IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mvano v. Affordable Housing Charitable Association,* 2024 BCSC 1014

Date: 20240612
Docket: S238305
Registry: Vancouver

Between:

Bomboko Mvano

Petitioner

And:

Affordable Housing Charitable Association

Respondent

Before: The Honourable Justice Warren

On judicial review from: An order of the Residential Tenancy Branch, dated November 28, 2023 (File No. 910135142).

Reasons for Judgment

Counsel for the Petitioner:	D. Sabelli
Counsel for the Respondent:	M. Grist P. Birak, Articled Student
Place and Dates of Hearing:	Vancouver, B.C. February 21 and April 9, 2024
Place and Date of Judgment:	Vancouver, B.C. June 12, 2024

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I. INTRODUCTION

[1] This is an application for judicial review of a decision of the Residential Tenancy Branch (the "RTB") issued on November 28, 2023 (the "Original Decision"). The petitioner, Mr. Mvano, is a low-income tenant residing in a rental unit managed by the respondent, the Affordable Housing Charitable Association (the "Association"). In the Original Decision, the RTB upheld a 10 day notice to end Mr. Mvano's tenancy for unpaid rent, and granted an order of possession and a monetary order in favour of the Association. In his petition filed December 6, 2023, Mr. Mvano seeks an order setting aside the Original Decision and remitting the matter to the RTB for redetermination. The Association opposes the application.

[2] Upon receipt of the Original Decision, Mr. Mvano applied to the RTB for a review pursuant to s. 79 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 (the "*RTA*"). That application was dismissed by the RTB on December 7, 2023 (the "Review Consideration Decision"). During the hearing of this petition, I also heard Mr. Mvano's application, filed February 20, 2024, for leave to amend the petition to enable him to challenge the Review Consideration Decision. The application to amend was filed out of an abundance of caution, in case the Review Consideration Decision, and not the Original Decision, was the appropriate subject for judicial review. The Association's position is that the application to amend the petition should be dismissed as unnecessary because the Association agrees that the Original Decision is the proper subject of judicial review in this case.

[3] For the reasons that follow, the petition is dismissed. The application for leave to amend the petition is also dismissed, given the consensus that the Original Decision is the appropriate subject of judicial review.

II. BACKGROUND

A. History of the Proceedings

[4] The Association develops, owns, and manages rental housing for low and moderate income people, including a building on MacPherson Avenue in Burnaby (the "Property").

[5] Mr. Mvano has lived at the Property for over a decade.

[6] Mr. Mvano's tenancy agreement with the Association (which includes an addendum for units where the rent is related to the tenant's income) expresses the rent for Mr. Mvano's unit as $2,500 per month and provides that Mr. Mvano is required to pay only a monthly "tenant rent contribution" in an amount that is related to his income if he complies with the information disclosure obligations of the agreement. Specifically, pursuant to the addendum, Mr. Mvano is required to declare his income and to submit certain information (the "Required Information") to the Association annually (the "Annual Income Review"). The Annual Income Review sets the rent subsidy amount and tenant rent contribution for the upcoming year (each October to September).

[7] Before 2023, Mr. Mvano participated in 12 Annual Income Reviews, and each time he provided the Required Information to the Association by the deadline. From October 2022 to September 2023, based on his 2021 income, Mr. Mvano's tenant rent contribution was $550 per month.

[8] According to the Association, in 2023 Mr. Mvano provided some, but not all, of the Required Information for the Annual Income Review to set his tenant rent contribution for the period from October 2023 to September 2024. As a result, the Association took the position that Mr. Mvano lost his subsidy and was required to pay the full monthly rent of $2,500, commencing October 1, 2023.

[9] Mr. Mvano says that he provided the Required Information and the Association failed to accurately track the information provided and identify what information was still outstanding.

[10] For the months of October and November, 2023, Mr. Mvano paid only his previous tenant rent contribution of $550 per month. The Association issued two 10 day notices to end the tenancy for unpaid rent under s. 46 of the *RTA*, first in October 2023 and again in November 2023. Section 46 of the *RTA* provides that if a tenant who has received such a notice does not, within five days after receiving the

notice, either pay the unpaid rent or apply to the RTB for dispute resolution, the tenant is "conclusively presumed to have accepted that the tenancy ends on the effective date of the notice" and "must vacate the rental unit … by that date". Mr. Mvano did not apply for dispute resolution in respect of either notice within the applicable five day window, or at all, nor did he pay the rent the Association claimed was unpaid.

