IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Panaich v. Martin,*
2023 BCSC 2149

Date: 20231206
Docket: S232429
Registry: Vancouver

Between:

Jaiinder Panaich and Randeep Panaich

Petitioners

And

Stephen Martin and Kerri Martin

Respondents

Before: The Honourable Madam Justice Murray

On appeal from: Orders of the Residential Tenancy Branch, dated February 3, 2023, and Review Consideration Order, dated February 24, 2023.

Reasons for Judgment

Counsel for the Petitioners:	A. Ehteshami
Counsel for Respondents:	No appearance
Place and Date of Hearing:	Vancouver, B.C. June 14, 2023
Place and Date of Judgment:	Vancouver, B.C. December 6, 2023

INTRODUCTION

[1] The petitioners seek orders setting aside the orders of two arbitrators of the Residential Tenancy Branch (RTB). The respondents did not participate in this judicial review.

[2] By way of brief background, the petitioners, residents of Surrey, purchased a home in Kelowna on August 31, 2022 (“the property’) in order to house their daughter who had been admitted to the University of British Columbia, Okanagan campus (UBCO) commencing in September 2022. Pursuant to the contract for purchase and sale the sellers were to provide vacant possession of the property. The respondents were served 2-month notice pursuant to s. 49 of the *Residential Tenancy Act* (*RTA*) by the previous owner advising that they must move out by September 30, 2022 because “the purchaser or a close family member intends in good faith to occupy the rental unit”.

[3] On or about November 21, 2022, the respondents applied to the RTB for dispute resolution alleging that the landlord petitioners had not complied with the *RTA* or used the property for the stated purpose for ending their tenancy. The respondents sought a monetary award of 12 months rent.

[4] The RTB hearing was scheduled for the afternoon of January 31, 2023. The petitioners uploaded documents and photographs to prove that their daughter had been living in the property including photographs of the daughter in the property, photos of mail addressed to the Petitioners’ daughter at the property address, plane tickets between Abbotsford and Kelowna in December 2022 and videos of Mr. Panaich clearing snow from the front of the property in December and January.

[5] When they called into the RTB hearing on January 31, 2023, the petitioners learned that the hearing had been adjourned as an arbitrator was not available. The hearing took place on February 2, 2023, before arbitrator C. Wilson via telephone. Both of the petitioners and respondents attended.

[6] At the RTB hearing the respondents testified that the property appears to be vacant. They stated that they saw two postings on Facebook advertising one or two of the three bedrooms of the property for rent. The ads were admitted as evidence.

[7] The petitioners responded that their daughter, who attends UBCO has been residing at the property since the respondents moved out. They testified further that Mr. Panaich is often at the property doing maintenance and renovations. The petitioners sought to rely on evidence that they had uploaded to the RTB system as proof but the arbitrator declined to consider it as the petitioners had erroneously not served it on the respondents. With respect to the Facebooks ads, Ms. Panaich advised that her brother had posted the ads but they did not rent the bedroom(s) as their daughter did not feel safe having a stranger living with her.

[8] In a decision dated February 3, 2023 arbitrator C. Wilson (the "Wilson decision") noted that s. 51(2) of the *RTA* provides that compensation may be due if a landlord does not take steps to accomplish the stated purpose for ending the tenancy within a reasonable time after the effective notice, or if the rental unit is not used for that stated purpose for at least six month's duration beginning within a reasonable time after the effective date of the notice. The landlords bear the burden of proving that they did what was stated as the reason for ending the tenancy.

[9] Arbitrator Wilson then went on to make the following findings:

> In this case I accept that the Two Month Notice was issued by the seller of the rental property at the request of the landlords who purchased it. I also find, based on the affirmed testimony of R.P., that the landlords are not currently occupying the rental unit. In addition, I find there is insufficient evidence before me to find that the landlords' daughter is occupying the rental unit. The landlords' daughter did not attend the hearing to provide testimony and the rental unit in the photographs included in the Facebook advertisements does not appear to be occupied.

[10] Arbitrator Wilson then found that the tenants (respondents on this appeal) were entitled to 12 months' rent for a total of $20,688 plus $100 costs.

[11] The petitioners sought a review under s. 79 of the *RTA* which provides for a review on only three grounds:

a) a party was unable to attend the original hearing due to circumstances that could not be anticipated and that were beyond the party's control;

b) a party has new and relevant evidence that was not available at the time of the original hearing; and

c) a party has evidence that the director's decision or order was obtained by fraud.

