IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ball v. Beacham,*
2024 BCSC 21

Date: 20240105
Docket: S21000
Registry: Duncan

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

Between:

Michael Ball, also known as Mike Ball, and Jeannie Coates, also known as Jeannie Ball

Petitioner

And

Christine Beacham and Clinton Beacham

Respondents

Before: The Honourable Justice Maisonville

Reasons for Judgment

The Petitioners, appearing in person:	M. Ball J. Coates
The Respondent, Clinton Beacham, appearing in person and on behalf of Christine Beacham:	C. Beacham
Counsel for the Attendee, Residential Tenancy Branch:	J. Patrick
Place and Date of Hearing:	Duncan, B.C. November 15, 2023
Place and Date of Judgment:	Duncan, B.C. January 5, 2024

Table of Contents

Introduction

[1] The petitioners, Michael Ball (“Mr. Ball”) and Jeannie Ball (“Ms. Ball”) (together, the “petitioners”), apply for a judicial review of an order issued by an arbitrator (the “Arbitrator”) of the Residential Tenancy Branch (the “RTB”) on November 8, 2021 (the “Decision”). The applicable grounds are set out in the petitioners’ Amended Petition to the Court filed October 3, 2023 (the “Amended Petition”).

[2] The Decision was made pursuant to s. 67 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*]. The petitioners also seek review of an associated review of the Decision (the “Review Decision”) made by a separate arbitrator (the “Review Arbitrator”). For reasons set out below, however, the Decision alone is properly before this Court for review.

[3] The petitioners are self-represented. Likewise, the respondent, Clint Beacham, opposes the judicial review on his own behalf and on behalf of his wife, Christine Beacham (together, the “respondents”).

[4] For the reasons that follow, I find that, in respect of the Decision, the tribunal did not act fairly in all of the circumstances. In light of failings in respect of the service of key evidence tendered by the respondent—and more centrally, the Arbitrator’s actions in not sufficiently confirming service—the petitioners were not afforded the necessary appreciation of their case to meet. These circumstances invited procedural unfairness upon the petitioners, with specific implication of the principle of *audi alteram partem*.

[5] The Amended Petition is allowed, the Decision is set aside, and I remit the matter back to the RTB for reconsideration before a different arbitrator.

Background

[6] The petitioners owned and acted as landlords in respect of a home in Duncan, BC (the “Unit”). The respondents occupied the Unit as tenants. On January 25, 2021, the petitioners served on the respondents a two-month notice to end

tenancy for landlord occupation of the rental unit pursuant to s. 49 of the *RTA* (the "Notice").

[7] Pursuant to s. 49(3) of the *RTA*, a "landlord who is an individual may end a tenancy in respect of a rental unit if the landlord or a close family member of the landlord intends in good faith to occupy the rental unit". A separate purpose cannot be substituted for the purpose set out in a notice to end a tenancy even if that substitute purpose would otherwise have provided a valid reason for ending the tenancy: *Blouin v Stamp*, 2021 BCSC 411 at para. 36.

[8] The tenancy ended pursuant to the Notice on March 31, 2021 and the petitioners took possession of the Unit on April 1, 2021.

[9] After vacating the Unit, on or about June 28, 2021, the respondents filed an Application for Dispute Resolution with the RTB, seeking a monetary award from the petitioners on the basis of s. 51(2) of the *RTA*, which provides:

> (2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if the landlord or purchaser, as applicable, does not establish that
>
> (a) the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and
>
> (b) the rental unit, except in respect of the purpose specified in section 49 (6) (a), has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.

[10] Where s. 51(2) is raised, any previous intentions of the landlord, whether in good faith or not, are no longer relevant and whether the landlord actually accomplished the stated purpose for ending the tenancy is material. As of the date of the initial arbitration hearing, November 8, 2021, the petitioners had still not occupied the Unit.

[11] Pursuant to s. 51(3) of the *RTA*, the petitioners argued that "extenuating circumstances" had and continued to prevent them from occupying the Unit in

accordance with s. 51(2) of the *RTA*. They contended that there was significant work required in order to make the Unit habitable, including but not limited to mold remediation and repairs for structural damage from water ingress.

Timeline

[12] The following is the timeline of events:

Notice to end tendency for landlords' (petitioners') use of the property:	January 25, 2021
Tenancy ended:	March 31, 2021
The respondents vacated the property:	April 1, 2021
The petitioners on cleaning and replacing carpets discovered significant structural damage requiring significant work:	Early April 2021
Building permit obtained:	Late April 2021
Dispute notice filed by the respondents on the basis that the landlords family had not moved into the property:	June 28, 2021
Hearing and decision of the arbitrator:	November 8, 2021
Review consideration decision:	November 18, 2021
Petition filed:	January 6, 2022
The petitioners discovered in the response of the RTB director documents that had been filed late as well as not served on them:	Early 2023
Amended petition to the court filed:	October 3, 2023
Amended response to the amended petition filed by the RTB director	October 16, 2023

The Decision

[13] On November 8, 2021, the respondents' Application for Dispute Resolution with the RTB was heard by the Arbitrator. The hearing was conducted by way of a conference call in accordance with the usual procedures at the RTB, and lasted approximately 20 minutes according to the evidence of Mr. Ball. The hearing was attended by the petitioners and the respondents.

[14] The Arbitrator indicated that he had turned his mind to all the documentary evidence and testimony of the parties, however, this evidence was not particularized in the *Decision*. He noted that the petitioners tendered evidence indicating that the

Unit required considerable renovations to make it habitable and that this work had taken a long time due to, *inter alia,* material shortages, shipping delays, and scheduling conflicts.

[15] The Arbitrator also noted that the petitioners had removed the carpeting inside the Unit and discovered water leaks, which required the removal of drywall, the replacement of appliances, the repair of structural damage, and various plumbing and electrical work.