[11] On November 20, 2023, relying on the 10 day notice to end tenancy that was issued in November (the "Eviction Notice"), the Association applied to the RTB for an order of possession for Mr. Mvano's unit. Among the material submitted by the Association in support of the application was a standard form RTB proof of service document asserting that the Eviction Notice had been served on Mr. Mvano on November 2, 2023, by attaching it to his door. As required by the standard form, the proof of service document was signed by the person who served the Eviction Notice and by a witness.

[12] Pursuant to s. 55(2)(b) and (4) of the *RTA,* where a notice to end tenancy has been served by a landlord, the tenant has not disputed the notice by making an application for dispute resolution, and the time for making that application has expired, the RTB may grant an order of possession and an order requiring payment of rent without any further dispute resolution process; that is, on an *ex parte* basis, without a participatory hearing, and based on the written application materials submitted by the landlord. That is what happened here, and on November 28, 2023, Adjudicator Campbell of the RTB issued the Original Decision.

[13] Adjudicator Campbell upheld the Eviction Notice, issued an order of possession in favour of the Association, and granted a monetary order of $4,000, which consisted of $3,900 for unpaid rent for October and November 2023, and a $100 filing fee. The material part of the Original Decision reads as follows:

> Section 46 of the Act states that upon receipt of a 10 Day Notice the Tenant must, within five days, either pay the full amount of the arrears as indicated on the 10 Day Notice or dispute the 10 Day Notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch. If the Tenant does not pay the arrears, or dispute the 10 Day Notice, they are conclusively

> presumed to have accepted the end of the tenancy under section 46(5) of the Act.
>
> I have reviewed all documentary evidence and I find that the Tenant was obligated to pay the monthly rent in the amount of $2,500.00, as per the tenancy agreement.
>
> In accordance with sections 88 and 90 of the Act, I find that the 10 Day Notice was served on November 2, 2023, and is deemed to have been received by the Tenant on November 5, 2023, three days after its posting.
>
> I accept the evidence before me that the Tenant has failed to pay the rent owed in full within the five days granted under section 46(4) of the Act and did not dispute the 10 Day Notice within that five-day period.
>
> Based on the foregoing, I find that the Tenant is conclusively presumed under section 46(5) of the Act to have accepted that the tenancy ended on the effective date of the 10 Day Notice, November 15, 2023.
>
> Therefore, I find that the Landlord is entitled to an Order of Possession based on a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities (the 10 Day Notice) under sections 46 and 55 of the Act.
>
> …
>
> I grant an Order of Possession to the Landlord effective two (2) days after service of this Order on the Tenant. …
>
> …
>
> I grant the Landlord a Monetary Order in the amount of $4,000.00 for rent owed for October and November 2023, and for the recovery of the filing fee for this application. …

[14] As noted, upon receipt of the Original Decision, Mr. Mvano applied to the RTB for a review pursuant to s. 79 of the *RTA*. He identified the following grounds for review: (1) he was unable to attend due to circumstances outside of his control; (2) he had new and relevant evidence not available at the time of the hearing; and (3) a required issue was not determined.

[15] Mr. Mvano filed his petition for a judicial review of the Original Decision on December 6, 2023. On the same day he obtained an order from this Court staying the order of possession and the monetary order.

[16] On December 7, 2023, RTB Arbitrator Randhawa issued the Review Consideration Decision, dismissing Mr. Mvano's application for review. Arbitrator Randhawa:

1. noted that Adjudicator Campbell found that Mr. Mvano received the Eviction Notice on November 5, 2023, meaning the last day for him to dispute it was November 10, 2023;

2. found that Mr. Mvano did not prove he was unable to dispute the Eviction Notice between those dates;

3. found that Mr. Mvano had not proved that he had new and relevant evidence; and

4. found that Adjudicator Campbell did not leave any issue undetermined.

B. The Statutory Scheme

[17] The relevant provisions of the *RTA* are:

> **Landlord's notice: non-payment of rent**
>
> **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.
>
> …
>
> **Order of possession for the landlord**
>
> **55** (1) If a tenant makes an application for dispute resolution to dispute a landlord's notice to end a tenancy, the director must grant to the landlord an order of possession of the rental unit if

> (a) the landlord's notice to end tenancy complies with section 52 *[form and content of notice to end tenancy]*, and
>
> (b) the director, during the dispute resolution proceeding, dismisses the tenant's application or upholds the landlord's notice.

(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 *[landlord's notice: non-payment of rent]*, 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.

(2) A landlord may request an order of possession of a rental unit in any of the following circumstances by making an application for dispute resolution:

> …
>
> (b) a notice to end the tenancy has been given by the landlord, the tenant has not disputed the notice by making an application for dispute resolution and the time for making that application has expired;
>
> …

…

(4) In the circumstances described in subsection (2) (b), the director may, without any further dispute resolution process under Part 5 *[Resolving Disputes]*,

> (a) grant an order of possession, and
>
> (b) if the application is in relation to the non-payment of rent, grant an order requiring payment of that rent.

