

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cowichan Hospitality Group Ltd. v.
Canada Mental Health Association,*
2026 BCSC 1371

Date: 20260721
Docket: S231271
Registry: Victoria

Between:

Cowichan Hospitality Group Ltd. dba Ramada Duncan

Plaintiff

And:

**Canada Mental Health Association, Cowichan Valley Branch 1992, and
the Provincial Rental Housing Corporation**

Defendants

Before: The Honourable Justice K. Wolfe

Reasons for Judgment

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(November 17-21 and 24-27, 2025)

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Place and Date of Trial:

Victoria, B.C.
November 17-21 and 24-28, 2025

Place and Date of Judgment:

Victoria, B.C.
July 21, 2026

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Introduction and scope of phase one of the trial

[1] The COVID-19 pandemic required the world to change and adapt in ways previously not contemplated. Social distancing had tangible effects on people's daily lives, including the lives of vulnerable segments of the population. For the unhoused, creative solutions were required to address the reality that shelters could not accommodate the same number of individuals. In some communities in British Columbia, provincial entities worked with organizations involved in social housing to temporarily rent hotel space to provide shelter for the unhoused.

[2] The present claim arises from one of these arrangements. In Duncan, British Columbia, the plaintiff, Cowichan Hospitality Group Ltd. dba Ramada Duncan ("Cowichan"), entered into a contract in May 2020 with the defendant, Canadian Mental Health Association, Cowichan Valley Branch 1992 ("CMHA") to rent all 34 rooms in Cowichan's Ramada hotel (the "Hotel"). The British Columbia Housing Management Commission ("BC Housing") and its land-holding arm, the defendant, the Provincial Rental Housing Corporation ("PRHC"), funded and supported this arrangement.

[3] Initially, the contract was for one month. It was quickly extended – first to the end of June 2020, then to the end of September 2020 and then beyond. There are disputes about how the agreement evolved over time, including what obligations continued when the CMHA terminated its involvement at the end of November 2020 and BC Housing stepped in directly. However, there is no dispute the unhoused population continued to use the Hotel, and BC Housing / PRHC funded that use, until April 30, 2022.

[4] Cowichan says the vulnerable population destroyed the Hotel during the rental period and the agreement between the parties required the Hotel to be restored to brand standards, with rent to be paid until it was functioning again. Disputes arose about the degree of damage done by the guests, the scope and cost of the restoration required and who was responsible for doing that work. Although

the Hotel's rooms were gutted by a BC Housing contractor in May 2022 after the guests vacated, they were never restored.

[5] Cowichan initially filed this claim against CMHA and PRHC. The claim as filed alleges breach of contract and seeks orders compelling restoration of the Hotel, as well as damages for unpaid rent until the Hotel becomes functional again. Cowichan confirmed at trial it no longer seeks specific performance. Shortly before the trial commenced, and by consent, Cowichan discontinued its claim against CMHA. Although no request was made to amend the style of cause, in practical terms, PRHC is the only remaining defendant.

[6] PRHC admits it was obligated to restore the Hotel to its May 2020 pre-lease condition and says it took reasonable steps towards that end, but Cowichan refused to cooperate and failed in its own obligations to undertake the work PRHC could not do. PRHC says if Cowichan had done so, the present dispute would be limited to how much PRHC should reimburse Cowichan. However, because of Cowichan's alleged failure to meet its own duties, PRHC says it has no obligation to pay Cowichan rent beyond the end of September 2022, the date by which the restoration was originally expected to be completed.

[7] At the start of trial, PRHC applied to sever the liability issues from those of damages, primarily on the basis that the scope of the contractual obligations should be settled first. Cowichan agreed and consented to severance. After hearing submissions, I gave brief oral reasons and granted an order that the liability issues be heard and determined first, and that I be seized of phase two. While some of the evidence I heard goes to the issue of damages, the parties agree my focus at phase one is on liability and contractual interpretation.

[8] In general terms, the severance order specified that phase one of the trial would address the terms of the agreement between Cowichan and PRHC, and how those terms should be interpreted, including whether PRHC breached its obligations to restore the Hotel and / or to pay rent to Cowichan after September 30, 2022. These are my reasons on phase one of the trial.

Issues

[9] Both parties accept there was an agreement between Cowichan and PRHC that permitted BC Housing / PRHC to use the Hotel for the unhoused population between December 1, 2020 and April 30, 2022. However arguments about what specifically constituted that agreement, and the proper scope and interpretation of its terms and obligations, occupied phase one of the trial.

[10] The parties articulated the phase one issues in the severance order. The first issue concerns contract formation; the remaining issues all arguably relate to contractual interpretation, including whether PRHC breached any of its obligations (once properly defined). The severance order also preserves the Court's discretion to decide that one or more of the "liability issues" should be determined at phase two, which will address damages (including mitigation and quantification).

[11] In closing submissions, PRHC submitted the breach questions should be left to phase two of the trial, given what PRHC characterized as the parties' mutual obligations to restore the Hotel. Cowichan argued the Court should determine if PRHC breached its obligations to restore the Hotel and pay rent, subject to future arguments about mitigation at phase two.

[12] In these reasons, I have approached the issues as follows:

- a) what constituted the agreement between Cowichan and PRHC?
- b) what was the scope of PRHC's obligation to restore the Hotel and did PRHC breach that obligation?
- c) is PRHC entitled to a reduction in the cost to restore the Hotel by reason of betterment? and
- d) was PRHC obligated to pay rent to Cowichan after September 30, 2022 and if so, did PRHC breach that obligation?

[13] As the parties anticipate a phase two, neither addressed costs at this stage.

The factual background

[14] At the start of trial, Cowichan and PRHC provided an agreed statement of facts. The following chronology of events builds on the agreed statement of facts based on the evidence at trial. Although many of the relevant dates and events were captured in contemporaneous communications among those involved, some witnesses unsurprisingly testified to their own perceptions of what occurred. Where the parties disagree about facts that I must resolve for this decision, I address those disputes either in this section or in the analysis.

The parties

[15] Cowichan is a company incorporated under the laws of British Columbia; its three shareholders are themselves companies, each of which owns 1/3 of the shares in Cowichan. One of the shareholding companies, Adepta Properties Ltd., is owned by Mr. Omar Lalani, Mr. Av Hundle and Mr. Adrian Robinson. A number of other individuals were involved in Cowichan through the other shareholding companies. The individuals who comprise these “indirect” owners of Cowichan were sometimes referred to as the “ownership group”. Cowichan called Mr. Lalani to give evidence during this phase of the trial.

[16] PRHC is a government corporation incorporated under the laws of British Columbia and an agent of the Crown in right of the Province of British Columbia under s. 10(2) of the *Ministry of Lands, Parks and Housing Act*, R.S.B.C. 1996, c. 307 (the “Act”). The parties agree that PRHC acquires, leases, and holds land for use by BC Housing in the management and administration of housing projects in British Columbia.

[17] BC Housing is also incorporated under the laws of British Columbia. Section 10(1)(b) of the Act continues BC Housing as a corporation; s. 10(2) makes BC Housing an agent of the Crown. The evidence confirms that BC Housing works with provincial entities and different levels of government, various non-profit and community organizations, and others on a range of housing-related initiatives,

including shelters and supportive housing. BC Housing develops, manages and administers housing initiatives, including by funding them; it also administers PRHC.

[18] From approximately April 2020 to January 2022, Ms. Cassandra Chang, a real estate asset manager at BC Housing, was Cowichan's primary point of contact with BC Housing / PRHC. When Ms. Chang abruptly went on leave in January 2022, Ms. Sandeep (Sandy) Lamba, a property agent in real estate strategies at BC Housing, took over Ms. Chang's point of contact role. From May 31, 2020 to October 1, 2022, Mr. Patrick Murphy, an executive director at BC Housing, was also involved in certain issues concerning BC Housing / PRHC's rental of the Hotel. Of these three individuals, PRHC only called Ms. Lamba to give *viva voce* evidence during this phase of the trial. As explained below, by agreement, Ms. Chang's evidence was provided through excerpts from the transcript of her examination of discovery. PRHC did not call Mr. Murphy to testify.

[19] While PRHC and BC Housing are two separate legal entities, throughout the evidence, and in practical terms, they were largely treated as one and the same by the individuals involved in the events that led to this proceeding. The people who communicated with Cowichan about the lease of the Hotel were employed by BC Housing. Their email addresses terminated in "@bchousing.org". Communications with Cowichan, contractors and others generally referred to BC Housing, rather than PRHC. At all times, including when the CMHA was still directly involved, Cowichan understood "BC Housing" to be funding the lease of the Hotel. Counsel for PRHC submitted that individuals like Ms. Chang and Ms. Lamba were agents of BC Housing, negotiating on behalf of PRHC.

[20] Accordingly, while the named defendant to this proceeding is PRHC (as the legal entity that leases and holds land for BC Housing's projects), for ease and consistent with the practices of those involved in this matter, in these reasons, I will generally refer to the defendant as BC Housing or BC Housing / PRHC unless the distinction is material. However, my decision in this matter is in respect of PRHC as the named defendant.

The Hotel and its key personnel

[21] On or about July 6, 2010, Cowichan purchased the Hotel, which is located at 140 Trans-Canada Highway, Duncan, British Columbia. At the time, it was branded as a “Travelodge” hotel. The Hotel consists of 34 guest rooms, a restaurant, a pub, a banquet hall and a conference centre.

[22] On July 6, 2015, Cowichan entered into a franchise agreement in respect of the Hotel with Wyndham Hotel Group Canada, ULC (“Wyndham”), as authorized by Ramada Worldwide Inc. From 2015 to 2016, Cowichan renovated the Hotel to re-brand it from a “Travelodge” to a “Ramada”. The renovations upgraded the Hotel so it would meet the Wyndham standards in effect at the time, but it is not disputed that some aspects of the Hotel were not upgraded or repaired. The Hotel re-opened as a Ramada in June or July 2016.

[23] On June 13, 2018, Ramada Worldwide Inc. inspected the Hotel, including specific inspections of six rooms. While some minor and largely cosmetic deficiencies were noted, overall, the Hotel passed its inspection and was allowed to continue operating as a Ramada. Ramada Worldwide Inc. did not do any subsequent inspections of the Hotel.

[24] From July 6, 2015 to April 1, 2023, Cowichan was required to operate and maintain the Hotel in compliance with Wyndham’s Standards of Operation and Design Manual (the “Ramada Brand Standards”), as amended from time to time. The Ramada Brand Standards dated October 15, 2019 were in effect on May 20, 2020. The Ramada Brand Standards dated April 21, 2022 were in effect as of May 1, 2022. Cowichan terminated its franchise agreement with Wyndham in April 2023.

[25] From January 2014 to mid-March 2023, Cowichan employed Mr. Nick Both as the general manager of the Hotel. Mr. Both was directly involved in the conversion project that led to the Hotel re-opening as a Ramada in 2016; he acted as a form of project manager. He was also Cowichan’s primary point of contact with BC Housing / PRHC during the relevant period. Mr. Both had authority from the ownership group

to represent Cowichan in relation to certain matters, such as signing lease agreements on behalf of Cowichan. Mr. Lalani confirmed the ownership group was not involved in the day-to-day operation of the Hotel and visited infrequently, but their approval was required for major decisions, such as extensions to lease agreements. Mr. Both's email reports to the ownership group and communications seeking various approvals were in evidence at trial. Given his role, Mr. Both was Cowichan's principal witness on phase one of the trial. To avoid the need to recall him for phase two, Mr. Both provided evidence that went beyond the issues to be addressed at phase one.

[26] From March 1, 2020 to January 1, 2024, Cowichan also employed Ms. Catherine Kynoch as the assistant manager of the Hotel. Ms. Kynoch worked with Mr. Both to manage the Hotel during the period when it was used to house the vulnerable population. Ms. Kynoch was not called to testify.

The initial arrangement to use the Hotel: May to November 2020

[27] The initial period of the Hotel's use for the vulnerable population was governed by two written documents: an initial 30-day lease agreement that began May 20, 2020 and was extended to June 30, 2020 (the "Initial CMHA Lease"), and a subsequent agreement with an initial term of July 1 to September 30, 2020, and an option to extend to December 31, 2020 (the "CMHA Lease").

[28] The Initial CMHA Lease and the subsequent CMHA Lease included the following identical terms respecting the obligation to pay rent until delivery of vacant possession of the Hotel in a certain condition:

11.2 Despite any contrary provision of this Agreement:

(a) the Tenant's obligation to pay Rent to the Landlord will cease on the later of the end of the Term, the date specified in a Notice, and the date on which every Guest has left the Hotel and the Tenant has delivered vacant possession of the Hotel to the Landlord, in the condition contemplated in Schedule A.

(b) At the end of the Term and the Termination of this Agreement, however cause[d], neither the Tenant or the Landlord will have any further obligation to their counterpart hereunder for any matter arising after the termination date, excepting that the Landlord's confidentiality

obligations set out in section 6.6, the Tenant's indemnity obligations set out [in] section 9.1, and the Tenant's obligations in Schedule A, will survive the end of the Term and the Termination of this Agreement, howsoever caused.

[Emphasis added.]

[29] The Schedule A attached to both documents was also identical. In relevant part, it read as follows:

After the property is vacated, the TENANT is responsible, at its cost, for:

- a professional "deep clean" of each room
- restoring each room to the same condition (or better) as on initial inspection
- replacement of any good that are deemed unrepairable or missing
- paying daily rate set by LANDLORD until room meets brand standard and is returned to LANDLORD inventory
 - the daily rate will be consistent with seasonal RACK rate for each room that is not returned to LANDLORD inventory

[Emphasis added.]

[30] The parties agree the reference to "good" in Schedule A includes "case goods", which encompasses items like beds, headboards, desks, chairs, side tables and other furniture or furnishings used to outfit a hotel guest room.

The Initial CMHA Lease and the pre-lease inspection

[31] On May 13, 2020, Cowichan and the CMHA entered into the Initial CMHA Lease. Under that lease, the CMHA was to rent all 34 guest rooms in the Hotel for 30 days commencing May 20, 2020, and Cowichan was to provide one meal per day for the guests. Mr. Both testified the Initial CMHA Lease was prepared by a member of the Cowichan ownership group and former lawyer, with assistance from Mr. Both and Ms. Kynoch. While the CMHA was the signatory to the Initial CMHA Lease, there is no dispute that BC Housing funded the lease costs from the outset.

[32] The CMHA also worked on this initiative with the Cowichan Housing Association, a local non-profit organization involved in social housing initiatives. The CMHA identified and referred individuals to appropriate housing sites and

coordinated mental health resources. The Cowichan Housing Association provided “on-the-ground” operations support at the Hotel until April or May 2021 (when another non-profit took over that role). The Cowichan Housing Association had staff at the Hotel seven days a week, providing residential housing supports, onsite guest intake, guest behaviour monitoring and room inspections and cleaning.

[33] Mr. John Horn was the Director of the Cowichan Housing Association from April 8, 2019 to April 30, 2021. He was called by PRHC and testified about his involvement and observations when on site. Mr. Horn testified he attended the Hotel three to five times a week between May 2020 and April 2021, but sometimes only for a brief “stop-in” visit.

[34] On May 20-21, 2020, Mr. Both, Ms. Kynoch, Mr. Horn and another employee from Cowichan Housing Association conducted a pre-lease condition inspection of the Hotel’s rooms. During the pre-lease inspection, photographs were taken and basic room inspection forms were completed for each room, to document their condition. Mr. Horn testified that while he did not personally write out the inspection forms, the process of completing them was collaborative; those involved in the inspection would confer on what should be written down for each room.

[35] The photographs and inspection forms in evidence reflect some minor, pre-existing damage to some of the rooms and furnishings, including (but not limited to) chips, scratches and other marks. Mr. Both admitted the Hotel was not in brand new condition in May 2020, but there is no suggestion it was not operating consistent with Ramada Brand Standards. Mr. Horn testified the Hotel was a modest hotel, clean but with what he described as some “ordinary wear and tear” from the travelling public. The photographs also reflect some variation in the appliances between rooms (e.g. mini-fridges, microwaves and kettles). However, Mr. Horn and Mr. Both each testified the rooms were generally consistent in appearance. As one might expect from a recognized brand of hotel, I find there were minor variations, but an overall general consistency of appearance and design theme among the rooms.

[36] The guests began moving into the Hotel once the pre-lease inspection had been completed. Cowichan and the CMHA subsequently agreed to extend the Initial CMHA Lease to June 30, 2020.

