IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ling v. Gibbon,*
2024 BCSC 2094

Date: 20241016
Docket: S-234045
Registry: Vancouver

Between:

Joan Elizabeth Ling

Petitioner

And

Nicole Marie Gibbon

Respondent

Corrected Judgment: The text of the judgment was corrected at the cover page on November 22, 2024.

Before: The Honourable Justice Stephens

On judicial review from: Decision of Arbitrator
of the Residential Tenancy Branch, April 5, 2023

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	A.E. Kuntze C. Chen
Counsel for the Respondent:	Ö. Yazar
Place and Date of Trial/Hearing:	Vancouver, B.C. August 1, 2024
Place and Date of Judgment:	Vancouver, B.C. October 16, 2024

Overview

[1] **THE COURT:** The petitioner landlord, Joan Elizabeth Ling, applies by judicial review to set aside a decision of a Residential Tenancy Branch arbitrator (the "Arbitrator") dated April 5, 2023 (the "Arbitration Decision"), which cancelled her notice to end the tenancy of the tenant respondent Nicole Marie Gibbon dated December 5, 2022 (the "Notice to End Tenancy"). The Notice to End Tenancy was for cause, brought pursuant to s. 47 of the *Residential Tenancy Act,* S.B.C. 2002, c. 78 [*Act*].

[2] The petitioner argues that the Arbitration Decision is patently unreasonable and was made contrary to procedural fairness, since the Arbitrator refused to allow her to present certain written and oral evidence at the hearing, and then proceeded to dismiss her Notice to End Tenancy.

[3] The petitioner contends that the Arbitration Decision was severe, since the Arbitrator refused to consider her written evidence and her other witnesses' oral testimony, and then found against the petitioner for failing to adduce sufficient evidence.

[4] The respondent contends that the Arbitration Decision included the Arbitrator's discretionary decision to decline to consider certain evidence, which was not patently unreasonable, and that the decision and its findings were not otherwise patently unreasonable in law or fact, nor made contrary to the duty of fairness. The respondent tenant submitted that the Arbitration decision is the most recent of a series of unsuccessful attempts by the petitioner to end the respondent's tenancy.

[5] For the reasons which follow, I find that the relief on the petition is granted, the Arbitration Decision is set aside, and the matter remitted back to the Residential Tenancy Branch ("RTB").

Background Facts

[6] By way of background, there was an earlier arbitration decision dated December 2, 2022 (following a December 1, 2022, hearing), between the parties in

regard to this tenancy where a different arbitrator dismissed the petitioner's complaint made pursuant to s. 56 of the *Act*, but permitted the petitioner to seek to end the respondent's tenancy pursuant to a notice to end tenancy for cause pursuant to s. 47 of the *Act*

[7] The petitioner therefore served the notice to end tenancy for cause on December 5, 2022, which gave rise to this Arbitration Decision dated April 5, 2023.

[8] The arbitration hearing took place before the Arbitrator on April 4, 2023, by conference call.

[9] This judicial review petition relates in significant part to the documentary evidence which the petitioner landlord had served and filed to rely on at that arbitration hearing, and which the Arbitrator excluded from consideration.

[10] The Director of the RTB, while taking no position on this petition for judicial review, has filed an affidavit containing the record which was before the Arbitrator at the hearing.

[11] The record indicates that the documentary evidence the petitioner landlord filed in support of their position at the arbitration hearing (appended at Exhibit C of the RTB's affidavit) included evidence in the following categories:

a) Documents, including emails and photographs, pre-dating December 5, 2022.

b) An email from another tenant post-dating December 5, 2022, but which includes information about events pre-dating December 5, 2022. Specifically, there is an email dated February 13, 2023, from another tenant to the petitioner landlord describing incidents during 2022.

c) Emails post-dating December 2, 2022, which reflects information post-dating December 2, 2022. For example, there is an email dated January 12, 2023, regarding an incident on that date.

d) Also included in the landlord's materials was digital evidence. The actual digital evidence was not contained in the chambers record before me, but the index of digital material included in the record indicates that certain digital file names were dated in February 2023.

[12] The record also indicates that the petitioner had two witnesses available for the arbitration hearing: one described as a tenant and the other as a boarder. One of these witnesses was the author of certain of the emails included in the petitioner's documentary evidence, including the email dated February 13, 2023, noted above.

[13] At issue during the arbitration hearing, among other things, was the timing of service of the petitioner's documentary evidence for the hearing, as discussed further below.

