IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chishuan Housing Society v. Silver,*
2021 BCSC 1074

Date: 20210604
Docket: S202649
Registry: Vancouver

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

Between:

Chishuan Housing Society

Petitioner

And

Joan Silver and the Director, Residential Tenancy Branch

Respondents

Before: The Honourable Mr. Justice Kirchner

On judicial review from: A decision of the Residential Tenancy Branch, dated January 6, 2020 (file number 31058056)

Reasons for Judgment

In Chambers

Counsel for Petitioner:	A. Dosanjh S. Smith
Counsel for Joan Silver:	A. Hudson
Place and Date of Hearing:	Vancouver, B.C. May 21, 2021
Place and Date of Judgment:	Vancouver, B.C. June 4, 2021

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Introduction

[1] The petitioner, Chishuan Housing Society ("Chishuan" or "CHS") is a non-profit society that provides subsidized housing to low-income seniors with funding it receives from the British Columbia Housing Commission ("BC Housing"). It owns and operates Oakridge House which is a residential building located in Vancouver.

[2] The respondent Joan Silver is a tenant in Oakridge House. She and CHS entered into a rental tenancy agreement ("Tenancy Agreement") dated November 4, 2016.

[3] In November 2019, Ms. Silver initiated a dispute resolution proceeding with the Residential Tenancy Branch ("RTB") against CHS claiming clause 17 in her Tenancy Agreement is unconscionable contrary to s. 6(3)(b) of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 (the "*Act*"). Clause 17 restricts Ms. Silver's ability to be absent from her home for more than one month without authorization from CHS. In a subsequent filing containing her evidence, Ms. Silver asserted more broadly that clause 17 is "oppressive" when compared to a standard form rental agreement issued by BC Housing, unfair, and not applied equitably by CHS.

[4] CHS responded on December 20, 2019 with its own evidence and argument. It asserted the *Act* does not prohibit it from imposing a restriction on absences from the unit, that doing so is consistent with the objectives of providing subsidized housing, and, in any event, Ms. Silver was granted the full extended absence she requested. CHS argued there is nothing in the *Act* that entitles Ms. Silver to be absent from her subsidized housing for more than a month.

[5] In a decision dated January 6, 2020, an arbitrator for the RTB (the "Arbitrator") found clause 17 contravenes Ms. Silver's right to quiet enjoyment under s. 28(c) of the *Act* and found that CHS is not entitled to restrict Ms. Silver's absences from her unit.

[6] CHS applies for judicial review of the Arbitrator's decision on several grounds, including that s. 28(c) and quiet enjoyment was not raised by the parties or argued in

the arbitration, that CHS had no opportunity to make submissions on that point, and the Arbitrator's decision is patently unreasonable because, among other things, it fails to provide adequate reasons explaining the decision regarding quiet enjoyment. CHS seeks an order setting aside the Arbitrator's decision and remitting the matter back to the RTB Director for reconsideration by a different arbitrator.

[7] Ms. Silver opposes the application arguing that, while quiet enjoyment under s. 28(c) was not specifically mentioned in submissions, it was put in issue by CHS who argued there is nothing in the *Act* that is inconsistent with clause 17. Ms. Silver argues this opened up the entirety of the *Act* for the Arbitrator's consideration in scrutinizing the lawfulness of clause 17.

[8] The RTB and the Attorney General of British Columbia filed a response to the petition taking no issue with the relief sought other than costs.

Facts

The Tenancy Agreement and Request for Absence

[9] CHS provides subsidized housing to low-income seniors with funding from BC Housing. Under its arrangement with BC Housing, CHS must ensure its tenants meet eligibility criteria for recipients of a rental subsidy, including a requirement that residents reside permanently in British Columbia.

[10] On November 4, 2016, Ms. Silver and CHS entered into the Tenancy Agreement. Section 17 of that agreement, which is at the heart of this dispute, reads:

> **17. Extended absences from Residential Premises**
> If the tenant is eligible for a rent subsidy and if the tenant is absent from the residential premises for one consecutive month or longer without the prior written consent of the landlord, the landlord may end the tenancy, even if the rent is paid for the period.

[11] BC Housing has a template residential tenancy agreement for non-profit housing that contains a clause almost identical to clause 17. However, the BC Housing template restricts absences to three consecutive months rather than the

one month found in the CHS agreement. Clause 21 of the template agreement reads:

> **21 Extended Absence from Rental Unit**
>
> If the tenant is eligible for a rent subsidy and if the tenant is absent from the rental unit for three consecutive months or longer without prior written consent of the landlord, the landlord may end the tenancy, even if the rent is paid for that period.

[12] On September 26, 2019, Ms. Silver informed CHS she he would be out of town from January 1 to March 24, 2020. On October 2, 2019, CHS informed Ms. Silver that the Tenancy Agreement restricted extended leaves from the unit and therefore denied her request for a three-month absence. That letter states:

> Extended leave…… The Tenancy Agreement (between you and the Chishuan Housing Society) only allows one continuous month of extended absence per calendar year. Therefore the CHS management **DOES NOT APPROVE** for [*sic*] a 3-month absence from your suite (i.e., from January 1, 2020 to March 31, 2020.) [Emphasis in original]

[13] Ms. Silver replied on October 20, 2019 reiterating her request and providing medical notes from two doctors advising that she suffers from asthma and a three-month absence in Mexico during the winter is recommended to assist her with the medical condition. She asked for a response by October 28, 2019.

