IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Clements v. Gordon Nelson Investments Inc.,* 2010 BCSC 31

Date: 20100112
Docket: No. S093940
Registry: Vancouver

IN THE MATTER OF THE *ADMINISTRATIVE TRIBUNALS ACT*, R.S.B.C. 1996, c. 241

Between:

Kevin Clements, Trina McDougall, Brian Broster, Ross Waring, Tim Pawsey, Heather Pawsey, Robert Crudo, Dana Crudo, Roland McFall, Mary McFall, Donald Ransom, David Bronstein, Maureen Molloy, Wendy Stephenson, Christie Stephenson, Mark Moore, and Christine Brandt, Tenants

Petitioners

And

Gordon Nelson Investments Inc., Landlord, and K. Miller, in her capacity as a Dispute Resolution Officer under the *Residential Tenancy Act.*

Respondents

Before: The Honourable Madam Justice Loo

On judicial review from the Residential Tenancy Branch Dispute Resolution Services (Burnaby File No. 722107)

Reasons for Judgment

(In Chambers)

Counsel for Petitioners:	J. K. Hadley
Counsel for Respondents:	J. K. McEwan, Q.C. M. S. Oulton
Place and Date of Hearing:	Vancouver, B.C. November 17 to 18, 2009
Place and Date of Judgment:	Vancouver, B.C. January 12, 2010

INTRODUCTION

[1] The petitioners are tenants who live at 1436 Pendrell Street, Vancouver (the "Tenants") in a building known as the Seafield. The respondent Gordon Nelson Investments Inc. is the landlord (the "Landlord"). The respondent K. Miller is a Dispute Resolution Officer (the "Officer") under the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*Act*]. Following a teleconference hearing on March 11, 2009, the Officer issued a decision on April 2, 2009 permitting the Landlord to impose rent increases of between 15 and 38 percent on ten units in the Seafield.

[2] On this application for judicial review, the Tenants seek an order setting aside the Officer's decision and remitting the dispute to a new Dispute Resolution Officer for a rehearing, with directions. The Tenants also seek an order that the Landlord repay the additional rent they have paid as a result of the decision.

[3] For the reasons that follow, I conclude that the Tenants' application is successful and the Officer's decision must be set aside.

BACKGROUND

[4] The Seafield is a 14-unit heritage building located in Vancouver's West End. Many of the Tenants have lived at the Seafield for over 30 years.

[5] The Landlord took ownership of the Seafield on July 31, 2008. Generally, landlords may only increase rent annually, and only up to the amount prescribed by the *Act* and the *Residential Tenancy Act Regulation*, B.C. Reg. 477/2003 (the "*Regulation*"). In certain circumstances, a landlord may apply for a rent increase above the annual rent increase allowed by statute. In January 2009, the Landlord applied to increase the rent for 13 units by between 53.2 and 73.3 percent (according to the Tenants' calculations). The Tenants opposed the rent increases on the basis that the statutory criteria for permitting an additional rent increase were not met.

[6] The Officer described the Seafield in her decision as follows:

> The subject property is a 3-storey apartment building located in the West End of Vancouver, four blocks from English Bay to the Southwest, 5 blocks from Robson Street to the Northeast and 4-5 blocks from Burrard Street to the Southeast. There are 14 units in the building, with units 1-12 being original and units 14 and 15 having been added to the building's basement in the 1990's. There is no unit 13 in the building. The building was constructed in the 1930's and is a timber frame construction clad in brick and stone. It is registered as a heritage building by the city and the original units and common areas feature original hardwood floors, high ceilings, mouldings, electric fireplaces and original wood doors and hardware. The kitchens and bathrooms in units 1-12 are original. The subject property does not have an elevator. Rent includes heat and hot water. There are six parking spots at the property and tenants have access to a coin-operated laundry and bike and storage lockers. Among the affected rental units, the duration of tenancies ranges from 9 months to 48 years. Rent increases have been implemented throughout the tenancies, none higher than the amount permitted under the Act and Regulation.
>
> One unit in the building, unit 2, is not part of this application. Unit 2 is a two-bedroom unit which was recently vacated and re-rented to tenants who began occupying the unit on April 1 and paying $2,250.00 per month in rent.

