

CANADA / JUDGMENT

McDonald v. Creekside Campgrounds and RV Park

2020 BCSC 2095

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2095 McDonald v. Creekside Campgrounds and RV Park

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McDonald v. Creekside Campgrounds and RV Park,

2020 BCSC 2095

Date: 20201231

Docket: S207046

Registry: Vancouver

Between:

Lynn McDonald and Dave High

Petitioners

And

Creekside Campground and RV Park and

Treena aka Charlene Knight

Respondents

Before: The Honourable Madam Justice MacNaughton

On judicial review from: A decision of an arbitrator with the Residential Tenancy Branch, dated June 26, 2020.

Reasons for Judgment

Counsel for the Petitioners:

D. Sabelli

Appearing for the Respondents:

C. Knight

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 25, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 31, 2020

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Introduction

- [1] In their amended petition, the petitioners seek an order setting aside the decision of an arbitrator, appointed by the Residential Tenancy Branch ("RTB"), declining jurisdiction over the petitioners' complaint. They seek to have their tenancy recognized under the Manufactured Home Park Tenancy Act, S.B.C. 2002, c. 77 [MHPTA].

- [2] The MHPTA is intended to regulated tenancies for those who occupy a manufactured home park as a permanent primary residence. It does not regulate accommodations intended for short-term vacation or recreational use where the stay is transitory and has no features of permanence: *Steeves v. Oak Bay Marina Ltd.*, 2008 BCSC 1371.

Background

- [3] The petitioners own and live in a recreational vehicle ("RV") and rent a site (the "Site") in the Creekside Campground and RV Park ("Creekside") on the Sunshine Coast in Sechelt, BC. The respondent Charlene Knight manages Creekside.
- [4] According to the petitioners, they have lived in their RV on the Site since September 1, 2017. They have lived at three different locations within Creekside. At first, and while they waited for a permanent site to become available, they were in the tourist section of Creekside. Once a permanent site became available, they moved their RV to it. Finally, when their current Site, which is more private, became available, Creekside consented to the petitioners moving their RV to it.
- [5] On June 1, 2020, the petitioners filed an application for dispute resolution with the RTB to dispute a guest fee which they had been charged by Creekside and to seek a declaration that the MHPTA applies to the RV on the Site. Section 3 of the Manufactured Home Park Tenancy Regulation, B.C. Reg. 481/2003, prohibits guest fees.
- [6] On June 26, 2020, the RTB released the decision that is under review (the "Decision").
- [7] The arbitrator concluded that the petitioners had a licence to occupy the Site, not a tenancy covered by the MHPTA. As a result, the Decision did not deal with the issue of the guest fee.
- [8] The petitioners allege that, in arriving at the Decision, the arbitrator made two significant errors.
- [9] First, the arbitrator failed to weigh or address relevant evidence regarding their exclusive possession of the Site. An applicable RTB policy guideline presumes that a tenancy has been created under the MHPTA if the tenant has exclusive possession of a site, for a term, and pays a fixed amount of rent. If the presumption applies, the evidentiary burden shifts to the landlord to prove otherwise. In this case, the petitioners say that there was no dispute that they paid a fixed amount of monthly rent but the RTB failed to make a finding on their exclusive possession.
- [10] Second, the arbitrator failed to consider the rationale for the MHPTA and, without explanation, failed to apply binding precedent. As a result, the Decision was internally inconsistent and patently unreasonable.

- [11] Creekside filed a response to the petition. Due to an error in the style of cause, it was rejected by the court registry. In order to preserve the date set for this judicial review, and because an unfiled version of the response had been served on the petitioners, I considered Creekside's response and heard Ms. Knight's submissions.
- [12] The Director of the RTB and the Attorney General of British Columbia (collectively, the "Provincial Respondents"), responded to the initial petition. They did not respond to the amended petition and did not appear at the hearing.
- [13] The Provincial Respondents filed an affidavit from Lesley Pollard, attaching the complete record of the proceedings as defined in s. 1 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241. The Provincial Respondents also made written submissions about the applicable standard of review. Apart from opposing a costs award against them, the Provincial Respondents took no position on the relief sought in the petition.

The Issues on Judicial Review

- [14] The issues I have to decide are:
- (a) what is the applicable standard of review of RTB decisions?
 - (b) was there a breach of the petitioners' right to procedural fairness?
 - (c) applying the applicable standard(s) of review, should the Decision be set aside? and;
 - (d) if so, what remedial orders or directions should be made?

