IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kurvers v. Strathmore Lodge Ltd.,*
2025 BCSC 74

Date: 20250117
Docket: S248187
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Marian Kurvers

Petitioner

And

Strathmore Lodge Ltd.

Respondent

Before: The Honourable Justice Morishita

On judicial review from: An order of the Residential Tenancy Branch, dated November 6, 2024 (RTB File No. 910172313)

Reasons for Judgment

The Petitioner, appearing in person:	M. Kurvers
Counsel for the Respondent:	C.R. Rubinstein
Place and Date of Hearing:	Vancouver, B.C. December 11 and 16, 2024 & January 13, 2204
Place and Date of Ruling given to parties with Reasons to Follow:	Vancouver, B.C. January 16, 2025
Place and Date of Judgment:	Vancouver, B.C. January 17, 2025

Introduction

[1] This is a petition for judicial review of a decision of an arbitrator (the "Arbitrator") from the Residential Tenancy Branch (the "RTB") under the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*].

[2] The Arbitrator issued a decision (the "Decision") dated November 6, 2024, giving effect to a settlement reached by the parties at the RTB hearing and granting an order of possession compelling the petitioner (the "Tenant") to vacate the subject rental property on December 1, 2024.

[3] The Tenant argues that the Arbitrator erred in determining which method of service of the Notice to End Tenancy was effected on the Tenant, and conducted the hearing in an unfair manner by exerting undue pressure on her to accept a settlement proposed by the respondent (the "Landlord").

[4] The Landlord argues that the petition should be dismissed.

[5] Counsel for the Director of the RTB (the "Director") filed an application response and an affidavit, but did not participate in the hearing of the petition.

Facts

Background

[6] Since about January 1, 2019, the Tenant has resided at the subject rental property, which is located in Downtown Vancouver (the "Subject Rental Unit").

[7] The Subject Rental Unit is managed by the Landlord.

[8] The materials before the Arbitrator show a landlord-tenant relationship that was challenging.

[9] The Landlord alleges that since the Tenant moved into the Subject Rental Unit, she has been very difficult to manage, initiated a number of legal proceedings, and has been causing harm to the Subject Rental Unit and other tenants of the building.

[10] The Landlord alleges that throughout the tenancy, it has received multiple complaints regarding the Tenant's behaviour, including:

a) Unauthorized installation of duct tape, which is obstructing ventilation and creating a safety hazard;

b) Breach of other residents' right to quiet enjoyment; and

c) Non-compliance with the landlord's requests for access to the Subject Rental Unit to address maintenance issues.

[11] The Tenant denies installing duct tape over vents in the kitchen and bathroom. She alleges that the tape was installed by the Landlord.

[12] In addition, the Tenant alleges that the Landlord failed to make required repairs and remediation to the Subject Rental Unit, is refusing to address her complaints about cigarette smoke, and is bullying and harassing her.

[13] Matters came to a head on September 24, 2024, when the Landlord attempted to serve the Tenant with a One Month Notice to End Tenancy for Cause (the "Notice to End Tenancy").

[14] The Notice to End Tenancy listed the following reasons for ending the tenancy:

a) The tenant significantly interfered with or unreasonably disturbed another occupant or the landlord, seriously jeopardized the health or safety or lawful right of another occupant or the landlord, and put the landlord's property at significant risk;

b) The tenant has engaged in illegal activity that has, or is likely to damage the landlord's property;

c) The tenant has engaged in illegal activity that has, or is likely to adversely affect the quiet enjoyment, security or physical well-being of another occupant of the property;

d) The tenant has not done required repairs of damage to the unit; and

e) Breach of a material term of the tenancy agreement that was not corrected within a reasonable time after written notice to do so.

[15] When the Landlord attempted to personally serve the Tenant with the Notice to End Tenancy on September 24, 2024, the Tenant advised the Landlord that she could not accept service of the notice at that time, because of her dyslexia. She further advised the Landlord that she would need some time to review the notice before she could sign for service.

[16] On that same day, the Landlord also served copies of the Notice to End Tenancy to the Tenant to the email address they had on file for the Tenant (pursuant to section 43(1) of the *Residential Tenancy Regulation*, B.C. Reg. 47/2003 [*Regulation*]), and by Registered Mail to the Tenant (under s. 88 of the *RTA*).

[17] Under s. 44 of the *Regulation*, the Notice to End Tenancy is deemed to be received the third day after being sent to an email address for service.

[18] Under s. 90 of the *RTA*, the Notice to End Tenancy is deemed to be received the fifth day after it is mailed via Registered Mail.

[19] In sum, the Tenant was served with the Notice to End Tenancy or deemed to have been served on the following dates: September 24, 2024 (personal service); September 27, 2024 (email service), and September 29, 2024 (Registered Mail).

[20] Under s. 47(4) of the *RTA*, a tenant served with a Notice to End Tenancy may dispute the notice by making an application for dispute resolution within 10 days after the tenant receives the notice.

[21] Thus, the Tenant was required to file an application for dispute resolution by October 4, 2024.

[22] The Tenant was under the mistaken belief that because she was served with the Notice to End Tenancy by three methods, she could choose which of the three methods she was served by, and that she would be bound by the deadline associated with that method of service. The Tenant believed that she could rely on the deemed service by Registered Mail, which would correspond to an October 9, 2024 deadline to file an Application for Dispute Resolution.