[7] The Officer compared the Seafield's two-bedroom units to four other two-bedroom units that she considered comparable. Those units were located at 962 Jervis Street, 1225 Nelson Street, 855 Thurlow Street, and unit 2 at the Seafield. She compared the Seafield's one-bedroom units to two other one-bedroom units she considered comparable at 962 Jervis Street and 1225 Nelson Street. She referred to Residential Tenancy Policy Guideline No. 37 (the "Guideline"), and allowed the rents for seven two-bedroom units at the Seafield to increase from the range of $1,325 to $1,450 per month, up to $1,833 per month, and the rent for two one-bedroom units to increase from $1,067 and $1,068 per month to $1,225 per month.

[8] The Officer denied an additional rent increase for one of the one-bedroom units because the rent was not significantly lower than the other comparable units. The Officer also denied rent increases for the two bachelor units and one of the two-bedroom units because there was a lack of comparable units with significantly higher rents.

THE LAW

Rent Increases

[9] Section 43 of the *Act* establishes the framework for how and when a landlord may increase rent:

> 43 (1) A landlord may impose a rent increase only up to the amount
>
> (a) calculated in accordance with the regulations,
>
> (b) ordered by the director on an application under subsection (3), or
>
> (c) agreed to by the tenant in writing.
>
> (2) A tenant may not make an application for dispute resolution to dispute a rent increase that complies with this Part.
>
> (3) In the circumstances prescribed in the regulations, a landlord may request the director's approval of a rent increase in an amount that is greater than the amount calculated under the regulations referred to in subsection (1) (a) by making an application for dispute resolution.
>
> …
>
> (5) If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase.
>
> [Emphasis added.]

[10] Section 22 of the *Regulation* sets out a formula for determining the amount by which a landlord may annually increase rent under s. 43(1)(a) of the *Act*:

> 22 (1) In this section, inflation rate means the 12 month average percent change in the all-items Consumer Price Index for British Columbia ending in the July that is most recently available for the calendar year for which a rent increase takes effect.
>
> (2) For the purposes of section 43 (1) (a) of the Act [*amount of rent increase*], a landlord may impose a rent increase that is no greater than the percentage amount calculated as follows:
>
> percentage amount = inflation rate + 2%

For 2009, the allowable annual rent increase is 3.7 percent; for 2010, it is 3.2 percent.

[11] Section 23 of the *Regulation* sets out when a landlord may apply for an additional rent increase:

> 23 (1) A landlord may apply under section 43 (3) of the Act [*additional rent increase*] if one or more of the following apply:
>
> > (a) after the rent increase allowed under section 22 [*annual rent increase*], the rent for the rental unit is significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as, the rental unit[.]

[12] Subsection (3) outlines the factors that the director must consider in deciding whether to approve an application for additional rent increase:

> (3) The director must consider the following in deciding whether to approve an application for a rent increase under subsection (1):
>
> > (a) the rent payable for similar rental units in the residential property immediately before the proposed increase is intended to come into effect;
> >
> > (b) the rent history for the affected rental unit in the 3 years preceding the date of the application;
> >
> > (c) a change in a service or facility that the landlord has provided for the residential property in which the rental unit is located in the 12 months preceding the date of the application;
> >
> > (d) a change in operating expenses and capital expenditures in the 3 years preceding the date of the application that the director considers relevant and reasonable;
> >
> > (e) the relationship between the change described in paragraph (d) and the rent increase applied for;
> >
> > (f) a relevant submission from an affected tenant;
> >
> > (g) a finding by the director that the landlord has contravened section 32 of the Act [obligation to repair and maintain];
> >
> > (h) whether, and to what extent, an increase in costs with respect to repair or maintenance of the residential property results from inadequate repair or maintenance in a previous year;
> >
> > (i) a rent increase or a portion of a rent increase previously approved under this section that is reasonably attributable to the cost of performing a landlord's obligation that has not been fulfilled;
> >
> > (j) whether the director has set aside a notice to end a tenancy within the 6 months preceding the date of the application;
> >
> > (k) whether the director has found, in dispute resolution proceedings in relation to an application under this section, that the landlord has
> >
> > > (i) submitted false or misleading evidence, or
> > >
> > > (ii) failed to comply with an order of the director for the disclosure of documents.

[13] Subsection (4) outlines the options available to the director:

> (4) In considering an application under subsection (1), the director may
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> (a) grant the application, in full or in part,
>
> (b) refuse the application,
>
> (c) order that the increase granted under subsection (1) be phased in over a period of time, or
>
> (d) order that the effective date of an increase granted under subsection (1) is conditional on the landlord's compliance with an order of the director respecting the residential property.

