COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Athwal v. Johnson,*
2023 BCCA 460

Date: 20231208
Docket: CA49033

Between:

Nirmal Singh Athwal, and Harjeet Kaur Athwal

Appellants
(Petitioners)

And

Stephen Frederick Johnson and Kathleen Elaine Chandler

Respondents
(Respondents)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Stromberg-Stein
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated April 5, 2023 (*Athwal v. Johnson*, New Westminster Docket 245773).

Counsel for the Appellants: R. Davidson

The Respondents, appearing in person: S.F. Johnson
K.E. Chandler

Place and Date of Hearing: Vancouver, British Columbia
November 30, 2023

Place and Date of Judgment: Vancouver, British Columbia
December 8, 2023

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Justice Skolrood

Summary:

Following a Two-Month Notice to End Tenancy, the respondent tenants brought an Application for Dispute Resolution seeking compensation pursuant to s. 51 of the Residential Tenancy Act. The Residential Tenancy Branch arbitrator concluded that the appellant landlords had not fulfilled the purpose of the Two-Month Notice within a reasonable amount of time and awarded the respondents compensation equivalent to 12 months' rent ($24,000). The appellants brought an application for judicial review alleging that the hearing was procedurally unfair because they had not received particulars of the respondents' claim. The chambers judge dismissed the procedural fairness claim on the grounds that the appellants should have raised an objection during the hearing, and the appellants appealed the chambers decision. Held: Appeal allowed. There is no question that the appellants were entitled to receive the particulars of respondents' claims setting out what the respondents were seeking and the basis for their claims. The uncontroverted evidence before the chambers judge was that the appellants did not receive the handwritten Application for Dispute Resolution which contained the particulars of the respondents' claim for compensation under s. 51. This procedural defect had an unmistakable impact on the fairness of the RTB proceeding and its outcome. In the circumstances, the chambers judge erred by rigidly applying the principle that a procedural fairness issue cannot be raised for the first time on judicial review, resulting in an unjust order.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Background

[1] This is an appeal from an order made on judicial review of a Residential Tenancy Branch ("RTB") arbitrator's decision under the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*]. The appeal concerns procedural fairness in the RTB hearing process, and whether the chambers judge erred by dismissing the appellants' procedural fairness claim on the basis that the appellants raised the procedural fairness issue for the first time on judicial review.

[2] The appellants, as landlords, entered into a residential tenancy agreement with the respondents, as tenants, to rent a home in Delta, British Columbia (the "Rental Unit") commencing on April 1, 2013.

[3] On May 27, 2021, the appellants issued the respondents a Two-Month Notice to End Tenancy (the "Two-Month Notice") under s. 49(3) of the *RTA*. The Two-Month Notice specified a vacancy date of July 31, 2021.

[4] The respondents vacated the Rental Unit on or around August 3, 2021, and the appellants took possession. After taking possession, the appellants proceeded to complete renovations to the Rental Unit. They did not move into the Rental Unit until April 19, 2022.

[5] Approximately three months after vacating the Rental Unit, the respondents brought an Application for Dispute Resolution seeking compensation pursuant to s. 51 of the *RTA*. They also submitted claims for the return of goods left in the Rental Unit and return of a damage deposit.

Residential Tenancy Branch decision

[6] At the outset of her reasons, the arbitrator stated:

> 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.

[7] Because of the limited time available for the hearing, the arbitrator dismissed the respondents' claims for return of goods and their damage deposit, with the right to reapply, as being unrelated to the primary claim before the RTB, which was for compensation under s. 51.

[8] There was no dispute between the parties that the appellants moved into the Rental Unit in mid-April 2022. The issue before the arbitrator was whether the appellants had failed to accomplish the stated purpose in the Two-Month Notice because they did not occupy the Rental Unit in a reasonable amount of time.

[9] The respondents argued that the appellants had not satisfied the purpose of the Two-Month Notice because they completed substantial renovations rather than moving into the Rental Unit.

[10] The appellants argued that the renovations were necessary to "refresh" the property and repair damage. When asked by the arbitrator whether there were any extenuating circumstances that had prevented them from moving into the Rental

Unit, the appellants said COVID-19 permitting issues and a stop-work order delayed the renovations.

