IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smith v. Sidhu,*
2024 BCSC 1244

Date: 20240711
Docket: S253351
Registry: New Westminster

2024 BCSC 1244 (CanLII)

Between:

Brittany Grace Smith

Petitioner

And

Gursharan Singh Sidhu and Perry Auguston

Respondents

Before: The Honourable Madam Justice W.A. Baker

On judicial review from: An order of the Residential Tenancy Branch, dated April 22, 2024

Reasons for Judgment

The Petitioner, appearing in person:	B. Smith
Counsel for Gursharan Sidhu:	A. Ehteshami L. Muldoon
Place and Date of Hearing:	New Westminster, B.C. June 14, 2024
Place and Date of Judgment:	New Westminster, B.C. July 11, 2024

[1] Ms. Smith brings this application for judicial review of a decision of Arbitrator Kirk dated April 22, 2024, under the *Residential Tenancy Act*, S.B.C. 2002, c. 78, (the "*Act*") upholding her landlord's notice to end tenancy, and ordering her to give up possession of her unit.

[2] The landlord's notice to end tenancy, was based on Ms. Smith's failure to give access to the unit after delivery of a 24 hours written notice. Arbitrator Kirk agreed that Ms. Smith had received 24 hours written notice, and had failed to give the required access.

[3] On April 23, 2024 Ms. Smith applied for a review consideration, seeking to adduce additional evidence to prove that the 24 hours written notice was placed on the wrong door, and to dispute various findings made by Arbitrator Kirk. Arbitrator Grande found that Ms. Smith's evidence was not new, and her application was an attempt to reargue the application. Arbitrator Grande dismissed the application for review.

[4] In her petition, Ms. Smith challenges only the decision of Arbitrator Kirk, alleging the decision was patently unreasonable, and the hearing was procedurally unfair.

[5] Ms. Smith sought a stay of the arbitrator's decision and the order for possession pending the hearing of this petition, and that stay was consented to by the landlord Mr. Sidhu. At the end of the hearing before me, the parties agreed to maintain the stay pending my decision.

[6] The Director of the Residential Tenancy Branch ("RTB") filed a response on May 30, 2024. The Director submits that the petitioner improperly named the Deputy Attorney General and the Ministry of Justice as respondents. The Director submits that these two respondents ought to be removed from the style of cause. I agree and made this order during the hearing of this petition.

[7] The Director provided submissions on the relevant standard of review and on the available remedies on a judicial review.

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[8] The respondent landlord Mr. Sidhu filed his response on June 5, 2024.

[9] The final respondent, Mr. Perry Auguston, did not file a response. He is the property manager for the owner/landlord Mr. Sidhu.

What is the appropriate standard of review

[10] The appropriate standard of review of an arbitrator's decision under the *Act* has been determined many times by this court, and is grounded in sections 5.1 and 84.1 of the *Act* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "ATA"). Questions of fact, law and discretion are only open to review if such decisions are patently unreasonable: *Campbell v. The Bloom Group*, 2023 BCCA 84 [*Campbell*] at para 11-14. Questions of procedural fairness, however, must be decided "having regard to whether, in all of the circumstances, the tribunal acted fairly": *Campbell* at para. 4.

[11] Under the ATA, a decision is patently unreasonable if there is no evidence to support the findings, or the reasoning in the decision is clearly irrational or so flawed that no amount of curial deference can justify letting it stand: *Yee v Montie*, 2016 BCCA 256 at para 21-22; *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at paras. 39-44 (citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52).

Is the Arbitrator's Decision Patently Unreasonable?

[12] The determinative issue on this petition is whether the arbitrator's decision upholding the landlord's notice to end tenancy is patently unreasonable.

[13] The landlord served two different notices to end tenancy. The first was served on January 30, 2024. This notice contained the wrong rental address and therefore was not valid pursuant to s. 52 of the *Act*.

[14] On February 29, 2024, the landlord served a second notice to end tenancy, which complied with s. 52 and was posted to the tenant's door in accordance with s. 88 of the *Act*.

[15] Ms. Smith filed a notice of dispute in relation to the first notice, and then amended her notice of dispute to reflect the second notice. The hearing before the arbitrator proceeded in relation to the February 29, 2024 notice to end tenancy.

[16] The *Act* permits a landlord to terminate a tenancy in certain express circumstances. In this case, s. 47 of the *Act* is the applicable section which gives the landlord the right to end a tenancy if any of the listed causes are met.

[17] The landlord used a standard form document to give notice. This standard form document sets out all of the bases upon which a landlord may give notice under s. 47 of the *Act*. Beside each basis to terminate, there is a check box so that the landlord can indicate what they are relying on.