[16] Insofar as the petitioners had still not moved into the Unit on November 8, 2021, the Arbitrator found that the they had not accomplished their stated purpose for ending the tenancy. The key issue was whether this failure could be attributed to extenuating circumstances as per s. 51(3) of the *RTA*. The petitioners submitted that they were unaware of the degree of work that was required to make the Unit habitable until after they took possession.

[17] The Arbitrator described extenuating circumstances in the following way:

> Extenuating circumstances are those situations that would make it unreasonable and unjust to expect a landlord to accomplish the stated purpose renting a tenancy. While an unexpected discovery of water damage to the rental property, or material shortage may be an example of such extenuating circumstances, I find that the degree of the work undertaken by the landlords goes beyond addressing these issues and more in the nature of upgrading the property. I find such factors as ordering appliances, adding an extension to the bedroom, replacing windows and cabinetry to be more properly characterized as renovation rather than repairs. I find that the evidence supports the interpretation that the landlords commenced work beyond addressing immediate deficiencies but to renovate and upgrade the property.

[18] In assessing extenuating circumstances, the Arbitrator relied on parts of the Residential Tenancy Policy Guideline 50, which provides, in part:

> **Extenuating Circumstances**
>
> An arbitrator may excuse a landlord from paying additional compensation if there were extenuating circumstances that stopped the landlord from accomplishing the stated purpose within a reasonable period, from using the rental unit for at least 6 months, or from complying with the right of first refusal requirements. These were circumstances where it would be unreasonable and unjust for a landlord to pay compensation, typically

> because of matters that could not be anticipated or were outside a reasonable owner's control. Some examples are:
>
> - A landlord ends a tenancy so their parent can occupy the rental unit and the parent dies one month after moving in;
> - A landlord ends a tenancy to renovate the rental unit and the rental unit is destroyed in a wildfire.
> - A tenant exercised their right of first refusal, but did not notify the landlord of a further change of address after they moved out so they did not receive the notice and new tenancy agreement.
>
> The following are probably not extenuating circumstances:
>
> - A landlord ends a tenancy to occupy the rental unit and then changes their mind.
> - A landlord ends a tenancy to renovate the rental unit but did not adequately budget for the renovations and cannot complete them because they run out of funds.

[19] Ultimately, the Arbitrator did not accept the petitioners' submissions that they were unaware of the degree of work that would be required when they took possession of the rental property, nor that, by extension, there were extenuating circumstances in play in the Decision at 4:

> […] I find the landlords' own evidence demonstrates that the renovation work was anticipated and expected […]
>
> […] I do not find the landlords' submissions to be persuasive, consistent with the evidence of the parties or their own submissions. The rental unit was occupied by the tenants until the end of the tenancy. There was no question that the rental unit was suitable for habitation at the time that the landlords gained possession.

[20] The arbitrator made this finding in part because of the landlords' "decision to perform additional renovations and upgrades to the rental unit": Decision at 4. In obiter, the Arbitrator stated that "[i]f the landlords were aware that they would perform work on the rental unit then they could have issued a notice to end tenancy [*sic*] pursuant to section 49.2 of the [*RTA*]": Decision at 5.

[21] The arbitrator released the Decision on November 10, 2021, although it was dated November 8, 2021, the same day as the hearing wherein an amount of $16,200, the equivalent of 12 times the monthly rent of $1,350, was awarded to the respondents.

[22] I note that this hearing, as with the review hearing described below,, was not recorded. The parties were advised not to record the hearings on their own volition

The Review Decision

[23] The Review Decision first considered the amount of time that the applicants had to bring an application for review. The Review Arbitrator concluded that 15 days had been available to the petitioners, despite the fact that they had filed the applicable application with the RTB on November 12, 2021, only two days after the Decision was released.

[24] A party may apply to the Director of the RTB for the review of a decision in only one or more of three circumstances as provided in s. 79(2) of the *RTA*:

> (2) A decision or an order of the director may be reviewed only on one or more of the following grounds:
>
> (a) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control;
>
> (b) a party has new and relevant evidence that was not available at the time of the original hearing;
>
> (c) a party has evidence that the director's decision or order was obtained by fraud.

[25] The petitioners' first ground of review concerned what they claimed to be new evidence in the form of a request for an adjournment of proceedings they submitted to the RTB after the hearing before the Arbitrator had ended. The Review Arbitrator determined that this ground served only to reiterate evidence already canvassed in the Decision and dismissed it without leave to reapply.

[26] The petitioners' second ground for review concerned s. 49.2 of the *RTA*, which the petitioners characterized as 'new evidence' to the extent that it was raised on the volition of the Arbitrator alone.

[27] As the Review Arbitrator found, s. 49.2 of the *RTA* was not in force at the time of the Notice. Rather, prior to July 1, 2021, the predecessor to s. 49.2 was set out in s. 49(6)(b) of the *RTA,* which provided:

> 49(6) A landlord may end a tenancy in respect of a rental unit if the landlord has all the necessary permits and approvals required by law, and intends in good faith, to do any of the following:
>
> […]
>
> (b) renovate or repair the rental unit in a manner that requires the rental unit to be vacant.

[28] At that time, notice under s. 49(6)(b) of the *RTA* could not be given to a tenant until a landlord had all of the necessary permits and approvals in place required by law for the intended renovations. Also under s. 49 at the applicable time, this notice would take effect no earlier than four months after the tenant's receipt of the notice, and if the tenant wished to dispute it, they had 30 days to do so.

[29] The Review Arbitrator found that "the [Arbitrator's] reference to section 49.2 [was] of no meaningful consequence, given the existence of section 49(6)(b) [*sic*] when the original Application was initiated" and dismissed this ground of review: Review Decision at 5.

