COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Middlegate Development Ltd. v. Acosta,* 2023 BCCA 459

Date: 20231128
Docket: CA48935

Between:

Middlegate Development Ltd.

Appellant
(Respondent)

And

Damien Acosta

Respondent
(Petitioner)

And

Director of the Residential Tenancy Branch

Respondent

Before: The Honourable Justice Dickson
The Honourable Mr. Justice Butler
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated March 3, 2023 (*Acosta v. Middlegate Development Ltd.*, Vancouver Docket S229760).

Oral Reasons for Judgment

Counsel for the Appellant:	S.M. Gallagher S. O'Connell
The Respondent, appearing in person:	D. Acosta
Counsel for the Respondent, Director of the Residential Tenancy Branch:	S.A. Davis K. Fast
Place and Date of Hearing:	Vancouver, British Columbia November 24, 2023
Place and Date of Judgment:	Vancouver, British Columbia November 28, 2023

Summary:

The appellant appeals an order granting the respondent's petition for judicial review. The petition concerned a One-Month Notice to End Tenancy for Cause issued by the appellant landlord to the respondent tenant. The respondent filed an application with the Residential Tenancy Branch (the "RTB") to dispute the Notice one day past the ten-day time limit established by s. 47(4) of the Residential Tenancy Act. Prior to the RTB hearing, the respondent filed an amended application requesting an extension of time to dispute the Notice. The respondent was unsuccessful in the dispute resolution process at the RTB as a result of the late filing. On judicial review, the judge found the dismissal of the respondent's application was a breach of natural justice and ordered that the RTB conduct a new hearing on the merits. Held: Appeal allowed in part. The judge erred in his basis for finding a breach of procedural fairness. At the RTB hearing, the respondent's request for an extension was an essential issue and procedural fairness dictates the issue ought to have been canvassed with him. Additionally, the failure of the RTB arbitrator to address and provide an explanation for their treatment of the request made the dispute resolution process procedurally unfair. The appropriate remedy is to remit the matter to the RTB for a new hearing on all issues, including whether an extension of time ought to be granted.

[1] **BUTLER J.A.**: This appeal arises from a dispute between the appellant landlord, Middlegate Development Ltd. ("Middlegate"), and the respondent tenant, Damien Acosta, over a One-Month Notice to End Tenancy for Cause (the "Notice") issued by Middlegate, pursuant to s. 47(1) of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*]. The central issue relates to Mr. Acosta's application to the Residential Tenancy Branch (the "RTB") to dispute the Notice, which was submitted one day beyond the ten-day time limit established by s. 47(4) of the *RTA* (the "Application").

[2] Mr. Acosta was unsuccessful in the dispute resolution process at the RTB as a result of the late filing of his Application. An arbitrator granted Middlegate an order for possession and a second arbitrator upheld that decision on review. Mr. Acosta's petition to the British Columbia Supreme Court was successful. The chambers judge granted Mr. Acosta's application for judicial review on the basis that it was a breach of natural justice to dismiss his Application without considering the merits of the dispute when it was filed only a day late. He remitted the matter to the RTB and ordered that a hearing be conducted to consider the merits of the dispute.

[3] On appeal, Middlegate asks that the decision of the chambers judge be set aside and that the order for possession be reinstated. This appeal raises questions about the appropriate standard of review and the application of that standard. I am of the view that the judge identified the proper standard of review and did not err in remitting the dispute to the RTB. However, I arrive at that conclusion on a different basis than the chambers judge. I would allow the appeal, but only to the extent of remitting the dispute to the RTB with different directions than those of the chambers judge.