The CMHA Lease and the end of the CMHA's involvement

[37] In July 2020, Cowichan and the CMHA entered into the CMHA Lease, which was backdated to July 1, 2020. Under the CMHA Lease, the CMHA was to lease the guest rooms from July 1 to September 30, 2020, with an option to extend until December 31, 2020. In September 2020, the CMHA exercised the option to extend the CMHA Lease to December 31, 2020, either by text or conversation. Although no specific documentation of this extension was in evidence, it is agreed the guests remained in the Hotel beyond September 30, 2020.

[38] On November 9, 2020, the CMHA asked the Cowichan Housing Association to take over the lease with Cowichan and Mr. Horn agreed to do so. In a separate email the same day, Mr. Both advised Mr. Horn and the CMHA that Cowichan had received verbal confirmation BC Housing was prepared to extend funding for the guests until March 31, 2021. Mr. Both said Cowichan was interested in the proposal but would want to update the lease agreement. He testified about a desire to add more detail about the repair terms, including because the guests had stayed longer and there was more damage than initially anticipated.

[39] On or around November 13, 2020, the CMHA advised Cowichan and BC Housing it wished to relinquish the CMHA Lease at the end of the month. Cowichan accepted the CMHA had given appropriate termination notice under the CMHA Lease.

[40] The CMHA's announcement triggered unsuccessful efforts to find another non-profit organization to take over for the CMHA. Mr. Horn testified the Cowichan Housing Association's board of directors was not interested in taking on the CMHA Lease itself. As a result, Mr. Horn proposed that another of the Cowichan Housing Association's partner organizations take over, either by assuming the CMHA Lease or entering into a new lease.

[41] On November 26, 2020, Ms. Chang asked Mr. Both to prepare a new lease agreement between BC Housing (through PRHC) and Cowichan. The next day, Mr. Both responded that he was meeting with Mr. Horn about the CMHA Lease and Ms. Chang asked him to confirm when possible. However, no alternative was in place by November 30, 2020. Despite this, the guests did not vacate the Hotel. Instead, it appears that Cowichan and BC Housing implicitly agreed to continue the *status quo* while discussions with the other organization were ongoing.

[42] In early December 2020, following Ms. Kynoch's suggestion, Mr. Horn and an employee from the CMHA inspected the rooms; no one from Cowichan attended. Mr. Horn testified that since the CMHA was ending its involvement, the December 2020 inspection was to ensure the CMHA felt comfortable it had met its obligations under the CMHA Lease. In Mr. Horn's view, the December 2020 inspection was not related to restoration issues because the Hotel was continuing to be used and restoration would not occur until after the guests had vacated.

[43] On December 2, 2020, Mr. Horn sent an email to various people at the CMHA confirming he was confident the rooms were in the same condition as before the guests began occupying the Hotel. Given this, he stated the Cowichan Housing Association was comfortable assuming full responsibility for the units. No one from Cowichan was included on the email and there is no question Mr. Horn was not speaking for Cowichan when he provided his assessment of the rooms' condition. In his testimony, Mr. Horn revised his assessment of the condition of the rooms at the beginning of December 2020, admitting the rooms had "greater wear and tear than [one] would have expected" from temporary hotel guests. I prefer Mr. Horn's live testimony on this point; it is more consistent with common sense and the totality of other evidence before me on phase one.

The continuing use of the Hotel: December 2020 to April 2022

The initial draft tripartite agreement

[44] In December 2020, after the end of the CMHA's involvement, Mr. Horn and Ms. Chang exchanged comments on a draft tripartite agreement prepared by

Cowichan (at Ms. Chang's request). Consistent with the ongoing discussions, the draft tripartite agreement contemplated that the CMHA would assign its rights and interests in the CMHA Lease to the other non-profit organization identified by Mr. Horn. The draft effectively incorporated the terms of the CMHA Lease with certain modifications requested by Cowichan; it was to be backdated to December 1, 2020 to provide continuity.

[45] Cowichan's requested modifications included, but were not limited to, the addition of a new section 11.2(c) to the CMHA Lease that provided for payment of cascading rental rates if the tenant remained in possession of all or part of the Hotel after the end of the term. At the time, Ms. Chang and Mr. Horn both agreed it was "fair" for Cowichan to charge those rates, given that time would be required to repair and renovate the Hotel after the guests had vacated.

[46] Ms. Chang also confirmed to Mr. Horn in these same communications that BC Housing would fund the cost of any repairs required because of damage caused by the guests. When asked about this in her examination for discovery, Ms. Chang said she did not know if the funding would be provided up front, paid to a contractor or reimbursed to Cowichan, but agreed that paying those costs was BC Housing's responsibility.

The February 2021 Agreement

[47] Despite the work towards a new agreement, in mid-January 2021, Ms. Chang advised Cowichan that the other non-profit organization was not prepared to take over as the new tenant. As the Hotel's rooms were still required for the vulnerable population, and no other options had been identified, Ms. Chang asked Mr. Both to modify the existing draft tripartite agreement by substituting PRHC as the assignee and new tenant. This would see BC Housing / PRHC assume responsibility for the lease of the Hotel, including the CMHA's obligations, as of December 1, 2020.

[48] In late January and early February 2021, Ms. Chang and Mr. Both discussed further revisions to the second version of the draft tripartite agreement; it is not contested that, at that point, Ms. Chang was reviewing the draft agreement for the

second time. Other than as expressly indicated in the body of the draft agreement, Ms. Chang did not propose further changes to the underlying CMHA Lease that was to be incorporated; in particular, she did not request any changes to sections 11.2(a) or (b), or to Schedule A of the CMHA Lease. The draft agreement defined the “Lease” as the CMHA Lease, which was to be attached as Schedule 1.

[49] In February 2021, each of Cowichan and PRHC signed the revised draft agreement (the “February 2021 Agreement”), which defined the term of the lease as being December 1, 2020 to May 31, 2021, with an option to extend further to October 31, 2021. Ms. Chang asked Mr. Both to coordinate obtaining the CMHA’s signature on the February 2021 Agreement.

[50] Mr. Both made several attempts to have the CMHA sign the February 2021 Agreement, but when the CMHA refused, he asked Ms. Chang to assist. In April 2021, Ms. Chang followed up with Ms. Anne Brunet at the CMHA by email. Ms. Brunet was the CMHA’s Acting Executive Director from February 2020 to late September 2020 and its Chief Administrative Officer from April 2020 to December 2022; she was called by PRHC to testify. Ms. Brunet testified the CMHA did not agree to sign the February 2021 Agreement because the CMHA understood the Cowichan Housing Association had assumed full responsibility after November 30, 2020. In other words, the CMHA did not consider itself to have any further involvement in, or obligations under, the CMHA Lease. Ms. Brunet confirmed this position in her email response to Ms. Chang.

[51] In her testimony, Ms. Brunet referenced and was taken to Mr. Horn’s December 2, 2020 email where he expressed his view that the CMHA had fully discharged its responsibilities under the CMHA Lease. In cross-examination, Ms. Brunet accepted that Mr. Horn was not a representative of Cowichan when he made that statement. Ms. Brunet also agreed that despite the CMHA ending its own involvement on November 30, 2020, the guests did not move out on that date. However, she maintained the CMHA was entitled to rely on Mr. Both’s acceptance of the CMHA’s notice to terminate and Mr. Horn’s subsequent assurance that the

CMHA's involvement was complete. On receipt of Ms. Brunet's response and explanation on April 27, 2021, Ms. Chang responded that BC Housing would move forward to sign a new lease agreement with Cowichan directly.

Subsequent discussions with Ms. Chang about a new lease

[52] While Mr. Both and Ms. Chang exchanged further communications from time to time between April 2021 and January 2022 about concluding a new formal written agreement between the two parties, the parties agree no further formal document was ever signed. The communications between Mr. Both and Ms. Chang, and their subsequent conduct, suggest doing so was not a priority. I find each understood the other to be operating pursuant to the February 2021 Agreement, despite the CMHA's refusal to sign it.

[53] For example, in late April and early May 2021, Mr. Both and Ms. Chang negotiated both an extension of the lease of the Hotel to December 31, 2021 (a date beyond the latest extension date contemplated in the February 2021 Agreement) and an increase to the rental rate to be effective June 1, 2021. The negotiations occurred over email. In her examination for discovery, Ms. Chang agreed that when she broached the subject, she provided notice to Cowichan under the February 2021 Agreement. She also agreed that when she referred to the parties' "agreement" in her emails, she was referring to the February 2021 Agreement.

[54] Although there were some exchanges in spring 2021 about preparing a new lease agreement, and Mr. Both expressed a willingness to enter into a new agreement, both sides recognized that certain matters required further discussion and neither prioritized the completion of a new agreement. There were further exchanges again in June and July 2021 about certain details to be included in a new lease agreement. At that time, Ms. Chang expressed a desire to avoid significant changes to the "agreement" between the parties as it could create issues for BC Housing in terms of securing approvals for signing.

[55] Ms. Chang next followed up about a new lease in later September 2021, at the same time as she requested an extension of the rental term for the rooms to

March 31, 2022. Ms. Chang and Mr. Both had a discussion and exchanged further emails in the first half of October 2021 about a new lease agreement and the extension, as well as Cowichan's expectations for restoration of the Hotel.

[56] Mr. Both and Ms. Chang met on October 7, 2021 and Mr. Both summarized their discussion in an October 12, 2021 email. In that email, Mr. Both referenced Ms. Chang's comment that BC Housing did not anticipate having the resources to undertake the renovations itself. He noted that while Cowichan had experience with renovating the Hotel, the amount of work needed to restore the property to Ramada standards would be "substantial". His notes reflect a discussion about obtaining quotes from contractors who could do the work and the fact that there would be an additional cost if Cowichan were to oversee the restoration. Ms. Chang did not correct anything in Mr. Both's summary. Instead, she responded she would aim to provide a draft of a new agreement by the end of October 2021; she did not do so until late November 2021.

[57] When he received the new draft in late November 2021, Mr. Both requested a Word version of the draft so he could track suggested changes; Mr. Both testified no Word version was ever sent. Ms. Chang's new draft agreement included a provision setting a maximum \$164,700 compensation payment from PRHC to Cowichan for lost revenue during the anticipated two-month renovation period in April and May 2022. Ms. Chang followed up seeking feedback in mid-December 2021 and at that time, requested a further additional extension to the end of April 2022.

[58] Mr. Both and Ms. Chang were both occupied during the December holiday period and on January 11, 2022, Ms. Chang followed up again on the lease and asked about a possible further extension to the end of June 2022. Mr. Both responded that that timing would change the discussion with the ownership group (as it would mean the Hotel would lose its summer for 2022) and he would have to get back to Ms. Chang.

Ms. Lamba becomes BC Housing's contact

[59] On Sunday, January 16, 2022, Ms. Chang sent Mr. Both an email advising she would be on leave effective immediately. She introduced Ms. Lamba as the new BC Housing contact in respect of the Hotel lease. While Ms. Lamba had been working on other social housing related COVID-19 contracts, she did not have any previous experience with the situation in Duncan or the specific agreement with Cowichan. Ms. Chang and Ms. Lamba each acknowledged that the February 2021 Agreement (as it incorporated the CMHA Lease) included details and schedules that were not part of the standard PRHC lease template. In one of her emails with Mr. Both, Ms. Chang stated that the standard PRHC template lease had been “significantly amended” for the agreement with Cowichan.

[60] Ms. Lamba testified she had a short discussion with Ms. Chang (she suggested 15-30 minutes) and did some of her own research and “due diligence” about the Hotel to ground her views about next steps. It was apparent from Ms. Lamba’s testimony and her internal communications with BC Housing personnel that Ms. Lamba quickly formed some very strong opinions about the situation, including before she spoke with Mr. Both. Ms. Lamba never went to the Hotel.

[61] Mr. Both testified that his early dealings with Ms. Lamba gave him the impression she did not appreciate the nature of the agreement between Cowichan and BC Housing / PRHC. For example, at the end of January 2022, Ms. Lamba revised BC Housing’s extension request to seek a further lease of all 34 rooms until the end of April 2022, with five rooms to be retained until the end of March 2023. To that point, the agreement for use of the Hotel had been a lease of all the rooms, or none of them; Cowichan had been clear from the beginning that it was not feasible to have only part of the Hotel used by the vulnerable population.

[62] The documents before me confirm that, in addition to refusing that request, Mr. Both provided Ms. Lamba detailed emails setting out the background to the situation, including why there was no formal agreement beyond the February 2021 Agreement and what matters required resolution between the parties. This included

Cowichan's need for a definitive timeline for reopening and information about the scope of the restoration work to be done as well as the need to confirm who would be responsible.

[63] These exchanges led to further discussions involving Mr. Both, Ms. Lamba and Mr. Murphy in February 2022. At the end of February 2022, Ms. Lamba confirmed that BC Housing would have its guests vacate the Hotel by the end of April 2022 and asked Mr. Both to provide a proposal for the rental rates after the end of March 2022. It is clear Cowichan was seeking compensation as it was anticipated the Hotel would lose its summer season to the planned renovation period.

[64] On March 10, 2022, in response to Ms. Lamba's request, Mr. Both provided proposed rental rates for April to September 2022, as well as an additional penalty rate if the Hotel were not ready to re-open as a Ramada brand by October 1, 2022. On March 21, 2022, Ms. Lamba accepted the daily rental rate for April 2022, and on April 5, 2022, Ms. Lamba confirmed BC Housing's agreement to the proposed rental rates for all of April to September 2022. Ms. Lamba did not confirm BC Housing's agreement to the specific penalty rates beyond September 2022 that Mr. Both had listed in his March 10, 2022 email and Mr. Both did not follow up on that point.

[65] The parties agree that, by April 30, 2022, all guests associated with BC Housing had vacated the Hotel.

Restoration discussions: Spring to September 2022

[66] Ms. Lamba testified that when she took over from Ms. Chang in January 2022, her priority was to negotiate a further extension to the lease (then set to expire on March 31, 2022). However, Ms. Lamba testified, and her communications between January and April 2022 confirm, that she was also beginning to think about the repairs that would be required when the guests vacated and how to terminate the arrangement with Cowichan. Ms. Lamba testified she had some experience negotiating deals to close down similar COVID-related hotel projects in other communities on the mainland.

[67] Ms. Lamba initially testified she expected Cowichan to be directly involved in the restoration work but admitted on cross-examination that she only assumed Cowichan would lead the work because of her experience on other projects (including projects where the hotels were paying for the costs). In mid-February 2022, Mr. Both told Ms. Lamba the scope of the restoration work was beyond what he could take on as general manager for the Hotel and Cowichan was not able to take on a project management role either.

[68] In his email summary of a subsequent meeting with Ms. Lamba and Mr. Murphy in later February 2022, Mr. Both reflected back BC Housing's comments that most hotels wished to have a "more hands on approach" for the restoration (including to avoid delays associated with BC Housing's procurement process), but that, in this case, BC Housing would find a trusted and reliable general contractor to work with the Hotel's managers.

[69] In mid-April 2022, another employee at BC Housing contacted Mr. Matt Mulleray, then president of Method Engineering and Building Services Ltd. ("Method") to confirm his willingness to assess the scope of necessary repairs at the Hotel, provide cost estimates and liaise with contractors and procurement personnel. Around the same time, Ms. Lamba asked Mr. Both to provide information about the scope of work required to repair the Hotel, including any photographs that might assist with assessing the damage. On April 12, 2022, Mr. Both sent Ms. Lamba two sets of photos – one from the May 2020 pre-lease condition inspections and a second set from ongoing room inspections over the previous two years that documented damage as it was noticed.

[70] On April 19, 2022, Ms. Lamba communicated to Mr. Both that she was arranging for a "consultant" to assist with inspecting the Hotel and developing a scope of work. In the following days, Ms. Lamba asked Mr. Mulleray to tour the Hotel and then develop and submit for BC Housing's review and approval a "scope of work" for the repairs. Given his role in discussions with both parties about the

restoration work, PRHC called Mr. Mulleray to provide evidence on this phase of the trial. I agree that Mr. Mulleray was not an interested witness.