[14] Upon receipt of this letter, the Tenant Services Manager at CHS wrote Ms. Silver on October 25, 2019 stating that her request is “non-routine” and, because of the “significant rent subsidy being provided by BC housing,” CHS would have to refer this matter to BC Housing for review and comment. She further said CHS was not optimistic they would hear back from BC Housing by October 28, 2019 but CHS’s director, Alfred Wong, would inform Ms. Silver once they heard back from BC Housing.

[15] On November 13, 2019, Mr. Wong wrote Ms. Silver advising CHS had heard from BC Housing and had consulted with CHS’s legal counsel. Mr. Wong told Ms. Silver her request for a three-month absence was being approved in this one instance but she should not expect future authorizations. Mr. Wong stated:

> On a one-time basis, the CHS consents to your absence of three (3) consecutive months from the residential premises from January 1, 2022 March 31, 2020.
>
> It is important for you to understand that this is an extraordinary consent. You are eligible for rent subsidy and receive such a subsidy. As such, your lease does not permit absences from the residential premises for one (1) consecutive month or longer. CHS seeks to provide year-round housing to tenants eligible for BC Housing-subsidized housing. This goal is undermined by extended absences by tenants.
>
> If you expect future lengthy absences owing to your medical condition or otherwise, you should not rely on further consent from CHS and you should seek alternative accommodations.

[16] Shortly thereafter, Ms. Silver applied for dispute resolution under the *Act*.

Submissions Before the Arbitrator

[17] Ms. Silver's original complaint dated November 8, 2019 focused on the assertion that clause 17 is an unconscionable term and thus unenforceable under s. 6(3) of the *Act* which reads:

> **6.** (3) A term of a tenancy agreement is not enforceable if
>
> (a) the term is inconsistent with this Act or the regulations,
>
> (b) the term is unconscionable, or
>
> (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it. [Emphasis added]

[18] Her application states under "Applicant's dispute description":

> Tenancy Agreement #17 regarding extended absences is an unconscionable term. The housing society took advantage of my distress at finding subsidized housing when I signed this agreement.

[19] The complaint further alleges her agreement with CHS is inconsistent with the BC Housing template which, as noted, permits extended absences for up to three months. Finally she notes her intention to be absent from January 5 until March 24, 2020. The complaint is dated before CHS had approved that absence, although on CHS's copy of the complaint, there is a handwritten notation indicating the complaint was received by CHS on November 18, 2019, after it had approved the absence.

[20] On December 4, 2019, Ms. Silver filed her evidence and submissions with the RTB. Her evidence describes her request for an extended absence and the reasons for it. It also states she was desperate to find subsidized housing when she signed the Tenancy Agreement, a point that relates to her assertion of unconscionability. She also referred to the extended absence provision in the BC Housing template. Under the heading "Dispute Information" Ms. Silver states:

> The Tenancy Agreement #17 is unconscionable. The Residential Tenancy Policy Guideline 8 Unconscionable and Material Terms states "a term is unconscionable if the term is oppressive or grossly unfair to one party…"
>
> Paragraph 17 of the Tenancy Agreement is oppressive when compared to section 21 of the Residential Tenancy Agreement sample.

[21] The Residential Tenancy Policy Guideline 8 is part of a set of guidelines produced by the Province of British Columbia (presumably the RTB) to assist landlords and tenants understand issues that are likely to be relevant in disputes under the *Act*. The reference to the "Residential Tenancy Agreement sample" is to the BC Housing template agreement.

[22] Ms. Silver's submission goes on to describe the legal test for unconscionability and makes submissions to the effect that Ms. Silver was in a position of need and distress when she signed the Tenancy Agreement. She then makes this submission with respect to the fairness of clause 17:

> I would submit this one-month limit is unfair and is not applied equitably by CHS. I am aware of other tenants who have been absent for more than one month at a time in 2019. It would appear lengthy absences are approved or not on an inequitable basis.
>
> …
>
> I am requesting the Arbitrator to determine if paragraph 17 of the CHS Tenant Agreement is an unreasonable restriction to place on tenants in light of section 21 of the BC Housing Residential Tenancy Agreement [the template agreement] and that a more reasonable restriction would be three months as set out in the sample BC Housing Tenancy Agreement.

[23] Thus, the thrust of Ms. Silver's position before the Arbitrator was that clause 17 is unconscionable and is unfair in comparison to the three-month extended absence permitted under the BC Housing template.

[24] Ms. Silver also took issue with CHS's approval for her 2020 absence noting she felt the tone and content of Mr. Wong's November 13, 2019 letter presented a threat to her continued housing security.

[25] CHS filed its response to the application on December 23, 2019. It stated in its "Overview" section:

> There is nothing in the Act or the Tenancy Agreement which entitles the Applicant to be absent from the rental unit for more than one consecutive month, absent written consent of the landlord. Similarly, there is nothing in the Act or the Tenancy Agreement which prohibits CHS from imposing reasonable restrictions on the length or frequency of tenant absences.

[26] CHS asserts in the Overview section there is no basis for the claim that clause 17 is inherently unconscionable. CHS then provides enumerated responses to each point in the complaint, stating the BC Housing template is a sample that does not govern the relationship between CHS and Ms. Silver, that Ms. Silver was granted her request for an extended absence, and CHS's decisions regarding length of time and frequency of absences are discretionary, based on the particular circumstances of the request. In a passage Ms. Silver particularly relies on for this judicial review, CHS states:

> There is nothing in the Act which entitles a tenant to unrestricted absences from the rental unit and therefore the residential tenancy branch has no jurisdiction to grant this request [Emphasis added].