The Arbitration Decision

[14] At the arbitration hearing, the respondent tenant objected to the petitioner's evidence. The Arbitrator dealt with this as a preliminary matter in their decision. The Arbitration Decision records the parties' submissions as follows on p. 2:

> The Tenant submits that they have not had sufficient time to respond to the Landlord's evidence provided recently to the Tenant. The Landlord states that their evidence was provided to the Tenant on March 7 and 27, 2023. The Landlord states that although this evidence is to support the reasons for the notice to end tenancy that was given to the Tenant in December 2022 they served it on these dates as it was before the latest period allowed under the Rules for their evidence to be provided. The Landlord states that a lot of the evidence was also the same as was provided to the Tenant for a hearing on December 1, 2022. This hearing resulted in a Decision dated December 2, 2022 (the "Decision"). The Landlord confirms that this evidence was present and available at the time the notice to end tenancy was given but that they needed more time to prepare the materials and to include evidence of incidents after the date the notice to end tenancy was given. The Landlord also wishes to call witnesses to support the reasons for the Notice. The Tenant states that the Landlord had all the witnesses attend the previous hearing and that there should not be any reason for them to attend and repeat the evidence.

[15] The Arbitrator considered the application of Rule 3.11 of the RTB Rules of Procedure, which gives an arbitrator the discretion to refuse to consider evidence if service is unreasonably delayed:

> **3.11 Unreasonable delay**
>
> Evidence must be served and submitted as soon as reasonably possible.
>
> If the arbitrator determines that a party unreasonably delayed the service of evidence, the arbitrator may refuse to consider the evidence.

[16] The Arbitrator applied Rule 3.11, found the petitioner had unreasonably delayed service of their evidence, and declined to consider their documentary evidence, as well as declined to hear from any of the petitioner landlord's third party witnesses, for these reasons (p. 2):

> Rule 3.11 of the RTB Rules of Procedure provides that evidence intended to be relied upon by a party must be served and submitted as soon a reasonably possible. If the arbitrator determines that a party unreasonably delayed the service of the evidence the arbitrator may refuse to consider this evidence. As the Landlord had the evidence to support the notice to end tenancy in early December 2022 and as there is no reasonable excuse for the delay of approximately 4 months in providing that evidence to the Tenant, I decline to consider the Landlord's documentary evidence. The Landlord remains entitled to provide oral testimony and evidence. As the Landlord unreasonably delayed the service of their evidence on the Tenant I consider that the Landlord is not now entitled to bring witness testimony to remedy this failure. The Landlord could have provided written statements from the Witnesses in accordance with the Rules. For these reasons I decline to hear from any of the Landlord's Witnesses. [emphasis added]

[17] The Arbitrator made no finding about what documentary evidence had been served by the petitioner on March 7 and what evidence was served on March 27, 2023. I take the Arbitrator's calculation of a four-month delay by the petitioner in serving documentary evidence to be a reference to the approximate amount of time from early December 2022, to the later date, March 27, 2023.

[18] As stated in the passage of the Arbitration Decision above, while the Arbitrator declined to consider the petitioner's documentary evidence and hear any oral evidence from other witnesses (the "Excluded Evidence"), the Arbitrator did nevertheless permit the petitioner to present their own oral evidence at the hearing, stating the "Landlord remains entitled to provide oral testimony and evidence".

[19] After considering the evidence which was permitted to be adduced, the Arbitrator then cancelled the Notice to End Tenancy, finding that the petitioner had

the burden of proof and had failed to adduce sufficient evidence to satisfy their burden to uphold the Notice to End Tenancy. The Arbitration Decision on p. 6 states:

> Section 47(1)(d)(i) and (ii) of the Act provides that a landlord may end a tenancy by giving notice to end the tenancy if the tenant or a person permitted on the residential property by the tenant has
>
> - significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property, or
> - seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant.
>
> The Landlord bears the burden of proof that the Notice is valid for its reasons. I consider the incident of alleged speeding to be too remote in time to be considered as evidence of any interference, disturbance of jeopardy. There is only evidence of two occasions of loud noises twice late at night in May and June 2022. The remaining evidence of noise incidents is that they occurred during the day and there is no evidence to support that these daytime occurrences or the two night-time occurrences caused any significant or unreasonable amount of disturbance or interference to anyone. There is nothing to support that other tenants changed their locks in response to the Tenant's behavior as opposed to the incident involving the horse and this evidence of the Tenant sounds more believable. A one time and brief incident of covering a security camera is not evidence of serious jeopardy to the Landlord's lawful rights or interest in relation to security. There is no evidence to support that the completion of any amount of laundry has jeopardized any interest of the Landlord or disturbed or interfered with any other occupant. Given these reasons and considering the Tenant's evidence I find on a balance of probabilities that the Landlord has not substantiated that the Notice is valid for its reasons. The Notice is therefore cancelled, and the tenancy continues.