[30] The next and final ground for the review was that the Decision was obtained by fraud. The petitioners suggested, in reference to a particular text message exchange, that the respondents had knowledge of structural damage in the Unit and were not forthright with the Arbitrator in this respect. The petitioner also suggested that the respondents had not lived in the Unit until the end of the tenancy.

[31] The Review Arbitrator found that the text message exchange, which was before her, gave no indication that the respondents had knowledge of structural damage, and that the latter ground was asserted without evidence. Ms. Ball would later refer to these grounds as having been a "Hail Mary" in the instant proceeding. Both were dismissed by the Review Arbitrator.

[32] Having dismissed all of the grounds for review posed by the petitioners, the Review Arbitrator dismissed the application for review in its entirety and confirmed the Decision.

Evidence

Evidence of the Petitioners

[33] Because neither of the hearings for the Decision or the Review Decision were recorded, and no transcripts are available, the parties' affidavit evidence speaks to any disputes thereon. I note this practice has now been discontinued by the RTB and hearings are recorded.

[34] In their affidavit evidence, the petitioners set out certain difficulties they had in respect of receiving and reviewing the respondents' evidence in advance of the initial RTB hearing. The second affidavit of Mr. Ball outlines that on October 27, 2021, in preparation for the initial hearing, he attempted to log on to the RTB online portal to review the evidence that had been submitted to date. He was unable to access the interface he sought, so he turned to online support tools and sent an email seeking assistance to what appeared to be an appropriate email address. He deposes, however, to have never received a response. Consequently, it would seem that Mr. Ball was unable to access the site at least as between October 27, 2021 and the Hearing on November 8, 2021 or thereafter.

[35] Affidavit evidence of the petitioner, Ms. Ball, was also filed in this matter. In her second affidavit, she deposed that on November 10, 2021, she logged on to the RTB online system for the first time, but was not able to access or review any content in the system.

[36] On November 13, 2021, Ms. Ball emailed the RTB in response to an email received by her on July 29, 2021 that included a receipt for a document entitled "Failure_to_do_walk_through.jpg" submitted to the RTB by the respondents. An email exchange followed—as well as a phone call—with an Information Officer at the RTB. In these discussions, Ms. Ball asserted that she never received the noted document by mail, and requested that it be sent to her by the RTB.

[37] In addition, Ms. Ball requested assistance in ensuring the document could be identified to the Review Arbitrator, prior to the issuance of the Review Decision. In her second affidavit, Ms. Ball deposed:

> In the ensuing email exchange, I confirmed for the agent that his evidence was not known/seen by me/Mike in advance of the hearing. I asked the agent for assistance in ensuring that the existence of this unknown/seen evidence was identified to the reviewing arbitrator.

[38] Ms. Ball further deposed in her second affidavit that:

> The agent's last response on November 23, 2021, the date of the decision, notified that the review decision had been received and did not respond to my request.

[39] Having set out some knowledge of evidentiary issues relevant to the Decision hearing and the Review Decision hearing, the petitioners deposed that the hearing itself did not allow for the evidentiary issues to be uncovered. As Mr. Ball's second affidavit sets out:

> [The Arbitrator] attended the arbitration a few minutes after the start time, he did not introduce himself and started the proceeding with basic formalities, such as no recording be made of the arbitration as per the residential tenancy branch arbitration procedures. [The Arbitrator] then asked both parties whether we had read the evidence that had been submitted. There was no review of the number of documents to confirm that the parties were in possession of the same materials. [The Arbitrator] proceeded to give firm instructions saying "don't read over the evidence that you have submitted" and "be brief in our [*sic*] presentation". In hindsight, this prevented either side from ensuring that our evidence was properly understood and considered.

[40] In her second affidavit Ms. Ball further deposed that, in early 2023, she discovered that there was a discrepancy in the number of pages and the content of evidence submitted by the respondents. This discovery arose from information revealed in the affidavit of Lesley Pollard. It seemed, Ms. Ball deposed, that there was evidence before the Arbitrator and the Review Arbitrator that had not been served on the petitioners.

Affidavit of Christine Beacham

[41] Ms. Beacham has filed an affidavit in which she denies being fraudulent or trying to manipulate the Arbitrator. She deposes she was honest at the hearing and further that she had no idea there were structural problems with the house. The affidavit does not address the issue of service of documents. Nor were there any submissions made to the Court in respect of the discrepancy of the documents uploaded to the RTB and consequently before the arbitrator but not served to the Petitioners.

Affidavit of Lesley Pollard

[42] Ms. Pollard is the Coordinator of Education and Training at the RTB who reviewed the RTB files as it pertained to the dispute resolution between the petitioners and the respondents.

[43] In her affidavit made February 2, 2022, Ms. Pollard deposed that:

> In the ordinary course of operations, for each dispute resolution file, the RTB keeps a record of all materials submitted by parties to the dispute in paper and / or electronic form, depending on the manner in which the materials were submitted. I have access to those file records through my job as a coordinator.
>
> I have reviewed the RTB file as it pertains to [the file before the court] being a dispute resolution proceeding between Christine Beacham and Clinton Beacham (tenants) and Michael Ball and Jeannie Coates also known as Jeannie Ball (landlords).

[44] Ms. Pollard went on to set out six categories of documents that she had reviewed and which she detailed in exhibits:

> 1. Exhibit “A” the decision and order of the arbitrator;
>
> 2. Exhibit “B” the materials received by the RTB from the respondents for the dispute resolution proceeding;
>
> 3. Exhibit “C” the materials received by the RTB from the petitioners for the dispute resolution proceeding;
>
> 4. Exhibit “D” the materials received by the RTB from the petitioners for the RTB’s review consideration application and the RTB Documents View document, noting the petitioners’ online submission of their review consideration application;

> 5. Exhibit "E" the materials that form part of the RTB's dispute resolution proceeding file available to the arbitrators at the dispute hearing and at the review hearing respectively; and
>
> 6. Exhibit "F" the Residential Tenancy Policy Guidelines available to the public online and in person at the RTB offices and ServicesBC Centres.