[27] Of note, the issue of quiet enjoyment and s. 28(c) of the *Act* was not raised in the evidence or submissions of either party before the Arbitrator.

The Arbitrator's Decision

[28] The Arbitrator began her decision by stating CHS and its legal counsel attended the hearing and were each "given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses." CHS takes issue with this assertion on the basis it was not given a full opportunity to make submissions on the application of s. 28(c) of the *Act*.

[29] The Arbitrator then identified the central issue to be decided as:

> Is the tenant entitled to an Order directing the landlord to comply with the *Act*, regulation or tenancy agreement, pursuant to section 62 of the *Act*?

[30] After stating the facts, which are not in contention, the Arbitrator summarized Ms. Silver's evidence and argument, noting her assertion that clause 17 is unconscionable. The Arbitrator suggested the tenant's written submissions "sought a variety of remedies" and noted that when Ms. Silver was asked to specify the remedy she was seeking, she testified that "she was only pursuing a determination on the validity of clause 17 in the tenancy agreement".

[31] The Arbitrator then summarized the CHS's submissions including, as restated by the Arbitrator:

- There is nothing in the *Act* or the tenancy agreement which entitles the tenant to be absent form [*sic*] the rental unit for more than one consecutive month, absent written consent of the landlord.
- There is nothing in the *Act* or the tenancy agreement which prohibits the landlord from imposing reasonable restrictions on the length or frequency of tenant absences.
- The tenant has been granted her request for an extended absence from the rental unit and as such the subject of this dispute is now moot.
- Clause 17 permits the landlord to maintain maximum occupancy of its subsidized rental units in keeping with its mandate of providing permanent housing for low-income seniors. Extended and routine absences are inconsistent with permanent residency requirements of the BC Housing subsidized housing program.
- Clause 17 is an absolute bar on extended absences as it includes the possibility of landlord consent.
- There is no basis for the tenant's claim that clause 17 is unconscionable because it does not permit absences longer than one month and the landlord did not put undue pressure on the tenant to sign the tenancy agreement.

[32] The Arbitrator then turned to her analysis. She led off with a discussion of s. 28(c) of the *Act* which, as noted, was not specifically put in issue by any either party. She noted s. 28(c) assures a tenant quiet enjoyment of a rental unit, including but not limited to rights to exclusive possession of the unit subject only to the landlord's right to enter the rental unit in accordance with s. 29. She then noted that s. 5 of the *Act* "states that landlords and tenants may not avoid or contract out of this

Act or the regulations. Any attempt to avoid or contract out of this Act or the regulations is of no effect".

[33] The Arbitrator then turned to the substance of her decision on the complaint, deciding it on the basis of s. 28(c) and the right to quiet enjoyment. She stated:

> I find that clause 17 of the tenancy agreement seeks to limit the tenant's right to quiet enjoyment under section 28(c) of the *Act* by limiting her right to exclusive possession of the subject rental property. I find that in limiting the tenant's ability to travel or leave the subject rental property, for any length of time, the landlord is attempting to contract out of the tenant's right to quiet enjoyment under section 28(c) of the *Act*. I therefore find, pursuant to section 5 of the *Act*, that clause 17 of the tenancy agreement has no force or effect and is void. The landlord is not entitled to restrict the length of the tenant's absences.

[34] As seen from this passage, the Arbitrator did not leave room for any restriction on absences, such as the three-month absence clause found in the BC Housing template. Rather, she stated that the landlord is not entitled to restrict the length of the tenant's absences at all.

[35] The Arbitrator went on to state that CHS's submissions on the policy reasons behind clause 17 are not relevant. Those policy reasons relate to the specific circumstances of subsidized rental housing which are subject to some restriction under CHS's agreement with BC Housing. The arbitrator stated the *Act* "applies to all landlords and tenants equally, the landlord does not receive special consideration for its aims as a non-profit housing society".

[36] The Arbitrator found the fact that CHS had granted Ms. Silver an extended absence did not make the dispute moot since the tenant took issue with clause 17 generally and "this dispute stands on its own and does not need to be connected to a claim that the tenant was not permitted an extended leave."

[37] The Arbitrator concluded her substantial analysis by finding it was unnecessary to address the primary ground on which the complaint was brought, namely unconscionability. She stated:

> As I have determined that clause 17 of the tenancy agreement does not comply with section 28(c) of the *Act,* I decline to consider if clause 17 of the tenancy agreement is in unconscionable term.

Issues to be Decided

[38] There are two main issues to be decided on this judicial review:

a) Was the process leading to the Arbitrator's decision procedurally unfair in that the Arbitrator decided the dispute on the basis of s. 28(c) without it having been specifically raised or argued by the parties?

b) Is the decision patently unreasonable?

The second issue focuses primarily on the adequacy of the Arbitrator's reasons but also invokes other points such as BC Housing's policy regarding extended absences, the BC Housing sample agreement, and the statutory context of the *Act*.

Standard of Review

[39] The standard of review applicable to decisions of RTB arbitrators is governed by s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45. For issues of procedural fairness, the standard is whether, in all circumstances, the decision-maker acted fairly. The parties agree this standard applies to the question of whether the Arbitrator's consideration of the right to quiet enjoyment under s. 28(c) of the *Act* constitutes a breach of CHS's rights to procedural fairness.

[40] For matters within the Arbitrator's exclusive jurisdiction, the standard of review is patent unreasonableness. This standard applies to the question of whether the Arbitrator's reasons are adequate and other grounds raised in the petition.