[20] I add that in the course of the decision, the Arbitrator also found that certain arguments made by the petitioner in regard to a horse injury incident were *res judicata* by virtue of the earlier December 2, 2022, arbitration decision with respect to s. 56 of the *Act*. The petitioner did not take issue with this aspect of the Arbitration Decision.

Issues

[21] On this petition, the following issues arise:

a) Is the Arbitration Decision patently unreasonable?

b) Was the Arbitration Decision made contrary to the duty of fairness?

c) What is the decision to be reviewed, and should the Review Consideration Decision be set aside?

Analysis

Discussion - Standard of Review

[22] On a judicial review of the substantive merit of the Arbitration Decision, the standard review is patent unreasonableness: *Act,* s. 5.1; *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 58 [*ATA*].

[23] The patently unreasonable standard has been described in various ways, including "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand": *Campbell v. The Bloom Group*, 2023 BCCA 84 at para. 13.

[24] On an application for judicial review, a reviewing court must focus on the reasons given by the tribunal: see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 82-87 [*Vavilov*]. The reasons shed light on the rationale for a decision. The focus of a court on judicial review must be on the decision actually made by the decision maker, including both the decision and the outcome: *Vavilov* at paras. 81-83. This is referred to as a reasons-first review: *Champ's Fresh Farms Inc. v. British Columbia (Employment Standards Tribunal)*, 2023 BCSC 1075 at para. 33; and *Connors v. Maclean*, 2022 BCSC 1460 at para. 33, citing *Vavilov*.

[25] In addition, where the "impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" and "if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention": *Connors* at para. 34, citing *Vavilov* at paras. 133-135.

[26] However, the reasons are not required to meet a standard of perfection: *Vavilov* at para. 91.

[27] A decision is patently unreasonable if there was no evidence to support a factual premise of the decision. So long as there was some evidence of the fact, it is not for the court to assess whether evidence was sufficient. This standard precludes curial reweighing of evidence or rejecting the inferences drawn by the fact finder from that evidence or substituting the reviewing court's preferred inferences for those drawn by the fact-finder: *Technical Safety BC v. BC Frozen Foods Ltd.*, 2019 BCSC 716 at para. 74.

[28] Discretionary decisions of the Arbitration Decision are also reviewed on a standard of patently unreasonableness: *ATA*, s. 58(2)(a). This occurs in the circumstances set out in s. 58(3) of the *ATA*:

> 58 … (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.

[29] The standard of review applicable to a decision of the RTB for questions of procedural fairness is whether, in all the circumstances, the arbitrator acted fairly: *ATA*, s. 58(2)(b), and *Campbell* at paras. 14 and 48.

Application of the Standard of Review - Declining to Consider Evidence

[30] The petitioner contends the Arbitrator committed a patently unreasonable error by declining to consider the Excluded Evidence. In the course of their submissions, the petitioner referred to (among other things) portions of the landlord's documentary evidence filed with the RTB for the hearing which post-dated December 2022 and evidence in the record that they had witnesses available to testify at the hearing, all of which the Arbitrator declined to consider at the hearing.

[31] The respondent contends that the Arbitrator made no error in law or fact, or in the exercise of their discretion in excluding the petitioner landlord's evidence, and then cancelling the Notice to End Tenancy.

[32] The Arbitration Decision was a severe result for the petitioner. This is because the petitioner was not permitted to rely on any of their documentary evidence or any oral testimony of other witnesses, and then the Notice to End Tenancy was cancelled on the basis that the petitioner landlord had failed to adduce sufficient evidence in order to meet their burden of proof that the Notice to End Tenancy was valid.

[33] With respect to the exclusion of written and witness evidence, the Arbitrator applied Rule 3.11 of the Rules of Procedure, which I will restate again for convenience:

> **3.11 Unreasonable delay**
>
> Evidence must be served and submitted as soon as reasonably possible.
>
> If the arbitrator determines that a party unreasonably delayed the service of evidence, the arbitrator may refuse to consider the evidence.

