IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leung v. Ty* ,
2024 BCSC 1214

Date: 20240605
Docket: S241483
Registry: Vancouver

Between:

Timmy Chi Keung Leung

Petitioner

And

Robert Sand Ty

Respondent

Before: The Honourable Justice Jones

On judicial review from: Decision of Arbitrator of the Residential Tenancy Branch, January 15, 2024 (RTB File No. 910123059)

Oral Reasons for Judgment

In Chambers

Representative for the Petitioner, appearing in person:	G. Tsau
The Respondent, appearing in person by videoconference:	R. Ty
Place and Date of Hearing:	Vancouver, B.C. May 30, 2024
Place and Date of Judgment:	Vancouver, B.C. June 5, 2024

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I. INTRODUCTION

[1] These are my oral reasons for judgment on the petitioner landlord's application for judicial review of an order of the Residential Tenancy Branch (“RTB”), dated January 15, 2024, in RTB File No. 910123059, regarding the petitioner's claim relating to damage to a rental unit and a security deposit.

[2] For the reasons that follow, the petitioner landlord's petition to quash the RTB decision awarding the respondent tenant double the amount of the security deposit plus interest is dismissed.

[3] I uphold the decision of the RTB to award the respondent tenant double the security deposit plus interest, and to award the petitioner landlord damages to the rental unit and the filing fee, with the set-off of the awards resulting in the RTB's final decision and order that the landlord pay the tenant $1,073.95.

II. BACKGROUND

[4] The petitioner is the landlord, Timmy Chi Keung Leung (“Landlord”), and the respondent is the tenant, Robert Sand Ty (“Tenant”).

[5] The Tenant rented a residential unit from the Landlord commencing April 1, 2021, and paid a security deposit of $1,025. The tenancy ended on August 15, 2023. A dispute arose about the Landlord's allegations of damage to the unit and the return of the security deposit.

[6] On August 16, 2023, the Landlord filed an application for dispute resolution with the RTB under the *Residential Tenancy Act,* S.B.C. 2002, c. 78 [*RTA*]. The application sought an award of $892.50 for replacement of carpet, requested retention of the security deposit to that amount, and the cost of the $100 filing fee. Two days later, on August 18, the Landlord filed a request to amend the application to seek an additional $210 for painting costs.

[7] The RTB dispute resolution hearing was heard on January 15, 2024, by telephone conference call. The participants on the call were the arbitrator ("Arbitrator"), the Tenant, and the Landlord's agent, Gloria Tsau.

III. ARBITRATOR'S DECISION

[8] The Arbitrator's decision is dated January 15, 2024 (the "RTB Decision"). The issues identified by the Arbitrator were:

1) Is the Landlord entitled to a monetary order for damage to the rental unit or common areas?

2) Is the Landlord entitled to retain all or a portion of the Tenant's security deposit in partial satisfaction of the monetary award requested?

3) Is the Landlord entitled to recover the filing fee for this application from the Tenant?

[9] The Arbitrator found that the Landlord had established a claim for damage to the carpet and the discolouration of a wall in the unit.

[10] The Arbitrator awarded the Landlord $687.22 for carpet replacement, $210 for the cost of painting the wall, and $100 for the filing fee for the application.

[11] The Arbitrator also found that the Landlord's right to claim against a security deposit for damage to the property was extinguished under s. 24(2) of the *RTA* because the Landlord had not complied with the *RTA*'s s. 23 requirement that the Landlord give a copy of a move-in condition inspection report to the Tenant in accordance with the *Residential Tenancy Regulation*, B.C. Reg. 477/2003 [*Regulation*], s. 18(1)(a), that is, within seven days after the condition inspection report is completed.

[12] The parties agree that the Landlord completed a move-in condition inspection report on April 1, 2021 (the "Move-In Report"), and agree the Landlord did not give a copy of the Move-In Report to the Tenant in accordance with the *Regulation*.

[13] The Arbitrator found that the Landlord had also not complied with the *RTA*'s s. 35 requirement that the Landlord complete a condition inspection report at the end of the tenancy (the "Move-Out Report"), and give a copy to the Tenant in accordance with the *Regulation*, s. 18(1)(b), that is within 15 days after the later of: (i) the date the condition inspection is completed (here, August 15, 2023); and (ii) the date that the landlord receives the tenant's forwarding address in writing (here, July 23, 2023).

[14] The Arbitrator also found that the Landlord did not offer the Tenant two opportunities to do a move-out inspection, one in the RTB prescribed form, and therefore the Tenant did not extinguish his rights in relation to the security deposit.