[45] Critically, Ms. Pollard's affidavit included the range of materials that were available to the Arbitrator and the Review Arbitrator. The materials include, *inter alia,* numerous pictures as well as set screen captures from text messages and notes of the respondents.

Materials the Petitioners Received

[46] The exchange of evidence at the RTB is governed by Rule 3.14 of the *Residential Tenancy Branch Rules of Procedure* [*RTB Rules*] which sets out that "except for evidence related to an expedited hearing…, documentary and digital evidence that is intended to be relied on at the hearing must be received by the respondent and the Residential Tenancy Branch, directly or through a Service BC Office not less than 14 days before the hearing".

[47] Rule 3.15 of the *RTB Rules* sets out that "the respondent's evidence must be received by the applicant and the Residential Tenancy Branch not less than seven days before the hearing" in a "single complete package".

[48] Evidence tendered in respect of hearings at the RTB must be served upon the opposing party in accordance with ss. 88 to 90 of the *RTA*. As one of the exhibits to Mr. Ball's affidavit—a transaction receipt for materials uploaded to the RTB website—warns in red ink:

> Transaction receipt – do not reply **receipt**: evidence submission don't forget! A copy of all evidence submitted to the RTB must also be provided to the applicant(s) in this dispute. If it is not provided to the applicant(s) in part of hearing, it may not be considered.

[49] Counsel for the RTB confirmed in her oral submissions that each party is responsible for serving on the other party copies of any evidence uploaded to the RTB Content Management System.

[50] Ms. Ball deposed that she telephoned the RTB to inquire into their procedures for accessing evidence and learned, *inter alia*:

- the RTB relies solely on the "honour system" in respect of service;
- only RTB administrators/agents/arbitrator can view all the evidence submitted to the RTB Content Management System;
- dispute participants are "blind" to any document submitted to the RTB or RTB Content Management System by other participants;
- the RTB Content Management System does not notify participants of new submissions, dates, or volumes of submissions made by other participants;
- there is no system to prevent intentional or unintentional omissions between the evidence submitted to the RTB Content Management System and that served as amongst participants; and,
- RTB arbitrators are aware of the above-described system.

[51] In his second affidavit, Mr. Ball deposed that the entirety of the evidence served on the petitioners in advance of the initial hearing was as follows:

- On June 28, 2021 I received one email from the address [of the respondent, Christine Beacham] with a copy of the RTB dispute notice attached and with subject "Emailing Dispute Notice_110040176_06_28_2021(1).pdf". There was no text in the email message body. This email, including the attachment, is attached to this affidavit as exhibit "A".
- On June 28 and 29, 2021 I received three (3) emails from message@adobe.com titled "1624937019879_Dispute Notice_110040176_06_28_2021 (1)", Dispute Notice __110040176_06_28_2021 (1) (2)" and "Dispute Notice__110040176_06_28_2021 (1) (6)" respectively. Each email included a link to PDF copy of the same dispute notice provided via email in item 4 above. These three (3) emails are attached to this affidavit as exhibit "B".
- On approximately July 28, 2021 I received a package of documents via registered mail. The package included a hard copy of the "Notice of Dispute Resolution Proceeding" and a handful of evidence documents supporting the claim. This entire package including delivery envelope is attached to this affidavit as exhibit "C".
- Sometime following Oct 26, 2021 I received further documents via registered mail from Clint and Christine Beacham. The delivery package included 22 photos and one hand written note. The sending date stamp

> on this package was 2021.10.26. Copy of the entirety of the documents received in this package, including delivery envelope, are attached to this affidavit as exhibit “F”.

[52] The petitioners deposed that these documents do not comprise all of the documents that were available to the Arbitrator or the Review Arbitrator.

[53] The affidavit of Ms. Pollard lists documents and descriptions thereof submitted to the RTB by the respondents and documents available to the Arbitrator and the Review Arbitrator. When compared with the items listed by Mr. Ball above, the items in Ms. Pollard’s affidavit do not seem to fully align. To this extent, it would seem that the respondents submitted evidence to the RTB that was before the Arbitrator and the Review Arbitrator, but that was not served on the petitioners which, consequently, they were not aware of.

[54] The following additional evidence packages were before the arbitrator but were, at least in part, never served on the petitioners and are reproduced as they came to the Court:

a) Uploaded June 28, 2021:

- Empty house on June 28th 2021- Here is 1036 islay street, different times of day, no one physically living here as stated he needed the house for his family, not for renovating the house for him to live in. It’s been 4 months.
  Christine Beacham – Latest file added: 132 days before latest hearing.
  Evidence_of_no_one_living_there_.jpg (4.34 MB, Jun 28, 2021),
  Empty_house_1.jpg (4.03 MB, Jun 28, 2021),
  Empty_house_2.jpg (4.1 MB, Jun 28, 2021),
  Empty_house_3.jpg (4.21 MB, Jun 28, 2021),
  Empty_house_4_.jpg (4.15 MB, Jun 29, 2021),
  Empty_house_5th_picture_.jpg (5.11 MB, Jun 28, 2021),
  Empty_house_6th_picture_.jpg (4.81 MB, Jun 28, 2021),
  Empty_house_7th_.jpg(5.01 MB, Jun 28, 2021)

b) Uploaded June 29, 2021:

- Empty house as of June 29th 2021 - Letter of good faith in which he states he needs the house for his family.
  And an empty house, still on June 29th, 2021
  Christine Beacham - *Latest file added*: *132 days before latest hearing*.