[11] The arbitrator found that the appellants had not fulfilled the purpose of the Two-Month Notice because they did not occupy the Rental Unit within a reasonable amount of time and had failed to establish extenuating circumstances to justify the delay. The reason for the delay, in the arbitrator's view, was the extent of the appellants' renovations, which she described as "gutt[ing] the house, replac[ing] siding, windows, plumbing, electrical and an array of other changes." The arbitrator found that the appellants had failed to explain why it was necessary for them to conduct substantial renovations, including to the exterior of the Rental Unit, to "make [the Rental Unit] livable".

[12] The arbitrator ordered, pursuant to s. 51(2) of the *RTA*, that the respondents were entitled to a monetary award of $24,000.00, which was 12 times the monthly rent of $2,000 payable under the tenancy agreement.

Chambers decision

[13] The appellants brought a petition for judicial review seeking an order to set aside the arbitrator's decision or, in the alternative, to refer the matter back to the RTB for a new hearing.

[14] The original petition filed by the appellants did not allege a procedural fairness defect. However, the appellants sought and obtained leave to amend their petition to add a procedural fairness ground after they say they realized that the materials they received before the arbitrator's hearing were deficient. The appellants alleged that they had not received the respondents' "Written Application" containing the particulars of the respondents' claim for compensation under s. 51 of the *RTA*.

[15] The amended petition raised three grounds:

1) that the appellants had not received the particulars of the respondent's claim for compensation under s. 51;

2) that the arbitrator had erroneously concluded that the appellants' delay was caused by their renovations; and

3) that the RTB policy guidelines required the arbitrator to assess what a "reasonable period" was in the context, which the arbitrator failed to do.

[16] The second and third grounds were dismissed by the chambers judge and are not being advanced on appeal. This appeal concerns the chambers judge's dismissal of the procedural fairness ground, for which the chambers judge provided the following reasons:

> [18] The most troubling matter has to do with the assertion by the landlords that they simply did not receive the details of the claim, and here I have a rather stark and direct conflict in the evidence. However, it would have been plain to the landlords at the outset or very shortly after the outset of the hearing that this matter was proceeding on this compensation claim related to their failure to occupy the premises within a reasonable period of time.
>
> [19] In my view, if it was the case that they were taken by complete surprise, as they allege, it fell to them to do something about it at the time to raise a matter of complaint or objection or to apply for an adjournment so they could muster evidence that they now say that they wish they had led. I do not think it is sufficient, in the circumstances of this case, that they proceed through an entire hearing without raising that as a matter of complaint and instead leave it for judicial review to raise it for the first time.
>
> [20] In other circumstances a contrary conclusion might perhaps be drawn, but here I am satisfied that the nature of the hearing was well known to them at the outset or very near the outset of the hearing. They acknowledged to the arbitrator that they were satisfied with all of the disclosure and they had every opportunity to correct that as the hearing progressed and as it became apparent, or should have become apparent, that this is not what they had prepared for. It did behoove them to adopt some measure of self-help or relief at the time and not leave that to a later time, including at this judicial review.
>
> *Athwal v. Johnson* (5 April 2023), New Westminster S245773 (B.C.S.C.) [*RFJ*]

On Appeal

[17] The appellants submit the chambers judge committed two errors:

1) The chambers judge erred in fact and law, or in law alone, in the analysis of the principles of procedural fairness, and specifically, by finding that the appellants' failure to identify that the Written Application was missing during

the RTB Hearing, precluded the appellants from claiming relief under the principles of procedural fairness on judicial review.

2) The chambers judge erred in fact and law, or law alone, by finding that the principles of procedural fairness had been met by finding that the appellants knew the nature of the RTB Hearing at the outset or very near the outset of the RTB Hearing.

[18] I disagree with the appellants' assertion that the chambers judge found the RTB hearing to be procedurally fair simply because the appellants knew the nature of the hearing at its outset. In my view, the chambers judge's statement that "the nature of the hearing was well known to [the appellants] at the outset or very near the outset of the hearing" went to the chambers judge's determination that the appellants were precluded from raising the procedural fairness issue for the first time on judicial review.

[19] In any event, if the chambers judge did conclude that the hearing was procedurally fair simply because the appellants became aware of what the hearing was about during the hearing itself, it would be a clear error in law. This is because, for reasons I will explain, there is no question that the appellants were entitled to receive the claim particulars prior to the hearing.

[20] Accordingly, there is one issue on appeal: whether the chambers judge properly applied the law of procedural fairness, including in his determination that the appellants were precluded from raising the procedural fairness issue for the first time on judicial review.