[18] On neither of the two notices did the landlord check the applicable box to identify the basis upon which he sought to terminate the tenancy. The February notice, which was the subject of the dispute before the RTB, states the grounds for ending the tenancy to be: “Tenant has refused entry to the unit after receiving more than 24 hours notice.”

[19] The only subsection which appears to possibly have relevance in this case, is subsection 47(1)(f):

> The tenant (i) has failed to comply with a material term, and (ii) has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

[20] In making this assumption, I note that the tenancy agreement does address the landlord’s entry into the rental unit upon 24 hours written notice.

[21] A notice under s. 47(1)(f) must be in writing and must comply with certain requirements, including that the notice states the grounds for ending the tenancy: s. 52 of the *Act*.

[22] The tenant submits that she did not receive notice from the landlord requiring entry into the rental unit in accordance with s. 29 of the *Act*. Therefore, she submits

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the notice to end tenancy is not valid as she did not refuse the landlord entry to the unit.

[23] On January 27, 2024 the landlord purported to give written notice to Ms. Smith to access her unit, by emailing the notice and posting it on her front door ("Access Notice"). However, both forms of delivery were defective, as will be discussed below. Before January 27, 2024, Ms. Smith and the landlord had been in communication via text messages, as the landlord sought to access her unit.

[24] The arbitrator found that Ms. Smith exchanged text messages with the landlord to set up times to view the unit over a number of weeks, but "the Tenant's cooperation ends when there is a request for entry for the appraiser."

[25] The arbitrator then referred to the Access Notice and found that "by the time the email to an incorrect address and the notice posted to the neighbor's door had been done by the Landlord's property manager, the Tenant had by that time refused the Landlord entry for the appraiser to complete his work so that the buyer's financing could be finalized and the sale completed. At best, the additional notices requesting entry from the Landlord were superfluous as the Tenant had already demonstrated she would not allow entry until after the deadline for the appraiser to complete his work".

[26] Finally, the arbitrator found "the Tenant had changed the lock and knew the Landlord and his realtor could not enter."

[27] The arbitrator concluded:

> I find the Landlord has presented sufficient evidence that on a balance of probabilities the Landlord requested entry in accordance with section 29 of the Act, that the Tenant unreasonably withheld consent in violation of the Act and material breach of the tenancy agreement, resulting in serious jeopardy to the Landlord's lawful rights regarding the rental unit.

[28] On this basis, the arbitrator upheld the landlord's notice to end tenancy and issued an order for possession.

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Issues

a) Was the arbitrator's finding that Ms. Smith received notice pursuant to s. 29 of the *Act* prior to the Access Notice patently unreasonable?

b) If so, was it patently unreasonable for the arbitrator to find, on the whole of the evidence, that the landlord requested entry in accordance with s. 29 of the *Act*, and Ms. Smith unreasonably withheld her consent following receipt of such request?

c) Was the arbitrator's decision to uphold the notice to end tenancy patently unreasonable?

d) Was the arbitrator's finding that Ms. Smith changed the locks to the unit available to her to ground her finding on the validity of the notice to end tenancy?

Was the arbitrator's finding that Ms. Smith received notice pursuant to s. 29 of the *Act* prior to the Access Notice patently unreasonable?

[29] Section 29(1) of the *Act* sets out the circumstances by which a landlord may enter a rental unit. For the purposes of this Review, the relevant subsections are s. 29(1)(a), where the tenant gives permission at the time of the entry or not more than 30 days before the entry, and s. 29(1)(b), which reads:

> (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
>
> > (i) the purpose for entering, which must be reasonable;
> >
> > (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;

Text messages

[30] Prior to the Access Notice, the tenant and the landlord had been in communication over a number of months regarding access to the unit, as the landlord was in the process of selling it. Typically, the parties communicated by text message, and there was no dispute at the hearing that Ms. Smith had accommodated multiple showings.

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[31] In January 2024, the landlord had an accepted offer for the unit, and wanted Ms. Smith to allow the buyer's appraiser in for a short viewing. They communicated by text message about setting up a time. The tenant was at that time dealing with her ailing mother, and found it inconvenient to arrange a showing.