The Statutory Scheme

[4] Section 47 of the *RTA* allows a landlord to end a tenancy for cause. In order to do so, the landlord must give notice as provided in s. 44(1)(a). Section 52 sets out the form and content required for an effective notice, which includes the grounds for ending the tenancy and the effective date of the notice. Section 47(4) provides that a tenant may dispute a notice within ten days. If that is not done, s. 47(5) establishes a conclusive presumption that the tenant has accepted the end of the tenancy. Relevant provisions of s. 47 include:

> 47 (1) A landlord may end a tenancy by giving notice to end the tenancy if one or more of the following applies:
>
> …
>
> (3) A notice under this section must comply with section 52.
>
> (4) A tenant may dispute a notice under this section by making an application for dispute resolution within 10 days after the date the tenant receives the notice.
>
> (5) If a tenant who has received a notice under this section does not make an application for dispute resolution in accordance with subsection (4), the tenant
>
> (a) is conclusively presumed to have accepted that the tenancy ends on the effective date of the notice, and
>
> (b) must vacate the rental unit by that date.

[5] Dispute resolution proceedings are governed by Part 5 of the *RTA*. Applications for dispute resolution are made to the director: s. 58(1). Pursuant to s. 58(2)(c), the director must not determine a dispute if “the application for dispute

resolution was not made within the applicable time period specified under this Act." Dispute resolution officers act as delegates of the director for the purpose of hearing disputes of the nature set out in s. 58: *Ganitano v. Metro Vancouver Housing Corporation*, 2014 BCCA 10 at para. 14. I will refer to the delegated dispute resolution officers as arbitrators.

[6] Section 55 of the *RTA* governs the circumstances under which an arbitrator may grant an order of possession to a landlord:

> 55 (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if
>
> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
>
> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.
>
> …
>
> (2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:
>
> …
>
> (b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;
>
> …
>
> (4) In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 *[Resolving Disputes]*,
>
> (a) grant an order of possession, …

[7] In *Ganitano*, Justice Frankel explained the effect of these provisions and, in particular, the conclusive presumption:

> [43] … In the case of a notice for cause, s. 47(4) gives a tenant ten days to dispute the notice. If a tenant does not dispute the notice, then by operation of s. 47(5), he or she "is conclusively presumed to have accepted that the tenancy ends" and must vacate the unit by the date set out in the notice. If a tenant unsuccessfully disputes a notice the landlord can obtain an order for

> possession from a DRO under s. 55(1). If a notice is not disputed, then the landlord can obtain an order for possession from a DRO under s. 55(2).
>
> [44] In my view, the Legislative Assembly has clearly and expressly stated that a tenant's failure to respond within the statutory time limits to a notice given in accordance with either s. 46(4) or s. 47(4) will, by operation of law, bring a tenancy to an end and entitle the landlord to regain possession of the rental unit. Such a termination is a statutory forfeiture (i.e., a taking back of the remainder of the term of the tenancy) and is beyond the reach of s. 24 of the *Law and Equity Act*. Indeed, it would be anomalous to allow a tenant to call in aid the equitable jurisdiction of the courts to reinstate a tenancy he or she is "conclusively presumed to have accepted" is at an end.
>
> [Emphasis in original.]

[8] Pursuant to s. 66 of the *RTA*, the arbitrator's ability to extend a time limit is circumscribed:

> (1) The director may extend a time limit established by this Act only in exceptional circumstances …
>
> …
>
> (3) The director must not extend the time limit to make an application for dispute resolution to dispute a notice to end a tenancy beyond the effective date of the notice.

[9] Section 74(1) of the *RTA* gives the arbitrator the discretion to conduct hearings in the manner considered appropriate. In practice, many hearings are conducted by telephone conference, as they were here. I understand from the submissions of the director of the RTB (the "Director") (a respondent in this appeal, pursuant to s. 15 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241), that in order to facilitate hearings, the standard form documents and other material submitted by tenants and landlords are input into the RTB's electronic Dispute Management System ("DMS"). I understand that arbitrators have access to the information in the DMS when conducting dispute resolution hearings.