The Applicable Standard of Review

Does the Standard of Correctness Apply?

- [15] The petitioners argue that, because the question addressed by the RTB was a jurisdictional one, the applicable standard of review is correctness. I do not agree.
- [16] As the Supreme Court of Canada explained in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov] at para. 17, the presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions can be rebutted in two situations.
- [17] First, reasonableness as a standard may be rebutted where the legislature intends that a different standard applies or provides for a statutory right of appeal. The Court recognized that the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA], is one such legislative statement of intent. The ATA demonstrates that, for many BC tribunals, the legislature did not intend the reasonableness standard to apply to their decisions.

- [18] Second, reasonableness as a standard may be rebutted where the rule of law requires the application of a correctness standard with respect to certain categories of questions. Those questions are constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies.
- [19] In this case, the petitioners submit that the RTB Decision, finding no jurisdiction, left open a question of jurisdictional boundaries between it and the Civil Resolution Tribunal ("CRT"), and created a risk that the CRT would also decline jurisdiction, leaving the petitioners with no available administrative remedy. However, as the majority of the Court in Vavilov explained, at paras. 63-64, the standard of correctness is applied with respect to jurisdictional boundaries when two administrative bodies assert jurisdiction over the same dispute. That is not the case here. In this case, there is only one administrative body involved, the RTB, and it has declined jurisdiction.
- [20] Vavilov made clear, at para. 65, that jurisdictional questions, also referred to as true questions of jurisdiction, no longer attract a correctness standard of review. True questions of jurisdiction were said to arise where a tribunal had to decide whether its statutory authority allowed it to decide a particular question.
- [21] That a patent unreasonableness standard applies on questions of whether an arbitrator has jurisdiction to consider a matter under the MHPTA is also consistent with the finding of this Court in *Powell v. British Columbia (Residential Tenancy Branch)*, 2016 BCSC 1835 at para. 50.

The Applicable Standards

The Standard with Respect to the Jurisdictional Question

- [22] Pursuant to s. 5.1 of the MHPTA, and s. 58 of the ATA, the Provincial Respondents submit, and I agree, that the applicable standard of review is patent unreasonableness.

- [23] Pursuant to s. 77.1 of the MHPTA, RTB decisions are protected by a privative clause. It provides:

77.1 (1) The director has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding under Division 1 of this Part or in a review under Division 2 of this Part and to make any order permitted to be made.

- (2) A decision or order of the director on a matter in respect of which the director has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

- [24] Section 58 of the ATA applies to those tribunals, including the RTB, that are protected by a privative clause. It provides that such tribunals must be considered expert in relation to all matters within their exclusive jurisdiction. Section 58(2) provides that an expert tribunal's findings of fact or law, or exercise of discretion, must not be interfered with unless patently unreasonable.
- [25] Section 58(3) of the ATA defines "patently unreasonable" with respect to discretionary decisions. It does not define patent unreasonableness as it relates to findings of fact or law. However, it is settled law that the standard of patent unreasonableness is at the high end of the spectrum of deference applied to administrative decisions: see, for example, *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at paras. 39-44, endorsing the definition in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52.
- [26] In a number of cases, patently unreasonable decisions have been described as "openly, clearly, evidently unreasonable", "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand".
- [27] In sum, with respect to the petitioners' arguments about the RTB's jurisdictional conclusion in this case, the applicable standard of review is patent unreasonableness as defined in the cases.

The Standard with Respect to Procedural Fairness

- [28] The petitioners' procedural fairness argument, pursuant to s. 58(2)(b) of the ATA, is to be reviewed on a standard of fairness. Procedural fairness requires that a party to an administrative proceeding have the right to be heard, the right to know the case they are required to meet, and the right to a hearing before an impartial decision maker.
- [29] As explained by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 22, assessing the level of procedural fairness required requires a "contextual approach" that looks to the decision being made and its statutory, institutional, and social context. This Court has considered the level of procedural fairness required with respect to RTB hearings in a number of cases.
- [30] In *PHS Community Services Society v. Swait*, 2018 BCSC 824 at para. 88, Justice Sharma acknowledged that the informal nature of hearing processes at the RTB, including conducting hearings by telephone, influences the procedural steps necessary to accord with the duty of fairness.