[23] The Tenant filed her Application for Dispute Resolution on October 9, 2024. In the application, the Tenant disputed the Notice to End Tenancy on the basis of "[f]alse and irrational allegations made against [her] designed to evict her instead of doing repairs." She further stated that the Landlord was falsely accusing her of installing duct tape over the kitchen and bathroom vents. She alleged that there was no duct tape installed in the bathroom and that the duct tape in the kitchen was installed by the Landlord.

[24] In addition, the Tenant's application sought the following relief:

a) An order to allow her to reduce rent for repairs, services, or facilities agreed upon but not provided under ss. 27 and 65 of the *RTA*;

b) An order for the Landlord to make repairs to the rental unit under ss. 32 and 66 of the *RTA*;

c) An order for the Landlord to provide services or facilities required under s. 27 of the *RTA*; and

d) Authorization to recover the filing fee for the application from the Landlord under s. 72 of the *RTA*.

[25] On October 10, 2024, the Landlord filed an Application for Dispute Resolution seeking an order for possession with respect to the Subject Rental Unit. In the application the Landlord noted the following in their description of the dispute:

- Despite multiple warnings the Tenant has not completed repairs to the unit;
- The Tenant failed to remove duct tape obstructing ventilation, posing serious health risks, including carbon monoxide poisoning and mould;
- The Tenant refused access for safety inspections on August 6 and 26, 2024;
- The Tenant was issued five caution notices between August 7 and September 18, 2024 for safety violations, and for breaching other residents' right to quiet enjoyment by recording them without consent and causing noise disturbance.

The November 6, 2024 RTB Hearing

[26] The hearing of the two applications was heard by telephone before the Arbitrator on November 6, 2024.

[27] The hearing was recorded. At the request of the Court, the Director filed a copy of the audio recording. An official court reporter-certified transcript of the hearing would have been be ideal; however, given cost and timeliness concerns, I was content to have respondent's counsel's office draft an unofficial transcript and then get agreement from the parties that the unofficial transcript accurately reflected the audio recording.

[28] As an aside, I note that my decision to proceed on this basis was an exercise of discretion that may be exercised differently by other judges.

[29] At the January 13, 2025 hearing, the petitioner advised that she had not had an opportunity to fully review respondent's counsel's unofficial transcript of the RTB hearing. In any event, the petitioner did not raise any concerns with the respondent's unofficial transcript. I reviewed the unofficial transcript and listened to the relevant portions of the audio recording. There were a few very minor and non-substantive errors in the unofficial transcript. I have corrected those errors in the portions of the transcript that are included in these reasons.

[30] At the RTB hearing the Arbitrator noted that because the Landlord's application (which she called the initial application) was regarding a one month notice to end tenancy, the Rules of Procedure authorized her to dismiss unrelated claims. The Arbitrator then noted that because the Tenant's application (which she called the secondary application) dealt with the one month notice to end tenancy, but had other claims which were unrelated, she would dismiss those unrelated claims, with leave to reapply. The Tenant's unrelated claims were the orders she sought for reduction of rent and to require the Landlord to make repairs and provide services and facilities.

[31] The Arbitrator provided no other reasons for dismissing the unrelated claims.

[32] The Arbitrator then moved on to dealing with service of the Notice to End Tenancy and whether the Tenant had responded in time. The following exchanges occurred in this regard (emphasis added):

Arbitrator:	[…] so in regards to the one-month notice dated September 24, 2024, I have confirmed that the email address that the tenant would have received the email address sorry, the notices here or sorry the one month notice is, in fact, the email that was pre-agreed to by the tenant and according to the regulation, so the residential tenancy regulation section 44, it does state that correspondence received in that method is being served on the third day. So, if the email was sent September 24th the tenant would have had until September 27th to file an application disputing this one-month notice, and also for the tenant, it does state that on the top of the one-month notice that you would have received, where it says, how do you dispute this notice. So, I just want to confirm with you, just because on your application, it says, I think you just provided the service by registered mail. So, I'll just confirm with you, did you receive the email on September 24, 2024?
Tenant:	Yes, and I received a registered, well I received three of them, so I received that and the registered mail and in-person one, which I would like to point out I did not refuse to sign. I …. [the landlord] said I was unwilling to sign the in-person proof of service. This is not true. I stated several times I was willing to sign it, but the landlord was not willing to wait.
Arbitrator:	Okay, so I think with that type of service, it's kind of irrelevant at this point. There's other methods of service that were provided and so because you've also confirmed that you received the email September 24, 2024, I'm just going to provide some information to you […] Okay, so on the one-month notice at the

top, it says, “how to dispute this notice?,” you have the right to dispute this notice within 10 days of receiving it by filing an application for dispute resolution with the Residential Tenancy Branch online, in person. And then it goes on to say, “if you do not apply within the required time limit, you’re presumed to accept that the tenancy is ending and must move out of the rental unit by the effective date of this notice”. So, the effective date of the notice was October 31, 2024 and so in regards to your application, it was filed late, so you would have had so even if I take the extra three days that the regulations allows, September 27, you applied…let me just see here. I’m just going to have a look at when you applied here […] so you would have had to apply by October 7 at the latest, if I considered the deeming provision in the regulation. **So you filed late. You filed past the 10 days. So because you filed past the 10 days, you are presumed to accept that the tenancy ended, and the effective date of the notice that was provided to you would be the move out date, which would have been October 31, 2024 and so at this time, there’s two things that I can offer the parties. I can either make a decision myself as to when the tenancy will end and issue the landlord an order of possession, or the parties can come to a resolution in terms of a move out date and so the nice thing about a settlement is that it allows both parties the opportunity to know the exact date that the tenancy is ending.** And so I will ask, I’ll ask Marian, in terms of a move out date, how much time do you think you need to move out?

