

CANADA / JUDGMENT

Zhao v. Ochitwa

2022 BCSC 535

COURT

Supreme Court of British Columbia

DECIDED

4 April 2022

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2022 BCSC 535 Zhao v. Ochitwa

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhao v. Ochitwa,

2022 BCSC 535

Date: 20220404

Docket: S218020

Registry: Vancouver

Between:

Vania Haijia Zhao

Petitioner

And

Carmen Jean Ochitwa

Respondent

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:

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J. Gray (A/S)

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L. Hlus

Counsel for the Residential Tenancy Branch:

J.M. Patrick

Place and Date of Hearing:

Vancouver, B.C.

January 12, 2022

Place and Date of Judgment:

Vancouver, B.C.

April 4, 2022

INTRODUCTION

- [1] The petitioner, Vania Zhao, is the landlord of the respondent, Carmen Ochitwa. Disputes between the parties led to Ms. Zhao serving Ms. Ochitwa with a ten-day notice to end tenancy for unpaid rent (the "Notice"). Ms. Ochitwa later disputed Ms. Zhao's claim for unpaid rent by filing an application for dispute resolution at the Residential Tenancy Branch (RTB).
- [2] In July 2021, the matter came before the RTB. The main issue before the Arbitrator was whether the Notice should be cancelled and, if not, whether Ms. Zhao was entitled to an Order of Possession and monetary order. The Arbitrator found that no rental arrears existed under the existing tenancy and that the Notice was of no force and effect. No orders were granted in favour of Ms. Zhao (the "Decision").
- [3] Ms. Zhao seeks a judicial review of the Decision. In particular, she seeks an order setting aside the Decision and imposing the relief she sought at the RTB; alternatively, she asks that the Court remit the matter back to the RTB for reconsideration.

FACTUAL BACKGROUND

- [4] Ms. Zhao is a 20-year-old student. She is the owner of the single detached home located in Vancouver (the "Rental Unit"). Sometime in 2020, Ms. Zhao became the registered owner of the Rental Unit after a transfer from her mother, Min Peng.
- [5] Ms. Ochitwa is a practicing lawyer.
- [6] On June 23, 2017, when Ms. Peng was the registered owner of the Rental Unit, she leased the Rental Unit to Ms. Ochitwa and her then-partner, Timothy Ochitwa (the "2017 Tenancy"). The terms of the 2017 Tenancy are found in the RTB standard form lease and include:
- a) the tenancy was for a fixed term of three years (July 15, 2017-July 14, 2020);

- b) at the end of the term, the tenancy would continue on a month-to-month basis or for another fixed length of time;
 - c) the tenants would pay a security deposit of \$2,000; and
 - d) the tenants would pay monthly rent of \$4,000 on the 15th day of each month, subject to rent increases given in accordance with the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA].
- [7] Between July 2018 and March 2019, four cheques written by Ms. Ochitwa to Ms. Peng for the monthly rent were not honoured by her bank. The total of those dishonoured cheques was \$14,000.
- [8] In early 2020, Mr. Ochitwa left the Rental Unit.
- [9] On July 14, 2020, Ms. Zhao (then the registered owner of the Rental Unit) and Ms. Ochitwa entered into a residential tenancy agreement in respect of the Rental Unit (the "2020 Tenancy"). This agreement, as with the 2017 Tenancy, was memorialized in the RTB standard lease form. The 2020 Tenancy included many of the same terms as the 2017 Tenancy except that: (1) the parties were different; (2) the term of the rental was different, being July 15, 2020-July 14, 2022; and (3) a security deposit was not required (presumably since it had been provided under the 2017 Tenancy). Ms. Ochitwa gave evidence that she and Ms. Zhao did not inspect the Rental Unit when the 2020 Tenancy was signed.
- [10] In December 2020, an incident of water ingress in the Rental Unit occurred, resulting in the basement being unusable. The parties agreed that Ms. Zhao would take steps to remediate the issue.
- [11] On March 12, 2021, Ms. Zhao delivered the Notice to Ms. Ochitwa by registered mail. The basis for the Notice (to end the 2020 Tenancy) was that Ms. Ochitwa owed rent of \$14,000 that was due on March 1, 2021. The Notice was issued pursuant to s. 46 of the RTA and was in the RTB standard form. The Notice provided that Ms. Ochitwa had five days to file an application for dispute resolution with the RTB, failing which she was presumed to accept the end of the tenancy and that she must move out.
- [12] Despite having received notice of delivery of the registered mail (i.e., the Notice), Ms. Ochitwa failed to pick up her mail at the Post Office. Only later, on March 24, 2021, did Ms. Ochitwa pick up the Notice from the Post Office and read it.