The Decision under Review

- [31] The RTB held a dispute resolution hearing into the petitioners' complaint on June 25, 2020 (the "Hearing").

- [32] In advance of, and during, the Hearing, the petitioners and the respondents provided evidence that the petitioners' RV was on the Site that was located in the section of Creekside reserved for permanent residents.
- [33] According to Ms. McDonald's affidavit, which was not refuted by the respondents, when the petitioners first arrived on September 23, 2016, they planned to permanently locate their RV at Creekside. Their RV was located in the tourist section of Creekside until a site in the permanent section of Creekside became available. The petitioners moved their RV into the permanent section of Creekside in October 2016. On September 1, 2017, they moved their RV to the Site, which was more private.
- [34] Ms. McDonald said that since 2017, the petitioners have lived in their RV, as their permanent residence, and that they have had exclusive possession of the Site since September 2017. According to the respondents, the petitioners have lived permanently at Creekside since 2016. The petitioners pay rent in the amount of \$550 per month.
- [35] At the Hearing, the respondents did not dispute that there was a verbal agreement that the petitioners were going to live permanently in their RV at Creekside; that is why the petitioners were given a site in the section for permanent residents. In her submissions before me, Ms. Knight acknowledged that there are a number of low income seniors living in RVs at Creekside on a permanent basis, and she described the supportive community of residents.

Was the RTB Decision Declining Jurisdiction Patently Unreasonable?

- [36] "Tenancy" is defined in s. 1 of the MHPTA as a tenant's right to possession of a manufactured home site under a tenancy agreement. A "manufactured home site" is defined as a site in a "manufactured home park" which is rented or intended to be rented for the purpose of being occupied by a "manufactured home". It can include a site in a campground. Based on these definitions, it is necessary to determine whether something is a "manufactured home" in order to determine if it is on a "manufactured home site" and covered by the MHPTA. A "manufactured home" is defined as a structure, whether or not equipped with wheels, designed to be moved by being towed or carried and is used or intended to be used as a living accommodation.
- [37] Therefore, the question the arbitrator had to answer, to determine whether the RTB had jurisdiction over this matter, was whether the petitioners' RV came within the definition of a "manufactured home" and, in particular, whether it was used as a living accommodation. Living accommodation is not defined in the MHPTA, but case law has defined it as a permanent primary residence. Thus, key to the arbitrator's analysis was a determination of whether the petitioners used their R.V. as their permanent primary residence.
- [38] On June 26, 2020, the arbitrator issued the Decision determining that the petitioners have a licence to occupy the Site and not a tenancy covered by the MHPTA. She dismissed the petitioners' application.

- [39] In the Decision, the RTB arbitrator referenced Steeves, and agreed that the MHPTA is not intended to regulate seasonal campgrounds that are used by wheeled vehicles, for temporary accommodation, and licensed to be moved on their own power or towed behind other vehicles. She distinguished Steeves on the basis that it was "based on other fact, as this decision was based on ending the tenancy agreements that were under the Manufacture Home Park Act. These tenancy agreements were signed, and which required the tenants to provide at least one month notice to end tenancy" (As written).
- [40] The arbitrator went on to accept that the petitioners' RV was designed for recreational use, saying:

In this case, I accept that the R.V. is designed and intended for recreational use the [sic] residential use. This is not a large manufacture[d] home that will require any significant effort to move, which it has been moved on three occasion by being towed behind another vehicle.

- [41] Although the arbitrator accepted that the RV on the Site was used by the petitioners as their primary residence, she found that the use of a recreational vehicle for longer-term housing did not change the intent or purpose of the MHPTA. She found that the passage of time did not change the original agreement between the petitioners and the respondents, which stated that the accommodation was subject to a licence to occupy.
- [42] The arbitrator considered Residential Tenancy Policy Guideline No. 9, issued by the RTB (the "Guideline"). Although RTB guidelines do not have the force of law, the preface to the Guideline states that it is "intended to help the parties to an application understand the issues that are likely to be relevant" and may also "help parties know what information or evidence is likely to assist them in supporting their position."
- [43] The Guideline clarifies the factors distinguishing a tenancy agreement from a licence to occupy. As it relates to the issues in this case, the Guideline sets out the definition of tenancy agreement in the MHPTA as "an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a manufactured home site, use of common areas and services and facilities. It does not include a licence to occupy" (Emphasis in original).
- [44] The Guideline then describes tenancy agreements and licences to occupy. It provides:

B. TENANCY AGREEMENTS

Under a tenancy agreement, the tenant has exclusive possession of the site or rental unit for a term, which may be on a monthly or other periodic basis. Unless there are circumstances that suggest otherwise, there is a presumption that a tenancy has been created if:

- the tenant gains exclusive possession of the rental unit or site, subject to the landlord's right to access the site, for a term; and

- the tenant pays a fixed amount for rent.