20210628_204320.jpg (2.71 MB, Jun 29, 2021),
20210606_140234.jpg (5.01 MB, Jun 29, 2021)

c) Uploaded September 14, 2021

- Letter - Letter from landlords and still not living there. Renovating, 6 months after eviction
  Christine Beacham - *Latest file added: 54 days before latest hearing*.
  Letter_stating_landlord_needs_a_home_Septeniber_l4th_renovating_ .jpg (2.46 MB, Sep 14, 2021)

d) Uploaded October 19, 2021

- Water in bathroom - The toilet seat broke 2 years into our contract. We contacted landlord. We got new toilet. No restoration company came to clean up water damage through ceiling.
  Christine Beacham - *Latest file added: 19 days before latest hearing*.
  Water_damage_from_6_years_ago.jpg (23 MB Oct 19, 2021)

e) Uploaded October 19, 2021

- Furnace was not serviced – Landlord never serviced furnace or gas appliances. Stated they didn't need doing. We changed the filter ever 3 months, due to sons asthma. We offered to get the furnace done he declined.
  Christine Beacham - *Latest file added: 19 days before latest hearing*.
  Fumace_gas_appliances_.jpg (2.23 MB. Oct 19, 2021)

f) Uploaded October 19, 2021

- Supposed mold on house - We have a clean washroom no signs of mold. We have used this washroom 8 years 10 months. If it was so unpalatable, why didn't landlord fix the leaks while we were living there. He never checked the ho [*sic*]
  Christine Beacham - *Latest file added: 19 days before latest hearing.*
  Animal_excrement_not_visible_here_.jpg (2.58 MB. Oct 19, 2011)

g) Uploaded October 19, 2021

- Mold - Our kitchen we used not knowing there was mold, as slated by landlords reason not to move in. We lived there 8 years 10 months
  Christine Beacham - *Latest fife added: 19 days before latest hearing.*
  Mold_in_house.jpg (2.31 MB. Oct 19, 2021)

h) Uploaded October 19, 2021

- Appliance landlord says was not suitable and broke down after he got there - We had no problems with this fridge for almost 9 years which landlord stated he got from side of road and says its not suitable for his family.
  Christine Beacham - *Latest file added: 20 days before latest hearing*.
  Fridge_.jpg (2.22 MB. Oct 19, 2021)

i) Uploaded October 26, 2021:

- Proof landlord failed to take required steps - As of June 10th, 2021. His family, as stated in his letter is not residing at this address. Neighbors state he hasn't been there for 2 weeks also.
  Christine Beacham - *Latest file added*: *13 days before latest hearing*
  Landlord_did_not_give_proper_notice_for_renovation.jpg (2.94 MB, Jul 2, 2021),
  Renovation_.jpg (276MB. Jul 2,2021), Renovating_.jpg(2.79 MB. Jul 2, 2021),
  Empty_house_with_pemilt_sign.jpg (829.96 KB, Jul 2 2021),
  Failure_to_do_walk_through.jpg (422.79 KB, Jul 29, 2021).
  Observations_.jpg (2.39 MB, Jun 9, 2021)
  No_walk_through.jpg (423.11 KB, October 28, 2021)

The Petition

[55] This matter was served on the director of the RTB as required by ss. 15 and 16 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[56] The petitioners raised a wide range of procedural and substantive grounds of review, touching on aspects of both the Decision and the Review Decision. On the materials and submissions before me, the matter distills to a question of procedural fairness in respect of the Decision, which was not substantively considered in the Review Decision. In respect of this ground, the petitioners, in their Amended Petition, pleaded as follows:

> **2. The legal grounds on which this petition is brought forward**
>
> **a. The Decision of [the Arbitrator] was procedurally unfair and patently unreasonable because** the arbitrator's decision relied on evidence, claims, and sections of the Act and RTB guidelines that were NOT the subject of the dispute notice nor raised for exploration/evidence per the Rules of Procedure.
>
> […]
>
> ii. [The Arbitrator] did NOT address nor canvass the parties on the issue of submission of added or late evidence in advance nor during the hearing as required per the RTB Rules of Procedure.

> [Emphasis in original.]

[57] The petitioners also pleaded, in respect of numerous additional allegations:

a) Breaches of procedural fairness and natural justice;

b) That the Decision and Review Decision were patently unreasonable;

c) Bias on the part of the Arbitrator; and,

d) Breaches of duties delegated to the RTB by the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*].

[58] The petitioners contested that both the Decision and the Review Decision were properly before this Court for review, and sought that both decisions be set aside. The petitioners additionally sought their costs. A Petition Response and an Amended Petition Response were filed on behalf of the Director of the RTB relating to the petitioners request for costs, and counsel for the RTB appeared to make submissions on this point.

Law

Which Decision to Review?

[59] The law on questions of whether an original decision or a review decision should be the subject of judicial review was summarized by Justice Sewell in *Ndachena v Nguyen*, 2018 BCSC 1468:

> [33] In *Sereda v. Ni*, 2014 BCCA 248, the Court followed *United Steelworkers, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, Local 2009 v. Auyeung*, 2011 BCCA 527 and held that in cases in which the statute pursuant to which a decision is made contains an internal review procedure the review decision is the proper subject matter for judicial review. However, the Court also stated that the original decision should form part of the record and inform the inquiry on judicial review.
>
> [34] In *Martin v. Barnett*, 2015 BCSC 426, Justice Burke reviewed the law in this area. She concluded that two subsequent decisions of the Court of Appeal, *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329, *and Fraser Health Authority [v.] Worker's Compensation Appeal Tribunal*, 2014 BCCA 499 had clarified the law, and held that when the internal review decision did not address the merits of the underlying application, the original decision should be subject to judicial review.