[15] As a result of the breach of the Landlord's obligation to give a copy of the Move-In Report to the Tenant, at the end of the tenancy the Landlord had no right to make a claim against the security deposit for damage to the unit under s. 38(1)(d) of the *RTA*, because that right had been extinguished when the Landlord failed to give a copy of the Move-In Report to the Tenant, and the Landlord later failed to give a copy of the Move-Out Report to the Tenant.

[16] The Arbitrator found that the Landlord did make a s. 38(1)(d) application for dispute resolution against the security deposit within 15 days of the tenancy ending; that is, the application was made on August 16, 2023, one day after the tenancy ended. However, the Arbitrator then reviewed the circumstances of the Landlord failing to give the Tenant a copy of the Move-In Report and the Move-Out Report, and decided that since the Landlord's right to claim against the security deposit for damage to the unit had been extinguished and the Landlord did not claim against the security deposit for something other than damage to the unit, which could have entitled the Landlord to retain the security deposit, and the Landlord did not repay the security deposit to the Tenant under s. 38(1)(c), the Landlord breached s. 38(1) of the *RTA* regarding the repaying or retaining security deposits and was subject to the s. 38(6)(b) doubling of the security deposit.

IV. REVIEW of the RTB DECISION

[17] On January 17, 2024, the Landlord applied to the RTB for a review consideration of the RTB Decision.

[18] The Landlord based its application for review on two grounds:

1) new and relevant evidence not available at the time of hearing; and

2) procedural error.

[19] The Landlord's new evidence referred to the circumstances of the move-out inspection and the Landlord giving a copy of the Move-Out Report to the Tenant.

[20] On January 18, 2024, an RTB adjudicator issued a review consideration decision (the “Review Decision”) dismissing the Landlord's application for review consideration.

[21] The Review Decision found that the Landlord's submissions could not be considered new, as the evidence referenced by the Landlord had been available at the time of the RTB hearing, and the Landlord's submissions would not have had a material effect on the outcome of the RTB's Decision.

[22] The Review Decision also found that there was no procedural error and the Landlord was attempting to reargue the case based on the same fact pattern.

V. WHAT DECISION SHOULD BE REVIEWED?

[23] As a preliminary issue, I must decide whether the subject of this judicial review is the RTB Decision or the Review Decision.

[24] In *Najaripour v. Brightside Community Homes*, 2023 BCSC 2032, Justice MacNaughton concluded that the RTB's review decision in that case did not review the merits of the RTB decision. The scope of the review was whether new evidence should be admitted and whether fraud occurred.

[25] Here the Review Decision refers to the finding of the RTB Decision that the Landlord extinguished their right to claim for damages against the security deposit, but does not review the merits of the RTB Decision.

[26] As a result, the same reasoning as in *Najaripour* applies here, as the scope of the review was based on the two grounds of whether new evidence should be admitted and whether there was a procedural error, not a review of the merits of the RTB Decision.

[27] Consequently, it is the RTB Decision that is the subject of this judicial review.

[28] This is what the Landlord seeks in its petition.

VI. PARTIES' POSITIONS

Director of the Residential Tenancy Branch

[29] The director of the RTB (the "Director") filed a response to petition taking no position on the orders sought by the Landlord and filed an affidavit attaching a record of the proceeding.

[30] The Director's response takes no position on the petition, but requests that the style of cause be amended to remove the reference to the RTB or alternatively name the Director, Residential Tenancy Branch for the following reasons set out in the response:

4. The petition names the RTB as a party in this judicial review. The RTB is not a legal entity, nor is the RTB a decision maker subject to judicial review.

5. The statutory authority to resolve disputes under the *RTA* is granted to the Director, who delegates authority to resolve disputes to arbitrators pursuant to s. 9.1 of the *RTA.*

6. The order made after the hearing of this judicial review ought to amend the style of cause to either remove the reference to RTB or to read "Director, Residential Tenancy Branch".

[31] I note that the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 15 provides that for an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power:

a) must be served with notice of the application and a copy of the petition; and

b) may be a party to the application at the person's option.

[32] Here, since the Director does not wish to be a party to the application, I agree that the style of cause can be amended to remove the reference to the RTB.

The Petitioner's Position

[33] The Landlord's petition seeks the following orders:

1. quashing the RTB Decision and the order to award the Tenant $2,050.00; and

2. upholding the RTB Order awarding $897.22 for damages to the Landlord for damage to the unit and awarding the Landlord the $100 filing fee.

[34] The Landlord's petition submits that the standard of review is correctness on the basis of the submission that the petition is a pure matter of law because: “the RTB Decision misapplies the sections of the statutory provisions of the *RTA* (ss. 23–24, 32, 35–36 and 38) and therefore incorrectly states the law and penalizes the Landlord when no penalty arises.”