May 2022 inspection of the Hotel and initial demolition of the rooms

[71] On May 3, 2022, Mr. Mulleray attended the Hotel to inspect it. He met with Mr. Both and Ms. Kynoch and was joined by Ms. Amanda Parnham of BC Housing. The purpose of the visit was to determine the scope of the damage to the Hotel. Ms. Parnham is the only person from BC Housing (or PRHC) who visited the Hotel after the end of April 2022. Neither Ms. Lamba nor Mr. Murphy ever went to the Hotel. The next day, Ms. Parnham asked Mr. Both to provide some additional information for Mr. Mulleray; Mr. Both provided that information on May 9, 2022.

[72] Also on May 9, 2022, Ms. Parnham reported to Ms. Lamba and Mr. Murphy (copying Mr. Mulleray) that, among other things, all furniture and equipment (mattresses, linens, side tables, lamps, fridges, etc.) would need to be replaced, as would the air conditioning units (“PTAC units”) and all carpet. Ms. Parnham also reported that drywall patching and fresh paint would be required. Mr. Both testified Ms. Parnham’s list was consistent with his understanding of what would be required to restore the Hotel.

[73] On May 10, 2022, Mr. Mulleray wrote to Ms. Parnham to provide a proposal for project management services for interior renovations to the Hotel. He also provided Method’s “preliminary findings”, which included his assessment that:

- There is significant damage to the suites, including damage to: interior walls, baseboard trims, door trims and casings, window coverings, beds (mattresses and box springs), carpets, furniture / case goods, and bathroom fixtures / finishings.
- The condition of the furniture / case goods suggests there is no possibility to save items with the expectation that they would be suitable for consumer use in the future. Any items that could be salvaged would be suitable for donation, at best.
- The suites all require new carpet, millwork, beds / bedding, furniture / case goods, light fixtures, interior paint, and a full cleaning.
- Other interior repairs / replacements would be evaluated on a suite-by-suite basis. The items to be evaluated include, but are not limited

to: bathroom fixtures, bathroom flooring, gypsum wall board, air conditioners, doors, appliances, TVs, window screens, and phones.

- Exterior work includes, but is not limited to, debris removal, minor amounts of graffiti / paint removal, rainwater leader repairs, privacy fencing removal / upgrades, localized painting, minor landscaping, and general cleaning.

[74] When Mr. Murphy sent Method's preliminary findings to Mr. Both on May 19, 2022, Mr. Both agreed Method had captured the majority of the required repair work but maintained there would be more work than Method had listed.

[75] Mr. Mulleray went to the Hotel again on May 10, 2022 with a demolition contractor; Mr. Both and Ms. Kynoch were not present. Over the next few days, Mr. Both and Mr. Mulleray communicated about the next steps, and Mr. Both provided further information as requested. Within a week, Mr. Both had connected Mr. Mulleray with a case goods procurement agent familiar with the Ramada Brand Standards to provide information about, among other things, case goods, paint colours, carpet and area rugs. Mr. Mulleray exchanged emails with the supplier in the following week; he testified he felt she provided the information he needed to understand "brand standards".

[76] In his emails with Mr. Both in early May 2022, Mr. Mulleray advised Mr. Both that "BC Housing is working on project arrangements / roles." Mr. Mulleray indicated Method had not been approved on the project, but he would be meeting with BC Housing to discuss next steps and could then provide an update on Method's involvement. In addition to the work required to restore the Hotel, Mr. Both and Mr. Mulleray discussed some additional work Cowichan wanted to explore doing at the same time as the restoration. Ms. Parnham's emails indicate she was generally aware of these discussions and advised Ms. Lamba and Mr. Murphy that it would be important to segregate any such work to ensure it did not derail the timeline for BC Housing's restoration. In his emails with BC Housing in or around May 11, 2022, Mr. Mulleray suggested some of the items in the Hotel might be salvageable, including phones, televisions and certain appliances. His email was not copied to Cowichan.

[77] On May 16, 2022, Mr. Mulleray and a demolition crew began to gut the interior of the Hotel's 34 rooms. Mr. Mulleray testified BC Housing had directed the demolition work, which did not require input from Cowichan. Mr. Mulleray and his team documented the condition of the Hotel as they did the demolition, including taking pictures.

Method's efforts to obtain clarity and its initial May 2022 proposal

[78] On May 17, 2022, Mr. Mulleray sent an email to multiple people at BC Housing, as well as Mr. Both and Ms. Kynoch, seeking guidance. Among other things, Mr. Mulleray sought clarity about who he was reporting to at BC Housing; he testified that issue was never clarified. Mr. Mulleray also set out a list of outstanding questions before Method could move forward with "assessing condition and developing an associated budget". His questions included who was authorized to decide what was salvageable and whether consistency of appearance was to be considered. Mr. Mulleray noted that many, but not all, of the rooms needed a "complete renovation". He also noted that while there were a variety of styles of appliances, PTAC units and bathroom taps, there was general consistency of case goods and furniture styling. Mr. Mulleray noted Method was not under contract with either party but would continue with removal, disposals and stockpiling of certain goods "on good faith", while awaiting direction that would allow Method to develop "a more accurate budget and schedule".

[79] Mr. Both responded the same day and again the next day, providing contact information for trades and, as noted, contact details for the Ramada Brand Standards supplier. Mr. Murphy responded on May 18, 2022 indicating BC Housing would attempt to "centralize all aspects" with Mr. Mulleray, however he also took the position that an "important component" of Method's work as a consultant was to oversee the division of costs (between BC Housing and Cowichan) and assess the portion for which BC Housing was reasonably responsible. Mr. Murphy suggested it had been agreed between he and Mr. Both that it was more appropriate for Cowichan to engage Method directly. In his subsequent emails and again in his testimony, Mr. Both denied any such agreement.

[80] Mr. Mulleray responded to Mr. Murphy later the same evening noting that he had no formal contract in place but direction to date had been given by BC Housing. Mr. Mulleray advised he needed formal confirmation of Method's engagement and clear direction of who he was to report to, at least initially. Mr. Mulleray also responded that the question of cost sharing was a matter for BC Housing and Cowichan to negotiate between them. He attached a proposal from Method dated May 18, 2022.

[81] On May 19, 2022, Mr. Murphy responded again that Cowichan was the appropriate party to both give direction and enter into a contract with Method. Mr. Mulleray testified that in his discussions, Mr. Both had been clear Cowichan did not wish to enter into a contract with Method. This is consistent with Mr. Both and Mr. Lalani's evidence that Cowichan did not have the cashflow to sign a contract with Method and did not wish to sign a contract without assurances about what BC Housing would pay. As a result, Mr. Mulleray responded to Mr. Murphy that since BC Housing had provided the directions to date, Method would "wrap up" its assessment work and issue an invoice to BC Housing for the work to date. Mr. Murphy responded again suggesting Mr. Mulleray forward the Method proposal to Mr. Both and stating that BC Housing would pay the invoices regardless of who entered into the contract. While PRHC asserted in its closing submissions that Mr. Murphy was trying to prevent *Cowichan* from stalling the restoration process, in his email Mr. Murphy references not wanting *BC Housing* to stall the process.

[82] In the evening of May 24, 2022, Mr. Mulleray wrote to an increased number of people at BC Housing, and to Mr. Both, to confirm that the demolition of the rooms at the Hotel had been completed on May 20, 2022. Mr. Mulleray advised the rooms had generally been emptied of mattresses, linens, drapes, furniture, baseboards, carpets and underlay, and that appliances had been labelled and stockpiled in two rooms. He advised that larger furniture had been stockpiled outside and "protected from weather". He stated that while he had connected with the Ramada procurement agent, he required further input on "specific needs, quantities, styling" and scheduling to obtain final pricing. Mr. Mulleray wrote that as neither party had

indicated a desire to enter into an agreement, Method would not perform any further site work until there was a contract in place. Mr. Mulleray confirmed in his testimony that he and Method did not return to the site after May 20, 2022.

[83] Later on May 24, 2022, Ms. Lamba asked Mr. Both if he had reached out to Mr. Mulleray based on BC Housing's understanding that Cowichan would engage Method and invoice BC Housing for the cost. On May 26, 2022, Ms. Lamba followed up with Mr. Both again about Cowichan engaging with Method directly. Mr. Both replied on May 27, 2022 stating that while he had discussed expectations and the scope of work required with Mr. Mulleray, there had been no mention in their discussions about Cowichan hiring and paying for Method. Rather, Mr. Both stated Cowichan's understanding was that since BC Housing had engaged Method to date, BC Housing, not Cowichan, should continue dealing with Method to complete the restoration. Mr. Both suggested a conversation early the next week.

[84] On May 26, 2022, Mr. Mulleray confirmed to Ms. Lamba that Method was "keen" to help move the project towards completion and could provide an updated proposal on request. On the same day, Mr. Murphy confirmed that if Cowichan would not retain Method, BC Housing would do so and was prepared to sign a contract. Mr. Mulleray replied that Method had been continuing to work in the background and could provide an updated proposal, including with information from the procurement agent. On May 30, 2022, Ms. Lamba wrote to Mr. Mulleray advising BC Housing did not want the work to stall and confirming BC Housing would cover the cost of the damage and Method's services but required an estimate of the damage caused by its guests as a starting point. On May 31, 2022, Mr. Murphy followed up with Mr. Mulleray about a revised proposal and suggested a three-way conversation about appropriate division of costs. None of these emails were copied to, or forwarded to, Mr. Both or anyone else connected to Cowichan.

Method's June proposals and initial repair budget

[85] On June 1, 2022, Mr. Mulleray sent Mr. Murphy and Ms. Lamba an email attaching a "Proposal for Hotel Repair Management and Site Supervision" for the

Hotel (the “June 1 Proposal”). Mr. Mulleray’s proposal included an initial repair budget and an initial quote from the Ramada procurement agent recommended by Mr. Both, with an estimated total cost of \$1,227,000 (before tax) to restore the Hotel. Of that amount, Mr. Mulleray had allocated \$1,052,000 as the cost to be borne by BC Housing but he was candid in his testimony that he did not receive any direction about how the costs ought to be divided and did not know the terms of the agreement between the parties. In addition, Mr. Mulleray’s email recognized there was “still quite a bit of variation that could swing the scope and associated project cost.” Mr. Mulleray testified he was seeking direction from BC Housing about how to proceed. This email was not copied to Mr. Both or anyone from Cowichan.

[86] On June 6, 2022, Mr. Mulleray followed up with Mr. Murphy about the June 1 Proposal noting time was of the essence for completing the Hotel restoration by October 1, 2022. Although Mr. Murphy apparently signed the June 1 Proposal that same day, in cross-examination, Mr. Mulleray testified he did not recall having seen a signed copy or being aware that Mr. Murphy had signed it. However, Mr. Mulleray sent a further email to Mr. Murphy on June 6, 2022 advising he would “get rolling” as soon as possible and suggesting a meeting with Mr. Both.

[87] On June 7, 2022, Mr. Mulleray received a PTAC unit assessment report from Mr. Paul Frechette showing that 18 PTAC units required replacement. Mr. Mulleray testified he accepted it was a fair evaluation of the PTAC units. Ms. Lamba accepted that some, but not all, of the PTAC units were damaged.

[88] On June 9, 2022, Mr. Mulleray wrote to Mr. Murphy and Ms. Lamba seeking confirmation about several matters, including Method’s level of authority, the cost-sharing arrangement and the scope of the repairs, including since the initial repair budget had excluded certain items (some of the exceptions had been set out in the June 1 Proposal while the email listed others). For example, the initial repair budget included a line item for “air conditioning – new” but there was no cost estimate associated with that line item. While the budget included a contingency fee, Mr. Mulleray confirmed those funds were not for the replacement of the PTAC units

and Mr. Mulleray did not update the initial repair budget after receipt of the PTAC unit assessment report.

[89] The initial repair budget also did not include cost of materials to address appliances, kitchens, bathroom fixtures (like toilets, sinks and tubs), mirrors, doors and door hardware. Mr. Mulleray had suggested to BC Housing that some of these items might be salvageable on a case-by-case basis. While Mr. Mulleray did not consider other items identified by Mr. Both, such as tile flooring and ceiling plumbing, to have been damaged by the vulnerable population, Mr. Mulleray testified he was aware Cowichan might wish to “add on” while the rooms were being repaired. In his June 1 Proposal, Mr. Mulleray indicated he could track such costs separately.

[90] It is not controversial that the initial repair budget did not include tax. Further, like all construction-related costs following the COVID-19 pandemic, the budget was subject to volatility related to the availability and cost of materials and trades. Recognizing these uncertainties, in his June 9, 2022 email, Mr. Mulleray suggested a need for agreement between BC Housing and Cowichan about Method’s involvement, noting that Cowichan might prefer to “take a lump sum payment and proceed on their own”. Again, Cowichan was not copied.

Discussions about the “scope of work”: June to July 2022

[91] On June 10, 2022, Mr. Mulleray wrote to Mr. Both noting there had been some difficulty connecting with Mr. Both and advising that BC Housing had authorized Method to coordinate a meeting. Mr. Mulleray testified he felt he needed permission to speak to Mr. Both without BC Housing present; the many emails where Cowichan was not copied confirm the reverse was not true. Mr. Both responded the same day and indicated his willingness to connect. A meeting between Mr. Mulleray and Mr. Both was arranged for June 14, 2022.

[92] On June 13, 2022, Mr. Mulleray advised Ms. Lamba of the upcoming meeting with Mr. Both, indicating he would provide an update afterwards; Mr. Both was not copied. Mr. Mulleray indicated his goal was to create a scope of work and estimated cost acceptable to both Cowichan and BC Housing. He stated he would discuss the

proposed work and cost allocation, identify any issues Cowichan might have or additional work Cowichan considered required and discuss scheduling. Mr. Mulleray suggested BC Housing would then be able to “decide how to proceed”, whether by paying the Hotel a lump sum or some other arrangement. On the same day, Mr. Mulleray sent Mr. Both the one-page initial repair budget, noting that it included an “allocation breakdown”, and excluded several items, such as PTAC units, kitchens (cabinets, counters and appliances), small appliances and tile flooring.

[93] On June 14, 2022, Mr. Mulleray and Mr. Peter Smither (a project manager engaged by Method) met with Mr. Both at the Hotel to discuss the initial repair budget and obtain Mr. Both’s input. Mr. Mulleray summarized their discussion in a draft letter dated June 20, 2022, which he sent to Mr. Both for review. Mr. Both provided comments back on June 21, 2022, and Mr. Mulleray then revised the letter and sent it to both BC Housing and Mr. Both on June 21, 2022. Despite the letter expressly indicating the discussion with Mr. Both had highlighted certain items that were not accounted for in the initial repair budget, Mr. Mulleray did not update the repair budget; instead, he again included the same initial repair budget provided to BC Housing on June 1, 2022. Mr. Mulleray testified BC Housing never instructed him to prepare a revised budget.

[94] Consistent with the covering email and the letter itself, Mr. Mulleray testified the letter was not a proposal but a summary of the discussion with Mr. Both, and an attempt to obtain direction on how to proceed. In the letter, Mr. Mulleray stated that because there had been no confirmation on design, start date or trade / material availability by that point, restoration of the Hotel by the end of September 2022 was no longer possible. He suggested restoration by the end of 2022 might be possible and recommended BC Housing and Cowichan meet to discuss budgeting, project management and next steps.

[95] On June 27, 2022, Ms. Lamba wrote to ask Mr. Both if Cowichan wished to enter into a settlement agreement with BC Housing or have Method undertake the restoration work; she said the latter option would require BC Housing and Cowichan

to sign an agreement on the scope of damages for which PRHC was responsible and next steps. She suggested a meeting to discuss.

[96] On July 11, 2022, Mr. Both, Ms. Lamba and Mr. Murphy met virtually to discuss next steps. The following day, Ms. Lamba requested certain information from Mr. Both, including the age of the case goods and their normal life cycle, as well as Cowichan's financial information to establish profit and loss for the Hotel. In her July 12, 2022 email, Ms. Lamba stated that BC Housing was continuing to ask that the "scope of work be established clearly". However, Ms. Lamba admitted in her testimony that BC Housing had not previously requested that particular information.

[97] On July 21, 2022, Mr. Both responded to Ms. Lamba that most of the information about the case goods was not available and the financial information included information about services other than guest rooms (such as food and beverage services), so would not be useful for BC Housing. Ms. Lamba admitted she did not follow up further to insist the information be provided.

