IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shigani v. Taylor,*
2024 BCSC 979

Date: 20240606
Docket: S238392
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Ali Shigani

Petitioner

And

William Taylor

Respondent

Before: The Honourable Madam Justice Sukstorf

On judicial review from an Order of the Residential Tenancy Branch dated October 12, 2023

Reasons for Judgment

Counsel for the Peititioner:	A. Ehteshami L.G. Muldoon
The Respondent appearing on own behalf:	W. Taylor
Place and Date of Hearing:	Vancouver, B.C. April 17, 2024
Place and Date of Judgment:	Vancouver, B.C. June 6, 2024

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Introduction

[1] This is a petition for judicial review in which the petitioner, Ali Shigani (the "Landlord"), asks the court to set aside a decision (the "Decision") of Arbitrator, V. Hedrich (the "Arbitrator") dated October 12, 2023, in the Residential Tenancy Branch (the "RTB") Dispute number 310093677. The parties have agreed not to give effect to the enforcement of the Arbitrator's Order dated October 12, 2023, until the outcome of this judicial review has been decided. In addition, the Landlord seeks costs.

[2] The Arbitrator's Decision ordered the Landlord to pay a 12-month compensation of $46,384 to his tenant, Mr. Taylor (the "Tenant") under s. 51(2) of the *Residential Tenancy Act,* S.B.C. 2002, c. 78 [*RTA*].

Issue

[3] The only issue to be determined is whether the Decision ought to be set aside because it is patently unreasonable.

Standard of Review

[4] This is a request for judicial review pursuant to ss. 5.1 and 84.1 of the *RTA* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*].

[5] Section 84.1 of the *RTA* is a privative clause that provides exclusive and final jurisdiction to the Director of Residential Tenancies to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding or in a review and to make any order and whose exclusive jurisdiction is not open to question or review in any court. The Director is considered to be an "expert tribunal" within the meaning of s. 58 of the *ATA.*

[6] Under s. 58(2)(a) of the *ATA*, findings of fact or law, or exercises of discretion by the Director or dispute resolution officers in respect of matters within their exclusive jurisdiction are reviewable on the standard of patent unreasonableness.

[7] 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 (s. 58(2)(b)). Further, in determining whether a decision is patently unreasonable, the court is required to examine both the reasons and the outcome.

[8] Pursuant to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*], in conducting a judicial review, the court is required to focus on the reasons given by the tribunal, and not engage in its own "treasure hunt for error": at paras. 84, 91, 102.

[9] For all other matters not identified in ss. 58(2)(a) and (b), s. 58(2)(c) provides for review on the standard of correctness.

[10] Accordingly, for those grounds of judicial review which relate to the Arbitrator's findings of fact, law, or mixed fact and law, the petitioner bears the onus of showing that those findings are patently unreasonable: *Manz v. Sundher*, 2009 BCCA 92.

[11] A decision is patently unreasonable where it is not merely unsupported by reasons that are capable of withstanding a probing examination, but is openly, evidently and clearly irrational: *Yee v. Montie*, 2016 BCCA 256 at para. 22. When reviewing a decision for patent unreasonableness, it is not open to the court to second guess conclusions drawn from the evidence considered by the decision-maker, or to substitute different findings of fact or inferences. Stated slightly differently, a decision can only be said to be patently unreasonable where there is no evidence to support the findings, or the decision is openly, clearly and evidently unreasonable: *Manz* at para. 39, citing *Speckling v. British Columbia* (*Workers' Compensation Board*), 2005 BCCA 80.

Background Facts

[12] The Landlord purchased the home located at 911 Leovista Avenue, North Vancouver (the "Property") on July 2, 2022 and the Tenant was resident in it at the

time. The fixed-term tenancy began on November 1, 2019 and reverted to a month-to-month tenancy after October 31, 2020. The evidence suggested that the Landlord purchased the Property with the intention of demolishing it and building a new home. After the purchase of the Property, the Landlord's intentions were conveyed to the Tenant. However, in August 2022, the Landlord changed his mind because he wanted his daughter who was struggling with a number of medical issues to move in.

[13] On August 10, 2022, the Landlord served the Tenant with a Two Month Notice to End Tenancy for Landlord's Use of Property (the "Notice") by email. The email exchange that accompanied the Notice indicated that the Landlord intended to do some cosmetic renovations and would also move in with his daughter.

[14] The Tenant vacated the Property on November 1, 2022 and received compensation from the Landlord by not paying any rent for the last month of the tenancy.

[15] After moving out, the Tenant noticed that neither the Landlord nor his daughter had moved into the Property and that there were more extensive renovations ongoing.

[16] The Tenant applied for an order for compensation under s. 51(2) of the *RTA* because the Landlord ended their tenancy under s. 49(3) of the *RTA* and did not accomplish the stated purpose for ending the tenancy within the requirements of the *RTA*.

Law

[17] Section 49(3) of the *RTA* states:

> A landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit.