[41] The standard of patent unreasonableness has been variously described but it unquestionably marks the highest level of deference accorded to a tribunal. It has been suggested that a patently unreasonable result is one that "must almost border on the absurd": *Voice Construction v. Construction & General Workers' Union, Local*

92, 2004 SCC 23 at para. 18. In *Ahmad v. Merriman*, 2019 BCCA 82 the Court stated at para. 37

> The standard of patent unreasonableness requires the decision under review be accorded "curial deference, absent a finding of fact or law that is patently unreasonable": *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority,* 2016 SCC 25 at para. 29. Stated otherwise, it must be "clearly irrational" or "evidently not in accordance with reason": *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963–64. A patently unreasonable decision is one that is "so flawed that no amount of curial defence can justify letting it stand": *Ryan v. Law Society (New Brunswick),* 2003 SCC 20 at paras. 52–53.

[42] In *Law Society of New Brunswick v. Ryan,* 2003 SCC 20 the Court described the patently unreasonable standard in these terms:

> In *Southam*, *supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[43] The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 does not alter this standard (see *College of New Caledonia v. Faculty Association of the College of New Caledonia*, 2020 BCSC 384 at paras. 32-33). However, it does direct courts to take a "reasons first" approach to reviewing decisions from administrative tribunals and to do so from a posture of restraint. As explained in *Vavilov* at para. 84:

> [W]here the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review

> and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[44] In *Parmar v. Translink Security Management Limited,* 2020 BCSC 1625 at para. 15 our Court of Appeal confirmed, the "reasons first" approach in *Vavilov* applies in the context of a patently unreasonable standard.

Analysis

Fairness of the Process

[45] Procedural fairness and the principles of natural justice seek to ensure parties are afforded a right to know the case that is being made against them and to have a right to respond. CHS argues it was denied this right by the Arbitrator considering and deciding Ms. Silver's complaint on the basis of quiet enjoyment under s. 28(c) of the *Act* which was not specifically raised or argued by any party. Ms. Silver responds that CHS put the entirety of the *Act* in issue by arguing there is nothing in the *Act* prohibiting CHS from imposing the restriction on absences. On this basis, Ms. Silver argues it was open to the Arbitrator to consider s. 28(c) to address her complaint.

[46] CHS relies primarily on three decisions of this court in support of its position on the right to be heard on s. 28(c): *Amacon Property Management Services Inc. v. Dutt*, 2008 BCSC 889, *Wiebe v. Olsen*, 2019 BCSC 1740, and *McDonald v. Creekside Campgrounds and RV Park*, 2020 BCSC 2095.

[47] In *Amacon,* a group of tenants filed a complaint with the RTB alleging their landlord was in breach of the *Act* and their tenancy agreements by failing to provide heat to their rental units. The heat had been interrupted during some necessary repairs on the building. The arbitrator found the heat was not out for an inordinately long period, such that it did not warrant an abatement of the tenants' rent. However, the arbitrator went on to find the landlord had acted negligently in failing to give the tenants adequate warning they would not have heat during the repairs. The issue of negligence had not been raised by any of the tenants, who based their complaint entirely on the *Act* and their tenancy agreements, and no notice was given to the

parties that the arbitrator would be considering or deciding the complaint on the basis of negligence.

[48] The landlord applied for judicial review. Justice Slade held the landlord's rights to procedural fairness were breached by the arbitrator basing his decision on negligence without notice to the landlord, contrary to the common law principle of *audi alteram partem* which affords a person affected by a decision the right to be heard. Slade J. found at para. 34 that the new ground of decision based negligence "arose from the arbitrator's own thought process, rather than from consultation with others." He stated:

> [36] In this case, the arbitrator interpreted and applied the facts adduced by the parties to an issue that neither of the parties had raised or argued, without giving the parties notice that he was considering the issue or an opportunity to make submissions. The issue raised by the arbitrator, negligence, involves principles of law and interpretations of the evidence very different from those involved with the issues argued by counsel. Negligence was not a facet of the case missed the parties, and, with respect to the arbitrator, he should have offered each side an opportunity to be heard on the point before he reached an independent conclusion. Accordingly, I conclude that, in all of the circumstances, the arbitrator did not act fairly.

[49] Ms. Silver argues *Amacon* is distinguishable because there, the arbitrator went entirely outside of the *Act* and based his decision on tort law. In my view, though, it is the basic principle of *audi alteram partem* that is important. The relevant question is whether the issue was raised with an opportunity for the parties to speak to it, rather than the nature of the issue itself.

[50] Likewise, in *Wiebe v. Olsen*, Justice Branch found an RTB arbitrator's decision resulted from an unfair process because the decision was based on a point not raised or argued in the arbitration. There, a landlord had ended a tenancy on two months' notice because the rental unit was to be occupied by the landlord or a close family member. At issue in the arbitration was the adequacy of notice and that turned on whether the tenancy was under the *Act*, which permitted the two-month notice period, or whether it was a tenancy under the *Manufactured Home Park Tenancy Act*, S.B.C. 2002, c. 77 [*MHPTA*], which required at least 12 months notice to vacate. The arbitrator, however, decided the complaint on the basis that no

tenancy had been established under either Act, which had not been raised or argued by either party.