Tenant: I have a question. The landlord didn’t specify that they were going with the date with the email delivery date. So they sent a registered mail which had a different response date, and I acted on that one because I assume that they wouldn’t have sent that unless they meant it.

Arbitrator: I understand that, and that’s why I took the time to go through and ask the landlord which were the service methods that were provided and that’s why I asked the landlord to let me know where I can find that it was, in fact, a pre-agreed email address, and because I have verified that in fact you did receive the one-month notice in this method, so by email, that was the first initial time that you would have received it. That’s when you would have to act on it and it does provide that in the one month notice. And so normally if a tenant is disputing the notice, normally the tenant disputes the notice first, and because you did not dispute the notice within the required time limit, that’s why the landlord would have then filed their application first. So normally, if the tenant files their application first, then the hearing takes place to determine where there’s valid grounds. **But under the Act I am required to uphold the notice if the service requirements are not met. So in this case, you had the 10 days and you did not dispute it within that time limit**.

Tenant: But I did dispute it within the time limit for the registered mail.

Arbitrator: I understand what you’re saying, but the first time that it was provided to you, you didn’t dispute it within that time limit. So it’s

> up to you. There's one of two things that can happen. It's called conclusive presumption. So it means because you didn't dispute it within the 10 days and I factored in, I even said to you, I factored in the three days that the regulations allows by email, although you stated that you received the email on September 24, 2024, which is the date the landlord has confirmed in their evidence that that was when the email was provided to you as well. I factored in the three days grace period for the email, which would be September 27th so even if I factor in the extra three days, the application was still not filed within the time limit. **So again, I'm providing this information. It's up to you what you would like me to do. If I issue a decision and I issue the landlord an order of possession, I have to consider when the effective date of the notice was. So in this case, the effective date of the notice was October 31st so this date has already passed. The landlord has already provided you the one-month for you to move. So at this point, it is up to my discretion how much time I want to give you to move, and it can be as early as seven days. The other option is to do a settlement agreement with the landlord. Again, the nice thing about the settlement agreement is that if you do need more time, it allows you more time to move and so it's up to you which one you want to take at this point** […]
>
> Arbitrator: Okay, so then I'll just confirm with Marian, would you like to try and do a settlement agreement with the landlord for a move out date?
>
> Tenant: Yes, yes I would.

[33] The hearing then moved into a settlement/mediation phase, where the arbitrator discussed with the parties resolving a move out date. During that part of the hearing the following exchange occurred:

> Arbitrator: Okay, so then I'll just ask Marian so the landlord has indicated that they're not willing to give an extension past the end of this month, so November 30th So, I'll ask if you'd be willing to do a settlement agreement for a move out date of November 30, 2024?
>
> Tenant: I would prefer Dec 30th.
>
> Arbitrator: Okay, so I guess at this point that was the final agreement in terms of a move out date that the landlord has provided. So, it's completely up to you whether you want to do the settlement agreement. The landlord's indicated that they're only going to give until that, that's the absolute date, November 30th.
>
> Tenant: I you know that's only three weeks. That's not even a month. That's just, I just can't manage in that short a period.
>
> Arbitrator: **Okay, so the other thing is, if you're not, if you don't agree with the settlement agreement, if I was to issue an order of**

> **possession, it could, it could be as early as seven days. So the effective date as soon as the landlord serves you, would be seven days, so that's earlier than the time limit the landlord is allowing you. So it's up to you, what you would prefer, for the landlord to provide you the opportunity to stay until the end of the month, or if you would like a decision made where there's a possibility that you would have to move out sooner than that?**
>
> Tenant: **Well, I don't really have a choice then do I, I have to take the 30th November?**

[34] The Arbitrator then confirmed with the Landlord agreement of a move out date of November 30, 2024 and an order of possession that would be enforceable as of December 1, 2024.

[35] The RTB hearing concluded approximately 36 minutes after it started.

The Decision

[36] Pursuant to section 64.2 of the *RTA*, the Arbitrator recorded the settlement in the form of a decision and order.

[37] The Decision, which is two pages long, indicates that the Arbitrator dealt with both the Landlord and Tenant's respective applications. The Decision further notes as follows (bold in original):

> Rule 2.3 of the Residential Tenancy Branch Rules of Procedure authorizes me to dismiss unrelated claims. I considered the Landlord's application for an Order of Possession based on a One Month Notice to End Tenancy for Cause and their application filing fee. In the Tenant's application, I considered only the claim to cancel the One Month Notice and the filing fee as they are directly related to the Landlord's application. The Tenant's remaining claims are dismissed, with leave to reapply.
>
> **Settlement Reached**
>
> Under section 63 of the Act, the Arbitrator may assist the parties to settle their dispute. If the parties settle their dispute during the dispute resolution proceedings, the settlement may be recorded in the form of a Decision or an Order. During the hearing the parties discussed the issues between them, turned their minds to compromise and reached an agreement to settle their dispute with the following terms:
>
> - both parties agreed to the tenancy ending on November 30, 2024, and the Tenant vacating the rental unit on November 30, 2024