Background

The RTB Decisions

[10] In June 2015, Mr. Acosta entered into a rental agreement with Middlegate to rent an apartment unit in a building in West Vancouver, British Columbia. On June 27, 2022, Middlegate served Mr. Acosta with the Notice. The Notice is a

standard form document with boxes to be checked by a landlord to indicate the bases for alleging cause. Middlegate indicated that it was relying on ss. 47(1)(d)(i), (1)(e)(ii) and (1)(h) of the *RTA* as the bases for the Notice. I note that details of these allegations are set out in the affidavit of the resident manager of the apartment building that was filed in response to the application for judicial review. The evidence regarding the allegations was not considered by the arbitrators or the chambers judge and is not relevant to the issues on appeal.

[11] The Notice form contains information advising a tenant of their right to dispute the eviction. It states, in part:

> - The tenant has the right to dispute the Notice within ten days after they receive it by filing an application with the RTB.
> - An arbitrator may extend that time line if a tenant accepts a party's proof that they had a serious and compelling reason for not filing the application on time.
> - If a tenant does not file an application within ten days, they are presumed to accept the Notice and must move out of the rental unit or vacate the site by the date set out on page one of the Notice.

[12] Mr. Acosta filed his Application to the RTB to dispute the Notice on July 8, 2022, one day outside of the ten-day period established in the *RTA*. That document is not included in the appeal books. However, the parties agree on this fact. In the Application, Mr. Acosta did not indicate that it was not filed in time, nor did he seek an extension of time to dispute the Notice.

[13] On July 9, 2022, Middlegate applied to the RTB for an order for possession of the apartment unit. On July 21, 2022, the RTB emailed Mr. Acosta a confirmation receipt of his Application and a Notice of Dispute Resolution Proceeding. That document contained the following statement:

> It is noted that you received the One Month Notice to End Tenancy for Cause on June 27, 2022 and you[r] Application for Dispute Resolution was submitted on July 8, 2022 which is outside the ten-day dispute period outlined on the notice. You did not request more time to submit your application, so you may wish to amend this.
>
> [Emphasis added.]

[14] On July 22, 2022, after receipt of the confirmation from the RTB, Mr. Acosta filed a document titled "Tenant Request to Amend a Dispute Resolution Application" (the "Amended Application"). In that document, he checked three boxes indicating that he wanted to add issues for dispute resolution: (1) "I need the Landlord to make emergency repairs for health and safety reasons…"; (2) "I want to suspend or set conditions for landlord access to the rental unit …"; and (3) "I want authorization to change the locks on the rental unit...". The form does not contain a check box for the applicant to indicate that they are seeking an extension of time to dispute a notice to end tenancy. However, in the section of the form that asks an applicant to "… describe why you would like to add claim(s) to your existing Application for Dispute Resolution", Mr. Acosta wrote, in part:

> Please & Thank you!!! * Require Extension by 2 days. Filed Friday July 8th as that is 10 working days. My landlady is not available on weekends. Neither is the Tenancy Branch. *Reduced capacity due to Covid.

[15] On December 1, 2022, Mr. Acosta's Application and Middlegate's application for possession were heard by telephone conference. Both parties provided evidence for the hearing and attended by phone.

[16] The arbitrator, M. Thiessen (the "Arbitrator"), issued a decision on December 5, 2022 (the "Decision"). The Arbitrator was of the view that the question of whether the tenancy was ending was urgent, and so, did not consider the other relief sought by Mr. Acosta.

[17] Ultimately, the Arbitrator found that Mr. Acosta was not entitled to a cancellation of the Notice. The Arbitrator noted that Mr. Acosta filed his Application on July 8, 2022, and that "[t]he Tenant on their Application did not indicate they were not filing the Application on time and did not address this in the hearing." The Arbitrator referred to the information given to Mr. Acosta on July 21, 2022, informing him that his Application was late and that he "may wish to amend this."

[18] In the analysis section of the Decision, the Arbitrator found that the Notice satisfied the requirements for a notice to end tenancy as set out in s. 52 of the *Act*. The Arbitrator concluded:

> I find that the Tenant did not dispute the Notice within ten days as set out in s. 47(4). The Residential Tenancy Branch informed the Tenant of this at the time of their Application.
>
> I find that the Tenant is conclusively presumed to have accepted that the tenancy has ended in accordance with s. 47(5).