C. LICENCES TO OCCUPY

Under a licence to occupy, a person is given permission to use a rental unit or site, but that permission may be revoked at any time. The Branch does not have the authority under the MHPTA to determine disputes regarding licences to occupy.

[45] The Guideline provides that it is up to a party applying under the MHPTA to show that a tenancy agreement exists.

[46] As explained in Steeves, an RV may be a permanent home that is occupied for "long continuous periods". Accordingly, as explained in the Guideline, the MHPTA may apply even if the home is in an RV park or a campground. The Guideline sets out a non-exhaustive lists of features which may indicate permanence:

- The home is hooked up to services and facilities meant for permanent housing, e.g. frost-free water connections;
- The tenant has added permanent features such as a deck, carport or skirting which the landlord has explicitly or implicitly permitted;
- The tenant lives in the home year-round;
- The home has not been moved for a long time.

[47] The Guideline also sets out a list of factors that may suggest that the MHPTA does not apply:

- the park (or property) owner retains access to or control over portions of the site and retains the right to enter the site without notice;
- rent is charged at a daily or weekly rate, rather than a monthly rate and tax (GST) is paid on the rent;
- the parties have agreed that the occupier may be evicted without a reason, or may vacate without notice;
- the agreement has not been in place for very long;
- the property owner pays utilities and services like electricity and wi-fi; and
- there are restricted visiting hours.

[48] The Guideline explains that, in coming to a decision about whether the MHPTA applies, an RTB arbitrator will weigh all the factors for and against finding that a tenancy exists.

The Adequacy of Reasons

- [49] RTB decision makers are not required to meet the standard for adequacy of reasons that apply to courts. For reasons to be sufficient, they must: (1) set out the applicable legal test, (2) set out the findings of fact and the evidence upon which those findings were made, and (3) apply the test to those facts in a way that makes clear how and why the final decision was arrived at: *Laverdure v. First United Church Social Housing Society*, 2014 BCSC 2232 at para. 35.
- [50] In *Laverdure* at para. 37, the court said:
- [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.
- [51] Although *Vavilov* has limited application when reviewing administrative decisions to which the ATA applies, it confirms that the focus of a reviewing court must be on a decision maker's reasons even when the applicable standard is statutory. In that regard, *Vavilov* confirmed the BC Court of Appeal reasons in *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 74, directing that judicial review involves a review of the outcome of the decision and the reasons provided for it.
- [52] In this case, I have concluded that the RTB arbitrator's decision is patently unreasonable. In particular, the arbitrator failed to consider that the evidentiary burden shifted to the respondents once the petitioners established that they had exclusive possession of the Site, subject to Creekside's right to access the site, for a term, and that the petitioners paid a fixed rental amount. Had it been necessary, I would also have concluded that the arbitrator did not consider relevant evidence.
- [53] Evidence of the petitioners' exclusive possession of the Site, for a term, was highly relevant. As explained in *Wiebe v. Olsen*, 2019 BCSC 1740, the Guideline creates a presumption that a tenancy exists where there is exclusive possession and rent is paid for a term. The term can be from month to month. In *Wiebe*, the court recognized, at para. 41, that an arbitrator is not required to follow the Guideline, but must explain why they are not following it, or not applying the presumption created by exclusive possession and rent paid for a term. These facts, together with the payment of monthly rent, were sufficient to shift the burden to the respondents to establish that a tenancy did not exist based on other factors.
- [54] In *Wiebe*, the RTB arbitrator also declined jurisdiction under the MHPTA. The court found that the decision was patently unreasonable as a result of the arbitrator's failure to provide reasons for not following the Guideline or applying the presumption favouring a tenancy:

- [38] As noted, the Arbitrator relied on the Guideline. Although the Guideline does not have the force of statute or regulation, I accept that the Arbitrator could reasonably have regard to it: Powell at paras. 32-33. However, once a decision was made to apply the Guideline, the Arbitrator should have applied the Guideline consistently. It was problematic for the Arbitrator to "cherry pick" aspects of the Guideline without some explanation of why those aspects were applied to the exclusion of others.
- [40] the Arbitrator did not address the fact that the Guideline itself contemplates a shifting evidentiary onus. Once an applicant has demonstrated that they have exclusive possession for a term and that rent is paid, the Guideline provides for a presumption that there is a tenancy, suggesting that at that point at least an evidentiary burden should shift to the respondent
- [55] In this case, the petitioners provided evidence to the arbitrator that they had exclusive possession of the Site, and the arbitrator accepted that the petitioners paid monthly rent. Although the Decision identified this evidence, the arbitrator did not consider the presumption that it created, and the Decision suggests that the evidentiary burden remained on the petitioners throughout. In particular, the arbitrator wrote:

It is up to the party making an application under the MHPTA to show that a tenancy agreement exists. To determine whether a tenancy or licence to occupy exists, an arbitrator will consider what the parties intended, and all the circumstances surrounding the occupation of the rental unit or site.

In light of the above, I find the tenants have not established that a tenancy exists. I find the tenants have a license to occupy with [sic] can be revoked at any time. I find the tenants were not entitled to make an application for any remedies under the [MHPTA]. Therefore, I dismiss the tenants' application without leave to reapply.

- [56] Further, the arbitrator should have made findings on the criteria outlined in the Guideline. Although the Guideline did not bind the arbitrator, the reasons should have articulated why the arbitrator did not apply the factors set out in the Guideline to the circumstances of this case.
- [57] It was incumbent on the arbitrator to analyze the facts in comparison to the type of living accommodation to which the MHPTA was intended to apply and the type of living accommodation to which it was not. In this case, that analysis would involve assessing whether the RV on the Site was used, or intended to be used, by the petitioners as their permanent primary residence, as opposed to short-term use for a vacation or for recreation.

[58] There is no evidence that the petitioners' RV was used for anything other than permanent residential use, at least after 2017 when they moved it to the Site. The Arbitrator's conclusion that the MHPTA did not apply to the petitioner's situation denied the petitioners' access to certain rights and protections guaranteed under it. For example, the respondents could decide to tow the petitioners' home from the Site without notice, impose arbitrary fees, or increase the rent without limit.

[59] The Arbitrator wrote:

I have read the Supreme Court decision of *Steeves vs Oak Bay Marine Ltd*, submitted by the tenants' advocate I find that decision is based on other facts, as this decision was based on ending the tenancy agreements that were under the Manufacture[d] Home Park Act. These tenancy agreements were signed, and which required the tenants to provide at least one month notice to end tenancy.

The decision also stated the following that related to R.V's in a campground, which is the case before me.

[112] The MHPTA is not intended to regulate seasonal campgrounds that are utilized not by large manufactured homes that require significant effort to move from place to place but by wheeled vehicles intended and used as temporary accommodation and licensed to be moved on their own power or towed behind other vehicles. That such RVs can and occasionally are used as longer-term housing is evidenced by some of the homes in the Pedder Bay Park. That use in and of itself does not, in my opinion, change the character or purpose of the MHPTA.

[60] The arbitrator said that the use of the RV by the petitioners for longer-term housing did not change the intent or purpose of the MHPTA. She wrote, "the passage of time does not change the term of the original agreement." This phrase was in an earlier version of Guideline No. 9. It was rewritten in May 2020, prior to the arbitrator's decision in this case. The current Guideline makes it clear that the passage of time may change the nature of an agreement.

[61] The case law confirms that permanence constitutes part of the definition of "living accommodation" as it applies to manufactured homes covered by the MHPTA. Permanence may be determinative of whether a tenancy exists. The passage of time may have the effect of changing the original agreement, but the arbitrator's reasons make a conclusory statement in that regard without any analysis. In *D. & A. Investments Inc. v. Hawley*, 2008 BCSC 937, this Court upheld an arbitrator's decision that the MHPTA applied to recreational vehicles in an RV park because they were being used as a principal residence over several years, rather than for recreational use.

[62] The current Guideline confirms that duration of the arrangement matters. It references *Steeves* and states that "there are situations where an RV may be a permanent home that is occupied for 'long, continuous periods.'"

