# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Al-Sudani v. Ghavami,*
2023 BCSC 2280

Date: 20231228
Docket: S228622
Registry: Vancouver

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

Between:

**Haider Al-Sudani**

Petitioner

And

**Roxanna Ghavami and Director, Residential Tenancy Branch**

Respondents

Before: The Honourable Justice Tucker

On judicial review from: An order of the Residential Tenancy Branch, dated August 26, 2022 (File Nos. 310046854 and 310055256).

## Reasons for Judgment
**In Chambers**

| | |
|---|---|
| Counsel for Petitioner: | S. Garoupa |
| The Respondent, appearing in person on her own behalf: | R. Ghavami |
| Place and Date of Hearing: | Vancouver, B.C.<br>November 7, 2023 |
| Place and Date of Judgment: | Vancouver, B.C.<br>December 28, 2023 |

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## I. Introduction

[1] This is a judicial review petition brought by Haider Al-Sudani (or the "Tenant"). The respondents are his former landlord, Roxanna Ghavami (or the "Landlord") and the Director of the Residential Tenancy Branch (the "Director").

[2] The Tenant applies for judicial review with respect to the August 26, 2022 decision ("Decision") of an arbitrator ("Arbitrator") of the Residential Tenancy Branch ("RTB").

[3] The Decision addressed two different notices of dispute resolution and numerous issues. The claims determined in the Decision included the Tenant's claim under s. 38 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 ("*RTA*"). Under s. 38, the Tenant claimed the Landlord was obliged to pay him twice the amount of his security deposit ("Doubling Claim"). The Decision deals with the Doubling Claim under a separate heading ("Doubling Decision"). The petition for judicial review is restricted to the Doubling Decision.

[4] The Tenant contends that there was a breach of procedural fairness in the RTB hearing and also that the Doubling Decision is patently unreasonable.

## II. Background

### A. The Applications for Dispute Resolution

[5] The RTB dispute arose out of a tenancy agreement for a house (the "Unit"). The tenancy began on December 15, 2019. The Tenant paid a $4,200 security deposit at the outset of the tenancy. The tenancy concluded on August 1, 2021, by expiry of the tenancy agreement.

[6] The Landlord filed an application with the RTB on August 30, 2021. She sought compensation for damage to the Unit and the right to retain the security deposit. The Tenant filed his own application on November 18, 2021. He sought damages for interference with quiet enjoyment, the return of his security deposit and advanced the Doubling Claim.

### B. The *RTA* Provisions Relevant to the Doubling Claim

[7] Section 38 includes the following provisions:

> **Return of security deposit and pet damage deposit**
>
> 38(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of
>
> (a) the date the tenancy ends, and
>
> (b) the date the landlord receives the tenant's forwarding address in writing,
>
> the landlord must do one of the following:
>
> (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
>
> (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.
>
> …
>
> (6) If a landlord does not comply with subsection (1), the landlord
>
> (a) may not make a claim against the security deposit or any pet damage deposit, and
>
> (b) must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable.
>
> …
>
> [Emphasis added.]

[8] As the time limit under s. 38(1) runs from receipt of a forwarding address, the following provisions are also of potential relevance:

> **How to give or serve documents generally**
>
> 88 All documents, other than those referred to in section 89 [*special rules for certain documents*], that are required or permitted under this Act to be given to or served on a person must be given or served in one of the following ways:
>
> (a) by leaving a copy with the person;
>
> …
>
> (c) by sending a copy by ordinary mail or registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;

> **When documents are considered to have been received**
>
> 90 A document given or served in accordance with section 88 or 89, unless earlier received, is deemed to be received as follows:
>
> (a) if given or served by mail, on the fifth day after it is mailed[.]

### C. The RTB Hearing

[9] I pause to comment on the affidavit materials. The Director filed the RTB hearing record. The Tenant filed the affidavit of the Tenant's legal counsel before the RTB ("Hearing Counsel") and another attaching the transcript for the final RTB hearing day. (The Landlord filed no affidavits and raised no objection to those filed.)