[14] Though the *Act* and *Regulation* refer to a decision being made by the director, pursuant to s. 9(2) of the *Act* the director may retain other persons, including a Dispute Resolution Officer, to exercise the director's powers and perform the director's duties and functions under the *Act*.

[15] Residential Tenancy Policy Guideline No. 37, titled "Rent Increases" provides assistance regarding when to allow an additional rent increase, and the Officer referred to it in arriving at her decision. The Guideline reads as follows at p. 37-3:

> **Additional Rent Increase under the Residential Tenancy Act**
>
> The Residential Tenancy Act allows a landlord to apply to a dispute resolution officer for approval of a rent increase in an amount that is greater than the basic Annual Rent Increase. The policy intent is to allow the landlord to apply for dispute resolution only in "extraordinary" situations. The Residential Tenancy Regulation sets out the limited grounds for such an application. A landlord may apply for an additional rent increase if one or more of the following apply:
>
> > (a) after the allowable Annual Rent Increase, the rent for the rental unit is significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as, the rental unit[.]

[16] The Guideline details the concept of significantly lower rent at pp. 37-6 to 37-8:

> **Significantly lower rent**
>
> The landlord has the burden and is responsible for proving that the rent for the rental unit is significantly lower than the current rent payable for similar units in the same geographic area. An additional rent increase under this provision can apply to a single unit, or many units in a building. If a landlord wishes to compare all the units in a building to rental units in other buildings in the geographic area, he or she will need to provide evidence not only of rents in the other buildings, but also evidence showing that the state of the

rental units and amenities provided for in the tenancy agreements are comparable.

The rent for the rental unit may be considered "significantly lower" when (i) the rent for the rental unit is considerably below the current rent payable for similar units in the same geographic area, or (ii) the difference between the rent for the rental unit and the current rent payable for similar units in the same geographic area is large when compared to the rent for the rental unit. In the former, $50 may not be considered a significantly lower rent for a unit renting at $600 and a comparative unit renting at $650. In the latter, $50 may be considered a significantly lower rent for a unit renting at $200 and a comparative unit renting at $250.

"Similar units" means rental units of comparable size, age (of unit and building), construction, interior and exterior ambiance (including view), and sense of community.

The "same geographic area" means the area located within a reasonable kilometer radius of the subject rental unit with similar physical and intrinsic characteristics. The radius size and extent in any direction will be dependant on particular attributes of the subject unit, such as proximity to a prominent landscape feature (e.g., park, shopping mall, water body) or other representative point within an area.

Additional rent increases under this section will be granted only in exceptional circumstances. It is not sufficient for a landlord to claim a rental unit(s) has a significantly lower rent that results from the landlord's recent success at renting out similar units in the residential property at a higher rate. However, if a landlord has kept the rent low in an individual one-bedroom apartment for a long term renter (i.e., over several years), an Additional Rent Increase could be used to bring the rent into line with other, similar one-bedroom apartments in the building. To determine whether the circumstances are exceptional, the dispute resolution officer will consider relevant circumstances of the tenancy, including the duration of the tenancy, the frequency and amount of rent increases given during the tenancy, and the length of time over which the significantly lower rent or rents was paid.

The landlord must clearly set out all the sources from which the rent information was gathered. In comparing rents, the landlord must include the Allowable Rent Increase and any additional separate charges for services or facilities (e.g.: parking, laundry) that are included in the rent of the comparable rental units in other properties. In attempting to prove that the rent for the rental unit is significantly lower than that for similar units in the same geographical area, it is **not** sufficient for the landlord to solely or primarily reference Canada Mortgage and Housing Corporation (CMHC) statistics on rents. Specific and detailed information, such as rents for all the comparable units in the residential property and similar residential properties in the immediate geographical area with similar amenities, should be part of the evidence provided by the landlord.

The amount of a rent increase that may be requested under this provision is that which would bring it into line with comparable units, but not necessarily with the highest rent charged for such a unit. Where there are a number of comparable units with a range of rents, a dispute resolution officer can

> approve an additional rent increase that brings the subject unit(s) into that range. For example, a dispute resolution officer may approve an additional rent increase that is an average of the applicable rental units considered. An application must be based on the projected rent after the allowable rent increase is added.
>
> [Emphasis in original.]

