IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Omranzadeh v. Ferdowsi,*
2024 BCSC 53

Date: 20240112
Docket: S250889
Registry: New Westminster

Between:

Hamidreza Omranzadeh and Fatemeh Shaiganfard

Petitioners

And

Mohsen Ferdowsi

Respondent

Before: The Honourable Justice M. Taylor

On judicial review from: An order of the Residential Tenancy Branch, dated August 23, 2023.

Reasons for Judgment

The Petitioners appearing in Person:	H. Omranzadeh and F. Shaiganfard
Counsel for the Respondent:	G. Flores
Place and Date of Hearing:	New Westminster, B.C. December 12, 2023
Place and Date of Judgment:	New Westminster, B.C. January 12, 2024

Introduction

[1] This is a petition by Hamidreza Omranzadeh and Fatemeh Shaiganfard (the "Tenants") to set aside a decision of Residential Tenancy Branch ("RTB") arbitrator C. Nelson (the "Arbitrator") dated August 23, 2023 (the "Decision").

[2] In the Decision, the Arbitrator upheld a 10 Day Notice to End Tenancy for Unpaid Rent served upon the Tenants by Mohsen Ferdowsi (the "Landlord"), ordered payment of rent and Hydro arrears and granted the Landlord an Order of Possession with respect to the rental property where the Tenants resided.

[3] An application for review consideration on the basis of fraud was dismissed by RTB adjudicator J. Doyon on September 7, 2023 (the "Review Decision").

Background

[4] The Tenants are recent immigrants to Canada from Iran and do not speak English. They required the assistance of an interpreter at the hearing.

[5] The Tenants rented a property at 2409-652 Whiting Way in Coquitlam, British Columbia (the "Rental Unit") from the Landlord beginning in October 1, 2020, which they vacated pursuant to the Order of Possession in September 2023.

[6] The Landlord and the Tenants entered into three successive one-year residential tenancy agreements, which were drafted by the Landlord's agent and signed by all parties (the "2020 Agreement", the "2021 Agreement" and the "2022 Agreement", respectively).

[7] In the 2020 Agreement, rent was set in clause 3(a) at $2000. In clause 3(b) (entitled "What is included in the rent") a box was ticked for "Electricity" among other included items. The Landlord's agent also added a separate box at the bottom of clause 3(b) which stated: "Tenant is Responsible for their Hydro, Cable and Internet". The words "Hydro, Cable and Internet" were crossed out in the box. In a separate addendum these words were also crossed out.

[8] In the 2021 Agreement, the rent was also set at $2000 in clause 3(a). In clause 3(b), the “Electricity” box was not checked. However, in the separate box at the bottom of clause 3(b) it stated: “Tenant is Responsible for: Hydro, Internet, Cable, Tenant’s Insurance, Move In/Move out Fee”. The word “Hydro” was crossed out in the box.

[9] The Tenants adduced correspondence at the hearing indicating that, despite the above wording in the 2021 Agreement concerning Hydro, there was a verbal agreement between the Landlord and the Tenants in 2021-2022 that the Landlord would pay a base portion of the Hydro bills up to $100 and the Landlord would pay any overage.

[10] In the 2022 Agreement, the rent was increased to $2500 in clause 3(a). In clause 3(b), the “Electricity” box was not checked. In the separate box at the bottom of clause 3(b) it stated: “Tenant is Responsible for their Internet, Cable, Tenant’s Insurance”. The word “Hydro” was not referenced or crossed out in the box.

[11] The Tenants asserted at the hearing that, during the course of late 2022 and into early 2023 they developed the view that the rent increase from $2000 to $2500 in the 2022 Agreement had been illegal and coercive on the part of the Landlord, and communicated this view to the Landlord. The dispute escalated. The Landlord issued a One Month Notice to End Tenancy on January 13, 2023 on the basis of unpaid strata parking fines, which was successfully challenged by the Tenants at the RTB and ultimately cancelled by arbitrator G. Lloyd on March 1, 2023.

[12] On or about February 3, 2023, the Landlord sent the Tenants a demand for payment of Hydro bills dating back to October 1, 2022. The Tenants alleged at the hearing that there had in fact been a verbal agreement with the Landlord that he would pay the Hydro bills in the 2022-2023 rental year to compensate for the fact that he had raised their rent from $2000 to $2500. This, they argued, was why the Landlord had not previously billed them for Hydro for four months dating back to the start of the contract term on October 1, 2022. They alleged that the late decision by the Landlord to bill for backdated Hydro bills was retaliation for their decision to question the legality of the rent increase and was therefore in bad faith.