Discussion

Standard of review

[21] In *Campbell v. The Bloom Group*, 2023 BCCA 84, this Court set out the relevant principles concerning the standard of review that applies on appeal of a judicial review decision:

> [11] … On appeal from a judicial review decision, the Court effectively steps into the shoes of the judge below: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 46. Unless the chambers judge was called upon to make an original finding of fact, the focus of the appeal is on the original administrative decision, rather than the reasons for judgment of the chambers judge on judicial review: *Crook v. British Columbia (Director of Child, Family and Community Service),* 2020 BCCA 192 at para. 35; *1193652 B.C. Ltd. v. New Westminster (City),* 2021 BCCA 176 at para. 41.
>
> [12] On judicial review from a decision of the RTB, and by operation of s. 84.1 of the *Residential Tenancy Act*, s. 58(2)(a) of the *Administrative Tribunals Act,* S.B.C. 2004, c. 45 provides that an arbitrator's findings of fact or law or exercise of discretion cannot be interfered with unless they are patently unreasonable.
>
> [13] A patently unreasonable decision has been described as "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand": *Beach Place Ventures Ltd. v. Employment Standards Tribunal,* 2022 BCCA 147 at para.17, quoting from *Law Society of New Brunswick v. Ryan,* 2003 SCC 20 at para. 52.
>
> [14] Where procedural fairness is invoked, s. 58(2)(b) of the *Administrative Tribunals Act* provides that all "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".

[22] The standard of review for questions of procedural fairness was the subject of discussion in *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission*), 2021 BCCA 67 [*R.N.L.*], and *Brar v. British Columbia (Securities Commission)*, 2023 BCCA 432. An appellate court will review questions of procedural fairness on the basis of "correctness, sometimes termed 'fairness'": *R.N.L.* at para. 57.

Procedural fairness

[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.

[24] In the present case, in light of the decision being made and its statutory, institutional and social context, I am of the view that the parties were entitled to a high level of procedural fairness. I would adopt the reasons of Justice Sewell in *Ndachena v. Nguyen,* 2018 BCSC 1468, which I find applicable:

> [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.

(See also *Ganitano v. Metro Vancouver Housing Corporation*, 2009 BCSC 787 at para. 40; *Kikals v. British Columbia (Residential Tenancy Branch)*, 2009 BCSC 1642 [Kikals] at paras. 56–58; *Fulber v. Doll*, 2001 BCSC 891 at paras. 26–30.)

[25] I would add that RTB Rules 3.1(a) and 3.5, at the time of the dispute resolution proceeding, provided as follows:

> 3.1 Documents that must be served with the Notice of Dispute Resolution Proceeding Package
>
> The applicant must, within three days of the Notice of Dispute Resolution Proceeding Package being made available by the Residential Tenancy Branch or within a different package specified by the director, serve each respondent with copies of the following:
>
> a) the Notice of Dispute Resolution Proceeding provided to the applicant by the Residential Tenancy Branch, which includes the Application for Dispute Resolution;
>
> […]
>
> 3.5 Proof of service required at the dispute resolution proceeding
>
> At the hearing, the applicant must be prepared to demonstrate to the satisfaction of the arbitrator that each respondent was served with the Notice of Dispute Resolution Proceeding Package and all evidence as required by the Act and these Rules of Procedure.

[26] Additionally, s. 59(2) and (3) of the *RTA* provide:

> 59 […]
>
> (2) An application for dispute resolution must
>
> (a) be in the applicable approved form,
>
> (b) include full particulars of the dispute that is to be the subject of the dispute resolution proceedings, and
>
> (c) be accompanied by the fee prescribed in the regulations.
>
> (3) Except for an application referred to in subsection (6), a person who makes an application for dispute resolution must give a copy of the application to the other party within 3 days of making it, or within a different period specified by the director.
>
> [Emphasis added.]

[27] In my view, there is no question that the appellants were entitled to know, prior to the hearing, the remedies the respondents were seeking and the basis for their claims. The *RTA* and RTB Rules provide such an entitlement, and the appellants had a reasonable expectation that RTB notice and disclosure procedures would be followed.

[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* at para. 30.

[29] This brings me to the issue of what information was provided to the appellants and whether it satisfied the duty of procedural fairness.

What did the appellants receive?

[30] The appellants allege that they never received the particulars of the respondents' claim for $24,000.00 under s. 51 of the *RTA*. This is a factual issue that went unresolved before the RTB arbitrator and the chambers judge, for different reasons. It is necessary for this Court to address it.

