IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ferguson v. Candou Industries Ltd.,* 2025 BCSC 2430

Date: 20251128
Docket: S257252
Registry: Vancouver

Between:

Margaret Ferguson

Petitioner

And

Candou Industries Ltd.

Respondent

Before: The Honourable Justice E. McDonald

Oral Reasons for Judgment

Counsel for the Petitioner:	C. Kanigan
Counsel for Respondent:	M. Sveinson
Place and Date of Trial/Hearing:	Vancouver, B.C. November 26, 2025
Place and Date of Judgment:	Vancouver, B.C. November 28, 2025

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[1] These reasons for judgment respecting the petition filed October 15, 2025 were delivered orally. They have since been edited for distribution and publication.

[2] The petitioner seeks to judicially review a decision of an arbitrator of the Residential Tenancy Branch ("RTB") issued on September 24, 2025 and/or a review consideration decision made September 29, 2025.

[3] The petitioner raises two grounds in the petition, breach of procedural fairness and patent unreasonableness.

[4] For the reasons that following I have determined that the RTB decision should be set aside and remitted back for reconsideration.

Background

[5] The petitioner is the tenant and the respondent, Candou Industries Ltd., is the landlord. The petitioner has been a tenant at the rental property since 1988.

[6] On July 22, 2025, the landlord applied, pursuant to s. 56 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*], for dispute resolution on an expedited basis and for an order for possession, claiming it would be unreasonable or unfair for the landlord to wait for a One Month Notice to End Tenancy for Cause to take effect. The landlord had inspected the rental property prior to that and obtained a building inspection report on June 17, 2025, that determined the property was heavily deteriorated with serious risks for the health and safety of occupants.

[7] A hearing was held on multiple dates in September 2025 and on September 24, 2025, the arbitrator issued a decision. In the decision, the arbitrator exercised the arbitrator's discretion to amend the application from a claim of relief under s. 56 of the *RTA* to a claim of relief under s. 56.1 of the *RTA*. The arbitrator ultimately granted the landlord an order for possession under s. 56 of the *RTA* and a monetary order against the tenant for the filing fee. The arbitrator issued an order respecting an application under ss. 56 and 55 of the *RTA* requiring that the tenant deliver vacant possession of the premises effective two days after service of the order. The

respondent submits that the decision and order should have referenced s. 56.1, rather than s. 56, given the arbitrator's discussion in the decision to amend the application to consider the relief sought under s. 56.1 rather than s. 56.

[8] The respondent points out that this application for judicial review is the second application for judicial review brought by the petitioner. Earlier this year, there was a previous decision of the RTB respecting the landlord's notice of dispute resolution and when that decision was judicially reviewed, the parties consensually agreed that the decision should be set aside and the matter remitted back to the RTB for redetermination, which has now happened. The respondent's concern is that due to urgency concerns related to the unsafe state of the rental unit and questions about its inhabitability, if the matter is remitted back to the RTB, the court should provide directions, including that the matter be reconsidered on an expedited basis.

Standard of Review

[9] There is no dispute respecting the standard of review that applies to this application for judicial review.

[10] Respecting the issue of procedural fairness, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] provides that the standard of review is whether, in all of the circumstances, the tribunal acted fairly: s. 58(2)(b), *ATA*. The tribunal's duty to provide procedural fairness is contextual and informed by factors that include: (1) the nature of the decision and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to those affected by it; (4) the legitimate expectations of the person challenging the decision and (5); the choice of procedure made by the administrative decision maker: *Hollyburn Properties Limited v. Straehli*, 2022 BCSC 28 at para. 27 citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 77.

[11] Respecting findings of fact and law or an exercise of discretion, s. 58(2) of the *ATA* provides they may not be set aside unless they are patently unreasonable. A patently unreasonable decision has been described as "openly, evidently, and

clearly irrational" and "unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures": *Kong v. Lee*, 2021 BCSC 606 at para. 59, citing *Gichuru v. Palmar Properties Inc.*, 2011 BCSC 827 at para. 34, citing *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 41.

[12] Section 58(3) of the *ATA* provides the circumstances for when a discretionary decision will be patently unreasonable. The criteria for finding a discretionary decision patently unreasonable includes failing to take statutory requirements into account: s. 58(3)(d) *ATA*.

Which Decision is Subject to Judicial Review?

[13] The petitioner submits that the decision made September 24, 2025 is the decision subject to judicial review, not the review consideration decision.