[18] Pursuant to s. 51(2) of the *RTA*, a landlord must pay a tenant an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if the landlord does not establish that:

a) the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of notice provided under s. 49; and

b) the rental unit has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

[19] Under s. 51(3) of the *RTA*, a landlord may be excused from paying the tenant the amount required under s. 51(2) if, there are extenuating circumstances that prevented the landlord from accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy.

[20] Regarding extenuating circumstances, the Landlord drew the Court's attention to the purpose of the enactment of s. 51(3), as outlined in Hansard from 2018. The provision at s. 51(3) aims to balance the rights of landlords and tenants by ensuring that compensation is not automatically awarded but rather considered in light of extenuating circumstances. Policy guidelines were cited, providing examples such as renovations and the right of first refusal.

Positions of the Parties

Position of the Petitioner

[21] During the hearing and in the submitted materials, the Landlord presented sworn evidence that his daughter, Faezeh, needed to move into the Property due to conflicts with her mother that were severely worsening her mental health issues. Medical reports were provided to support this recommendation. After the Landlord notified the Tenant of this need, Faezeh's medical conditions deteriorated to the point where she could not live on her own and that is why she didn't move into the Property.

[22] It is the Landlord's position that the Arbitrator's Decision is patently unreasonable for two primary reasons:

a) The Arbitrator conflated two distinct sections of the *RTA*, leading to the Decision that is patently unreasonable; and

b) Secondly, the Arbitrator did not adequately consider the extenuating medical circumstances of Faezeh in making the Decision.

Position of the Respondent

[23] In response, the Tenant contends that the Landlord's factual basis is inaccurate and that there was never a clear intention for Faezeh to move into the Property on her own, to live independently. In fact, the Tenant relied upon an August 10, 2022 email that specifically stated that the Landlord intended to move into the Property with Faezeh. The Arbitrator noted this expressed intention of the Landlord in rendering the Decision.

[24] Further, the Tenant asserts that the Arbitrator's Decision is not patently unreasonable for the following reasons:

a) The Decision thoroughly considered all relevant elements, was carefully reasoned, and does not approach the meaning of "patently unreasonable";

b) The Arbitrator considered the standard set forth in s. 49(3) of the *RTA*, requiring the Landlord to intend in good faith to occupy the Property because that was the basis and reason given by the Landlord for requiring the Tenant to vacate the premises; and

c) The Arbitrator clearly applied the s. 51(2) standard and rejected the Landlord's argument that there were extenuating circumstances that should relieve him of his obligation to pay 12 months' compensation.

The Decision

[25] In the Decision, the Arbitrator identified the primary issue she had to decide as follows:

> Has the landlord established that the landlord has complied with the *Act* by using the rental unit for the purpose contained in a Two Month Notice to End Tenancy For Landlord's Use of Property?

[26] In her summary of the evidence considered, the Arbitrator recognized that the Landlord served the Tenant with the Notice by email and she was provided with a

copy of the email and reviewed it at the hearing. The Notice was actually dated July 27, 2022 and contained an effective date of vacancy of November 4, 2022, which was exactly 4 months after the final closing date of the Property. The Notice provided just under 3 months' notice to the Tenants.

[27] What seems to be at the core of the issue before this Court is the August 10, 2022 email that the Landlord's agent, who was also his son, Saeid, sent to the Tenant which accompanied the Notice. It read as follows:

> Hello Wing,
>
> My father asked me to inform you about his decision for the 911 Leovista property. As I told you on our first discussion on the phone, he wants to renovate the house to prepare it for my sister and himself to live. Please see the attached Two-month notice for end tenancy. The date for termination is Nov 4th, 2022, as it is defined in the purchase agreement (4 months after the completion), but I wanted to let you know earlier so you have more time to find a new place. Please reply to this email to confirm receiving my email, thanks.
>
> Please let me know if you have any questions or concerns,
>
> Regards,
>
> Saeid
>
> [Emphasis Added.]

[28] The Arbitrator's Decision acknowledged that the Tenant did not contest the Notice. However, in the email evidence presented before the Arbitrator, Mr. Taylor explicitly raised his concerns in an email to Saeid. He asked for clarification on whether they still intended to build a new home or renovate, and he made clear the potential consequences if they did not follow through with their stated intentions. On August 12, 2022, he wrote:

> If you deliver a notice to us stating your intention to renovate and occupy this currently existing building then that is what must happen. If you were to build a new home after delivering this type of notice to us, we would be entitled to 12 months rent compensation ($46,284).

[29] On the same day, Saeid responded to Mr. Taylor's email confirming that they no longer intended to build a new house, but that the Landlord would be moving in with Faezeh. On Friday August 12, 2022, he wrote:

> Regarding our conversation on the phone, I told you my father likes to build a house for himself, but he decided to live with my sister there and asked me to stop working on drawings.
>
> [Emphasis Added.]

