COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Choi v. Westbank Projects Corp.,* 2024 BCCA 410

Date: 20241212
Docket: CA48937

Between:

Chong-Kuen (Eric) Choi
and Kyung (Kay) Won Choi

Appellants
(Defendants)

And

Westbank Projects Corp., PW Comox Development Limited Partnership,
PW Comox Holdings Ltd., PW Comox GP Inc., and
Westbank Pacific Realty Corp.

Respondents
(Plaintiffs)

And

Director of the Residential Tenancy Branch

Intervener

Before: The Honourable Madam Justice Fenlon
The Honourable Justice Donegan
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated March 9, 2023 (*Westbank Projects Corp. v. Choi*, Vancouver Docket S214312).

Counsel for the Appellants: T. Hakemi
S.J. Marescaux

Counsel for the Respondents: C. Batrouny

Counsel for the Intervener: J.M. Patrick
L.M. Lubke

Place and Date of Hearing: Vancouver, British Columbia
September 27, 2024

Place and Date of Judgment: Vancouver, British Columbia
December 12, 2024

2024 BCCA 410 (CanLII)

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Justice Donegan
The Honourable Justice Riley

2024 BCCA 410 (CanLII)

2024 BCCA 410 (CanLII)

Summary:

Appeal from an order dismissing the appellants' application to strike a notice of civil claim in which their landlords allege the appellants negligently broke a sprinkler nozzle, causing extensive property damage. The appellants argue that the matter is a Residential Tenancy Act dispute within the exclusive jurisdiction of the Residential Tenancy Branch, and that, according to the procedure prescribed in Gates v. Sahota, 2018 BCCA 375, the landlords were required to file a petition rather than a notice of civil claim. The chambers judge dismissed the application to strike because it was not plain and obvious that the Supreme Court did not have either shared or exclusive jurisdiction over the matter. Held: Appeal dismissed. Not all disputes between landlords and tenants are RTA disputes within the Director's exclusive jurisdiction. Taken at face value, the notice of civil claim pleads negligence and seeks damages over the small claims limit. It is thus not plain and obvious that the claim would not be subject to the jurisdiction of the Supreme Court even if it is ultimately found to be an RTA dispute. The 2021 amendments to the Residential Tenancy Act did not change the requirement that applicants must apply by way of petition on notice to the Director to have an RTA matter heard in the Supreme Court, but failure to do so is an irregularity that does not warrant dismissal of the claim.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The main issue on this appeal is whether it is plain and obvious that the *Residential Tenancy Act,* S.B.C. 2002, c. 78 ["*RTA*"] ousts the Supreme Court's jurisdiction to hear a negligence claim brought by a landlord against a tenant.

Background

[2] The appellants, Chong-Kuen (Eric) Choi and his sister, Kyung (Kay) Won Choi, signed a residential tenancy agreement in July 2017 to rent an apartment from the respondent landlords for $1,700 per month. In April 2019, a fire suppression sprinkler nozzle in the unit was struck and broken, causing flooding into the appellants' unit, other units in the building, and common areas, including the elevator.

[3] In April 2021, the landlords filed a notice of civil claim (the "NOCC") alleging the tenants were negligent in striking and activating the sprinkler nozzle, and seeking damages for repair costs that meet or exceed $250,000. In January 2022, the tenants filed a response denying they were negligent and raising the jurisdiction of the Residential Tenancy Branch. The parties proceeded with discovery of

documents and exchanged correspondence about setting examinations for discovery. It was not until February 2023, almost two years after the litigation began, that the tenants applied to strike the NOCC on two bases: first, because it was an *RTA* dispute within the exclusive jurisdiction of the Residential Tenancy Branch, and second, because it should have been commenced by way of petition with notice to the Director.

2024 BCCA 410 (CanLII)

[4] In brief oral reasons, the chambers judge dismissed the application on the basis that it was not plain and obvious that the NOCC failed to disclose a cause of action that could be adjudicated in the Supreme Court. He concluded the Supreme Court had at least a shared jurisdiction over the dispute, if not an exclusive one. The judge did not address the procedural irregularity raised by the tenants.

<u>On Appeal</u>

[5] The tenants submit the chambers judge erred in failing to strike the NOCC for lack of jurisdiction and non-compliance with the procedural requirement to file a petition on notice to the Director.

[6] For the reasons that follow, I would dismiss the appeal.

