the latest salvo in 151's 12-year campaign to interfere with their quiet enjoyment of their site at the Park which they have occupied since 1993. They seek dismissal of the petition as an abuse of process and special costs.

[5] For the reasons that follow, I conclude that the RTB decision is patently unreasonable because it: 1) fails to grapple with the validity of the 2012 lease, a central issue before the arbitrator; and 2) does not permit the parties or this Court to discern the arbitrator's analysis on the issue of estoppel. The petition is therefore allowed and remitted to the RTB for a re-hearing.

II. FACTUAL BACKGROUND

[6] The relevant background facts are largely non-contentious.

[7] The petitioner owns and operates the Park, which comprises approximately seven acres of land, including 127 fully-serviced manufactured homes and recreational vehicle sites.

[8] On or about January 1, 2009, the respondents, who were then managers of the Park, drafted and signed a new lease agreement. Ms. McAllister signed the 2009 lease as both a tenant and on behalf of the landlord. The 2009 lease required the respondents to pay annual rent in the amount of $2,285 for their site at the Park.

[9] On April 29, 2012, 151's authorized representative, Julie Pachkowsky, the Park's former site manager, presented the respondents with a new lease effective May 1, 2012. The respondents signed this lease on May 12, 2012. The 2012 lease refers to a five-page addendum, specifying 24 Park rules. There is a dispute between the parties about whether they reached an agreement regarding this addendum. Although the respondents testified at the RTB hearing that they had an interlineated addendum in their possession, they neither produced it, nor were they ordered to do so at the RTB hearing.

[10] The 2012 lease provided, in part, that:

a) The respondents' tenancy commenced on May 1, 2012;

b) Their tenancy was fixed for a period of one year, ending April 30, 2013, following which it could be continued on a month-to-month basis;

c) The respondents owed rent of $425 per month, payable on the 31st day of each month ($5,100 a year); and

d) The respondents were required to pay electricity costs of $250 per year, pending the installation of a meter for their site.

[11] The respondents' electricity was metered in June 2012. Since then, they have been paying their power bill monthly (rather than at the annual flat rate of $250.00).

[12] Ms. Pachkowsky was terminated from her position as the Park's site manager in December 2012. Since January 1, 2013, the respondents have paid their rent, once annually, in the amount specified in the 2009 lease.

[13] On April 27, 2022, the petitioner posted a notice on the respondents' door which read, in part, as follows:

> Please find enclosed the standard form of your fully executed lease commencing May 31, 2012 … It is unfortunate you have chosen to hide and disregard this governing 2012 lease from everyone and to seek benefits of the old expired Illahie lease.

[14] On May 1, 2022, the petitioner sent the respondents an invoice stating a "total due" of $22,988.46. The invoice included charges of $26,361.23, comprising $25,933.71 for alleged overdue rent, $425 for May 2022 rent, $2.40 for Hydro, and $0.12 in GST, and subtracted $3,372.77 from this amount, representing rent the respondents had paid over the last decade.

[15] On May 6, 2022, 151 served the respondents with a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities. 151 based this 10 Day Notice on Mr. Park's assertion that he had discovered the 2012 lease for the first time in 2022. 151 submits that the parties entered into the 2012 lease in 2012, and that it is a valid and binding lease agreement that has been in effect ever since. The respondents disagree. On May 19, 2022, they disputed 151's 10 Day Notice.

[16] A hearing before RTB arbitrator, D. Vaughn, proceeded by conference call on January 26, 2023. Three people attended this hearing on the petitioner's behalf:

a) Mr. Park;

b) Robina Dillabough, the Park manager; and

c) Ken Tremblett, a director of 151.

[17] The respondents were also in attendance. No party then had counsel.

[18] Ms. McAllister confirmed at the RTB hearing that she had executed the 2012 lease. 151 produced a copy of the addendum to the 2012 lease from its tenants' files, with no interlineations. The respondents did not produce the addendum which they say they had interlineated.

[19] On February 2, 2023, the RTB arbitrator issued a decision. The arbitrator cancelled the 10 Day Notice, ordered the tenancy to continue until it legally ends under the *Manufactured Home Park Tenancy Act*, S.B.C. 2002, c. 77 [*MHPTA*], and granted the respondents a one-time rent reduction of $100.

III. PROCEDURAL HISTORY

[20] As noted, the parties have a long history of litigation. I do not propose to review all of it in detail here. Much of it is helpfully summarized in the reasons of Justice Coval in *Gabriele v. No. 151 Cathedral Ventures Ltd.*, 2021 BCSC 2628, a proceeding in which Ms. McCallister and Ms. Snow, the respondents here, were petitioners. It is clear that 151 has been attempting unsuccessfully to substantially increase the rent payable by seasonal residents of the Park for many years.

[21] In *Lang v. British Columbia (Residential Tenancy Arbitrator)*, 2008 BCSC 1707, this Court found that the Park was a manufactured home park pursuant to the *MHPTA*, and that its residents were tenants under the *MHPTA* and not common law licensees. As noted by Coval J. in *Gabriele* at para. 22, the seasonal tenants and the Park signed tenancy agreements under the *MHPTA* following the *Lang* decision. This was an important development that reflected the outcome in *Lang*.