[13] On or about February 24, 2023, the Tenants applied to the RTB to dispute the amount of rent payable under the 2022 Agreement.

[14] Commencing in March 2023 and up until June 2023, the Tenants unliterally lowered their rental payments from $2500 to $2040 per month, without the agreement of the Landlord.

[15] On June 15, 2023, Arbitrator G. Lloyd issued a decision dismissing the Tenants' claim on the rent increase in its entirety (the "June RTB Decision"). The Arbitrator found in the June RTB Decision that, as the parties had entered into a fixed-term agreement in August 2022, the restriction on rent increases under s. 43 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 (the "*Act*"), as alleged by the Tenants, did not apply.

[16] Subsequent to the June RTB Decision, the Tenants wrote to the Landlord and advised that, although they accepted the decision, they wanted to repay the outstanding rent arrears in instalments over time. There was no evidence that this proposal was accepted by the Landlord.

[17] On or about June 27, 2023, the Tenants paid rent in the amount of $1500 for July 2023. They also paid $1000 toward rent on July 6, 2023, with the result that they were in arrears on rent at that time in the amount of $1840 exclusive of utilities. As of July 4, 2023, the Hydro arrears were at $2840.

[18] On July 4, 2023, the Landlord sent a 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") to the Tenants. The Tenants disputed the 10 Day Notice and a RTB hearing was held on August 22, 2023.

[19] In the Decision, the Arbitrator dismissed the Tenants' claim, noting that there was a tenancy agreement in place from October 1, 2022 and finding that the Tenants had failed to pay the full amount of the rent and Hydro arrears under that agreement within the 10 Day Notice period. The Arbitrator also observed that the arrears were still outstanding as of the date of the hearing on August 22, 2023, which was not disputed by the Tenants. The Arbitrator found that the Landlord was

entitled to a Monetary Order of $3,327.56 for unpaid rent and utilities and also issued a Notice of Possession.

[20] The Tenants applied for a reconsideration on the grounds that the decision was obtained by fraud.

[21] In the Review Decision dated September 7, 2023, the Adjudicator dismissed the application, finding that the Tenants had not adequately explained how the Landlord had committed fraud. The Adjudicator noted that the Tenants had submitted copies of emails exchanged with the Landlord's agent negotiating who was responsible for Hydro bills but found that, regardless of discussions before entering into a tenancy, the terms in the written agreement are what would be enforced and the Tenants were expected to read through the tenancy agreement carefully before signing and agreeing to its terms.

[22] The adjudicator also found there was no evidence that the Landlord had falsified the 2022 Agreement, altered the signature of the Tenants or otherwise modified the terms of the agreement after it was signed.

[23] Following the Review Decision, the Tenants sought judicial review in this Court.

Analysis

[24] In the Petition, the Tenants claimed that the Arbitrator had not acted fairly, arguing that the Arbitrator had failed to consider evidence that the Tenants had communicated to the Landlord that they respected the June RTB Decision and that they would be paying the arrears in rent ordered by the RTB, but needed more time to pay in instalments.

[25] The Tenants also argued that the Landlord had acted in bad faith by proceeding with the Ten Day Notice despite their communication that they would pay in instalments. The Tenants further claimed that the Arbitrator had failed to consider an alleged verbal agreement the parties had that the Landlord would pay the Hydro

bills, despite the wording of the 2022 Agreement to the contrary, and asserted that there were accordingly no Hydro arrears.

[26] I will address each of the Tenants' issues in turn.

[27] The first question to be addressed (not raised by the Tenants but a live issue nonetheless) is whether it is the Decision or the Review Decision that is the subject of judicial review.