[98] Also on July 21, 2022, Mr. Both wrote to Mr. Mulleray reiterating Cowichan's view that the initial repair budget did not include the entire scope of work to be done. Mr. Both suggested any revised quote should account for: first, the need for general consistency of appearance and Ramada Brand Standards (he stated "[i]f it used to match, it needs to match"); and second, the distinction between damage done by the guests versus deficiencies that were part of the previous condition of the Hotel. Mr. Both suggested a meeting. On or around July 29, 2022, Mr. Mulleray and Mr. Both had a conversation about the scope of work. Mr. Both then reported to Ms. Lamba that Mr. Mulleray was looking for confirmation from BC Housing.

The final breakdown in the relationship: August 2022

[99] On August 2, 2022, Ms. Lamba emailed Mr. Both with two options:

Option 1: Matt to go ahead and complete the work as per his initial repair estimate of BC Housing portion of the work, the total cost estimated to be, \$1,052,000. No other work is to be added to that and BC [H]ousing will not be responsible for any delays caused due to Ramada portion of the work.

Option 2: BC [Housing] to pay you the amount as a settlement agreement and you sign a contract with Matt to have him complete the work for you as per your design and brand standards.

[100] Mr. Both responded to Ms. Lamba the same day stating that as the initial repair budget provided by Method did not include all the damage caused by the guests, Mr. Both had asked Mr. Mulleray to prepare a more inclusive quote. Within minutes Ms. Lamba responded saying she would wait for Mr. Mulleray to send a revised quote. It is not disputed that no revised quote was ever prepared.

[101] In cross-examination, Ms. Lamba accepted that when she sent her “options” email to Mr. Both on August 2, 2022, BC Housing did not yet have formal approval to offer to pay \$1,052,000 for renovations or enter into a settlement for that amount. She testified her own authority was limited to expenditures up to \$50,000. While Mr. Murphy had approval in principle to fund COVID-related hotel work, formal approval was needed before specific funds could be spent. Ms. Lamba testified Mr. Murphy began seeking formal approval for the restoration work around the same time she sent her August 2, 2022 options email. Ms. Lamba confirmed BC Housing ultimately did receive approval for up to \$1.9 million to address the situation with Cowichan but it is agreed that approval was not received until the first (calendar) quarter of 2023.

[102] Ms. Lamba also testified, in response to a question from the Court, that the \$1,052,000 figure for restoration would not be in addition to payments BC Housing had made for “loss of use” since April 30, 2022; instead, Ms. Lamba testified the payments would be deducted from the restoration amount. On its face, the August 2, 2022 options email does not include that detail. In closing submissions, PRHC counsel conceded that, based on the totality of evidence, Ms. Lamba’s suggested interpretation was not a reasonable one.

[103] On August 3, 2022, Mr. Mulleray forwarded Mr. Both’s July 21, 2022 email to Ms. Lamba and Mr. Murphy and took the position his initial repair budget included sufficient allowances to repair items *that were to be retained*, such as kitchens and

PTAC units. However, Mr. Mulleray recognized he had no knowledge of the agreement between BC Housing and Cowichan and limited understanding of the condition of the Hotel prior to Method's involvement. He suggested a three-way meeting to move matters forward. This email was not copied to Mr. Both.

[104] On August 8, 2022, Ms. Lamba wrote to Mr. Both advising she had spoken with Mr. Mulleray and understood Mr. Mulleray believed his initial repair budget sufficiently outlined the work to be done and included a contingency for additional work. Ms. Lamba referenced the funds BC Housing had paid since the guests vacated at the end of April 2022 and noted that a landlord has a duty to mitigate damages. Ms. Lamba accused Mr. Both of, among other things, refusing to provide a direct phone number, delay in answering emails and working with Mr. Mulleray, and purposefully delaying BC Housing's offers to do the restoration work. Ms. Lamba advised BC Housing would make a last and final payment of \$150,000 in September 2022 and said a formal letter would follow. In cross-examination, Ms. Lamba admitted she knew, when she wrote the August 8, 2022 email, that Mr. Both did not have a direct phone number. She also conceded she did not know the extent to which Mr. Both had worked with Mr. Mulleray, including because she had never been to the Hotel.

[105] On August 12, 2022, Ms. Lamba instructed Mr. Mulleray not to do any further work other than removing a portable washroom from the site and sending BC Housing his final invoice. On the same day, Mr. Mulleray wrote to Mr. Both stating Method had "been advised by BC Housing, as our Client, to not provide any further service" on the file.

[106] On August 23, 2022, Mr. Both responded to Ms. Lamba's August 2, 2022 email, disputing both that he had been delaying and that Mr. Mulleray's initial repair budget was sufficiently inclusive. Mr. Both recognized there was disagreement about certain matters and proposed a meeting the following week to "get back on the same page". Two days later, Mr. Both sent another email to Ms. Lamba and Mr. Murphy advising that Cowichan had asked its legal counsel to review the correspondence

and materials to confirm BC Housing's responsibilities to remediate the Hotel but noting that counsel was away until the first week of September 2022.

[107] On August 29, 2022, Ms. Lamba sent Mr. Both an email attaching a letter from Mr. Murphy reiterating BC Housing's position that by the end of September 2022, with a final payment to Cowichan of \$178,250.00, BC Housing and PRHC would have fulfilled all obligations under the CMHA Lease.

[108] By the end of September 2022, the parties agree that BC Housing had paid the following amounts:

- a) \$867,675.00 to Cowichan as compensation for the loss of use of the rooms at the Hotel between May 1, 2022 and September 30, 2022;
- b) \$60,041.93 for the cost of security and fencing; and
- c) \$45,568.28 to Method for its consulting and other work.

Post-September 2022 events

[109] In early 2023, Cowichan obtained alternative fee estimates to complete the restoration work from Grant Healey Construction and Robert Jelley Holmes. Their estimates ranged from \$1,329,020 to \$1,377,973.80 after tax. Both alternative fee estimates included the estimated costs for replacement of most if not all PTAC units, as well as replacement of some mini-fridges and kitchenettes.

[110] In the first quarter of 2023, BC Housing obtained formal approval to spend up to \$1.9 million to resolve the situation with Cowichan.

[111] From Spring to Fall of 2023, Cowichan and a construction company discussed a proposal to repair and redevelop the Hotel to house construction workers for a project in Duncan. Given those discussions, in March 2023, Cowichan notified Wyndham that it intended to terminate the Ramada franchise agreement. On May 2, 2023, Wyndham wrote to Cowichan confirming the Ramada franchise agreement had terminated as of April 1, 2023.

[112] On June 2, 2023, Cowichan’s counsel sent BC Housing’s counsel the two alternative estimates and asked BC Housing to at least pay its acknowledged share of the restoration costs (i.e. \$1,052,000) so Cowichan could start the repairs and reduce losses for both parties. In their August 16, 2023 response, BC Housing’s counsel said BC Housing would only pay an additional \$184,325 (i.e. the difference between \$1,052,000 and the \$867,675 BC Housing had paid in compensation) and after that payment, would consider its obligations to restore the Hotel complete. BC Housing paid Cowichan \$184,325 on September 11, 2023. By that date, BC Housing had formal approval to spend up to \$1.9 million to settle with Cowichan.

[113] On October 25, 2023, counsel for Cowichan proposed BC Housing pay \$1,350,000 in trust to be disbursed to pay construction invoices for repairs with BC Housing approval. BC Housing did not respond to that proposal.

[114] The Hotel site has now been rezoned to allow for greater development.

Analysis

[115] The parties agree on the legal principles and authorities governing contract formation and interpretation, but not on how they apply to present facts. Before turning to the specific issues, I offer the following general comments.

[116] First, the parties adduced a large volume of evidence on phase one of the trial, through *viva voce* witnesses, contemporaneous documents and read-ins from examinations for discovery. As Ms. Chang was unable to testify due to personal circumstances, counsel agreed to provide her evidence through read-ins from her examination for discovery transcript. Although I have reviewed all the evidence, I refer only to what is necessary to ground my decision.

[117] Second, the parties’ communications create a contemporaneous record of most of their interactions with each other and third parties over the relevant period. As a result, I generally agree with Cowichan that this is not a case that turns on the overall credibility of one or more witnesses, with one exception I address below. In my view, the evidentiary “conflicts” that exist are largely because of different

interpretations of what was said or written rather than because a witness was not being truthful or accurate. In *Wu v. Sun-Gifford et al*, 2001 BCSC 191, Justice Davies offered the following helpful comments about credibility issues in the context of a contractual dispute where there is a contemporaneous record like that which exists here:

[28] In any commercial dispute which does not proceed to trial for many years after the events in issue, it is not surprising to find serious conflicts in the evidence as memories fade and positions harden. The result will often be the reconstruction of events to accord with the position advanced by the litigants. That is not to say that the litigants are intentionally dishonest when testifying. Although that may be true in some cases, more often witnesses who have a stake in the outcome of the litigation will have adopted as their evidence a version of events which has emerged and evolved over time through the litigation process and which favours their legal position.

[29] In such circumstances the most reliable evidence as to what transpired will likely be found in contemporaneous documentation. In addition, the evidence of independent witnesses and the actions of all witnesses at the time events unfolded will more often reflect reality than a view of the past presented through reconstructive lenses. Further, the consistency or lack of consistency of the evidence of an interested witness with the contemporaneous documentation and with the evidence of independent witnesses will often be a valuable indicator of reliability.

[Emphasis added.]

[118] Where it is necessary for me to assess the credibility or reliability of some aspect of a witness' testimony, I bear in mind the above guidance. I also consider the well-known principles governing credibility and reliability set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, [2012] S.C.C.A. No. 392 and *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.), and the many cases that cite them.

[119] As noted, there is one exception to my general comments above about the credibility and reliability of witnesses overall. That exception is the live testimony offered by Ms. Lamba, who became BC Housing's point person at a critical juncture in time. In her direct examination, Ms. Lamba often portrayed herself as the driving force and a key decision-maker for BC Housing in respect of this matter. She offered explanations about what she meant by her communications and what she was trying

to accomplish. However, when challenged in cross-examination, Ms. Lamba's evidence changed markedly. She frequently resiled from statements she had made in direct, including changing her explanations or claiming she was not actually directly involved and instead was merely following Mr. Murphy's directions. Where she stated certain matters as "facts" in direct, in cross-examination, she conceded that she had merely assumed certain things transpired. Overall, I found Ms. Lamba's responses in cross-examination evasive and argumentative.

[120] A change in testimony between direct and cross-examination and responses that are evasive or argumentative are among the many factors a Court may consider when assessing the credibility and reliability of a witness' evidence: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Laces Canada Ltd.*, 2019 BCSC 739 [*Youyi Group*] at paras. 91-92, aff'd 2020 BCCA 130, leave to appeal to SCC ref'd [2020] S.C.C.A. No. 218. Other factors include the extent to which a witness has direct knowledge of events; Ms. Lamba's testimony was replete with hearsay statements about what other people did, thought or told her.

[121] In closing submissions, PRHC counsel conceded PRHC was not seeking to rely on much of Ms. Lamba's evidence, and admitted that, viewed in the context of the evidence as a whole, some of the matters to which she testified did not reflect a reasonable understanding of the circumstances. However, PRHC counsel still urged the Court to accept Ms. Lamba's evidence respecting the nature and terms of the agreement between the parties.

[122] I am mindful that credibility and reliability are not "all or nothing" propositions, and it is open to me to accept all, part or none of a witness' evidence: *Radacina v. Aquino*, 2020 BCSC 1143 at para. 96, citing *R. v. R.(D.)*, [1996] 2 S.C.R. 291, 1996 CanLII 207 (S.C.C.) at para. 93, per L'Heureux-Dubé J. (in dissent in the result). However, having reflected on Ms. Lamba's live testimony, both on its own and in the context of the other evidence at trial, I have very little confidence in it. I do not believe Ms. Lamba was being intentionally dishonest, but given the significant shifts in her evidence, particularly between direct and cross, and her apparent lack of

direct knowledge, I am unable to determine what portions of her evidence to believe. As a result, I am unable to rely on Ms. Lamba's testimony at trial, including her explanations of what she meant in various communications, unless it is clearly consistent with either the contemporaneous documentation or evidence given by other witnesses.

Issue 1: What constituted the agreement between the parties?

[123] The issue of what constituted the agreement between the parties, and what comprised its terms, engages questions of contract formation. The parties agree the decision in *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 [*Le Soleil*] succinctly sets out the governing principles of contract formation:

[322] For parties to be bound in a contractual relationship there must be a manifest meeting of the minds. They must express themselves outwardly in a manner that indicates both an intention to be bound and reasonably certain mutually agreed terms: *Klemke Mining Corporation v. Shell Canada Limited*, 2007 ABQB 176, affirmed 2008 ABCA 257 (CanLII).

[323] These fundamental principles of contract law enable commercial life to operate in a fair, predictable and efficient manner. They apply whether the purported contract in question is concluded in writing, orally, by conduct, or by a combination thereof. The key question in all cases is whether an agreement has been reached on all essential terms, regardless of its form: *Catalyst Paper Corp. [v. Companhia de Navegacao Norsul]*, 2008 BCCA 336; *Periscan Financial Services Inc. v. 519090 B.C. Ltd.*, 2007 BCSC 707; *Leong & Associates Actuaries & Consultants Inc. v. Watt*, 2003 BCSC 1885.

Intention to Create Legal Relations

[324] The test for determining the intention to create legal relations is objective. It is explained by G.H.L. Fridman in *The Law of Contract*, 5th ed. (Toronto: Thomson Carswell, 2006) as follows:

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is not concerned with the parties' intentions but with their manifested intentions. It is not whether or not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of the agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.

[325] The objective test serves the main purpose of contract law: to protect reasonable expectations created by promises. Accordingly, "the test of whether a promise is made, or of whether assent is manifested to a bargain,

does not and should not depend on an enquiry into the actual state of mind of the promisor, but on how the promisor's conduct would strike a reasonable person in the position of the promisee": S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005), cited in *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188.

[326] If the parties have reduced the alleged agreement to writing, the starting point for analysis is the wording of the document itself. The words used should be given their plain, literal and ordinary meaning, unless absurdity would result, and the contract should be construed in context and as a whole: *A.L. Scott Financial (FIR) Inc. v. PDF Training Inc.*, 2004 BCSC 1646, at 105-107; *B.G. Checo International Ltd. v. B.C. Hydro and Power Authority*, 1993 CanLII 145 (SCC), [1993] 1 S.C.R. 12; *Jardine v. General Hydrogen Corporation*, 2007 BCSC 119 at 23.

[Emphasis added.]

[124] In this case, the parties agree there was some form of agreement between them but disagree about what constituted the agreement.

[125] Cowichan says the February 2021 Agreement, which incorporated the terms of the CMHA Lease with certain modifications, constituted a binding agreement between the parties, notwithstanding the CMHA's refusal to sign it. Cowichan says the February 2021 Agreement was not solely an assignment; it was also a forward-looking agreement between PRHC and Cowichan designed to take effect after the CMHA Lease terminated on November 30, 2022. However, even if the Court is not satisfied the February 2021 Agreement is itself a binding contract, Cowichan says the parties had a manifest intention to contract on the terms set out in the February 2021 Agreement in any event.

[126] PRHC disputes that the February 2021 Agreement is a legally binding agreement. In closing submissions, PRHC submitted the February 2021 Agreement, and the CMHA Lease which it purported to incorporate, were both void *ab initio* because neither contained a certain end date, which is an essential term of a lease. In the alternative, PRHC says the CMHA Lease could not be assigned because it had terminated before the effective date of the February 2021 Agreement, and further, the February 2021 Agreement is not enforceable because it was not executed by the CMHA. Instead, PRHC says the parties had an informal, unwritten

agreement with three terms. In closing submissions, PRHC counsel framed those three terms as follows:

- a) from December 1, 2020 to April 30, 2022, PRHC would pay an agreed amount of monthly rent to Cowichan for use of the Hotel by its guests, and would also pay additional compensation to Cowichan for the loss of its rooms during the reasonable amount of time it would take to restore the rooms;
- b) at the end of the rental period, BC Housing would restore the Hotel to its pre-lease condition (i.e. its May 2020 condition); and
- c) Cowichan would, at PRHC's expense, repair any damage to the Hotel caused by PRHC's guests if PRHC was unable to do so.

[127] PRHC accepts that the CMHA Lease and the February 2021 Agreement informed or guided the above three terms but says the written documents themselves do not constitute the enforceable agreement. Further, PRHC says even if the Court finds the February 2021 Agreement enforceable in whole or in part, the above terms are still what should govern.

Were the CMHA Lease and February 2021 Agreement void ab initio?