[35] The Landlord's submissions can be broadly summarized as follows:

1) The *RTA, s.* 32(3) obligation on tenants to repair damage to a unit and the RTB Decision finding that the Landlord established a claim for damage to the rental unit are independent of ss. 35–39 of the *RTA* regarding a condition inspection at the end of a tenancy, the consequences if the report requirements are not met, and the return of the security deposits.

The Landlord also submits that the Landlord has an independent right to this compensation without reference to ss. 35–39.

2) *RTA,* ss. 24(2) and 36(2) provide that a Landlord's right to claim against a security deposit is extinguished if the Landlord does not comply with the requirements of those sections with respect to the move-in and move-out inspections of the condition of the unit and completion of the condition inspection report, and delivery of a copy of a report to the Tenant.

3) The Landlord submits that the *RTA* s. 38(1) provides a landlord with 15 days after the end of the tenancy to repay the security deposit to the tenant, or file a dispute resolution notice with the RTB.

4) The Landlord submits the tenancy ended on August 15, 2023 and the Landlord filed a dispute resolution notice on August 16, 2023, hence the Landlord submits that no penalties for non-compliance with s. 38(1) are available to an adjudicator.

5) The Landlord also submits that the adjudicator committed a *nunc pro tunc* error and penalized the Landlord under s. 38(6)(b) (double repayment) because the Landlord had not provided two opportunities for the Tenant to complete the move-in or move-out inspection under s. 36(2) and had not received the condition inspection report.

6) The Landlord submits that the adjudicator's error was to impute the status of the file on January 15, 2024, for the date of the application that was in the first 24 hours after the end of the tenancy. At the time of the application, no breach of the s. 36(2) had occurred and, pursuant to the applicable sections, it is still open to the party to complete a condition inspection report, according to the Landlord's submissions.

[36] The Landlord admits that its claim is for damages, that is, damage to the unit, and its rights pursuant to s. 24(2) or 36(2) regarding condition reports "might well be ‘characterized’ as extinguished"; however, the Landlord submits it is not making a

claim pursuant to s. 38(4)(a) as referenced in s. 38(5), which the Landlord submits does not apply, suggesting that a claim under s. 38(4)(b) may proceed, and the Director has jurisdiction to make an order under that section for the Landlord's retention of an amount of the security deposit.

The Respondent's Position

[37] The respondent Tenant, in his response to petition and in oral submissions, submits that the RTB Decision should be upheld.

[38] The Tenant also submits in his response and in oral submissions that the Landlord did not use the form prescribed by the *Regulation* for the move-out inspection, and on that basis submits that the Landlord has no legal basis to argue that damages to the unit were left by the Tenant.

[39] I understand that position to be that by not using the move-out inspection form prescribed by the *Regulation*, the Landlord has no legal basis to argue that there was damage to the unit.

[40] This issue raised by Tenant about the Landlord's use of non-compliant forms does not appear to have been raised at the RTB hearing in relation to the damage alleged by the Landlord and as found by the Arbitrator, so the question arises whether I should exercise my discretion to consider this new issue on this judicial review.

[41] I find this issue was not raised before the RTB and is not addressed by the RTB Decision.

[42] The Tenant did not apply for a review consideration of the RTB Decision on the basis of that issue, and did not seek judicial review on the basis of that issue.

[43] A judge's discretion to entertain a new issue not raised at the RTB hearing will generally not be exercised where the issue could have been but was not raised before the tribunal.

[44] Where, as here, the Legislature has entrusted the determination of residential tenancy issues to the RTB, the court may be denied an adequate evidentiary record to consider the issue and to raise an issue for the first time on judicial review may unfairly prejudice the opposing party. Any determination of the Tenant's position should be made at first instance by the RTB, and the RTB has exclusive jurisdiction over the matter which must be submitted to the director for dispute resolution under the *RTA*.

[45] As stated in *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at paras. 34–48:

> [34] The function of a court on judicial review is supervisory. The court must ensure that a tribunal has operated within legal norms. Courts are, in a very strict sense, reviewing what went on before the tribunal. They are not undertaking a fresh examination of the substantive issues.
>
> . . .
>
> [48] It is a well-established principle that issues in litigation ought to be thrashed out at first instance, both to ensure that all evidence relevant to those issues is included in the record, and to ensure that the expertise of the tribunal of first instance is brought to bear on the issues.

See also *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 22.

[46] This issue raised for the first time by the Tenant on this judicial review could have been but was not raised before the RTB. The Legislature has entrusted the determination of residential tenancy issues and the interpretation of the *RTA* to the RTB, particularly where the issues relate to the RTB's specialized functions and expertise.