[60] In *Quigley v. Columbus Charities Association*, 2016 BCSC 1557, the petitioner applied for judicial review in respect of an RTB proceedings where an initial decision and a review decision had been rendered. Justice Sharma found that "[t]he Review Decision did not consider the substance of [the petitioner's] complaint because none of [the petitioner's] issues raised [fell] into the strict categories contained in s. 79(2)": *Quigley* at para. 15. On this basis, the original decision was the proper decision for the Court to review.

[61] I find that, in respect of the procedural fairness concerns set out in the evidence above, the proper decision for review is the Decision by the Arbitrator. As Ms. Ball deposed, the issue of unserved evidence was not apparent to her until after the RTB hearings, and once the judicial review proceedings had been initiated. To this extent, the issue was not in substance before the Review Arbitrator. Moreover, in light of s. 79(2) of the *RTA* and the limited grounds upon which a review may be sought, the issue could not have been raised as an issue for substantive disposition before the Review Arbitrator.

Standard of Review

[62] Broadly, in judicial review, the role of the court is to ensure that a statutory decision makers do not overstep their legal authority, having regard to the legality, the reasonableness, and the fairness of administrative processes and their outcomes: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28.

[63] The petitioners contested that there were both procedural and substantive defects in the Decision and the Review Decision. The gravamen of the parties' submissions, however, revealed certain of their procedural fairness concerns in respect of the Decision to be central to the disposition of this matter.

[64] The Legislature has provided clear instruction on the standards of review applicable to the issues raised by the petitioners, which must be respected: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 34–35 [*Vavilov*]. The standards set out in s. 58 of the *ATA* are as follows:

Standard of review with privative clause

58 (1) If the Act under which the application arises contains or incorporates 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…

[65] Section 5.1 of the *RTA* provides:

Application of the *Administrative Tribunals Act*

5.1 Sections 1, 44, 46.3, 48, 56 to 58 and 61 of the Administrative Tribunals Act apply to the director as if the director were a tribunal and to dispute resolution proceedings under Division 1 of Part 5, reviews under Division 2 of Part 5 and the imposition and review of administrative penalties under Part 5.1.

[66] The *RTA* includes a privative clause as follows:

Exclusive jurisdiction of director

84.1(1) The director has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in a dispute resolution proceeding or in a review under Division 2 of this Part and to make any order permitted to be made.

(2) A decision or order of the director on a matter in respect of which the director has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

Procedural Fairness

[67] On the basis of the foregoing, the standard of review applicable to the petitioners' procedural fairness pleadings is that, in all of the circumstances, the tribunal acted fairly. As the Court of Appeal set out in *Athwal v. Johnson*, 2023 BCCA 460:

> [23] It is trite law that an administrative decision resulting from an unfair process cannot stand. A determination of what constitutes an unfair process requires a "contextual approach" that looks to the decision being made and its statutory, institutional and social context: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 [*Baker*] at para. 22; *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal)*, 2019 BCCA 131 at para. 13.

[68] The Court of Appeal went on, at para. 24 of *Athwal*, to adopt Sewell J.'s assessment of what constitutes fairness in the RTB context from *Ndachena*, which I also adopt:

> [56] The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker.
>
> [57] Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.
>
> [58] I am satisfied that the petitioners were entitled to a high level of procedural fairness in the Dispute Resolution Applications. The issues before the Arbitrator were adversarial with serious financial consequences to the petitioners. The statutory scheme under the RTA vests the RTB with the same powers in residential tenancy disputes to grant monetary judgments as the provincial court has in other matters.
>
> [59] The RTB Rules govern Dispute Resolution proceedings. They contemplate a high level of procedural fairness. Any person dealing with the RTB would have a reasonable expectation that the RTB Rules would be complied with.
>
> [60] Rule 1.1 states that the objective of the RTB Rules is to ensure a fair, efficient and consistent process for the resolution of disputes between landlords and tenants.
>
> [61] The RTB Rules contain specific provisions for the giving of notice of evidence to be relied upon at a Dispute Resolution hearing. Rule 2.5 requires an applicant for Dispute Resolution to submit copies of all documentary and digital evidence to be relied upon at the hearing of the Dispute Resolution Application. Once the RTB gives notice of the date of the Dispute Resolution hearing, an applicant must serve the other party with copies of all documents required to be filed under Rule 2.5. Rule 3.5 requires the applicant to

> demonstrate that each respondent was served with all evidence required by the RTB Rules.

[69] I note also Justice McEwan's observation in *Kikals v. British Columbia (Residential Tenancy Branch)*, 2009 BCSC 1642, contextual to RTB hearings, that:

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

Raising Issues of Procedural Fairness

[70] Allegations related to procedural fairness concerns cannot be raised for the first time on judicial review "if they could reasonably have been the subject of timely objection in the first-instance forum": *Athwal* at para. 55; *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at para. 72 [*R.N.L.*], citing *Taseko Mines Limited v. Canada (Environment),* 2019 FCA 320, leave to appeal ref'd [2020] S.C.C.A. No. 49 (S.C.C.). A procedural fairness issue should be raised when "the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection": *Athwal* at para. 56; *Benitez v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 461, at para. 220, aff'd 2007 FCA 199.

[71] Considering unserved materials at the RTB, the Court of Appeal discussed the obligations of parties to raise procedural fairness issues in *Athwal* as follows:

> [57] The evidence indicates that the appellants did not, in fact, know about the deficiency in the materials at the time of the hearing, and presented their case on the basis of the materials they did have, not addressing one of the issues that was missing which, in fact, was material to the arbitrator's decision. The question is whether the appellants could reasonably have been expected to identify and raise the procedural fairness issue before the arbitrator. […]
>
> [58] A determination of when the appellants became aware of the relevant information and could have reasonably been expected to raise an objection depends on the appellants' circumstances, the hearing procedure and the nature of the procedural fairness issue. In my view, whether the appellants could be expected to *raise* an objection is also distinct from the threshold issue of whether they could be expected to *identify* the need for such an objection in the first place.