…

How to give or serve records generally

88 All records … that are required … under this Act to be given to or served on a person must be given or served in one of the following ways:

…

> (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides …

…

When records are considered to have been received

90 A record given or served in accordance with section 88 … is deemed to be received as follows:

…

> (c) if given or served by attaching a copy of the record to a door or other place, on the third day after it is attached …

[18] To sum up the relevant provisions, 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. The notice may be given by attaching a copy to a door at the address at which the tenant resides, and it is deemed to have been received by the tenant three days later.

[19] Within five days after receiving the notice to end the tenancy, the tenant may pay the overdue rent or apply to the RTB to dispute the notice. If a tenant who has received a notice to end tenancy for unpaid rent fails to do either, they are conclusively presumed to have accepted that the tenancy ends on the effective date of the notice to end the tenancy and they must vacate the unit by that date.

[20] A landlord may request an order of possession by making an application to the RTB for dispute resolution. Where the landlord has given a notice to end tenancy, the tenant has not filed an application to dispute the notice, and the time for making the application has expired, the RTB may grant an order of possession and a monetary order for unpaid rent without any further process; in other words, *ex parte* and without a participatory hearing.

C. The Standard of Review

[21] There is no dispute that in relation to findings of fact or law, or mixed fact and law, the standard of review for decisions of the RTB is patent unreasonableness. This highly deferential standard was recently described by the Court of Appeal in *Momeni v. Percy*, 2024 BCCA 77 at para. 33–36:

> [33] By the combined effect of ss. 5.1 and 84.1 of the *RTA* and s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (“*ATA*”), the standard of review for a judge conducting judicial review of the decision of an RTB arbitrator is patent unreasonableness.
>
> [34] The patent unreasonableness standard of review is a highly deferential one. In *Campbell v. The Bloom Group*, 2023 BCCA 84, a judgment arising from the dismissal of a challenge to a Notice to End Tenancy by an RTB arbitrator, Voith J.A. described the standard in this way:
>
> > [13] A patently unreasonable decision has been described as “clearly irrational”, “evidently not in accordance with reason”, or “so

> flawed that no amount of curial deference can justify letting it stand": *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147 at para.17, quoting from *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 52.

[35] Even more recently, in another challenge to a decision of an RTB arbitrator, Fenlon J.A. stated that such a decision can be interfered with only if it "almost borders on the absurd", citing *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28: see *McNeil v. Elizabeth Fry Society of Greater Vancouver*, 2024 BCCA 2 at para. 5.

[36] For discretionary decisions, s. 58(3) of the *ATA* defines the patent unreasonableness standard in this way:

> For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
>
> (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.

[22] In relation to procedural fairness, s. 58(2)(b) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 provides:

> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> …
>
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly…

[23] The fairness standard was described as follows in *Warkentin v. Metro Vancouver Housing Corporation*, 2015 BCSC 2144:

> [47] …With respect to the standard of review in an assessment of fairness, in *Robertson v. British Columbia (Teachers Act, Commissioner)*, 2014 BCCA 331 at para. 66, 376 D.L.R. (4th) 1, the majority of the Court of Appeal noted
>
> > the "fairness" analysis does not differ markedly from the application of a correctness standard. In both instances, the authorities suggest that no deference is owed and that the task of the reviewing court is to assess whether the impugned decision maker correctly applied the principles of natural justice and procedural fairness: See, for example, *Construction & Specialized Workers' Union, Local 1611 v. SELI Canada Inc.*, 2010 BCCA 335; *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55; *Compass Group Canada (Health Services) Ltd. v. Hospital Employees' Union*, 2007

BCCA 237; *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97.

[24] A decision that was reached through an unfair process cannot stand: *Ndachena v. Nguyen*, 2018 BCSC 1468 at para. 55, citing *Baker v. Canada (Minister of Citizenship and immigration)*, [1999] 2 S.C.R. 817. As explained by Justice Sewell in *Ndachena* at para. 57, the factors relevant to determining the content of the duty of fairness include, but are not limited to:

1. the nature of the decision being made and process followed in making it;
2. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. the importance of the decision to the individual or the individuals affected;
4. the legitimate expectations of the person challenging the decision; and
5. the choices of procedure made by the decision-maker.

D. Positions of the Parties

[25] Mr. Mvano submits that Adjudicator Campbell failed to make necessary inquiries and factual findings related to his eligibility for a rent subsidy renewal, which he says renders the Original Decision patently unreasonable. In particular, Mr. Mvano argues that, before granting the orders sought by the landlord, Adjudicator Campbell was required to find that Mr. Mvano was ineligible for a rent subsidy renewal and consequently obligated to pay rent of $2,500 for each of October and November, 2023.