[51] In finding this to be procedurally unfair, Branch J. stated:

> [60] As noted, during the judicial review hearing I raised a concern that the [Petitioner] had received no notice in advance of the day of the hearing that the Arbitrator may find that there was no tenancy arrangement under either statute.
>
> [61] The respondent had effectively conceded jurisdiction under the *Act* in all her materials filed or served in advance of the hearing. The RTB had not signaled that its jurisdiction could be an issue at the hearing.
>
> …
>
> [64] Before the hearing, the only question at issue was whether the petitioner's tenancy was governed by the *MHPTA* or the *Act*. Accordingly, the petitioner would not and could not have been prepared to make submissions on the issue of tenancy under the *Act*.
>
> [65] I accept that an administrative tribunal cannot and should not act without jurisdiction, and that a tribunal has the power to raise concerns about its jurisdiction on its own motion. I also accept that the case for jurisdiction under the *Act* would appear to be questionable, and that a contrary finding on jurisdiction may not have changed the outcome. However, where the other party quite clearly concedes a point, and the tribunal intends to rely on a new position that undercuts the effect of that concession for the first time of its own motion, it should at least give the parties an opportunity to reasonably address the tribunal's concerns: *Godfrey v. Ontario Police Commission*, 1991 CarswellOnt 954 (Div. Ct.) at para. 49.

[52] Justice Branch noted there may have been evidence or legal argument the petitioner would have advanced had they been aware this point would be in issue. As a result, the petitioner was denied a procedurally fair hearing: para. 66.

[53] Ms. Silver argues that *Weibe* is distinguishable in that at no time did she concede clause 17 of a rental agreement was not an infringement of her right to quiet enjoyment. While that may be true, it is also true that at no time did she suggest or argue that clause 17 is an infringement of her right to quiet enjoyment or otherwise raise s. 28(c) of the *Act*. Nor did the Arbitrator. In my view, the relevant question in this case, as framed by Ms. Silver herself, is whether CHS put s. 28(c) in issue through its general submission that nothing in the *Act* entitles Ms. Silver to be absent from the rental unit for more than a month.

[54] Finally, CHS relies on *McDonald*, where an occupant of an RV park disputed the landlord charging a guest fee which the occupant said was not permitted under the *MHPTR.* The landlord argued that the occupant did not have a tenancy under the *MHPTR* but a mere licence to occupy a recreational site. One of the points considered by the arbitrator in deciding if a tenancy existed was whether either party was required to give notice to end the occupancy. In finding notice was not required, the arbitrator relied on Rule 5 of Creekside Campground's rules but the occupant was not given a copy of that rule for the arbitration and the arbitrator had indicated during the hearing that it was not relevant in any event. Justice MacNaughten held this rendered the process unfair because the decision was based on an issue not raised by the parties and because the tenant did not have a copy of the document relied on by the arbitrator. She stated at para. 80:

> The decision indicates that the arbitrator relied on the rules she had been given to make a finding on an issue that neither party raised or had the opportunity to speak to, during the hearing. In any event, petitioners did not have the evidence before them to be able to speak to it. [emphasis added]

[55] Ms. Silver argues *McDonald* is distinguishable because, unlike here, the arbitrator relied on a document the tenant did not have and had indicated at the hearing that the document was not relevant. However, as noted, this was not the only or even the primary basis for MacNaughten J.'s decision. As reflected in the above-quoted passage, the fact neither party raised or had the opportunity to speak to the issue was determinative.

[56] Ms. Silver acknowledges she "did not specifically invoke s. 28(c) … in her application for dispute resolution or in her December 4, 2019 written submissions." However, she argues CHS (at least implicitly) put s. 28(c) in issue by arguing "[t]here is nothing in the Act or the Tenancy Agreement which entitles the Applicant to be absent from the rental unit for more than a month" and "there is nothing in the Act or the Tenancy Agreement which prohibits CHS from imposing reasonable restrictions on the length or frequency of tenant absences." Ms. Silver states that through these general submissions, "CHS argued before the Arbitrator that clause 17 is consistent with s. 28(c) of the *Act*." She goes on to say, "CHS's evident regrets about not

providing more detail on this point do not impugn the fairness of the RTB proceedings."

[57] Ms. Silver argues the Arbitrator's decision must be considered in the "statutory, institutional, and social context" in which the decision is made: *Baker v. Canada (Minister of Citizenship an Immigration*), [1999] 2 S.C.R. 817 at para. 22. RTB arbitrations are relatively informal and conducted by telephone which influences the procedural steps necessary to accord procedural fairness: *PHS Community Services Society v. Swait*, 2018 BCSC 824 at para. 88; *McDonald* at para. 30.

[58] She also argues the purpose of the *Act* is to confer rights on tenants who will often be unrepresented and are entitled to rely on the expertise of RTB arbitrators to apply the appropriate statutory provisions. She states that her case generally asked the Arbitrator to consider whether clause 17 was an unreasonable restriction and "this put CHS on notice that the reasonableness and lawfulness of clause 17 was generally in issue."

[59] I am satisfied that CHS was denied its right to procedural fairness by the Arbitrator's consideration of quiet enjoyment under s. 28(c) and the fact she ultimately based her decision on that. I do not agree with Ms. Silver's position that CHS put s. 28(c) in issue through its general submissions regarding the *Act*. While CHS's statements were broad, they cannot reasonably be read as an invitation or a challenge to the Arbitrator scour the whole *Act* in search of a provision that might prove CHS wrong.

[60] Ms. Silver clearly put in issue the question of whether clause 17 is unconscionable in light of her own circumstances and whether it is unfair in light of the BC Housing precedent. Those were the issues advanced in the arbitration. Despite the informality of the proceeding and the fact that Ms. Silver generally asserted that clause 17 is an unreasonable restriction, I find that this was not sufficiently specific to put CHS on notice that it would need to address s. 28(c).