> The parties confirmed during the hearing that this agreement was made voluntarily and that it was made in full satisfaction of the Landlord's application and the Tenant's application.
>
> **Conclusion**
>
> To give effect to the settlement reached between the parties, and as discussed at the hearing, I grant an Order of Possession to the Landlord effective **on December 1, 2024,** after service of this Order on the Tenant. Should the Tenant or any occupant on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.
>
> This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act

The Review Consideration Decision

[38] Under s. 79 of the *RTA,* a party may apply to the Director for a review of the Director's decision or order. The Director's power on a review is limited. Section 79(2) provides eight grounds on which a decision or order may be reviewed:

a) a party was unable to attend the original hearing or part of the original hearing because of circumstances that could not be anticipated and were beyond the party's control;

b) a party has new and relevant evidence that was not available at the time of the original hearing and that materially affects the decision;

c) a party, because of circumstances that could not be anticipated and were beyond the party's control, submitted material evidence after the applicable time period expired but before the original dispute resolution proceeding, and that evidence was not before the director at the original dispute resolution proceeding;

d) a person who performed administrative tasks for the director made a procedural error that materially affected the result of the original dispute resolution proceeding;

e) a technical irregularity or error occurred that materially affected the result of the original dispute resolution proceeding;

f) a party has evidence that the director's decision or order was obtained by fraud;

g) in the original dispute resolution proceeding, the director did not determine an issue that the director was required to determine; and

h) in the original dispute resolution proceeding, the director determined an issue that the director did not have jurisdiction to determine.

[39] On November 12, 2024 the petitioner applied for a review of the Decision.

[40] The petitioner sought a review on three grounds: (1) that the decision was obtained by fraud; (2) there was procedural error; and (3) that there was an issue that was not determined.

[41] Adjudicator S. Smit issued the Review Consideration Decision on November 12, 2024 (the “Review Consideration Decision”).

[42] The Review Consideration Decision dismissed the petitioner’s application for review.

[43] With respect to the petitioner’s allegation that the Landlord provided false testimony, the review adjudicator found that because the parties reached a settlement at the hearing, the outcome of the dispute would have been no different, because the testimony of the parties was not used to make a decision.

[44] With respect to the petitioner’s allegation of procedural error, the review adjudicator noted that the application must show that RTB staff performing an administrative task made a procedural error, and that that error had an impact on the outcome of the proceeding. The review adjudicator further noted that arbitrator or adjudicator decisions cannot be reviewed under this ground. The review adjudicator found that the petitioner had not sufficiently demonstrated that an RTB staff member aside from the Arbitrator made a procedural error that directly affected the outcome.

[45] With respect to an issue not being determined, the petitioner argued that the Arbitrator did not evaluate the allegation of fraud against the Landlord. The review adjudicator found that because the parties reached a settlement, the Arbitrator did not miss an issue that was required to be determined.

[46] Having exhausted the procedures available for her with the RTB, the petitioner filed this petition on November 26, 2024.

Positions of the Parties

[47] The petitioner argues that the Arbitrator refused to listen to her claims against the respondent that relate to the ending of the tenancy. She says she was prepared to present evidence that demonstrated the respondent's mistreatment of her, and that the Arbitrator wrongfully found those to be irrelevant and wrongfully did not listen to her.

[48] The petitioner further argues that the Arbitrator erred and was unfair in her determination of which method of service was effected on her and related to that, the deadline on which the petitioner was required to a file a dispute.

[49] Last, the petitioner says that the arbitrator exerted undue pressure on her to accept the respondent's settlement proposal to vacate the Subject Rental Unit in 30 days.

[50] The respondent says that the Arbitrator acted reasonably when dismissing the petitioner's claims with the right to reapply, and in assisting the parties to negotiate a settlement.

[51] Further, the respondent argues that there was no lack of procedural fairness, as the petitioner failed to submit her materials in time. The respondent states that the petitioner was able to participate in the hearing and willingly negotiated and accepted the proposed settlement.

Issues

[52] The issues for the Court to determine are:

a) Is the Decision reviewable on judicial review?

b) If so, was the Decision reached in an unfair manner and/or a patently unreasonable exercise of discretion?

Is the Decision reviewable on judicial review?

Law

[53] In *Sadahy v. EMV Holdings Corporation*, 2016 BCSC 262 the petitioner tenant sought an order setting aside the decision of a RTB dispute resolution officer. The officer's decision concluded that a settlement had occurred between the tenant and the respondent landlord, and granted a possession order respecting the subject rental suite.

[54] The relevant background facts in *Sadahy* were as follows:

- The landlord served the tenant with a Notice to End Tenancy on the grounds of illegal activity (the landlord's view was that the tenant stole shoes that went missing from the communal laundry room).
- The tenant failed to file a dispute within the deadline.
- The landlord applied for a possession order and obtained a hearing date.
- The tenant filed the dispute notice over three weeks late.
- At the RTB hearing, the tenant signed a Mutual Agreement to End Tenancy. The RTB arbitrator recorded the parties' settlement in a decision.
- The day before the tenant was to vacate, she filed a petition for judicial review
- In the judicial review proceeding, the tenant deposed that at the RTB hearing the arbitrator did not accept any evidence from her and informed her of the high standard that needed to be met in order to be granted an

> extension of time to file the dispute. She further deposed that the arbitrator insinuated that if she failed to meet that high standard, she could be evicted immediately and that she felt pressured to settle, as the arbitrator made settlement seem like the only viable option. Last, the tenant deposed that the arbitrator did not provide her with an opportunity to present her evidence as to why she missed the filing deadline.