[22] In 2011, 151 sought to evict another seasonal tenant at the Park; this eviction was subsequently overturned by the RTB. Thereafter, 151 sought judicial review of the RTB's decision. Justice Groves upheld the RTB decision, followed *Lang*, and found that the respondent was a tenant with a tenancy under the *MHPTA: No. 151 Cathedral Ventures Ltd. v. Hyssop* (26 October 2011), Kelowna S92241 (B.C.S.C.).

[23] Justice Coval noted in *Gabriele* at para. 28 that, following *Hyssop*, 151 continued its campaign against the Park's seasonal tenants and, in February 2012, asked the RTB to increase their rents under the *MHPTA*. The RTB refused. From 2011 to 2016, 151 attempted unsuccessfully to evict various seasonal tenants: *Gabriele* at paras. 28 – 29.

[24] In 2019, 151 issued letters to most of the tenants at the Park, terminating their occupancy on the basis that they were common law licensees and not tenants under the *MHPTA*: *Gabriele* at para. 33. This resulted in an extensive RTB hearing in January 2020. These proceedings included Ms. McCallister and Ms. Snow, the respondents on the petition before me. In February 2020, an RTB arbitrator found that the residents were tenants under the *MHPTA*.

[25] Based on the February 3, 2020 RTB decision, both sides were represented by counsel and extensive procedures were invoked in order to fully and finally decide the issue of whether seasonal residents at the Park held leases under the *MHPTA* or were common law licensees. As noted by Coval J. in *Gabriele* at para. 37, there was a full-blown hearing on this issue, including substantial documentary and photographic evidence, written argument, direct and cross-examinations, and oral submissions. The proceedings were transcribed by a court reporter. Following this hearing, an RTB arbitrator found that the seasonal residents of the Park were tenants under the *MHPTA*. This ruling was final and binding on the parties. Notably, this RTB arbitrator expressly found that 151 was bound by the 2009 manufactured home site tenancy agreements, with a start date of January 1, 2009. Unfortunately, this RTB decision did not end the parties' longstanding dispute.

[26] Ms. McCallister and Ms. Snow subsequently sought judicial review of another RTB decision dated May 21, 2020, upholding 151's notice terminating or restricting a service or facility under the *MHPTA*: *Gabriele* at para. 79. The termination in question in *Gabriele* related to the Park residents' winter parking storage rights for their manufactured homes from October to April, when these homes were not occupied: *Gabriele* at para. 80. The effect of the notice was to require the tenants to

remove their manufactured homes from their sites for six months every year: *Gabriele* at para. 80. Justice Coval granted the petitioners, including Ms. McCallister and Ms. Snow, the relief they sought, set aside the RTB decision, and remitted the matter to the RTB for a re-hearing: *Gabriele* at para. 105.

[27] Shortly after the release of Coval J.'s decision in *Gabriele*, 151 purportedly discovered the 2012 lease, which provides for the payment by respondents, Ms. McCallister and Ms. Snow, of substantially increased rent. The respondents refute the validity of the 2012 lease. This dispute prompted another RTB hearing, followed by this petition by 151 for judicial review of that decision.

IV. LAW AND ANALYSIS

A. What comprises the record on this judicial review?

[28] While Mr. Park filed new affidavit evidence on this petition that was not before the RTB, his lawyer submits that this judicial review is properly based on the record before the RTB and the transcript of those proceedings.

[29] The respondents seek to rely on new evidence that was not before the RTB arbitrator, including, in particular, the affidavit of Ms. McCallister, made May 2, 2023. In this affidavit, Ms. McCallister offers her views about 151's longstanding campaign to evict the respondents from the Park, and terms in the 2009 lease that were unacceptable to them.

[30] Evidence on a judicial review is generally confined to the record before the decision-maker: *Beaudoin v. British Columbia*, 2021 BCSC 512 at para. 80. Evidence that could, or should, have been before the tribunal but which was not, in fact, before the tribunal is generally not admitted in judicial review proceedings: *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at para. 52.

[31] There is no indication that the evidence on which the respondents now seek to rely was unavailable to them at the RTB hearing. They could have put this evidence before the RTB arbitrator but did not.

[32] I accept that the record before the RTB, as appended to the affidavit of Ellen Graham, RTB policy analyst, properly comprises the record for the purposes of this judicial review: *Percy v. Momeni*, 2023 BCSC 522 at para. 22. I have considered the transcript of proceedings from the RTB hearing but not the parties' recently-filed affidavits which were not before the RTB.

B. What is the role of the reviewing court?

[33] I adopt the summary of the law regarding this Court's role on judicial review, as outlined in the petition response of the Director of the RTB, filed April 18, 2023.

[34] The role of the court on judicial review is to ensure that a statutory decision-maker or tribunal acted within the authority bestowed upon it by the Legislature: *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9 at para. 28. Judicial review functions to maintain the rule of law while giving effect to legislative intent: *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para. 2 [*Vavilov*].

[35] The court is not to hear new evidence or argument or to decide or re-decide the case on judicial review; rather, it is simply to ensure that the tribunal: (1) acted within its jurisdiction by deciding what it was directed to decide by its constituent legislation; and (2) did not lose jurisdiction by failing to provide a fair hearing or by rendering a decision outside the degree of deference owed by the reviewing court: *Actton Transport Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 272 at paras. 19-23; *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at para. 54; *Powell v. British Columbia (Residential Tenancy Branch)*, 2015 BCSC 2046 at paras. 49-51; *Alberta Teachers' Assn. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 at paras. 22-26.