[47] The issues on this judicial review are those that arise in the RTB Decision. To paraphrase the *Air Canada* case, the function of this court on judicial review is supervisory. The court must ensure that the RTB operated within the legal norms. This court is, in a very strict sense, reviewing what went on before the RTB. It is not undertaking a fresh examination of the substantive issues and issues raised for the first time on judicial review and not raised before the RTB.

[48] For these reasons, I exercise my discretion to not consider the issue raised by the Tenant for the first time on this judicial review and not at the RTB hearing.

VII. LEGAL PRINCIPLES

[49] The legal principles that apply to my consideration of the issues on this judicial review are as follows.

General Principles of Judicial Review

[50] In conducting a judicial review, I am guided by the relevant provisions of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241; the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]; and the *RTA*.

[51] This petition seeks judicial review of the decision of the RTB Arbitrator made under Part 5 of the *RTA*, which sets out the statutory scheme for resolution of residential tenancy disputes.

[52] Pursuant to s. 5.1 of the *RTA*, decisions of the director and the director's delegates are reviewable in accordance with the statutory standard of review set out in s. 58 of the *ATA*.

[53] The role of the court on a judicial review is to ensure that the statutory decision maker or tribunal acted within the authority bestowed upon it by the legislature: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28.

[54] The review is based on the record before the tribunal: See *Actton Transport Ltd. v. British Columbia (Employment Standards),* 2010 BCCA 272 at para. 19.

[55] The role of the court on judicial review is thus not to hear new evidence or argument or to decide or re-decide the case. Rather, the role of the court is to ensure that the tribunal:

> (a) acted within its jurisdiction by deciding what it was directed to decide by its constituent legislation; and

(b) did not lose jurisdiction by failing to provide a fair hearing or by rendering a decision outside the degree of deference owed by the reviewing court.

Standard of Review

[56] The Landlord submits the standard of review is the correctness standard, as this is a "pure matter of law". The Landlord's submissions do not refer to any case law authority to support that proposition.

[57] The Landlord's submissions also state that the RTB Decision "misapplies sections of the *RTA*". Explicit in that submission of a misapplication of the *RTA* is that the RTB Decision applies or allegedly misapplies the statutory provisions of the *RTA* to the facts of the case which makes this judicial review a matter of fact and law, not just an interpretation of law or a pure matter of law.

[58] Key statutory provisions of the *RTA* are ss. 5.1 and 84.1. Section 5.1 makes s. 58 of the *ATA* applicable to residential tenancy disputes as follows:

> 58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
>
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

> (3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
>
> (b) is exercised for an improper purpose,
>
> (c) is based entirely or predominantly on irrelevant factors, or
>
> (d) fails to take statutory requirements into account.
>
> [Emphasis added.]

[59] Section 84.1 of the *RTA* is a privative clause granting the director of the RTB exclusive jurisdiction 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.

[60] Here, this judicial review proceeding falls within s. 58(1) and (2)(a) of the *ATA*. The *RTA* has a privative clause in s. 84.1 and the RTB Decision involves findings of facts and law, resulting in the standard of review under s. 58(2)(a) of the *ATA* being patent unreasonableness.

[61] The standard of review applicable to RTB decisions is set out in *Hollyburn Properties Limited v. Staehli,* 2022 BCSC 28 at paras. 23–27 as follows:

> [23] A comprehensive consideration of the standard of review that applies to decisions rendered by RTB arbitrators pursuant to the RTA can be found in the Court's recent decision in *Kong v. Lee,* 2021 BCSC 606, at paras. 54-66.
>
> [24] In this judgment, Madam Justice MacDonald explained first that the standard is prescribed by provincial legislation. Accordingly, the presumption that the standard is reasonableness established by the Supreme Court of Canada in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 does not apply. That legislation is s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 ("ATA"), which applies by operation of ss. 5.1 and 84.1 of the RTA. Section 58(2) of the ATA provides that findings of fact and law made within a tribunal's exclusive jurisdiction and protected by a privative clause can only be set aside if they are patently unreasonable. Therefore, the standard of patent unreasonableness applies to all substantive aspects of the Arbitrator's decision.
>
> [25] As the *ATA* does not define patent unreasonableness as it applies to a tribunal's factual or legal findings, however, guidance regarding its meaning must be sought from the case law. In *Kong* at paras. 58-65*,* Madam Justice MacDonald set out a number of jurisprudential holdings which provide content to the notion of patent unreasonableness, including:

(a) as expert tribunals are entitled to significant deference, the standard is an onerous one and their decisions can only be quashed if there is no rational or tenable line of analysis supporting them (*Victoria Times Colonist v. Communications, Energy and Paperworkers,* 2008 BCSC 109 at para. 65; aff'd 2009 BCCA 229);

(b) a decision is patently unreasonable if it is openly, evidently, and clearly irrational, or unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures (*Gichuru v. Palmar Properties Inc.,* 2001 BCSC 827 at para. 34, citing *Lavender Co-Operative Housing Association v. Ford,* 2011 BCCA 114);

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

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

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

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

[26] In sum, the standard of review that applies to the substance of the Arbitrator's decision in the case at bar is patent unreasonableness. It is an onerous standard, and her decision will not be set aside unless the Arbitrator's reasons are so defective that it is not possible for the reviewing court to understand why the Arbitrator concluded as she did.