[19] The Decision makes no reference to the request for an extension, but does refer to the Amended Application. On the first page of the Decision, the Arbitrator mentions an amendment dated "September 14, 2022" in which Mr. Acosta sought Middlegate's "provision of emergency repairs for health or safety reasons". (I note that the date appears to be an error as the Director states in its factum that "the only amendment application in the file is the one dated July 22, 2022").

[20] Mr. Acosta immediately sought review of the Decision, which was carried out by arbitrator D. Tangedal (the "Review Arbitrator"). The review consideration decision (the "Review Decision") was issued on December 6, 2022. Pursuant to s. 79(2) of the *RTA*, the Decision was reviewable on limited grounds. Mr. Acosta sought a review on the grounds that: he was unable to attend the hearing due to circumstances beyond his control (he was injured the previous evening which caused him to be late for the hearing); and that he had new and relevant evidence that was not available at the time of the original hearing.

[21] The Review Arbitrator dismissed the review on the first ground because the record showed that both parties attended the hearing, and Mr. Acosta provided no medical evidence to support his assertion that he was injured or feeling unwell.

[22] On the second ground, the Review Arbitrator referred to Residential Policy Guideline 24, which outlines the test applicable to the acceptance of new evidence. The Review Decision states:

> In response to the instruction "List each item of new and relevant evidence and state why it was not available at the time of the hearing and how it is relevant", the applicant for review responded as follows:
>
> > "Dispute Notice to End Tenancy - Application to dispute/cancel a notice to end tenancy was made but it was not considered. I had only submitted 12 days instead of the 10 day time limit. I had also filed an amendment at the tenancy branch which was not taken account in the arbitrators decision. The landlords evidence for the eviction has been excluded completely from the arbitrators decision, and the order of possession was granted based entirely on my late submission to dispute the eviction."
>
> [Emphasis added.]

[23] The Review Arbitrator considered the Decision and the contents of the DMS, and, similar to the Arbitrator, found that the only amendment "received by the tenant was dated September 14, 2022" in which Mr. Acosta asked: "I need the landlord to make emergency repairs for health and safety reasons."

[24] The Review Arbitrator concluded that Mr. Acosta had sought consideration of only one additional issue in the Amended Application: emergency repairs. Accordingly, he reasoned:

> Given that there are no other amendments made by the tenant and that the **above-noted amendment was not for additional time to make an application to dispute a Notice to End Tenancy**, I find that the amendment indicated above is not relevant to the decision the arbitrator had before them; namely, whether or not the tenancy was continuing. In other words, the emergency repairs amendment is not relevant given that the tenancy ended based on conclusive presumption under the Act, due to the tenant failing to dispute the 1 Month Notice within the required 10-day timeline.
>
> [Emphasis in original.]

[25] The Review Arbitrator observed that in light of the conclusive presumption, the timing of the Application was the only relevant matter. As the Application was late, the Review Arbitrator applied the conclusive presumption and found that the tenancy was at an end. The Review Arbitrator dismissed the second ground of the application for review consideration and confirmed the order of possession in favour of Middlegate.

[26] On judicial review, the Director filed the affidavit of Casey Van Wensem, a Policy Analyst at the RTB, presumably to establish the contents of the record that was before the Arbitrator and the Review Arbitrator. Van Wensem affirmed that the RTB keeps a record of all materials submitted by parties to a dispute in paper or electronic form, depending on the manner by which the material was submitted. Attached to the affidavit are all of the materials that formed part of this dispute resolution proceeding file that were available to the arbitrators. A large part of the material is from the DMS, which contains information that was input from the standard form documents submitted by the parties.