[36] If the court chooses to exercise its discretion to grant prerogative relief, the appropriate remedy on judicial review is to set aside all (or part) of the decision(s) and any accompanying order, along with a direction that the Director (or her delegate) reconsider the application for dispute resolution pursuant to s. 5 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[37] A court will only rarely make the decision which the Legislature has assigned to an administrative decision-maker: *British Columbia (Workers' Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49 at paras. 50-52; *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302 at paras. 4-12.

C. What is the applicable standard of review?

[38] The applicable standard of review is not controversial.

[39] The standard of review for decisions of an RTB arbitrator is set out in s. 58 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 [*ATA*]. Section 77.1 of the *MHPTA* contains a privative clause, as contemplated in s. 58(2) of the *ATA*, the effect of which is that this Court must not interfere with decisions of the RTB unless they are patently unreasonable: *Hawk v. Nazareth*, 2012 BCSC 211 at para. 8.

[40] Section 58(3) of the *ATA* defines "patently unreasonable" with respect to a discretionary decision; it does not define patent unreasonableness as it relates to questions of fact or law. In *Yee v. Montie*, 2016 BCCA 256 at para. 21, citing *Manz v. Sundher*, 2009 BCCA 92 at para. 39, and *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80 at para. 37, the Court of Appeal explained the meaning of this phrase in relation to factual matters:

> […] [A] decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. […]

[41] A patently unreasonable decision is one that is clearly irrational, evidently not in accordance with reason, or so flawed that no amount of curial deference can justify letting it stand: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52. A patently unreasonable decision is one where the result borders on the absurd: *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92,* 2004 SCC 23 at para. 18.

[42] A patent unreasonableness review requires the court to ask whether there is a rational or tenable line of analysis to support the decision: *Kong v. Lee*, 2021 BCSC 606, citing *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109. Both the outcome of a decision and the reasons provided must meet this standard: *Kong* at paras. 63-64. In other words, patent unreasonableness also applies to the adequacy of reasons: *Kong* at para. 63. Patent unreasonableness is a high standard. It falls at the high end of the deference spectrum: *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at paras. 39 – 44.

[43] Questions of procedural fairness are reviewed on a standard of fairness, as required by section 58(2)(b) of the *ATA*. Assessing the level of procedural fairness required in a given tribunal process necessitates a contextual approach that looks to the decision being made and its statutory, institutional, and social context: *Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, 1999 CanLII 699 at para. 22. The informal hearing structure of the RTB, the relaxed rules of evidence, and the nature of telephone hearings all influence what procedural steps are required to accord with the duty of procedural fairness: *PHS Community Services Society v. Swait*, 2018 BCSC 824 at para. 88.

[44] I have relied on these principles in my analysis.

D. What did the arbitrator decide?

[45] I begin with a review of the RTB arbitrator's decision.

[46] The arbitrator identified the issue at the RTB hearing as whether the landlord had submitted sufficient evidence to support its notice to end the respondents' tenancy, or whether the notice should be cancelled. 151's notice to end the respondents' tenancy was based on their alleged failure to pay arrears of rent accumulated over 10 years at the rate of $425/month pursuant to the 2012 lease in the total amount of $22,988.46. Whether 151 was entitled to arrears of rent in that amount and, by extension, a writ of possession, was dependant on the arbitrator finding that the 2012 lease was valid and enforceable.

[47] The arbitrator made the following essential findings, as set out in the RTB decision:

a) There was an inconsistency in Mr. Park's affidavit (between dates in the body of the affidavit and the jurat) which cast doubt on the landlord's credibility;

b) Mr. Park's affidavit otherwise consisted of re-arguments and disagreements with the outcomes of past disputes;

c) The landlord's claim for arrears of rent was barred by the legal principle of estoppel because:

   i. 151 claimed it did not discover the 2012 lease until April 2022, but, if so, it neither discovered nor acted on the 2012 lease for ten years (despite being in dispute resolution many times since 2012) due to its own lack of due diligence;

   ii. The 2012 lease was within the landlord's control since 2012, in its own office file;

   iii. The landlord continued to accept annual rent pursuant to the 2009 lease until 2022, without ever seeking to enforce the 2012 lease;

iv. The landlord's actions in attempting to enforce the 2012 lease, 10 years after it was allegedly signed, were unreasonable;

v. If the landlord intended to enforce the 2012 lease, it ought to have filed a 10 Day Notice to End Tenancy in 2013, the first year after the 2012 lease was allegedly signed, but failed to do so;

vi. The tenants were entitled to rely on the actions of the landlord (i.e., that it was relying on the 2009 lease, as agreed at multiple previous hearings); and

vii. The landlord was therefore estopped from relying on the 2012 lease.

[48] In the result, the arbitrator found that the landlord had failed to show the tenants did not pay rent and, by extension, 151 was not entitled to an order for possession. The arbitrator cancelled 151's notice to end the respondents' tenancy, finding it to be of no force and effect, and ordered the 2009 tenancy to continue "until it may otherwise end under the Act". The arbitrator expressly noted that, "to provide clarity to the parties going forward", the 2009 lease "applies to this tenancy" and the 2012 lease "is not binding on these parties".

E. Is the arbitrator's decision patently unreasonable?

[49] The petitioner argues that the arbitrator's decision is patently unreasonable because:

a) The arbitrator failed to address the central issue between the parties;

b) The arbitrator misapplied and/or misapprehended the law of estoppel;

c) The arbitrator granted an equitable remedy without considering whether the respondents came to court with clean hands; and

d) The arbitrator made a flawed adverse assessment of the landlord's credibility.