[61] I accept the arbitration process is an informal one where participants are often unrepresented. Even if they may rely to some extent on guidance from the RTB or even arbitrators, this does not give arbitrators licence to decide issues that were not argued before them without giving the parties a chance to be heard on those points.

[62] Ms. Silver also argues that the question of quiet enjoyment under s. 28(c) was not a new issue and relies on how the Supreme Court of Canada defined "new issue" for the purposes of appellate review in *R. v. Mian*, 2014 SCC 54. Speaking for the Court in that case, Justice Rothstein said at para. 30 that genuinely new issues are "legally and factually distinct from grounds of appeal raised by the parties." He summarized the point in these terms at para. 35:

> In summary, an appellate court will be found to have raised a new issue when the issue was not raised by the parties, cannot reasonably be said to stem from the issues as framed by the parties, and therefore would require that the parties be given notice of the issue in order to make informed submissions. Issues that form the backdrop of appellate litigation will typically not be "new issues" under this definition. Exercising the jurisdiction to ask questions during the oral hearing will not constitute raising a new issue, unless, in doing so, the appellate court provides a new basis for reviewing the decision under appeal for error.

[63] With respect, I do not agree that the issue of quiet enjoyment stems from the overall reasonableness and lawfulness of clause 17 as argued by Ms. Silver. Her complaint focused on unconscionability and unfairness in relation to the BC Housing template agreement. As discussed earlier, I find that the general submissions made by each of CHS and Ms. Silver were not sufficiently precise to put s. 28(c) in issue or give notice that it would be considered.

[64] Ms. Silver also points to *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 where the Court said at 339 the *audi alteram partem* principle is applied with more leniency with respect to legal arguments than factual issues. At issue in that case was whether a specialized labour tribunal that ordinarily sits in panels of three could meet as a full board outside of the hearing to discuss the legal and policy implications of draft reasons a three-member panel was proposing to release. The full board did not hear the case and, apart from the three who heard it, had no right to rule

on its outcome. Nor could the full board force or induce the panel to adopt positions advanced at the full board meeting.

[65] Key to *Consolidated-Bathurst* is the fact the full board was considering the legal and policy implications of arguments already made to the panel. It was not considering or raising new issues that had not been advanced by the parties or argued at the hearing. Significantly, Justice Gonthier, speaking for the majority at 338, noted the *audi alteram partem* rule could be breached if "a new policy or a new argument is proposed at a full board meeting and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond." Later on the same page he stated:

> The parties had every opportunity to deal with the matter at the hearing and indeed presented diverging proposals for modifying the policy. … Though the reasons are expressed in great detail, the appellant does not identify any of them as being new nor does it contend that it did not have an opportunity to be heard or to deal with them.

[66] That is very different to this case where the Arbitrator, on her own, considered a new issue not raised or argued by the parties and decided the dispute on that basis.

[67] As CHS did not have an opportunity to make submissions or lead evidence on the issue of quiet enjoyment and s. 28(c) of the *Act*, I am satisfied that its rights to procedural fairness have been denied and that the Arbitrator's decision must be set aside on this basis.

Adequacy of Reasons

[68] I am also satisfied that the Arbitrator's decision is patently unreasonable as her reasons do not explain, even in cursory terms, how or why she decided the right to quiet enjoyment under s. 28(c) encompasses a right to be absent from the premises for an extended period of time.

[69] Reasons for a decision given by RTB adjudicators are not expected to live up to the standard of a superior court judge: *McDonald* at para. 49. Nor is an

administrative decision-maker "required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion." *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16. See also *Ganitano v. Yeung*, 2016 BCSC 2227 at para. 23.

[70] However, there are minimal standards that a decision maker's reasons must meet, even on a patently unreasonable standard.

[71] In *Laverdure v. First United Church Social Housing Society*, 2014 BCSC 2232, Justice Davies reviewed a number of authorities on the extent to which a RTB arbitrators must provide reasons for a decision. He distilled those authorities to following points:

> [35] What I take from my review of all of the authorities to which I was referred is that for the reasons of a Dispute Resolution Officer to be adequate, they must:
>
> 1) Set out the legal test to be met by the party advancing its claim;
>
> 2) Set out the adjudicator's findings of fact and the principal evidence upon which those findings were made; and
>
> 3) Apply those findings of fact to the test to be met in reaching a conclusion that will allow the parties and others (including a reviewing court) to understand how and why the adjudicator reached that decision. [Emphasis added]

[72] In *Christiansen v. Harwood*, 2015 BCSC 1440, which was also a judicial review from a RTB arbitrator, Justice Fisher (then of this Court) said at para. 20:

> [20] It has been held that reasons will be adequate when they set out the legal test to be met by the party advancing its claim, the findings of fact and the principal evidence on which those findings were made, and an application of those findings to the legal test: *Laverdure v. First United Church Social Housing Society*, 2014 BCSC 2232. It has also been held that in residential tenancy disputes, it is impoActnt to assess the sufficiency of reasons in the proper context. In many of these kinds of cases, the legal test will be fairly straightforward and expressed in plain language terms, and the issue to be decided may involve only an assessment of whether a party has given sufficient evidence to support a finding of fact in his or her favour. The primary goal is for the parties and a reviewing court to be able to understand how and why the decision was made: see *Khan v. Shore*, 2015 BCSC 830. [Emphasis added]

[73] Justice Fisher found the reasons adequate even though the arbitrator had not fully explained a specific aspect of the reasoning. She found the arbitrator had generally explained how and why the decisions was made: para. 21.