[34] There are several notable features of the Arbitration Decision reasons applying Rule 3.11 and excluding the petitioner's documentary evidence and declining to hear from their other witnesses:

1) The Arbitrator found that "the Landlord had the evidence to support the notice to end tenancy in early December 2022". This was a central part of the Arbitration Decision reasoning to apply Rule 3.11 since it was the premise for the finding of there being "no reasonable excuse for the delay of approximately 4 months in providing that evidence to the Tenant."

2) However, the premise that "the Landlord had the evidence to support to the notice to end tenancy in early December 2022" is, on the record, factually inaccurate, to the extent the petitioner's documentary evidence also included an email dated February 13, 2023, from another tenant that summarized information about 2022 incidents and other emails postdating the issuance of the Notice to End Tenancy dated December 5, 2022, about at least one incident after this date. The Arbitration Decision

reasons did not refer to documentary evidence post-dating December 2022; and

3) Having found that the service of the petitioner's written materials to have been unreasonably delayed, the Arbitrator denied the petitioner an opportunity to call oral evidence from witness testimony of others to support the notice to end tenancy to "remedy this failure".

[35] I find that the Arbitrator's application of Rule 3.11 to be patently unreasonable.

[36] First, the Arbitration Decision proceeds from the incorrect premise that the landlord's documentary evidence was all available by December 2022, when actually some of the petitioner's documentary evidence included emails postdating December 2022. While it is the case that a significant amount of the petitioner's documentary evidence was dated prior to December 2022, not all of it was. Service of documentary evidence post-dating December 2022 (for example, dated February 13, 2023) would necessarily not have been delayed by four months as the Arbitrator found, but instead a lesser period of time.

[37] To the extent the petitioner's documentary materials included an email dated February 13, 2023, referencing information of events prior to December 5, 2022, the Arbitration Decision does not refer to it or give reasons why service of that information or other documentary evidence dated after December 2022 had been unreasonably delayed.

[38] Second, the Arbitration Decision excludes entirely any oral evidence of the petitioner's other witnesses. At the arbitration hearing, the petitioner "Landlord … wish[ed] to call witnesses to support the reasons for the Notice": Arbitration Decision, p. 2. However, the Arbitrator did not permit the landlord to call those witnesses and declined to hear evidence from them, stating, "As the Landlord unreasonably delayed the service of their evidence on the Tenant I consider that the Landlord is not now entitled to bring witness testimony to remedy this failure": Arbitration Decision, p. 2.

[39] However, the Arbitration Decision had proceeded on the incorrect premise that the documentary evidence the petitioner was to rely on was all available to the petitioner by early December 2022, but as I have noted, the documentary material included emails from the tenant that the petitioner wished to call as a witness, which were dated in January and February 2023. There were not reasons given why no oral evidence from other witnesses should be considered about information contained in documentary evidence which post-dated December 2022.

[40] If the Arbitrator disregarded any documentary or oral evidence postdating December 2022 on the basis it was considered irrelevant to whether the Notice to End Tenancy dated December 5, 2022 was justified, this is not reflected in the Arbitration Decision reasons. The decision did not find that all the Excluded Evidence was irrelevant at the disputed resolution hearing. The court must adopt a reasons-first approach and "it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision": *Connors v. Maclean*, 2022 BCSC 1990 at para. 22, quoting *Vavilov* at paras. 96-97.

[41] Assuming without expressing an opinion on, whether Rule 3.11 can be reasonably interpreted to permit an arbitrator to exclude oral testimony from witnesses which relates to documentary evidence which an arbitrator excludes under that rule, the Arbitrator proceeded on the incorrect premise that all the petitioner landlord's documentary evidence existed as at early December 2022.

[42] The respondent RTB, while taking no position on this petition, referenced in its response to petition RTB Rule 3.12, which permits the exclusion of evidence where there has been a wilful or recurring failure to comply with the *Act*, Rules of Procedure, or another reason where acceptance of the evidence would prejudice the other party or result in a breach of the principles of natural justice:

> **3.12 Willful or recurring failure**
>
> The arbitrator may refuse to accept evidence if the arbitrator determines that there has been a willful or recurring failure to comply with the Act, Rules of Procedure or an order made through the dispute resolution process, or if, for some other reason, the acceptance of the evidence would prejudice the other party or result in a breach of the principles of natural justice.

However, the Arbitration Decision did not invoke this rule nor give reasons which would have justified its application. No finding of willful conduct was made, nor did the Arbitrator find that acceptance of the evidence would prejudice the respondent tenant or result in a breach of the principles of natural justice. The record indicates that the respondent tenant's affidavit filed at the hearing was dated March 20, 2023.