[27] With respect to procedural fairness, the ATA provides at s. 58(2)(b) that the standard of review is whether, in all of the circumstances, the tribunal acted fairly. The factors that inform the content of a tribunal's duty to provide procedural fairness are contextual and include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the affected individuals; (4) the legitimate expectations of the person challenging the

> decision; and (5) the choice of procedure made by the administrative decision-maker: *Vavilov* at para. 77.

[62] In summary, a patently unreasonable decision is one that is openly, evidently, and clearly irrational or unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures. A patently unreasonable decision is also one that almost borders on the absurd. These are examples of what patent unreasonableness means: see also *Partridge v. Aquaterra Management Ltd*., 2023 BCCA 416 at paras. 23–24.

[63] As a result, given the issues in this case involve findings of fact and law, I find that the standard of review is patent unreasonableness.

VIII. THE ISSUES

[64] The hearing of this petition is not the forum for hearing and deciding all of the issues between the parties, it is a judicial review of the RTB Decision.

[65] The issue raised by this petition is whether the RTB Decision is patently unreasonable.

IX. ANALYSIS

[66] The parties agree the Landlord did not comply with its obligation under s. 18(1)(a) of the *Regulation* to give the Tenant a copy of the Move-In Report promptly and, in any event, within seven days after the condition inspection report was completed. The Move-In Report was completed by the Landlord on April 1, 2021.

[67] As a result of the Landlord's failure to give the Tenant a copy of the Move-in Report, pursuant to s. 24(2)(c) of the *RTA* the Landlord's right to claim against the security deposit for damage to residential property was extinguished.

[68] As a result of that extinguishment of the Landlord's right to claim against the security deposit for damages to residential property, the Landlord had no right to

make an application for dispute resolution against the security deposit under s. 38(1)(d) of the *RTA* on account of property damage.

[69] Also, as a result of that extinguishment of the Landlord's right to claim against the security deposit for damage to residential property, at the end of the tenancy the only options of the Landlord regarding the security deposit are set out in s. 38 of the *RTA* as follows:

1) to repay the security deposit pursuant to s. 38(1)(c); or

2) to make an application for dispute resolution pursuant to s. 38(1)(d) claiming against the security deposit;

3) to retain from a security deposit, pursuant to s. 38(3), an amount that:

    a) the director has previously ordered the tenant to pay to the landlord; and

    b) at the end of the tenancy remains unpaid; or

4) to retain the security deposit if the tenant had agreed in writing pursuant to s. 38(4)(a).

[70] I note that the RTB Decision refers to a claim against the security deposit "for something other than damage", which is the Arbitrator stating that if the Landlord had a claim against the security deposit for something other than damage, for example unpaid rent, then the Landlord would have been within its rights to retain the security deposit and make an application for dispute resolution under s. 38(1)(d) for a claim to unpaid rent. However, that is not the case here.

[71] The Landlord submits that its retention of the security deposit was not made pursuant to the s. 38(5) reference to s. 38(4)(a), but to s. 38(4)(b) regarding a director's order that the landlord may retain the amount.

[72] However, s. 38(4)(b) does not come into play in these circumstances regarding the security deposit, because s. 38(1) of the *RTA* states that:

> 38 (1) Except as provided in subsection (3) or (4) (a) [and note, not 4(b)] within 15 days after the later of
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
>
> the landlord must do one of the following:
>
> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.
>
> [Emphasis added.]

[73] Here, the Landlord did not repay the deposit, and had no right to apply for dispute resolution for damage to the unit because that right had been extinguished pursuant to s. 24(2) when the Landlord failed to comply with its obligations to provide a copy of the Move-In Report to the Tenant pursuant to s. 23 of the *Act*, and s. 18(1)(a) of the *Regulation*.

[74] The only exceptions to the requirement to repay the security deposit in this case was from the introductory wording of s. 38(1), except as provided in subsection (3) or (4)(a), not (4)(b), subsection (3) being the right of the landlord to retain an amount that the director has previously ordered the tenant pay the landlord, or s. 38(4)(a), written agreement of the tenant at the end of the tenancy.