[50] I address each point in turn.

1. Did the arbitrator fail to address the central issue?

[51] A decision-maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision-maker was alert and sensitive to the matter before it: *Vavilov* at paras. 127-128.

[52] The petitioner submits that the central issue before the arbitrator was the validity of the 2012 lease. It argues that, subject to the answer to this question, two additional issues arose: 1) whether the respondents owed arrears of rent (based on the 2012 lease); and 2) whether 151 was entitled to an order of possession (based on unpaid arrears of rent under the 2012 lease). 151 denies the arbitrator addressed this central issue. It argues that the arbitrator's failure to analyze the validity of the 2012 lease, beyond finding it to be non-binding, is contrary to the principles of justification and transparency, thereby rendering the arbitrator's reasons patently unreasonable.

[53] A decision-maker's reasons must be read holistically: *Revive Spa Ltd. v. Melka Construction Ltd.,* 2022 BCCA 336 at para. 31, citing *Vavilov* at paras. 99-104. In conducting this holistic reading, the reviewing court should be sensitive to the administrative setting in which the decision was made, including the administrator's institutional experience and expertise and the history and context of the proceedings: *Vavilov* at paras. 91-94.

[54] In *Laverdure v. First United Church Social Housing Society*, 2014 BCSC 2232, Justice Murray succinctly summarized how to assess the adequacy of reasons in the context of a judicial review of an RTB decision based on the standard of patent unreasonableness:

> [37] In short, for reasons to be adequate, they need not necessarily address every issue raised by the parties nor all of the evidence adduced, but on the central issue or issues that underlie the conclusion reached there must be sufficient clarity of fact finding and application of those facts to the test to be met to allow the parties and a court to know why the decision was reached and whether it was within a range of acceptable outcomes.

[55] Based on the transcript of proceedings from the RTB hearing, the arbitrator said they would determine whether the 2012 lease was binding or enforceable. The arbitrator acknowledged that they did not reproduce all the details of the parties' submissions or arguments in the decision. Read as a whole, the RTB decision is consistent with the arbitrator finding the 2012 lease to be neither binding nor enforceable and therefore invalid.

[56] Following a discussion about estoppel, the arbitrator stated:

> For these reasons, I find the landlord was estopped from seeking enforcement of the 2012 tenancy agreement. Therefore, I find the landlord has failed to prove the tenants failed to pay rent.

[57] The arbitrator followed these findings with a conclusory statement that the 2012 lease was not binding on the parties. Beyond a statement of the respondents' position, the arbitrator did not engage in an analysis of that issue. Reading the RTB decision as a whole, I am unable to conclude that the arbitrator grappled with the respondents' evidence about the unilateral interlineations they say they made to the addendum, or considered whether, in the circumstances, the parties had reached consensus regarding the essential terms of the 2012 lease, and whether the 2012 lease was a valid and binding contract.

[58] The arbitrator's decision was apparently grounded on the conclusion that the 2012 lease was not binding based on the law of estoppel. Accordingly, I turn next to the discussion of that issue in the RTB decision.

2. Did the arbitrator misapply the doctrine of estoppel?

[59] The petitioner argues that the arbitrator's application of the doctrine of estoppel reflects a fundamental misapprehension of the law, thereby rendering the RTB decision patently unreasonable. Counsel for the petitioner submits that the language in the RTB decision clearly engages the doctrine of promissory estoppel, and that a pre-requisite to applying promissory estoppel is a finding that there was an existing legal relationship between the parties: *Khela v. Clarke*, 2021 BCSC 503 at para. 106, aff'd 2022 BCCA 71. As noted in *Khela* at para. 106, citing *Ecobase*

Enterprises Inc. v. Mass Enterprise Inc., 2017 BCCA 29 [*Ecobase*], the party relying on this doctrine must establish:

a) An existing legal relationship;

b) A promise or assurance made by the other party and intended to affect their legal relationship;

c) Reliance on the promise or assurance; and

d) A change in position to the party's detriment.

[60] Counsel for the petitioner argues that it is conceptually inconsistent for the RTB arbitrator to: 1) find that the 2012 lease was not legally binding on the parties; but 2) bar the landlord from relying on the 2012 lease based on the doctrine of promissory estoppel (which, she asserts, necessarily presumes the validity of the 2012 lease). She submits that the 2012 lease must exist as a valid contract which binds the parties before the respondents are eligible for equitable relief by way of promissory estoppel, citing *Khela* at paras. 104 – 105; *Ecobase* at para. 10; *Remington Energy Ltd. v. British Columbia Hydro & Power Authority*, 2005 BCCA 191 at para. 10; *Kahle v. Ritter*, 2002 BCSC 199 at para. 39. 151 denies promissory estoppel applies to prevent a landlord from relying on the terms of a lease in the future, after giving notice of an intention to do so, citing *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.,* 2002 BCSC 934 at para 87.

[61] By contrast, the respondents submit that the arbitrator correctly barred 151's notice to end tenancy based on issue and/or cause of action estoppel, the two branches of the doctrine of *res judicata*. They say it is beyond dispute that 151 had the means to advance its argument that the 2012 lease (and not the 2009 lease) was binding on the parties at previous RTB hearings. They argue that it was grossly negligent for 151 not to review its own tenancy files while repeatedly asserting its rights to increase the respondents' rent and terminate their tenancy agreement. In essence, they say that 151 had ample previous opportunities to raise this issue

during the parties' many years of dispute resolution and related litigation and that the doctrines of *res judicata* and abuse of process now bar 151 from relying on the 2012 lease.