[74] A persistent theme in all the cases reviewed by Davies J. in *Laverdure* and those that have followed, including *Christensen*, *McDonald,* and others is that the reasons of an administrative decision maker, including those of RTB adjudicators, should at least explain why and how the decision was reached. This is true even when the decision is subject to the patently unreasonable standard. With respect, I do not read the Adjudicator's reasons in this case as meeting the required minimum threshold.

[75] On its face, s. 28 concerns the right of a tenant to enjoy exclusive possession free from interference from the landlord:

> **28** A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:
>
> (a) reasonable privacy;
>
> (b) freedom from unreasonable disturbance;
>
> (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 ;
>
> (d) use of common areas for reasonable and lawful purposes, free from significant interference.

[76] Section 29 of the Act, referenced in s. 28(c) reads:

> **29** (1) A landlord must not enter a rental unit that is subject to a tenancy agreement for any purpose unless one of the following applies:
>
> (a) the tenant gives permission at the time of the entry or not more than 30 days before the entry;
>
> (b) at least 24 hours and not more than 30 days before the entry, the landlord gives the tenant written notice that includes the following information:
>
> (i) the purpose for entering, which must be reasonable;
>
> (ii) the date and the time of the entry, which must be between 8 a.m. and 9 p.m. unless the tenant otherwise agrees;
>
> (c) the landlord provides housekeeping or related services under the terms of a written tenancy agreement and the entry is for that purpose and in accordance with those terms;

> (d) the landlord has an order of the director authorizing the entry;
>
> (e) the tenant has abandoned the rental unit;
>
> (f) an emergency exists and the entry is necessary to protect life or property.
>
> (2) A landlord may inspect a rental unit monthly in accordance with subsection (1)(b).

[77] It is not immediately apparent on the face of s. 28(c), particularly when read in light of s. 29, that quiet enjoyment under the *Act* would encompass a right to extended absences from the premises. The focus of ss. 28 and 29 is on disturbances to the Tenant's exclusive occupation and possession of the premises. This is not to say quiet enjoyment may not encompass a right to extended absences or that the Arbitrator's conclusion on that point is necessarily wrong. I express no opinion on either point. However, I agree with CHS that that the Arbitrator's reasons on this point are conclusory. They do not explain how and why she came to the conclusion that extended absences fall within quiet enjoyment as it is described in s. 28(c).

[78] The Arbitrator's finding on this point begins with this statement:

> I find that clause 17 of the tenancy agreement seeks to limit the tenant's right to quiet enjoyment under section 28(c) of the *Act* by limiting her right to exclusive possession of the subject rental property. [emphasis added].

The underlined passage simply restates the wording of s. 28(c). It does not explain how or why the restriction on extended absences falls within that wording.

[79] The Arbitrator continues:

> I find that in limiting the tenant's ability to travel or leave the subject rental property, for any length of time, the landlord is attempting to contract out of the tenants right to quiet enjoyment under section 28(c) of the *Act*.

Again, this does not explain how or why a rule against extended absences falls within the wording of s. 28(c). Rather, it speaks to a prohibition against contracting out of obligations under the *Act*. It therefore assumes a breach of s. 28(c) but does not explain how it was breached, other than by way of the conclusory statement that limits on extended absences are contrary to s. 28(c).

[80] Finally, the Arbitrator states:

> I therefore find, pursuant to section 5 of the *Act*, that clause 17 of the tenancy agreement has no force or effect and is void. The landlord is not entitled to restrict the length of the tenant's absences.

Again, this is conclusory and contains no analysis or explanation as to how or why the restriction on extended absences is prohibited by s. 28(c).

[81] Thus, while accepting that the Arbitrator's reasons need not meet the standards of superior court or even other administrative tribunals (like the Labour Relations Board or the Human Rights Tribunal), the minimal standards of explaining how and why a conclusion was reached must still be met. The conclusory nature of the Arbitrator's reasons and the absence of any explanation for how and why the any limit on extended absences runs afoul of the wording of s. 28(c) is a defect that appears on the face of the reasons and is both immediate and obvious. Based on the authorities cited above, including those relating to a patently unreasonable standard of review, as well as my review of the Arbitrator's decision and the record that was before her, I find that her reasons do not meet the minimal standard required to explain her decision and that decision is therefore patently unreasonable.

[82] CHS also argues that the Arbitrator's reasons are inadequate because they fail to refer to the Residential Tenancy Policy Guideline 6: Entitlement to Quiet Enjoyment. This is one in a series of guidelines that are produced by the Province. Excerpts of the Guidelines are attached to the affidavit of Lesley Pollard, filed by the RTB and the Attorney General. The Guidelines contain this explanatory note:

> This Policy Guideline is intended to provide a statement of the policy intent of legislation, and has been developed in the context of the common law and the rules of statutory interpretation, where appropriate. This Guideline is also intended to help parties to an application understand issues that are likely to be relevant. It may also help parties know what information or evidence is likely to assist them in supporting their position.