[28] In *Najaripour v Brightside Community Homes*, 2023 BCSC 2032, Justice MacNaughton described the applicable analysis:

> [49] As a preliminary issue, I must determine whether it is the 2022 RTB decision or the Review Consideration Decision that is subject of this judicial review.
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> [50] There has been some controversy about whether, when a statutory scheme provides for an internal review procedure, it is the original or the review decision that is the proper subject of the judicial review.
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> [51] In *Sereda v. Ni*, 2014 BCCA 248, the Court followed *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, 2011 BCCA 527, and determined that the review decision was the subject of the judicial review but that the original decision should form part of the record and "inform" the inquiry on judicial review: at para. 26.
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> [52] In *Martin v. Barnett*, 2015 BCSC 426, Justice Burke reviewed the law in this area and concluded that in two subsequent decisions, being *Yellow Cab Co. v. British Columbia (Passenger Transportation Board)*, 2014 BCCA 329 and *Fraser Health Authority v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2014 BCCA 499, the Court of Appeal clarified the law and concluded that when an internal review decision does not address the merits of the underlying decision, the original decision should be the subject of the judicial review: at para. 44. Justice Sewell followed Burke J.'s reasoning in *Ndachena v. Nguyen*, 2018 BCSC 1468: at paras. 34–37.
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> [53] In this case, the Review Consideration Decision did not review the merits of the 2022 RTB Decision. The scope of the Review Consideration Decision was whether new evidence should be admitted and whether fraud occurred. Therefore, it is the 2022 RTB Decision that this is the subject of the judicial review. I note that this is what Ms. Najaripour sought in her amended petition.

[29] In this case, as in *Najaripour*, the adjudicator in the Review Decision did not review the merits of the Decision (except as I will describe below with respect to the Hydro bill payments) and the scope of the review was limited to whether fraud

occurred. Therefore, in my view, it is the Decision that is the subject of the judicial review except with respect to the Hydro issue where the Review Decision did at least in part address the merits of the Tenants' claim.

[30] Turning next to the merits of the arguments raised on the application, I emphasize at the outset the limited role of the court on judicial review, which is reflected in the patent unreasonableness standard of review. In *Holojuch v. Residential Tenancy Branch*, 2021 BCCA 133, the Court of Appeal recently summarized the standard of review to be applied to decisions of the RTB:

> [16] In this case, the Legislature has conferred exclusive jurisdiction on the Director of the Residential Tenancy Branch to determine whether compensation is payable pursuant to s. 67 of the *Residential Tenancy Act*. The Director's decision is reviewable on judicial review, but only on the standard of review that is established by the operation of ss. 5.1 and 84.1 of the *Residential Tenancy Act* and s. 58(2)(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. In *Metro Vancouver (Regional District) v. Belcarra South Preservation Society*, 2021 BCCA 121, this Court described that standard of review in these terms:
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> > [30] The standard of review of the Arbitrator's decision is determined by the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Arbitrators of the RTB have delegated authority to make decisions pursuant to various provisions of the *RTA* that pertain to applications for dispute resolution. Matters within an arbitrator's exclusive jurisdiction are subject to the patent unreasonableness standard of review that is set out in s. 58 of the *Administrative Tribunals Act*: *Ahmad v. Merriman*, 2019 BCCA 82 at para. 37.
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> [17] The meaning to be given to patent unreasonableness under this legislative scheme depends on the nature of the decision under review. If it is a discretionary decision, s. 58(3) of the *Administrative Tribunals Act* explains how this standard is to be applied:
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> > 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.
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> [18] If the decision contains a finding of fact that is disputed, the standard of review is still patent unreasonableness, but the content of that standard is defined by the common law rather than a statutory provision. This Court explained that standard in *Ahmad v. Merriman*, 2019 BCCA 82, in these terms:

> [37] Section 58(2)(a) of the *ATA* requires that a decision of an expert tribunal, such as the RTB, may not be interfered with unless it is patently unreasonable. The standard of patent unreasonableness requires the decision under review be accorded "curial deference, absent a finding of fact or law that is patently unreasonable": *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 29. Stated otherwise, it must be "clearly irrational" or "evidently not in accordance with reason": *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963–64. A patently unreasonable decision is one that is "so flawed that no amount of curial def[er]ence can justify letting it stand": *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at paras. 52–53.

[31] With the standard of review set out in *Holojuch* in mind, I emphasize in the first place that the Tenants have not claimed that the Arbitrator has made an error or law (for example, by failing to decide what the Arbitrator was legislatively directed to decide or otherwise exceeding jurisdiction). In the Decision, the Arbitrator appropriately addressed the question whether the 10 Day Notice was properly given and duly served on the Tenants and also whether the Tenants had paid the arrears of rent within the five days required pursuant to s. 46 of the *Act*.