[30] In his later email response of the same day, Saeid confirmed that they only intended to undertake cosmetic changes such as painting or tiling that did not require applying for building permits or a renoviction order.

[31] The Arbitrator cited the evidence of the Landlord's agent that if the Landlord had known that renovations were required, they were such that they would not have required the Tenant to vacate.

[32] The Tenant admitted that from that August 10, 2022 email, he knew the Landlord intended to renovate but accepted the good faith assurances of Saeid that any renovations that needed to be done were minor. Consequently, he did not formally dispute the Notice.

[33] The evidence was that as early as November 9, 2022 until August 2023 there were ongoing renovations being undertaken, which included trucks, extensive yard work, painting and construction. It also included replacing the hardwood floor and carpet, structure of the rooms, painting and repairing damage to walls. The floors took an extensive amount of time.

[34] On December 2, 2022, pursuant to s. 51(2) of the *RTA*, the Tenant filed a compensation claim at the RTB, alleging that the Landlord did not fulfil the purpose of the Notice.

[35] On October 4, 2023, the parties appeared before the Arbitrator of the RTB.

[36] In the first paragraph of her analysis in the Decision, the Arbitrator set out the proper test she was applying. She wrote:

> Where a tenant makes an application for the additional compensation, the onus is on the landlord to establish that the landlord took the necessary steps to use the rental unit for the purpose contained in the notice to end the tenancy within a reasonable time after the effective date of the notice and for at least 6 months duration. The law also states that I may excuse the landlord

> from paying the additional compensation if I am satisfied that extenuating circumstances exist that prevented the landlord from accomplishing that stated purpose.

[37] The Arbitrator was also clear that she reviewed all the evidence, including the affidavits provided by the Landlord and the sworn declarations provided by the Tenant. Having reviewed the evidence and heard the submissions of the parties, the Arbitrator stated:

> Ending a tenancy is a very serious matter, and in the case of a landlord ending a tenancy for the landlord's use of the property the landlord cannot be indecisive. The Notice states that the rental unit will be occupied by the landlord's child…
>
> I find that the landlord did not act in good faith and had no intention of moving his child or children into the rental unit, but renovated for another purpose.

Analysis

Preliminary Issue: Exhausting Internal Remedies

[38] The first issue to be addressed prior to conducting a judicial review is that of procedure. It is a general principle that courts will not consider judicial review applications until internal remedies have been exhausted. Except in "exceptional circumstances," courts should not grant judicial review unless the individual has utilized all available remedies within the administrative process, as noted in *C.B. Powell Limited v. Canada (Border Services Agency*), 2010 FCA 61 at para 31.

[39] The *RTA* provides for an internal review process on the specific grounds outlined in s. 79(2). This section was amended on October 2, 2023, to add additional grounds of review. There are now nine grounds for review under s. 79(2):

> (2) A decision or an order of the director may be reviewed only on one or more of the following grounds:
>
> (a) a party was unable to attend the original hearing or part of the original hearing because of circumstances that could not be anticipated and 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 that materially affects the decision;
>
> (b.1) a party, because of circumstances that could not be anticipated and were beyond the party's control, submitted material evidence after the

> applicable time period expired but before the original hearing, and that evidence was not before the director at the original hearing;
>
> (b.2) a person who performed administrative tasks for the director made a procedural error that materially affected the result of the original hearing;
>
> (b.3) a technical irregularity or error occurred that materially affected the result of the original hearing;
>
> (c) a party has evidence that the director's decision or order was obtained by fraud;
>
> (d) in the original hearing, the director did not determine an issue that the director was required to determine;
>
> (e) in the original hearing, the director determined an issue that the director did not have jurisdiction to determine.

[40] In their response to the Landlord's petition, the Director of the RTB suggested that the new s. 79(2)(d) may be relevant to the Landlord's case. Section 79(2)(d) provides a mechanism for review where "the director did not determine an issue the director was required to determine."

[41] Section 79(2)(d) was one of the new additions to the *RTA* and the Landlord argued that the RTB's Policy Guidelines were not available until November 30, 2023. The Decision which is the subject of the judicial review was rendered on October, 12, 2023.

[42] The Policy Guideline for Review Consideration includes an example of the type of issue that could be raised under s. 79(2)(d) which specifically refers to the decision-maker's failure to consider extenuating circumstances:

> On a tenant's application for monetary compensation under section 51(2) of the RTA, a landlord puts forward evidence as to why they did not accomplish the purpose for which they gave the notice to end tenancy but the arbitrator did not determine whether the landlord should be excused under section 51(3) (see *Maasanen v. Furtado*, 2023 BCCA 193)

[43] Pursuant to s. 80(c) of the *RTA*, a party has 15 days after receipt of the order to apply for review. The Director can extend this deadline under s. 66(1) in exceptional circumstances.

[44] It is also important to be cognizant of the fact that there is no absolute bar to bringing judicial review proceedings until internal remedies have been exhausted, but rather, it is a discretionary decision. *Colwill v. Workers' Compensation Board*, 2019 BCCA 453 at paras. 36, 39.