[128] I start with PRHC's argument that the CMHA Lease and the February 2021 Agreement were void *ab initio* because they lack "certainty of term", which is a fundamental term of a lease. Relying on *0723922 B.C. Ltd. v. Karma Management Systems Ltd. (DBA Madame Cleo's)*, 2008 BCSC 492 at para. 59, PRHC says the "end" of both documents was based on a contingency (i.e. the date the restoration would be completed), which offends the need for certainty of a lease term.

[129] Cowichan says this argument must fail for two reasons. First, PRHC's own pleadings preclude it from arguing for the first time in closing submissions that the CMHA Lease and the February 2021 Agreement are void *ab initio* such that no leases were ever formed. Second, and in any event, the argument is not supportable

on the merits; both documents define “term” by reference to a date certain, at which time the lease of the Hotel – in the sense of PRHC’s interest in land – ends, subject to renewal for a further period by agreement. I agree on both fronts.

[130] PRHC’s amended response to civil claim was filed jointly with the CMHA and not amended after the claim was discontinued against the CMHA. In it, PRHC pleads the existence of the CMHA Lease as a “lease” which terminated on November 30, 2020 (see amended response to civil claim at paras. 10-12). Further, PRHC pleads the existence of a second “lease” (defined as the “PRHC Lease” in the pleading) beginning on or around December 2020 and terminating on April 30, 2020. The amended response to civil claim refers to the February 2021 Agreement as the “Purported Assignment Agreement”.

[131] While the legal basis of the amended response to civil claim pleads the February 2021 Agreement is not a “legally binding agreement” and makes vague reference to questions about the “existence and / or enforceability” of both the February 2021 Agreement and the CMHA Lease, there are no material facts pleaded that would support an argument that either the CMHA Lease or the February 2021 Agreement were void *ab initio* due to lack of certainty of term. There are no material facts pleaded at all that support a challenge to the *existence* of the CMHA Lease as a “lease”. Further, the only material facts pleaded in relation to the February 2021 Agreement are that it was not signed by the CMHA and it purported to assign rights under the CMHA Lease when that lease had already terminated. PRHC did not apply to amend its pleadings.

[132] It is trite law a party cannot advance an argument that is inconsistent with or not supported by its pleadings. As the courts have recognized on many occasions, pleadings are foundational, serving to guide the litigation process and ensure its fairness by defining the issues on which the parties require a decision and giving fair notice of the case to be met: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at paras. 21-23; *Creyke v. Creyke*,

2016 BCCA 499 at para. 47; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 43.

[133] PRHC did not plead the material facts necessary to establish a challenge to the CMHA Lease or the February 2021 Agreement on the basis that either document was void *ab initio* due to uncertainty of term. As a result, Cowichan did not have notice of the argument until PRHC's closing submissions, depriving Cowichan of the opportunity to canvass this issue both before and at trial. I agree it would be unfair and contrary to the interests of justice to entertain the argument at this late stage.

[134] Further, even if I were prepared to entertain submissions that the CMHA Lease and the February 2021 Agreement were void *ab initio* due to uncertainty of term, I would reject those arguments on their merits.

[135] Both the CMHA Lease and the February 2021 Agreement (which, under s. 7, incorporates the CMHA Lease with modifications) contain a definition of "Term" and a date certain for the end of the Term, subject to earlier termination pursuant to s. 11 or extension pursuant to s. 3.2. In both documents, s. 3.2 specifies a defined end date for the extension. The respective recitals of both documents speak to Cowichan renting the rooms for the "Term". The CMHA Lease, as incorporated in to the February 2021 Agreement, also conveys the demise (or interest in land) for the "Term" as it may be extended pursuant to s. 3.2. Finally, the termination provisions contemplate the interest in land ending at the end of the "Term", even though certain other contractual obligations, such as the obligation to restore the Hotel and pay rent, survive the demise and end of the Term. The language used treats the Term and the termination of the agreement as separate events. This is consistent with the settled proposition that a lease is both an interest in land and a contract: *Highway Properties Ltd. v. Kelly, Douglas and Co.*, [1971] S.C.R. 562, 1971 CanLII 123 (S.C.C.) at p. 576. Accordingly, the language of the documents does not support PRHC's position that the term of the lease – i.e. PRHC's interest in land – is uncertain.

[136] For the foregoing reasons, I reject PRHC's argument that either the CMHA Lease or the February 2021 Agreement were void *ab initio*.

Does the February 2021 Agreement itself, or alternatively its terms, constitute the binding agreement between PRHC and Cowichan?

[137] Cowichan says the written February 2021 Agreement is the binding agreement between the parties. While drafted to include an assignment from the CMHA, Cowichan says the February 2021 Agreement was in greater part a bilateral agreement between PRHC and Cowichan. Cowichan says the operative terms of the agreement between the parties became effective on December 1, 2020 (after the "Term" of the CMHA Lease had expired) and were not dependent on the CMHA's involvement or execution. As the CMHA's signature or acceptance of the February 2021 Agreement was not required, Cowichan effectively says the CMHA's refusal to sign does not negate the document's effect as a binding agreement between PRHC and Cowichan. However, if the Court is not satisfied the document itself is the agreement between the parties, Cowichan says the parties nonetheless agreed to be bound by the terms of the February 2021 Agreement.

[138] PRHC says the parties' intention was to enter into a tripartite agreement with the CMHA that included an assignment. Since the CMHA did not execute the February 2021 Agreement, a key component of the parties' contractual intentions was never realized, leaving the contract "incomplete". Relying on *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.*, 79 DLR (4th) 97, 1991 CanLII 2734 (O.N.C.A.), PRHC says, in this case, the full execution of the February 2021 Agreement by all three of the contemplated signatories was essential to the formation of the contract itself. PRHC says it is inconsistent with the parties' true intentions to treat the February 2021 Agreement as a bilateral agreement. As well, PRHC says the ambiguity and uncertainty of certain terms of the February 2021 Agreement prevented the formation of a contract. Further, when it became clear the CMHA would not sign, the parties continued their negotiations towards a new contract. PRHC says these subsequent negotiations demonstrate neither the

February 2021 Agreement itself, nor its terms, constituted the agreement between the parties.

[139] There is no question the test for contract formation is objective: the parties must have indicated to the outside world (i.e. the objective reasonable bystander) their intention to contract and their clear agreement on the essential terms of the contract: *Le Soleil* at para. 338, quoting *Remington Energy Ltd. v. British Columbia Hydro & Power Authority*, 2005 BCCA 191 at para. 31. To determine if a binding contract was created, “the Court may consider both the parties’ conduct leading up to and following conclusion of the alleged agreement”: *Le Soleil* at paras. 334, 338. For example, the Court may consider “if the parties acted on their understanding of the agreement and incurred expenses” or engaged in subsequent negotiations (which is not necessarily inconsistent with a contract having been formed): *Le Soleil* at para. 334.

[140] Applying the objective test, and considering the history leading up to and following the signing of the February 2021 Agreement by PRHC and Cowichan, for the reasons that follow, I find the parties reached a binding agreement on the operative terms set out in the February 2021 Agreement, as amended in two specific respects through the parties’ subsequent negotiations.

The parties’ interactions leading to the February 2021 Agreement

[141] The relationship between BC Housing / PRHC and Cowichan began with the Initial CMHA Lease, as BC Housing funded the lease costs. The evidence shows Ms. Chang was already involved when the subsequent CMHA Lease was signed. While the term of the CMHA Lease was stated to be July 1, 2020 to September 30, 2020, it is agreed the document was not signed until July 22, 2020. It is also agreed that at some point before the end of September 2020, the term of the CMHA Lease was extended to December 31, 2020, pursuant to s. 3.2 of the CMHA Lease. The parties further agree that in mid-November 2020, the CMHA advised of its intention to terminate the CMHA Lease effective November 30, 2020.

[142] There is no dispute that when the CMHA advised it would end its involvement, the parties negotiated towards a new tripartite agreement. That proposed agreement was drafted on the theory that the CMHA would “assign” its rights and interests under the CMHA Lease to a proposed new party. When discussions with the new party fell apart in mid-January 2021, Ms. Chang directed that the existing draft be modified to substitute PRHC as the new tenant.

[143] Although PRHC contends the parties’ true intentions were to have a tripartite agreement, there is no evidence that any of BC Housing / PRHC, Cowichan or the CMHA believed the CMHA would have an ongoing role with respect to the use of the Hotel. Instead, the common understanding was that the CMHA would cease to have any real role; this is, in fact, what played out. While one option would have been to draft a new lease agreement between PRHC and Cowichan (without any involvement from the CMHA), Ms. Chang’s evidence was that she preferred to use an assignment because the CMHA Lease “was already produced” and PRHC could simply “take over” for the CMHA on essentially the same terms.

[144] As discussions with the proposed new tenant were ongoing, the parties negotiated modifications to some of the terms of the CMHA Lease as they were to be incorporated under the tripartite agreement. This included new language around extensions under s. 3.2 and the termination clause in s. 11.1, as well as the addition of a new s. 11.2(c) about rent if the tenant remained in possession of any of the rooms after the end of the lease term. The “Term” was originally to be extended to March 31, 2021.

[145] Apart from these negotiated changes, Ms. Chang said she understood the terms of the CMHA Lease would “more or less” be incorporated and carried forward by Cowichan and the new tenant under the tripartite agreement. When the tenant shifted to PRHC, the parties negotiated a few more changes to the terms of the underlying CMHA Lease, including changing the end date of the term to May 31, 2021. Through all these negotiations, the key provisions of the underlying CMHA Lease that are now in issue, including ss. 10.1 (damage), 11.2(a) and (b) and

Schedule A, remained unchanged. In February 2021, each of PRHC and Cowichan signed the February 2021 Agreement.

[146] Virtually all the negotiations about the tripartite agreement occurred after the November 30, 2020 expiry of the term of the CMHA Lease. Despite that expiry, the vulnerable guests remained in the Hotel and BC Housing continued to pay the lease costs. The record of communications reveals that, virtually from the start of this initiative, the representatives of Cowichan and BC Housing / PRHC did not focus on concluding technically perfect formal documents by strict and specific deadlines. By way of example, there are typos and language inconsistencies in both the Initial CMHA Lease and the CMHA Lease, there is no formal documentation extending the CMHA Lease to December 31, 2020, and there are only emails respecting the CMHA's notice of termination. Further, by the time PRHC and Cowichan signed it in February 2021, the February 2021 Agreement had to be backdated more than two months to an effective date of December 1, 2020.

[147] Rather than a technical approach to their interactions, the individuals involved focused on dealing with the practicalities of an uncertain and unexpected situation. They were prepared to act on good faith and continue the *status quo* past specific deadlines and in the absence of formally signed documents. In one exchange in late January 2021, Mr. Both wrote about “agree[ing] to continue the positive relationship until we get the details worked out.” As discussed further below, this approach persisted at least until Ms. Chang went on leave in January 2022.

[148] There is no question both PRHC and Cowichan signed the February 2021 Agreement. Ms. Chang's evidence was that before Mr. Murphy signed the February 2021 Agreement on behalf of PRHC, BC Housing obtained formal approval from the executive committee for the dates and cost of the February 2021 Agreement; she shared this fact with Mr. Both. On a *prima facie* basis, the history leading up to and the signing of the February 2021 Agreement appears to objectively indicate to the outside world both the intentions of Cowichan and PRHC to contract with each other and the terms by which those two parties agreed to be bound.

[149] Given that preliminary conclusion, I must now consider if any of the other concerns raised by PRHC negate that outward expression of agreement.

The CMHA's refusal to sign

[150] There is no dispute the CMHA did not ultimately sign the February 2021 Agreement. However, I find the CMHA's refusal – which was only finally confirmed in late April 2021 – did not invalidate the agreement reached between PRHC and Cowichan in February 2021. I say this for several reasons.

[151] First, taken together, recital B and s. 2 of the February 2021 Agreement contemplate that, as of the December 1, 2020 effective date, the CMHA would assign its interest in the Lease to PRHC “for the remainder of the Term”; the “Term” is defined by reference to the term of the CMHA Lease. However, the parties agree the term of the CMHA Lease expired on November 30, 2020. Accordingly, as of the effective date of the February 2021 Agreement, the CMHA did not have any rights or interests left under the CMHA Lease that it could assign. By its own terms, then, the *assignment* portion of the February 2021 Agreement was ineffective.

[152] Second, to the extent the CMHA's *obligations* persisted after November 30, 2020 (because the CMHA did not deliver vacant possession of the Hotel or restore the rooms to the condition contemplated in Schedule A to the CMHA Lease), the assignment portion of the February 2021 Agreement could not have had any legal effect. As a matter of contract law, a party can only assign its rights or benefits, not its obligations: *Weyerhaeuser Company Limited v. Hayes Forest Services Limited*, 2008 BCCA 69 at para. 35-39; *Lounsbury Co. Ltd. v. Duthie v. Sinclair*, [1957] S.C.R. 590 at p. 596, 1957 CanLII 62 (S.C.C.).

[153] Further, since the contemplated assignment was only until November 30, 2020, I agree with Cowichan that the operative terms that began to govern the relationship between PRHC and Cowichan as of December 1, 2020 existed independent of any assignment. Since the terms of the February 2021 Agreement contemplate the CMHA's involvement ceasing November 30, 2020, the CMHA's signature and participation could not have been required in relation to

matters that only took effect after that point. The language of ss. 3 and 4 of the February 2021 Agreement supports this conclusion: those provisions specify that PRHC and Cowichan agree to extend and modify the lease; the CMHA's involvement is not contemplated. Further, the effect of s. 7 of the February 2021 Agreement is that PRHC agreed to be bound by the CMHA Lease as amended on a go-forward basis, voluntarily undertaking "substituted performance" of the CMHA's obligations.

[154] I accept that the original plan was for the CMHA to sign the February 2021 Agreement, but as there are no formal requirements for a contract to be binding, the absence of a signature of one or more parties does not prevent the formation of a contract: Angela Swan and Jakub Adamski, Halsbury's Laws of Canada (online), Contracts, "Formal Requirements: General Considerations" (VI.1) at HCO-90 "No general formal requirement" (2021 Reissue). In my view, this is particularly the case where the "go-forward" part of the agreement does not concern the party that did not sign.

[155] The decision in *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75 [*Hoban*], aptly demonstrates that even where there are significant failures in the formality of a document, the Court may still conclude the document reflects the parties' intentions about the *substance* of their agreement. Although the failure or refusal of the CMHA to sign the February 2021 Agreement is of a different nature than the flaws in *Hoban*, the principles are the same. If a reasonable third-party observer would conclude from all the circumstances, including the flawed document itself, that the parties – in this case, PRHC and Cowichan – reached an agreement they intended to be binding and enforceable, mere failings in formality will not preclude such a finding: *Hoban* at paras. 39, 46.

[156] Based on all the above, I find the formation of a binding agreement between PRHC and Cowichan, with an effective date of December 1, 2020, was not contingent on the CMHA accepting or signing the February 2021 Agreement.

Alleged uncertainty or ambiguity of terms

[157] In closing submissions, PRHC advanced several somewhat perplexing arguments relating to what PRHC characterizes as ambiguous and commercially unreasonable terms in the February 2021 Agreement. At times, these submissions appeared to repeat or overlap PRHC's arguments that the CMHA Lease and the February 2021 Agreement were void *ab initio*. To the extent my understanding is accurate, I explained above why I am not willing to entertain PRHC's arguments that either document was void *ab initio* for lack of certainty of term. At other times, the arguments bled into PRHC's submissions about how to interpret its acknowledged contractual obligations to restore the Hotel and pay rent or other compensation during the restoration period. The interpretation questions are the subject of the second and fourth issues below.

[158] At a principled level, I accept the Court cannot find the requisite meeting of the minds for an enforceable agreement where the terms of the alleged agreement are vague, ambiguous or incomplete; the parties must express themselves in a way that allows their meaning to be determined with a reasonable degree of certainty: *Le Soleil* at para. 339. However, courts do not expect agreements to be drafted with strict precision or to include all details that (particularly with hindsight) would have been ideal; it is well-settled that courts will "strive to preserve bargains if, on close analysis, definite meaning can be discerned from their terms": *Le Soleil* at para. 341. As the Court of Appeal stated at para. 50 of *Hoban*, unless the alleged defects "render essential terms of the contracts so vague and uncertain as to be incapable of interpretation", the defects will be irrelevant to the question of whether an enforceable contract was formed.