[27] Of import to this appeal, the materials that were available to the arbitrators included a copy of the paper form of the Amended Application. Nonetheless, neither of the arbitrators referred to Mr. Acosta's handwritten statement in the Amended Application that he required a two-day extension having filed the Application beyond the ten-day limit. It is not clear why this was not referred to. But it seems likely that the arbitrators referred only to the statements that were input to the DMS, which did not include Mr. Acosta's handwritten comments.

The Judicial Review Decision

[28] On December 7, 2022, Mr. Acosta commenced the proceeding for judicial review of the RTB Decision. His petition sought judicial review of the RTB order on the basis that it was patently unreasonable.

[29] At the hearing of the petition on March 3, 2023, the chambers judge granted the order for judicial review. No reasons for judgment of the court's decision were issued. The full transcript of the judge's reasons reads:

> The application for judicial review is granted. I am ordering that the residential tenancy conduct another hearing, at which time each party will be entitled to provide all the evidence they want on the merits of the case. In my view, it is a complete breach of natural justice not to facilitate someone who is struggling to represent themselves on their own before any tribunal to say to them, oh, it's a 10-day deadline and it's day 11, I'm not going to hear from you. That frankly is completely ridiculous.

Issues

1. Did the chambers judge select and apply the correct standard of review?

2. What is the appropriate remedy?

Did the Chambers Judge Select and Apply the Correct Standard of Review?

Positions of the Parties

[30] Middlegate argues that the applicable standard of review is patent unreasonableness and that the chambers judge erred in not applying that standard. It submits that the arbitrators, faced with an application brought out of time, with no explanation as to why it was late, and on finding no application to extend time, were obliged to uphold the Notice under s. 47(5) of the *RTA*. Thus, they say that the rules of natural justice, as applied by the chambers judge, were not engaged on these facts. They further submit that in these circumstances, there is no basis on which to find that their decisions were patently unreasonable.

[31] The Director takes no position on whether the appeal should be granted but makes submissions about the analytical framework to be applied in reviewing the decisions and the appropriate remedy. The Director submits that the question of which of the arbitrators' decisions is the proper subject of judicial review, is a preliminary consideration. It says that because of the limited nature of the Director's internal review power under s. 79 of the *RTA*, the original Decision of the Arbitrator is the proper subject of judicial review.

[32] The Director argues that the correct standard of review is dependent on whether this Court finds that Mr. Acosta applied for an extension of time. If he did, they say that the question is one of procedural fairness, and further, that the failure to consider that application is a breach of the standard. However, if this Court finds Mr. Acosta did not apply for an extension, then the question is whether the Decision was patently unreasonable.

[33] Mr. Acosta argues that the chambers judge selected and applied the appropriate standard of review.

Analysis

[34] On appeal from judicial review, the task of this Court is to step into the shoes of the chambers judge, and, focusing on the Arbitrator's Decision, determine whether the chambers judge properly applied the appropriate standard of review: *Cowichan Valley (Regional District) v. Wilson*, 2023 BCCA 25 at para. 69. This is a question of law reviewable on a standard of correctness: *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation British Columbia*, 2022 BCCA 247 at para. 39.

[35] I would agree with the Director that the Arbitrator's Decision is the proper subject of judicial review for this Court, as it was for the chambers judge. Typically, a party must exhaust statutory administrative review procedures prior to seeking judicial review. This would mean that the final decision (here, the Review Decision), would typically be the subject of judicial review. But where the power of reconsideration is not wide enough to encompass the alleged error, reconsideration is not an adequate remedy and accordingly, the initial Decision is reviewable: *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at paras. 38–39.

[36] Section 79(2) of the *RTA* sets out the only grounds on which a decision of the Director may be reviewed. As set out above, the Review Arbitrator considered two of those grounds. However, it is evident that those powers of reconsideration would not permit consideration of the alleged error: that the Arbitrator did not consider an application made for an extension of time or that he found no such application was made in the face of evidence to the contrary.