[12] The petitioners' application for review was based on the following:

a) Their daughter was unable to attend the hearing as she was in classes;

b) The evidence to corroborate their evidence was not considered at the hearing as they were unaware that they had to serve it on the tenants.

[13] On February 24, 2023 arbitrator N. Smith dismissed the petitioners' review application (the "review decision").

THE LAW

[14] The role of the court on judicial review is not to hear new evidence or argument or to re-decide the case, it is to ensure the tribunal acted within its jurisdiction by deciding what it was directed to decide and did not lose jurisdiction by failing to provide a fair hearing or by rendering a decision outside the degree of defence owed by the reviewing court: *Powell v. British Columbia (Residential Tenancy Branch)*, 2015 BCSC 2046 at paras. 49-51.

[15] It is agreed that the standard of review is patent unreasonableness which has been defined as a "result that borders on the absurd": *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, 2004 SCC 23 at para. 18.

[16] It is further agreed that questions of fairness must be reviewed on a standard of fairness which requires a contextual approach. I will return to this.

ISSUES

[17] The issues to be determined on this judicial review are:

a) Which decision is the subject of judicial review- the Wilson decision or the review decision or both;

b) Whether the decision in issue is patently unreasonable or procedurally unfair;

c) If the decision is found to be patently unreasonable or procedurally unfair, what is the appropriate remedy?

[18] I will consider the issues in turn.

ISSUE 1: Which decision is the subject of judicial review- the Wilson decision, the review decision, or both?

[19] I will begin by considering the review decision.

[20] Pursuant to s. 79 of the *RTA* a decision may be reviewed on only three grounds:

a) a party was unable to attend the original hearing due to circumstances that could not be anticipated and that were beyond the party's control;

b) a party has new and relevant evidence that was not available at the time of the original hearing; and

c) a party has evidence that the director's decision or order was obtained by fraud.

[Emphasis added.]

[21] In dismissing the petitioners' application for review, arbitrator Smith found that:

a) The daughter was not a party to the matter; and

b) The evidence was not new and could have been produced at the hearing.

[22] The petitioners' concerns regarding the initial hearing did not fall under the narrow grounds for review permitted by the *RTA*. Accordingly, there is in my view no ground of review from the review decision.

[23] I am satisfied that it is only the Wilson decision that is properly the subject of this judicial review. If the Wilson decision is found to be either patently unreasonable or procedurally unfair then both decisions necessarily must be set aside.

ISSUE 2: Whether the Wilson decision is patently unreasonable or procedurally unfair

[24] I will start by considering whether the hearing was procedurally unfair.

[25] RTB hearings are held via telephone. It is a people's court meaning it is designed for parties to appear on their own behalf. Put another way, it is designed so parties do not have to engage lawyers. Consequently, the hearing is informal and the rules of evidence are relaxed.

[26] In *PHS Community Services Society v. Swait*, 2018 BCSC 824, Madam Justice Sharma held that the informal hearing structure, the relaxed rules of evidence and the telephone hearings used by all arbitrators influence what procedural steps are required to accord with the duty of fairness in a RTB hearing:

> [88] In *Baker*, the Supreme Court of Canada stated assessing procedural fairness requires a contextual approach in that the court looks to "the decision being made and its statutory, institutional, and social context" (para. 22) to determine if parties have been fully heard, and known the case against them. It is important to remember that Board hearings are less formal than tribunals acting in a quasi-judicial capacity, and hearings are often conducted by telephone. This does influence what procedural steps are required to accord with the duty of fairness.

[Emphasis added.]

[27] The objective of the RTB is to "ensure a fair, efficient and consistent process for resolving disputes between landlords and tenants": Rule 1.1 of the RTB Rules of Procedure. Section 75 of the *RTA* declares that rules of evidence do not apply:

> **75** The director may admit as evidence, whether or not it would be admissible under the laws of evidence, any oral or written testimony or any record or thing that the director considers to be
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> (a) necessary and appropriate, and
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> (b) relevant to the dispute resolution proceeding.

[28] Pursuant to s. 76 of the *RTA* the director may on the director's own initiative require a person to attend a hearing to give evidence or produce documents or anything else relating to the subject of the dispute.

