IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Li v. Virk,*
2023 BCSC 83

Date: 20230113
Docket: S226949
Registry: Vancouver

Between:

Fuping Li

Petitioner

And

Sarabjit Singh Virk

Respondent

Before: The Honourable Madam Justice J. Hughes

On judicial review from: An order of the Residential Tenancy Branch, dated August 29, 2022 (RTB File No. 310069548 and 310070157).

Oral Reasons for Judgment

The Petitioner, appearing on her own behalf:	F. Li G. Wang (Agent) Y. Zhao (Agent)
Counsel for the Respondent:	H. Saini
Place and Date of Hearing:	Vancouver, B.C. January 9, 2023
Place and Date of Judgment:	Vancouver, B.C. January 13, 2023

Introduction

[1] This is an application for judicial review pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, of a decision of the Residential Tenancy Branch ("RTB") made August 29, 2022 (the "Decision") which ordered the petitioner, Fuping Li, to deliver vacant possession of premises located at 9220 Garden City Road, Richmond, British Columbia (the "Premises") to the respondent, Sarabjit Singh Virk, by 1:00 p.m. on August 31, 2022 (the "Order of Possession").

[2] The petitioner says that the Decision is patently unreasonable and that the RTB erred in multiple respects in making the Order for Possession. In support of her submissions, the petitioner seeks to adduce extra-record evidence that was not before the RTB. The petitioner also makes allegations of bias and bad faith on the part of the RTB.

[3] The issues before me on this judicial review are thus as follows:

a) Should the petitioner be granted leave to adduce new extra-record evidence on judicial review?

b) Is the Decision patently unreasonable?

c) Was the Decision procedurally unfair on account of the Arbitrator being biased against the petitioner?

[4] For the reasons that follow, I decline to consider the extra-record evidence. I find that the Decision is not patently unreasonable nor was the petitioner denied procedural fairness.

Statutory Framework

[5] Residential tenancy matters are governed by the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*].

[6] Section 26(1) of the *RTA* requires tenants to pay rent, subject to any right they may have to deduct all or a portion of the rent.

[7] Section 19(1) of the *RTA* provides that a landlord must not require or accept a security deposit that is greater than one half month's rent payable under the tenancy agreement. Section 19(2) in turn provides that if a landlord accepts a security deposit greater than the amount permitted under s. 19(1), then the tenant may deduct the overpayment from rent.

[8] However, s. 21 of the *RTA* provides that a tenant must not apply a security deposit as rent absent written consent of the landlord. This is also reflected in the RTB's Residential Tenancy Policy Guideline 17 "Security Deposit and Set off", which provides that "a tenant must not apply all or part of the security deposit to rent without the written consent of the landlord".

[9] Section 46 of the *RTA* sets out the grounds upon which a landlord may issue a Notice to End Tenancy for non-payment of rent, and the rights and obligations of the tenant in response:

> 46 (1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.
>
> (2) A notice under this section must comply with section 52 [form and content of notice to end tenancy].
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> (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.
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> (4) Within 5 days after receiving a notice under this section, the tenant may
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> (a) pay the overdue rent, in which case the notice has no effect, or
>
> (b) dispute the notice by making an application for dispute resolution.
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> …
>
> [Emphasis added.]

[10] A Notice to End Tenancy must be in the form prescribed by s. 52 of the *RTA*:

> 52 In order to be effective, a notice to end a tenancy must be in writing and must
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> (a) be signed and dated by the landlord or tenant giving the notice,
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> (b) give the address of the rental unit,
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> (c) state the effective date of the notice,

> (d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy,
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> (d.1) for a notice under section 45.1 [tenant's notice: family violence or long-term care], be accompanied by a statement made in accordance with section 45.2 [confirmation of eligibility], and
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> (e) when given by a landlord, be in the approved form.

[11] Orders for possession in favour of a landlord are governed by s. 55 of the *RTA,* which provides as follows:

> **55** (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
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> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
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> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.
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> (1.1) If an application referred to in subsection (1) is in relation to a landlord's notice to end a tenancy under section 46 *[landlord's notice: non-payment of rent]*, and the circumstances referred to in subsection (1) (a) and (b) of this section apply, the director must grant an order requiring the payment of the unpaid rent.
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> …
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> [Emphasis added.]

[12] As to the effective date of an order for possession under s. 55, the RTB's Residential Tenancy Policy Guideline 54 "Ending a tenancy: Orders of Possession" provides that effective dates are generally set for two days after the order is received. However, that guideline also notes that an arbitrator has discretion to set the effective date and may do so based on what they determine is appropriate based on the totality of the evidence and submissions of the parties.

Background

[13] In December 2018, the petitioner signed a lease agreement with the former owner of the Premises, pursuant to which she agreed to pay rent in the amount of $2,500 per month (the "Original Lease"). The Original Lease was for a fixed term from December 10, 2018 to January 31, 2024, following which time it would continue on a month to month basis or for another fixed length of time unless the tenant gave

notice to end tenancy within a specific time frame. The Original Lease also included a lengthy addendum to the standard form lease agreement.