[37] Pursuant to ss. 5.1 and 84.1 of the *RTA*, certain provisions of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*], including s. 58, apply to the arbitrators. Section 58 of the *ATA* sets out the standard of review applicable to decisions of the RTB:

> (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, …

Did the Chambers Judge err in his Application of the Standard of Review?

[38] It is convenient to consider Middlegate's submission that the chambers judge erred in his application of the standard of procedural fairness before dealing with selection and application of the appropriate standard. I would agree with Middlegate's submission. The basis for the judge's conclusion was that it was a "complete breach of natural justice" not to consider the merits of the dispute when Mr. Acosta's Application was filed only a day late. In arriving at that conclusion, the chambers judge did not consider the statutory scheme.

[39] Had the chambers judge considered the relevant provisions of the *RTA*, he could not have concluded that it was a breach of natural justice for the RTB to dismiss an application for dispute resolution because it was only one day late. Indeed, it is clear from this Court's decision in *Ganitano* that "a tenant's failure to respond within the statutory time limits to a notice given in accordance with … s. 47(4) will, by operation of law, bring a tenancy to an end and entitle the landlord to regain possession of the rental unit": at para. 44 (emphasis in original). The statute establishes the condition for a statutory forfeiture of the tenancy. Where an application for dispute resolution is not made within the ten-day time limit, an arbitrator *must* dismiss the tenant's application unless they have sought an extension of time. As Middlegate argues, the chambers judge could not conclude,

solely on the basis of the timing of Mr. Acosta's Application, that it was procedurally unfair to apply the statutory conclusive presumption.

What is the Appropriate Standard of Review?

[40] As I cannot accept the chambers judge's basis for finding a breach of procedural fairness, it is necessary to consider whether the appropriate standard of review is as set out in s. 58(2)(a) or (b) of the *ATA*: patent unreasonableness; or procedural fairness. It is helpful to identify the decisions that the Arbitrator had to make when faced with the competing applications of Mr. Acosta and Middlegate:

- First, the Arbitrator had to decide whether Mr. Acosta had applied to extend time to dispute the Notice. This issue was engaged because of Mr. Acosta's request for an extension in the Amended Application. The issue was important, if not critical, because of the conclusive presumption in s. 47(5).

- If an application for an extension was made, the Arbitrator had to decide whether the application established "exceptional circumstances" such that they should exercise their discretion and allow an extension pursuant to s. 66(1) of the *RTA*. Once again, this was a serious issue because a failure to establish exceptional circumstances would require the Arbitrator to apply the conclusive presumption in s. 47(5).

- Finally, if time was extended, the Arbitrator had to consider the merits of the application and whether to grant the order for possession.

[41] It is clear that the Arbitrator did not reach the third step of the decision path. It is more difficult to determine if they made a finding that no application had been made to extend time or whether such an application had been made but Mr. Acosta had not established exceptional circumstances. This cannot be determined because the Arbitrator gave no indication that they had seen or considered the request for an extension as set out in the Amended Application.

[42] Relying on similarities between this case and the circumstances in *Sullivan v. Strata Plan BCS-251*, 2005 BCCA 342, the Director submits that the appropriate standard of review is procedural fairness. In *Sullivan*, the tenant's application to dispute a notice to end a tenancy for cause was nine days beyond the ten-day limit established in s. 47(4). As the tenant did here, Ms. Sullivan used the approved form for her application for dispute resolution. In doing so, she identified a code for the order she was requesting described as: "An order setting aside a notice to end a tenancy given for cause, and/or in exceptional circumstances, extending the time in which the application for such an order may be made": at para. 16.