[29] Section 64(4) of the *RTA* permits the director to provide a non-party the right to be heard at a hearing:

> **64** (4) If, in the director's opinion, another tenant of a landlord who is a party to a dispute resolution proceeding will be or is likely to be materially affected by the determination of the dispute, the director may
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> (a) order that the other tenant be given notice of the proceeding, and
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> (b) provide that other tenant with an opportunity to be heard in the proceedings.

[30] I find that these provisions clearly show that the RTB is a system that is geared toward helping self-represented parties obtain a just and fair dispute resolution. And the arbitrator is to play a pivotal role in that process.

[31] My review of the transcript of the hearing raises concern as to the fairness of the proceeding for several reasons:

a) As soon as arbitrator Wilson learned that the petitioners did not provide to the respondents copies of the evidence they uploaded, he immediately advised that he could not consider it. When the petitioners advised that

they did not know that they had to serve the respondents, arbitrator Wilson responded "I can still accept your oral testimony, okay?" Arbitrator Wilson did not inquire as to the import of the evidence nor did he consider granting a short adjournment to allow the petitioners to serve the respondents. There was no urgency to having the hearing concluded that day. The hearing had already been adjourned for a few days because an arbitrator was unavailable. In my view, given the fact that the petitioners were facing a significant monetary penalty if the ruling went against them, it was incumbent on the arbitrator to give them the opportunity to present their case fully. It was also important that the arbitrator have all of the evidence. That is supported by ss. 64(4), 75 and 76 of the *RTB*;

b) The arbitrator "assumed" what the respondents' evidence was rather than hearing it from them:

> Arbitrator: So tenants, I'm assuming that your evidence will be that the landlords didn't do what they said they were going to do by moving into the rental property; is that right?
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> S. Martin: That's right.
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> Arbitrator: Okay. When tenants make that assertion, the landlord has the burden of proving that they did move into the property…

c) The arbitrator did not give the petitioners an opportunity to answer the respondents' allegations that the house appeared to be empty when they drove by;

d) The arbitrator's decision was based on two "facts": first that the petitioners' daughter did not testify and second, that the rental unit appears to be unoccupied in the Facebook ad photos. Yet the arbitrator did not ask the petitioners about either of those things. He did not give the petitioners an opportunity to explain why their daughter was not at the hearing or when the photos in the ad were taken or why the rooms in the photos appear unoccupied.

[32] Again, the fact that he did not give the petitioners an opportunity to respond to matters he found pivotal is troubling given the significant monetary penalty they were facing should he find against them.

[33] Procedural fairness has two components; the right to be heard and the right to an impartial hearing: *Crest Group Holdings Ltd. v. British Columbia (Attorney General)*, 2014 BCSC 1651. Here I find that the petitioners were not given an opportunity to be heard.

[34] For the reasons above I am satisfied that the hearing was procedurally unfair. As the petitioners were not permitted to fully present their evidence, I find the decision to be patently unreasonable as well.

ISSUE 3: REMEDY

[35] The petitioners seek orders setting aside the Wilson decision and the review decision. They further ask this Court to dismiss the respondents' claim instead of remitting it back to the RTB for rehearing. The petitioners argue that they intend to rely on the same evidence and call their daughter to testify if there is a rehearing. They argue that, given their evidence, the only possible outcome at a subsequent hearing would be a dismissal of the respondent's claim. They stress that it would be an inefficient use of public resources to have a rehearing given the backload of cases the RTB has to deal with.

[36] Mindful that the court will only rarely make the decision which legislation has assigned to an administrative decision maker, I am satisfied that this is a case in which the court should substitute a decision rather than remitting it back to the RTB.

[37] As per the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65 at para. 142, where it is evident that one outcome is inevitable and there is concern for the efficient use of public resources the court may consider substituting a different decision rather than remitting it back to the decision maker:

> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.
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> [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paras. 18-19 (CanLII). An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, at paras. 54 and 88 (CanLII). Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.
>
> [Emphasis added.]

[38] If I were to remit the matter back to the RTB for rehearing it would be with the direction that the arbitrator consider the documentary and photographic evidence of the petitioners and the evidence of their daughter. I agree with the petitioners that that would provide ample evidence for an arbitrator to find that their daughter was living in the rental unit. Accordingly, I set aside the Wilson and review decisions and substitute the decision that the respondents' claim be dismissed.

CONCLUSION

[39] The decisions of arbitrator C. Wilson dated February 3, 2023 and arbitrator N. Smith dated February 24, 2023 are set aside and the decision that the respondents' claim be dismissed is substituted.

"The Honourable Madam Justice Murray"