[10] The RTB joined the Landlord and Tenant applications for hearing. Both parties had legal counsel. The Landlord called four witnesses (including Ms. Ghavami), and the Tenant called five (including Mr. Al-Sudani).

[11] The Doubling Claim alleged that the Landlord failed to file for dispute resolution within the time limit under s. 38(1). The filing date was known – August 30, 2021. The factual dispute was about how and when the Landlord received the Tenant's forwarding address.

[12] The Tenant's stated position before the RTB included an assertion that he sent the address by registered mail on August 6, 2021 ("August 6 Letter"), but the letter was not collected by the Landlord.

[13] It was agreed that the address was provided to the Landlord inside an envelope ("Envelope"). There was conflicting evidence as to when and how the Envelope was received. Two friends of the Tenant testified that they delivered it to the Landlord by hand on August 14, 2021, immediately after participating in a move-out inspection of the Unit. In her cross-examination, the Landlord denied the Envelope was delivered by hand and testified that she found the Envelope in her mail box the day after the inspection (i.e., on August 15, 2021).

[14] The Tenant was the last witness called at the hearing. While his direct examination was ongoing, the Arbitrator ruled that the time available for his direct examination was concluded ("Ruling").

[15] The alleged breach of procedural fairness is based on the Ruling and an assertion that the Ruling prevented evidence in support of the Doubling Claim from being adduced.

[16] Hearing Counsel had prepared an outline ("Outline") of questions and summaries of the evidence to be elicited for use in the Tenant's direct examination. She made an entry on the Outline when the Ruling was made. Matters below that entry on the Outline include the Tenant's efforts to deliver his forwarding address to the Landlord.

### D. The Doubling Decision

[17] The relevant portions of the Arbitrator's decision read:

> *Tenant's Application: return of security deposit*
>
> In their written submission, the Landlord presented that they retrieved mail from their postal box with the Tenant's forwarding address, on August 15, 2021. The Landlord made their Application for Dispute Resolution on August 30, 2021; this was within 15 days as prescribed in the Act, therefore, there is no doubling on the deposit on its return to the Tenant. Further, retrieved via regular mail is deemed to have been received by the Landlord 3 days later, making the date here deemed to be August 18.
>
> In the hearing, the Tenant stated they sent their forwarding address to the Landlord on August 6. This was via registered mail that the Landlord declined. ... They also provided a dated postal receipt though the copy in the evidence is illegible, and a second receipt, dated August 18, 2021.
>
> A witness for the Landlord stated they attended the rental unit on August 15 specially to give the Landlord their forwarding address in person. They did this "by hand" to the Landlord, and had no contact with this Landlord after that. This was the day following a more formal inspection meeting, with others present on August 14th. This witness also presented that they inquired on the deposits' return on August 19th and received no response from the present Landlord.
>
> …
>
> In this hearing, I find the Tenant's forwarding address was within the Landlord's knowledge on August 15, 2021. The Tenant's witness provided that they handed this directly to the Landlord on that date; I find this confirms

> an adequate proportion of weight to the Landlord's statement that they had the Tenant's address on August 15th. I find it more likely than not that the Landlord knew of the Tenant's forwarding address on that date.
>
> I find the Landlord properly applied for dispute resolution within the 15 days as set out in the Act, on August 30, 2021. ...
>
> [Emphasis added]

## III. Standard of Review

[18] The applicable standard of review is established by the combined effect of s. 58 of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 ["*ATA*"] and the privative clause found in s. 84.1 of the *RTA*.

[19] Section 58(2)(a) of the *ATA* prescribes that the applicable standard of review for findings of fact or law or an exercise of discretion by the RTB is patent unreasonableness. Section 58(2)(b) of the ATA prescribes that the standard of review that applies to procedural fairness issues is "having regard to whether, in all the circumstances, the tribunal acted fairly".

## IV. Tenant's Position

[20] The Tenant contends that the Ruling was a breach of procedural fairness as it deprived him of a fair opportunity to put forward his case on the Doubling Claim. But for the Ruling, he would given testimony about the hand delivery on August 14 and about sending the August 6 Letter.