[14] Sometime prior to May 2019, one of the rooms in the Premises became unusable on account of a crack in the foundation. The petitioner and the former owner thus entered into a new lease agreement with a rent reduction to $2,000 per month (the "Second Lease"). The term of the Second Lease was the same as the Original Lease. The Second Lease did not include the addendum that formed part of the Original Lease.

[15] At some point in spring 2022, the respondent entered into a contract of purchase and sale to purchase the Premises from the former owner. The purchase completed on March 31, 2022 with a possession date of April 1, 2022. The respondent was aware that the Premises was subject to a tenancy agreement and was provided with a copy of the Original Lease.

[16] It is undisputed for the purpose of this judicial review that the petitioner paid a damage deposit to the former owner in the amount of $2,500 and that this was transferred to the respondent in conjunction with completion of his purchase of the Premises. It is also undisputed that a deposit of $2,500 exceeds that permitted by s. 19(1) of the *RTA*.

[17] On March 31, 2022, the respondent's property manager provided the petitioner with a Notice to Tenant/Acknowledgement advising that the Premises had been sold to the respondent effective March 31, 2022, and that all rental payments from that date onwards should be made to the respondent. The notice provided the respondent's phone number and email addressed and said this:

> I confirm that your present monthly rent is $2500 and that is payable on the 1st day of each month, and please e-transfer monthly rent 1st day of each month. I also confirm that your lease or rental agreement ends January 31, 2024, if applicable.

[18] The petitioner did not pay any amount of rent on April 1, 2022. She advised the respondent's property manager that the proper rent was $2,000, but was unable

to provide a copy of the Second Lease at that time. The petitioner thought the respondent was trying to force her to sign a new lease with an illegal rent increase of $500.

[19] On April 6, 2022, the respondent's property manager again wrote to the petitioner to follow up on the April rent payment and provided an updated email address to which the rent payment could be e-transferred. The property manager also indicated that a new lease would be drawn up reflecting the new landlord and property management company.

[20] The petitioner still had not paid rent by April 10, 2022 and on that date, the respondent issued a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the "Notice"). The Notice provided that the tenancy was ending because the petitioner had failed to pay rent in the amount of $2,500 which was due on April 1, 2022.

[21] On April 17, 2022, the petitioner provided a copy of the Second Lease to the respondent.

[22] The petitioner testified before the Arbitrator that she attempted to pay $2,000 April rent to the respondent in cash, but that he refused it. The petitioner did not provide any evidence corroborating the attempted cash payment.

RTB Decision

[23] On April 17, 2022, the petitioner filed an application with the RTB disputing the Notice. The petitioner also sought an order that the respondent comply with the *RTA*, regulations and the tenancy agreement, though it does not appear she provided any particulars of what form of compliance she sought.

[24] On April 26, 2022, the respondent filed an application with the RTB seeking an order of possession based on the Notice, recovery of unpaid rent, and reimbursement of filing fees.

[25] The parties attended a dispute resolution hearing by telephone before an Arbitrator (the "Arbitrator") on August 18, 2022. At the hearing, the petitioner

confirmed receipt of the evidence submitted by the respondent in support of his application, but not the corresponding application package. As such, the Arbitrator was not satisfied that service had been properly effected and dismissed the respondent's application with leave to reapply (other than as to reimbursement of filing fees).

[26] The Arbitrator issued the Decision on August 29, 2022. She framed the issues before her as: (a) whether the petitioner was entitled to an order that the respondent comply with the *RTA*, regulation and tenancy agreement; (b) whether the Notice should be cancelled; and (c) whether the petitioner was entitled to reimbursement of her filing fee.

[27] The Arbitrator first dealt with the issue of which tenancy agreement applied, noting that the respondent relied on the Original Lease and the petitioner relied on the Second Lease. The Arbitrator found that the Second Lease superseded the Original Lease, concluding as follows (Decision at p. 5):

> The parties disagree about which written tenancy agreement submitted is accurate. … I find the Tenant is in a better position to know what they signed with the prior owner than the Landlords or the realtor are because they were not parties to the agreements. I find the [Second Lease] superseded the [Original Lease], and that the [Second Lease] is the current agreement in this matter. I find rent is $2,000.00 per month due on the first day of each month pursuant to the 2021 agreement.

[28] As to payment of rent, the respondent testified that the petitioner did not pay rent for April 2022 and had not paid any rent since the Notice was issued on April 10, 2022. The petitioner did not dispute that she did not pay rent. She testified that she tried to pay $2,000 rent in cash in April, but the respondent refused to accept it. The petitioner conceded that she had not paid any rent since the Notice was issued.