[17] Both the Tenants and the Landlord referred to the following debates of the British Columbia Legislative Assembly, during the second reading of Bill 70, which became the *Act*: British Columbia, Legislative Assembly, *Hansard*, vol. 9, no. 13 (31 October 2002) at 4205 (Hon. R. Coleman):

> One of my issues when I used to debate this act was that you had to make it so people felt like there was a decent relationship between the two parties. Without that, you wouldn't get reinvestment in the sector. My concern in 1997 was the concern I have today, which was that we're not building rental housing in British Columbia. That therefore takes us down the road to having a shortage of rental housing, which eventually creates a housing crisis in residential tenancies.
>
> …
>
> We had a consultant meet with landlord and tenant groups, who obtained and brought back those views on how to modernize the act. We compiled the information carefully. We spent time reviewing it and began redrafting an act, which you see before you today. The changes we made tended to do a number of things: (1) provide balance and fairness in what should be a compatible relationship between a landlord and a tenant, balance and fairness so that the tenancy is good and people are happy, so that they're comfortable in their residence and have a relationship with their landlord that makes sense; (2) clearly outline the responsibility and obligations of both landlords and tenants so that we can reduce the number of arbitrations, which is currently around 20,000 arbitrations a year, in arguments between the two parties in residential tenancy.
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> …
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> The first thing that will take place is that.... In this province, there's been a rent review system, and that rent review system was a system of people we used to refer to as soft rent controls — difficult and onerous as far as the landlord getting the information he had to provide in order to increase the rent in a tenancy. The relationship got to the point where people were always in arbitration over any little dollar, particularly in a couple of forms of tenancy in this province.
>
> The issue we had to deal with was this. Do you not have a system at all of rent fairness and go straight to the market, where you would have an open market to establish rents, or do you have a rent fairness system? That could be where a certain percentage of rent is allowable on an annual basis for landlords to be able to take, if the market permits and if it's necessary to operate the facility; and if they take that, that it not be subject to arbitration so

> we don't put everybody into this adversarial relationship every time somebody wants to operate their business.
>
> We struggled with that. We came to the conclusion after consulting with the landlord groups, frankly, and with tenant groups that there had to be some form of rent fairness. We've come up with a formula that we will put into regulation, which will be a percentage of increase that will be allowable to a landlord plus the consumer price index on the basis of a rent increase on an annual basis. Anything above that will have to go if the landlord wants it to. If it's disputed, it can be disputed by arbitration to justify a substantial rent increase over and above that.

[18] Both the Tenants and the Landlord agree that ss. 22 and 23 of the *Regulation* provide a means of balancing the free market against a closed rental market and that s. 23(1)(a) acts as a safety valve if the rent for a unit is significantly lower than the rent payable for other rental units that are similar and in the same geographic area. In other words, they agree that those provisions are meant to ensure balance and fairness between a landlord and a tenant.

Standard of Review

[19] The *Act* contains a privative clause in s. 77(3):

> 77 (3) Except as otherwise provided in this Act, a decision or an order of the director is final and binding on the parties.

[20] Section 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, describes the standard of review that applies where a tribunal's enabling statute contains a privative clause:

> 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (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 (b), 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
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> (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.
>
> [Emphasis added.]

[21] Section 78.1 of the *Act* provides that s. 58 of the *Administrative Tribunals Act* applies to dispute resolution proceedings under the *Act*.

[22] In *Manz v. Sundher*, 2009 BCCA 92, the Court of Appeal confirmed that although the common law of judicial review no longer invokes the standard of patently unreasonable as a result of the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the standard of patently unreasonable still applies under the *Administrative Tribunals Act*. Madam Justice Saunders stated:

> [4] After the reasons for judgment were issued in this case, the Supreme Court of Canada issued reasons for judgment in *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9, [2008] 1 S.C.R. 190. In *Dunsmuir*, in reasons for judgment for the majority authored by Justices Bastarache and LeBel, the Supreme Court of Canada changed the range of standard of review on a judicial review application from the three standards of correctness, reasonableness and patent unreasonableness, to two standards, correctness and reasonableness. Justice Binnie in concurring reasons for judgment agreed with condensing the standards of review to two, but cautioned of the multi-faceted assessment that will be required in considering the standard of reasonableness. Justice Deschamps for Justices Charron and Rothstein, agreed in the result but on an approach akin to the appellate approach to review of decisions of a trial court.
>
> [5] The law of standard of review in administrative law cases engaging issues other than natural justice and procedural fairness has used much ink in the last two decades and has been the source of much confusion. This is particularly so where, as here, the tribunal in issue has the advantage of privative clauses. To bring more certainty to this area of law the legislature in British Columbia, in 2004, before *Dunsmuir*, enacted the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, the terms of which incorporate the correctness, reasonableness and patent unreasonableness standards of review, depending on the nature of the question and the presence or not of a privative clause. As a result of *Dunsmuir*, the common law of judicial review no longer invokes the standard of patently unreasonable while British