[159] Leaving aside any arguments about uncertainty of term (which I addressed and rejected above), I understood PRHC to contend that the February 2021 Agreement cannot comprise an enforceable agreement between the parties because of significant ambiguity, inconsistency and / or commercial unreasonableness in two key areas:

- a) ambiguous and inconsistent terms about the standard to which the rooms must be restored (PRHC points to s. 10.1 and Schedule A of the CMHA Lease as incorporated into the February 2021 Agreement); and
- b) ambiguous and commercially unreasonable terms about the payment of rent or compensation after the tenants have vacated and before all the rooms have been restored.

[160] What is perhaps unique in this case is that PRHC acknowledges it has general obligations in the two areas identified above. This is not a case where, for example, Cowichan says there was an obligation to restore the rooms and PRHC refutes that basic proposition. As noted, PRHC accepts it had to: 1) restore the rooms to their May 2020 pre-lease condition; and 2) pay at least some compensation after the guests vacated (in recognition that Cowichan could not generate revenue from the rooms during the restoration period).

[161] There is no question the parties have different interpretations about the scope of these two contractual obligations; each led evidence on, and made extensive submissions about, how those obligations should be interpreted in this context. But given PRHC's recognition that it had these two categories of contractual obligations, and given the interpretation arguments advanced at trial, in my view, there is no merit to any suggestion that these two essential terms as so ambiguous and uncertain as to be *incapable* of interpretation.

[162] Difficulties in interpretation do not, in and of themselves, render a term *incapable* of interpretation; the question is whether the *substance* of the parties' intentions can be discerned: *Hoban* at para. 47, citing *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1968 CanLII 581 (B.C.C.A.) 1 D.L.R. (3d) 513 at pp. 517-518. Keeping in mind the Court's obligation to make "every effort" to find meaning, in my view, the issues identified by PRHC do not rise to the level of ambiguity, inconsistency or uncertainty that would render them "meaningless" and therefore unenforceable.

[163] While I leave the interpretive exercise itself to my further analysis below, I must briefly address one more issue. To the extent PRHC argued, in relation to this or any other issue, that the obligation to pay rent or compensation after the tenants vacated is “commercially unreasonable” or leads to a commercial absurdity, I find that argument is also not open to PRHC based on its pleadings. While PRHC’s original response to civil claim included pleas that s. 11.2(c) was a “penalty clause” and that the payments required under it were “commercially unreasonable”, those pleas were struck out in the amended response to civil claim. Having expressly abandoned those pleas and absent an application to amend, I find PRHC is precluded from advancing those arguments about commercial unreasonableness.

The parties’ conduct after February 2021

[164] Finally, PRHC contends the parties’ conduct after February 2021, including their subsequent discussions towards a new agreement and how Ms. Chang and Ms. Lamba viewed the February 2021 Agreement, support a finding that the February 2021 Agreement or its terms did not constitute a binding agreement between the parties. I do not accept PRHC’s position for the following reasons.

The parties’ subjective views about the agreement

[165] PRHC sought to rely on subsequent statements made or evidence given by Ms. Chang and Ms. Lamba about whether they viewed the February 2021 Agreement or its terms to be binding on BC Housing / PRHC. There are two problems with this line of argument.

[166] First and most critically, the test of whether a binding agreement was reached is *objective*, not subjective. The oft-cited passage from G.H.L. Fridman’s text, *The Law of Contract*, 5th ed. (Toronto: Thomson Carswell, 2006), quoted at para. 324 of *Le Soleil*, states “[t]he law is not concerned with the parties’ intentions but with their manifested intentions”. The quote continues that what an individual party believed or understood is not “the criterion of the agreement”; rather, the focus is whether a *reasonable person* in that situation would have believed or understood the other party was consenting to the same terms.

[167] Professor Waddams put it this way in *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005): “the test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an enquiry into the actual state of mind of the promisor, but on how the promisor’s conduct would strike a reasonable person in the position of the promisee” (emphasis added; quoted in *Le Soleil* at para. 325). In this case, the “promisee” is Cowichan, who was primarily represented by Mr. Both. Accordingly, the question is not what Ms. Chang and Ms. Lamba believed or understood, but rather what a reasonable person in Mr. Both’s shoes would have taken from their conduct.

[168] While I address BC Housing’s conduct in more detail below, the second problem with PRHC’s attempt to rely on Ms. Chang and Ms. Lamba’s subjective views is that their statements do not support an argument that the terms of the February 2021 Agreement were not binding. First, the question of whether or not a document is legally binding is one for the Court to determine. An after-the-fact statement by a party now in litigation that it did not consider a document to be binding is not determinative. But more fundamentally, Ms. Chang and Ms. Lamba each gave evidence that they considered the terms of the February 2021 Agreement to govern BC Housing’s relationship with Cowichan.

[169] In her discovery evidence, Ms. Chang admitted that, from the time Mr. Murphy signed the February 2021 Agreement, she conducted herself as though the terms of the February 2021 Agreement were “the governing terms between PRHC and [Cowichan]”. While I accept that Ms. Chang attempted to backtrack somewhat, including by subsequently characterizing the February 2021 Agreement as “guidelines” or “parameters”, she agreed the February 2021 Agreement contained the terms that PRHC had to abide by, and conceded there was nothing else that governed the parties’ relationship before she went on leave in January 2022. She also agreed she never referred to the February 2021 Agreement as “guidelines”, or anything other than an agreement, in her dealings with Cowichan.

[170] With respect to Ms. Lamba, I note first that Ms. Lamba was not involved with Cowichan at all until January 2022. As a result, even her contemporaneous emails are more than a year after the parties negotiated the terms of the February 2021 Agreement that Mr. Murphy signed, and more than a year after the parties had been operating consistent with its terms. Ms. Lamba's evidence does not assist me in understanding events when the agreement was reached.

[171] At trial, considerable time was spent on one email Ms. Lamba sent to Mr. Murphy and another BC Housing employee on February 16, 2022. The specific email was not copied to anyone from Cowichan; Ms. Lamba described it as an "internal reporting email". The email followed an earlier email from Ms. Lamba sent the same day, again only to BC Housing personnel, in which Ms. Lamba provided a summary of the situation with Cowichan. In the earlier summary email, one of Ms. Lamba's bullet points stated "[A]n amendment agreement was signed by [BC Housing] where it was agreed that if we remain in possession of more than 15 rooms, the rental rate per day will be double as of [the end of the term – October 31, 2021]..." There is no dispute this is a reference to s. 11.2(c), which was added to the CMHA Lease by the February 2021 Agreement.

[172] When Mr. Murphy received Ms. Lamba's summary email, he asked her to "check the lease and extensions", specifically in relation to the rental rate doubling. In response, Ms. Lamba attached both the CMHA Lease and the February 2021 Agreement, the latter of which she called the "amendment" or the "amending agreement". The relevant portions of her response email read:

Attached please find the lease between CMHA and the amendment / assignment. It has a clause 11.2(c) (current penalty formula) as follows. The amendment has been signed by the hotel and PRHC but not by CMHA as CMHA was out of the picture at that time. I did argue that the amending agreement is not fully executed but the hotel is claiming that they have been relying on the original lease and this amendment and there was nothing signed after this and we did remain in possession of all 34 rooms after [October 31, 2021]. We did ratify this new agreement via emails and the new rate...

[Emphasis added.]

[173] This is one of many email communications where, when asked about various pieces of it, Ms. Lamba’s testimony changed markedly from direct to cross-examination. I accept that Ms. Lamba consistently resisted the suggestion that when she wrote “we did ratify this new agreement”, she was referring to the February 2021 Agreement. Instead, she offered various theories, including that she was just “trying to understand”. At one point in her testimony, Ms. Lamba suggested she only meant the “new rate” to which BC Housing had agreed. I find that suggestion inconsistent with the fact that, on its face, Ms. Lamba’s email distinguishes between “this new agreement” and “the new rate”. Accepting her post-facto explanation at trial would render the written distinction meaningless.

[174] Nor do I accept the alternative explanation PRHC counsel advanced in closing submissions that Ms. Lamba was referring to a “new agreement” to remain in possession of the rooms beyond October 31, 2021. Even leaving aside my difficulties with Ms. Lamba’s testimony overall, and particularly around this email, in her evidence at trial, Ms. Lamba did not offer this other “perfectly reasonable explanation” (as counsel characterized it). In the absence of any evidence from Ms. Lamba to this effect, I do not accept counsel’s unsupported submission. Instead, I agree that the only reasonable conclusion to draw from this email is that Ms. Lamba meant what she wrote – she understood BC Housing / PRHC had both ratified the February 2021 Agreement and accepted the new rate.

[175] I therefore reject PRHC’s arguments that Ms. Chang and Ms. Lamba’s subjective views preclude a finding that the terms of the February 2021 Agreement were binding between the parties.

The parties conducted themselves as if the terms of the February 2021 Agreement were binding

[176] Returning to the parties’ subsequent actions more generally, for the following reasons, I find BC Housing / PRHC conducted itself as if the terms of the February 2021 Agreement governed and were binding on the parties’ relationship.

[177] First, as noted above, the guests continued to use the Hotel and BC Housing continued to pay Cowichan's invoices, consistent with the terms of the CMHA Lease as incorporated into the February 2021 Agreement. I will address the subsequent amendment to the rate below.

[178] Second, on April 21, 2021, Ms. Chang wrote to Mr. Both to advise that BC Housing / PRHC intended to extend the term of the lease to December 31, 2021. Ms. Chang's email stated "under the agreement, we are to provide you notice prior to May 1st and I am emailing you informally in case we somehow miss this deadline". She suggested she would send an "extension agreement" the next week; there is no dispute Ms. Chang did not send an such extension. The requirement to provide notice by May 1, 2021 is found in s. 3(b) of the February 2021 Agreement, which replaced the previous s. 3.2 of the CMHA Lease governing extensions. There is no evidence of any other document or informal agreement that would have required BC Housing / PRHC to give Cowichan notice of an intention to extend the lease by May 1, 2021.

[179] When asked what she meant by the phrase "under the agreement" (emphasis added), Ms. Chang confirmed she was referring to the February 2021 Agreement. Further, after the CMHA confirmed it would not sign the February 2021 Agreement, and the parties began discussing a new lease agreement, Ms. Chang continued to distinguish between the *existing* "agreement" and a "new draft", "new agreement" or "changes to" the lease agreement. At least during Ms. Chang's tenure, no one from BC Housing ever suggested to Cowichan, particularly in writing, that there was *no agreement* between the parties.

[180] After PRHC and Cowichan signed the February 2021 Agreement, the parties' communications often included reference to the need to restore the rooms once the guests vacated. Again, the obligation to restore the rooms is found in the CMHA Lease (ss. 10.1, 11.1, 11.2(a) and (b) and Schedule A), as incorporated into the February 2021 Agreement. I acknowledge that s. 11.1 was modified by the February 2021 Agreement, but not with respect to the obligation to restore to "the condition

contemplated in Schedule A". The new s. 11.2(c), which was added to the underlying CMHA Lease by the February 2021 Agreement, also addresses the obligation to restore. Again, there is no evidence of any other document or informal agreement that required BC Housing / PRHC to restore the rooms after the guests vacated.

[181] Based on the foregoing, I conclude that a reasonable, third-party observer in the shoes of Mr. Both would have understood from BC Housing / PRHC's conduct that they viewed the terms of the February 2021 Agreement as binding and enforceable.

The parties' subsequent negotiations do not invalidate their original agreement

[182] Finally, PRHC says that when the parties learned the CMHA would not sign the February 2021 Agreement, they shifted to negotiating a new agreement, and those subsequent negotiations are inconsistent with the idea that there was already a binding agreement between them. I do not agree.

[183] There is no dispute Ms. Chang and Mr. Both began discussing a new agreement in late April and early May 2021, after the CMHA definitively confirmed it would not sign the February 2021 Agreement. I accept that on May 6, 2021, Mr. Both confirmed he had "no concerns" with a new contract moving forward and suggested it could provide an opportunity for "minor adjustments" to ensure "loose ends or things open to interpretation" could be clearly defined. Mr. Both also proposed an increase in the daily rate to \$3,000, including because BC Housing had requested an extension to December 31, 2021, beyond the latest date for extension set out in the February 2021 Agreement.

[184] In her response the same day, Ms. Chang simply said "[w]e will work together towards the signing of a new contract" and notes she will need to get back to Mr. Both on the proposed new rate. Ms. Chang did not suggest that the longer extension period (which was BC Housing's request) or Cowichan's proposed new rate somehow invalidated the agreement the parties had been working under since

at least mid-February 2021. Nor was there any suggestion that Mr. Both's reference to "loose ends" reflected a fundamental disagreement about the material terms of the contract. In my view, Mr. Both was referencing the kinds of granular details often worked out between the parties after an agreement has been reached.

[185] While Ms. Chang and Mr. Both exchanged sporadic communications about a new agreement for the remainder of 2021, the evidence confirms neither party prioritized completing one. If either party believed there was a contractual vacuum, as PRHC now suggests, one would have expected to see both a greater emphasis and more urgency towards concluding a formal agreement. Instead, I find both parties were content to continue dealing with each other as they had previously done, in reliance on the terms of the February 2021 Agreement. In fact, the record of communications demonstrates that, after a few exchanges in June and July 2021, Ms. Chang did not raise the issue of a new agreement again until mid-September 2021 when she sought a further extension of the lease to the end of March 2022.

[186] It is true that Mr. Both initially held the pen on drafting a new agreement, but Ms. Chang did not strenuously press him to finish it, nor did she suggest a deadline to have a new agreement in place. In early October 2021, Ms. Chang and Mr. Both had a meeting to discuss multiple items, including a new agreement and the logistics and timing for restoring the Hotel given BC Housing's further extension request. After that meeting, Ms. Chang took over responsibility for, as she phrased it, "stitching together the various document components of this into one lease agreement". She indicated she would aim for a draft by the end of October, but did not ultimately provide a draft until late November 2021. That draft agreement is never agreed to, finalized or signed by the parties. Again, through these many months, no one ever suggested the parties did not have an agreement.

[187] While continuing negotiations between parties *may* suggest they never agreed to the same terms, if the Court concludes an agreement was reached, the fact that parties engaged in subsequent negotiations after that point will only affect the existence of a contract "if the continuation of the negotiations can be construed

as an agreement to *rescind* the contract”: *Le Soleil* at para. 335, citing Sir Guenther Treitel’s *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003) at 16-17.

[188] In *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2013 BCSC 866 [*Vancouver Canucks*], the Court was faced with a situation where the parties had pre-existing and related sponsorship and equipment agreements and were negotiating renewals. While they reached agreement on virtually all substantive terms, they continued to negotiate about amendments to a clause that linked the two agreements. At para. 153 of *Vancouver Canucks*, the Court referred to the decision in *Perry v. Suffields*, [1916] 2 Ch. 187 (C.A.) for guidance about the impact of subsequent negotiations.

[189] In *Perry*, the English Court of Appeal held at pp. 191-192 that where a complete contract is formed, subsequent negotiations commenced on new points after that time will not affect or invalidate the original agreement. In *Vancouver Canucks*, the Court relied on *Perry*’s guidance in holding that the subsequent negotiations in the case at bar did not negate the formation of an agreement.

[190] The Ontario Superior Court of Justice reached the same conclusion in *Ice Gardens at York University Inc. v. Parmalat Dairy and Bakery Inc.*, 2004 CanLII 13500 (O.N.S.C.), [2004] O.J. No. 1083 [*Ice Gardens*], which was also quoted in *Vancouver Canucks* at para. 154. In *Ice Gardens*, the Court found that after the parties had settled the major components of their agreement, they engaged in subsequent rounds of negotiation for more than a year to “massage some supplementary details” (at para. 44). Throughout this same period, the parties conducted themselves consistent with the original agreement, including by paying invoices. The Court held the subsequent negotiations did not alter the existence of the original agreement.

[191] There are similarities between the present case and both *Vancouver Canucks* and *Ice Gardens*. Here, Cowichan and BC Housing (on behalf of PRHC) negotiated the February 2021 Agreement; Cowichan and PRHC both signed that document in mid-February 2021, demonstrating their agreement to its terms. There is no

evidence of any disagreement between Cowichan and PRHC when they signed the February 2021 Agreement. In fact, the evidence demonstrates their agreement.