[45] A review of recent case law is helpful in identifying whether this is the type of case where the discretion should be exercised. In the recent case, *Maxwell v. Mo*, 2023 BCSC 493, Justice Thomas dismissed an application to adduce new evidence on judicial review of the RTB decision. At para. 25, Thomas J. cited *Alfier v. Sunnyside Villas Society,* 2021 BCSC 212 as stating that "a party to a judicial review under the *RTA*" is required to "explain why they did not invoke their internal right of review." He further noted at para. 29 that the petitioners should have sought a consideration of the evidence pursuant to s. 79 of the *RTA*; "[i]n my view, their failure to do so is fatal to their application."

[46] In *Dennison v. Stankovic*, 2022 BCSC 1274, the Court dismissed the petition for judicial review on the ground that the petitioners had not applied for the internal review within the RTB first. Justice Norell succinctly explained the Court's approach:

> [30] If a party's grounds for review of an RTB decision fall within one of the three grounds for review in s. 79(2) of the *RTA*, generally that party must pursue an internal RTB review before he or she can bring an application for judicial review. However, if the basis for seeking review does not fall within one of the grounds listed in s. 79(2), the RTB director cannot review the decision and the party may bring a judicial review application.

[47] A review of the case law reveals that the Court recognizes that the scope of internal review under s. 79(2) of the *RTA* is quite narrow despite the additional subsections that were recently added. Generally, in cases where the petitioners raise issues outside the scope of s. 79(2), the Court will hear their petitions on the merits even though no prior applications for internal review were made.

[48] In *Gordon v. Guang Xin Development Ltd*., 2022 BCSC 1544, the petitioner did not apply for the internal review before filing the petition to this Court, however, Justice McDonald decided to hear the petition on its merits, because the error alleged by the petitioners, namely that the decision was "patently unreasonable" fell

"beyond the scope of the statutory review power set out in s. 79(2) of the *Act* [*RTA*]": para. 10. Justice McDonald found that the decision was patently unreasonable (it failed to properly consider ss. 49 and 51(2), and to provide adequate reasons) and sent the case back for reconsideration at the RTB.

[49] In a very recent case of *Han v. Ma*, 2024 BCSC 281, the facts were much more complex then the case at bar and involved a dispute between former spouses Ms. Han and Mr. Ma over a house in Vancouver, where the relatives of Mr. Ma were tenants. One of the grounds that Mr. Ma raised against Ms. Han was that she failed to apply for internal judicial review first (one of Ms. Han's complaints was that she had not been served with application to the RTB and thus did not attend the hearing – the issue covered by s. 79(2)(a)). Justice Loo considered that ground and further noted at para. 69 that allegations of fraud raised by Ms. Han could fall within the scope of s. 79(2)(c). At paras. 70–72, Loo J. cited case authorities on the Court's discretion to grant applications for judicial review and concluded at paras. 73–74 that it was the right case to exercise such discretion due to "the seriousness of the consequences" of the RTB order.

[50] In the case before me, I note that some of the Landlord's arguments relate to extenuating circumstances, which the Director suggested might fall within s. 79(2)(d), "in the original hearing, the director did not determine an issue that the director was required to determine".

[51] However, I find that the instant petition can be distinguished on two levels. Firstly, the Landlord's counsel argued that the Arbitrator failed to "properly assess the extenuating circumstances" (para. 58 of the petitioner's written submissions). This alleged error arguably differs from the ground for internal review in s. 79(2)(d) and goes to the heart of how the Arbitrator assessed the extenuating factors she was required to consider.

[52] Secondly, the primary issue raised in the matter before me is that the failure of the Arbitrator to properly assess the extenuating factors and an error in the conflation of ss. 49(3) and 51(2) resulted in a patently unreasonable decision. In

short, I find that the Landlord's arguments extend beyond s. 79(2) of the *RTA* and the scope of the internal *RTA* review process.

[53] After considering the facts before me and the caselaw, it is my view that this Court should exercise its discretion to conduct this judicial review despite the Landlord's failure to first seek a review under s. 79 of the *RTA*.

Conflation of ss. 49(3) and 51(2) of the *RTA*

[54] The Landlord argued that the Decision of the Arbitrator is patently unreasonable because the Arbitrator conflated two separate legal tests in coming to her conclusion. He argued that the two tests are separate and distinct from one another and are to be engaged at different stages of the notice process.

[55] He argued that the essence of s. 49(3) is the requirement for the landlord to have a good faith intention to occupy the rental unit without any ulterior motive when issuing a Two Month Notice to End the Tenancy for the Landlord's use. It is his position that since Mr. Taylor's application for dispute resolution was related to s. 51(2) and not s. 49(3) then, the Arbitrator erroneously blended the requirements of both ss. 49(3) and 51(2) in coming to her Decision.