> Columbia, through the *Administrative Tribunals Act*, embraces that standard for certain tribunals and certain issues. In other words, British Columbia's legislation now departs from the common law as recently expressed in *Dunsmuir*.
>
> [6] In particular, by the *Administrative Tribunals Act*, tribunals with a privative clause are subject to review on the standard of correctness or patent unreasonableness, depending on the issue. This standard was the same standard as would have applied at common law before enactment of the *Administrative Tribunals Act*: *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77. However, now, absent the *Administrative Tribunals Act* and applying the common law standard of review set out in *Dunsmuir*, the standard of review would have shifted from that described in *Speckling* to a review for correctness or reasonableness, depending on the issue.

[23] She further discussed the patently unreasonable standard as follows:

> [39] The standard of review was that of patently unreasonable. When applied to findings of fact or law the *Administrative Tribunals Act* does not define that term. (Section 58(2)(a) refers to a finding of fact or law or an exercise of discretion, but s. 58(3) is said to apply only to discretionary decisions). Accordingly, the well understood meaning of that phrase in relation to factual matters applies, is as described in *Speckling*:
>
> > [37] As the chambers judge noted, a decision is not patently unreasonable because the evidence is insufficient. It is not for the court on judicial review, or for this Court on appeal, to second guess the conclusions drawn from the evidence considered by the Appeal Division and substitute different findings of fact or inferences drawn from those facts. A court on review or appeal cannot reweigh the evidence. Only if there is no evidence to support the findings, or the decision is "openly, clearly, evidently unreasonable", can it be said to be patently unreasonable. That is not the case here.

[24] In *Falc v. Mainstreet Equity Corp*., 2009 BCSC 410, Madam Justice Satanove dealt with a tenant's application for judicial review of a decision made by a Dispute Resolution Officer under the *Act*, and the application of the patently unreasonable standard under s. 58 of the *Administrative Tribunals Act*:

> [9] In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, Iacobucci J. described (at paras. 56-57) an unreasonable decision as one that was not supported by any reasons that could stand up to a probing examination. He explained that the difference between patent unreasonableness and reasonableness is the "immediacy" or "obviousness" of the defect in the tribunal's decision. The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect. This analysis remains the law with respect to the standard of patent

> unreasonableness in s. 58 of the *Administrative Tribunals Act*, despite the Supreme Court of Canada's fusion of the two standards in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, (*Bagri v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 300, and *Tallarico v. Workers' Compensation Appeal Tribunal*, 2009 BCSC 49).

[25] Accordingly on this application for judicial review, the standard of review is patently unreasonable under s. 58. A finding of fact or law or an exercise of discretion is patently unreasonable if it is "openly, clearly, or evidently unreasonable": *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 57.

ARGUMENT AND ANALYSIS

[26] The Tenants argue that the finding of fact or law or exercise of discretion is patently unreasonable as the Officer made the following errors:

a) an error of law by basing her analysis on rents before (rather than after) the rent increase permitted under s. 22 of the *Regulation*;

b) a factual error by considering the comparator rental units provided by the Landlord sufficiently similar;

c) an error of law by finding that the requirements of s. 23(1)(a) of the *Regulation* were met by comparing at least two similar rental units;

d) unfairly refusing to consider the Tenants' submission; and

e) failing to comply with the *Act* by failing to provide adequate reasons.

(a) analysis based on rents before the allowable rent increase

[27] Section 23(1)(a) of the *Regulation* specifies that a landlord may apply for an additional rent increase if "<u>after</u> the rent increase allowed under section 22" the rent is significantly lower than that of other similar rental units in the same area (emphasis added).

[28] At p. 1 of the decision, the Officer properly describes the issue requiring resolution as follows:

> After a rent increase permitted by the Regulation, is the rent for these rental units significantly lower than rent payable for other rental units similar to and in the same geographic area as the rental units? [Emphasis added.]

