COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Green v. Kooner,*
2024 BCCA 336

Date: 20240731
Docket: CA49966

Between:

Steve Green and Pam Green

Appellants
(Petitioners)

And

Surjit Kooner

Respondent
(Respondent)

Before: The Honourable Madam Justice Fenlon
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated May 29, 2024 (*Green v. Kooner*, 2024 BCSC 919, New Westminster Docket S248895).

Oral Reasons for Judgment

Counsel for the Appellants: D. Babcock

No one appearing on behalf of the Respondent

Place and Date of Hearing: Vancouver, British Columbia
July 31, 2024

Place and Date of Judgment: Vancouver, British Columbia
July 31, 2024

Summary:

The appellants seek a stay of execution of a Residential Tenancy Branch order of possession pending the hearing of their application to review or vary a decision of a single justice in chambers. The single justice declined to grant a stay of execution pending the hearing of the appeal, basing his assessment of the merits of the appeal on the limited grounds available to the Review Panel under the Residential Tenancy Act. Held: Application allowed. It is arguable that the single justice erred in principle by basing his assessment of the merits of the appeal on the review panel's statutorily constrained decision rather than the arbitrator's. As the single justice recognized, an appeal from the original decision of the arbitrator arguably has merit. Since the appellants would suffer irreparable harm if forced to leave their home, the balance of convenience and interests of justice favour granting the stay.

[1] **FENLON J.A.**: The appellants Steve and Pam Green apply on an urgent basis for a stay of execution of a Residential Tenancy Branch ("RTB") order requiring them to vacate the home they have been renting from the respondent Surjit Kooner for the past 12 years. The stay is sought pending the hearing of their application to review or vary the decision of a single justice in chambers denying a stay pending the hearing of the appeal on the basis that the appeal has no merit. The respondent takes no position on the application and did not attend the hearing today.

Background

[2] On April 5, 2023, an RTB arbitrator granted an order of possession to the respondent for a rental unit that has been occupied by the appellants for approximately the past 12 years. The landlord applied to end the tenancy on the ground that the tenants breached a clause in the parties' tenancy agreement that prohibited the keeping of pets.

[3] The appellants disputed the notice to end tenancy by filing an Application for Dispute Resolution. They asserted that they had kept a dog for the entire duration of their tenancy, and that the landlord was aware of, and had acquiesced to, their ownership of a dog at the property.

[4] The RTB arbitrator's reasons for granting the order of possession did not address the reasons for ending the tenancy, nor the appellants' reasons for

disputing the notice to end tenancy. Instead, the arbitrator dismissed the dispute on the basis the tenants had not properly served their notice of dispute resolution on the landlord and for abuse of the dispute resolution process. After setting out RTB Rules of Procedure 3.1 and 2.5, which govern service and document submission, the arbitrator stated:

> I note the Tenants failed to provide a copy of the 1 Month Notice to End Tenancy for Cause (the 1-Month Notice) and instead uploaded a rude and profane picture under the 1 Month Notice heading in the dispute access web portal. In any event, the Tenants failed to provide a copy of the 1 Month Notice as required by Rule 2.5 and instead appear to have made a joke out of their obligations under the Rules of Procedure. I turn to the following part of the Act:
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> > [Text of s. 62(4) of the *Residential Tenancy Act* omitted.]
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> I find the Tenants[‘] inappropriate and rude documents uploaded in place of the 1 Month Notice is an abuse of the dispute resolution process. The Tenants filed an application to cancel a 1 Month Notice, but rather than provide a copy of that Notice, they opted to make a joke. I hereby dismissed both of the Tenants’ applications, in full, without leave, pursuant to section 62(4)(c) of the Act.
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> Further, I note Tenants provided a scattered and unclear explanation as to what was served and when, in terms of their Notice of Dispute Resolution Proceedings and evidence. They initially stated it was served by registered mail, but could not provide a copy of any proof of mailing, then they said it was served in person. The Landlord stated that they never received anything from the Tenant[s]. Without further proof of service, I find there is insufficient evidence the Tenants served any of the required documents or their evidence, and the Tenant[s’] applications are also being dismissed on that basis.
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> I note the RTB provided the hearing details to the Landlord over the phone as a courtesy and the Landlord provided a copy of the 1 Month Notice prior to the hearing.