[56] The Landlord contends that if the Tenant doubted that the Landlord had a good faith intention to occupy the Property, and suspected that the Property may be used for other purposes, then he should have filed an application at that time they received the Notice, to dispute the two-month requirement to vacate the unit. If he had of been successful, the Tenant's remedy would have been the cancellation of the Notice.

[57] The Landlord submitted that since the Tenant accepted the Notice, s. 49(3) had fulfilled its purpose and the issue of good faith is now irrelevant for any subsequent disputes. In response, the Tenant argued that the good faith intentions of a landlord often do not become obvious until later when the Landlord has not satisfied his stated intention for occupying the property.

[58] Justice Maisonville summarized the distinction of the two tests in the recent case of *Ball v. Beacham*, 2024 BCSC 21 at para 10:

> [10] Where s. 51(2) is raised, any previous intentions of the landlord, whether in good faith or not, are no longer relevant and whether the landlord actually accomplished the stated purpose for ending the tenancy is material. As of the date of the initial arbitration hearing, November 8, 2021, the petitioners had still not occupied the Unit.

[59] The Landlord admits that if a landlord does not move into the home within a reasonable period after the effective date of the Notice and does not occupy it for at least six months, then the tenant is entitled to compensation in an amount equivalent to 12 months' rent. The Landlord told the court that the purpose of the Notice was to provide accommodation for his daughter, who suffered from various health issues, including bipolar disorder and ADHD. The daughter's doctors advised that she needed to move out of their family home for her well-being, and to avoid conflict with her mom and this is what prompted the Landlord to seek possession of the Property for his daughter to live in.

[60] The daughter's mental health condition, specifically borderline personality disorder, was presented to the RTB as a key extenuating factor to be considered in the case. Acting on medical advice, in seeking suitable accommodation for his daughter, the Landlord considered factors such as proximity for monitoring her well-being and ensuring a conducive environment for her needs. He determined that the Property was the right place for her to reside. However, the daughter's condition worsened after the Notice was issued, leading to a change in her medication and heightened vulnerability, which was explained to the RTB.

[61] Despite correctly citing and describing the proper test to be applied when she started her analysis, the Arbitrator then addresses the Landlord's legal counsel's argument acknowledging that the Landlord's intention to renovate is no longer relevant. It is not completely clear whether she is referencing the position being advocated by the Tenant or she is reciting the law to distinguish the facts. In any event, in dismissing the extent of the renovations, the Arbitrator's explanation creates confusion:

> However, regardless of the extent of renovations, the law states that if a landlord fails to act in good faith or use the rental until for the purpose contained in a Two Month Notice to End Tenancy For Landlord's Use of Property within a reasonable time after the effective date of the Notice and for at least 6 months duration there are monetary consequences.
>
> [Emphasis Added.]

[62] It is clear that in this paragraph, the Arbitrator conflates the two tests when she states that if a landlord fails to act in good faith or use the rental unit for the purpose contained in the Notice within a reasonable time, and for at least six months duration, there are monetary consequences. It is not clear what the Arbitrator means by monetary consequences, but since the specific request relates to compensation under s. 51(2), in this context, this statement is not correct. The absence of good faith is not a requirement or a factor that on its own, will lead to compensation under s. 51 of the *RTA*.

[63] The Arbitrator's use of the conjunction "or" connects both the failure to act in good faith with the failure to use the Property as set out in the Notice within a reasonable time and for at least six months describing two separate possibilities or alternative paths to compensation. They are not. On its own, the simple proof of a landlord's failure to act in good faith can not lead to financial compensation under s. 51(2). Only the failure of the latter would entitle a tenant to compensation provided that there are no extenuating circumstances that would excuse the Landlord from paying the tenant compensation.

[64] In *Vavilov* at para. 128, the Court emphasized that while decision-makers are not required to address every possible nuance, failing to consider a key element that could change the outcome is deemed indefensible and unreasonable. As a reviewing court, I must ensure that the Arbitrator's reasons adequately address the main issue or issues that needed to be decided.

[65] It is clear from the facts before the Arbitrator that neither the Landlord, nor any of his family members moved into the property within a reasonable time and for at least six months. In their submissions before the court, the Landlord admitted that the criteria for compensation owed to the Tenant as set out at s. 51(2) of the *RTA*

had been met, but strenuously argued that the extenuating circumstances should excuse him from paying the compensation. Essentially, the Arbitrator was left with a very narrow issue to decide.

Did the Decision Ignore Extenuating Circumstances?

[66] The Landlord contended that the Notice was issued because his daughter needed to move into the Property to live away from her mother, as their conflict aggravated the daughter's medical conditions. However, they also argued that after the Notice was issued, the daughter's medical issues worsened, making it unfeasible for her to live independently. The Landlord claims that his daughter's medical issues are extenuating circumstances that should exempt him from paying compensation.