[26] Mr. Mvano also submits that Adjudicator Campbell's failure to hold a participatory hearing in this case was patentably unreasonable or procedurally unfair, or both. He argues that it was patently unreasonable for Adjudicator Campbell not to exercise the discretion to reconvene the matter as a participatory hearing and instead to "passively" accept the "untested truthfulness" of the Association's written allegations. Further, given the severe implications for tenants facing eviction and in

the absence of clear evidence that the facts were undisputed, Mr. Mvano argues that procedural fairness demanded that Adjudicator Campbell reconvene the matter as a participatory hearing.

[27] Lastly, Mr. Mvano argues that the Association's actions led him to reasonably believe that it would not terminate his tenancy due to the alleged failure to provide the Required Information, with the result that the Association is estopped from enforcing the Eviction Notice.

[28] The Association submits that Adjudicator Campbell was not required to ascertain Mr. Mvano's eligibility for a rent subsidy or hold a participatory hearing, and the failure to do either does not render the Original Decision patently unreasonable. The Association submits that Mr. Mvano's failure to dispute the Eviction Notice, a procedural opportunity available to him, does not render the Original Decision procedurally unfair, emphasizing that the *RTA* expressly authorizes an *ex parte* proceeding where a notice to end tenancy is not disputed by the statutory deadline. Lastly, the Association submits that equitable relief such as estoppel is not available to Mr. Mvano in the circumstances.

III. ISSUES

[29] The following issues were raised:

a) Is the Original Decision patently unreasonable because Adjudicator Campbell failed to inquire into Mr. Mvano's eligibility for a rent subsidy renewal?

b) Was Adjudicator Campbell's failure to hold a participatory hearing patentably unreasonable or procedurally unfair, or both?

c) Is the Association estopped from enforcing the Eviction Notice?

IV. ANALYSIS

A. Is the Original Decision patently unreasonable because Adjudicator Campbell failed to inquire into Mr. Mvano's eligibility for a rent subsidy renewal?

[30] Mr. Mvano argues that Adjudicator Campbell was required to ascertain whether the rent was indeed unpaid and that this necessitated an inquiry into whether the Association appropriately evaluated the information provided by Mr. Mvano to ascertain his eligibility for a rent subsidy. Mr. Mvano submits that Adjudicator Campbell's failure to make necessary inquiries and factual findings related to his eligibility for a subsidy renewal was patently unreasonable.

[31] Mr. Mvano relies on *Potecho v. Red Door Housing Society*, 2014 BCSC 36; *Ryan v. Mole Hill Community Housing Society*, 2022 BCCA 200; *LaBrie v. Liu*, 2021 BCSC 2486; *Hu v. Red Door Housing Society*, 2016 BCSC 1238; and *Najaripour v. Brightside Community Homes*, 2023 BCSC 2032, essentially for the proposition that where a rent shortfall stems from the landlord terminating or withdrawing a rent subsidy, the RTB must inquire into and make findings about whether the tenant has lost their entitlement to the subsidy.

[32] Mr. Mvano's position on this point fails to recognize that the conclusive presumption in s. 46(5) of the *RTA* was not engaged in the cases referred to above, and in those cases the RTB decision under review was not the result of an *ex parte* hearing pursuant to s. 55(4). His position is inconsistent with the plain language of s. 46(5) and s. 55(2)(b) and (4) of the *RTA*. Again:

- pursuant to s. 46(5), if a tenant who has received a notice to end the tenancy for unpaid rent does not, within the stipulated time, pay the rent or make an application for dispute resolution, the tenant is "conclusively presumed" to have accepted that the tenancy ends on the effective date of the notice and must vacate the rental unit to which the notice relates by that date; and

- pursuant to s. 55(2)(b) and (4), if a landlord applies to the RTB for an order of possession on grounds that the landlord has given a notice to end tenancy,

> the tenant has not filed an application to dispute the notice, and the time for making the application has expired, the RTB may grant an order of possession and a monetary order for unpaid rent without any further process; in other words, without a participatory hearing.

[33] As Mr. Mvano conceded in his written submission, the purpose of these provisions is to "streamline and expedite the process to grant orders of possession to landlords in cases where unpaid rent is uncontested".

[34] Through these provisions, the legislature has "clearly and expressly stated that a tenant's failure to respond within the statutory time limits … will, *by operation of law*, bring the tenancy to an end and entitle the landlord to regain possession of the rental unit": *Ganitano v. Metro Vancouver Housing Corporation*, 2014 BCCA 10 at paras. 43-44, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 98 [emphasis in original].