[14] The respondent submits that nothing really turns on whether the decision made September 24, 2025 or the review consideration decision made September 29, 2025 is judicially reviewed. That is because the review consideration decision essentially provides further explanation for the September 24th decision in response to the petitioner's complaint about the arbitrator unilaterally amending the landlord's application after the application was heard and not during the hearing.

[15] There is authority, specifically respecting judicial reviews of RTB decisions, that it is the first level decision, not the second level review consideration decision, that the court judicially reviews, where the second level review consideration decision does not address the merits of the underlying decision: *Ndachena v. Nguyen*, 2018 BCSC 1468 at para. 34 and 36 and *Quigley v. Columbus Charities Association*, 2016 BCSC 1557.

[16] Therefore, based on the authorities and the parties' submissions, I find that the September 24, 2025, initial decision is the decision subject to judicial review,

although the review consideration decision, with its discussion of the procedural fairness issue, provides context.

Is the Decision Procedurally Unfair?

[17] The petitioner submits that the arbitrator breached the duty of procedural fairness when the arbitrator purported to amend the application *after* the hearing had concluded, without allowing the parties to make submissions respecting the new section that the application would be determined under.

[18] In the decision, the arbitrator notes that the landlord's application is pursuant to s. 56 of the *RTA* but he concludes the application is more appropriately considered under s. 56.1.

[19] Sections 56 and 56.1 of the *RTA* state as follows:

> **Application for order ending tenancy early**
>
> **56**(1) A landlord may make an application for dispute resolution requesting
>
> (a)an order ending a tenancy on a date that is earlier than the tenancy would end if notice to end the tenancy were given under section 47 *[landlord's notice: cause]*, and
>
> (b)an order granting the landlord possession of the rental unit.
>
> (2) The director may make an order specifying an earlier date on which a tenancy ends and the effective date of the order of possession only if satisfied, in the case of a landlord's application,
>
> (a) any prescribed grounds apply or the tenant or a person permitted on the residential property by the tenant has done any of the following:
>
> (i) significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property;
>
> (ii) seriously jeopardized the health or safety or a lawful right or interest of the landlord or another occupant;
>
> (iii) put the landlord's property at significant risk;
>
> (iv) engaged in illegal activity that
>
> (A) has caused or is likely to cause damage to the landlord's property,
>
> (B) has adversely affected or is likely to adversely affect the quiet enjoyment, security, safety or physical well-being of another occupant of the residential property, or

(C) has jeopardized or is likely to jeopardize a lawful right or interest of another occupant or the landlord;

(v) caused extraordinary damage to the residential property, and

(b) it would be unreasonable, or unfair to the landlord or other occupants of the residential property, to wait for a notice to end the tenancy under section 47 *[landlord's notice: cause]* to take effect.

(3) If an order is made under this section, it is unnecessary for the landlord to give the tenant a notice to end the tenancy.

Order of possession: tenancy frustrated

56.1(1) A landlord may make an application for dispute resolution requesting

(a) an order ending a tenancy because

(i) the rental unit is uninhabitable, or

(ii) the tenancy agreement is otherwise frustrated, and

(b) an order granting the landlord possession of the rental unit.

(2) If the director is satisfied that a rental unit is uninhabitable or the tenancy agreement is otherwise frustrated, the director may make an order

(a) deeming the tenancy agreement ended on the date the director considers that performance of the tenancy agreement became impossible, and

(b) specifying the effective date of the order of possession.

[20] The Residential Tenancy Branch Rules of Procedure provide rules, some which are directly relevant to the present application:

Rule 6 – Pertaining to the hearing in general

6.1 Arbitrator's role

The arbitrator will conduct the dispute resolution proceeding in accordance with the Act, the Rules of Procedure, and principles of procedural fairness.

6.2 What will be considered at a dispute resolution hearing

The hearing is limited to matters claimed on the application unless the arbitrator allows a party to amend the application. [Emphasis added.]

…

Rule 7 – During the hearing

Amending an Application for Dispute Resolution at the Hearing

7.12 Amending an application at the hearing

An application can be amended at the hearing only in circumstances:

> • that can reasonably be anticipated, such as when the amount of rent owing has increased since the time the Application for Dispute Resolution was made, or
>
> • where the applicant requests an amendment to their application and the respondent consents to the amendment. If an amendment to an application is sought at a hearing, an Amendment to an Application for Dispute Resolution need not be submitted or served.
>
> **7.12.1 Removing claims made in the application at the hearing**
>
> **If an applicant requests that their application be amended to remove** a claim at the hearing and the respondent consents to the amendment, the arbitrator's decision will record that the claim was withdrawn and the applicant can submit a new Application for Dispute Resolution for the withdrawn claim, unless otherwise agreed to by the parties.
>
> **7.13 Objecting to a proposed amendment**
>
> A respondent may raise an objection at the hearing to an Amendment to an Application for Dispute Resolution on the ground that the respondent has not had sufficient time to respond to the amended application or submit evidence in reply. The arbitrator will consider such objections and determine if the amendment would prejudice the other party or result in a breach of the principles of procedural fairness. The arbitrator may hear the application as amended, dismiss the application with or without leave to reapply, or adjourn the hearing to allow the respondent an opportunity to respond.
>
> …

[21] In the decision, the arbitrator refers to Rule 7.12 of the RTB's Rules of Procedure indicating "that an application can be amended only in circumstances that can reasonably be anticipated". The arbitrator also determines that the amendment to rely on s. 56.1, rather than s. 56, was reasonably anticipated.

[22] However, in the decision, the arbitrator appears to ignore an important phrase in Rule 7.12, specifically, that an application can be amended "at the hearing".

[23] In the review consideration decision, the arbitrator directly grapples with the issue of whether the application can be amended *after* the hearing has completed. The arbitrator notes that the purpose of Rule 7.12 is to ensure that the parties are aware of "any modification to any claim being made and to have an opportunity to respond accordingly". The arbitrator found that because the landlord mentions the allegation that the property is uninhabitable in the claim, specific reference to s. 56.1

of the *RTA* was unnecessary to trigger consideration of whether the unit was uninhabitable or to apply s. 56.1, rather than s. 56, as the basis for the application.

[24] In the review consideration decision, the arbitrator found the petitioner's suggestion that no party raised inhabitability or gave submissions on s. 56.1 to be inaccurate and misleading. The arbitrator concluded that while the amendment of the claim was recorded *after* the hearing, "the actual amendment occurred during the hearing," and the tenant reasonably anticipated the amendment and consented to it by making submissions concerning the issue of uninhabitability.

[25] What is misleading is that the tenant attended the hearing and directed evidence and submissions to the requirements of s. 56, not s. 56.1. The differing requirements for s. 56, versus s. 56.1 was an important consideration, and the arbitrator explained that difference in the decision as follows:

> … I would add that whereas section 56 of the Act requires a determination of responsibility for extraordinary damage to the property or threats to personal safety, section 56.1 does not. Section 56.1(1) of the Act states that a Landlord may make an application for dispute resolution requesting an order ending a tenancy because the rental unit is uninhabitable. The Landlord may also request an Order for Possession of the rental unit for this reason.

[26] Had the tenant known at the hearing that the arbitrator was considering amending the application to consider it under s. 56.1, rather than s. 56, the evidence and submissions might have been different.

[27] The arbitrator and the parties referred me to extensive evidence and submissions presented by both parties at the hearing going to the criteria of whether the tenant had done certain things, such as seriously jeopardizing health or safety, or putting the landlord's property at significant risk. Those criteria are relevant to s. 56, but according to the decision, the whole issue of conduct could be sidestepped by framing the landlord's application under s. 56.1 and by answering a factual question.

[28] No party suggests that the arbitrator ever directed the parties to focus their submissions or their evidence on the question of habitability and to avoid discussing

whether the tenant's actions had interfered with or seriously jeopardized the health or safety of the property. Had that occurred, the submissions and evidence might have been different. As well, an adjournment might have been sought by the petitioner on the grounds that there was insufficient time to respond to the amendment.

[29] The arbitrator acknowledges the amendment to the application was recorded, on the arbitrator's own volition, *after* the hearing, but the arbitrator finds the amendment can be inferred as having been made at the hearing and having been consented to by the petitioner because the petitioner brought evidence concerning habitability. The arbitrator fails to consider how that evidence might also have related to the stated ground of the application under s. 56 of the *RTA,* that the petitioner had jeopardized the safety or interest of the landlord, or put the landlord's property at significant risk.

[30] In my view, this is the nub of the procedural unfairness to the petitioner that occurred at the hearing and from the decision. Later in these reasons, I will address whether the decision on ending the tenancy under s. 56.1(1)(a(i) of the *RTA,* based solely on a factual determination of uninhabitability, was patently unreasonable.

[31] Given that parties are often unrepresented, they are entitled to clarity on the grounds for an application at a hearing. It is hard to imagine an aspect of the basic procedure that is more fundamental to procedural fairness than knowing the actual basis and requirements for an application related to a notice to vacate. The absence of knowledge of the landlord's grounds at a hearing has been characterized by a justice of this court as crucial to preparing to dispute a notice to end tenancy: *Parkland Manufactured Home Park. v. Mcalpine*, 2023 BCSC 1709 at paras. 34-35.