[21] The Tenant advanced multiple arguments directed at establishing the Doubling Decision is patently unreasonable. Notably, these included:

a) the Arbitrator mischaracterized the evidence: he stated that the Tenant's witnesses testified that they hand delivered the Envelope on August 15 (their actual testimony being that they did so on August 14) and there appears to be no evidentiary basis for his finding about the August 6 Letter;

b) that having found that the August 6 Letter was sent, the Arbitrator erred in failing to conclude there was deemed receipt under s. 90(a) of the *RTA*.

## V. Landlord's Position

[22] On procedural fairness, the Landlord submits that the time scheduled for the hearing was generous, especially by RTB standards, and the Tenant was given a fair opportunity to advance his case. She argues that the Tenant made poor use of hearing time and failed to plan his case to fit. She says the Tenant ran out of time for direct examination due to his litigation approach and strategy, not because the amount of time scheduled by the Arbitrator was not reasonable. She submits that there was no breach of procedural fairness.

[23] With respect to the Tenant's deemed delivery argument, the Landlord objects that the argument was not raised before the Arbitrator. The Landlord acknowledged that the August 6 Letter was referred during the course of the hearing. However, both parties' cases on the Doubling Claim centered on the Envelope and the question of whether she received it on August 14 or on August 15. The August 6 Letter was nothing more than part of the background leading up to the delivery of the Envelope.

[24] The Landlord did not dispute that the Arbitrator misconstrued the testimony about hand delivery. However, she contends that there is no point in making a remittal based on that error.

[25] The Landlord cites s. 25.5(1) of the *Interpretation Act*, R.S.B.C 1996, c. 238:

> 25.5 (1) If a day that is specified for doing an act falls on a holiday, the day falls on the next day that is not a holiday.

[26] Under s. 19 of the *Interpretation Act*, the word "holiday" includes a Sunday. August 29, 2021 was a Sunday. Thus, the Landlord says no matter the outcome in the August 14 versus August 15 dispute, her August 30 filing was timely. She asks me to make a finding to that effect and dismiss the petition.

## VI. Decision

[27] The facts relating to the alleged breach of procedural fairness are straightforward. The timing and effect of the Ruling were as described above.

[28] As observed by Justice Gibb-Carsley in *Ball v. Bedwell Bay Construction Ltd*., 2023 BCSC 1470*,* the RTB is entitled to control its own process:

> [29] … Procedural fairness requires that a party to an administrative proceeding have the right to be heard, the right to know the case they are required to meet, and the right to a hearing before an impartial decision maker: *LaBrie v. Liu*, 2021 BCSC 2486 at para. 8. Assessing the level of procedural fairness required in a given circumstance calls for a contextual approach that looks to the decision being made and its statutory, institutional, and social context: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 at para. 22.
>
> [30] I emphasize that a specialized tribunal like the RTB is entitled to control its own process, including in matters of procedural fairness. As stated in *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at 568–569, 1989 CanLII 131:
>
> > As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.

[29] In *Universe v. Fraser Health Authority*, 2022 BCCA 201 at para. 77, Madam Justice Newbury (for the Court) observed that time limits can be a legitimate means to control court processes and maintain order. She further observed that the objective of proportionality "reflects that no one litigant or group has the right to demand that unlimited time and resources be devoted to a particular case, no matter how important it is". She commented that balancing the rights and interests of parties before the court, with the right and interests of those waiting to be heard, favours the enforcement of measures intended to achieve efficiencies (para. 78).

[30] Madam Justice Newbury's comments in *Universe* were made with respect to superior courts, which have inherent jurisdiction. A statutory tribunal is without inherent jurisdiction, and has only the powers granted to it under its constituent or other legislation. However, as noted in *Ball*, the RTB is among those tribunals that have been conferred discretionary powers with respect to its own hearing process.