[31] The arbitrator stated that "[n]either 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. While the arbitrator's statement appears to confirm that the RTB notice and disclosure requirements were complied with, there are two reasons why, in my view, it cannot be taken as an

explicit finding about what the appellants received or the sufficiency of that information for the purposes of procedural fairness.

[32] The first reason is that the arbitrator's statement is ambiguous, due to the arbitrator's use of the words "and/or". It is unclear what the parties said they received.

[33] The second reason is that the arbitrator's statement simply reflects the parties' own confirmation that they received and reviewed "the Application and/or the documentary evidence". The only fact established by the arbitrator's statement is that the appellants, or their daughter who assisted them during the hearing, told the arbitrator they had received what they believed to be "the Application and/or documentary evidence", and they did not raise any related concerns. As I will explain, the evidence demonstrates that the appellants did receive some form of an "Application for Dispute Resolution". The arbitrator's statement leaves unresolved the questions of what information the appellants received, and whether it was sufficient.

[34] This is not to say that the parties' own statements provide no indication of the information provided and received. Rather, in the particular circumstances of this case, a statement made by the appellants during the hearing cannot be taken as proof that the hearing was procedurally fair.

[35] The chambers judge also did not make any explicit finding concerning the particulars the appellants received. He said there was a "rather stark and direct conflict in the evidence" regarding this issue: *RFJ* at para. 18. The judge dismissed the appellants' procedural fairness argument without determining what the appellants received or whether it was sufficient.

[36] For the following reasons, I conclude there was no "stark and direct conflict in the evidence" concerning what the appellants received. In my view, the uncontroverted evidence before the chambers judge was that the appellants did not

receive any document setting out the particulars of the respondents' claim for $24,000.00 under s. 51 of the *RTA*.

[37] In his affidavit filed on August 24, 2022, (the "First Athwal Affidavit"), Mr. Athwal provided a factual background of various events in chronological order. The following excerpt is relevant:

> 12. On April 19, 2022, final inspection was carried out by the City and thereafter we were able to move into the Rental Unit.
>
> 13. The tenants then served me with their application for dispute resolution and Notice of Hearing, seeking damages equivalent of 12 times the monthly rent. Attached hereto and marked as **Exhibit "C"** to this my Affidavit is a true copy of the Notice of Dispute Resolution Proceeding that was served on me…
>
> [Emphasis added.]

[38] Exhibit C to the First Athwal Affidavit is a four-page document titled "Notice of Dispute Resolution Proceeding". The first page of the document provides the names and contact information of the parties, the dispute address, and information about the hearing. The second page has the bolded title "Application for Dispute Resolution", under which the parties' information and dispute address is provided again. On the third page, under the smaller bolded heading "Dispute Information", the document describes the respondents' claims as follows:

> The following information has been provided to the Residential Tenancy Branch and describes the claims made against the respondent(s)
>
> 01 - I want part or all of my security deposit and/or pet damage deposit back
>
> $2,000.00
> **Notice delivery date:** Jul 31, 2021
>
> **Notice delivery method:** Other
>
> **Applicant's dispute description**
>
> SEE APPLICATION FOR DETAILS.
>
> **Supporting Evidence**
>
> No evidence submitted at time of application
>
> 02 – I want compensation for my monetary loss or other money owed
>
> $24,000.00
>
> **Applicant's dispute description**
>
> SEE APPLICATION FOR DETAILS.

> **Supporting Evidence**
>
> No evidence submitted at time of application
>
> 03 - I want the landlord to return my personal property
>
> **Applicant's dispute description**
>
> SEE APPLICATION FOR DETAILS.
>
> **Supporting Evidence**
>
> No evidence submitted at time of application
>
> 04 - I want to include a request for the landlord to pay me back for the cost of the filing fee

[39] In the Exhibit C document there is no information detailing the particulars of the respondents' claims. Those details are indicated as being provided by the "APPLICATION". With hindsight, it is obvious that the "APPLICATION" is in fact a separate document entirely, but there is nothing in Exhibit C which indicates this. I note the words "SEE APPLICATION FOR DETAILS" appear in a section of the document titled "Application for Dispute Resolution".

