Dispute Resolution Services

Residential Tenancy Branch
Ministry of Housing

A matter regarding PACIFIC VILLAGE II LTD C/O TRIBE MANAGEMENT INC
and [tenant name ppressed to protect privacy]

DECISION

Landlord Pacific Village II Ltd C/O Tribe Management Inc. applied for an additional rent increase for capital expenditures under section 43(3) of the Residential Tenancy Act (the Act) and 23.1 of the Residential Tenancy Regulation.

This decision should be read in conjunction with the decisions dated January 19, May 30, October 18, 2023 and February 12, 2024.

On February 12, 2024 I authorized tenant CHB to serve written submissions and evidence about jurisdiction and the Landlord to serve response submissions and evidence. Hereinafter, I will refer to these documents as the jurisdiction documents.

Both parties submitted their jurisdiction documents to the RTB and did not raise issues about service of these documents.

The documents submitted by tenant CHB include a letter from the Songhees Nation. I accept this letter as part of the submissions from CHB, as the Songhees Nation is not a part of this application.

I have reviewed all the jurisdiction documents but will refer only to what I find relevant for my decision.

Both parties agree the rental complex is located on Songhees reserve land, the Landlord is not a first nation, but tenant CHB is a member of the Songhees Nation.

The parties have opposing positions about the application of the *Act* in this matter and referenced several decisions in their submissions:

- Cardinal v. A.-G. Alta., 1974 2 SCR 695 *(Cardinal)*
- Park Mobile Home Salves v. Le Greely, 1978 BCCA 601 *(Park Mobile)*
- Derrickson v. Derrickson, 1986, 1 SCR 285 *(Derrickson)*
- Matsqui Indian Band v. Bird, 1992 BCSC 1255 (*Matsqui)*
- Sechelt Indian Band v. British Columbia, 2013 BCCA 262 *(Sechelt)*

- Bosa v. Canada (Attorney General), 2013 FC 793 *(Bosa)*
- McCaleb v. Rose, 2017 BCCA 318 (*McCaleb)*
- Matachewan First Nation v*.* Reeb, 2021 ONSC 7166 (*Matachewan*)

In 1974 the SCC decided in *Cardinal* about the application of the *Wildlife Act of Alberta, R.S.A. 1970,* on reserve land:

> 37. I am unable to agree that the broad terms used in the first portion of s. 12 can be limited, inferentially, in this way. In my view, having made all Indians within the boundaries of the province, in their own interest, subject to provincial game laws, the proviso, by which the province assured the defined rights of hunting and fishing for food, was drawn in broad terms. The proviso assures the right to hunt and fish for food on Indian reserves, because there can be no doubt that, whatever additional rights Indian residents on a reserve may have, they certainly have the right of access to it. This view was expressed by the Saskatchewan Court of Appeal in Rex v. Smith, [1935] 2 W.W.R. 433, 64 C.C.C. 131, [1935] 3 D.L.R. 703 , to which reference has already been made.
> 38. For these reasons, I am of the opinion that s. 12 of the Agreement made the provisions of The Wildlife Act applicable to all Indians, including those on reserves, and governed their activities throughout the province, including reserves. By virtue of s. 1 of the B.N.A. Act, 1930, it has the force of law, notwithstanding anything contained in the B.N.A. Act, 1867, any amendment thereto, or any federal statute.

In *Park Mobile* the BCCA decided about the application of the *Landlord and Tenant Act, S.B.C. 45,* on reserve land:

> 1 The issue in this appeal is whether s.27 of the Landlord and Tenant Act, 1974, S.B.C. Ch. 45, which restricts the right of a landlord to increase rent for residential premises applies to a month-to-month tenancy of a pad located in a mobile home park on an Indian Reserve, the landlord and tenant being non-Indians. It is my view that this section does apply.
> 2 The Tsinstikeptum Indian Reserve No. 9 is located in Osoyoos Division of the Yale District of the Province of British Columbia. On July 1st, 1971, Her Majesty the Queen, represented by the Minister of Indian Affairs and Northern Development, leased to Wes-Kel Holdings Ltd., Lots 31 and 32 of the Reserve, for a term of fifty years. On the 12th day of October, 1972, Wes-Kel Holdings Ltd. sub-let the property (for the balance of the term) to Park Mobile Homes Sales Ltd., the appellant herein. In August 1975 the appellant rented a mobile home pad to the respondent Le Greely pursuant to the terms of a month-to-month residential tenancy agreement. Subsequently, a dispute arose between the appellant and the respondent in respect of a proposed rent increase.