1. Did the Chambers Judge Err in Refusing to Strike the NOCC Under Rule 9-5(1) for Lack of Jurisdiction?

[7] Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 provides:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[8] It is important to recognize that, on an application to strike under Rule 9-5(1), a judge is not required to make a definitive determination on jurisdiction or the merits of any cause of action pleaded. Rather, the test to be applied is whether, assuming the facts in the NOCC to be true, it is plain and obvious that the claim is certain to fail: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. In the present case, the judge was not satisfied the test had been met. I agree with that conclusion.

2024 BCCA 410 (CanLII)

[9] The jurisdictional line between tribunals and the courts can be a challenging one to discern. The foundational principle is this: if the Legislature intends to oust the jurisdiction of a superior court to hear claims, it must do so with “clear and explicit statutory wording to this effect”: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 at para. 46; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at paras. 5, 42. Such express language is found in s. 58(3) of the *Residential Tenancy Act*, which provides:

> 58 (3) Except as provided in subsection (4) or (4.1), <u>a court does not have and must not exercise any jurisdiction in respect of a matter that must be submitted to the director for dispute resolution under this Act</u>.
>
> [Emphasis added.]

[10] In *Gates v. Sahota*, 2018 BCCA 375, leave to appeal to SCC ref’d, 38438 (2 May 2019) [*Gates*], this Court recognized that the *RTA* gives the Director exclusive jurisdiction over *RTA* disputes, subject to exceptions enumerated within the *RTA* (at para. 71). When *Gates* was decided, there were two exceptions. There are now three:

1. When the claim is for an amount that is more than the monetary limit for claims under the *Small Claims Act*, R.S.B.C. 1996, c. 430 (s. 58(2)(a));

2. When the amount claimed under certain enumerated provisions exceeds $65,000 (s. 58(2)(a.1)); and

3. When the dispute is linked substantially to a matter that is before the Supreme Court (s. 58(2)(d)).

[11] Section 58(1) describes *RTA* disputes as follows:

> (1) Except as restricted under this Act, a person may make an application to the director for dispute resolution in relation to a dispute with the person's landlord or tenant in respect of any of the following:
>
> (a) rights, obligations and prohibitions under this Act;
>
> (b) rights and obligations under the terms of a tenancy agreement that
>
> (i) are required or prohibited under this Act, or
>
> (ii) relate to
>
> (A) the tenant's use, occupation or maintenance of the rental unit, or
>
> (B) the use of common areas or services or facilities.
>
> [Emphasis added.]

[12] It is convenient to address here the landlords' argument that the Director's jurisdiction is not exclusive, but is concurrent with that of the courts, because s. 58 uses permissive language, saying only that "… a person may make an application to the director…". I would not accede to this argument. This Court has repeatedly affirmed the Director's exclusive jurisdiction over most *RTA* disputes: *Gates* at para. 71; see also *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 BCCA 176 at para. 13, leave to appeal to SCC ref'd, 39773 (9 December 2021).

[13] However, not every dispute between a landlord and a tenant will be an *RTA* dispute subject to the exclusive jurisdiction of the Director. Some disputes, such as negligence causing personal injury, or defamation, are not matters grounded in the *RTA* or a tenancy agreement, and therefore are not *RTA* disputes: see *Janus v. The Central Park Citizen Society*, 2019 BCCA 173 at para. 30. Further, as noted, the *RTA* reserves to the Supreme Court jurisdiction over matters that are *RTA* disputes in three circumstances, two of which are relevant here:

> 1. Where the dispute is a monetary claim for debt or damages exceeding the small claims limit: s. 58(2)(a); or
>
> 2. Where the *RTA* dispute is linked substantially to an existing matter before the BCSC: s. 58(2)(d).

2024 BCCA 410 (CanLII)

(I have underlined "debt or damages" above to emphasize that the small claims limit does not apply to a claim for repairs under the *RTA*: *Gates* at para. 54.)

[14] The dispute between the tenants and landlords in the present case is framed in negligence. As pleaded, it does not rely on the tenancy agreement, or on rights and obligations under the *RTA*. Despite that, the tenants argue the claim is in essence one for property damage to a rental unit and common property, and therefore invokes the rights and obligations of the landlords and tenants under their residential tenancy agreement.