RTB PROCEEDINGS

- [13] On March 26, 2021, Ms. Ochitwa submitted an application for dispute resolution to the RTB. In Ms. Ochitwa's application, she primarily raised two issues: (1) she sought to dispute the Notice; and (2) she sought an abatement of rent on account of the water damage in the basement.

[14] Ms. Ochitwa's first ground for challenging the Notice was "All rent due under this Tenancy Agreement has been paid on time and in full" (emphasis added). Ms. Ochitwa did not dispute that she and Mr. Ochitwa owed \$14,000 in rent under the 2017 Tenancy.

[15] On July 13, 2021, the Arbitrator convened the hearing by telephone. Ms. Zhao was represented by counsel; Ms. Ochitwa represented herself.

[16] On July 14, 2021, the Arbitrator issued written reasons (later amended on July 21, 2021 to correct a typographical error) (the "Decision").

[17] The stated relevant issue before the Arbitrator was:

Should the [Notice] be cancelled? If not, is [Ms. Zhao] entitled to an Order of Possession?

[18] The Arbitrator first considered whether Ms. Ochitwa had filed her application for dispute within the required time limits. Despite finding that she had not, the Arbitrator then considered the validity of the Notice and concluded:

(26) Based on the totality of the evidence I am not satisfied that there is a rental arrear for the present tenancy that gives rise to the issuance of a 10 Day Notice to End Tenancy for Unpaid Rent. The evidence of the correspondence between the parties shows little mention of this arrear as being outstanding or that the amount is now payable to the new landlord under the present fixed-term tenancy agreement. I find insufficient evidence that the current landlord has any basis to seek rent that was unpaid for an earlier tenancy agreement between the tenant and a previous landlord.

Accordingly, I find that the 10 Day Notice of March 12, 2021 to be of no force or effect as I find there is no rental arrear that gives rise to its issuance.

[19] The Arbitrator went on to consider the water ingress issue. He ordered a retroactive and prospective monthly rent reduction of \$1,500 in favour of Ms. Ochitwa, resulting in an order that Ms. Zhao pay \$10,500 for past rent paid under the 2020 Tenancy. No issue arises in respect of this part of the Decision in this judicial review.

STANDARD OF REVIEW

[20] The parties agree that the standard of review applicable to the Arbitrator's decision is patent unreasonableness. This is established by the statutory framework created by the combination of s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA] and the privative clause found in s. 84.1 of the RTA.

[21] Section 58(3) of ATA provides that a discretionary decision is patently unreasonable if the arbitrator's discretion was:

- (a) exercised arbitrarily or in bad faith,
- (b) exercised for an improper purpose;

- (c) based entirely or predominantly on irrelevant factors, or
- (d) failed to take statutory requirements into account.

[22] While the "patently unreasonable" standard falls at the upper end of the "reasonableness" spectrum, the decision under review must still be defensible in respect of the facts and the law. To be defensible, the decision must still fall within the range of defensible outcomes: *The College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board*, 2010 BCSC 1340 at para. 63.

[23] The RTB's counsel refers to a helpful discussion of this concept--the standard to be applied to findings of fact or law--found in *Yee v. Montie*, 2016 BCCA 256, as follows:

[21] The ATA does not define patent unreasonableness as the term applies to questions of fact or law. In *Manz v. Sundher*, 2009 BCCA 92 at para. 39, Saunders J.A. adopted the meaning of the phrase in relation to factual matters from *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80:

[37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. That is not the case here.

[22] In *Pacific Newspaper Group Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 2000*, 2014 BCCA 496 at paras. 39-44, this Court affirmed that the standard of patent unreasonableness is at the high end of the deference spectrum, and endorsed this description of the phrase from *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52:

a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Citations omitted.]

[24] This concept was also articulated in *Ma v. British Columbia (Employment Standards Tribunal)*, 2016 BCSC 2097:

[33] In sum, when applying the patent unreasonableness standard a court must determine whether the decision under review, taken as a whole, is defensible in respect of the facts and law in the sense that it is not clearly irrational or fundamentally flawed, even though the court may disagree with its conclusions or find its analysis unpersuasive.

THE ISSUES

[25] Ms. Zhao submits that the Decision, in failing to grant an Order of Possession and monetary order in her favour for the unpaid rent, was patently unreasonable for two reasons:

- a) The Arbitrator did not consider or apply the relevant provisions of the RTA which provide that, when a tenant does not file a timely dispute to a 10-day notice to end tenancy for unpaid rent, the Director "must" grant an Order of Possession and a monetary order for the unpaid rent; and
- b) The Arbitrator was patently unreasonable in finding that the 2020 Tenancy was not a continuation of the 2017 Tenancy.