[35] In the result, it is not patently unreasonable for an RTB adjudicator to grant an order of possession on the sole ground that the tenant did not dispute a notice to end the tenancy within the statutory time limit: *Warkentin* at paras. 30, 31, 54 and 57.

[36] To be clear, the presumed acceptance of the end of their tenancy by a non-responding tenant does not in itself entitle the landlord to an order of possession; rather, the landlord must apply and the RTB adjudicator is permitted to grant the order without any further dispute resolution process: *Carpenter v. Verlaan*, 2023 BCSC 920 at para. 39. The tenant's presumed acceptance does not preclude the tenant from seeking judicial review of the decision that was made in their absence, if a valid ground for review exists: *Carpenter* at para. 41. The question is whether a valid ground has been demonstrated.

[37] As I have explained, when a landlord applies for an order of possession in circumstances where the s. 46(5) conclusive presumption is engaged, an RTB adjudicator is expressly permitted by s. 55(4) to grant an order of possession

provided the adjudicator is satisfied that the landlord has given a notice to end tenancy, the tenant has not paid the rent claimed in the notice and has not filed an application to dispute the notice, and the time for doing one or the other has expired. Those are the only findings that the adjudicator is required to make in these circumstances.

[38] In *Potecho* at para. 76, Justice Harris held that it was patently unreasonable for an RTB arbitrator to have found that a tenant living in subsidized housing did not provide the information necessary to prove his eligibility for a subsidized unit, in circumstances where there was no finding as to the applicable time frame or as to the specific information which had not been provided by the tenant. Crucially, this was a case where the tenant applied for dispute resolution to set aside a notice to end tenancy, resulting in a hearing on the merits before the RTB. *Potecho* does not stand for the proposition that it is patently unreasonable for an RTB adjudicator to fail to make such findings in circumstances where the s. 46(5) conclusive presumption is engaged, the requirements of s. 55(2)(b) have been met, and the order of possession is granted under s. 55(4).

[39] Similarly, in each of *LaBrie*, *Hu* and *Najaripour*, the tenant disputed a notice to end tenancy, and in *Ryan* the tenant paid the overdue rent as claimed by the landlord in a notice to end tenancy and then applied for dispute resolution. In all of these cases, the RTB held a participatory hearing and the s. 46(5) presumption was not engaged.

[40] Mr. Mvano also relied on *Mbulu v. Wu*, 2024 BCSC 60, but it too does not support his position. In that case an RTB review decision was found to be patently unreasonable for not taking into account the tenant's attempt to pay rent by e-transfer and the landlord's intentional decision to decline that rent payment so he could file a 10 day notice to evict the tenant. The landlord's misleading statement, in support of the landlord's original application, that rent had not been paid was held to have met the criteria for fraud (para. 35), which is one of the statutory grounds for an application for a review. In that case, the tenant failed to dispute the original 10 day

notice and there was no valid attack directly against the original RTB decision because the tenant was properly served, did not dispute, and the arbitrator made the correct decision based upon the evidence in support of the notice: *Mbulu* at para. 33.

[41] Adjudicator Campbell found that the Eviction Notice was served on Mr. Mvano on November 2, 2023 and was deemed to have been received by him on November 5, 2023; that Mr. Mvano failed to pay the overdue rent as claimed in the Eviction Notice within the five days granted under section 46(4) of the *RTA* and did not dispute the Eviction Notice within that five-day period; and that, in the circumstances, Mr. Mvano is conclusively presumed under section 46(5) of the *RTA* to have accepted that the tenancy ended on the effective date of the Eviction Notice, November 15, 2023. Having made these findings, Adjudicator Campbell was expressly permitted by the *RTA* to grant the orders in question and the landlord was entitled, as a matter of law, to regain possession of Mr. Mvano's unit.

[42] These findings were amply supported by the Association's application. Among other things, included in the Association's application was:

- a standard form RTB proof of service document claiming that the Eviction Notice had been served on Mr. Mvano on November 2, 2023, by attaching it to his door;
- the Eviction Notice, which expressly asserted that rent in the amount of $3,900 had not been paid by Mr. Mvano;
- the tenancy agreement;
- the landlord's direct request worksheet showing $2,500 was owed for each of October and November 2023, that $550 was paid for each month which left $3,900 owing, and that nothing had been paid since the Eviction Notice was issued; and
- correspondence from the Association to Mr. Mvano establishing that the Association had advised Mr. Mvano that his subsidy had been withdrawn as a

result of his failure to provide the information required to support his subsidy renewal and, effective October 1, 2023, he was required to pay full rent of $2,500.