[29] Based on the evidence before her, the Arbitrator concluded that the petitioner had failed to pay rent since April 2022 (Decision at pp. 5-6):

> I find it more likely than not that the Tenant failed to pay April rent. The Tenant testified that they tried to pay April rent in cash, but the Landlords would not accept it. The Tenant did not submit any evidence to support their testimony that they tried to pay April rent. I do not accept the Tenant's

> testimony for two reasons. First, it does not accord with common sense that the Landlord would decline $2,000.00 in cash for April rent because the whole purpose of a tenancy is to collect rent in exchange for possession of the rental unit. Second, M.D.S. sent a letter to the Tenant April 06, 2022, stating that the Tenant can email rent to an email address provided. It does not accord with common sense that M.D.S. would send this letter if the Landlords were declining rent. Further, it is unclear why the Tenant did not simply pay rent by the email provided in M.D.S.'s letter if in fact the Landlords were denying cash payments. Given the evidence before me, I do not accept that the Tenant tried to pay April rent and I find the Tenant failed to pay April rent.
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> The Tenant did not point to any authority under the Act to withhold April rent and therefore I find the Tenant was required to pay $2,000.00 by April 01, 2022, pursuant to section 26(1) of the Act and that section 46(3) of the Act does not apply.
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> [Emphasis added.]

[30] The Arbitrator went on to conclude that the respondent was entitled to issue the Notice and that it complied with s. 52 of the *RTA*. The Arbitrator also found that the petitioner failed to pay any rent after the Notice was issued. With respect to the petitioner's dispute of the Notice, the Arbitrator held that "the Tenant has not provided any valid basis for disputing the Notice because I do not accept that the Tenant tried to pay April rent or tried to pay rent after the Notice was issued": Decision at p. 6.

[31] As such, the Arbitrator concluded that the respondent was entitled to an Order of Possession pursuant to s. 55(1) of the *RTA* and issued such an order effective at 1:00 p.m. two days later, on August 31, 2022: Decision at pp. 6-7. The Arbitrator also made a monetary order under s. 55(2) of the *RTA* for unpaid rent for April through August 2022 in the amount of $10,000.00: Decision at p. 7.

[32] As to the petitioner's application to have the respondent comply with the *RTA*, the petitioner indicated that her position was that the respondent was forcing her to pay increased rent of $2,500 and change the term of the lease. In response to this, the Arbitrator noted that she had concluded the proper rent was $2,000, but found that the petitioner's failure to pay rent and the resulting determination that the tenancy was ending, rendered the petitioner's application moot (Decision at p. 7):

> I have decided that rent was $2,000.00 per month. However, the tenancy is ending pursuant to the Notice and therefore this is moot. I dismiss the Tenant's request for an order that the Landlord comply with the Act, regulation and/or the tenancy agreement without leave to re-apply.

Extra-Record Evidence

[33] For the purpose of this judicial review, the petitioner seeks to rely on evidence that was not before the RTB when it made the Decision and granted the Order of Possession. This evidence includes, in material respect:

a) evidence establishing that a deposit of $2,500 was paid by the petitioner to the former owner of the Premises and transferred to the respondent in conjunction with his purchase of the Premises;

b) correspondence between the parties that post-dates the Decision and in which the petitioner offered to pay the rent owing from April 2022 to September 2022 in exchange for continued tenancy of the Premises; and

c) documents regarding the respondent's efforts to obtain possession of the Premises after the Decision was issued.

[34] The function of a court on judicial review is supervisory; it must ensure that the tribunal operated within legal norms and are, in a very strict sense, reviewing what went on before the tribunal: *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387, at para. 34. A court is not permitted to embark on a hearing *de novo* by undertaking a fresh examination of the substantive issues and consider evidence that was not before the decision-maker: *Duhamel v. Financial Institutions Commission*, 2018 BCSC 962 at para. 18, citing *Actton Transport Ltd. v. British Columbia (Employment Standards)*, 2010 BCCA 272 at para. 23; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 24 [*Citizens' Services*]. For this reason, judicial review normally concerns itself only with evidence that was considered by the tribunal: *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427 at para. 154.

[35] As the Court of Appeal noted in *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at para. 52:

> [52] ... There is ample authority for the proposition that evidence that could or should have been before the tribunal, but which was not in fact before it, is generally not admitted in judicial review proceedings. The court is reviewing, and must show some deference for, the decision already taken, rather than decide the matter anew on different evidence.
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> [Emphasis in original.]

[36] In *Air Canada*, the Court framed the relevant question as whether the admission of the evidence in issue is consistent with the limited supervisory jurisdiction of the court:

> [39] In determining whether an affidavit is admissible on judicial review, the key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court. Evidence that was before the tribunal is clearly admissible before the court. Evidence that casts light on the manner in which the tribunal made its decision will also be admissible within tight limits. Factual evidence setting out the procedures followed by the tribunal, or providing information showing that the tribunal was not impartial will also be admissible.
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> [40] With respect to "general background information", such information will be admissible only if it is confined to what the tribunal actually knew or acted upon. Thus, an affidavit may educate the court on matters that are within the specialized expertise of a tribunal, or which form the common understanding of those who operate in a particular field. Courts must be vigilant, however, not to accept affidavits that simply seek to shore up weaknesses in the record, or serve to provide a revisionist version of the tribunal's reasons.
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> [Emphasis added.]