[43] In *Sullivan*, the arbitrator concluded that the tenant had not applied within the time limits to set aside the notice to end tenancy, the same conclusion reached by the Arbitrator here. The Court did not engage in a detailed analysis of the proper standard of review, but rejected the landlord's contention that the application did not contain a request for an extension and allowed the tenant's appeal on the basis of a breach of procedural fairness:

> [21] The respondent defends the reasons of the arbitrator saying that the appellant did not request an extension of time when she appeared before the arbitrator. Counsel points out that the box entitled "ORDER or DECISION REQUESTED" did not contain such a request.
>
> [22] I would not accede to the argument made by the respondent. While Ms. Sullivan did not spell out her request for an adjournment on the form, she did use the correct code which includes a request for an extension of time. Ms. Sullivan could not proceed without an extension. She appeared at the hearing ready to argue her case. In my view, the question of an extension of time ought to have been canvassed with her. It was unfair to this lay litigant not to do so. Ms. Sullivan did not have a proper hearing.

[44] Middlegate argues that patent unreasonableness is the appropriate standard and that *Sullivan* is distinguishable because the tenant in that case had checked the box in the approved form indicating that she was seeking an extension of time to apply. It submits that Mr. Acosta did not make any such application. I would reject this argument. Although Mr. Acosta did not check a box seeking an extension of time (and he could not have done so as the Amended Application form contained no such box), he specifically noted: "Please + Thank You!!! *Require Extension by 2 days.

Filed Friday July 8th". I have no hesitation in concluding that Mr. Acosta's request for a two-day extension was an application for an extension of time to dispute the Notice.

[45] I am of the view that the standard of procedural fairness is engaged because:
(1) Mr. Acosta did not have a meaningful opportunity to present his case; and
(2) The Arbitrator failed to provide any reasons explaining why the request for an extension was not accepted.

[46] The foundational principal of procedural fairness, *audi alteram partem*: to hear the other side, encompasses the right to be heard: *Campbell v. The Bloom Group*, 2023 BCCA 84 at para. 48. Mr. Acosta, representing himself at the hearing, had a reasonable expectation that the issues he raised would be canvassed by the Arbitrator. As outlined above, Mr. Acosta's request for an extension was an essential issue at the hearing, and procedural fairness dictates that he should have had a meaningful opportunity to present his case. I would reject Middlegate's submission that the Arbitrator did not need to consider that request because Mr. Acosta did not raise the question of an extension on his own accord at the hearing. Instead, I echo the comments of the Court in *Sullivan* at para. 22. Mr. Acosta appeared at the hearing ready to argue his case. The question of an extension of time ought to have been canvassed with him. It was unfair to him as a lay litigant not to do so, and that failure meant that Mr. Acosta did not have a proper hearing, thus engaging the standard of procedural fairness.

[47] Additionally, the *audi alteram partem* rule is invoked by the Arbitrator's failure to provide reasons. A person must know the case they have to meet, and be provided with an opportunity to answer it: *Nova-BioRubber* at paras. 74–77. Although Mr. Acosta has not specifically raised the issue of adequacy of the reasons of the Arbitrator, the absence of any discussion of the extension request in the Decision is problematic. As Justice Groberman noted in *Morgan-Hung v. British Columbia (Human Rights Tribunal)*, 2011 BCCA 122, it is now well-established in Canadian law that a failure to provide adequate reasons may

constitute a breach of the rules of procedural fairness: at para. 43. Reasons must be sufficient to let the individual whose rights and interests are affected know why the decision was made, and to permit effective judicial review: at para. 44. He explained the parameters of that duty:

> [45] A tribunal's reasons need not address every issue raised before it. Where an issue is trivial, moot, or of merely academic interest, a tribunal's reasons will not be deficient merely because they fail to address it. Equally, if the determination of an issue is patently obvious from the record, discussion of the issue in the reasons may be seen as otiose. I do not intend this to be a comprehensive list of situations where reasons are not necessary.
>
> [46] Where a serious and consequential issue has been raised before a tribunal, however, the tribunal will normally be expected to resolve the issue and to provide at least some indication of its reasons for deciding it in the way that it does.
>
> [Emphasis added.]