[55] The chambers judge remitted the matter back for a rehearing due to a lack of procedural fairness and under the principle of *audi alteram partem* (i.e. the right of each party to be heard). In reaching this decision, the chambers judge held that the dispute resolution officer had a duty to hear the tenant's arguments and review them in full, rather than embark on the settlement proceedings.

[56] The landlord appealed. The Court of Appeal allowed the appeal: *Sadahy v. EMV Holdings Corporation*, 2017 BCCA 98.

[57] In reaching its decision, the Court of Appeal noted that the appeal turned on the issue of whether the chambers judge was correct to hold that procedural fairness required the RTB officer to hear the tenant's arguments in full rather than embarking on settlement proceedings: at para. 16.

[58] Further, the Court of Appeal also noted that the chambers judge did not address the tenant's assertion that the settlement should be set aside, nor did the chambers judge make a finding that the RTB officer had exerted pressure upon the tenant to settle, other than by encouraging her to engage in settlement discussions before presenting her case: at para. 8.

[59] The Court of Appeal concluded that it could not be said that the RTB hearing did not confirm with the requirements of procedural fairness, and moreover that there was an insufficient basis upon which to conclude that the settlement was coerced: at para. 6.

[60] The Court of Appeal then went on to discuss, at para. 27, its views with respect to the statutory power that was subject to judicial review in the case before it. The Court writes:

> [28] However, I also wish to express my views with respect to the statutory power that was subject to judicial review in this case, because it is important to understand the issue determined by this appeal. Section 5 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*], provides:
>
> > (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of *a* statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.
> >
> > [Emphasis added.]
>
> [29] The emphasized phrase is defined:
>
> > In this Act:
> >
> > "statutory power of decision" means a power or right conferred by an enactment to make a decision deciding or prescribing
> >
> > > (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
> > >
> > > (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,
> >
> > and includes the powers of the Provincial Court; …
> >
> > [Emphasis added.]
>
> [30] In *Stark v. Board of School Trustees of School District No. 39 (Vancouver)*, 2005 BCSC 931, (upheld on appeal at 2006 BCCA 124, without addressing this question) Ballance J. considered challenges to agreements, awards and decisions in a labour dispute, all brought pursuant to the *JRPA*. In relation to the challenge to the settlement, she held, correctly in my view:
>
> > [33] The Settlement Agreement is an agreement reached among parties facilitated through mediation and is not a reviewable decision under the *Judicial* Review *Procedure Act*. There is no basis for judicial interference in relation to it in this proceeding.
>
> [31] The *recording* of the settlement is certainly the exercise of a statutory power and may amount to *the exercise of a statutory power of decision*. In the case at bar, the judge might have set aside the Decision if she had found the Officer had erred in exercising her discretion under s. 63(2) to record the settlement as a decision. She did not address that question or the substantive question: whether the settlement was fundamentally flawed as a product of coercion. The respondent, seeking to set aside a settlement as coerced,

> obtained a judgment that addressed the process that ought to have been engaged in order to ensure a fair determination of a dispute on the merits rather than the validity of the settlement.
>
> [32] The real issue raised by the respondent, whether she was bound by the agreement she entered into – whether, pursuant to s. 55(2) of the *Residential Tenancy Act*, she had agreed in writing to end the tenancy – was not amenable to judicial review. In allowing the appeal, therefore we will simply reinstate the decision to record the agreement as a decision of the Director of the Residential Tenancy Branch. We should do so because no case was made out that the Officer erred by recording the settlement in the form of a decision.

[61] In my view, the Court of Appeal in *Sadahy* does not say that no settlement agreement reached among parties and recorded in a decision at an RTB hearing is reviewable on judicial review. As the Court of Appeal writes at para. 31 of its decision, the chambers judge may have set aside the RTB officer's decision if she found that the officer had erred in exercising her discretion to record the decision as a settlement. Nevertheless, the Court of Appeal notes that the chambers judge did not address that issue or the issue of whether the settlement at the RTB hearing should be set aside as a product of coercion.

[62] It is important to note that the tenant and landlord in *Sadahy* signed a Mutual Agreement to End Tenancy at the RTB hearing.

[63] Section 44(1) of the *RTA* sets out circumstances where a tenancy ends. It's reads (emphasis added):

> **44**(1) A tenancy ends only if one or more of the following applies:
>
> (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
>
> (i) section 45 *[tenant's notice]*;
>
> (ii) section 45.1 *[tenant's notice: family violence or long-term care]*;
>
> (iii) section 46 *[landlord's notice: non-payment of rent]*;
>
> (iv) section 47 *[landlord's notice: cause]*;
>
> (v) section 48 *[landlord's notice: end of employment]*;
>
> (vi) section 49 *[landlord's notice: landlord's use of property]*;

(vii) section 49.1 *[landlord's notice: tenant ceases to qualify]*;

(viii) section 50 *[tenant may end tenancy early]*;

(b) 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) **the landlord and tenant agree in writing to end the tenancy**;

(d) the tenant vacates or abandons the rental unit;

(e) the tenancy agreement is frustrated;

(f) the director orders that the tenancy is ended;

(g) the tenancy agreement is a sublease agreement

[64] Section 55 of the *RTA* sets out how a landlord can obtain possession. It reads (emphasis added):

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:

(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.**

[65] In *Sadahy*, the tenant and landlord signed, at the hearing, a standalone written settlement agreement ending the tenancy. This contrasts with a situation where an oral settlement agreement ending the tenancy is made between parties at the hearing. In the latter, the settlement agreement is only enforceable if recorded in a decision.