Further, proportion and efficiency are of no less concern to many statutory tribunals than to the courts, and it is a matter of general knowledge that the RTB is called upon to address a high volume of cases.

[31] However, while a tribunal with discretionary power to determine its own hearing process may have the authority to impose reasonable time limits on examinations in-chief, cross-examinations, re-examinations and submissions in the interest of efficiency and proportionality, it may do so *only* in a manner that accords with the duty of procedural fairness: see, for example, *Re Japan Electric Manufacturers Ass'n and Anti-Dumping Tribunal*, 1986 CanLII 3938, [1986] F.C.J. No. 652 (FCA.) at paras. 20 and 21.

[32] The requirement to provide procedural fairness in imposing any time limits extends well beyond the reasonableness of the amount of time granted. There may be procedural fairness implications, for example, to the manner in which time limits are imposed, the timing of their imposition, and differential impact in light of the nature of the parties' respective cases or burdens.

[33] Here, there were no time limits established before or even at the outset of the hearing. Nothing in the evidence before me suggests any time limit on direct examination was expressly or implicitly agreed upon in the course of hearing. The transcript reveals nothing more than aspirational exchanges between Hearing Counsel and the Arbitrator as to how much time it might take to put in the Tenant's testimony in chief. Hearing Counsel never represented that her examination of the Tenant would be concluded by a time certain.

[34] Rather, while the Tenant's direct examination was ongoing, the Arbitrator interjected to comment that the examination needed to be wrapped up. No further questions were posed to the Tenant before the Ruling was made.

[35] The Ruling imposed an inflexible time limit without notice and effectively after the fact. The Tenant had no opportunity to plan and organize his case to fit. There were no known set parameters to fit it within. The Ruling was made without any

exploration or consideration of the additional time that might be required or the significance of the testimony being truncated. Finally, the Ruling introduced a time limit on direct examination that applied to only one party – the Landlord's case in chief was already in.

[36] This case does not require any fine consideration of the bounds of the RTB's discretion. The Ruling was a clear breach of procedural fairness. Even if the record established (and it does not) that the Tenant failed to use his hearing time productively, the Ruling would remain a breach of procedural fairness. As explained above, the procedural fairness implications of a time limit extend well beyond the reasonableness of the amount of time allocated.

[37] As the Outline shows that the Ruling impacted the Tenant's opportunity to establish a case on the Doubling Claim, the Doubling Decision must be set aside.

[38] Each party has asked the Court to determine the Doubling Claim in its favour rather than remit it for rehearing. The Landlord asks me determine the matter by applying s. 19 of the *Interpretation Act.* The Tenant asks me to make a finding of deemed delivery of the August 6 Letter under s. 90(a) of the *RTA*. Neither of these arguments were raised before the Arbitrator, and I decline to entertain them for the first time on judicial review: *Johnson v. British Columbia (Workers' Compensation Board),* 2011 BCCA 255 at paras. 50-52; *Vancouver Whitecaps FC LP v British Columbia (Information and Privacy Commissioner),* 2020 BCSC 2035 at para. 38.

[39] Further, the Tenant has taken the position that there is no evidentiary basis for the Arbitrator's "finding" that the August 6 Letter was sent. The Tenant relied on this lack of evidentiary basis to argue that the Doubling Decision was patently unreasonable and in arguing that the Ruling prevented the Tenant from providing evidence relevant to the Doubling Claim. Having done so, the Tenant cannot change lanes and ask the Court to apply s. 90(a) and render that same finding dispositive of the claim.

## VII. Disposition

[40] The petition is allowed on the basis that the Ruling resulted in a breach of procedural fairness. The Doubling Decision is severed from the Decision and set aside. The remainder of the Decision is unaffected.

[41] The Doubling Claim is remitted for hearing before a new arbitrator.

[42] The parties will each bear their own costs.

[43] Finally, the petition named the "BC Residential Tenancy Branch" as a respondent. The parties agree that there is no such legal entity and that the style of cause should be amended to name as the second respondent the "Director, Residential Tenancy Branch". I order the style of cause be so amended.

"Tucker J."