[75] Section 38(4)(b) does not provide the Landlord with an exception to that obligation to repay the security deposit, or any independent right to apply to the RTB for dispute resolution relating to damage to the unit. This is the basis of my disagreement with the Landlord's submission that a claim under s. 38(4)(b) may proceed. It does not provide an independent right to claim against the security deposit in these circumstances that would allow the Landlord to retain the security deposit, unless there was a director's order after the end of the tenancy that allowed

the Landlord to retain an amount of the security deposit. Here there was no such order.

[76] A possible scenario of how s. 38(4)(b) might arise in this case is if the Landlord had a claim other than damage to the unit, for example, unpaid rent, in which case the Landlord's application for dispute resolution under s. 38(1)(d) could have allowed the Landlord to retain all or a portion of the security deposit pending a dispute resolution hearing, and a possible director's order after the end of the tenancy that the Landlord could retain all or a portion of the security deposit, which would then be an application of s. 38(4)(b).

[77] Here, s. 38(5) makes the point clearly:

> (5) The right of a landlord to retain all or part of a security deposit . . . under subsection (4) (a) does not apply if the liability of the tenant is in relation to damage and the landlord's right to claim for damage against a security deposit . . . has been extinguished under section 24 (2) [*landlord failure to meet start of tenancy condition report requirements*] or 36 (2) [*landlord failure to meet end of tenancy condition report requirements*].

[78] Again, the Landlord was not in a position to seek the Director's order for retention of the security deposit relating to damage because, for the reason given by the Arbitrator, as explained above, the Landlord had no right to make an application for dispute resolution under s. 38(1)(d) because of the failure to provide the Tenant a copy of the Move-In Report, leaving the Landlord with the only options under s. 38(1)(a) to repay the security deposit or to get the Tenant's agreement in writing to retain the security deposit.

[79] As a result, the Landlord having failed to comply with s. 38(1), the Arbitrator applied the provisions of s. 38(6) to order that the Landlord pay the Tenant double the amount of the security deposit.

[80] As a result, I uphold the RTB Decision. It is not patently unreasonable. As explained above, there is a rational and tenable line of analysis supporting the decision in accordance with the *RTA* and the *Regulation*, and the reasons clearly indicate how and why the decision was made.

[81] I need go no further, having upheld the RTB Decision, on my finding that the RTB Decision is not patently unreasonable for the reasons above. However, I will address other submissions of the Landlord which further support the conclusion that the RTB Decision is not patently unreasonable.

[82] The Landlord submits that it is unreasonable and unfair for the Arbitrator to have awarded compensation to the Landlord for damage to a carpet or wall, but then award the Tenant double the security deposit.

[83] The difficulty with this submission is that it ignores the fact that while the Landlord asserts the Tenant did not uphold its obligations under the *RTA* to repair the damage to the unit and the Landlord should be compensated, it suggests that the Landlord should not be held to the same standard when the Landlord does not uphold its obligations under the *RTA*.

[84] Here, the RTB Decision awards compensation to the Landlord for the damage to the unit. Had the Landlord complied with its obligation to deliver the inspection condition reports, the result could have been an order for the Landlord to retain an amount of the security deposit for the compensation for the damage and then make a smaller payment from the Landlord to the Tenant for the balance of the security deposit; however, the Landlord, having failed to comply with its obligations regarding the inspection reports, the damages are set off by the doubling of the security deposit, and a larger payment is ordered to be made in favour of the Tenant.

[85] Another submission of the Landlord is that the obligation of the Tenant to repair damage under s. 32 of the *RTA* and the Landlord's right to compensation is independent of ss. 35–39 regarding condition inspections and return of security deposits. However, that submission ignores the modern principle of statutory interpretation regarding legislative texts being read in their entire context, including the *RTA* as a whole, and including its components: See *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 as follows:

> [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a

> statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

[86] The Landlord's submission that the Tenant's obligation to repair damage under s. 32 of the *RTA*, and the Landlord's right to compensation, are independent of the *RTA* provisions regarding condition inspection and return of security deposits, also ignores the obvious interconnectedness of the relevant *RTA* provisions relating to landlord and tenant obligations, specifically in the context of move-in and move-out condition inspection reports, damage to the unit, and security deposits. All of the *RTA* provisions relating to these matters are included in Part 2 of the *RTA* entitled "Residential Tenancies - Rights and Obligations".

[87] That Part 2 of the *RTA* includes Divisions 3, 4, and 5, titled respectively, "Division 3 - At the Start of a Tenancy", "Division 4 - During a Tenancy", and "Division 5 - At the End of a Tenancy", emphasizing the interconnectedness of the statutory provisions over the course of a tenancy from beginning to end.