[37] The discretion to look beyond the record must be exercised sparingly and only in exceptional circumstances, which circumstances may include to establish general background information, to show lack of jurisdiction or a denial of natural justice, or to establish that there was no evidence to support a material finding: *Duhamel* at para. 21, citing *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at para. 17; see also *Miller v. The Union of British Columbia Performers*, 2021 BCSC 1054 at para. 52.

[38] I find that the evidence sought to be relied on by the petitioner is not proper evidence on this judicial review and I decline to consider it. The new evidence does

not cast light on the proceedings before the Arbitrator; rather, it addresses post-Decision correspondence between the parties and conduct by the respondent in attempting to obtain vacant possession of the Premises at a time when the stay of the Order of Possession had lapsed. That evidence also seeks to prove facts that were not before the Arbitrator, in particular, the amount of the deposit actually paid and that it was transferred to the respondent by the former owner.

[39] The evidence in issue here cannot be characterized as falling within the narrow confines of "general background information" contemplated in the jurisprudence: see e.g. *Air Canada* at para. 41, citing *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 45. I find that the new evidence the petitioner seeks to rely on constitutes an attempt to "shore up" the record by placing information before the Court that the Arbitrator did not—and with respect to the evidence of the parties' post-Decision conduct, could not—have the opportunity to consider: *Air Canada* at para. 43; see also *R.B. v. British Columbia (Superintendent of Motor Vehicles)*, 2021 BCCA 262 at para. 57.

[40] Whether the Decision was patently unreasonable must be assessed on the record that was considered by Arbitrator. Proceeding in the manner suggested by the petitioner would amount to the Court impermissibly embarking on a *de novo* hearing based on evidence that was not before the decision-maker, and did not even exist at the material time: *Duhamel* at para. 18; see also *Metro Vancouver (Regional District) v. Belcarra South Preservation Society*, 2020 BCSC 662 at para. 25, aff'd 2021 BCCA 121. As such, I decline to consider the new evidence proffered by the petitioner.

Standard of Review

[41] Pursuant to ss. 5.1 and 84.1 of the *RTA*, the standard of review on this application is prescribed by s. 58 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 [*ATA*]. Section 58 provides as follows:

> 58 (1) If Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be

> an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
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> > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> >
> > (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> > (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
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> > (a) is exercised arbitrarily or in bad faith,
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> > (b) is exercised for an improper purpose,
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> > (c) is based entirely or predominantly on irrelevant factors, or
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> > (d) fails to take statutory requirements into account.

[42] Thus, pursuant to s. 58(2)(a) of the *ATA*, findings of fact or law, or exercise of discretion by dispute resolution officers in respect of matters within their exclusive jurisdiction, are reviewable on a standard of patently unreasonableness. A helpful summary of the meaning of patent unreasonableness is set out in para. 25 of *Hollyburn Properties Limited v. Staehli*, 2022 BCSC 28 [*Hollyburn Properties*]:

> [25] As the *ATA* does not define patent unreasonableness as it applies to a tribunal's factual or legal findings, however, guidance regarding its meaning must be sought from the case law. In *Kong* [*Kong v. Lee,* 2021 BCSC 606] at paras. 58-65, Madam Justice MacDonald set out a number of jurisprudential holdings which provide content to the notion of patent unreasonableness, including:
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> a) as expert tribunals are entitled to significant deference, the standard is an onerous one and their decisions can only be quashed if there is no rational or tenable line of analysis supporting them (*Victoria Times Colonist v. Communications, Energy and Paperworkers,* 2008 BCSC 109 at para. 65; aff'd 2009 BCCA 229);
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> b) a decision is patently unreasonable if it is openly, evidently, and clearly irrational, or unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures (*Gichuru v. Palmar Properties Inc.,* 2001 BCSC 827 at para.

34, citing *Lavender Co-Operative Housing Association v. Ford,* 2011 BCCA 114);

c) a patently unreasonable decision is one that almost borders on the absurd (*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23 at para. 18 and *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28);

d) it is a possible that a great deal of reading and thinking will be required before the problem in a patently unreasonable decision is apparent, but once its defect is identified, it can be explained simply and easily, leaving no real possibility of doubting that the decision is defective (*Yee v. Montie,* 2016 BCCA 256 at para. 22);

e) the standard of patent unreasonableness also applies to the consideration of adequacy of reasons, which involves an assessment of the justification, transparency and intelligibility of the decision-making process (*Vavilov*); and

f) under the *RTA* regime, the overriding test for adequacy of reasons is whether a reviewing court is able to understand how and why the decision was made (*Ganitano v. Yeung,* 2016 BCSC 2227 at para. 24).

[43] A decision is not patently unreasonable if the evidence is merely insufficient. As the Court of Appeal noted in *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80:

> [37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. …
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> [Emphasis added.]

[44] Expert tribunals such as the RTB are entitled to significant deference and the patently unreasonable standard is onerous. A decision will only be quashed where there is "no rational or tenable line of analysis" supporting it: *Kong v. Lee*, 2021 BCSC 606 at para. 58, citing *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 at para. 65, aff'd 2009 BCCA 229.