[192] More than two months later, after having operated under the February 2021 Agreement for the intervening period, the parties began to discuss a new document. Over time, each party suggested various details to include in the new document. There is no evidence BC Housing / PRHC viewed the negotiations around those details as reflecting a fundamental disagreement about the material terms of the February 2021 Agreement. In the circumstances, I do not find the subsequent negotiations between Ms. Chang and Mr. Both negated the existence of the parties' original agreement to the terms of the February 2021 Agreement.

Conclusion on the agreement between the parties

[193] As the foregoing analysis confirms, I am not persuaded that any of PRHC's concerns negate the parties' original outward expression of agreement to the terms of the February 2021 Agreement, as evidenced through PRHC and Cowichan's signing of that document.

[194] However, I accept there were some subsequent amendments to the terms of the February 2021 Agreement. For example, there was an initial further extension of the lease to December 31, 2021 (a date which was beyond the October 31, 2021 extension date set out in the February 2021 Agreement), and then subsequent extensions to March 31, 2022 and ultimately to April 30, 2022. The parties also negotiated and agreed to a rate adjustment to \$3,000/day (up from the \$2,700/day reflected in the February 2021 Agreement). On May 19, 2021, Ms. Chang emailed Mr. Both to confirm she had "board approval" for that rate adjustment. Finally, in March and April 2022, the parties negotiated, and on April 5, 2022 Ms. Lamba agreed to, a schedule of further rate increases for the months of April to September 2022. The parties understood the May to September payments were to compensate Cowichan for loss of revenue during the anticipated period of the restoration work.

[195] All these amendments were negotiated by email; they were never incorporated into a new, formal document. But as in *Ice Gardens*, each of these

subsequent amendment requests was agreed to by the other party, and both parties continued to operate under the terms of the February 2021 Agreement as they had mutually agreed to amend them. As noted above, there are no formal requirements for an agreement; it can be concluded in writing (formal or otherwise), orally, by conduct or, as here, by a combination of these forms.

[196] Accordingly, I find the parties reached a binding agreement on the terms set out in the February 2021 Agreement, which incorporated and continued the terms of the CMHA Lease but for certain expressly stated modifications. I find further that the parties agreed to modify the original terms of the February 2021 Agreement in two respects: first, through extensions of the lease term, initially to December 31, 2021 and ultimately to April 30, 2022; and second, through an initial rate adjustment during the tenure of the lease and then further increases for the period of April to September 2022.

Issue 2: What was the scope of PRHC's obligation to restore the Hotel and did PRHC breach that obligation?

[197] The remaining three issues engage questions of contractual interpretation with respect to two key aspects of the agreement I have found existed between the parties: 1) the obligation to restore the Hotel; and 2) the obligation to pay rent or compensation until the rooms are restored. Before delving into the first obligation, I will first set out the key principles that govern contractual interpretation.

The principles of contractual interpretation generally

[198] The parties agree the starting point for contractual interpretation is the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*]. In *Sattva*, the Court confirmed that contractual interpretation has evolved to require a "practical, common-sense approach" rather than one "dominated by technical rules of construction" (para. 47). According to the Court, the overriding goal of contractual interpretation is to determine the mutual and objective intention of the parties and the scope of their understanding as expressed in the words of the contract at the time the contract was made (paras. 47, 57).

[199] To achieve this goal, *Sattva* says the Court must “read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract” (para. 47). As *Sattva* confirms at paras. 47-48, reliance on “surrounding circumstances” recognizes that the text of a contract will derive its meaning, at least in part, from the context, which will include the purpose of the agreement and the nature of the relationship created by it. The Court commented on the importance of context as follows:

[47] ...Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[200] While the evidence of surrounding circumstances that informs an interpretive exercise will necessarily vary from case to case, the Court in *Sattva* was clear that there are limits: the evidence “should consist only of objective evidence of the background facts at the time of the execution of the contract”, in the sense of facts that were or reasonably ought to have been within the common knowledge of both parties at or before the date of contracting: *Sattva* at paras. 58 and 60. Further, despite recognizing the importance of context, in *Sattva* the Court cautioned that surrounding circumstances “must never be allowed to overwhelm” the words of the agreement and “cannot be used to deviate from the text such that the court effectively creates a new agreement” (para. 57). Interpretation of a contractual provision must always remain “grounded in the text”, which must be “read in light of the entire contract”: *Sattva* at para. 57.

The parties' positions on the obligation to restore the Hotel

[201] The actual dispute between the parties about the scope of PRHC's obligation to restore the Hotel is relatively narrow. There is no question that once the guests vacated the Hotel, PRHC was obligated to repair any damage caused by its guests, excepting reasonable wear and tear. In practical terms, the parties agree that because the Hotel was a functioning hotel in May 2020 when it was leased to the CMHA, PRHC was required to restore the Hotel to its pre-lease functional condition as a hotel. The dispute arises because the parties have different interpretations of the key provisions relating to restoration, and therefore the standard or degree to which the Hotel was required to be repaired.

[202] To situate the parties' positions, it is helpful to repeat the key terms of the February 2021 Agreement that address restoration. All of them originated in the CMHA Lease; there were no substantive amendments to these provisions when they were incorporated into the February 2021 Agreement. Substituting the parties' names, the key provisions are as follows:

10. DAMAGE

- 10.1 Usual wear and tear excepted, [PRHC] covenants and agrees to repair and make good, to the satisfaction of [Cowichan], acting reasonably, any damage caused to the Hotel by Guests during the Term, as extended, to a condition as close as possible to the condition that such damaged portions of the Hotel were in prior to the Commencement Date.

11. TERMINATION

[...]

- 11.2 Despite any contrary provision of this Agreement:
- (a) [PRHC's] obligation to pay Rent to [Cowichan] will cease on the later of the end of the Term, the date specified in a Notice [advising of a desire to terminate the agreement], and the date on which every Guest has left the Hotel and [PRHC] has delivered vacant possession of the Hotel to [Cowichan], in the condition contemplated in Schedule A.

SCHEDULE "A" – Rooms

[...]

After the property is vacated, [PRHC] is responsible, at its cost, for:

- a professional “deep clean” of each room
- restoring each room to the same condition (or better) as on initial inspection
- replacement of any good that are deemed unrepairable or missing
- paying daily rate set by [Cowichan] until room meets brand standard and is returned to [Cowichan’s] inventory
- [...]
 - if [PRHC] is unable to meet the above requirements, [Cowichan] will arrange for this to be completed at the expense of [PRHC] with additional fees

[Emphasis added.]

[203] Cowichan says the surrounding circumstances known to all parties in May 2020 include that the Hotel was operating as a Ramada brand hotel and was required to meet certain standards to maintain that brand status, including with respect to general consistency of appearance. Cowichan says this is what was meant by the term “brand standard” in Schedule A.

[204] Cowichan acknowledges that, in May 2020, the Hotel was not brand new, not every appliance or PTAC unit matched from room to room and there was some variation in fixtures and other items, such as bathroom taps and toilets. Cowichan says “brand standard” does not mean “brand new” or that *everything* must match. However, Cowichan relies on the uncontested evidence of Mr. Both, Mr. Horn and Mr. Mulleray that the case goods and other finishings were generally consistent, and there was a consistent colour scheme and theme or style across the rooms, as would be expected from a recognized brand of hotel. As a result, Cowichan says that if the elements used to match across the rooms in May 2020, PRHC must restore those same elements to a matching state. Mr. Both’s turn of phrase was “if it used to match, it needs to match”.

[205] Cowichan accepts that, to achieve general consistency of appearance with rooms where the case goods or furnishing were damaged by the guests, PRHC may be required to replace specific case goods or items in rooms where the guests did

not cause damage to them. Lastly, Cowichan says the phrase “to the same condition (or better)” (emphasis added) in Schedule A recognizes that, particularly given the matching requirement, PRHC may not be able to replace goods that were in “used” condition in May 2020 with “used” goods now, and may therefore be required to provide new goods instead. Cowichan says this language precludes any claim by PRHC for betterment. I address betterment separately below.

[206] Cowichan says the above provisions respecting restoration must be interpreted collectively, and when they are, it is clear they require PRHC to restore the Hotel to “brand standard”, subject to anything that can be returned to Cowichan in the same condition it was in at May 2020 (excepting reasonable wear and tear), and taking into account the need to ensure general consistency of appearance for items that matched across the 34 guest rooms in May 2020.

[207] PRHC says its obligation was to restore the Hotel, “as close as possible” to the standard of its May 2020 pre-lease condition. PRHC seeks to rely exclusively on the language of s. 10.1, which it says sets a clear standard for the scope of the repairs. PRHC contends the additional language in Schedule A is “unclear, ambiguous and internally contradictory”. PRHC says the parties did not discuss or exchange any information about the Ramada Brand Standards before Method became involved in mid-2022, and the reference to “brand standard” in Schedule A is too ambiguous and subjective to be enforceable.

[208] Similarly, PRHC says the reference to “or better” in Schedule A is unclear and inconsistent with the language of s. 10.1, which both excepts “reasonable wear and tear” and obliges PRHC to restore the Hotel to a condition “as close as possible” to its pre-lease condition. PRHC’s assertion that the Hotel was in poor condition in May 2020 initially grounded its claim that the Court should find it entitled to a reduction for betterment; again, I address this below.

[209] Given the asserted ambiguity and lack of clarity in the words of Schedule A, PRHC says this Court should instead interpret the scope of the obligation to repair by reference to the language of s. 10.1 and the default principles that a tenant is

obliged to repair premises to the condition they were in at the start of a lease, excepting reasonable wear and tear. PRHC also says the parties' agreement included a corresponding obligation on Cowichan to complete the restoration at PRHC's cost if PRHC was unable to do so. However, PRHC says that because the question of Cowichan's conduct in relation to the restoration work is closely related to the issue of mitigation, it should be left to phase two of the trial.

Discussion on the interpretation of the restoration obligation

[210] To begin, I am unable to accept PRHC's position that the scope of its obligation to restore the Hotel should be interpreted based exclusively on the language of s. 10.1, without regard to the language in Schedule A. In my view, such an approach would offend the principle from *Sattva* that I must read the "contract as a whole" and interpret specific provisions in light of the entire contract: *Sattva* at paras. 47 and 57.

[211] In *Sutter Hill Management Corporation v. Mpire Capital Corporation*, 2022 BCCA 13 [*Sutter Hill BCCA*], rev'g 2020 BCSC 238, leave to appeal to SCC ref'd [2022] S.C.C. No. 90, the Court of Appeal overturned the trial judge's interpretation of the specific contractual provisions at issue in that case, including because the trial judge had not given effect to *the totality of all of the words* used by the parties to describe the contractual obligations. At paras. 32-35, the Court of Appeal's analysis offers the following guidance for how trial judges may be able to guard against such errors in future:

- a) consider the clause or clauses in question as a whole, in light of the surrounding circumstances, rather than approaching particular phrases or elements of phrases in a piecemeal fashion;
- b) rather than focusing on how similar words have been used in other situations, use the specific context to discern the intention of the parties in the particular situation at hand; and

- c) ensure any interpretation takes into account *all* of the words used, in the context of the whole agreement and the surrounding circumstances, given that the objective is to determine the parties' intention, not merely the textual possibilities.

[212] I will therefore consider the language of ss. 10.1, 11.2 and Schedule A in interpreting the scope of PRHC's obligation.

[213] PRHC's restoration obligation must be interpreted in light of surrounding circumstances that include the fact that, from mid-2016 to the start of the Initial CMHA Lease in May 2020, Cowichan had been operating the Hotel as a Ramada. While the Hotel was not "brand new" in May 2020, and there is evidence of both wear and tear and certain minor deficiencies, there is no evidence to suggest that the condition of the Hotel in May 2020 was such that Cowichan was at risk of losing its ability to operate as a Ramada brand.

[214] Further, the evidence is clear that Ms. Brunet (for the CMHA), Mr. Horn (for the Cowichan Housing Association), and Ms. Chang (for BC Housing / PRHC), were all aware at the relevant times that to continue to operate as a Ramada brand hotel, there were certain objective standards that Cowichan had to meet. Ms. Brunet testified that since the Hotel had been operating as a hotel, "obviously there was a standard there". Mr. Horn testified that, at the pre-lease condition inspection, the rooms were "quite consistent room to room." He agreed there was discussion about the expectation of consistency, in the sense of an expectation that, after the Hotel had been remediated, a regular hotel guest would have the same experience regardless of which room they stayed in at the Hotel.

[215] When asked about the language of "brand standard" in Schedule A, Ms. Chang's evidence was that although she had never seen a specific document with details, she was aware there was an "objective brand standard" that Cowichan had to meet for every room in the Hotel, and that the standard was set by the entity responsible for Ramada franchises overall, rather than by Cowichan itself. This express recognition that a franchisee must maintain certain standards to continue

operating as a franchise is, in my view, consistent with objective background facts that were or reasonably ought to have been within the common knowledge of both PRHC and Cowichan at the relevant time.

[216] I accept that the specific Ramada Brand Standards in effect in May 2020 and May 2022 were not exchanged between the parties either when the CMHA Lease was executed or when the terms of the February 2021 Agreement were agreed. But I find PRHC’s approach to the language of “brand standard” in Schedule A overly technical and rigid. PRHC’s position is essentially that to be sufficiently clear, a requirement to restore to “brand standard” would have had to be grounded in the particular Ramada Brand Standards document in effect at a specific time.

[217] It is well settled that “[i]t is not necessary for every conceivable matter to be resolved between the parties before an enforceable contract is created”: *Le Soleil* at para. 330. As the decisions in *Hoban* and *Ice Gardens* demonstrate, there are often supplementary details for the parties to work out after an agreement is reached. This makes even more sense where there are detailed or technical requirements that may not have crystallized by the time the contract is formed.

[218] In *Hoban*, the Court of Appeal disagreed with the trial judge’s conclusion that an unspecified reference to sums owing for “adjustments” was too vague. Instead, the Court of Appeal found that adjustments are the “type of details” commonly resolved at a later date, and it was not a condition precedent or an essential element of the contracts that the adjustments be quantified in advance: *Hoban* at para. 54.

[219] While the context and nature of the details yet to be resolved in this case are different than in *Hoban*, I find the principle instructive. Here, the mutual and objective intention of the parties was that PRHC would restore the Hotel to its May 2020 pre-lease condition as a *functioning Ramada brand hotel* – in other words, to “brand standard”. I agree with Cowichan that, given the evidence of the scope of the parties’ understanding, the reference to “brand standard” in Schedule A should be interpreted as a reference to an external standard, rather than a specific document or particular design scheme. It is clear the parties understood Cowichan had to meet

an external standard to continue operating the Hotel under the Ramada brand, even if the details of that standard were not expressly discussed.

[220] Given the exception in s. 10.1 for “reasonable wear and tear” and the evidence that there were certain minor deficiencies in the condition of the Hotel in May 2020, I agree with Cowichan that restoring the Hotel to “brand standard” does not necessarily require PRHC to restore the Hotel to all “brand new” condition. To the extent that anything can be returned to Cowichan in the same condition it was in as of May 2020, and excepting reasonable wear and tear, that is consistent with PRHC’s contractual obligations, subject to the following qualification: PRHC also has an obligation to ensure that items that matched across the 34 rooms in May 2020 are restored to a matching condition. To be clear, where there was variation before, there is no obligation to have matching items afterwards.

Did PRHC breach its contractual obligation to restore the Hotel?

[221] The next question is whether PRHC breached the obligation to restore, as I have interpreted it above. As noted, in closing submissions, PRHC suggested I should leave the question of breach to phase two of the trial, given its interrelation with issues of mitigation. Cowichan countered that the Court does not even get to the question of mitigation without first finding a breach.

[222] In my view, the evidence leaves little doubt that PRHC breached its obligation to restore the Hotel. Mr. Both provided considerable, and at times, graphic evidence about what occurred at the Hotel while it was occupied by the vulnerable population, including but not limited to significant drug use, sex work and the premises being used as bicycle “chop shops”. Mr. Both described damage resulting from some of the vulnerable guests smoking and / or using drugs in the rooms, including burns on carpets, furnishing and mattresses, as well as ceiling fans being detached so that drugs could be hidden in them. Mr. Both also testified to some guests having defecated or urinated in their rooms generally (including in the PTAC units), rather than using the bathroom facilities.