[26] Ms. Zhao contends that the Decision should be varied to grant an Order of Possession and monetary order in her favour; in the alternative, Ms. Zhao submits that the Decision should be set aside and remitted back to the RTB for reconsideration: Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 at ss. 2 and 7.

THE NOTICE / RELIEF ISSUE

[27] Section 46 of the RTA sets out the grounds upon which a landlord may end a tenancy for unpaid rent, and the rights and obligations of a tenant who receives a notice to end tenancy under this section. The relevant portions are as follows:

46(1) A landlord may end a tenancy if rent is unpaid on any day after the day it is due, by giving notice to end the tenancy effective on a date that is not earlier than 10 days after the date the tenant receives the notice.

- (2) A notice under this section must comply with section 52 [form and content of notice to end tenancy].
- (3) A notice under this section has no effect if the amount of rent that is unpaid is an amount the tenant is permitted under this Act to deduct from rent.
- (4) Within 5 days after receiving a notice under this section, the tenant may
 - (a) pay the overdue rent, in which case the notice has no effect, or
 - (b) dispute the notice by making an application for dispute resolution.
- (5) If a tenant who has received a notice under this section does not pay the rent or 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 to which the notice relates by that date.

[28] As the RTB's counsel notes, the Arbitrator only referred to s. 46(4)(b) of the RTA in the Decision. He made no mention of ss. 46(4)(a) or (5) in his analysis of the issues.

[29] The first step in the Arbitrator's legal analysis was to determine when the Notice had been served on Ms. Ochitwa. He began by considering ss. 88(c) and 90(a) of the RTA, which provide as follows:

88. All documents, other than those referred to in section 89 [special rules for certain documents], 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:
- (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;
90. A document given or served in accordance with section 88 [how to give or serve documents generally] or 89 [special rules for certain documents], unless earlier received, is deemed to be received as follows:
- (a) if given or served by mail, on the fifth day after it is mailed;

[Emphasis added.]

[30] The Arbitrator also referred to certain provisions of Residential Tenancy Policy Guideline 12 (the "Policy Guideline 12") entitled "Service Provisions". Policy Guideline 12 provides in part:

Where a document is served by Registered Mail or Express Post, with signature option, the refusal of the party to accept or pick up the item, does not override the deeming provision. Where the Registered Mail or Express Post, with signature option, is refused or deliberately not picked up, receipt continues to be deemed to have occurred on the fifth day after mailing.

In the event of disagreement between the parties about the date a document was served and the date it was received, an arbitrator may hear evidence from both parties and make a finding of when service was effected.

The Supreme Court of British Columbia has determined that the deeming presumptions can be rebutted if fairness requires that that be done [referring to *Atchison v. British Columbia*, [2008] B.C.J. No. 1448]. For example, the Supreme Court found in *Hughes v. Pavlovic*, 2011 BCSC 990 that the deeming provisions ought not to apply in that case because Canada Post was on strike, therefore unable to deliver Registered Mail.

A party wishing to rebut a deemed receipt presumption should provide to the arbitrator clear evidence that the document was not received or evidence of the actual date the document was received. For example, if a party claimed to be away on vacation at the time of service, the arbitrator would expect to see evidence to prove that claim, such as airplane tickets, accommodation receipts or a travel itinerary. It is for the arbitrator to decide whether the document has been sufficiently served, and the date on which it was served.

The decision whether to make an order that a document has been sufficiently served in accordance with the Legislation [referring in part to RTA, s. 71(2)(b)] or that a document not served in accordance with the Legislation is sufficiently given or served for the purposes of the Legislation [referring in part to RTA, s. 71(2)(c)] is a decision for the arbitrator to make on the basis of all the evidence before them.

- [31] The Arbitrator concluded that the effect of the deeming service provisions in the RTA were such that Ms. Ochitwa was deemed to have received the Notice on March 17, 2021, five days after it was mailed on March 12, 2021.
- [32] The Arbitrator then turned to consider whether Ms. Ochitwa could rebut the deeming provisions as a matter of fairness. He found that the deeming provision applied because Ms. Ochitwa did not advance a cogent explanation as to why she delayed in picking up the mail. Since Ms. Ochitwa did not provide any evidence to suggest that the Notice was not received by her in time because of circumstances beyond her control, the Arbitrator determined that there was no breach of the principles of procedural fairness or natural justice.
- [33] Since the deemed service occurred on March 17, 2021, the Arbitrator found that Ms. Ochitwa had until March 22, 2021 to file her application for dispute resolution with the RTB pursuant to s. 46(4)(b). Since Ms. Ochitwa did not file anything with the RTB until March 24, 2021, it was out of time. In the result, the Arbitrator dismissed Ms. Ochitwa's application by which she had sought a cancellation of the Notice based on the unpaid rent issue.