[45] The Court owes no deference to administrative decision-makers on questions of procedural fairness, but must ensure that a decision was made fairly: *Nova-*

BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia, 2022 BCCA 247 at para. 71, citing *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55 at para. 52.

[46] The standard of review to be applied to matters of procedural fairness arising from an RTB decision is thus whether, in all of the circumstances, the decision maker acted fairly: *ATA*, s. 58(2)(b); *Kong* at para. 66; *Hollyburn Properties* at para. 27, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 77.

Analysis

Is the Decision Patently Unreasonable?

[47] The precise errors in the Decision that are alleged by the petitioner to render it patently unreasonable are voluminous and somewhat difficult to discern. Broadly framed, however, the petitioner asserts that the Arbitrator made palpable and overriding errors in:

a) Rejecting the petitioner's testimony that she attempted to pay the April rent in cash and instead drawing a "common sense" inference that had she in fact done so, the respondent would have accepted it;

b) Concluding that s. 46(3) of the *RTA* did not apply to the circumstances before her;

c) Concluding that the petitioner had no valid basis to dispute the Notice and finding that it complied with s. 52 of the *RTA*;

d) Concluding that the petitioner's application to have the respondent comply with the *RTA*, regulations and tenancy agreement was moot;

e) Granting the Order of Possession instead of ordering payment of interest on the unpaid rent; and

f) Determining the effective date of the Order of Possession, setting it for two days after the Decision instead of two days after it was received by the petitioner.

[48] The petitioner also alleges that the Arbitrator exercised her discretion in bad faith in setting the date for the Order of Possession for August 31, 2022, and failing to deduct the $1,500 deposit overpayment from the April 2022 rent owing.

[49] The respondent says none of the errors alleged by the petitioner render the Decision patently unreasonable or procedurally unfair.

Rejection of the petitioner's testimony re attempted cash payment of April rent

[50] The petitioner submits that the Arbitrator's decision is patently unreasonable because it raises allegations of bias on account of the Arbitrator rejecting her testimony that she attempted to pay April rent of $2,000 in cash, but the respondent refused to accept it. Instead, the Arbitrator found it "more likely than not that the Tenant failed to pay April rent": Decision at p. 5. In so concluding, the Arbitrator relied on the lack of any evidence supporting the petitioner's evidence that she tried to pay April rent. This conclusion is largely a credibility finding that was open to the Arbitrator on the record before her, particularly given the lack of evidence corroborating the petitioner's alleged attempted cash payment.

[51] The petitioner also takes issue with the Arbitrator's reasoning as to why she did not accept the petitioner's uncorroborated evidence. First, she says that the Arbitrator's inference that the landlord's alleged refusal to accept $2,000 rent did "not accord with common sense…because the whole purpose of a tenancy is to collect rent in exchange for possession of the rental unit" was unreasonable. Second, she takes issue with the Arbitrator's conclusion that it was non-sensical that the property manager would send the April 6, 2022 letter containing instructions for rent payment if the landlord was refusing to accept it.

[52] In support of her position, the petitioner points to other conduct by the respondent that she says is inconsistent with the inference that he would have accepted $2,000 if the petitioner had offered it – primarily his continued reliance on the Original Lease and $2,500 rent, and issuance of the Notice. The petitioner also says that the Arbitrator's "common sense" inferences were inconsistent with the positions the respondent took at the RTB hearing– pointing to complaints he made about the cost of utilities and the Premises being sublet by the petitioner as evidence that he did not accept her alleged cash payment because he wanted to remove her from the Premises.

[53] Inferences drawn by a decision-maker should not be interfered with if they were available on the evidence and the inference-making process was sound: *Chavez-Salinas v. Tower*, 2022 BCCA 43, at para. 28, citing *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10, 21–23. Conversely, inferences that lack support in the record are speculation, which, when arising in respect of a material fact, may constitute palpable and overriding error: *Chavez-Salinas* at para. 29.

[54] In my view, the petitioner has not established that the inferences drawn by the Arbitrator were speculative, or unavailable to her on the record before her, or that her reliance on them in rejecting the petitioner's testimony was arbitrary or based on irrelevant factors. The fact remains that the petitioner did not provide any evidence corroborating the claim that she attempted to pay April rent prior to the Notice being issued, and did not in fact pay any rent for the subsequent four months leading up to the hearing. In the circumstances, I find that the inferences drawn by the Arbitrator were available to her on the evidence—or lack thereof—before her, and it cannot be said that the reasoning process she adopted was unsound. It is no answer for the petitioner to say—as she now does on judicial review—that the Arbitrator erred because she failed to place the burden on the respondent to prove that he refused to accept a cash payment that he testified was never offered.