[29] At p. 7 of the decision, the Officer cites the highest monthly rent for a two-bedroom unit in the Seafield as $1,450:

> While the rents payable for the subject units are not significantly lower than the unit at 1225 Nelson Street, I find that the rents are significantly lower than the rents payable at 962 Jervis Street, 855 Thurlow Street and Unit 2 in the subject property, with the $1,450.00 highest rent for the subject units being $100.00 less than the lowest rent of the comparables and $800.00 less than the highest rent of the comparables. I find that the landlords have met their burden of proof and are entitled to a rent increase above that provided for in the Regulation.

[30] At p. 9 of the decision, the Officer cites the $1,067 and $1,068 as the rents for the one-bedroom units:

> I find that the $1,067.00 and $1,068.00 rents payable for the subject units are significantly lower than the rents payable at 962 Jervis Street and 1225 Nelson Street, with the rent being $82.00 - $83.00 less than the lowest rent of the comparables and $232.00 - $233.00 less than the highest rent of the comparables. I find that the landlords have met their burden of proof and are entitled to rent increase above that provided for in the Regulation.

[31] On the face of the decision, when the Officer turned to consider the difference in rent between the units at the Seafield and the other comparator units, she compared the rent of the Seafield units before the annual rent increase permitted by the *Regulation* with the rent of the comparator units. Although the Officer stated the issue clearly and correctly at the beginning of her decision, her analysis is based on the rents before and not after the 3.7 percent increase allowed for 2009 under s. 22 of the *Regulation*.

[32] I therefore conclude that the Officer failed to take the statutory requirement of s. 23(1)(a) into account contrary to s. 58(3)(d) of the *Administrative Tribunals Act*, meaning that it is a patently unreasonable application of the law.

(b) comparator units provided by the Landlord

[33] Section 23(1)(a) of the *Regulation* requires the landlord to show the rent is significantly lower than that of "other rental units that are similar to, and in the same geographic area as, the rental unit" (emphasis added). The Guideline provides some assistance in defining what it means for a unit to be "similar to" and "in the same geographic area" (at p. 37-7):

> "Similar units" means rental units of comparable size, age (of unit and building), construction, interior and exterior ambiance (including view), and sense of community.
>
> The "same geographic area" means the area located within a reasonable kilometer radius of the subject rental unit with similar physical and intrinsic characteristics. The radius size and extent in any direction will be dependant on particular attributes of the subject unit, such as proximity to a prominent landscape feature (e.g., park, shopping mall, water body) or other representative point within an area.

[34] The Officer appears to have had these criteria in mind when she considered whether the Landlord's proposed comparator units were "similar" and in the "same geographic area". At pp. 4-5 of the decision, she discusses the factors she considered in determining which units were comparable:

> When determining whether other units are comparable to the rental unit, it is important to note that I am tasked with determining whether the other units are similar to, not identical to, the rental unit. There will be differences between any two rental units, even those in the same building and managed by the same landlord. I have endeavoured to determine which differences are sufficiently significant to have an appreciable impact on the rent which could be attracted by a unit. Not all differences have a positive impact on rental rates.
>
> …When considering the heritage suites, I have only considered comparable units in heritage buildings as other buildings would not offer the same character. I have not considered as comparable suites with balconies, more than one bathroom, ensuite laundry facilities or amenities such as swimming pools, saunas or fitness centres. Furnished suites, including those with Murphy beds, were not considered, nor were suites in heritage buildings which had been renovated to an extent that they had been substantially modernized. Although the subject property is located in the West End of Vancouver, I have narrowed the comparables to those which are in a very limited range of the subject property. I did not consider comparables within a few blocks of English Bay, Stanley Park or Robson or Burrard Streets as I find that units located closer to those attractions or conveniences are able to attract a higher rent. A number of the suites offered by the landlords as

> comparables were disregarded because they lacked sufficient detail to permit a meaningful comparison.
>
> [Emphasis added.]

[35] The Seaview is five blocks from Robson Street. The Officer stated that she did not consider units within a few blocks of Robson Street comparable because those units are able to attract higher rent, but she did just that. Two of the buildings from which comparator units were drawn are clearly within a few blocks of Robson Street: 855 Thurlow is at most a block from Robson Street (a two-bedroom unit in this building was considered comparable), 962 Jervis is within two blocks (a one-bedroom and a two-bedroom unit in this building were considered comparable), and 1225 Nelson is within three blocks (a one-bedroom and a two-bedroom unit were considered comparable) of Robson Street.