[32] Section 46 of the *Act* states:

> 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.
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> (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
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> (b) dispute the notice by making an application for dispute resolution.
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> (5) If a tenant who has received a notice under this section does not pay the rent or make an application for dispute resolution in accordance with subsection (4), the tenant
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> (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and

> (b) must vacate the rental unit to which the notice relates by that date.
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> (6) If
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> (a) a tenancy agreement requires the tenant to pay utility charges to the landlord, and
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> (b) the utility charges are unpaid more than 30 days after the tenant is given a written demand for payment of them,
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> the landlord may treat the unpaid utility charges as unpaid rent and may give notice under this section.

[33] The Tenants did not point to any provision of the *Act* which lawfully permitted them to withhold unpaid rent pursuant to s. 46(3) or otherwise, nor did they assert that the rent arrears were in fact paid. There was therefore no error of law in this respect.

[34] Further, the Arbitrator also correctly addressed the impact of s. 55 of the *Act,* which requires the Arbitrator to grant an Order of Possession where a tenant's application to set aside a landlord's notice to end tenancy is dismissed and the notice complies with s. 52 of the *Act* (which the Arbitrator found it did in this case), and further authorizes a monetary order for unpaid rent. The Tenants also did not argue that any error was made by the Arbitrator in this respect.

[35] Nonetheless, the Tenants argued that the Arbitrator erred by failing to address their arguments that: (1) the Landlord was acting in bad faith when he issued the 10 Day Notice after the Tenants had communicated that they would be paying the arrears they owed; and (2) there was a verbal agreement that the Landlord would pay the cost of the Hydro bills in pursuant to the 2022 Agreement.

[36] As a preliminary matter, there was no compelling evidence on the record that the Tenants were denied procedural fairness. Procedural fairness requires that a party to an administrative proceeding has the right to be heard, the right to know the case they are required to meet, and the right to a hearing before an impartial decision maker: *McDonald v. Creekside Campgrounds and RV Park*, 2020 BCSC 2095 at para. 28.

[37] In this case the Tenants were given the full opportunity to provide the Arbitrator with written materials in advance of the hearing, to review the materials filed by the Landlord, and also to present oral evidence at the hearing.

[38] The Tenants argued that they were denied an adjournment by the Arbitrator for the purposes of translating certain correspondence from Farsi to English. I am not convinced that the right to an adjournment to translate documents that could have been translated prior to the hearing falls within the scope of the right to procedural fairness. However, even if such a right did exist, I have reviewed the translations on the judicial review application and am not convinced that these translated documents would have materially affected the result before the Arbitrator. The key documents relied upon by the Tenants consisted principally of text exchanges between them and the Landlord's agent but many of these documents are not clearly dated, and it is ambiguous whether they relate to the negotiation of the 2021 Agreement (which is not the subject of this judicial review) or the 2022 Agreement. Further, these translated documents reveal evidence about contractual negotiations in 2021 and 2022 but not definitive evidence about a separate concluded collateral agreement in 2022 other than the 2022 Agreement itself.

[39] Turning next to the argument that the Arbitrator should have considered the communications from the Tenants that they would be paying what they owed in instalments (and therefore that the Landlord was acting in bad faith by issuing the 10-Day Notice), I am not persuaded that the Arbitrator's decision was patently unreasonable. To the contrary, my view is that it was correct.

[40] In the June RTB Decision, the RTB had previously dismissed the argument of the Tenants that they had no obligation to pay the rent increase stipulated in the 2022 Agreement. This prior decision on the rent increase itself was not a subject of the Tenants' judicial review petition. Thus, on judicial review, the only live issue as it relates to rent was whether the Tenants had the right to pay the unpaid rent arrears by instalments.

[41] In this respect, the Tenants were unable at the hearing to identify a statutory or contractual entitlement to pay arrears by instalments nor there was any evidence

on the record that the Landlord had agreed to the Tenants paying by instalments. To the contrary, the undisputed evidence was that the Landlord at all material times considered the Tenants to be in arrears on payments of rent and did not agree to payment by instalments.

[42] Unfortunately, the Tenants could have avoided this whole issue by paying the arrears identified in the June RTB Decision within the time frame stipulated in the 10 Day Notice period but they made the unilateral decision not to do so. It was not unreasonable for the Arbitrator to conclude that their decision to withhold arrears in rent was not, in itself, evidence of bad faith on the part of the Landlord.