Was the Decision Patently Unreasonable in finding that Ms. Ochitwa filed her application for dispute resolution out of time?

- [34] Ms. Ochitwa contends that that the Arbitrator erred in law in applying the deemed service provisions of the RTA, rather than accept and rely upon the evidence as to when she actually received the Notice.
- [35] Ms. Ochitwa argues that the Arbitrator erred in proceeding on the assumption that deemed delivery trumps actual delivery. She contends that her application to the RTB took place within two days of her actual receipt of the Notice on March 24, 2021, in compliance with s. 46(4)(b) of the RTA.
- [36] Ms. Ochitwa relies on *Atchison v. British Columbia (Residential Tenancy Act, Dispute Resolution Officers)*, 2008 BCSC 1015, a decision referred to in the RTB's Policy Guideline 12.
- [37] In *Atchison*, Justice Ehrcke addressed similar circumstances where the application for review by the RTB was brought beyond the deadline arising from deemed service, but within the deadline based on actual service. At paras. 17-18, Ehrcke J. found that the deemed service provision in the RTA created a rebuttable presumption and that the arbitrator erred in applying the provision as if it created an irrebuttable presumption.

- [38] At para. 26 of Atchison, Ehrcke J. found that the tenant's explanation for not picking up the registered mail (following the advice of the police) had some validity and allowed for some accommodation given the rare circumstances. The underlying rationale for allowing this accommodation was that an irrebuttable presumption had the potential to infringe a fundamental rule of natural justice, namely the right to be heard: para. 16.
- [39] The rationale applied in Atchison was also applied in *Hughes v. Pavlovic*, 2011 BCSC 990, another decision referred to in the RTB's Policy Guideline 12. Similarly, the Court considered the deeming provision to be a rebuttable one. In that case, it was rebutted by evidence that a postal strike had prevented the notice was being received at all.
- [40] At the time of the Atchison decision, s. 90(a) of the RTA did not include the phrase "unless earlier received". That phrase was introduced by the Tenancy Statutes Amendment Act, 2017, S.B.C. 2017, c. 18, which now allows for evidence of receipt of a notice under the RTA even before the deemed date of receipt.
- [41] The deemed service provisions were further considered in *Johal v. Damiano*, 2021 BCCA 19. The Arbitrator there concluded that the deemed service provisions under the RTA applied because the landlords had provided no evidence that they were unable to pick up the registered mail. Justice Frankel stated:
- [52] In the affidavit that was before Arbitrator Martin, Ms. Johal deposed that neither she nor her husband received a copy of Mr. Damiano's Application for Dispute Resolution or the documents on which he relied. She further deposed that she first learned of the RTB proceedings when she received a copy of Arbitrator Edwards's decision in the mail at her residence. Absent from Ms. Johal's affidavit is any mention of the registered mail notice cards. She does not state that she and Mr. Johal did not receive those cards or explain why the packages were not picked up.
- [53] In finding that the Johals had not established they were unable to attend the first hearing because of circumstances they could not have anticipated and that were beyond their control, Arbitrator Martin noted they had not provided any evidence that they could not receive mail at their residence, i.e., there was no evidence that they did not receive the notice cards delivered to their residence. In effect, Arbitrator Martin held that, in the context of a statutory scheme that provides for service by registered mail, a person who elects not to pick up registered mail that contains a notice of hearing cannot later say they were unable to attend the hearing because of lack of notice.
- [54] There is nothing "clearly irrational" about Arbitrator Martin's conclusion. ...
- [42] In *Johal* at paras. 55-56, Frankel J.A. referred to *Pacific National Investments Ltd. v. British Columbia (Assessor of Area #01-Saanich/Capital)* (1994), 116 D.L.R. (4th) 166 (B.C.C.A.) at 175, in particular quoting:

The presumption of delivery is not, however, irrebuttable. Where it can be shown that, without fault, neglect or avoidance of delivery on the part of the person to whom notice is directed that delivery has not been effected by the time required it will be open to that person to show that the required notice had not been "given".