[66] Since *Sadahy,* this Court has confirmed that a decision to record a settlement agreement reached during an RTB hearing can amount to an exercise of a statutory power of decision, subject to judicial review: *Shaikh v. Brar*, 2023 BCSC 1285, at para. 114.

[67] A party seeking to set aside such a decision can succeed on judicial review if they demonstrate that it was patently unreasonable to record a settlement as a decision or that the process that led to the settlement was procedurally unfair: *Shaikh*, at paras. 90-115.

[68] In *Shaikh*, the tenant sought judicial review of an RTB arbitrator's decision recording a settlement and making an order of possession compelling the tenant to vacate the subject premises.

[69] The tenant argued that the RTB hearing became a mediation-arbitration and was conducted in an unfair manner, particularly when the arbitrator advised them partway through the hearing that their claims would be severed and dismissed without a hearing (with leave to reapply), and then pressured them to move ahead with a partial settlement dealing only with the claim of the landlords.

[70] Unlike the situation in *Sadahy,* where the parties signed a written agreement to end the tenancy, in *Shaikh* the parties made an oral agreement.

[71] After reviewing the law and considering the evidence, Justice Veenstra held that the arbitrator's decision to record the decision was reviewable on judicial review.

Analysis

[72] The facts of this case are similar to those in *Shaikh.* The parties in this case reached an oral settlement agreement at the RTB hearing. In the settlement, the parties agreed to end the tenancy and agreed on a move out date. As set out above, the oral agreement to end the tenancy was only enforceable if the Arbitrator recorded the agreement as a decision, which she did.

[73] Accordingly, the Arbitrator's decision is reviewable on judicial review.

Was the Decision reached in an unfair manner and/or a patently unreasonable exercise of discretion?

Law

[74] In *Shaikh*, Justice Veenstra helpfully sets out the applicable standard of review as follows:

> [85] The standard of judicial review from an RTB arbitration is prescribed by s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]:
>
> > (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
> >
> > > (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> > >
> > > (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, and
> > >
> > > (c) for all matters other than those identified in paragraphs (a) and
> > >
> > > (d) the standard of review to be applied to the tribunal's decision is correctness.
> >
> > (3) 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.

[86] In *Baker* (cited above in *Sadahy*), Justice L'Heureux-Dube identified two central ideas that underlie judicial review of discretionary decisions:

> [53] … In my opinion, these doctrines incorporate two central ideas -- that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the Canadian Charter of Rights and Freedoms (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).

[87] What is patently unreasonable was recently discussed in *Hollyburn Properties Limited v. Staehli*, 2022 BCSC 28 at para. 25 (quoted and applied in *Wedekind* at para. 89):

> (a) as expert tribunals are entitled to significant deference, the standard is an onerous one and their decisions can only be quashed if there is no rational or tenable line of analysis supporting them (*Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 at para. 65; aff'd 2009 BCCA 229);
>
> (b) a decision is patently unreasonable if it is openly, evidently, and clearly irrational, or unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures (*Gichuru v. Palmar Properties Inc.*, 2001 BCSC 827 at para. 34, citing *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114);
>
> (c) a patently unreasonable decision is one that almost borders on the absurd (Voice Construction Ltd. v. Construction & General Workers' Union, Local 92, 2004 SCC 23 at para. 18 and West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal), 2018 SCC 22 at para. 28);

> (d) it is possible that a great deal of reading and thinking will be required before the problem in a patently unreasonable decision is apparent, but once its defect is identified, it can be explained simply and easily, leaving no real possibility of doubting that the decision is defective (*Yee v. Montie*, 2016 BCCA 256 at para. 22);
>
> (e) the standard of patent unreasonableness also applies to the consideration of adequacy of reasons, which involves an assessment of the justification, transparency and intelligibility of the decision-making process (*Vavilov*); and
>
> (f) under the *RTA* regime, the overriding test for adequacy of reasons is whether a reviewing court is able to understand how and why the decision was made (*Ganitano v. Yeung*, 2016 BCSC 2227 at para. 24).

[88] Authorities commenting on procedural fairness issues in the RTB context were usefully summarized by Justice Giaschi in *Bedwell Bay Construction v. Ball*, 2022 BCSC 559:

> [55] In *Ndachena v Nguyen*, 2018 BCSC 1468, at paras. 55-58, Justice Sewell addressed the duty of procedural fairness generally and specifically in relation to RTB hearings. He identified some of the relevant factors and held that a high degree of procedural fairness was required in an RTB hearing.
>
> > [55] It is settled law that a decision reached through an unfair process cannot stand. In *Baker v. Canada (Minister of Citizenship and Immigration)* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, the Court summarized the considerations going into determining the nature and extent of a duty of fairness in particular circumstances.
> >
> > [56] The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker.
> >
> > [57] Several factors are relevant to determining the content of the duty of fairness: (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 individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.
>
> [58] I am satisfied that the petitioners were entitled to a high level of procedural fairness in the Dispute Resolution Applications. The issues before the Arbitrator were adversarial with serious financial consequences to the petitioners. The statutory scheme under the RTA vests the RTB with the same powers in residential tenancy disputes to grant monetary judgments as the provincial court has in other matters.
>
> [59] The RTB Rules govern Dispute Resolution proceedings. They contemplate a high level of procedural fairness. Any person dealing with the RTB would have a reasonable expectation that the RTB Rules would be complied with.