[62] The arbitrator defined estoppel in the RTB decision as follows:

> Estoppel is a rule of law that states when one party, the landlord here, by act or words gives the other party, the tenants here, reason to believe that a certain set of facts upon which the other party takes action, the first party (landlord) cannot later, to their benefit, deny those facts or say that their earlier act was improper. The rationale behind estoppel is to prevent injustice owing to inconsistency.

[63] The Supreme Court of Canada identified six types of estoppel in *Ryan v Moore,* 2005 SCC 38: 1) estoppel by representation of fact; 2) proprietary estoppel; 3) promissory estoppel; 4) estoppel by convention; 5) estoppel by deed; and 6) estoppel by negligence: *Ryan* at para. 52. The various forms of estoppel, while related in some ways, are each distinct: *Delane Industry Co. Ltd. v. PCI Properties Corp.*, 2014 BCCA 285 at para. 49 (referring, in particular, to estoppel by representation, estoppel by convention, and proprietary estoppel). The doctrine of estoppel is also distinct from the two types of *res judicata*: 1) issue estoppel; and 2) cause of action estoppel: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 22-23.

[64] The parties interpret the arbitrator's discussion of estoppel in the RTB decision differently. In my view, this divergence underscores a fundamental gap in both the arbitrator's analysis and the adequacy of their reasons. The validity of the 2012 lease may, in turn, inform the application of this equitable doctrine.

[65] Issue estoppel is intended to prevent the same issue from being tried again. As set out in *Cliffs over Maple Bay Investments (Re)*, 2011 BCCA 180 at para. 31 [*Cliffs Over Maple Bay*]; *Masjoody v. Trotignon*, 2023 BCCA 220 at para. 16, it has three components:

a) The party puts forward a question that has already been decided;

b) The judicial decision said to create the estoppel must be final; and

c) The parties to the judicial decision must be the same or privies.

[66] Cause of action estoppel is established where:

a) There has been a final decision by a court of competent jurisdiction;

b) The parties to the action are the same;

c) The cause of action in the prior action is not separate and distinct; and

d) The basis of the cause of action and subsequent action was, or could have been, argued in the prior action if the parties had exercised reasonable diligence (*Cliffs Over Maple Bay* at para. 28; *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 15).

[67] Promissory estoppel arises when one party makes a promise to the other party; by contrast, estoppel by convention arises when parties act on a shared assumption: *Ryan v. Moore*, 2005 SCC 38 at para. 54. In *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.,* 2002 BCSC 934, a decision on which the petitioner relies, the landlord charged the tenant taxes based on an incorrect rate for approximately a decade. Justice Sigurdson considered whether estoppel applied and, if so, what type of estoppel was relevant:

> [73] Estoppel by convention depends on a shared assumption rather than a representation as to a state of facts. Here, the shared assumption arguably was the basis upon which taxes were allocated.

[68] The parties in this case apparently relied for many years on a shared assumption that rent was due and payable pursuant to the 2009 lease. Such an interpretation of the evidence might be consistent with application of the doctrine of estoppel by convention.

[69] The facts of this case are distinguishable from those in other decisions involving promissory estoppel. In *Central London Property Trust Ltd. v. High Trees*

House Ltd, [1947] KB 130, [1956] 1 All E.R. 256 [*Central London*], the landlord agreed to accept reduced rent during wartime conditions. Thereafter, the landlord asked that the rental rate return to the full amount payable under the lease. Lord Denning found that the landlord's promise (not to insist on the payment of full rent) was binding, but that it was temporary and expired when the prevailing conditions present at the time of the rent reduction had disappeared.

[70] The facts in *Central London* are distinguishable from those in the case before me. 151 did not promise to accept lower rent under the 2012 lease. Assuming, as it asserts, that 151 did not know of the existence of the 2012 lease until 2022, it would presumably have been impossible for 151 to have made such a promise. As noted, it instead appears that the parties operated on the shared assumption that the 2009 lease remained in effect until 2022.

[71] The distinction between promissory estoppel and estoppel by convention is not always important. As noted in *Foy v 0933164 B.C. Ltd*., 2022 BCSC 2046, at para. 81, quoting *Litwin Construction (1973) Ltd. v. Pan,* 1988 CanLII 174 (B.C.C.A):

> "Unfair or unjust" means "producing a result contrary to a sound sense of the equities, rights and conduct of [t]he parties".
>
> Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.

[72] Ultimately, it is unclear whether the outcome of the RTB hearing in this case would have been different if the arbitrator had specified what type of estoppel formed the basis for the RTB decision, identified the relevant test, and explained how it was applied. 151 effectively advances a reverse-engineered argument: namely, that the arbitrator must have found the 2012 lease to be valid because promissory estoppel requires an existing legal relationship: *Khela* at para. 106. By contrast, the

respondents ask me to draw inferences from the arbitrator's findings of fact and to apply *res judicata*, a doctrine the RTB decision does not explicitly identify or analyze.