- [63] Applying only some of the factors set out in the Guideline, the arbitrator concluded that the petitioners did not have frost-free water lines which would be expected if the intent was permanent housing. The arbitrator also found that the tenants did not have prior permission to erect structures and the structures they had erected were not permanent. The arbitrator appeared to ignore the issue of implicit consent.
- [64] The arbitrator discounted the permanence of the structures the petitioners had erected, concluding that the decking could easily be removed, the roofing over the RV appeared to be "A" frame construction covered in a type of plastic and could easily be removed, and the canopy had small posts covered in plastic and appeared to be unstable. The arbitrator did not consider the shed a permanent structure.
- [65] The arbitrator did not accept the petitioners' evidence that they did not know that they were charged GST. The arbitrator found that neither party was required to give notice to end the tenancy. According to the Creekside Campground Rules Guide ("Creekside Rules") put in evidence by the respondents, long term/month-to-month residents had a licence to occupy a site, and either party could end the license without delivering a notice to vacate.
- [66] Finally, the arbitrator concluded:
- Furthermore, while I accept the tenants have lived within the campground for a period of time, however, they have moved their R.V. three times to different sites. This does not support this tenancy is of a very long period or meant to be permanent, and even if it was, the passage of time does not change the original agreement.
- [67] The terms of the original agreement between the petitioners and the respondents are not decisive because, pursuant to s. 5(1) of the MHPTA, landlords and tenants cannot avoid or contract out of the MHPTA, and an attempt to do so is of no force or effect.
- [68] The arbitrator was required to determine whether the petitioners used or intended to use their RV on the Site as their permanent primary residence regardless of the terms of the original agreement that applied when they arrived at Creekside in 2016. In failing to address whether, on the evidence, the petitioners had established their exclusive possession of the Site, the arbitrator failed to determine whether the presumption of tenancy applied and failed to shift the burden to the respondents to establish otherwise.
- [69] Having decided to apply some of the Guideline factors pointing against the existence of a tenancy relationship, the arbitrator should have considered other factors suggesting such a relationship or explained why other factors were not considered.
- [70] In Powell, this Court remitted a decision to the RTB on the basis that the arbitrator did not consider relevant evidence in her analysis of whether the accommodation was covered by the MHPTA at paras. 57-82. In her analysis, the arbitrator relied entirely on the duration of the tenant's use of a recreational vehicle as their primary residence, finding the MHPTA applied. She listed several other factors that were relevant, some of which supported that the MHPTA would apply and some that did not. She did not discuss any of those factors in

her analysis. She stated there was no "viable" evidence to support the landlord's claim that the MHPTA did not apply. This statement led Justice Voith to conclude that the "Guidelines should not, and do not, bind a decision-maker" but the failure of the arbitrator "to either refer to this guidance or to address why she chose to deviate from it again suggests that the Arbitrator never considered the factors in the Guidelines and, more specifically, the evidence led by the petitioners in relation to those factors": para. 81. The arbitrator's decision was patently unreasonable as it ignored or disregarded relevant evidence.

- [71] The following cases are some of the examples of how this Court has considered when the MHPTA should apply and when to quash an arbitrator's decision on that point.
- [72] In 977230 Alberta Ltd. v. Boire, 2019 BCSC 66, the only issue for the court to decide was whether the MHPTA applied to certain lands on which the respondents had built mobile homes, decks, patios, water and sewage tanks, and garages. That decision was not a judicial review; it dealt with the transfer of leases following a mortgage foreclosure. The MHPTA did not apply as the respondents lived elsewhere for most of the year, and were not able to show that they primarily resided in the RVs or manufactured homes at issue, though they used the properties on a regular basis.
- [73] In Lang v. British Columbia (Residential Tenancy Arbitrator), 2008 BCSC 1707, the petitioner's manufactured home was located in a seasonal campground. In winter, the facilities (laundry, washrooms) were closed, and only 18 of 156 sites remained occupied. The manufactured home had laundry and shower facilities inside, a frost-free water hookup, and a sewage connection. It had been located there for ten years, though the petitioner had only recently purchased it. It was the petitioner's only residence, and he paid for hydro on top of monthly rent. The arbitrator held the manufactured home was not covered under the MHPTA, as the campground's rules were inconsistent with a residential tenancy. The arbitrator's ruling conflicted with two recent rulings on the same campground, where the MHPTA was considered applicable. The petitioner pointed this out at a review of the original arbitration decision, before a different arbitrator, who upheld the first arbitrator's decision. The court found the second arbitrator's decision patently unreasonable and overturned it. The second arbitrator should have asked what the outcome would have been if those conflicting rulings had been brought to the attention of the first arbitrator. Justice Brooke commented, at para. 20, that "Clearly, the recreational vehicle or manufactured home of the petitioner is a manufactured home within the meaning of the definition in the [MHPTA]."
- [74] For these reasons, I determine that the arbitrator's decision was patently unreasonable. In this case, the decision cannot be rationally supported by the legislation and the evidence. It is clearly and obviously unreasonable.