[67] Consequently, the central issue for the Arbitrator to decide was whether the health conditions of the Landlord's daughter constituted extenuating circumstances that should exempt the Landlord from paying the compensation claimed by the Tenant under section 51(2). Section 51(3) reads as follows:

> The director may excuse the landlord or, if applicable, the purchaser who asked the landlord to give the notice from paying the tenant the amount required under subsection (2) if, in the director's opinion, extenuating circumstances prevented the landlord or the purchaser, as applicable, from
>
> > (a) accomplishing, within a reasonable period after the effective date of the notice, the stated purpose for ending the tenancy, and
> >
> > (b) using the rental unit, except in respect of the purpose specified in section 49 (6) (a), for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

[68] In their written submissions, the Landlord argued at paras 67 and 70:

> 67. … an unforeseen medical crisis involving Faezeh warrants recognition as an extenuating circumstance, which should justifiably permit a delay in occupancy under s. 51(3), a consideration Arbitrator Hedrich failed to make.
>
> …
>
> 70. Nevertheless, despite recognizing the decline in Faezeh's health following the Two Month Notice, Arbitrator Hedrich did not adequately evaluate the considerable evidence to determine if it constituted extenuating circumstances. Instead, he concentrated on what alternative actions the Petitioner might have taken to fulfill the requirements of section 51(2) and on the good faith intention of the Petitioner's Daughter to move into the Property.

[69] Relying on Justice Murray's decision in *Furtado v. Maasanen*, 2020 BCSC 1340 at para. 32, the Landlord argues that extenuating circumstances must be considered when they are present.

[70] However, the instant petition is distinguishable from the circumstances in *Furtado*, where the arbitrator failed to consider the extenuating circumstances at all (para. 35) which is an example of an error that would affect the integrity of the decision. In this Decision, the Arbitrator listed all the facts that the Landlord relied on to prove extenuating circumstances and wrote as follows:

> Considering the medical evidence, I am satisfied that the landlord knew full well prior to issuing the Notice that his daughter could not live on her own due to her past medical history. The email to the tenant from the landlord's agent states that the landlord wanted to renovate to prepare the home for the landlord and the landlord's daughter to live, but neither moved in.

[71] Importantly, in this paragraph, the Arbitrator relies upon the Landlord's stated intention to move in with his daughter as well as all the medical evidence before her. This evidence led her to conclude that given Faezeh's past medical history, the medical conditions of the daughter were not unforeseen. In referring to the email to the Tenant, she recalls that the Landlord's intentions were to move into the Property to care for his daughter.

[72] Although the Arbitrator did reference the lack of good faith on the part of the Landlord and at one stage did conflate the test for compensation, it is important to examine her overall decision on the pivotal issue she needed to determine in the context of ss. 51(2) and 51(3). Did her error or misstatement affect the Decision's integrity?

[73] The Arbitrator was simply required to consider whether the evidence constituted extenuating circumstances that prevented the Landlord from occupying the Property earlier and if so, whether those circumstances would make it unreasonable and unjust to order the Landlord to pay compensation to the Tenants.

[74] While its clear that on its own, the absence of good faith is not required to meet the test for compensation set out at s. 51(2), in applying *Vavilov*, the mere

mention of an absence of good faith or its consideration in the assessment of extenuating circumstances, does not necessarily imply that the resulting decision was unavailable to the Arbitrator on the evidence. In fact, every case must turn on its own facts.

[75] The ultimate test is whether the arbitrator considered all the relevant evidence in assessing whether extenuating circumstances should excuse the Landlord's fulfilment of his stated intention. There is no bar to the consideration of evidence that gives meaning to the expressed intention of the Landlord in giving the Notice which is required to assess whether there were extenuating circumstances frustrated the Landlord's ability to fulfil his stated intentions. In fact, it is arguably impossible to consider whether the circumstances were unforeseen without placing them in the actual context of the Landlord's stated intentions. In this case, they are interlinked.

[76] In other words, although the proof of an absence of good faith may be entirely irrelevant in satisfying the test set out at s. 51(2) to trigger compensation, I have not been provided with any authority to suggest that the underlying facts related to the Landlord's intentions must be excluded from the consideration as to whether there were extenuating circumstances that frustrated the Landlord's intentions.

[77] During the hearing before the RTB, the Landlord presented extensive evidence to show extenuating circumstances, including the filing of medical evidence related to Faezeh's mental health issues. Despite intending to conduct minor renovations to the property, the evidence was clear that the Landlord sought to regain possession of the Property primarily for his daughter Faezeh, who was experiencing severe mental health challenges, including sleep disturbances and self-harming tendencies.

[78] After summarizing the circumstances and the time line, at page 7 of the Decision, and acknowledging Faezeh's requirement to have constant care, the Arbitrator rejected the medical evidence as extenuating circumstances when she wrote, "However, if the landlord was acting in good faith he would have moved in with his daughter as stated, who would then have had constant care."