[73] I accept that patent unreasonableness is a high standard, and that the RTB is an expert tribunal whose decisions are entitled to deference. However, reasons must be sufficiently clear and intelligible to allow the parties and others (including a reviewing court) to know why the tribunal decided as it did: *Andree v. Bentley*, 2011 BCSC 641 at para. 24. As noted by Justice Harris (then of this Court) in *Andree* at para. 24, there needs to be a sufficient explanation of why the losing party lost, sufficient reasoning to disclose whether grounds exist to challenge the decision, and sufficient analysis to allow a reviewing body to test the validity of the decision. In my view, the RTB decision here does not meet this minimum standard.

[74] I acknowledge that the validity and enforceability of the 2009 lease was a foundational element of multiple previous decisions involving the parties, including, in particular, the decision of Coval J. in *Gabriele.* If 151 had wished to dispute the validity of the respondents' 2009 lease on the basis it no longer remained in effect and had been replaced with the 2012 lease, it had multiple previous opportunities to advance this argument and failed to do so. I appreciate that 151 denies it was aware of the 2012 lease until 2022, one decade after it says the parties signed it.

[75] Ultimately, reading the RTB decision as a whole, I am unable to follow the line of reasoning that resulted in the arbitrator's conclusory statement that the 2012 lease was not binding on the parties. The arbitrator referenced estoppel generally but not specifically. All parties acknowledge that there are multiple types of estoppel. The RTB decision does not specify:

a) What type of estoppel the arbitrator found to be applicable;

b) What factual findings were consistent with this equitable doctrine; or

c) How the application of those findings of fact to that specific type of estoppel supported the conclusion that the 2012 lease was non-binding.

[76] The RTB decision does not discuss the doctrine of *res judicata* generally or issue estoppel specifically. The respondents argue that, read as a whole, the decision is sufficiently broad to cover both cause of action and issue estoppel, and that the effect of either would bar 151 from relying on the 2012 lease to support its notice to end the respondents' tenancy for arrears of rent. The difficulty with this argument is that, as in *Marshall v. Pohl*, 2019 BCSC 406 at para. 27, it effectively asks this Court to step into the shoes of the arbitrator, to weigh the evidence, and to substitute its view for that of the arbitrator. That is not this Court's role on judicial review: *Marshall* at para. 27, citing *Hawk v. Nazareth*, 2012 BCSC 211 at para. 33.

[77] I recognize that there are parallels between the RTB arbitrator's findings and the comments of Justice Newbury in *Cliffs Over Maple Bay* at para. 14, quoting from the seminal case *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313:

> In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, <u>but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case</u>. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> [Emphasis added]

[78] While I accept that the RTB arbitrator might have considered cause of action and/or issue estoppel, reaching that conclusion would require me to draw inferences from the RTB decision, including, for example:

a) The arbitrator's statement that the landlord did not raise the issue of a 2012 lease "despite being in dispute resolution numerous times since that date" (page 7); and

b) The arbitrator's finding that "the tenants had the right to rely upon the landlord's actions that they were relying upon the 2009 tenancy agreement as this was agreed upon in multiple hearings" (page 8).

[79] The RTB decision, read as a whole, in light of the arbitrator's definition of estoppel, suggests that the arbitrator applied the doctrine of promissory estoppel. I accept that the application of promissory estoppel (to bar 151 from relying on the 2012 lease) would require a finding that the 2012 lease was otherwise a binding contract. Notably, the arbitrator expressly concluded that the 2012 lease was not binding on the parties. It is difficult to reconcile this discrepancy.

[80] Notably, the RTB arbitrator did not engage in this analysis. In my view, the arbitrator's reasons do not allow the parties or this Court to follow the chain of reasoning that lead to their stated conclusions: *Andree* at para. 24. The RTB decision does not set out the arbitrator's analytical process, including, in particular, a clear statement of the governing test, identification of related factual findings, and an explanation of how those findings applied to the test and supported the outcome.

[81] Ultimately, I am unable to conclude that there is a rational or tenable line of analysis to support the RTB decision: *Kong* at para. 58, citing *Victoria Times Colonist* at para. 65. As noted, I also conclude that the reasons fail to grapple with the central issue of whether the 2012 lease was valid, and, if not, the reason. I find that the RTB decision fails to meet the minimum standard set out *in Laverdure*.

3. Did the arbitrator grant an equitable remedy in error?

[82] The petitioner submits that it was patently unreasonable for the arbitrator to grant the respondents an equitable remedy without considering whether they came to court with clean hands: *Khela,* at paras. 117-118. 151 relies on the respondents' admissions that they:

a) Knew about the 2012 lease; and

b) Refused to produce a fully executed copy of it, despite having it in their possession, due to a concern that the petitioner would use it against them.

[83] The clean hands doctrine decrees that "[h]e who comes to equity must come with clean hands": *Mayer v. Mayer*, 2012 BCCA 77 at para. 85. This doctrine is narrowly applied and does not entitle a court to canvass all aspects of the party's behaviour known to the court; its use must be confined to behaviour that is related to the relief sought: *Wang v. Wang*, 2020 BCCA 15 at para. 46.

[84] The maxim must not be taken too widely; what bars the claim is not a general depravity but one which has an immediate and necessary relation to the equity in question: *DeJesus v. Sharif*, 2010 BCCA 121 at para. 85, citing ***Snell's Equity***, 30th ed. (London: Sweet & Maxwell, 2000) at 32. If entitlement to equitable relief can be established without reliance on the alleged misconduct, the alleged misconduct does not bar the granting of the remedy: *Dehydration Research LLC v. EnWave Corporation*, 2022 BCCA 347 at para. 66.