[40] The First Athwal Affidavit was filed prior to the appellants' amendment of their petition to add the procedural fairness ground at issue in this appeal. In other words, the First Athwal Affidavit was not adduced to support any argument concerning the sufficiency of the information the appellants received. In my view, the First Athwal Affidavit provides a clear indication that the appellants did not receive the particulars of the respondents' claim. It also indicates that Mr. Athwal believed that the package he was served at some point after April 19, 2022, contained the "application for dispute resolution" and "Notice of Hearing".

[41] The Director of the RTB, who appeared as a respondent in the judicial review application, produced an affidavit filed on October 3, 2022 (the "Lisa Clout Affidavit"). Exhibit B to the Lisa Clout Affidavit contains the materials received by the RTB from the respondents, and includes a five-page document titled "Tenant's Application for Dispute Resolution Past Tenancy". This document contains much of the same information found under the "Application for Dispute Resolution" heading in the document attached as Exhibit C to the First Athwal Affidavit. However, there are several key differences. The "Tenant's Application for Dispute Resolution Past

Tenancy" document is filled out by hand and includes the particulars of the respondents' claims. With regard to the respondents' claim for $24,000.00, the document provides:

> Landlord evicted on basis of moving in. Instead of moving in he gutted the house and I believe added on some rooms. As of the filing of this notice 10/11/21 they have still not moved in and probably didn't apply for permits as there is now a stop work order on the house as of October. Landlord had contracters [*sic*] in to appraise the cost of adding 4 bedrooms while I still lived there

[42] In my view, the Lisa Clout Affidavit is further evidence of a distinction between the materials that the RTB received from the respondents and that which the appellants say they were served by the respondents.

[43] In a second affidavit filed by the appellants on February 16, 2023, (the "Second Athwal Affidavit") Mr. Athwal deposed that he reviewed the Lisa Clout Affidavit and "that the document at Exhibit 'B' from pages 14 to 18 was never provided to me or my wife…in advance of the hearing in the Residential Tenancy Branch". It was only after filing the Second Athwal Affidavit that the appellants sought and obtained leave to amend their petition to include the procedural fairness grounds. The Second Athwal Affidavit contains an explicit statement that the appellants did not receive the handwritten Application for Dispute Resolution containing the claim particulars.

[44] The evidence which I have described is uncontroverted. The respondents' evidence provides no indication of what documents they served on the appellants. The only mention of service is in the respondents' third affidavit, filed on March 17, 2023, in which the respondents rely on the arbitrator's statement as proof the appellants received the claim particulars. They deposed:

> 1. […] The plaintiffs […] decided to change their application to, they did not receive all the evidence used in the original case held with the Tenancy Branch. Even though they admitted at the hearing that they had received ALL evidence and had a chance to go through it all before the hearing. […]

[45] I have already explained why the arbitrator's statement does not establish what information the appellants received or whether that information was sufficient.

[46] The evidence demonstrates that what the appellants received was a "Notice of Dispute Resolution Proceeding", which contained a section titled "Application for Dispute Resolution". The documents the appellants received lacked any description of the particulars for the respondents' claim for $24,000. Those details are in the handwritten Application for Dispute Resolution and there is no indication in the record that the appellants ever received the handwritten Application for Dispute Resolution.

[47] The fact that the appellants did not receive the particulars of the respondents' claim for $24,000.00 under s. 51 of the *RTA* is inferentially supported by reference to the evidence and arguments which the appellants adduced in the RTB hearing process. The appellants submitted numerous photographs of what they alleged to be damage to the rental unit, as well as a supplementary written document detailing why they did not return the respondents' damage deposit and their assessment of the value of the items left inside the Rental Unit. They did not submit any evidence concerning the reasons they say they were delayed in moving into the Rental Unit.

[48] As counsel for the appellants pointed out to the chambers judge, the lack of evidence adduced by the appellants concerning the critical issue before the arbitrator indicates that the appellants went into the RTB hearing unaware of that issue. The appellants' evidence related to the return of a damage deposit and goods left in the Rental Unit, which were the two claims for which there were basic particulars provided in the Notice of Dispute Resolution Proceeding appended to the First Athwal Affidavit. This is clearly not a situation where the appellants failed to adduce any evidence. Rather, they adduced evidence, but only concerning the issues which were described in basic detail in the Notice of Dispute Resolution Proceeding, which they received.

[49] I am satisfied that the appellants did not receive the handwritten Application for Dispute Resolution, which contained the particulars of the respondents' claim for compensation under s. 51.

[50] I understand that the respondents say they did everything that was required of them, including providing the claim documents to the appellants. However, during the hearing of this appeal, the respondents did not point to any evidence in the record concerning what they sent to the appellants. Nor did they appear to appreciate what specifically the appellants alleged was missing.