- [43] Arising from the following, the clear weight of authority is that the deemed service provisions in the RTA are rebuttable arising from the principles of natural justice and fairness. The onus lies on the person asserting a contrary service date to establish, at the very least, some reasonable explanation as to why they did not receive the notice within that time.
- [44] Generally speaking, a person's refusal or deliberate choice not to pick up the registered mail at the post office will not suffice as a reasonable basis to justify relief from the deeming provisions.
- [45] I do not accept Ms. Ochitwa's submission that simply asserting a later date of receipt (arising from the actual picking up of a person's registered mail) is sufficient to rebut the deemed service provisions. To accept that proposition would entirely disregard and eliminate the effect of the clear statutory objectives under the RTA, which allow an efficient and effective dispute resolution process in landlord/tenant matters. This same sentiment was expressed in Johal:
- [60] To accept the Johals' position would be antithetical to the dispute resolution provisions of the RTA. Those provisions are intended to provide an effective and low-cost method of resolving landlord-tenant disputes. That purpose would be undermined if a party could thwart service by mail simply by not picking up their mail.
- [46] Here, Ms. Ochitwa provided no evidence to the Arbitrator that could be said to rebut the deemed service provisions. I reject Ms. Ochitwa's submission that she was not required to provide an explanation to the RTB to rebut the presumption. She was or should have been well aware of the RTB's Policy Guideline 12. The Arbitrator was not required to question her at the hearing to seek out her evidence on the point.
- [47] Ms. Ochitwa also refers to a portion of the Notice in support of her position:

If you were not personally served with this Notice, you are considered to have received the Notice, unless there is evidence to the contrary, on the following:

- 5 days after the landlord sends the Notice by registered or regular mail to the address where you live.

Note: The date a person receives documents is what is used to calculate the time to respond; the deeming provisions do not give you extra time to respond.

[Underline emphasis added; bold emphasis in original.]

- [48] I reject Ms. Ochitwa's arguments that this portion of the Notice overrides the deemed service provisions of the RTA. To the contrary, this portion of the Notice is entirely consistent with those provisions, as interpreted and applied by BC courts, and as set out in the RTB's Policy Guideline 12.
- [49] The Arbitrator analysis of the service issue was entirely in accordance with the RTA and the RTB's Policy Guideline 12. His conclusions were not patently unreasonable.
- [50] In argument, the parties made brief reference to the jurisdiction of an arbitrator to extend time limits established by the RTA, pursuant to s. 66. These comments were directed to a degree to the five-day time limit required to dispute a notice pursuant to s. 46(4)(b). As is evident from the Decision, Ms. Ochitwa did not seek any relief in that respect and the Arbitrator made no mention of any such request, let alone address any such request. In these circumstances, I decline to address the issue.

Was the Decision Patently Unreasonable in Refusing to Issue an Order of Possession?

- [51] Having dismissed Ms. Ochitwa's application to dispute the Notice, the Arbitrator proceeded to consider the evidence as to whether there were any rental arrears under the 2020 Tenancy to support the issuance of the Notice. At paras. 23-26 of the Decision, the Arbitrator determined that: (a) Ms. Zhao had failed to prove that the 2020 Tenancy was simply a continuation of the 2017 Tenancy; (b) the rental arrears pertained only to the 2017 Tenancy, namely between Mr. and Ms. Ochitwa and the previous landlord (Ms. Peng); and (c) there was no evidence that Ms. Ochitwa had failed to pay rent under the 2020 Tenancy.

- [52] As a result, at para. 26, the Arbitrator stated:

Accordingly, I find that the 10 Day Notice of March 12, 2021 to be of no force or effect as I find there is no rental arrear that gives rise to its issuance.

- [53] The Arbitrator did not grant an Order of Possession in favour of Ms. Zhao; nor did the Arbitrator grant a monetary order in her favour for the \$14,000 arrears.
- [54] From Ms. Zhao's point of view, the Arbitrator fell into error and was patently unreasonable when, having upheld the Notice when Ms. Ochitwa's application was dismissed, he failed to grant her an Order of Possession that flowed from that determination under s. 55(1). Instead, Ms. Zhao says that the Arbitrator proceeded, incorrectly, to consider the merits of the claim for rental arrears.
- [55] Ms. Zhao points to the comments found in *Ganitano v. Metro Vancouver Housing Corporation*, 2014 BCCA 10, leave to appeal ref'd [2014] S.C.C.A. No. 98. At para. 40, the court stated that the RTA sets out a "comprehensive scheme" for addressing non-payment of rent. After referring to various sections, including ss. 46(4) and 55(1), the court stated:

[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 termination is a statutory forfeiture (i.e., a taking back of the remainder of the term of the tenancy)

[Underline emphasis in original.]

[56] Having dismissed the application for dispute resolution, the Arbitrator, at para. 22, set out s. 55(1) of the RTA, which provides that:

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.

[Emphasis added.]

[57] Presumably, the Arbitrator's dismissal of the part of Ms. Ochitwa's application seeking cancellation of the Notice was sufficient to satisfy s. 55(1)(b). However, what did not follow the Arbitrator's mention of s. 55(1) was an analysis of s. 55(1)(a); rather, the Arbitrator simply moved to a consideration of the Notice on its merits. In addition, the Arbitrator did not analyze whether s. 46(5) or other sections of the RTA were engaged.