[88] Importantly, the provisions of the *RTA* relating to a tenant's obligation with respect to the repair of damage to the unit, and landlord and tenant obligations regarding inspection reports and security deposits, are separate but clearly linked in providing detailed provisions of the *RTA* for the purpose of:

1) providing the parties with mechanisms to establish evidence of the condition of the rental unit at move-in and move-out, which can potentially reduce the number of disputes to the RTB;

2) specifying the respective rights and obligations of the parties during the course of a tenancy; and

3) detailing the retention or return of security deposits.

[89] Here, the Landlord could have avoided the imposition of a penalty for failing to promptly return the security deposit in accordance with the *RTA* and *Regulation* if the Landlord had complied with its obligations to prepare and deliver condition inspection reports in accordance with the *RTA* and *Regulation*.

[90] The Landlord also submits that:

- The Arbitrator committed a *nunc pro tunc* error and penalized the Landlord under s. 38(6)(b) with a double security deposit because the Landlord had not provided two opportunities for the Tenant to complete the Move-Out Report and had not provided a copy of that report to the Tenant, thus imputing the status of the file on January 15, 2024, or the date of the application that was in the first 24 hours after the end of the tenancy.

- At the time of the application, no breach of s. 36 had occurred and, pursuant to the applicable section, it is still open to the parties to complete the Move-Out Report with reference to ss. 35 and 36 of the *RTA*, and ss. 14–21 of the *Regulation*, with the condition inspection report timing left entirely to the parties. There is not statutory time limit on the process.

[91] This submission ignores or sidesteps the fact that at the end of the tenancy on August 15, 2023, the Landlord was in breach of its obligation to provide the Move-In Report, so the Landlord's right to make application under s. 38(1)(d) to claim against the security report for damage to the unit had already been extinguished. The Landlord's August 16, 2023 application for dispute resolution to claim against the security deposit for damage to the unit was, in effect, already a nullity before any breach of the s. 36(2) obligation regarding the Move-Out Report, which occurred later.

[92] It is true that there was no breach of the s. 36(2) move-out inspection requirements as of August 15, 2023. However, the Arbitrator's reference to a s. 36 breach, apparently in that context, does not make the RTB Decision patently unreasonable. The Landlord's s. 24 breach had occurred long before the end of the

tenancy, and the Landlord's right to claim against the security deposit for damage to the unit had long been extinguished before the end of the tenancy. The s. 36(2) breach came within 15 days after the end of the tenancy, when the Landlord had not provided the Tenant with a second opportunity to inspect in the prescribed form and had not given the Tenant a copy of the Move-Out Report promptly, and in any event within 15 days after the date, after the condition inspection was completed pursuant to s. 18(1)(b) of the *Regulation*.

[93] The Landlord's submission there is no statutory time limit on the move-out inspection does not hold weight. Section 35 provides that a unit must be inspected before a new tenant begins to occupy the unit. The Landlord did not provide the Tenant with a second opportunity to inspect in the prescribed form, after the Landlord's agent arrived late for the agreed time of the first inspection. The Landlord prepared the Move-Out Report and signed it on August 15, 2023, but did not deliver a copy of the Move-Out Report to the Tenant until December 2023, with the petition materials, not in compliance with the *Regulation*, s. 18 obligation to give the Tenant a copy of the signed Move-Out Report within 15 days after the inspection, which would have been August 30, 2023.

[94] The Landlord also refers to the *Peters v. Lebert* case, 2014 BCSC 1805, in which an arbitrator's decision regarding a decision to double the security deposit was quashed. The *Peters* decision is distinguishable on its facts.

[95] In that case, the issue was whether or not the petitioner's application for dispute resolution had been made within the 15-day period in s. 38.

[96] The Court in *Peters* found that the RTB arbitrator had failed to examine the RTB's policies on the issue in its interpretation of the *RTA*, and the arbitrator's reasons did not deal with the evidence that the digital receipt of her application stated the application had been made once the fee had been paid, the fee having been paid within the 15-day period. As a result, the arbitrator's interpretation of the *RTA* that the application was not made until it was served on the other party was found to be patently unreasonable.

[97] A more relevant case for its reference to the Residential Tenancy Policy Guidelines is the decision in *Nazari v. Kask-Ryan*, 2016 BCSC 943, a judicial review of an RTB decision in which a tenant was awarded double security and pet deposits because the landlord, pursuant to s. 38(4), did not have the written consent of the tenant, nor did the landlord have an order from the director to retain the deposits. Therefore, the landlord was required to return the deposit to the tenant. The landlord failed to return the deposit and was found liable under s. 38(6) for double the amount of deposit: *Nazari* at para. 14.