Conclusion that s. 46(3) of the* RTA *did not apply

[55] The petitioner submits that the Decision is patently unreasonable because the Arbitrator erred in her conclusion that s. 46(3) of the *RTA* did not apply. The petitioner relies on the combined effect of ss. 19(1) and (2), 26(1) and 46(3) of the *RTA* to say that having found the rent payable was $2,000 per month, the Arbitrator should then have then also concluded that:

a) the respondent had accepted a security deposit in excess of that permitted by s. 19(1), resulting in an overpayment of $1,500;

b) the tenant was entitled to deduct the $1,500 overpayment from rent pursuant to s. 19(2) and 26(1) of the *RTA*; and

c) s. 46(3) then should have applied to negate the Notice.

[56] I do not accept this argument for two reasons. First, the petitioner does not appear to have raised or argued this issue before the RTB. It appears that the petitioner only took this position sometime after the Decision was issued. As such, there is no evidence in the record before the Arbitrator establishing that, at any time prior to the RTB hearing, the petitioner advised the respondent of her position that the deposit he received from the former owner exceeded the permissible amount under the *RTA* or that she wanted to deduct the overpayment from her rent.

[57] The issue of whether the petitioner was entitled to deduct the deposit overpayment from the April rent does not appear to have been mentioned before the Arbitrator. As the Arbitrator noted, “The [petitioner] did not point to any authority under the *RTA* to withhold April rent”: Decision, at p. 7.

[58] Generally, a party is not permitted to raise an issue on judicial review that was not, but could have been, before the administrative decision maker: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61 at para. 23 [*Alberta Teachers*]. However, the court retains discretion to

entertain a new issue in “exceptional circumstances”: *The Owners, Strata Plan VR 1120 v. Civil Resolution Tribunal*, 2022 BCCA 189 at para. 50 [*Strata Plan*].

[59] The exercise of discretion to consider new issues is guided by the rationales that underpin the general rule, namely respect for legislative intention to delegate matters to administrative decision makers, deference to administrative decision makers deciding issues within their expertise, and avoidance of prejudice that may arise if a sufficient evidentiary record is lacking: *Alberta Teachers* at paras. 24–26.

[60] The standard of review is a further indicium of whether a court can adequately show deference to the decision maker. It may be appropriate for the Court to exercise its discretion where the new issues are reviewable on the correctness standard (e.g. issues as to jurisdiction), where the decision maker’s and other courts’ views on the issue are well-canvassed in the jurisprudence, and where no further evidence is required: *Alberta Teachers* at para. 28; *Strata Plan* at para. 53; *Casavant v. British Columbia (Labour Relations Board)*, 2020 BCCA 159 at para. 41. However, the Court may decline to consider a new issue where the standard of review is patent unreasonableness such that the decision-maker is entitled to considerable deference and the opportunity to consider the issue at first instance: see e.g. *Powell v. British Columbia (Residential Tenancy Branch)*, 2015 BCSC 2046, at para. 50.

[61] Applying these principles to the case at bar, I decline to consider the new issue as to deduction of the deposit from April rent and whether this would be sufficient to engage s. 46(3) and thereby potentially render the Notice invalid. The standard of review that applies here—patent unreasonableness—requires considerable deference to the Arbitrator and, in my view, also requires that the Arbitrator have the opportunity to consider the issue at first instance. This is particularly the case given that the RTB is an expert tribunal, and the issue involves the interpretation and application of its home statute.

[62] Second, I find that in order to determine the issue of whether the petitioner was entitled to deduct any overpayment of the deposit from April rent, I would be

required to have recourse to evidence that was not before the Arbitrator, namely evidence establishing that a deposit of $2,500 was in fact paid by the petitioner and transferred to the respondent on the closing of his purchase of the Premises. The Court would be put in the position of interpreting and applying provisions of the *RTA* to facts that were not before the Arbitrator. These factors all militate in favour of this issue being considered by the RTB—not the Court—at first instance.

***Conclusion that the Notice complied with the* RTA**

[63] The Arbitrator rejected the petitioner's evidence that she attempted to pay April rent in cash, but the respondent refused to accept it: Decision at p. 6. The Arbitrator then went on to find as follows as to the Notice:

> Upon a review of the Notice, I find that it complies with section 52 of the Act in form and content as required by section 46(2) of the Act.

[64] The petitioner says this is a patently unreasonable conclusion because the Notice stated that the unpaid rent was $2,500, but the Arbitrator had determined that the rent payable was only $2,000 under the Second Lease. The petitioner points to no statutory provision or legal authority in support of her position. The Arbitrator's finding that the Notice complied with s. 52 of the *RTA* "in form and content" (emphasis added) is entitled to significant deference on judicial review. The RTB is an expert tribunal in matters of interpretation of the *RTA* and the Arbitrator's conclusion as to whether the Notice met the requirements of s. 52 falls squarely within that area of expertise.

[65] Further, s. 46(3) provides that a notice to end tenancy on the basis of unpaid rent has no effect if "the amount of rent that is unpaid is an amount the tenant is permitted…to deduct from rent". Regardless of whether the amount of rent stated in the Notice was $2,500 or $2,000, the fact remained that the Notice was for "unpaid rent" and rent was due and owing by the petitioner to the respondent when the Notice was issued. This remains the case even if the issue of the deposit overpayment had been raised before the Arbitrator and the petitioner's theory

accepted. Even if she had been entitled to deduct the alleged $1,500 deposit overpayment from the $2,000 April rent, $500 would have remained due and owing.