[72] In the present circumstances, the petitioners allege that nine separate evidence packages were submitted by the respondents to the Arbitrator having never been served upon them. I accept that at least some of these documents were not served on the petitioners.

[73] I find in the circumstances of this case, it is appropriate to allow the petitioners to raise the procedural fairness issue given that they could not have had knowledge of documents that were not served on them. Their ignorance in this respect explains their failure to raise any such issue before the Arbitrator on November 8, 2021 or before the Review Arbitrator on November 18, 2021. It was not until they were served with the affidavit of Ms. Pollard outlining the respondents' evidentiary submissions that the petitioners learned of the extent of evidence that they did not have at the hearing.

Patent Unreasonableness

[74] The patent unreasonableness standard was recently discussed by Justice Brongers in *Hollyburn Properties Limited v. Staehli*, 2022 BCSC 28:

> [25] […]
>
> (a) as expert tribunals are entitled to significant deference, the standard is an onerous one and their decisions can only be quashed if there is no rational or tenable line of analysis supporting them (*Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 at para. 65; aff'd 2009 BCCA 229);
>
> (b) a decision is patently unreasonable if it is openly, evidently, and clearly irrational, or unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures (*Gichuru v. Palmar Properties Inc*., 2001 BCSC 827 at para. 34, citing *Lavender Co-Operative Housing Association v. Ford*, 2011 BCCA 114);
>
> (c) a patently unreasonable decision is one that almost borders on the absurd (*Voice Construction Ltd. v. Construction & General Workers' Union*, Local 92, 2004 SCC 23 at para. 18 and *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 28);
>
> (d) it is a possible that a great deal of reading and thinking will be required before the problem in a patently unreasonable decision is apparent, but once its defect is identified, it can be explained simply and easily, leaving no real possibility of doubting that the

decision is defective (*Yee v. Montie*, 2016 BCCA 256 at para. 22);

(e) the standard of patent unreasonableness also applies to the consideration of adequacy of reasons, which involves an assessment of the justification, transparency and intelligibility of the decision-making process ([*Canada (Minister of Citizenship and Immigration v. Vavilov*, 2019 SCC 65]); and

(f) under the RTA regime, the overriding test for adequacy of reasons is whether a reviewing court is able to understand how and why the decision was made (*Ganitano v. Yeung*, 2016 BCSC 2227 at para. 24).

Reasonable Apprehension of Bias

[75] Making out a reasonable apprehension of bias involves overcoming a high hurdle. The Supreme Court of Canada affirmed the well established test for a reasonable apprehension of bias in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 [*Yukon*] citing *Committee for Justice and Liberty v. National Energy Board*, 1976, [1978] 1 S.C.R. 369 at 394, per de Grandpré J. (dissenting):

> [20] […]
>
> . . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted in original.]

[76] In elaborating on the test, Justice Watchuk set out in *C.S. v. British Columbia (Human Rights Tribunal)*, 2017 BCSC 1268, aff'd 2018 BCCA 264 that:

> [153] "Not deciding fairly" means not having an open mind (*Yukon* at para. 23). An "informed person" is a "reasonable person" whose perspective may differ from that of an affected litigant (*R. v. Millar*, 2017 BCSC 323 at para. 24).
>
> [154] The objective of the test "is to ensure not only the reality, but the appearance of a fair adjudicative process" (*Yukon* at para. 22). […]
>
> [155] A reasonable apprehension of bias inquiry "is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias" (*Yukon* at para. 26). The evidence of bias "must be substantial" (*Kinexus* [*Bioinformatics Corporation v. Asad*, 2010 BCSC 33] at para. 134).

[77] The burden rests with the party alleging the bias and, in discharging that burden, evidence must be adduced: *Toor v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCSC 2108 at para. 46.

[78] Moreover, there is a strong presumption that an administrative decision maker will act with impartiality and integrity: *Independent School Authority v. Parent*, 2022 BCSC 570 at paras. 30–32.

[79] Allegations of bias should be raised in the first instance before the administration of decision maker and not on a judicial review. This requirement would not apply, however, "the ground of disqualification is discovered after the tribunal has completed the case and rendered a decision on the merits of the dispute": *Eckervogt v. British Columbia (Minister of Employment and Investment)*, 2004 BCCA 398 at paras. 46–48.

Analysis

Procedural Fairness

[80] Hearings at the RTB may be conducted in a summary fashion, but must nonetheless be conducted attendant to a high degree of procedural fairness: *Ndachena* at para. 58. In a hearing in which the entire proceedings are conducted by conference call, it is impossible to see what documents or items are being referred to by the parties or by the arbitrator unless they are expressly so stated during the course of the hearing.

[81] As Ms. Ball deposed and argued, and as I accept, there are discrepancies between these documents outlined in Ms. Pollard's affidavit and those properly served upon the petitioners. In other words, there were documents before the Arbitrator that had not been served on the petitioners. I find that, at least in part, these unserved documents went to matters central to the disposition of the dispute: extenuating circumstances. Matters including mold and water damage were implicated.

[82] The *RTA* expressly requires an arbitrator to consider evidence of extenuating circumstances when determining whether a landlord was prevented from accomplishing the stated purpose for ending a tenancy within a reasonable period from the effective date of the notice: *Maasanen v. Furtado*, 2023 BCCA 193 at para. 24.