[48] In *Morgan-Hung*, the Court concluded that where the tribunal had discretion to accept or reject a claim that had been advanced, it had a duty to provide at least some explanation for its decision, and the failure to do so was a denial of procedural fairness: at para. 47. Here, as I have already found, the extension of time issue was serious and consequential because the application of the s. 47(5) conclusive presumption turned on its determination. The failure of the Arbitrator to address and provide some explanation for their treatment of the application for an extension made the dispute resolution process procedurally unfair.

[49] In summary, I am of the view that the circumstances of this case raise a serious question about the common law rules of procedural fairness, and it is my view that the RTB did not act fairly in resolving the issues before it.

What is the Appropriate Remedy?

[50] On finding a breach of procedural fairness that renders a decision invalid, the usual remedy is to remit the matter to the administrative decision maker for a new hearing: *Nova-BioRubber* at para. 67. One of the limited scenarios where declining to remit the matter may be appropriate is when the outcome is legally inevitable such that there is no point in remitting the matter back: *Canada (Minister of Citizenship*

and Immigration) v. Vavilov, 2019 SCC 65 at para. 142. This exception to the general rule is a narrow one and has been used when only one decision is legally permissible: *Nova-BioRubber* at para. 68.

Positions of the Parties

[51] Middlegate and the Director agree that on judicial review, the usual remedy is to remit the matter back to the RTB. However, relying on *Vavilov* para. 142, Middlegate submits that this is one of the limited scenarios where remitting the matter for a new hearing would be inappropriate as the outcome is inevitable. In support, they say that based on the wording of the request in the Amended Application, it is plain and obvious that the request is bound to fail.

[52] Additionally, Middlegate cites *Sullivan* at paras. 22–23 as an example of how remitting a matter to the RTB under similar circumstances could prolong an inevitable outcome and "give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations" cautioned against in *Vavilov* at para. 142. Middlegate asks this Court to render a decision based on its interpretation of s. 66(1) of the *RTA* and determine that exceptional circumstances did not exist to extend the time.

Analysis

[53] Respectfully, I cannot accede to Middlegate's argument. The circumstances of this case do not warrant a deviation from the usual remedy.

[54] This is not a case where only one decision is legally permissible. We cannot tell whether the Arbitrator considered that Mr. Acosta made a request or whether they considered s. 66(1) of the *RTA*. It appears that the Arbitrator decided neither, and in any event, provided no reasons. It is impossible to say that the request would inevitably be denied when we do not know what additional evidence Mr. Acosta would have given had this issue been explored at the hearing. We do not know how the RTB decision makers were applying the extension policy to applications that were one day late in the midst of the COVID-19 pandemic. I agree with the Director

that the determination of a possible extension is multifaceted. The legislature delegated the discretion to the RTB to determine that issue based on findings of fact and the application of the legal standard under s. 66(1) of the *RTA*: *Sadahy v. EMV Holdings Corporation*, 2017 BCCA 98 at para. 15. It would not be appropriate for this Court to decide the question in the first instance.

[55] As Middlegate argues, the legislature's implementation of the ten-day timeline in s. 47(4) of the *RTA* was intended to promote the timely and effective resolution of matters relating to the end of tenancy. However, the fact that there is a potential for a cycle of judicial reviews does not outweigh the importance of allowing Mr. Acosta that to which he is entitled: a determination of his Application in a manner that is procedurally fair.

Disposition

[56] I would not disturb the chambers judge's decision granting the petition for judicial review and remitting the matter to the RTB for a new hearing. However, I would allow the appeal to the extent of directing that the matters to be considered include all issues arising from the Notice and from Mr. Acosta's Application and Amended Application, including the question of whether an extension of time should be granted.

[57] **DICKSON J.A.**: I agree.

[58] **MARCHAND J.A.**: I agree.

[59] **DICKSON J.A.**: The appeal is allowed to the extent that the matter is remitted to the RTB for a new hearing and the matters to be considered include all issues arising from the Notice and from Mr. Acosta's Application and Amended Application, including the question of whether an extension of time should be granted.

"The Honourable Mr. Justice Butler"