[85] As noted, the respondents attended the RTB hearing without legal counsel. I accept, as did respondents' counsel, that, ideally, the respondents would have produced the interlineated addendum to the 2012 lease which they said they had in their possession before the RTB hearing. However, there was evidence before the arbitrator that the parties' long history of litigation had undermined the respondents' trust in 151. As noted by Ms. McCallister at the hearing, she did not trust Mr. Park not to use the addendum against her in "yet another hearing".

[86] This court has held that a party seeking equitable relief should come to court with clean hands and must disclose all relevant matters to the court: *Wong v. Magnuson*, 2020 BCSC 1752 at para. 24, citing *600443 B.C. Ltd. v. XJ Motors Ltd.,* 2011 BCSC 1144 at 34 and 36 [*XJ Motors Ltd.*]. In *XJ Motors Ltd.*, the court refused to grant relief from forfeiture because it found that the plaintiff did not come to the court with "clean hands", misrepresented facts at best, and, at worst, deliberately attempted to deceive it: *XJ Motors Ltd*. at para. 53.

[87] There is no indication that the respondents' behaviour in this case could be characterized as either misleading or a deliberate attempt to deceive. In my view, production of the interlineated addendum, setting out the Park rules and the precise amendments that the respondents say they made to them, did not preclude a fair determination of the material issues at the RTB hearing. It follows that there was not such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief: *Wang* at para. 48, citing *De Jesus* at para. 85.

[88] Based on the record as a whole, I am not persuaded that the RTB decision was patently unreasonable because the arbitrator failed to consider whether the respondents attended the hearing with "clean hands" before granting an equitable remedy.

4. Did the arbitrator make a flawed assessment of credibility?

[89] The petitioner submits that the arbitrator's assessment of the landlord's credibility was flawed because it failed to consider both: 1) the likelihood that a typographical or clerical error in Mr. Park's affidavit explained a discrepancy between dates in the body and the jurat of this affidavit; and 2) the evidence of Ms. Dillabough. 151 says this flawed credibility assessment renders the RTB decision patently unreasonable.

[90] 151 argues that the evidence before the arbitrator clearly supported the conclusion that the 2021 date in the jurat of Mr. Park's affidavit was a clerical error:

a) The typed jurat in Mr. Park's affidavit references the year 2021, but the lawyer who commissioned this affidavit wrote the year 2022 on the exhibit pages;

b) The contents of Mr. Park's affidavit (including, for example, reference to the landlord's 10 Day Notice to End Tenancy dated April 2022, and the

respondents' response to it filed in May 2022) would have been unknown in 2021;

c) Mr. Park and Ms. Dillabough both testified at the RTB hearing that the 2012 lease was discovered in April 2022;

d) The body of Mr. Park's affidavit references April 2022 (at paras. 19, 20, and 28); and

e) Mr. Park's affidavit contains (at para. 20) a handwritten correction (changing the year he said he attended at the Park offices to check the respondents' tenancy file) from 2010 to 2022.

[91] 151 denies this issue was raised at the RTB hearing, or that it was afforded any opportunity to explain this inconsistency. 151 submits that the arbitrator unfairly impugned Mr. Park's credibility and discounted all of its evidence, including that of Ms. Dillabough, while providing no analysis for doing so.

[92] The Supreme Court of Canada set out guiding principles for reviewing courts on judicial review in *Vavilov* at paras. 105 – 107 and 125 – 126:

a) Administrative decisions must be justified in light of the legal and factual constraints that bear on the particular administrative decision-maker at issue;

b) Decision-makers must take the evidentiary record and the general factual matrix into account and their decision must be reasonable in light of them; and

c) The reasonableness of a decision may be jeopardized where a decision-maker fundamentally misapprehends or fails to account for evidence before it.

[93] I accept, as did counsel for the respondents, that the RTB arbitrator likely misconstrued the date of Mr. Park's alleged discovery of the 2012 lease, based on what was probably a typographical error in the jurat of his affidavit. However, read as a whole, and excluding the inconsistency in dates between the body of Mr. Park's affidavit (2022) and its jurat (2021), I conclude that the RTB decision supports the arbitrator's adverse finding on credibility. In my view, this conclusion is supported by the following statements in the transcript of the RTB proceedings:

a) The arbitrator asked Mr. Park if the landlord was seeking to enforce a tenancy agreement (i.e., the 2012 lease), 10 years after it was either signed or apparently signed;

b) Mr. Park replied that the arbitrator's understanding was correct and that he was unaware of the 2012 lease until April 2022;

c) The arbitrator questioned Mr. Park about this matter again during the hearing, asking "[s]o basically, the landlord did nothing for 10 years, and now all of a sudden [the landlord] want[s] 10 years worth of back rent, is that right?";

d) Mr. Park again replied that the landlord did not know about the 2012 lease until April of 2022, and therefore took no action on it;

e) The arbitrator then asked Mr. Park to confirm, and he subsequently did so, that the landlord had the 2012 lease in its possession for 10 years; and

f) When asked by the arbitrator, Mr. Park confirmed that 151 took no steps in 2013, the first year after the 2012 allegedly came into effect, to issue a 10-day notice (i.e., to end the respondents' tenancy for the non-payment of rent).