[83] In *Athwal*, the Court of Appeal considered whether a proceeding before the RTB was procedurally unfair insofar as the appellant had not received particulars related to the respondent's claim for compensation under s. 51 of the *RTA*. In *Athwal* at para. 6, the Court of Appeal found, in fact, that no such particulars had been received by the petitioner, despite the following statement from by the arbitrator:

> [6] […]
>
> Neither party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

[84] Moreover, in *Athwal*, the Court of Appeal held that:

> [52] […], the documents that the appellants received were manifestly insufficient in light of the appellants' entitlement to know, prior to the hearing, the case against them. This procedural defect had an unmistakable impact on the fairness of the RTB proceeding and its outcome. The arbitrator's final determination relied on findings that the appellants "did not provide photographs of after their renovations to show that only minor modifications were made", "did not specify which trades or other aspects of the renovation were delayed by Covid", "did not explain why it was necessary to replace the exterior finishing of the residential property", and "did not have sufficient evidence of extenuating circumstances".

[85] In the present judicial review, given that the evidence relevant to the first hearing not articulated by the arbitrator and that service was not meaningfully confirmed, it is impossible to say that the petitioners were able to appropriately respond to the case to meet. Even if it could be said that the petitioners might have had an opportunity to respond to the unserved evidence in the hearing itself, the nature of the hearing—a conference call absent visual observance of evidence being relied upon—would render such a proposition unreliable. As in *Athwal*, I do not see the Arbitrator's comment following comment to be dispositive of this issue:

> As both parties were present service was confirmed. The arties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with section 88 and 89 of the Act: Decision at 1.

[86] There is no clear indication before me that the Arbitrator heard submissions from the petitioners on the unserved evidence. It is clear, however, that they were not fully aware of the evidence they would be dealing with at the hearing. Given that, despite the petitioners' ignorance, the unserved evidence was available to the Arbitrator in order to inform his reasoning, I find that there was procedural unfairness. These circumstances directly implicate the principle of *audi alteram partem*. As the Court of Appeal set out in *Athwal*:

> [28] An affected party's right to know the case against them is at the very foundation of participatory rights and the principle of *audi alteram partem*: to hear one side, or let the other side be heard: *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 at para. 27; *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781 at para. 29. Where the duty of fairness requires that parties be given full participatory rights, the entitlement to receive some form of notice of the issues before the decision maker is inextricable. Without knowing the issues before the decision maker, an affected party cannot be said to have been provided "a meaningful opportunity to present their case fully and fairly": *Baker* [*v. Canada (Minister of Citizenship & Immigration*, [1999] 2 S.C.R. 817] at para. 30.

[87] In a context where there are impediments to confirming the materials before a decision maker, it is incumbent on that decision maker to meaningfully confirm service. This is particularly so in circumstances where it is known to the decision maker that the parties cannot know the evidentiary basis for a decision absent explicit reference. The concern is heightened in proceedings where, like the RTB, parties may often be self-represented.

[88] While it is important that these hearings are conducted timely and efficiently (see *Sunjic v Uthayakumar*, 2022 BCSC 481 at para. 69), the inability of each party to simply have a noted summary of all of the evidence that was before the arbitrator worked to create an injustice and prevent the parties from properly laying out their case to the arbitrator.

[89] I find that, in all of the circumstances, the Decision was not reached fairly.

Allegation of Bias

[90] The petitioners have alleged that the arbitrator displayed bias by leading the respondents' case with respect to the livability of the home. In light of my findings on the fairness of the hearing, I need not make any determination in this respect.

[91] In the alternative, having turned my mind to the law set out above, I would find that the petitioners have not tendered any sufficient evidentiary foundation to make out a reasonable apprehension of bias: *Toor* at para. 46.

Costs

[92] Cost should not lie against the director of the RTB. The general rule is that no costs are payable by a decision maker to an applicant who is successful on judicial review, absent evidence of misconduct or perversity in the proceedings before the decision maker or inappropriate argument on the merits of the judicial review application: *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 at para. 55; *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 at paras. 44–54. The rationale for this immunity is that government agencies have a duty to act and should not be punished for carrying out their duty absent unreasonable actions or special or exceptional circumstances.

[93] In their Amended Petition, the petitioners appear to seek costs against the director due to perceived failings in the hearing process. While a breach of procedural fairness may, in some cases, justify a costs award against a tribunal, not all breaches of procedural fairness will be sufficient.

[94] Cases considering this issue have indicated that there is a high standard for misconduct and perversity. No costs were awarded in *Hefnawi v. Health Care Practitioners Special Committee for Audit Hearings*, 2016 BCSC 1067 at para. 11, for example, because the breach of procedural fairness “was not something akin to bias or other egregious conduct”. In *Glacier Resorts Ltd*. *v. British Columbia*

(Minister of Environment), 2018 BCSC 1955, Justice Forth explained the principles as follows:

> [24] […] The words used by the Court of Appeal—"misconduct" and "perversity"—denote conduct that is so improper or egregious that the court cannot condone it. The examples provided by the court in *Lang* [v. *British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244], when developing the exceptions are illustrative in this regard. The Court notes at para. 47 that costs may be justified if the tribunal:
>
> > [A]cted capriciously in ignoring a clear legal duty, made a questionable exercise of state power, effectively split the case so as to generate unnecessary litigation, manifested a notable lack of diligence…or where bias among tribunal members had necessitated a new hearing.

[95] In this case, the errors alleged by the petitioners do not constitute the bias, bad faith, egregious misconduct, or exceptional circumstances that courts have indicated may justify a costs order against a statutory decision maker. Despite my finding of procedural unfairness, there is no basis to depart from the general rule that no costs are payable by the statutory decision maker on judicial review.

Decision

[96] The petitioners have established that there were breaches of the rules of natural justice and procedural fairness in relation to the conduct of the hearing before the Arbitrator. Considering all of the circumstances outlined above, I am satisfied that the RTB did not act fairly.

[97] On this basis, I order that the Amended Petition is allowed, the Decision is set aside, and I remit the matter back to the RTB for reconsideration before a different arbitrator.

"Maisonville J."