[5] The tenants applied for review of the RTB decision, pursuant to s. 79(2) of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*]. At the time of their application, s. 79(2) of the *RTA* read:

> (2) A decision or an order of the director may be reviewed only on one or more of the following grounds:
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> > (a) a party was unable to attend the original hearing or part of the original hearing because of circumstances that could not be anticipated and were beyond the party’s control;

> (b) a party has new and relevant evidence that was not available at the time of the original hearing and that materially affects the decision;
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> (c) a party has evidence that the director's decision or order was obtained by fraud;

[6] The tenants relied on grounds (b) and (c). They tried to fit their concerns about the dog issue into the above grounds by submitting new evidence. That evidence included a heavily redacted document containing a doctor's opinion and certification as to Mr. Green's need for a service animal, which was dated after the landlord's notice to end tenancy was issued. The appellants also submitted that the RTB decision was obtained by fraud because the landlord was aware of the dog and its necessity as a service animal.

[7] The RTB arbitrators hearing the review application found that the tenants' new evidence was irrelevant to the parties' dispute, insufficient to demonstrate fraud, and was largely available at the time of the original hearing. Accordingly, the review application was unsuccessful. The appellants then filed an application for judicial review arguing that the arbitrators' reasons granting the order of possession were inadequate, patently unreasonable, and that the hearing was procedurally unfair because they were not permitted to provide evidence about the inappropriate cartoon uploaded to the RTB portal.

[8] The appellants' application for judicial review was dismissed on May 29, 2024 in reasons indexed at 2024 BCSC 919. The reviewing judge framed his conclusion as follows:

> [41] In the case before this [Court], the reasons of the arbitrator explain the basis for the decision by setting out the issues, describing the evidence or lack of evidence before the arbitrator as well as the evidence which supported the conclusions of the arbitrator. I find that the reasons generally explain how and why the decision was made. Considering the highly deferential review as outlined in *Momeni* at paras. 34–36, for all of these reasons, I am unable to conclude the arbitrator acted unfairly or that his decision was patently unreasonable such that a remedy is available to Mr. Green. Therefore, the present application is dismissed.

[9] The appellants filed a notice of appeal on June 14, 2024, seeking to set aside the RTB decision and the order dismissing their application for judicial review. They also filed an application for a stay of the underlying RTB order pending the appeal.

[10] On July 17, 2024, a justice of this Court, sitting in chambers, dismissed the appellants' stay application. The judge initially identified some prospect of success on appeal, saying:

> [7] The arbitrator dismissed the dispute in reasons given April 5, 2023. His primary reason for doing so was that the tenants had attached a disrespectful cartoon to the dispute instead of attaching a copy of the notice to end tenancy, as they were required to do. Mr. Green alleges, variously, that the cartoon might have originated with the arbitrator himself, or might have been attached to the dispute by accident. There is no evidence to support the idea that anyone other than Mr. Green filed the cartoon. Further, the arbitrator found, having heard the parties, that it was deliberately attached. I see no basis upon which that finding of fact is vulnerable on judicial review or on appeal.
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> [8] I am not, however, convinced that the judicial review would be unarguable if the sole basis of the arbitrator's decision was that attaching the cartoon was disrespectful or a procedural bar to the dispute. The Residential Tenancy Branch had obtained the required document from the landlord, so the record before the arbitrator included the required document. It seems to me that a decision based only on the attachment of a disrespectful document to the dispute might be characterized as a capricious decision of the arbitrator and therefore one that could be characterized as patently unreasonable.
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> [9] Obviously, serious matters were at issue—the tenants' right to remain in rental accommodation that they had occupied for ten years. I would not say that a judicial review of the arbitrator's finding of an abuse of process would be particularly strong, and I acknowledge that the judge on judicial review did not find the arbitrator's primary grounds for dismissing the dispute to be patently unreasonable. Nonetheless, I am also not prepared to say that, if that had been the sole ground for dismissing the dispute, the appeal would be completely lacking in merit.

[11] Ultimately, however, the chambers judge concluded that the appeal was without merit because the appellants had unsuccessfully applied to the RTB for a review of the original decision and there was no prospect of overturning the review decision, saying:

> [10] The difficulty for the tenant is that there was a reconsideration application in which the substance of the landlord/tenant dispute came to the fore. It is clear from the jurisprudence of this Court, that where a tribunal has undertaken a complete or partial reconsideration, that matter must be

> addressed on the judicial review: see, for example, *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at paras. 35–44; *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 427, particularly at paras. 211–214.
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> ...
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> [22] ...I find no basis upon which a judicial review of the arbitrator's decision not to accept the fresh evidence could be challenged. The result is that there was no evidence before the arbitrator that the dog in issue was a service dog.
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> [23] Accordingly, the arbitrator could not properly have concluded that the dog was permitted to occupy the premises despite the express provision of the tenancy agreement prohibiting pets. The arbitrator did not, then, arguably make an error in dismissing the dispute. Because there is no arguable error in the dismissal of the dispute, I cannot find that the appeal stands any chance of success.
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> [24] The first step in determining a stay application is to consider whether the appeal has some merit, that it might be arguable. I am unable to reach that conclusion. Accordingly, I am not prepared to grant a further stay of the order.
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> [Emphasis added.]