[15] In other words, the tenants argue that the landlords' claim is fundamentally an *RTA* dispute within the Director's exclusive jurisdiction, which cannot be avoided by framing the claim in negligence. This argument relies on the framework established by the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 [*Weber*]. In *Weber*, the Court held that it is the essential character of the claim, not the legal characterization, that determines jurisdiction where exclusive jurisdiction over some claims has been assigned to a statutory body (at paras. 49, 67).

[16] Because this appeal concerns an application to strike under Rule 9-5(1), it is neither necessary nor appropriate to decide this issue. It is sufficient to find it is not plain and obvious the Supreme Court does not have jurisdiction over the dispute. In this regard, it is significant that the landlords' claim is for $250,000, far more than the current monetary jurisdiction of the Small Claims Court of $35,000. As noted above, under s. 58(2)(a) the Supreme Court has jurisdiction over a claim for damages exceeding the small claims limit even if the claim is ultimately characterized as an *RTA* dispute.

[17] The tenants contest the amount of damages claimed. They say the tenancy agreement allocates risk for property damage by requiring the landlord to insure for water damage. Thus, they say, the most they could be found liable for is the deductible payable under the insurance policy—an amount well below the $35,000 small claims limit. In response, the landlords contend that even if their claim could be characterized as one made under the tenancy agreement, clause 40 provides that

2024 BCCA 410 (CanLII)

the tenant “may be held liable for accidental injury, accidental damage, or accidental breakage arising from the tenant’s abuse, willful or negligent act or omission … in their use of the landlords’ property.” However, neither party pleaded these terms of the tenancy agreement. On an application under Rule 9-5(1), the court is not to delve into the evidence. Taken on its face, the NOCC asserts a claim for damages in excess of $35,000.

[18] In summary on this ground of appeal, I see no error in the judge’s conclusion that it is not plain and obvious that the landlords’ claim will fail for want of jurisdiction. It is at least arguable that the Supreme Court has jurisdiction because the claim is either an *RTA* dispute involving more than $35,000, or a negligence claim at common law that is not an *RTA* dispute at all.

[19] Unfortunately, the dismissal of the application to strike leaves unanswered the question of whether the Supreme Court or the RTB is the correct forum. However, it remains open to the tenants even now to follow the correct procedure and apply in Supreme Court pursuant to s. 58(4) for an order that the claim in negligence is in reality an RTA dispute that should be heard by the Director, even if, because of the amount involved, it falls within the jurisdiction of the Supreme Court at first instance. Section 58(4) provides:

> 58 (4) The Supreme Court may, on application regarding a dispute referred to in subsection (2) (a) [a dispute over $35,000], (a.1) or (d) [a dispute substantially linked to a BCSC matter],
>
> (a) order that the director resolve the dispute, or
>
> (b) hear and determine the dispute.

[20] The procedure prescribed in s. 58(4) makes sense particularly where the parties do not agree on whether a claim is an *RTA* dispute within the jurisdiction of the Supreme Court. It gives the chambers judge more leeway to undertake the kind of qualitative analysis that may be required to determine jurisdiction in light of the principles articulated in *Weber*. I note however, that where a plaintiff has made a claim in Supreme Court that does not fall within one of the exceptions in s. 58(2), such that the claim as framed in the pleading appears to fall within the exclusive

2024 BCCA 410 (CanLII)

jurisdiction of the Director, s. 58(4) is not engaged, and an application to strike may be brought.

[21] I turn now to the procedural complaint.

2. Would a Procedural Irregularity Warrant Dismissal of the NOCC?

[22] The tenants contend that, even if it is not plain and obvious that the Supreme Court is without jurisdiction, the claim should be struck nonetheless because the proceeding should have been initiated by filing a petition rather than a notice of civil claim: *Gates* at para. 54.

[23] I would not accede to this submission. Even if the landlords commenced the proceeding using the wrong originating pleading, that would be an irregularity only and would not be fatal. Rule 22-7 addresses non-compliance with the *Supreme Court Civil Rules*. In particular, Rule 22-7(3) provides:

> **Proceeding must not be set aside for incorrect originating pleading**
>
> (3) The court must not wholly set aside a proceeding on the ground that the proceeding was required to be started by an originating pleading other than the one employed.

[24] At the hearing of the appeal, we considered whether the amendments to the *RTA* that came into force on March 1, 2021, about three years after *Gates*, did away with the need to proceed by way of petition and notice to the Director when a party wishes to raise an *RTA* dispute in the Supreme Court that falls outside of the Director's jurisdiction. Some background is necessary to address this point.