[51] By concluding that the appellants did not receive the claim particulars, it is not my intention to say that the respondents were being untruthful, or to cast blame upon them. In a system which relies on lay participants to serve documents on an opposing party, it is reasonable to expect that mistakes may occur. It must be recalled that the duty of procedural fairness falls on the decision maker, and in these circumstances that clearly required more than a cursory examination of whether the parties received the information necessary to exercise their participatory rights.

Was the RTB hearing procedurally fair?

[52] In my view, 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".

[53] Aside from photographs produced by the respondents, there was no concrete evidence before the arbitrator concerning the circumstances which the appellants said prevented them from moving into the Rental Unit. Evidence concerning the

renovations was critical to the issue of whether compensation should have been awarded in these circumstances.

[54] It is speculative to say why the Notice of Dispute Resolution Proceeding that the appellants received did not include any claim particulars, despite the provision in RTB Rule 3.1 that Notices of Dispute Resolution include the Application for Dispute Resolution. In oral submissions to the chambers judge, counsel for the appellants suggested that it was because the respondents submitted a handwritten Application for Dispute Resolution, rather than filing the claim online. In any event, the reason why the appellants did not receive the claim particulars is irrelevant. Given that RTB hearing was procedurally unfair, the question now becomes whether the chambers judge was correct to dismiss the appellants' procedural fairness claim on the basis that they raised it for the first time on judicial review.

Did the chambers judge err by dismissing the appellants' procedural fairness claim on the basis that the appellants raised it for the first time on judicial review?

[55] It is well accepted that allegations of procedural fairness 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": *R.N.L.* at para. 72, 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.). The rationale for this principle is straightforward—a first-instance decision maker should be afforded the opportunity to address procedural fairness issues before any harm is done, and a party that is aware of a procedural defect should not be permitted to "stay still in the weeds and later brandish it on judicial review when it happens to be unsatisfied with the first-instance decision": *Tsigehana v. Canada (Citizenship and Immigration),* 2020 FC 426 at para. 21, citing *Hennessey v. Canada,* 2016 FCA 180 at para. 21.

[56] The opportunity to raise a procedural fairness issue arises when "the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection": *Benitez v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 461, at para. 220, aff'd 2007 FCA 199.

[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. For the following reasons, I disagree with the chambers judge's conclusion on this issue.

[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.

[59] In these circumstances, I disagree with the chambers judge's conclusion that it was reasonable to expect the appellants, as laypersons unassisted by counsel, to identify the procedural fairness issue during the RTB hearing. As I have explained, the issue stemmed from the existence of a separate handwritten Application for Dispute Resolution. There is no evidence indicating that the appellants were aware of the handwritten Application for Dispute Resolution or that it contained information not found under the heading "Application for Dispute Resolution" in the documents they received.

[60] In my view, and as the evidence indicates, it was entirely possible for the appellants to assume that the documents they received satisfied their entitlements under the RTB process. Counsel for the appellants only identified the procedural fairness issue when the handwritten Application for Dispute Resolution was produced in the judicial review proceeding, which to me clearly shows why it would be unreasonable to expect the appellants to understand that the materials they received were deficient at an earlier point.

[61] Even if the appellants should have realized that the hearing was “not what they prepared for”, as the chambers judge indicated, I disagree that they could have been expected to raise an objection during the RTB hearing. Nor, in my view, would it be just to hold their failure to do so against them now.

[62] As I have noted, the appellants were unassisted by counsel during the RTB hearing, which took place over the telephone. The record indicates that the hearing began at 1:30 PM, and less than an hour and a half later, at 2:52 PM, the outcome of the hearing was registered in the RTB system. To raise the issue, the appellants would have needed to interject during the short teleconference hearing and explain to the arbitrator an issue which they could not have been expected to fully understand. They would have needed to determine that any surprise or confusion they were experiencing was not due to their personal failings, but instead attributable to a defect in the materials they received. Moreover, any objection raised by the appellants during the hearing would have required them to effectively contradict themselves, having already told the arbitrator at the outset that they received the “Application and/or the documentary evidence”.

[63] It is easy to forget, as lawyers and judges, how intimidating and foreign the adversarial dispute resolution process can be. While trained counsel could perhaps be expected to contemporaneously identify and raise a procedural fairness issue, I do not think the same expectation should be constructively imposed, to serious detriment, on the appellants in these circumstances.