[58] To elaborate on the first point, the Arbitrator did not set out or consider s. 52 of the RTA to determine whether s. 55(1)(a) was applicable. Section 52 provides:

52. In order to be effective, a notice to end a tenancy must be in writing and must

- (a) be signed and dated by the landlord or tenant giving the notice,
- (b) give the address of the rental unit,
- (c) state the effective date of the notice,
- (d) except for a notice under section 45 (1) or (2) [tenant's notice], state the grounds for ending the tenancy,

(d.1) for a notice under section 45.1 [tenant's notice: family violence or long-term care], be accompanied by a statement made in accordance with section 45.2 [confirmation of eligibility], and

- (e) when given by a landlord, be in the approved form.

[59] To elaborate on the second point, the Arbitrator did not set out or consider s. 46(5) of the RTA, which sets out the consequence if a tenant does not file an application for dispute resolution within the time limit required by s. 46(4)(b), as was found to be the case here. Section 46(5) provides:

- (5) If a tenant who has received a notice under this section does not pay the rent or 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 to which the notice relates by that date.

[Emphasis added.]

[60] The Arbitrator did not mention, let alone analyze, the interplay between the mandatory provision in s. 55(1) to grant an Order of Possession (assuming s. 52 requirements were met) and the declaratory result in s. 46(5). The Arbitrator did not link those provisions to his later analysis of the merits of the Notice.

[61] It is also entirely unclear whether the Arbitrator, in refusing to grant an Order of Possession, in some way considered and applied ss. 55(2)(b) and (4) of the RTA, which provides for a landlord to request an Order of Possession. This provision can be avoided by the application of s. 55(1) which mandates the granting of an Order of Possession if the tenant's application is dismissed. Section 55(2) provides:

- (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:
 - (a) a notice to end the tenancy has been given by the tenant;
 - (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;
 - (c) the tenancy agreement is a fixed term tenancy agreement that, in circumstances prescribed under section 97(2)(a.1), requires the tenant to vacate the rental unit at the end of the term;
- (c.1) the tenancy agreement is a sublease agreement;
- (d) the landlord and tenant have agreed in writing that the tenancy is ended.
- (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, and
 - (b) if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.

[62] The Arbitrator did not consider or apply s. 58(2)(c) of the RTA either:

- (2) Except as provided in subsection (4)(a), the director must not determine a dispute if any of the following applies:
- (c) the application for dispute resolution was not made within the applicable time period specified under this Act;

[63] The Arbitrator also did not consider the effect of his finding at para. 26 of the Decision that there were no arrears under the 2020 Tenancy on the validity of the Notice under s. 46(1), which provides that a landlord may end a tenancy "if rent is unpaid on any day after the day it is due". As I said above, the Arbitrator also did not consider s. 52, which relates to the form and content of notices to end tenancy. Section 68(2) provides that the Arbitrator has jurisdiction to set aside or amend a notice that does not comply with the RTA, yet there was no consideration of this. The Arbitrator simply appears to have concluded that the Notice was "of no force or effect" because of his finding that there is no rental arrear that gives rise to its issuance, without explaining the statutory basis for this conclusion, and the interplay between potentially applicable sections of the RTA.

[64] Although Ms. Zhao is, in a sense, correct to the extent that she suggests that the Arbitrator fell into error and was patently unreasonable when, having upheld the Notice, he failed to explain the mandatory consequences that purportedly followed from that determination, Ms. Zhao is incorrect to the extent she suggests that this would have inevitably resulted in a determination in her favour. As I set out above, there were a number of provisions that bore on the facts as found by the Arbitrator. One or a combination of these provisions could have yielded a different outcome. The Arbitrator's failure to mention and engage with these provisions (ss. 46(5), 55(1), 55(2)(b) and (4), 58(2)(c) and 68(2)) is enough to render the Decision patently unreasonable: ATA at s. 58(3)(d). In any event, the Arbitrator's failure to explain how he proceeded to consider the merits of the Notice after having upheld it is sufficient to render the Decision patently unreasonable.

Was the Decision Patently Unreasonable in Refusing to Issue a Payment Order?

[65] Ms. Zhao also says that, since the RTA provided that Ms. Ochitwa accepted that the tenancy had ended (s. 46(5)), the Arbitrator was required to grant an order for payment of the unpaid rent. She contends that it was patently unreasonable not to grant a monetary order in her favour.

[66] Similar to s. 55(1) in relation to mandating the granting of an Order of Possession, s. 55(1.1) of the RTA provides that:

(1.1) If an application referred to in subsection (1) is in relation to a landlord's notice to end a tenancy under section 46, and the circumstances referred to in subsection (1) (a) and (b) of this section apply, the director must grant an order requiring the payment of the unpaid rent.