[43] The Arbitration Decision did not address the petitioner's argument that "a lot of the evidence was also the same as was provided to the tenant for a hearing on December 1, 2022," and whether unreasonable delay occurred in the service of the petitioner's documentary evidence in this context.

[44] Third, the Arbitration Decision stated that both parties were "each given full opportunity under oath to be heard" and "to present evidence". With respect, this is not an accurate statement to the extent the petitioner was not given a full opportunity to present evidence, since they were not permitted to adduce any of their documentary evidence and the Arbitrator declined to hear from any of the landlord's other witnesses.

[45] In short, the Arbitration Decision made a sweeping decision to exclude all the petitioner's documentary evidence and declined to hear oral evidence of two witnesses of the landlord, substantially restricting the petitioner's ability to present evidence. That decision rested on an inaccurate factual premise relating to the calculation of time for service of the landlord's documentary evidence which was central to the finding of the petitioner's unreasonable delay, and the other reasons given, which had a severe impact on the petitioner landlord's ability to present its case at the hearing, do not justify this decision in a manner commensurate with what was at stake for the presentation of evidence at the hearing: *Connors* at paras. 33-34; *Vavilov* at paras. 133-135.

[46] I find, when looking at the reasons given, that the Arbitration Decision was patently unreasonable within the meaning of the jurisprudence and arbitrary, whether characterized as a decision interpreting and applying Rule 3.11 or as an exercise of the Arbitrator's discretion.

[47] I find this conclusion follows when looked at both from the perspective of the Arbitration Decision reasoning process, and the outcome.

[48] In making this finding, I express no comment on the impact, if any, of the admission of the Excluded Evidence would ultimately have had on the result of the arbitration hearing.

Procedural Fairness - Declining to Consider Evidence

[49] For substantially the same reasons, I further find the decision to exclude all the petitioner's documentary evidence and any oral evidence from two witnesses to be a breach of procedural fairness.

[50] Fairness must be considered contextually and in its statutory, institutional, and social context: *Chen v. Hung*, 2022 BCSC 894 at para. 33, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 at para. 22. I have considered the institutional context, including Rule 3.11. I have considered the respondent's submission that RTB arbitrators are given broad discretion as to how to conduct hearings.

[51] However, the Arbitration Decision does not justify the exclusion of the petitioner landlord's evidence. I find that by excluding this evidence from consideration, the hearing was not conducted fairly. This is an additional basis to set aside the Arbitration Decision and remit it back to the RTB.

The Review Consideration Decision

[52] The petitioner made an application for an internal review consideration before the RTB, which review consideration was dismissed on the ground that the petitioner had filed the review application out of time. The review consideration process provided three discrete grounds for a reconsideration of the Arbitration Decision, namely whether: the party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control; the party has new or relevant evidence that was not available at the time of the original

hearing; and the party has evidence that the director's decision order was obtained by fraud.

[53] The original arbitration decision, not the review consideration decision, is a decision to be reviewed if the alleged error could not be internally reviewed and determined: *Martin v. Barnett*, 2015 BCSC 426 at paras. 22-25.

[54] I am satisfied that the grounds for judicial review of the Arbitration Decision advanced on this petition could not be internally reviewed and determined under s. 79(2) of the *Act*. Accordingly, the appropriate decision to judicially review is the Arbitration Decision: *Martin* at paras. 22-25. And I have decided above that the Arbitration Decision should be set aside for the reasons I have stated.

Conclusion and Order Made

[55] For these reasons, I make the following orders:

1) I order that the April 5, 2023, Arbitration Decision be set aside; and

2) I order and direct that the application for dispute resolution of the petitioner's Notice to End Tenancy dated December 5, 2022, be remitted to the Director of the RTB or their delegate for reconsideration in accordance with these Reasons pursuant to s. 5 of the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241.

[56] Are there any submissions on costs?

[57] CNSL C. CHEN: Justice Stephens, we submit that costs should be in the cause.

[58] CNSL O. YAZAR: Justice --

[59] THE COURT: Ms. Yazar?

[60] CNSL O. YAZAR: With respect, the defence was not a frivolous defence. It was a defence related to the tenant's -- the respondent's home and her residence,

and given that it was not a frivolous defence and it was in relation to her residence, which was an essential need for her, I would ask that each party bears their own costs.

[61] THE COURT: All right. I have considered the parties' submissions and I find in the circumstances that each party will bear their own costs of this petition. And to be clear, there will be no costs ordered against the RTB. Each party will bear their own costs in this petition.

“Stephens J.”