[43] In conclusion, it was not patently unreasonable for Adjudicator Campbell to have done what was expressly authorized by the *RTA*. In other words, in the circumstances of this case, it was not clearly irrational, bordering on the absurd, or evidently not in accordance with reason for Adjudicator Campbell not to inquire further into Mr. Mvano's eligibility for a subsidy renewal and not to expressly find that Mr. Mvano was ineligible for a rent subsidy. To the contrary, in the circumstances, the granting of an order of possession was correct.

B. Was Adjudicator Campbell's failure to hold a participatory hearing patently unreasonable or procedurally unfair?

[44] There is no dispute that Adjudicator Campbell had the discretion not to grant the orders sought by the landlord on an *ex parte* basis and instead to convene a participatory hearing.

[45] Mr. Mvano argues that it was patently unreasonable for Adjudicator Campbell not to exercise this discretion and instead to "passively" accept the "untested truthfulness" of the Association's written application. Additionally, given the serious implications for tenants facing eviction and in the absence of clear evidence that the facts were undisputed, Mr. Mvano argues that procedural fairness demanded that Adjudicator Campbell reconvene the matter as a participatory hearing.

[46] Citing s. 58(3)(a) and (c) of the *Administrative Tribunals Act*, Mr. Mvano emphasizes that a discretionary decision is patently unreasonable if the discretion is exercised arbitrarily or is based entirely or predominantly on irrelevant factors. He observes that, pursuant to an RTB Policy Guideline, if an adjudicator has concerns about the material submitted by the landlord or needs to assess credibility, the adjudicator has the authority to adjourn the *ex parte* hearing and reconvene it as a participatory hearing. He argues that given the protective purpose of the *RTA* and the harsh consequences that flow from an order of possession, Adjudicator

Campbell had to "at least demonstrate consideration of whether a participatory hearing would offer a more fair and equitable resolution".

[47] I am not persuaded by this submission. There is nothing in the record before the RTB that suggests Adjudicator Campbell had or should have had questions about the materials submitted by the landlord or that it was necessary to assess credibility in order to make the required findings: that is, that the Eviction Notice was served on Mr. Mvano on November 2, 2023 and was deemed to have been received by him on November 5, 2023; that Mr. Mvano failed to pay the overdue rent as claimed in the Eviction Notice within the five days granted under s. 46(4) of the *RTA* and did not dispute the Eviction Notice within that five-day period; and that, in the circumstances, Mr. Mvano is conclusively presumed under s. 46(5) of the *RTA* to have accepted that the tenancy ended on the effective date of the Eviction Notice.

[48] As explained in more detail below, the Eviction Notice expressly set out the consequences for Mr. Mvano if he did not, within five days, either pay the rent claimed by the landlord to be owing or apply to the RTB for dispute resolution. Where a tenant fails to dispute a notice that is clear about the consequences of failing to do so, it is reasonable to infer that the tenant does not wish to participate in any further process. Put another way, it is reasonable to infer, from the tenant's failure to apply for dispute resolution, that the essential facts are undisputed.

[49] Of course, fairness issues may arise where there is another reason for the tenant's failure to apply for dispute resolution, such as where the tenant was unable to apply because of circumstances that could not be anticipated and/or were beyond the tenant's control. That situation is addressed below. Here, I am dealing only with whether it was patently unreasonable for Adjudicator Campbell not to exercise the discretion to reconvene the matter as a participatory hearing. For the reasons I have expressed, it was not.

[50] I turn now to Mr. Mvano's submission that Adjudicator Campbell's failure to hold a participatory hearing was procedurally unfair. Mr. Mvano argues that if he had "been afforded the chance" to present evidence and counter the landlord's evidence

the outcome of the Original Decision may have been different. He says it was procedurally unfair for Adjudicator Campbell to proceed *ex parte* "in the absence of any evidence that the unpaid rent is uncontested, or where necessary inquiries need to be made to resolve an issue".

[51] I start with a reminder of the factors relevant to determining the content of the duty of fairness. Again, they include, but are not limited to:

1. the nature of the decision being made and process followed in making it;
2. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. the importance of the decision to the individual or the individuals affected;
4. the legitimate expectations of the person challenging the decision; and
5. the choices of procedure made by the decision-maker.

[52] In this case, the first, third and fourth of these factors are conveniently considered together.

[53] The decision being made would cause Mr. Mvano to have to move out of his home of more than ten years. This is obviously of very great importance to him. However, the process followed included the Association serving the Eviction Notice on him, the Association proving such service in its application to the RTB, and Mr. Mvano having the opportunity to participate by disputing the Eviction Notice.