[79] In his request for judicial review, the Landlord adamantly rejected the Arbitrator's suggestion that the Landlord should have moved in with his daughter suggesting it was completely unreasonable. However, in referring back to the August 10, 2022 email, it is clear that this idea did not originate from the Arbitrator, but rather, it was the expressed intention of the Landlord. Further, there does not appear to be any evidence on the record to explain why the Landlord could not move into the Property as he intended to care for his daughter's worsened medical conditions.

[80] In his submissions, the Landlord argued:

> The Petitioner contends that Arbitrator Hedrich's expectation, as suggested in his decision, for a father to relocate to a house with his daughter amid her severe health crisis solely to comply with the stipulations of the Two Month Notice is wholly unreasonable, unjust, and likely beyond the intent of the legislature, particularly in a situation like the present case. At page 7 of the decision, (Tab 4, Clout Affidavit at pg. 17) the arbitrator even suggests that the Petitioner should have moved into the Property with his daughter, which is also not the legal test.

[81] Part of the legal test that the Arbitrator needed to apply was whether the Landlord or his family member moved into the rental home in a manner consistent with the stated intention set out in the Notice. In short, the Landlord's stated intention was that he intended to renovate and move into the house with his daughter. The email never suggested that the daughter would move into the house by herself to live on her own. Extenuating circumstances are by their pure nature different to what might arise in their day-to-day life. In other words, you couldn't know that it was going to happen nor could you have planned for it.

[82] Although the Arbitrator did accept the medical issues of the Landlord's daughter worsened at least for a time requiring constant care, she was required to examine the evidence of extenuating circumstances in the context of what the Landlord stated he intended to do.

[83] Reviewing the additional evidence filed by the Landlord, I note that the Landlord's daughter, Faezeh, has been suffering from numerous medical conditions since she was 17 or 18. She is now 26. Further, the evidence on the Petition Record, at pp. 109 and 110 of the Affidavit #1 of Lisa Clout, senior policy analyst at

the RTB, states that it was when Faezeh was in the in-patient unit at the Hope Centre by Lions Gate Hospital in or around 2021 that her attending psychiatrist recommended that Faezeh move out of her parents' house as her symptoms were aggravated by her relationship with her mother. The Notice in the matter before me wasn't issued until August, 10, 2022.

[84] Although the Arbitrator did accept that Faezeh's medical conditions did worsen, she was not persuaded that they amounted to extenuating circumstances to excuse the Landlord from meeting the statutory requirements set out at s. 51(2). In fact, the evidence of the Landlord that was before the Arbitrator was somewhat contradictory on what would assist Faezeh's recovery. Much of the medical evidence supported the fact that in order for the daughter to improve, she needed to move out of the family home to get away from the conflict arising from her relationship with her mother which was exacerbating her medical conditions.

[85] In her Decision, the Arbitrator found the timeline of events to be important and she referenced the August 10, 2018 email. She wrote:

- The landlord purchased the rental property on July 4, 2022 while the tenants were residing there, with the intention of demolishing it.
- In July or early August, 2022, the landlord's agent contacted the tenant to inform the tenant that a new structure was in the design phase.
- In August, 2022 the landlord changed his mind because he wanted his daughter to move in, as well as his son and wife.
- The Two Month Notice to End Tenancy For Landlord's Use of Property is dated July 27, 2022 and was not served until August 10, 2022.
- Also on August 10, 2022 the landlord's agent emailed the tenant stating that either the landlord or his daughter would be moving in and the landlord wanted to renovate the house to prepare it for that.
- The landlord's daughter is 26 years old and has been seeing specialists and therapists since she was 18 years old.
- A letter from another physician dated September 11, 2023 states that on September 27, 2022 the landlord's daughter informed the physician that a plan was under way for her to move out to manage her conflicts with her mother, and that she continued to require close support throughout the rest of 2022 and to the current date.
- In September, 2022 the landlord's daughter's situation changed and new medications were prescribed.

…

- On October 12, 2022 a physician assessed the landlord's daughter, who was diagnosed with diabetes in 2021, and reported migraines with visual aura, and past medical history included diabetes, depression and hyperlipidemia, and the physician "reiterated the importance of tight control over blood sugar, blood pressure and serum lipids."

…

- The Affidavit of the landlord's agent states at paragraph 18 that the tenant "accepted our good faith intention and confirmed that he would be moving out on November 4, 2022."
- The tenant vacated the rental unit on or about October 31, 2022.
- On November 9, 2022 a physician had a follow up with the landlord's daughter, and his report indicates that past medical history included depression, borderline personality disorder, fatty liver, diabetes type 2, obesity and migraine.
- Also, on November 9, 2022 the tenants walked by the home and witnessed construction materials and landscaping work.
- From November 2022 to August 2023 the tenant and the tenant's witness observed that the home was a construction site during that entire time period, and that there would have been no way for anyone to move into the home despite extenuating circumstances.
- Construction/ renovations started in December, 2022 and completed on the lower level 2 or 3 months later, and the main floor started in May 2023.
- No one moved into the rental unit.