Were the Petitioners Denied Procedural Fairness?

- [75] The petitioners submit that a key piece of evidence was not disclosed to them, resulting in a denial of procedural fairness.

- [76] During the Hearing, it became apparent that the petitioners did not have a complete copy of the Creekside Rules that the respondents submitted as part of their evidence to the RTB. The petitioners advised the arbitrator that they were missing the page containing rules 43-50. The arbitrator said she was missing the page containing rules 9-25. (I note that the copy of the Creekside Rules in the record before the court is also missing that page.)
- [77] According to Ms. McDonald, when Ms. Knight offered to read the missing rules aloud, the arbitrator said it was unnecessary because she believed that rule 1, marginally noted as "licence to occupy", was the only relevant rule. Ms. McDonald's evidence about the missing rules was not refuted by Ms. Knight.
- [78] Rule 5 of Creekside Rules states that it "appreciates advance notice from a guest who plans to vacate". There is a note in the margins of the page containing rules 43-50 that states, "notice to vacate is not required but will normally be granted by [Creekside] so the guest has time to make arrangements to leave".
- [79] Despite the arbitrator's view that rule 1 was the only relevant rule, in support of the finding, the arbitrator relied upon a rule on the page that was not in the petitioners' possession during the Hearing:

Further, I am satisfied that there is no requirement for either party to give notice to end the tenancy. The rule guideline filed in evidence by the landlord show that either party can end the licence to occupy at any time, although it is suggested that some notice would be appreciated for either party.

- [80] In the Decision, the arbitrator does not mention either party raising the issue of notices to terminate. The rule's implications do not appear to have been argued. The Decision indicates that the arbitrator relied on the rules she had been given to make a finding on an issue that neither party raised, or had the opportunity to speak to, during the Hearing. In any event, the petitioners did not have the evidence before them to be able to speak to it.
- [81] In all the circumstances, it was procedurally unfair for the arbitrator to rely on a rule that the petitioners did not have.
- [82] As a result, I find that the petitioners did not know the case they had to meet and did not have an opportunity to address one of the issues the arbitrator relied on to dismiss their application.

What Remedial Orders Should be Made?

- [83] The petitioners ask that I make a finding that the RTB has jurisdiction over the RV on the Site and only remit the remaining issues in the petitioners' application to the RTB.
- [84] In Vavilov at para. 142, the Court outlined several situations in which it may be appropriate to decide an issue instead of remitting it back to an administrative tribunal. One such situation is where it becomes evident to the court, in the course of a judicial review, that a particular outcome is inevitable and that, as a result, remitting the case would serve no

useful purpose. Considerations of delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs, and the efficient use of public resources will also impact an exercise of discretion not to remit a matter back to an administrative decision maker.

- [85] I accept that, in this case, there was no dispute that the RV was on a Site in the permanent part of Creekside. There was also no dispute that the petitioners have been living in their RV permanently for more than three years.
- [86] Nevertheless, in light of the injunction prohibiting the respondents from towing the RV until the determination of this judicial review, the petitioners are protected from any actions by the respondents to terminate the tenancy arrangement or to tow their RV.
- [87] I have decided that it is appropriate to remit the matter back to the RTB for redetermination taking into account the above considerations. They are the expert administrative body intended by the legislature, and best suited, to weigh all aspects of the Guideline in the circumstances of this case and to do so based on the policy objectives of the MHPTA.
- [88] I extend the interim injunction initially granted on August 12, 2020, until a decision is issued by the RTB on the question of jurisdiction.
- [89] I decline to make an order that the matter be decided by a new arbitrator as, in my view, such a direction would interfere with the assignment of matters at the discretion of the director of the RTB.

"MacNaughton J."

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