[223] Mr. Mulleray confirmed, in both his testimony and contemporaneous written communications, that there was such “significant damage” to the rooms, including to walls, window coverings, beds, carpets, furniture / case goods and finishings, that there was “no possibility to save items with the expectation that they would be suitable for consumer use in the future”. He also confirmed the rooms smelled bad, including as a result of smoke and other behaviours. Mr. Mulleray’s assessment was that all rooms would need “new carpet, millwork, beds / bedding, furniture / case goods, light fixtures, interior paint and a full cleaning.” Ms. Parnham, the only person from BC Housing / PRHC who went to the Hotel after April 30, 2022 (when the guests vacated), shared Mr. Mulleray’s view that extensive replacements and repairs would be required.

[224] More critical to the question of breach, however, is the uncontroversial evidence that as of May 20, 2022, all 34 rooms had been gutted and, to this day, they have never been restored. There is no question the Hotel has not been restored to a functioning Ramada brand hotel. Given that reality, I have no difficulty finding PRHC is in breach of its obligation to restore the Hotel as set out above.

[225] I acknowledge that PRHC says it did everything reasonably possible to move the restoration forward, but was hampered by a lack of agreement about the scope of the work and what it alleges was Cowichan’s non-responsiveness. PRHC also points to what it says was Cowichan’s breach of its own duty to undertake the restoration work if PRHC was “unable” to do so. For its part, Cowichan disputes it was non-responsive and says there is no evidence PRHC was “unable” to do the work, seeking to draw a distinction between the contractual language of “unable” and what it sees as PRHC’s choice not to proceed.

[226] In closing submissions, counsel for both parties agreed that Cowichan’s conduct in respect of its contractual obligation is related to the issue of mitigation and therefore is properly left to phase two of the trial. I agree with that assessment and will not address those issues in these reasons. In my view, given that arguments about Cowichan’s own conduct are being deferred, the questions to be determined

at phase two also necessarily encompass whether PRHC was, in fact, “unable” to meet its obligations to restore the Hotel.

Issue 3: Can PRHC claim a reduction in the cost to restore the Hotel by reason of betterment?

[227] As indicated above, there is no dispute the Hotel was not in “brand new” condition when it was first leased to the CMHA in May 2020. Multiple witnesses testified to minor deficiencies and “wear and tear”, and the photographs and inspection reports from the pre-lease condition inspection in May 2020 confirm that testimony. Based on this, PRHC initially took the position the Hotel was in such poor condition in May 2020 (including containing case goods no longer available for purchase) that any restoration of the Hotel would necessarily improve it above the pre-lease condition, resulting in betterment. Consistent with the articulation of the liability issues in the severance order, PRHC initially submitted the Court should find it was an express or implied term of the parties’ agreement that the cost of restoration would be reduced to account for any such betterment.

[228] However, in oral closing submissions, PRHC counsel submitted the Court should defer PRHC’s entitlement to claim a reduction for betterment to phase two of the trial. PRHC says the question of that entitlement is closely tied to questions about the pre-lease condition of the rooms and furnishings in comparison to what could be provided now (given that the rooms remain gutted). PRHC says the evidence adduced at phase one is insufficient to allow the Court to determine the pre-lease condition of the Hotel with the amount of specificity that will be required to assess betterment. Tedious as it might be, PRHC says the Court should have evidence of the condition of each room, and potentially also expert evidence of the general standards of the hotel industry, before deciding whether PRHC is entitled to claim a deduction for betterment. Relying on *Laichkwiltach Enterprises Ltd. v. F/V Pacific Faith (Ship)*, 2009 BCCA 157 at paras. 35-36, PRHC says betterment is “a question of fact to be determined on the evidence and with regard to what is reasonable in the particular case”, with the starting point being the cost of repair.

[229] Cowichan says the Court does not need evidence of the pre-and post-lease condition of the rooms to conclude that, as a matter of contractual interpretation, PRHC cannot advance a claim in betterment. Cowichan says the language of Schedule A, as incorporated into the February 2021 Agreement, precludes a claim in betterment because it expressly requires PRHC to restore each room “to the same condition (or better) as on initial inspection”. Cowichan says the agreed contractual language of “or better” would be rendered meaningless if PRHC were entitled to claim a deduction for betterment.

[230] Cowichan argues the language of “or better” was used to recognize that it may not be possible to replace or restore certain goods to their May 2020 pre-lease condition. For example, it may not be possible to replace a table that was scratched in May 2020 and then damaged further by a guest with another table also containing a scratch. Cowichan notes Ms. Brunet testified that she understood the words “or better” to mean that an older or used item that was damaged could end up being replaced with a new one. Cowichan says the case PRHC relies on is a tort case, rather than a contracts case in which the parties defined and allocated the risks through specific contractual language.

[231] I accept that the language of Schedule A expressly allows that some aspects of the Hotel may end up being restored to a better condition than they were in prior to May 2020 and suggests the parties’ contemplated that outcome. However, I also accept that the concept of betterment is a highly fact-specific exercise, requiring an assessment of the cost of the repair in comparison to the value of the item in its previous condition. Given the current gutted state of the Hotel rooms, and despite the contractual language, I am not satisfied the evidence adduced at phase one of the trial allows me to definitively rule out any possibility that PRHC could claim for betterment. At the end of the day, the specific evidence may or may not support a claim for betterment, but in my view, this is an issue more properly left for phase two.

[232] I therefore exercise my discretion to decline to decide the issue of betterment on phase one of the trial; it will be deferred to phase two of the trial.

Issue 4: Was PRHC obligated to pay rent after September 30, 2022 and if so, did PRHC breach that obligation?

The parties' positions on the obligation to pay rent

[233] The final issue concerns the proper interpretation of PRHC's obligation to pay rent between its delivery of vacant possession of the Hotel on April 30, 2022 and the date on which the Hotel was to be fully restored. Again, the question is not whether PRHC had *any* obligation to pay compensation while the necessary renovations were to have been underway. PRHC accepts it was required to compensate Cowichan for the loss of the use of the rooms while it was expected they would be restored. Further, in early April 2022, PRHC agreed to rental rates for the period from May to September 2022 inclusive, recognizing that the end of April 2022 timing for the guests to vacate would result in Cowichan losing its ability to operate the Hotel for the "summer season". It is also agreed that Cowichan paid those agreed-to amounts up until the end of September 2022.

[234] The dispute arises because PRHC says it only had to pay rent for the reasonable amount of time the restoration should have taken. PRHC sets the end of that time period at September 30, 2022, which was the date originally targeted by the parties and Method for having restored the Hotel. Cowichan says the terms of the February 2021 Agreement oblige PRHC to pay until the restoration of all rooms is complete and there was no agreement, implied or otherwise, to PRHC's suggested cut-off point of September 30, 2022. Since the Hotel has not been restored, Cowichan says PRHC is in breach of its obligation to pay, subject to arguments about mitigation at phase two.

[235] As the text must ground any question of contractual interpretation, I start with the relevant provisions. Cowichan says two provisions support its claim that PRHC was obliged to pay rent beyond September 30, 2022. The first is the combination of ss. 11.2(a) and (c), the latter of which was added to the CMHA Lease through the

terms of the February 2021 Agreement. The second is set out in Schedule A, which was unchanged from the CMHA Lease. They are as follows:

11. TERMINATION

[...]

11.2 Despite any contrary provision of this Agreement:

(a) [PRHC's] obligation to pay Rent to [Cowichan] will cease on the later of the end of the Term, the date specified in a Notice [advising of a desire to terminate the agreement], and the date on which every Guest has left the Hotel and [PRHC] has delivered vacant possession of the Hotel to [Cowichan], in the condition contemplated in Schedule A.

[...]

(c) If [PRHC] remains in possession of part or all of the Hotel after the end of the Term and without the execution and delivery of a new lease or written renewal or extension of this Agreement, there is no tacit or other renewal of this Agreement, and [PRHC] will be considered to be occupying the Hotel as a Tenant from month to month at a rental rate payable calculated as follows and notwithstanding any contrary term of the Agreement:

(i) if, in the manner required under this Agreement, [PRHC] remains in possession of not more than 8 rooms, the rental rate will be equal to \$1,800 per day, plus applicable taxes;

(ii) if, in the manner required under this Agreement, [PRHC] remains in possession of more than 8 rooms but not more than 14 rooms, the rental rate will be equal to \$2,700 per day, plus applicable taxes; and

(iii) if, in the manner required under this Agreement, [PRHC] remains in possession of 15 or more rooms, the rental rate will be equal to \$5,400 per day, plus applicable taxes.

SCHEDULE "A" – Rooms

[...]

After the property is vacated, [PRHC] is responsible, at its cost, for:

[...]

- paying daily rate set by [Cowichan] until room meets brand standard and is returned to [Cowichan's] inventory
 - the daily rate will be consistent with seasonal RACK rate for each room that is not returned to [Cowichan's] inventory

- if [PRHC] is unable to meet the above requirements, [Cowichan] will arrange for this to be completed at the expense of [PRHC] with additional fees

[Emphasis added.]

[236] Cowichan says each of the above provisions imposes an obligation on PRHC to pay rent until the Hotel is fully restored. Cowichan does not suggest it is entitled to compensation under both provisions but says it is entitled to rent until all rooms are restored to functional hotel rooms. Cowichan says issues about exactly what form of rent is payable, and how it should be calculated (i.e. quantification), are questions for phase two. At this stage, Cowichan just seeks a finding that it is entitled to payment of rent after September 30, 2022, and that PRHC is in breach of its obligation to pay, subject to arguments about mitigation.

[237] As I understood PRHC's closing submissions, its core position is that both s. 11.2 and the "daily rate" obligation in Schedule A violate commercially reasonable principles respecting damages for commercial leases because they create an absurd situation where PRHC may have to pay rent indefinitely. In this regard, PRHC appeared to renew its arguments about the uncertainty of the lease term and also suggested Cowichan was financially motivated to delay restorations, further supporting its position on commercial absurdity.

[238] In oral argument, PRHC expressly disclaimed reliance on certain portions of its written submissions, in part as I understand it, because some portions were unsupported in the pleadings. Further, although PRHC agrees that issues about Cowichan's conduct and duties in respect of restoration efforts will be addressed at phase two, PRHC nonetheless says that in interpreting how long it had to pay rent, the Court should recognize that Cowichan delayed and blocked PRHC's reasonable efforts to restore the Hotel. In essence, I understood PRHC to be urging the Court to interpret its obligations to pay rent after April 30, 2022 as including an implied cut-off at September 30, 2022, based on the anticipated reasonable period for completion of the restoration. However, if the Court finds an obligation to pay beyond

September 30, 2022, PRHC accepts that any amount to be paid is a question for phase two.

Discussion on the obligation to pay rent

[239] As summarized above, the parties approached this issue from vastly different perspectives. Cowichan took a primarily text-based approach, arguing the obligation to pay rent until the rooms are restored to Cowichan's inventory is clear and straightforward, and questions about how long that obligation should continue are properly addressed at phase two, when mitigation will be explored. PRHC advanced a complicated series of interwoven arguments, some of which depend, at least in part, on arguments I have already decided PRHC cannot advance, and others of which depend on issues that both sides agree should be left to phase two.

[240] There is nothing in the ordinary and grammatical meaning of the terms of s. 11.2 or the "daily rate" provision in Schedule A that support imposing a date-specific end to PRHC's obligation to pay rent after delivery of vacant possession. The ordinary meaning of all the provisions is that PRHC is required to pay rent of some amount until Cowichan gets all 34 rooms back in a condition that it can rent them out to the public as Ramada brand hotel rooms. The evidence confirms that when s. 11.2(c) was added in the negotiations leading up to the February 2021 Agreement, both Ms. Chang and Mr. Horn considered it to be "fair" for Cowichan to charge rent while the rooms were being restored. Accordingly, the mutual and objective intention of the parties appears to have been to recognize Cowichan's entitlement to compensation for a period after delivery of vacant possession, given the parties' understanding that restoration would take some time.

[241] There is no evidence the parties discussed how long they anticipated the restoration would take. In any event, had they engaged in those discussions in early 2021, the parties' knowledge about the condition of the Hotel would have been based on about eight months of the vulnerable population living at the Hotel. The evidence confirms the condition of the Hotel had changed by the time the vulnerable population finally vacated more than 14 months later, after more than two years of

full-time daily use of the Hotel's rooms. Further, there is no evidence that when PRHC agreed to rental rates from May to September 2022, the parties also agreed to amend the terms of the February 2021 Agreement to place a September 30, 2022 end date on PRHC's obligation to pay rent. Further, the evidence is clear that by mid-June, Mr. Mulleray had advised both parties he considered the September 30, 2022 timeframe to be unattainable. If PRHC had viewed the September 30, 2022 date as a hard stop on its obligations to pay rent pending completion of the restoration, it did not communicate that to Cowichan, let alone secure Cowichan's agreement to modify PRHC's contractual obligations.

[242] I previously decided that because PRHC's amended response to civil claim strikes out a pleading that payments required under s. 11.2(c) are commercially unreasonable, it is not open to PRHC to advance those arguments at trial. However, I accept that a truly indefinite obligation to pay rent would create an absurd result and run counter to the Court's obligation to strive to interpret contracts "in a manner that accords with sound commercial principles": *H.R.S. Resources Corp. v. Thompson Creek Metals Company Inc.*, 2024 BCSC 1847 at para. 134. That said, I disagree that s. 11.2 and the "daily rate" in Schedule A impose an indefinite obligation to pay rent. Rather, the end point is defined: it is the period when all the Hotel's rooms have been restored to a condition where they can again form part of Cowichan's Ramada-branded inventory.

[243] I appreciate that PRHC considers itself to have made reasonable efforts to move the work forward, and takes the position that, if not for the obstacles and delays PRHC says Cowichan created, September 30, 2022 ought to have been sufficient time to complete the restoration. However, as noted, the parties agree that questions about their respective conduct are tied to the issues of mitigation and will not be addressed until phase two. It is unclear how I could properly consider those questions at phase one for purposes of interpreting PRHC's obligation to pay rent.

[244] In these circumstances, I am unable to conclude that, as a matter of contractual interpretation, PRHC's obligation to pay rent to Cowichan ceased as of

September 30, 2022. I find instead that, pursuant to the terms of the February 2021 Agreement, PRHC was obligated to pay rent to Cowichan past September 30, 2022, given that the rooms had not yet been restored and returned to Cowichan's inventory.

[245] As PRHC has not paid rent past September 30, 2022, I find it is in breach of its obligation to do so. This finding is, of course, subject to arguments respecting mitigation.

Conclusion on phase one of the trial

[246] As indicated, this first phase of the trial is concerned with determining what constituted the agreement between the parties, interpreting and defining the scope of the obligations between the parties, and deciding whether those obligations were breached. As a result, this phase of the trial lends itself more to factual findings, and perhaps declaratory relief, than orders.

[247] Accordingly, I summarize my factual findings as follows:

- a) The agreement between PRHC and Cowichan consists of the terms of the February 2021 Agreement (which incorporate and modify the CMHA Lease), as subsequently amended by agreement of the parties with respect to the term of the lease and the rate adjustments PRHC approved in May 2021 and April 2022;
- b) The agreement between PRHC and Cowichan requires PRHC to restore the Hotel to its May 2020 pre-lease condition as a functioning Ramada brand hotel – in other words, to brand standard – subject to the following:
 - i. anything that can be returned to Cowichan in the same condition it was in as of May 2020, excepting reasonable wear and tear; and
 - ii. PRHC must ensure that items that matched across the 34 rooms in May 2020 are restored to a matching condition;

- c) PRHC breached its obligation to restore the Hotel to the standard required;
- d) The agreement between PRHC and Cowichan requires PRHC to pay rent to Cowichan after September 2022; and
- e) PRHC breached its obligation to pay rent after September 2022.

[248] It remains open to PRHC to argue issues of mitigation in respect of the two contractual obligations for which I have found PRHC in breach. If it assists the parties moving forward to frame the above factual findings as declarations, they have leave to do so. If the parties wish to make further submissions on the form of order, they may submit a request to appear.

[249] I defer the following issues to phase two of the trial, of which I am seized:

- a) PRHC's entitlement to claim a reduction in the cost to restore the Hotel by reason of betterment; and
- b) Questions relating to: Cowichan's obligation to undertake repairs if PRHC was unable to meet its obligation to restore the Hotel, including Cowichan's conduct in respect of that obligation; and whether PRHC was "unable" to undertake the restoration work.

[250] I leave the issue of costs of phase one to be addressed either at a future phase of the trial, or on application by the parties to make further submissions in that regard, if required.

"K. Wolfe J."