[56] Justice W.A. Baker was of a similar view in *Khan v. Savino*, 2020 BCSC 555, at para. 17:

> [17] Many cases have considered what level of procedural fairness is to be applied in RTB hearings, and have concluded that such hearings require the adjudicator to observe a high degree of procedural fairness, following the analysis in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 [*Baker*]: *Fernandez v. Sakr*, 2012 BCSC 1024 at paras. 25-30; *Ganitano v. Metro Vancouver Housing Corp.*, 2009 BCSC 787 at para. 40; *Fulber v. Doll*, 2001 BCSC 891 at para. 30; *Ndachena v. Nguyen*, 2018 BCSC 1468 at para 58.

[57] In *Kikals v. British Columbia (Residential Tenancy Branch)*, 2009 BCSC 1642, in relation to RTB hearings, Justice McEwan observed:

> [37] It should be understood that in a system as stripped of the usual guarantees of due process as this, with no record, hearings by telephone, and lay participants appearing without assistance or advice, extra care must be taken to ensure fairness and the appearance of fairness…

> [58] Similarly, in *PHS Community Services Society v. Swait*, 2018 BCSC 824, Justice Sharma wrote:
>
> > [88] In *Baker*, the Supreme Court of Canada stated assessing procedural fairness requires a contextual approach in that the court looks to "the decision being made and its statutory, institutional, and social context" (para. 22) to determine if parties have been fully heard, and know the case against them. It is important to remember that Board hearings are less formal than tribunals acting in a quasi-judicial capacity, and hearings are often conducted by telephone. This does influence what procedural steps are required to accord with the duty of fairness.
>
> [Emphasis added by Giaschi J.]

[89] In *Holewell v. Lally*, 2019 BCSC 1567, the tenant argued that because his application for monetary compensation had been filed before the landlord's application for an order for possession, it was not proper for the arbitrator to deal with the landlord's application first. Justice A. Ross did not accept this submission, stating:

> [55] Second, it was not procedurally unfair to deal with one issue before another issue. The adjudicator is not required to consider issues based on the sequence of their filing. If that were the case, civil actions could only proceed in the order of which party filed their pleadings first. A counter-claim could never be considered before the initial claim. A debtor could prevent enforcement proceedings by suing the creditor. That is clearly not the law in civil litigation, nor is it the case in administrative law. If one issue is capable of being resolved and the other is not, the arbitrator is at liberty to resolve the issue that he or she is capable of resolving. At page 2 of his decision, the arbitrator described his reasoning with respect to the severance of the issues:
>
> > The parties were advised that Rule 2.3 of the Rules of Procedure permits an arbitrator to exercise discretion to dismiss unrelated claims with or without leave to reapply. In these circumstances, I find it appropriate to exercise my discretion to sever certain aspects of the parties' application. The most pressing issue to address is related to the payment of rent and whether or not the tenancy will continue. The parties are granted leave to reapply for the remainder of the relief sought at a later dated, as appropriate.
>
> [56] As noted, in taking this step, the arbitrator also dismissed Mr. Lally's application for damages to the apartment and the cost of repairs. He granted both parties liberty to reapply.

> There was a real dispute between the parties regarding why the repairs needed to be carried out and who was at fault for the condition of the apartment. The arbitrator felt that the termination of the tenancy was a more pressing issue and he proceeded on that basis. As noted, Mr. Holewell's belongings remained in the apartment. He had an obligation to pay rent. There had been no agreement on an abatement of rent.
>
> [57] I do not find that exercising his discretion in this fashion was procedurally unfair, nor did it lead to an unfair result.

[75] In *Shaikh*, Justice Veenstra held that the decision of the arbitrator to sever and dismiss the tenant's claims was reached in a manner that was procedurally unfair. In reaching this decision, Justice Veenstra noted, at para. 90, that the arbitrator "clearly came to firm views as to the question of severance and dismissal either prior to, or at a very early stage of the hearing, and simply refused to allow the parties to be heard on that question."

[76] Justice Veenstra further noted that as a result of intensive interventions by the arbitrator, including the frequent use of the spectre of the tenant being suddenly unhoused if a two-day order of possession was granted, the tenant felt that they had to agree to a partial settlement. Justice Veenstra found that the process used by the arbitrator was fundamentally flawed, and moreover, had he been required to decide the issue, he would have concluded that the arbitrator's decision to record the decision in that case was patently unreasonable.

[77] In the result, Justice Veenstra set aside the arbitrator's decision and remitted the matter back to the arbitrator for a rehearing.

Analysis

[78] In my view, the RTB hearing was conducted in a manner that was not procedurally fair.

[79] Administrative decisions must be made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, and with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision maker.

[80] As Justice Sewell has noted in *Ndachena* and Justice Giaschi in *Bedwell Bay Construction*, the RTB rules which govern dispute resolution hearings contemplate a high level of procedural fairness.

[81] The petitioner was not aware that she had missed the deadline to file her dispute until the hearing. Up to that point, she was under the impression that the deadline to file her Application for Dispute Resolution was 10 days from the date the Notice to End Tenancy was deemed served by Registered Mail. She filed her Application for Dispute Resolution on October 9, 2024, which was 10 days from the deemed Registered Mail service date.