- [67] As with s. 55(1), s. 55(1.1) obviates the need for the landlord to separately apply for a monetary order in the face of a tenant's dispute to a notice. The Arbitrator makes no mention of this provision.
- [68] Ms. Zhao contends that there was no dispute that Ms. Ochitwa failed to pay \$14,000 in rent in respect of the Rental Unit. She further contends that Ms. Ochitwa's defence (that the monies were owing to Ms. Peng and not Ms. Zhao) should not have been considered because Ms. Ochitwa did not contest the Notice under the RTA time requirements.
- [69] As the RTB notes, the Arbitrator did not find it necessary to interpret s. 55(1.1) and this provision does not clearly state that the amount to be paid is the amount listed on the notice to end tenancy. I accept the RTB's comment that it is possible that an arbitrator may determine it is necessary to make a finding of fact with respect to how much rent is owing before making any order pursuant to s. 55(1.1) and this provision may require interpretation before it is applied. At this stage, any such interpretation by the RTB is purely speculative and I make no comment on what the appropriate interpretation might be.
- [70] However, no analysis of s. 55(1.1) can be found in the Decision. It is impossible to discern the reasoning behind the Arbitrator's decision to consider the merits in the face of potentially relevant statutory provisions in the RTA.
- [71] I conclude that the Decision is patently unreasonable.

THE TENANCY ISSUE

- [72] My findings above are sufficient to set aside the Arbitrator's Decision.
- [73] However, since the parties did so, I will briefly address the Tenancy Issue, which Ms. Zhao raised in the alternative if the Arbitrator properly considered the merits of the Notice.
- [74] One of the issues between the parties was whether the 2020 Tenancy was a continuation of the 2017 Tenancy or whether the 2020 Tenancy was a fresh and stand-alone agreement. The parties accepted that, in the event of the latter, the admitted \$14,000 in arrears could not be said to be owing to justify the Notice toward ending the 2020 Tenancy.
- [75] In support of her position, Ms. Zhao's counsel stated that Ms. Peng was her mother and that, in entering into the 2017 Tenancy, her mother was acting as her trustee until the time when Ms. Zhao reached the age of majority and could take title herself: Decision at para. 9. Ms. Zhao states that the Arbitrator was patently unreasonable in finding that Ms. Peng was not Ms. Zhao's mother.
- [76] In fact, the Arbitrator stated:

- (24) . While the landlord now submits that there is a familial relationship between the current and previous landlords, I find little documentary evidence in support of this explanation. I find little documentary evidence in support of this explanation. I find little evidence that the current landlord assumed the previous tenancy or that they are entitled to demand unpaid rent arising from the agreement the tenant had with the previous landlord.
- (25) If the current landlord assumed the earlier tenancy it would be reasonable to expect that there would have been some documentary materials informing the tenant of this change in landlord during the fixed-term tenancy. If the earlier fixed-term tenancy was continuing, it would simply have converted to a month-to-month tenancy. Instead the tenant signed and entered into a new fixed-term tenancy agreement as of July 15, 2020 with a new landlord. The tenant had an obligation under the new tenancy agreement to pay monthly rent to the current landlord.
- [77] I do not accept Ms. Zhao's interpretation of these findings as a rejection of the mother/daughter relationship between her and Ms. Peng. The Arbitrator's finding was only to the effect that, even in the face of such a familial relationship, he did not have any evidence to support the contention that Ms. Peng was holding the Rental Unit in trust for Ms. Zhao and entered into the 2017 Tenancy on behalf of Ms. Zhao.
- [78] The Arbitrator clearly weighed the evidence before him on this point and made his finding after considering all of the evidence. I see nothing patently unreasonable in his conclusion.
- [79] Moreover, the Arbitrator, quite reasonably, paid close attention to the terms of the two tenancies to discern their similarities and differences and if they could be considered to be a continuation or entirely separate agreements.
- [80] At para. 8, the Arbitrator stated:
- The agreement [the 2017 Tenancy] provides that fixed-term tenancy concludes on July 14, 2020 at which point the tenancy would have continued on a month-to-month basis.
- [81] Ms. Zhao states that this comment is in error. In fact, the 2017 Tenancy actually provided that, at the end of the term, the tenancy "may continue on a month-to-month basis or another fixed length of time" (emphasis added).
- [82] At para. 25 (quoted above) of the Decision, the Arbitrator, when discussing the potential interplay between the two agreements, stated:

If the earlier fixed-term tenancy was continuing, it would simply have converted to a month-to-month tenancy. Instead the tenant signed and entered into a new fixed-term tenancy agreement as of July 15, 2020 with a new landlord.