[54] The Eviction Notice is clearly labelled as a "legal notice that could lead to you being evicted from your home". That is followed by a heading, in capital letters, that reads "HOW TO DISPUTE THIS NOTICE". Following that, it provides that "you have 5 days to pay rent and or/utilities to the landlord or file an Application for Dispute Resolution with the Residential Tenancy Branch online, in person at any Service BC Office or by going to the Residential Tenancy Branch Office at #400 – 5021 Kingsway in Burnaby" and that "if you do not apply within the required time limit, you

are presumed to accept that the tenancy is ending and must move out of the rental unit by the effective date of this Notice". It sets out, expressly, the amount of rent that the landlord claims is owed. In a section on the second page there is a heading, in capital letters, that reads "IMPORTANT INFORMATION ABOUT THIS NOTICE". That is followed by advice that the notice is effective 10 days after it is received and an explanation of when the tenant is considered to have received it, depending on the manner of service. The third page contains a section headed "INFORMATION FOR TENANTS" that repeats the right to dispute the notice within 5 days, the manner in which to do that, and the consequences for failing to file a dispute, including that the landlord can apply for an order of possession. It also provides a phone number to call for more information.

[55] In these circumstances, notwithstanding the grave importance of the decision being made, it cannot be said that a tenant could reasonably or legitimately expect that they could fail to file a dispute within the time limit but avoid the expressly stated consequences; namely, being presumed to accept that the tenancy is ending and having to move out within ten days of receipt of the Eviction Notice.

[56] Contrary to Mr. Mvano's submissions, the process that was followed did afford him the opportunity to present evidence and counter the landlord's evidence. He had the opportunity to dispute the Eviction Notice, and the Eviction Notice clearly advised him about how to avail himself of that opportunity. Contrary to Mr. Mvano's submissions, there was evidence that the unpaid rent was uncontested and there were no substantive issues to resolve. Provided service of the notice is proved (as it was), it is reasonable to infer from the tenant's failure to apply for dispute resolution, that the essential facts are undisputed.

[57] I turn now to the second and fifth factors identified above as relevant to determining the content of the duty of fairness. These are the nature of the statutory scheme and the terms of the statute pursuant to which the body operates, and the choices of procedure made by the decision-maker.

[58] As already discussed, Adjudicator Campbell had the discretion not to grant the orders sought by the landlord on an *ex parte* basis and instead convene a participatory hearing. As already explained, there was nothing in the record that reasonably should have caused Adjudicator Campbell to determine that a participatory hearing was necessary in order for the required findings to be made. Upon being satisfied that the Eviction Notice was served on Mr. Mvano in a manner permitted by the *RTA*, it was reasonable to infer, from Mr. Mvano's failure to apply for dispute resolution, that he did not dispute the essential facts.

[59] As I have already alluded to, fairness issues may arise where there is another reason for the tenant's failure to apply for dispute resolution, such as where the tenant was unable to apply because of circumstances that could not be anticipated or were beyond the tenant's control. However, that concern is addressed by the statutory scheme and the terms of the *RTA*, which provide the opportunity for a tenant to seek a review of a decision, including a decision made in their absence.

[60] Pursuant to s. 79 of the *RTA*, a party to a dispute resolution proceeding before the RTB may apply for a review of a decision made in that proceeding, on certain stated grounds. Those grounds cover a range of scenarios that could, in the absence of the right to a review, seriously call into question the fairness of the RTB granting orders in default; that is, following an *ex parte* hearing in circumstances where a tenant does not apply for dispute resolution within the statutory timeline. For example, a party may apply for a review if they were unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control; where the party has new and material evidence that was not available at the time of the original hearing; where a procedural or technical error occurred that materially affected the result of the original hearing; where there is evidence that the original decision was obtained by fraud; where a necessary issue was not determined at the original hearing; and where an issue was determined at the original hearing that the decision-maker did not have jurisdiction to make.

[61] Mr. Mvano suggests that the Association knowingly adduced false or misleading evidence in the material it submitted in support of its request to the RTB for an order of possession. This suggestion appears to be based on Mr. Mvano's claim that the Association possessed pertinent evidence that it did not include in the material it submitted in support of that request. This evidence consists of correspondence exchanged between Mr. Mvano and the Association before the Original Decision was issued. In other words, it is evidence that Mr. Mvano must have known about. It was open to him to apply for a review of the Original Decision on the ground that it had been obtained by fraud, but he did not include that among the grounds relied on in his application for a review. Even if the "new" evidence was pertinent, the Association's failure to include it in the record before Adjudicator Campbell does not make the process followed by Adjudicator Campbell unfair.