[36] While it may be questionable whether three blocks is a few blocks, clearly one or two blocks comes within a few blocks. It is patently unreasonable to state that units within "a few blocks" of Robson Street are not comparable, and then proceed to consider those units as comparable. Therefore, on this point I conclude that the Officer made a patently unreasonable factual error.

(c) number of comparator units required by s. 23(1)(a) of the *Regulation*

[37] Section 23(1)(a) of the *Regulation* requires the landlord to show that the rent is "significantly lower than the rent payable for other rental units" that are similar and in the same geographic area (emphasis added). The Tenants argue that the Officer's finding that the requirements of s. 23(1)(a) are satisfied by comparing at least two similar rental units is an error in law. The Landlord argues that the language of the statute (using the plural "units") shows that only "more than one" other rental unit is required for comparison.

[38] As a result of my conclusion that the units at 855 Thurlow and 962 Jervis cannot be considered "similar to" or in the "same geographical area" as the Seafield because of their proximity to Robson Street, the only comparator units remaining are those at 1225 Nelson and the two-bedroom unit in the Seafield. This means that, at

most, there are only one one-bedroom unit and two two-bedroom units that can be considered sufficiently similar. Clearly, even based on the Landlord's argument that the language of the *Regulation* merely requires "more than one" other comparator unit, there are an insufficient number of comparator units by which to assess the significance of the difference in rent for the Seafield's one-bedroom units.

[39] As for the number of comparator two-bedroom units, it is significant that the Officer rationalized using a unit from the Seafield itself as a comparator unit because the Landlord had provided multiple other units as comparators. At pp. 6-7 of her decision, she describes this rationale:

> I find that unit 2 in the subject building [the Seafield] is comparable. ...The tenants pointed to Residential Tenancy Policy Guideline # 37 which provides, in part, as follows:
>
> > It is not sufficient for a landlord to claim a rental unit(s) has a significantly lower rent that results from the landlord's recent success at renting out similar units in the residential property at a higher rate.
>
> Had unit 2 been the only rental unit to which the landlords compared the subject units, I would have found that the evidence was insufficient. However, the landlords provided three other comparable units and when taken as part of that group, I find it appropriate to consider unit 2 in my considerations.
>
> [Emphasis added.]

[40] The Officer stated that the two-bedroom unit in the Seafield was comparable because it formed part of a group of four comparable two-bedroom units. It is not clear whether she would have considered the two-bedroom unit in the Seafield as a comparator unit if it was only one of two comparator units. Regardless, I doubt it was the intention of the *Act* to allow a landlord to obtain an additional rent increase by increasing the rent once a unit becomes vacant and then applying for a rent increase for other units on the ground that the remaining units in the building are similar to and in the same geographic area but attract significantly lower rents.

[41] Even if the two-bedroom unit at the Seafield can still be considered a comparable unit given that the other two comparables are removed, it is doubtful that s. 23(1)(a) requires merely two comparator units.

[42] This was a patently unreasonable error of law.

(d) failure to consider the Tenants' evidence

[43] The Tenants contend that the Officer unfairly refused to consider their submissions. Section 23(3) of the *Regulation* requires the director to consider a relevant submission from an affected tenant when deciding whether to allow an additional rent increase:

> 23(3) The director must consider the following in deciding whether to approve an application for a rent increase under subsection (1):
>
> ...
>
> (f) a relevant submission from an affected tenant
>
> [Emphasis added.]

[44] At p. 2 of her decision, the Officer stated that "[b]oth parties submitted considerable, well-researched evidence comparing the residential property to other buildings in the area". Then, at pp. 3-4 she stated:

> With their evidence, the tenants referenced a number of rental units which they believed to be comparable to the units in the subject property. In making my decision I have not considered the comparables provided by the tenants. Section 23(1)(a) of the Regulation provides as follows:
>
> > 23 (1) A landlord may apply under section 43 (3) of the Act [*additional rent increase*] if one or more of the following apply:
> >
> > (a) after the rent increase allowed under section 22 [*annual rent increase*] , the rent for the rental unit is significantly lower than the rent payable for other rental units that are similar to, and in the same geographic area as, the rental unit;
>
> The landlords do not have to prove that the rent is significantly lower than all comparable rental units, but merely have to prove that there is evidence that in the current market, there exist similar rental units which attract a higher rent than what is currently being paid for the subject unit. For the same reason, I have not considered either the tenants' West End Renters' Survey and the analysis derived therefrom or the Canada Mortgage and Housing Corporation's analysis of the survey.
>
> The tenants made other submissions to which I have given little or no weight. The tenants gave evidence that they have paid regular rent increases each year. Although the rent history must be considered pursuant to Regulation 23(3)(b), this evidence has not altered my decision as many of these tenancies are long-term tenancies and it is well within the realm of possibility that permitted rent increases have not kept the rent in line with market value. The tenants suggested that the landlords had been negligent in maintaining