[32] Section 88 of the *Act* sets out the methods by which a party may give a document to another party in accordance with the *Act.* Written notice from a landlord to a tenant is a document required to be given under the Act; therefore, such notice must be given in accordance with the *Act*. The delivery methods permitted by s. 88 are the following:

> 88 All records, other than those referred to in section 89 *[special rules for certain records]*, that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:
>
> (a) by leaving a copy with the person;
>
> (b) if the person is a landlord, by leaving a copy with an agent of the landlord;
>
> (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
>
> (d) if the person is a tenant, by sending a copy by ordinary mail or registered mail to a forwarding address provided by the tenant;
>
> (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
>
> (f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
>
> (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
>
> (h) by transmitting a copy to a fax number provided as an address for service by the person to be served;
>
> (i) [Repealed 2023-47-97.]
>
> (j) by any other means of service provided for in the regulations.

[33] Section 88 does not permit delivery of a notice required under the *Act* via text message. Section 29(1)(a) is permissive, in the sense that it permits a tenant to give permission for a landlord to enter unit, but does not give a landlord any mandatory powers of entry, or to demand entry. It is clear that through the text messages, which

were not a permitted form of notice pursuant to ss. 29(1)(b) and 88 of the *Act*, the landlord was simply seeking to enter the unit with the permission of the tenant, pursuant to s. 29(1)(a) of the *Act*.

[34] Ms. Smith did not give permission to the landlord to enter the unit in the text message exchange. However, s. 29(1)(a) cannot be read as authority for a landlord to assert a right of entry. Only s. 29(1)(b) gives the landlord a right of entry.

[35] The arbitrator impliedly held that Ms. Smith denied the landlord entry through the text messages, and that such denial was valid to found a notice to end tenancy. Such a conclusion is contrary to the express language of the legislation, and is therefore patently unreasonable.

January 27, 2024 notice

[36] When the tenant did not give her permission to enter the unit, the landlord attempted to exercise his rights pursuant to s. 29(1)(b) of the *Act*. This is clear from the language of the Access Notice. However, the landlord failed to deliver the Access Notice to Ms. Smith prior to the time for the planned access.

[37] The Access Notice sent on January 27, 204 stated, in part, "This letter is giving you at least 24 hours notice to allow the appraiser to enter your unit on Monday January 29, 2024 to do the appraisal. I am suggesting 12pm on the 29th of January but we are flexible on the 29th if another time in that day is better for you."

[38] At the hearing before the arbitrator, the landlord readily admitted that he sent this email containing the Access Notice to the wrong email address. Ms. Smith testified that she did not receive the Access Notice by email at any time.

[39] The landlord also purported to post a copy of the Access Notice on the tenant's front door. However, at the hearing before the arbitrator, the landlord also readily admitted that his agent, the property manager, posted the Access Notice on the wrong door. It was not entirely clear what day the Access Notice was posted by the property manager on behalf of the landlord. There was some evidence of when

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the property manager posted something on the neighbour's door, but the arbitrator did not accept this was necessarily the Access Notice.

[40] Ms. Smith testified that she did not get the Access Notice posted on her front door at any time. Ms. Smith testified that on February 5, 2024 she went to the community mailbox at her complex, a place she does not go to on a daily basis, and discovered the Access Notice taped to the front of the box. That was the first time she saw the Access Notice.

[41] Ms. Smith speculated that the property manager taped the Access Notice to her neighbour's door. The arbitrator asked Ms. Smith why her neighbours did not pass the Access Notice on to her, if it was posted on their door. While this is not a question Ms. Smith could properly answer, she did advise the arbitrator that the neighbours were new, she had not met them, they did not speak English, and the email did not indicate her unit number - it just had her name.

[42] In the face of this evidence, the arbitrator found:

> The Tenant testified that her unit had a yellow front door, which she stated the property manager had commented on. She further testified that her unit was visibly marked with the unit number. The Tenant states that she did not receive the Landlord's notice requesting entry until February 5, 2024, when she found it posted at the community mailbox. The Tenant submitted a front door camera video showing the property manager delivering a paper to the unit next door. There was no indication that the unit next door was served with the notice of entry intended for her. There was no evidence that the individual captured on her video allegedly posting or leaving paperwork at her neighbor's unit, particularly when the Tenant was served with both One Month Notices by attaching these to the door of her unit, notwithstanding that the first Notice bore the incorrect unit number. Furthermore, it stretches credulity that if, as the Tenant assumes, the neighbour received the Landlord's notice for the appraiser to enter that the neighbor would post it at a community mailbox rather than simply walk a few steps to the Tenant's unit next door. The Tenant noted that she had a mailbox at her front door, and that the community mailbox was for large packages.

[43] The evidence before the arbitrator from the landlord was that the Access Notice was posted on the wrong door. In light of this admission by the landlord, the Access Notice was not delivered in accordance with s. 52 of the *Act*.