- [83] Ms. Zhao argues that the Arbitrator did not refer to evidence that would have tended to establish that the 2020 Tenancy was a continuation of the 2017 Tenancy, such as: the rent under both Tenancy agreements was the same; the material terms of both tenancy agreements were the same; the tenant was not required to pay a security deposit under the 2020 Tenancy; and the parties did not carry out an inspection of the Rental Unit in respect of either the end of the 2017 Tenancy or the commencement of the 2020 Tenancy.
- [84] On a fair reading of the Decision on this issue, I am unable to agree with Ms. Zhao that it was patently unreasonable. It is quite evident that the Arbitrator paid close attention to the details of the respective tenancy agreements.
- [85] One relevant term in the 2020 Tenancy was that "This tenancy created by this agreement starts on 15 July, 2020" (emphasis added). Another relevant term in the 2020 Tenancy relied on by Ms. Ochitwa relates to any changes or additions:
- (1.2) Any change or addition to this tenancy agreement must be agreed to in writing and initialed by both the landlord and the tenant. If a change is not agreed to in writing, is not initialed by both the landlord and the tenant or is unconscionable, it is not enforceable.
- [86] Neither of these terms were expressly mentioned by the Arbitrator. Similarly, the Arbitrator did not specifically note the similarities in the Decision, as Ms. Zhao now does.
- [87] Having said that, there is nothing in the Decision to suggest that the Arbitrator was not aware of the various provisions and failed to weigh those aspects of the evidence in coming to his conclusion. For obvious reasons, he placed some emphasis on there being a "new landlord" and a "new" agreement, and not one referring back to the 2017 Tenancy. In addition, while the Arbitrator did not entirely correctly describe the options available at the end of the term of the 2017 Tenancy, I do not think that this detracts from his overall finding that the 2020 Tenancy was an entirely new agreement given the parties to it and its terms.
- [88] At bottom, the Arbitrator considered that the 2020 Tenancy was a new and fresh agreement. There was ample evidence before him to support such a finding. I see nothing patently unreasonable in his reasoning and conclusions.

CONCLUSION

- [89] I find the Decision to be patently unreasonable because it does not mention and engage with highly relevant provisions of the RTA that were relevant to the facts as found by the Arbitrator.
- [90] Ms. Zhao submits that it is not necessary to remit the matter to the RTB. She argues that, once the Notice was upheld by the Arbitrator, there was only one possible lawful outcome at the hearing before the RTB. Ms. Zhao says that she was entitled to an Order of Possession and a monetary order in the amount of \$14,000. Ms. Zhao submits that, given the above circumstances, this is an exceptional or rare instance where the Court should impose the appropriate relief: *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855 at

para. 3 and *Allman v. Amacon Property Management Services Inc.*, 2007 BCCA 302 at paras. 12, 15 and 16.

- [91] *Flynn v. Pemberton Holmes Ltd.*, 2021 BCSC 1143 is an example of this Court declining to remit the matter back to the RTB for reconsideration. In doing so, at para. 42, Justice Lyster cited *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 142, as follows:

However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: ...

[Citations omitted; underline emphasis in *Flynn*.]

- [92] I decline to adjudicate the matter, rather than remit it back to the RTB.

- [93] I do not accept Ms. Zhao's submission that there is only one possible decision to be made based on the facts found by the Arbitrator. As the RTB's counsel notes, there are a number of potentially relevant provisions of the RTA that were not considered or interpreted by the Arbitrator in this case. As I have determined that those potentially relevant sections, including ss. 46(5), 55(1) and (1.1) and 58(2)(c), remain to be potentially interpreted, if applicable, and potentially applied to the facts of this case, the appropriate course is to remit the matter to the RTB for that to occur.

- [94] As stated in *Vavilov* at paras. 307-311, this Court owes deference to the RTB in terms of its mandate to interpret and apply the RTA provisions, particularly given its expertise in the area. Only in that manner will the RTB have the "genuine opportunity to weigh in on the issue in question": *Vavilov* at para. 142. Given the lack of RTB or court guidance on the issue at hand, such a determination may be of benefit not only to the parties, but to others who may face the same issue in the future.

- [95] In the alternative, Ms. Zhao seeks an order that the matter be submitted to the Director for reconsideration by a different arbitrator with such direction as the Court considers appropriate. I also decline to make that order. Given that the Arbitrator's absence of reasoning is the foundation for my conclusions, I consider it appropriate to give the Arbitrator an opportunity to address the issues, particularly given his familiarity with the matter.
- [96] In light of the fact that there has been mixed success on this judicial review, I decline to make any costs award in favour of or against either party. Similarly, no costs are awarded against the Director.

"Fitzpatrick J."

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Prepared on 26 October 2026 · Esheria