> the building since purchasing it in 2008 by removing the services of the resident caretakers, failing to clean common areas, maintain the landscaping, sidewalks and downspouts and remove snow in a timely fashion, among other complaints. While this might be a relevant submission under Regulation 23(3)(c), which provides that I must consider a change in a service or facility that the landlord has provided in the year preceding the application, the tenants provided no evidence of how the change in maintenance standards had affected the value of the rentals. In the absence of such evidence, the tenants' position with respect to maintenance has had no effect on my decision. The tenants further argued that the landlords' true intent was to evict the tenants through applying rent increases. The tenants appear to be importing a kind of good faith argument, which is not part of the Act. There is nothing in the Act which prohibits landlords from working to maximize their profits. In any event, it is clear from the start of their ownership that the landlords were looking for means to increase revenue from the subject building and an application for an above guideline rent increase is, on its face, the most obvious means of achieving that end. I find that this is not a motivation prohibited under the Act and it has therefore had no impact on my decision.
>
> The landlords provided market rental estimates from three property valuators. While this evidence has been considered, I have relied almost exclusively upon the descriptions of and advertisements for comparable units provided by the landlords as in my opinion, the Regulation requires a comparison of specific rental units rather than general observations of market trends. I note that the property valuators provided examples of specific comparative rental units which the landlords had incorporated into their list of comparables and that many if not all of the examples listed in the market rental estimates had unique characteristics which, in my opinion, rendered them incomparable to the rental units.
>
> [Emphasis added.]

[45] The Officer implies that she did not consider the units suggested by the Tenants as comparable, the Tenants' evidence of the West End Renters' Survey, and the Canada Mortgage and Housing Corporation analysis of the survey because those submissions considered units with rents that were either similar to or lower than the Tenants' units.

[46] Although the Officer may be correct when she says that landlords do not have to prove that the rent (after the allowable increase) is lower than all comparable units, the Officer must consider the Tenants' relevant submissions. It defies common sense to imagine an affected tenant opposing a landlord's application for a rent increase would make a submission showing that there are similar rental units that attract higher rents. Tenants' submissions showing that similar rental units attract a

similar or lower rents are clearly relevant. On the face of the decision, the Officer failed to comply with the statutory requirement to consider relevant submissions from an affected tenant and that failure is patently unreasonable and an error of law.

(e) failure to provide adequate reasons

[47] The Tenants argue that the Officer failed to comply with s. 77 of the *Act* because she failed to produce adequate reasons. Section 77 reads, in part:

> 77 (1) A decision of the director must
>
> (a) be in writing,
>
> (b) be signed and dated by the director,
>
> (c) include the reasons for the decision, and
>
> (d) be given promptly and in any event within 30 days after the proceedings conclude.
>
> (2) The director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period in subsection (1) (d).
>
> (3) Except as otherwise provided in this Act, a decision or an order of the director is final and binding on the parties.
>
> [Emphasis added.]

[48] Although both the Tenants and the Landlord made submissions on the adequacy of the Officer's reasons, in light of my conclusions on the preceding points, it is unnecessary to consider this issue.

CONCLUSION

[49] The Officer's decision of April 2, 2009 must be set aside and the underlying dispute is remitted for rehearing by another Dispute Resolution Officer. I am reluctant to give specific directions, but expect that the Dispute Resolution Officer rehearing this dispute will be guided by these reasons for judgment.

[50] In addition, the Landlord must refund the Tenants any additional rents paid as a consequence of the Officer's decision. Section 43(5) of the *Act* states that:

> (5) If a landlord collects a rent increase that does not comply with this Part, the tenant may deduct the increase from rent or otherwise recover the increase. [Emphasis added.]

[51] If the parties are unable to resolve the issue of costs, they may make submissions.

"Loo J."