[12] The chambers judge dismissed the appellants' application, but ordered that the stay be extended to today, July 31, 2024, to give the tenants time to seek other accommodations.

[13] On July 24, 2024, the tenants filed an application to vary the chambers judge's order pursuant to s. 29 of the *Court of Appeal Act*, S.B.C. 2021, c. 6. On this application, the appellants are again seeking a stay of the underlying RTB order, this time pending hearing of their application to vary.

[14] The onus falls on the appellants to establish entitlement to a stay: *Bancroft-Wilson v. Murphy*, 2008 BCCA 498 at para. 9. The test has three components, as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 348–349. The applicant must demonstrate:

a) there is some merit to the appeal;

b) the applicant will suffer irreparable harm if a stay is refused; and

c) the balance of convenience favours granting a stay.

[15] The ultimate question is whether granting a stay is in the interests of justice: *Coburn v. Nagra*, 2001 BCCA 607 at para. 9.

Merits

[16] The question here is not the merit of the underlying appeal *per se*, but the merit of the s. 29 application to cancel or vary the chambers judge's refusal to stay the RTB order pending appeal.

[17] The question on a review under s. 29 is whether the single justice: (a) made an error in principle; (b) was wrong in the legal sense; (c) misconceived the facts; or (d) did not have relevant information brought to their attention: *Pyper v. Schuetze*, 2023 BCCA 394 at para. 20. The standard of review under s. 29 is correctness: *Mead v. Mead*, 2021 BCCA 477 at para. 19.

[18] In my view, the appellants have established that there is merit to their review application on the basis of an error in principle and a misapprehension of the evidence. I note parenthetically that the single justice did not have the benefit of submissions framed by counsel because the appellants have been self-represented at all stages of these proceedings prior to the application before me today.

[19] The single justice concluded that the issues on appeal concerned the review decision, and in particular whether it was patently unreasonable for the review panel of the RTB to have found no basis for setting aside the arbitrator's order for possession. However, the appellants rely on the principle that when grounds for review of an arbitrator's decision do not fit within the limited grounds for review available under s. 79(2) of the *RTA*, the judicial review is of the arbitrator's original decision as set out in *Guevara v. Louie*, 2020 BCSC 380 at para. 41. The Court in *Guevara* was simply following this Court's decision in *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at para. 39, in which the Court said:

> [39] There is a general principle that a party must exhaust statutory administrative review procedures before bringing a judicial review application: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561. For that reason, where an alleged error comes within a tribunal's statutory power of reconsideration, a court may refuse to entertain judicial review if the party has not made an attempt to take advantage of the reconsideration provision. Of course, where the power of reconsideration is not wide enough to encompass the alleged error, reconsideration cannot be considered an adequate alternative remedy to judicial review, and the existence of the limited power of reconsideration will not be an impediment to judicial review.
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> [Emphasis added.]

[20] There is accordingly some merit to the appellants' review application because the single justice did not take into account the narrow scope of the RTB review and the need to consider the original decision of the arbitrator.

[21] In this regard I note that the single justice recognized there was an arguable case in relation to the arbitrator's original decision because the arbitrator dismissed the notice of dispute resolution based on the cartoon, which the single justice recognized could be found to be capricious and patently unreasonable.

[22] In addition, the arbitrator did not address the tenants' primary ground of dispute: that the "no pets" provision in the lease was not a material term because the landlord had known about the dog for the entire tenancy of more than ten years, (which the landlord admitted at the hearing) and had not enforced the term.

[23] In terms of a misapprehension of evidence, the single justice understood the arbitrator had made a finding on evidence that the appellants had intentionally submitted the profane cartoon. The appellants submit that the recording of the hearing demonstrates the issue of the cartoon was not even raised at the hearing, and that they had no opportunity to address the question.

Irreparable Harm and Balance of Convenience

[24] I am satisfied that the appellants would suffer irreparable harm if they are forced to vacate the property they have lived in for the past 12 years before the application to vary is heard. The appeal would effectively be rendered moot.

[25] The landlord takes no position and has not asserted irreparable harm. I note that the appellants continue to pay rent and are not in arrears.

[26] I conclude that the balance of convenience and the interests of justice favour the granting of the stay pending the hearing of the s. 29 review. I therefore stay the order of the RTB until the hearing of the review application, or November 15, 2024, whichever first occurs.

[Discussion with counsel re: hearing date of the review application]

[27] **FENLON J.A.**: A half day is set for October 11, 2024 for the hearing of the review application.

“The Honourable Madam Justice Fenlon”