> 3 A hearing was held on the matter before the Rentalsman under the provisions of the Landlord and Tenant Act. At the hearing, counsel for the appellant argued that the Rentalsman was without jurisdiction to hear the dispute as the mobile park was located on Indian land belonging to the Federal Government. The Rentalsman ruled that he did have jurisdiction to hear this dispute. An appeal was taken from his decision to His Honour Judge Macdonald, who, in effect, affirmed the Rentalsman's decision. It is from this affirmation that the present appeal is brought.
> […]
> 9 This case is stronger on its facts than was the Cardinal case. There the Court held that if the legislation passed the above mentioned test it would be applicable everywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it. In the present case, the dispute is between non-Indians; further, an increase in rent does not affect Indian lands or the use of Indian lands. It follows that the Rentalsman has jurisdiction under s.27 of the Landlord and Tenant Act to deal with the dispute.
> […]
> 14 Accordingly I would dismiss the appeal.

In 1986 the SCC decided in *Derrickson* that Part 3 of the *Family Relations Act of British Columbia, R.S.B.C 1979,* is not applicable to reserve land:

> 89. I would answer the constitutional question as follows:
> Question: Whether the provisions of Part 3 of the Family Relations Act, R.S.B.C. 1979, c. 121, dealing with the division of family assets, are constitutionally applicable to lands in a reserve held by an Indian, in view of the Indian Act, R.S.C. 1970, c. I-6?
> Answer: No.
> 90. I would dismiss the appeal. No order as to costs was made by the Supreme Court of British Columbia nor by the Court of Appeal. I would likewise make no order as to costs.

In 2013 the BCCA decided in *Sechelt,* considering *Derrickson,* about provincial legislation applying on reserve land:

> [50] The present case concerns the Sechelt Lands which, by s. 31 of the Self-Government Act, are designated “lands reserved for the Indians within the meaning of Class 24 of section 91 of the Constitution Act, 1867”. I consider the case of Derrickson, decided subsequent to Re Park Mobile Homes, to be clear authority for the proposition that provincial legislation is not applicable to affect possession of such land. The MHPTA does purport to regulate possession of land under tenancy arrangements. I consider the comments of Chouinard J. in Derrickson set forth at para. 38, supra are applicable in the present case.

> […]
> [52] While I consider the case of Re Park Mobile Homes should be considered to be of doubtful authority in light of subsequent Supreme Court of Canada decisions, I need not reach any final conclusion on this issue as that case is distinguishable from the present one on its facts. Unlike the situation in that case, which involved a tenancy dispute between non-Indians, the present case involves a situation where the tenancy agreement is with an Indian band, the Sechelt Indian Band. I consider that whether one applies the doctrine of inter jurisdictional immunity or paramountcy, the result must be that the provisions of the MHPTA should be found to be inapplicable to the present dispute. I would therefore allow the appeal from the judgment of Silverman J. and set aside the decisions of the DRO. I would grant the declaration sought by the Band that the MHPTA is constitutionally inapplicable to any landlord and tenant relationship created by lease on the Sechelt Lands.

In 2017 the BCCA reaffirmed *Sechelt* in *McCaleb:*

> [14] In conclusion, Sechelt Indian Band remains a binding decision of this Court and is determinative of the issue in this appeal of whether the MHPTA is constitutionally inapplicable to the tenancy agreement between the appellant and the respondents. The summary trial judge was correct to have applied the decision in Sechelt Indian Band in ruling in favour of the respondents and, accordingly, I would dismiss the appeal.

Section 5.1 of the *Act* states that section 44 of the Administrative Tribunal Act (*ATA)* applies to the *Act.* Section 44(1) of the *ATA* states: "The tribunal does not have jurisdiction over constitutional questions."

Both parties raised questions about the application of the *Act* in this matter and based their submissions on the decisions listed above. In order to determine if the *Act* applies, the constitutional questions must be answered. Per section 44 of the *ATA,* I do not have jurisdiction over constitutional questions.

Thus, I decline to proceed with this matter.

The parties are at liberty to seek legal remedy in the Superior Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Act*.

Dated: March 25, 2024

Residential Tenancy Branch