[66] In the result, I reject the petitioner's submission that in such circumstances, the Arbitrator's conclusion that the Notice complied with s. 52 of the *RTA* in form and content was patently unreasonable on the evidence before her.

[67] The Arbitrator's conclusion that the petitioner had no valid basis to dispute the Notice was also predicated on her finding that in addition to non-payment of April rent, the petitioner also did not pay rent for the months after the Notice was issued:

> Based on the testimony of both parties, I find the Tenant did not pay any rent after the Notice was issued. To be clear, I do not accept that the Tenant tried to pay rent after the Notice was issued for the same reasons outlined above.
>
> The Tenant disputed the Notice April 17, 2022, within the time [given] April 16 and 17, 2022 were a weekend. However, the Tenant has not provided any valid basis for disputing the Notice because I do not accept that the Tenant tried to pay April rent or tried to pay rent after the Notice was issued. Given this, the Tenant's dispute of the Notice is dismissed without leave to re-apply.
>
> [Emphasis added.]

[68] The petitioner argues that during this time, there was a dispute between her and the respondent as to whether the rent was $2,500 under the Original Lease or $2,000 under the Second Lease and that she had never met the respondent. She therefore says that the RTB failed to consider her alleged entitlement to "carefully identify the new landlord to [avoid] the risks of paying the wrong person and get a consensus with the new landlord" before having to pay rent, and failed to appreciate that "It is [the respondent's] obligation to CLEARLY describe that he would accept $2,000 rent" (emphasis in original). She also repeats the submission that the rent should have been reduced by the amount of the deposit overpayment.

[69] I find that none of these alleged failures on the part of the Arbitrator render the Decision patently unreasonable. The petitioner identifies no statutory provision or basis in the jurisprudence suggesting she was entitled to withhold rent but remain in possession of the Premises pending identification to her satisfaction of the new landlord, or absent agreement from the landlord as to the amount of rent to be paid

pending resolution of that dispute. Regardless, the March 31, 2022 Notice to Tenant and the April 6th letter both provided information about the sale of the property to the respondent and instructions on how rent was to be paid thereafter, including contact information for the respondent.

[70] In the circumstances, the Arbitrator's conclusion that the petitioner had no valid basis to dispute the Notice was available to her on the evidence and was not irrational or unreasonable on its face. The Decision is therefore not patently unreasonable on the basis of that conclusion.

Conclusion that the petitioner's application was moot

[71] The petitioner says that the Arbitrator made a palpable and overriding error in concluding that her application to have the respondent comply with the Act, regulations and tenancy agreement was moot. Having concluded the Second Lease applied and the proper rent was $2,000, the petitioner says that the Arbitrator ought to have ordered the landlord to comply with the Act by not increasing the rent to $2,500 in reliance on the Original Lease. I disagree.

[72] The Arbitrator found that the Second Lease superseded the Original Lease and thus was the applicable tenancy agreement: Decision at para. 4. In light of that finding, she also concluded that the rent was $2,000 per month due on the first day of each month also pursuant to the Second Lease. These findings disposed of the petitioner's application for an order that the respondent comply with the *RTA* and not force her to enter into a new lease agreement or impermissibly increase the rent by $500.

[73] The Arbitrator's conclusion that the petitioner's application for an order that the respondent comply with the *RTA* was moot and was not patently unreasonable in light of the findings she made regarding non-payment of rent and which lease was applicable, namely the Second Lease.

Granting an Order of Possession instead of ordering interest on unpaid rent

[74] The petitioner does not point to any provision in the *RTA* or other basis upon which Arbitrator ought to have ordered interest on the $10,000 unpaid rent instead of granting the Order of Possession. To the contrary, s. 55(1) of the *RTA* provides that the Arbitrator "must" grant an order of possession to the landlord upon finding that the Notice complied with s. 52 of the *RTA* and dismissing the petitioner's application disputing the Notice. Likewise, s. 55(1.1) mandates that an order requiring payment of unpaid rent be made in the same circumstances.

[75] In the result, I find that the Arbitrator's decision to grant the Order of Possession rather than award interest on unpaid rent was not patently unreasonable.

Setting the effective date of the Order of Possession as August 31, 2022

[76] The petitioner says that the Decision is arbitrary because the Arbitrator exercised her discretion in an arbitrary way by issuing the Order of Possession to be effective at 1:00 p.m. on August 31, 2022—approximately two days after the date of the Decision (August 29, 2022)—instead of two days after it was received by the petitioner.

[77] Having dismissed the petitioner's application to dispute the Notice and found that the Notice complied with s. 52 of the *RTA*, the Arbitrator was required to grant and order of possession: *RTA*, s. 55(1). Section 55(3) of the *RTA* in turn provides that an order of possession may be granted before or after the date when a tenant is required to vacate a rental unit, and that that order takes effect on the date specified therein.