[43] Moving to the issue of the unpaid Hydro bills, the Tenants argue that they had a verbal agreement with the Landlord that he would pay the Hydro bills under the 2022 Agreement, as a means to offset the increase in rent from 2021 to 2022. I do have concern here that the Arbitrator did not expressly address this argument in the Decision and instead relied simply upon the text of the 2022 Agreement to conclude that the Tenants were liable for the Hydro bills. I also have sympathy for the Tenants as they were new immigrants to the country, do not speak English, and yet were put in a position of having to negotiate terms in an English rental agreement drafted by the Landlord's agent. It also appears from the record that there were certainly discussions between the Tenants and the Landlord's agent concerning excluding Hydro bills from the Tenants' obligations, although it is unclear whether these discussions took place in relation to the 2021 Agreement or the 2022 Agreement. It is also somewhat suspicious that the Landlord did not begin demanding payment from the Tenants of the Hydro bills until four months after the commencement of the 2022 Agreement (and only after the Tenants had indicated a desire to challenge the legality of the 2022 rent increase).

[44] However, it is not my role on judicial review to retry the case. The question I must address is whether it was patently unreasonable for the Arbitrator not to expressly address the issue of an alleged verbal agreement or extra-contractual representations in the Decision. Despite the concerns I have expressed above, in my view it was not. While it was certainly open to the Arbitrator to consider the

applicability of an exception to the parole evidence rule in this context, or to apply the principle of *contra proferentem* with regard to the 2022 Agreement, I cannot say that it was “clearly irrational” or “evidently not in accordance with reason” not to do so. The Arbitrator concluded that the 2022 Agreement was clear on its face that the Hydro bills were the responsibility of the Tenants. This was not an unreasonable conclusion. In clause 3(b) of the 2022 Agreement (entitled “What is included in the rent”) the “Electricity” box was not checked. In the separate box at the bottom of clause 3(b) it stated: “Tenant is Responsible for their Internet, Cable, Tenant’s Insurance” but the word “Hydro” was not referenced or crossed out in the box (as it was in the 2020 Agreement and the 2021 Agreement). Thus, on its face, there was no ambiguity in the 2022 Agreement that the Tenants were responsible for the Hydro bills.

[45] The Tenants had negotiated three successive one-year agreements with the Landlord from 2020 to 2022. In the 2020 Agreement and 2021 Agreement, they had negotiated amendments with the Landlord crossing out their obligations to make Hydro payments. By contrast, in the 2022 Agreement the Tenants did not negotiate the crossing out of Hydro payments, which was a material change. Given their experience with the negotiation of two prior agreements where the word Hydro was crossed out, there was clearly sufficient evidence to enable the Arbitrator to conclude that the Tenants understood the agreement structure relating to Hydro and would have understood that a failure to cross out the word Hydro would affect their rights. It was therefore not unreasonable for the Arbitrator to conclude that they understood what they were agreeing to when they signed (particularly since the wording on Hydro had materially changed in the 2022 Agreement).

[46] Further, there is no clear evidence on the record before me that there was a definitive collateral agreement or clear representation from the Landlord separate from the 2022 Agreement whereby the Landlord had agreed to pay the Hydro bills. As noted above, it is not clear from the text messages between the Tenants and the Landlord’s agent concerning the Hydro bills whether those messages were exchanged in 2022 or in 2021 (in which case they would have been irrelevant to the 2022 Agreement). Moreover, and in any event, the communications appeared to be

directed toward negotiating a final written agreement and not a collateral oral agreement. Certainly there was no dispute between the parties that the terms of the 2022 Agreement were indeed the final agreement between the parties.

[47] I also note that although the Arbitrator did not expressly consider the argument and evidence of the Tenants concerning the correspondence and negotiations relating to the Hydro bill, the adjudicator in the Review Decision did expressly consider this issue and concluded that these negotiations were ultimately superseded by the 2022 Agreement. Thus it cannot be said in fairness that the argument of the Tenants was not addressed as part of the RTB process.

[48] Taking the foregoing into account, it was not in my view patently unreasonable for the Arbitrator to rely solely upon the express terms of the 2022 Agreement with respect to the arrangement on Hydro, and to refrain from engaging in an express analysis concerning the legal impact of the pre-contractual negotiations. As noted in *Ganitano v. Yeung*, 2016 BCSC 2227, at para. 33 the Director is not necessarily required to address every argument made at a hearing and may address some arguments implicitly.

[49] Thus I conclude that the Arbitrator made no legal error in the Decision, nor were there any findings therein which were patently unreasonable or otherwise justify overturning the Decision.

Order

[50] The Petition is dismissed. The parties shall have leave to speak to costs.

"M. Taylor J."