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[44] If the evidence established that Ms. Smith received actual notice of the Access Notice on January 29, 2024, I would not find it unreasonable for the arbitrator to conclude that Ms. Smith failed to provide reasonable access. However, findings of fact must be based on evidence, or inferences available on the evidence. The only evidence before the arbitrator as to when Ms. Smith received the Access Notice is Ms. Smith's evidence that she saw it for the first time on February 5, when she saw it posted on the community mailbox. Ms. Smith testified that she did not know her new neighbours, and there was no unit noted on the Access Notice which would allow the neighbours to deliver it to her unit. There was no evidence from the neighbours that they delivered the Access Notice to Ms. Smith or her unit.

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[45] In the face of the evidence before the arbitrator, which was uncontroverted, it was patently unreasonable for the arbitrator to conclude, as she appears to have done, that Ms. Smith either received actual notice of the Access Notice on January 27, 2024, or was in some way untruthful in identifying the date she received the Access Notice. Any such conclusion is based solely on speculation by the arbitrator and is not grounded in the facts before her. I find this reasoning on the part of the arbitrator to be so irrational that it cannot be accorded curial deference.

Was the arbitrator's decision to uphold the notice to end tenancy patently unreasonable?

[46] A valid notice to end tenancy pursuant to s. 47(h) of the *Act* requires the landlord to prove that the tenant failed to comply with a material term, and that the tenant has not corrected the situation within a reasonable time after the landlord gives written notice to do so.

[47] The date of the tenant's receipt of the Access Notice is critical to the validity of the notices to end tenancy. The notice to end tenancy was based solely on the allegation that Ms. Smith failed to provide access within 24 hours of receiving written notice. The requirement to give access in accordance with the *Act* was a term of the lease agreement.

[48] As I have found that the arbitrator's conclusions on the landlord's compliance with s. 29 and 88 of the *Act* to be patently unreasonable, it follows that the landlord did not prove that Ms. Smith failed to comply with a material term of her lease.

[49] In addition, the landlord did not prove that Ms. Smith failed to correct the situation within a reasonable time after the landlord gives written notice to do so.

[50] Failure to satisfy both necessary conditions under s. 47(h) of the *Act* will result in a patently unreasonable decision: *Ali v British Columbia (Residential Tenancy Branch)*, 2023 BCSC 1336 at para 40-50.

[51] In the result, the decision to uphold the notice of termination without finding both necessary conditions under s. 47(h) had been met renders the arbitrator's decision patently unreasonable.

Was the arbitrator's finding that Ms. Smith changed the locks to the unit available to her to ground her finding on the validity of the notice to end tenancy?

[52] In discussing the evidence, the arbitrator stated:

> … Compounding matters, the Tenant took steps to assure the Landlord could not enter the unit – including in an emergency – by adding the biometric to the key lock for the unit. Section 31(3) of the Act precludes a tenant from changing the lock to a rental unit without first obtaining the landlord's written consent. The Tenant provided no evidence that she had obtained the Landlord's consent.

[53] In her conclusion, the arbitrator held:

> Finally, as previously noted, the Tenant had changed the lock and knew the Landlord and his realtor could not enter. By the time the Landlord undertook posting the notice to enter, the Tenant had already informed the Landlord's agent that she would not allow entry until after the stated deadline to complete the appraisal due to her mother's alleged health condition.

[54] While the decision is somewhat opaque on this point, it appears that she did consider the changing of the locks as a basis to uphold the notice to end tenancy.

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[55] Section 52 requires the landlord to state the basis for a notice to end tenancy. The landlord solely relied on the allegation that the tenant refused access after being given 24 hours notice. The landlord did not assert that Ms. Smith changed the locks.

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[56] There was some evidence in the hearing as to whether Ms. Smith changed the locks such that the landlord could no longer enter, or simply added an additional biometric feature that allowed her son to enter with his key but did not affect the functioning of the original key lock.

[57] None of the evidence in relation to the lock is relevant to the issue before the arbitrator. The landlord at no time provided Ms. Smith with written notice that she had changed the lock, as a basis for a valid notice to end tenancy.

[58] In addition, if the landlord had given Ms. Smith written notice about a change in the locks, the *Act* requires her to be given a reasonable time to remedy the issue. This did not happen.

[59] I find that the arbitrator's apparent reliance on grounds not stated in the notice to end tenancy, as a basis to uphold the notice to end tenancy, is patently unreasonable and cannot stand.

Conclusion

[60] The decision of arbitrator Kirk dated April 22, 2024, and the resulting order for possession, are set aside, and the Director or her delegate are directed to reconsider Ms. Smith's application pursuant to *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 5.

[61] I order costs in favour of Ms. Smith.

"W.A. Baker J."