[86] Importantly, the Notice and email do not suggest that Faezeh ever intended to live on her own. The original email and subsequent follow up was that the Landlord and his daughter would move in. I do not accept the Landlord's argument that the Arbitrator improperly concentrated on why the Landlord did not move proposing what was an alternative action that the Landlord might have taken simply to fulfil the requirements of s. 51(2). In short, the Arbitrator did not have any evidence before her to explain why the Landlord himself did not satisfy his own stated intention to occupy the Property. This was the type of evidence she was required to assess in evaluating whether the situation was unforeseen. From all the evidence provided by the Landlord himself, in light of the worsening health conditions of Faezeh, the Arbitrator could easily infer that there might be increased urgency in moving Faezeh into the Property to be away from her mother so her comments are not completely

unreasonable. I reviewed all the evidence before the Arbitrator and I do not see any evidence provided to her that would answer this question.

[87] I am also mindful of the evidence that the Landlord had just purchased the property and by all accounts, it appears that the Landlord's agent, his son, Saeid had been very honest and forthright with the Tenant in advising them what to expect. It is also clear from the evidence that the Landlord purchased the property for his own use in some capacity, whether he demolished it and built a new home or he moved his family members in. In short, it was the mechanics of how that transition unfolded within the legislative framework of the *RTA* which is at the heart of this dispute.

[88] In *Vavilov*, the majority judgment emphasized that tribunals must interpret statutes by understanding the legislative intent through the text, context, and purpose of the provision, aligning with the "modern principle" of statutory interpretation.

[89] The evidence is such that the Landlord did provide the Tenant with just shy of three months' notice when Saeid emailed the Tenant with the Notice explaining the intention of the Landlord was to move into the Property with his daughter. I found it interesting that in the email, he referred to providing them with four months' notice from the closing of the sale. There was also discussion of the types of renovations or cosmetic improvements that the Landlord intended to do and the Landlord had already discussed with the RTB whether permits would be required. The Tenant very astutely questioned Saeid on their intentions and indicated that if they intended to demolish or do extensive renovations, they needed to provide four months' notice and he highlighted the consequences for failing to provide the required notice.

[90] Although I have empathy for the position that the Landlord found himself in, the legislation at ss. 49 and 51 of the *RTA* is relatively rigid and intended to be so. The established compensatory regime was the product of Bill 12 and was specifically designed to improve the protection of tenants' rights. If the elements of

s. 51(2) are not met, then a tenant is entitled to compensation in the amount of 12 months' rent.

[91] However, by implementing s. 51(3), the government aimed to strike a balance between protecting tenants' rights and ensuring a fair process for landlords. Section 51(3) requires decision-makers to consider extenuating circumstances in assessing whether a Landlord should be excused, but there is no scaled or sliding spectrum of damages available for the Arbitrator to order. Section 51 provides an all or nothing level of 12 months' compensation which may appear unfair and unjust for the party not receiving a favourable order.

[92] The expectation is that the specialized expertise of the arbitrators at the RTB will bring unique perspectives that enrich the interpretation to ensure a fair application of the policy. As administrative decision-makers, they do not need to engage in a formalistic approach but they must ensure their interpretations are consistent with the statute's text, context, and purpose: *Vavilov* at paras. 118–122.

[93] Although I did find that the Arbitrator misstated the law at one stage, I am mindful that she was only required to consider the narrow issue as to whether there was evidence of extenuating circumstances that should excuse the Landlord from paying the Tenant compensation. It is a well noted administrative law principle that minor omissions in interpretation that do not undermine the decision as a whole are not grounds for review. I found that the Arbitrator plainly stated that she assessed the evidence and extenuating circumstances and provided her reasons why she did not find that the evidence sufficient to excuse the Landlord from paying the compensation.

[94] I find that read as a whole, the Decision demonstrates that based on the consideration of the evidence and the submissions made, the Arbitrator properly came to a determination that, extenuating circumstances that would excuse the Landlord from paying compensation had not been established: *Potherat v. Slobodian*, 2021 BCSC 1536 at para. 95.

[95] A decision can only be said to be patently unreasonable where there is no evidence to support the findings. When assessing for patent unreasonableness, the court can not challenge the conclusions drawn from the evidence by the decision-maker or replace them with different findings. The question is not whether I agree with the Arbitrator's Decision, but whether the resulting Decision was clearly available to her on the evidence. With respect, although the Arbitrator may have blurred the tests, I do not find she misapprehended the evidence on the very issue she was required to decide.

Conclusion

[96] I see no merit in the suggestion that the Arbitrator inappropriately considered the absence of good faith as the test to be applied in the determination of compensation. I also do not find that the Arbitrator failed to properly assess the extenuating circumstances argued by the Landlord. The conclusion she reached was available to her on the evidence.

[97] The petition for judicial review is dismissed.

"Sukstorf J."