[94] The arbitrator expressly rejected 151's position as unreasonable. In my view, it was open to the arbitrator to do so on the available record and to make an adverse assessment of credibility based on Mr. Park's own evidence that, while 151 had the

2012 lease in its possession for 10 years, 151 was unaware of it and took no action on it during this entire time. Reading the RTB decision holistically, in light of the entire record, including the transcript of proceedings, I conclude that the arbitrator's reasons are consistent with a rejection of Mr. Park's evidence on this point, and 151's overall position, as not credible. I am not persuaded that the arbitrator's assessment of credibility was patently unreasonable.

F. Was the arbitrator's decision procedurally unfair?

[95] Further, or in the alternative, the petitioner submits that the RTB decision was procedurally unfair because: 1) the arbitrator decided the matters in issue without addressing whether the respondents ought to have produced the interlineated addendum to the 2012 lease on which they relied; and 2) the arbitrator failed to draw an adverse inference against the respondents for their refusal to disclose this document. 151 says it was denied an opportunity to confirm the existence of this document and to provide evidence and argument in response to it.

[96] In the result, 151 describes the RTB hearing as procedurally unfair because:

a) If the respondents had disclosed the interlineated addendum, 151 could have questioned them about these alleged interlineations and potentially established the validity of the 2012 lease; and

b) If the arbitrator had made an adverse finding regarding the respondents' credibility (based on their admission that they intentionally did not disclose the interlineated addendum because it would support 151's claim), this could have changed the outcome of the hearing.

[97] Procedural fairness comprises two rights: 1) the right to be heard; and 2) the right to an impartial hearing: *Crest Group Holdings Ltd. v. British Columbia,* 2014 BCSC 1651 at para. 36. Procedural fairness goes to the manner in which the decision-maker went about making the decision: *Crest Group Holdings Ltd.* at para. 36.

[98] At the outset of the hearing, the arbitrator expressly confirmed:

a) The identity of all individuals in attendance at the hearing, which proceeded by conference telephone call;

b) That all parties had received the opposing parties' evidence;

c) All parties had affirmed to tell the truth at the hearing; and

d) The arbitrator would not consider any evidence unless it had been properly exchanged before the hearing, and both parties confirmed they had received it.

[99] The respondents say they interlineated the addendum to the 2012 lease, delivered it to 151, and that 151 rejected their proposed changes and returned this original document to them by letter dated May 8, 2012. The respondents did not produce this interlineated addendum to the 2012 lease (which they said they had in their possession) before the RTB hearing. 151 claimed not to have a copy of it. This document did not form part of the evidentiary record before the RTB arbitrator. Based on the arbitrator's express statement in the transcript of the RTB proceedings, I conclude that the arbitrator did not consider this document in rendering the RTB decision.

[100] The respondents did produce a letter which, on its face, was sent to them on the petitioner's behalf on May 8, 2012. This letter is unsigned; the sender is not identified. Mr. Park disputed its validity at the hearing. This letter states:

> Dear Judy and Linda
>
> As per Bill Park's Instructions:
>
> Your lease can't be accepted with the notations you have added. We are installing new electric meters within the next couple of weeks and you will be on regular monthly billing as per the rest of the park.
>
> The rules are not negotiable.
>
> Summerland Beach RV

[101] The respondents also produced a copy of the envelope that accompanied this registered letter, endorsed with a date of May 9, 2012, and a Canada Post stamp. This envelope formed part of the evidentiary record at the RTB hearing; it was open to the arbitrator to rely on it as corroborating evidence that 151 had rejected the amended addendum and returned it to the respondents.

[102] The validity of this letter, and the credibility of all parties, was squarely in issue at the RTB hearing. In my view, production of the interlineated addendum, setting out the Park rules and the precise amendments the respondents say they made to it, did not preclude a fair determination of the material issues before the RTB arbitrator at the hearing. The essential issue was not what specific changes the respondents made to this document, but rather whether the parties had reached a consensus regarding the 2012 lease and whether it was, in turn, a binding contract.

[103] Ultimately, I am not persuaded that the arbitrator's decision to base their reasons on the evidentiary record, absent the interlineated addendum to the 2012 lease, was procedurally unfair.

G. Is the petition an abuse of process?

[104] The respondents submit that the petition ought to be struck pursuant to *SCCR* 9-5(1)(d) as an abuse of process. The doctrine of abuse of process engages the inherent power of the court to control its own process: *Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63* at para. 37.

[105] 151 says that it has a statutory right to seek judicial review of any RTB decision pursuant to the *ATA*. It denies it has ever raised the validity of the 2012 lease in any previous proceedings and submits that this issue is not therefore barred by the doctrine of *res judicata*.

[106] I accept that the petitioner has a statutory right to judicial review of the decision of the RTB arbitrator, and that the validity of the 2012 lease is not an issue that the petitioner has raised previously. Counsel for the petitioner advised that 151

does not seek to set aside the multiple previous decisions made in connection with the parties' longstanding dispute on the basis they are all premised on the validity of the 2009 lease, and not the 2012 lease. On that basis, I make no finding that this petition is an abuse of process

H. Are the respondents entitled to special costs?

[107] Having found that this petition is not an abuse of process, I decline to award special costs.

V. DISPOSITION

[108] The petition is allowed and the matter remitted to the RTB for a rehearing.

[109] As noted, the parties have a long history of dispute resolution, followed by multiple judicial reviews. The petitioner has succeeded on some, but not all, of the arguments it made on this judicial review. In all the circumstances, including my conclusions regarding errors in the RTB decision, and absent information of which I am unaware that might alter this view, I order that the parties each bear their own costs.

"Douglas J."