[82] As indicated above, the hearing took just over 36 minutes. The preliminary and introductory matters took up the first 14 minutes of the hearing, after which the Arbitrator moved into a discussion about service of the Landlord's Notice to End Tenancy. After about eight minutes of the Arbitrator reviewing service-related documents and asking clarification questions, the Arbitrator, at about the 22 minute mark, began asking more substantive questions relating to service of the Notice to End Tenancy and discussing the deadline for the petitioner to file a dispute.

[83] At about the 25 minute mark of the hearing, the Arbitrator told the petitioner that she filed her dispute late and as a result she was presumed to accept that the tenancy had ended. The Arbitrator then stated that there were two things she could offer the parties: she could either make the decision herself as to when the tenancy would end and issue the Landlord an order of possession, or the parties could come to a resolution in terms of the move out date. The Arbitrator encouraged the parties to settle, adding that the "nice thing about a settlement is that it allows both parties the opportunity to know the exact date that the tenancy is ending." She then asked the petitioner how much time she needed to move out.

[84] The Arbitrator's statement that "there's two things that [she could] offer the parties" was incorrect. There was another option. Under s. 66(1) of the *RTA*, the Arbitrator could have extended the deadline for the petitioner to have filed her

Application for Dispute Resolution to October 9, 2024, the date that the petitioner's application was filed. Section 66(1) reads:

> **66**(1)The director may extend a time limit established by this Act only in exceptional circumstances, other than as provided by section 59 (3) *[starting proceedings]* or 81 (4) *[decision on application for review]*.

[85] It may very well be that the petitioner's reasons for filing her dispute late did not amount to exceptional circumstance; however, at no point in the hearing did the Arbitrator mention that the petitioner could apply for an extension of the deadline.

[86] The petitioner did try to provide an explanation. She indicated that she filed her dispute by the deadline associated with the service by Registered Mail, which she thought was acceptable. The Arbitrator was dismissive of the petitioner's attempts to explain the late filing. The Arbitrator's response was to say "I understand what you're saying, but the first time that it was provided to you, you didn't dispute it within that time limit." The Arbitrator then repeated that the petitioner had two options: the Arbitrator could issue a decision and grant the respondent an order of possession, in which case she indicated it was up to her discretion how much time she wanted to give the petitioner to move – which could be as early as seven days. Alternatively, the petitioner could do a settlement agreement with the Landlord. The Arbitrator encouraged a settlement agreement on the basis that if the petitioner needed more time to move out she could negotiate more time.

[87] At this point the petitioner indicated that she would do a settlement agreement with the respondent.

[88] Again, at no point did the Arbitrator indicate that the petitioner could ask the Arbitrator to make a ruling on whether the deadline to file the dispute could be extended.

[89] The petitioner deposed in her Affidavit that she felt undue pressure at the hearing to accept the settlement or have the Arbitrator make a decision that was worse.

[90] The *RTA* gives the Arbitrator the authority to assist the parties to settle their dispute. In serving their role as a mediator, it can be useful and appropriate for an arbitrator to push parties in order to encourage a settlement. However, in carrying out a mediator role, an arbitrator must be careful to not exert undue pressure, particularly when dealing with self-represented parties, or parties that are unfamiliar with the process. Moreover, an arbitrator must not provide inaccurate information to the parties when trying to encourage a settlement.

[91] In this case, as mentioned above, the Arbitrator's statement to the petitioner that she only had two options was inaccurate.

[92] In addition, the Arbitrator made it clear to the petitioner that her options were to try to negotiate a settlement with the Landlord that would provide for a later move out date, or not settle and risk having the Arbitrator rule that she would have to move out as soon as seven days from the hearing date. At that point the Arbitrator had already dismissed the petitioner's unrelated claims, without inviting submissions, and did not give the petitioner a reasonable opportunity to fully explain why she missed the deadline to file her dispute. In those circumstances, it was reasonable for the petitioner to be very concerned that the Arbitrator had pre-judged the issues, and to believe that if she didn't settle with the Landlord, the Arbitrator would rule that she had to move out in short order.

[93] I accept the petitioner's evidence and argument that she felt she had no choice but to settle with the Landlord.

[94] In other words, I find that the petitioner agreed to the settlement under duress and that the duress was caused by the Arbitrator conducting the hearing in a procedurally unfair manner.

[95] Accordingly, I am granting judicial review. The Arbitrator's decision is set aside. The matters before the Arbitrator are remitted for a new hearing.

[96] Because I am remitting the matters back to the RTB due to a lack of procedural fairness, it is not necessary for me to determine whether the Arbitrator's

decision to record a settlement was patently unreasonable or whether the reconsideration decision was patently unreasonable.

Costs

[97] The usual rule, as set out in Rule 14-1(9) of the *Supreme Court Civil Rules*, is that costs follow the event, subject to the court's residual discretion to deny a substantially successful party the costs to which it would otherwise be entitled: *Kakavelakis v. Boutsakis*, 2017 BCCA 396, at para. 94.

[98] If either the Landlord or Tenant believes a different costs order should be made, they may arrange for a 45-minute costs hearing to be scheduled for 9:00 a.m., to be held within 30 days from the date of these reasons. Otherwise, the Tenant shall have her costs at Scale B.

[99] No costs are payable to the Director.

[100] Last, I would like to express my gratitude to counsel for the respondent for his assistance in ensuring that the Court had all the necessary evidence before it.

"Morishita J."