[83] Guideline 6 provides some direction on how quiet enjoyment might be interpreted. It reads in part:

> A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.
>
> Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.
>
> In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises. A landlord can be held responsible for the actions of other tenants if it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

[84] As stated in *Weibe* at para. 38, the Guidelines do not have the force of law and an RTB arbitrator is not bound to follow them. However, once an arbitrator chooses to apply the Guidelines, they must be applied consistently or the arbitrator must explain why certain aspects of the relevant Guideline are being applied to the exclusion of other parts: para. 38

[85] The Arbitrator in this case did not refer to or rely on Guideline 6. (She only had before her Guideline 8, which deals with "Unconscionabilty and Material Terms.") She was not bound to follow the Guidelines but CHS argues she was required to at least consider Guideline 6 and explain why she was not applying it. CHS points out that it did not refer the Arbitrator to Guideline 6 since it did not know quiet enjoyment was going to be in issue.

[86] CHS relies on *McDonald* where the Arbitrator had considered the relevant Guideline but, like in *Weibe,* did not explain why it was not consistently applied. MacNaughton J. held that the arbitrator should have made findings on the criteria outlined in the relevant Guideline and articulate why those factors did not apply to the dispute in that case.

[87] In both *Weibe* and *McDonald*, the arbitrators referred to the relevant Guideline but neither case stands for the proposition that an arbitrator must consider

the Guidelines. Indeed, Branch J. stated in *Weibe* at para.38*,* "the Arbitrator could reasonably have regard to it" suggesting that it was permissive.

[88] I would not say the Arbitrator's decision is necessarily patently unreasonable only because she did not consider Guideline 6. Had she provided an explanation for how and why a rule against extended absences would contravene the right of quiet enjoyment as described in s. 28(c), her explanation may well have been sufficient to make her decision reasonable. Without adequate reasons, though, that cannot be discerned.

[89] That said, given the role that Guidelines play in providing direction (or at least assistance) to landlords, tenants and arbitrators, and for the reasons discussed in *Powell v. British Columbia (Residential Tenancy Branch),* 2016 BCSC 1835, it would certainly be advisable for an arbitrator to consider and receive submissions on the relevant guideline.

Other Grounds Advanced by the Petitioner

[90] CHS advances several other grounds on which it says the Arbitrator's decision is patently unreasonable. Given my conclusion that CHS was denied the right to a fair process and the reasons for decision are inadequate, it is necessary to refer this matter back to the RTB for reconsideration. I would therefore refrain from commenting substantively on other grounds that may be the subject of that reconsideration, but I would make the following two observations.

[91] First, CHS has argued that Ms. Silver's complaint is moot since CHS approved Ms. Silver's request for an extended absence. CHS argues the Arbitrator's finding that the dispute need not be connected to a specific claim to be adjudicated is patently unreasonable. While I will not weigh into the merits of this, I would respectfully suggest CHS's letter of November 13, 2019 may be fairly characterized as begrudging consent to a one-time extended absence and it leaves considerable doubt that future absences might be approved. I suggest that has a significant bearing on the mootness issue.

[92] Second, CHS argues the Arbitrator's decision is patently unreasonable for failing to consider the statutory context of clause 17 and in making the erroneous finding that CHS "does not receive special consideration for its aims as a non-profit housing society." CHS points to the fact that the *Act* and the *Residential Tenancy Regulation*, B.C. Reg. 477/2003 exempt public housing bodies (of which CHA is one) from specific provisions of the *Act* on the basis of their public policy mandate. I would acknowledge, as did Ms. Silver's counsel, that the Arbitrator was mistaken to the extent that she was suggesting there is no unique treatment under the *Act* for organizations like CHS that provide subsidized housing. (In oral submissions, Ms. Silver's counsel acknowledged this statement is not technically correct in that the *Act* does contain some provisions that are specific to subsidized rental housing. However, he argued that the statement is correct as it relates to quiet enjoyment under s. 28(c).) Beyond observing this clear error, I would leave any further consideration of the relevance of this point to the new arbitration.

Remedy

[93] The parties agree I should refer this matter back to the RTB for a new arbitration if, as I have found, the decision should be set aside. CHS argues I should order it be referred to different arbitrator and relies on *Wiebe* at para. 67 and *Marshall v. Pohl*, 2019 BCSC 406 at para. 42, both of which made orders in these terms. Neither case explained the reason for that order.

[94] Ms. Silver argues I should not order this be heard by a different arbitrator because the appointment of the arbitrator is in the discretion of the Director of the RTB. She refers to *McDonald* where MacNaughton J. stated:

> I decline to make an order that the matter be decided by a new arbitrator as, in my view, such a direction would interfere with the assignment of matters at the discretion of the Director of the RTB.

[95] In oral reply, counsel for CHS argues that having the same arbitrator re-hear this particular matter gives rise to concerns of fairness and reasonable apprehension of bias because the Arbitrator has already decided, without the benefit of submissions, that clause 17 offends s. 28(c). He suggested MacNaughton J.'s

comments in *McDonald* are not a concern here because the RTB, which filed a petition response, did not oppose the relief CHS seeks. He said if the Director was concerned about discretion over the assignment of arbitrators, the RTB would have taken that position in its petition response.

[96] I would not venture into difficult questions about fairness and apprehension of bias in the absence of submissions from RTB, which has not participated in this hearing. As noted, while CHS's petition specifies it is seeking an order referring this matter back for reconsideration by a different arbitrator, its submissions regarding fairness and reasonable apprehension of bias were raised orally. Although MacNaughton J.'s statement in *McDonald* is valid, in view of the fact the RTB took no position on the relief as described in the Petition, I would, on this occasion, make the same order as found in *Weibe* and *Marshall*, namely that the matter be remitted to a different arbitrator.

[97] If the parties are unable to resolve the issue of costs, they may arrange through the registry to address me on the issue in writing.

"Kirchner, J"