[98] The landlord sought judicial review of the decision, alleging the arbitrator erred in doubling the deposits. The Court in *Nazari* refers to the *Peters* case, but distinguishes that case on the facts, because in *Peters* the landlord made the application and attended the hearing, whereas in *Nazari*, the landlord failed to attend the hearing.

[99] The landlord in *Nazari* argued that all the landlord has to do is "make" the application under s. 38(1), pay the fee, and not attend the hearing. The Court stated the argument was inconsistent with the provisions of the Residential Tenancy Policy Guidelines regarding security deposits as follows:

> [27] I do not accept the Landlord's argument that all a landlord must do is "make" the application under s. 38(1)(d), pay the $50 filing fee, and not attend the hearing. The argument is inconsistent with the intent and purpose of dispute resolution under the *Residential Tenancy Act*, and it is inconsistent with the following provisions of the Residential Tenancy Policy Guideline 17. Security Deposit and Set off:
>
> C. RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH DISPUTE RESOLUTION
>
> 1. The arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:
>
> - a landlord's application to retain all or part of the security deposit; or
> - a tenant's application for the return of the deposit.
>
> unless the tenant's right to the return of the deposit has been extinguished under the Act [footnote omitted]. The arbitrator will order the return of the deposit or balance of the deposit, as

> applicable, whether or not the tenant has applied for dispute resolution for its return.
>
> . . .
>
> 3. Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit [footnote omitted]:
>
> - if the landlord has not filed a claim against the deposit within 15 days of the later of the end of the tenancy or the date the tenant's forwarding address is received in writing;
> - if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act [footnote omitted];
> - if the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the dispute resolution process;
> - if the landlord has obtained the tenant's written agreement to deduct from the security deposit for damage to the rental unit after the landlord's right to obtain such agreement has been extinguished under the Act;
> - whether or not the landlord may have a valid monetary claim.
>
> [28] The Arbitrator found that the Landlord had neither the written consent of the Tenants or an order from the director to retain the deposits. The Landlord therefore failed to repay to the Tenants within the statutory time limits, the security and pet deposits and was therefore properly found liable to pay the Tenants double the amount of the deposits.
>
> [Emphasis added.]

[100] The most recent version of Residential Policy Guideline 17, amended in February 2024, after the January 15 RTB hearing in this case, has the same wording as s. C.3. in the earlier version of the Policy Guideline quoted above, that version apparently having been in existence since at least 2016. The latest version of the above wording is found in s. F.3. with the amendments in February 2024, including a reference to the *Nazari* case.

[101] The key points of the Policy Guideline 17 in relation to the case at bar are underlined above, which are that the arbitrator will make an order for return of the

security deposit on either a landlord or tenant's application and whether or not the tenant has made application, and the arbitrator will order return of double the deposit if the landlord has claimed against the deposit for damage to the rental unit, and the landlord's right to make such a claim has been extinguished under the *RTA*.

[102] That is exactly what occurred in this case.

X. CONCLUSION AND COSTS

[103] All of the above reasons support my finding that the RTB Decision is not patently unreasonable.

[104] As a result, I make the following orders:

1) the petitioner's petition to quash that portion of the RTB Decision dated January 15, 2024, awarding the respondent/tenant Robert Sand Ty double the amount of the security deposit plus interest is dismissed;

2) the petitioner's petition to uphold that portion of the RTB Decision dated January 15, 2024, awarding the petitioner/landlord Timmy Chi Keung Leung $897.22 for damages and $100 for the filing fee, for a total of $997.22, was not disputed and is granted;

3) the RTB Decision and Order dated January 15, 2024, ordering the petitioner/landlord Timmy Chi Keung Leung to pay to the respondent/tenant Robert Sand Ty the sum of $1,073.95, being the award to the respondent/tenant Robert Sand Ty of double the $1,025.00 security deposit, or $2,050.00 plus interest of $21.17, set off by the award to the petitioner/respondent of $997.22, is upheld;

4) the style of cause in this case is amended to remove the reference to the RTB and these reasons for judgment and any further pleadings with respect to this matter shall not refer to the RTB as a respondent;

5) since the respondent/tenant was successful, I award the respondent/tenant Robert Sand Ty his costs as against the petitioner/landlord, Timmy Chi Keung Leung in accordance with Appendix B of the *Supreme Court Civil Rules*.

[105] In the circumstances of this case, costs do not lie against the Director of the RTB given the traditional immunity protecting quasi-judicial tribunals from costs awards: *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 at para. 55.

[106] The Director of the RTB filed a useful response to the petition outlining the relevant principles of judicial review, but the Director took no position on the outcome of the petition, has not asked for their costs, and did not appear at the hearing of the petition. Therefore, I make no order regarding the Director's costs.

"Jones J."