[62] In summary, there is no question that the Original Decision was very important to Mr. Mvano. The possibility of losing one's home can be extremely serious and this consequence suggests that a high degree of procedural fairness is required. At the same time, the conclusive presumption in s. 46(5) and the *ex parte* process permitted by s. 55(4) of the RTA serve a legitimate purpose – to streamline and expedite the process for landlords in circumstances where there is no dispute about the orders they seek. The process followed by Adjudicator Campbell included the requirement for the Association to prove service of the Eviction Notice, which clearly explained what had to be done by Mr. Mvano to avoid the serious consequences. In all the circumstances, it was reasonable for Adjudicator Campbell to infer from Mr. Mvano's failure to apply for dispute resolution, that the essential facts were not in dispute. Through the review process, the statutory scheme provided safeguards that could be engaged if there were other reasons for Mr. Mvano's failure to dispute the Eviction Notice, or if he believed the Association knowingly adduced false or misleading evidence in the material it submitted in support of its request for an order of possession.

[63] Adjudicator Campbell's failure to hold a participatory hearing was not procedurally unfair.

C. Is the Association estopped from enforcing the eviction notice?

[64] As noted, Mr. Mvano argues that some of the Association's correspondence to him indicated that the Association "might not execute their threat to end [his] tenancy due to the alleged failure to provide information to determine his eligibility for a subsidy renewal". He submits that, as a result, the Association is estopped from enforcing the Eviction Notice. He relies heavily on a November 1, 2023 letter sent to him by the Association.

[65] As discussed, most, if not all of the correspondence in question, including the letter of November 1, 2023, was not in the record before Adjudicator Campbell. Rather, it was exhibited to an affidavit filed in this proceeding by the Association.

[66] There are two fatal flaws in this aspect of Mr. Mvano's case.

[67] First, it is founded upon evidence that was not in the record before Adjudicator Campbell and, paradoxically, Mr. Mvano has taken the position that, as such, the evidence in question is not admissible on this application. He correctly cites *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal),* 2018 BCCA 387 at paras. 34, 35 and 39, for the proposition that the function of this court on judicial review is supervisory and normally only the evidence contained in the record before the tribunal should be considered. Exceptions to this rule must be consistent with the limited supervisory jurisdiction of the court, and could include evidence of the tribunal's own expertise or evidence that casts light on the procedures followed by the tribunal: *Air Canada* at paras. 35-42.

[68] Second, and relatedly, the court's jurisdiction is supervisory and limited to reviewing the Original Decision; specifically, to determine whether Adjudicator Campbell committed a patently unreasonable error of fact, law, or mixed fact and law, or whether the process resulting in the Original Decision was unfair. The impact of the Association's conduct, as reflected in the correspondence in question, was not an issue before Adjudicator Campbell. Again, because Mr. Mvano did not apply for dispute resolution in relation to the Eviction Notice, the only issues that Adjudicator Campbell had to determine were whether the Association had given a notice to end

the tenancy, whether Mr. Mvano failed to pay the rent claimed in the notice and failed to file an application to dispute the notice, and whether the time for doing those things had expired. Mr. Mvano has not even attempted to argue that the impugned conduct of the Association renders the Original Decision patently unreasonable. For the reasons I have already given, the failure of the Association to include the correspondence in the material it submitted in support of its request for an order of possession does not render the process before Adjudicator Campbell unfair.

[69] Mr. Mvano referred to *Guevara v. Louie*, 2020 BCSC 380 as an example of a case where this court found that a landlord was estopped from relying on instances where the tenant was late in paying the rent in support of a notice terminating the tenancy for repeated late payment of rent. However, in that case Sewell J. applied the principles of estoppel in the course of reviewing the RTB decision in question, and he concluded that the decision-maker's failure to properly apply those principles was one of several reasons which, taken together, caused him to conclude that the decision was patently unreasonable. Again, Mr. Mvano has not even argued that the impugned conduct of the Association renders the Original Decision patently unreasonable.

V. CONCLUSION

[70] The petition is dismissed. Should it choose to recover them, the Association is entitled to its costs of the proceeding at Scale B.

[71] Given the timing of the release of this decision, the stay of the order of possession will be extended until July 31, 2024 at 4pm.

[72] The Association requested that I dispense with the requirements for the Association to file a requisition, a further affidavit confirming service, and a writ of possession ordering Mr. Mvano to deliver to the Association possession of the Property. This was not opposed by Mr. Mvano. In the circumstances, I dispense with those requirements.

[73] On or after August 1, 2024, the sheriff may enter the unit and cause the Association to have possession, and the sheriff may promptly seize and sell the goods and chattels that remain on August 1, 2024 to partially satisfy the unpaid rent.

"Warren J."