[32] In conclusion, I find breaches occurred in the duty of procedural fairness owed to the petitioner. Rule 7.12 clearly states that an amendment to an application can be made at a hearing under certain circumstances. While the arbitrator determines that the procedural fairness purpose of Rule 7.12 was met in this case

even though the amendment was recorded after the hearing, I disagree for reasons that I have already explained.

[33] To be clear, I am not finding that an amendment to an application pursuant to Rule 7.12 can never be made *after* a hearing has been completed, just that in the circumstances of this case, doing so was contrary to the duty of procedural fairness owed to the petitioner.

Is the Decision Patently Unreasonable?

[34] The petitioner submits that the decision is also patently unreasonable because, while the decision purports to decide pursuant to s. 56.1 of the *RTA* that the tenancy should end, the decision fails to grapple with the doctrine of frustration of contract.

[35] In s. 92 of the *RTA,* it provides that the *Frustrated Contract Act*, R.S.B.C. 1996, c. 166 [*FCA*], and the doctrine of frustration of contract apply to tenancy agreements.

[36] The RTB has issued policy guidelines to help RTB staff and members of the public address issues under the *RTA*. One such policy guideline, "Guideline 34 – Frustration" provides a statement of policy intent of legislation developed in the context of the common law and the rules of statutory interpretation where appropriate. Among other things, Guideline 34 states:

> … This Guideline is also intended to help the parties to an application understand the issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position. …
>
> A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.
>
> The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. … A party cannot argue that a contract has been

> frustrated if the frustration is the result of their own deliberate or negligent act or omission.
>
> …

[37] The *RTA* and the Tenancy Policy Guidelines also contain a variety of provisions, covering situations, for example, where a landlord seeks to end a tenancy to demolish or renovate a rental unit. For example, in Residential Tenancy Policy guideline, GL2B-1, Policy 2B – Ending a Tenancy to demolish, Renovate or Convert a Rental Unit to a Permitted Use, it explains that the landlord bears the onus to provide evidence that the planned work reasonably requires the tenancy to end and there are compensation provisions for the tenant.

[38] The respondent submits that in proceeding under s. 56.1(1)(a)(i) of the *RTA*, the arbitrator appropriately side-stepped the need to engage with the doctrine of frustration because, unlike subsection (1)(a)(ii), it does not require a finding of frustration, nor any analysis of cause or fault, merely a factual determination that the property is uninhabitable.

[39] While the *RTA* may contain a variety of provisions about ending a tenancy due to the need to renovate or repair a unit, I find the respondent's interpretation of s. 56.1(1)(a)(i) would mean that a landlord could seek a finding of uninhabitability, and thereby avoid an analysis of whether the landlord's own conduct had caused the uninhability, and further avoid the application of the doctrine of frustration or the *FCA*.

[40] I find that such an interpretation of s. 56.1(1)(a)(i) of the *RTA* is patently unreasonable. A plain reading of s. 56.1 indicates it concerns frustration and s. 92 explicitly states that the *FCA* and the common law doctrine of frustration applies to residential tenancy agreements.

[41] I find that section 56.1(1)(a)(i) merely sets out one example of how a residential tenancy agreement may be frustrated – because the rental property is uninhabitable. That reading is supported by subparagraph (ii) of subsection (1)(a), which provides that a tenancy agreement can be "otherwise frustrated".

[42] My reading of s. 56.1(1)(a)(i) is also supported by the RTB's own Guidelines, which explain that the doctrine of frustration cannot be utilized by a party whose actions have frustrated the agreement. Therefore, applying s. 56.1(1)(a)(i) to decide whether an agreement is frustrated due to uninhabitability does not eliminate the need to apply the doctrine of frustration. The arbitrator's decision to the effect that this section merely required the arbitrator to make a factual finding of uninhability is patently unreasonable.

Disposition

[43] For the reasons explained, I quash the decision and the matter under RTB file 910206532 is remitted to the RTB for a new hearing.

[44] The respondent requests that I make certain directions to the RTB, for example, that the respondent's original notice of dispute resolution be set for hearing and that the RTB be directed to expedite the hearing due to the safety risks associated with the rental unit. However, I do not find that it is necessary to make such directions because the RTB is best placed to determine the proper procedure that is available and necessary to address the application(s).

"E. McDonald J."