[64] As this Court explained in *R.N.L.*, the principle that a party should raise all issues at first instance is not a hard and fast rule: *R.N.L.* at para. 74, citing *Air Canada v. British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 BCCA 387. The court may exercise its discretion to allow a party to raise a new issue on judicial review, especially if the party was practically precluded from raising the issue at first instance and there is no prejudice to the other party.

[65] The chambers judge’s decision to dismiss the appellants’ procedural fairness argument, without conducting an inquiry into the nature of the issue itself or the

procedural fairness entitlements of the appellants, was a discretionary one. The standard of review for a discretionary decision requires establishing "that the chambers judge erred in principle, gave insufficient weight to all relevant circumstances, clearly and demonstrably misconceived the evidence, or made an order resulting in a clear injustice": *Eastside Pharmacy Ltd. v. British Columbia (Minister of Health)*, 2019 BCCA 60 at para. 46.

[66] In my respectful view, the chambers judge committed several errors by dismissing the appellants' procedural fairness ground. He erred by rigidly applying the principle that procedural fairness grounds cannot be raised on judicial review. In doing so, he also failed to adequately consider the relevant circumstances before him, including the nature of the procedural fairness issue and the circumstances which made it unreasonable to expect the appellants to identify and raise the issue during the hearing. His decision was based in his misconception of the evidence concerning the procedural fairness issue, which was uncontroverted. The resulting order, in my respectful view, was unjust.

[67] This is a situation where the interests of justice required the chambers judge to scrutinize the procedural defect alleged to ensure fairness and the appearance of fairness in an administrative proceeding which carried serious consequences for the parties. As Justice McEwan stated in *Kikals*:

> [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. …

[68] The proper remedy that flows from such an analysis is, in my view, to remit the matter back to the RTB for a rehearing on the merits.

Claim For Compensation Under s. 51

[69] As a final matter, I wish to briefly comment on the nature of the respondents' claim for compensation under s. 51, and why, in these circumstances, evidence about the appellants' renovations was fundamental to the RTB arbitrator's ability to decide the issue on its merits.

[70] As I explained in a recent case concerning judicial review of an RTB order for compensation under s. 51, 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 [*Maasanen*] at para. 24.

[71] In *Maasanen*, the facts were similar. A landlord issued a Notice to End Tenancy pursuant to s. 49(3) of the *RTA*. The tenants vacated the rental unit, and the landlord sought to complete renovations, which were ultimately delayed. The tenants brought a claim for compensation under s. 51 alleging that the landlord had not complied with the stated purpose for ending the tenancy. The RTB arbitrator granted the tenants' claim and issued a monetary order equivalent to 12 months' rent.

[72] The RTB order was overturned on judicial review because the arbitrator had failed to consider evidence of extenuating circumstances. The chambers judge declined to remit the matter back to the RTB for reconsideration. This Court upheld the chambers judge's decision on appeal. As I noted, in the circumstances of that case, the chambers judge properly exercised her remedial discretion not to remit the matter back to the RTB because the *RTA* provisions at issue could not possibly have been intended to capture the landlord. A reconsideration of the issue could lead to only one result: *Maasanen* at para. 29.

[73] Under a similar line of analysis, if the appellants' renovations in this case were indeed necessary, but were delayed for reasons outside of their control, it may also be said that the applicable provisions in the *RTA* were not intended to capture the appellants. A claim for compensation under s. 51 has both a compensatory and a punitive, or deterrent, nature. The quantum of compensation will often be significant, and requires careful consideration of whether the landlord's actions warrant such a remedy. I do not say this to make any pronouncement about the merits of the underlying action, but rather to say that in these circumstances, the

evidence before the arbitrator was manifestly insufficient to decide whether the appellants failed to comply with the stated purpose in the Two-Month Notice within a reasonable amount of time and there were no extenuating circumstances.

[74] The arbitrator's determination under s. 51 is inherently contextual. It would be an error of law for an arbitrator to fetter their discretion by simply relying on policy directions when considering an individual's case. The application of a rigid policy is insufficient; so too is a determination made on the basis of an incomplete record tainted by a procedural defect. It certainly cannot be said that the outcome would have been the same had the appellants been afforded a procedurally fair hearing.

Disposition

[75] I would allow the appeal, set aside the RTB Decision, and remit the matter back to the RTB for rehearing.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Justice Skolrood"