[78] The petitioner points to the RTB's Residential Tenancy Policy Guideline 54 "Ending a tenancy: Orders of Possession" and the commentary therein to the effect that orders of possession are generally set for two days after the order is received (not granted). The RTB's policy guidelines are issued to assist members of the public and to guide arbitrators as to the criteria to be used in the decision-making

process; they are not law and they are not binding: *Morse v. Crystal River Court Ltd.,* 2021 BCSC 1868 at para. 32, citing *Powell v. British Columbia (Residential Tenancy Branch),* 2016 BCSC 1835, at para. 33.

[79] I conclude that the Decision is not patently unreasonable on account of the Arbitrator setting the effective date of the Order of Possession on August 31, 2022. The policy guideline was not binding on the Arbitrator and she had the discretion to make the order she did pursuant to s. 55(3) of the *RTA*. This exercise of discretion was not based on irrelevant factors and took the applicable statutory constraints under the RTA into consideration.

[80] Moreover, the tenancy ended pursuant to the Notice in April 2022, the RTB hearing did not take place until August 18, 2022, and the decision was not issued for another 11 days. In the circumstances, I cannot find it was patently unreasonable for the Arbitrator to have granted the Order of Possession effective two days after the date of the Decision when that date was already over four months after the tenancy ended pursuant to the Notice. This is consistent with the finding reached in *Morse* at para. 54; a decision relied on by the petitioner.

Procedural Fairness: Allegations of bad faith and bias

[81] The petitioner also raised allegations that the Arbitrator made her findings in bad faith and demonstrated bias in favour of the respondent. By way of example, she says that the Arbitrator acted in bad faith in setting the effective date of the Order of Possession, failing to deduct $2,500 (likely intended to reference the alleged $1,500 deposit overpayment), and concluding that s. 46(3) did not apply on the circumstances before her.

[82] I disagree. The petitioner's allegations of bad faith and bias are wholly unsupported in the evidence and appear to arise solely from disagreement with the Arbitrator's findings. I do not accept that she exercised her discretion in bad faith so as to render the Decision patently unreasonable.

[83] The petitioner also asserts bias on account of the Arbitrator failing to accept her submission that she attempted and was ready to pay rent. To the extent that this gives rise to allegations that the Decision should be set aside because she was denied procedural fairness, the applicable standard of review is whether, in all of the circumstances, the decision maker acted fairly: *ATA*, s. 58(2)(b); *Kong* at para. 66. As noted above, the Arbitrator's conclusion in this regard stems from credibility findings she made when she rejected the petitioner's testimony and the lack of any evidence to corroborate the alleged attempted payment. I find that in all of the circumstances, the Arbitrator acted fairly in considering and rendering the Decision.

Conclusion

[84] In the result, I conclude that considered as a whole, the Decision is not patently unreasonable and the RTB proceedings were procedurally fair. The petition is therefore dismissed.

[85] Pursuant to the Order of Justice Giaschi, the stay of the Order of Possession terminates upon determination of the petition on the merits. However, in order to permit the petitioner and any tenants of the Premises additional time to find new accommodation, I order that the Order of Possession be stayed until January 31, 2023.

Respondent's Cross-Application

[86] The respondent also applied within these judicial review proceedings for an order that the petitioner provide vacant possession of the Premises. That application first came on for hearing before Justice Giaschi on December 16, 2022 and was adjourned generally in light of the other orders he made.

[87] As there was insufficient time for this application to be heard in conjunction with the hearing of the petition on the merits, and that the respondent's entitlement to an order for vacant possession of the Premises appeared to be largely contingent on the outcome of the petition, I adjourned the respondent's application to be revisited following determination of the petition.

[88] I have now dismissed the petition with the effect being that the stay of the Order of Possession that had been in place is no longer in effect, though as noted, I have granted a further stay to January 31, 2023. The Order of Possession will be effective as of February 1, 2023.

[89] I also note that the respondent's application is materially deficient in that it does not properly identify the jurisdictional basis for the Court—rather than the RTB—to make the order sought. If the application is to be pursued, the respondent will need to particularize the jurisdictional bases for the orders sought beyond blanket reliance on the entirety of the *RTA* or the *Law and Equity Act*. This does not constitute a sufficient articulation of the legal basis for an application pursuant to the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The respondent should also consider whether the nature of the relief sought—a monetary award for costs of bailiff fees—is properly made on an application brought before this Court within the context of a petition for judicial review.

Costs

[90] The respondent has succeeded in having the petition dismissed and is therefore entitled to his costs of this proceeding.

[DISCUSSION WITH PETITIONER RE JUDGMENT]

[91] CNSL H. SAINI: Madam Justice, before we adjourn, I do have additional submissions regarding costs. May I present them to the Court?

[92] THE COURT: I have a hearing on another matter at 10:00 a.m. If you wish to speak further as to costs, you will need to contact Scheduling and set the matter down to a further hearing.

[93] CNSL H. SAINI: Thank you.

"Hughes J."