[25] When *Gates* was decided in 2018, the relevant provisions of the *RTA* read as follows:

> 58 …
>
> (2) Except as provided in subsection (4), if the director accepts an application under subsection (1), the director **must** resolve the dispute under this Part unless
>
> (a) the claim is for an amount that is more than the monetary limit for claims under the *Small Claims Act*,

2024 BCCA 410 (CanLII)

> (a.1) the claim is with respect to whether the tenant is eligible to end a fixed term tenancy under section 45.1 […],
>
> (b) the application was not made within the applicable period specified under this Act, or
>
> (c) the dispute is linked substantially to a matter that is before the Supreme Court.
>
> [Emphasis added.]

2024 BCCA 410 (CanLII)

This language suggested that the Director had jurisdiction over all *RTA* disputes—making it mandatory only that the Director hear monetary claims under the Small Claims Court monetary limit but granting the Director discretion to hear claims over that amount.

[26] Section 58(4) of the *RTA* in force when *Gates* was decided clearly required an application to be made in the Supreme Court before that court, rather than the Director, could exercise jurisdiction. It provided:

> 58 (4) The Supreme Court may
>
> (a) on application, hear a dispute referred to in subsection (2) (a) [a claim over the small claims limit] or (c) [a claim linked substantially to a matter in the BCSC], and
>
> (b) on hearing the dispute, make any order that the director may make under this Act.
>
> [Emphasis added.]

[27] The phrase "[t]he Supreme Court may…on application, hear a dispute" was central to the conclusion in *Gates* that a petition was required to bring an *RTA* dispute before the Supreme Court. Justice Frankel, writing for this Court, said:

> [42] Section 58(4) of the *RTA* authorizes the Supreme Court to hear an *RTA* dispute "on application". That provision does not impose a leave requirement. Rather, by reason of Rule 2-1(2)(b) of the *Supreme Court Civil Rules*, a petition is required to commence an *RTA* dispute in that Court:
>
> > (2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:
> >
> > …
> >
> > (b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;
> >
> > …

> [43] As an application under s. 58(4) can affect the Director's interests, the petition must be served on the Director, as required by Rule 16-1(3).

[28] In practice the requirement to apply by way of petition to raise an *RTA* dispute in the Supreme Court, and to give notice to the Director, has often been overlooked.

2024 BCCA 410 (CanLII)

[29] In contrast to the earlier version of the *RTA* discussed above, the current form expressly prohibits the Director from hearing monetary claims for debt or damages above $35,000 or those linked substantially to Supreme Court matters <u>unless</u> the Supreme Court orders the Director to resolve the dispute. The relevant parts of s. 58(2) now provide:

> (2) Except as provided in subsections (2.2) and (4) (a), the director must not resolve a dispute if any of the following applies:
>
> > (a) … the amount claimed for debt or damages is more than the monetary limit for claims under the *Small Claims Act*;
> >
> > ...
> >
> > (d) the dispute is linked substantially to a matter that is before the Supreme Court.

[30] Section 58(4) and (4.1) now provide:

> 58 (4) The Supreme Court may, on application regarding a dispute referred to in subsection (2)(a) [a dispute over the small claims limit] … or (d) [a dispute substantially linked to a BCSC matter],
>
> > (a) order that the director resolve the dispute, or
> >
> > (b) hear and determine the dispute.
>
> (4.1) If the Supreme Court hears and determines a dispute under subsection (4)(b), the Supreme Court may make any order that the director may make under this Act.

[31] It is tempting to interpret these changes as substantive ones which do away with the cumbersome petition process prescribed in *Gates*, and allow parties to simply plead in a NOCC the kinds of *RTA* disputes the Legislature has now clearly designated as subject to the exclusive jurisdiction of the Supreme Court. I have, however, come somewhat reluctantly to the conclusion that the changes to s. 58(4) do not have that effect.

2024 BCCA 410 (CanLII)

[32] If the legislators intended s. 58(4) to do no more than authorize the Supreme Court, on application by a party, to send a matter pleaded in a NOCC to the Director to resolve, there would have been no need to add s. 58(4)(b)—i.e., that on application the Supreme Court may "hear and determine the dispute." In other words, if the starting point is the right to plead in a NOCC *RTA* matters involving more than $35,000, or those substantially linked to another matter in the Supreme Court, and to put the onus on the party who wants those disputes heard by the RTB to apply to have them moved, s. 58(4)(b) would be redundant—it would go without saying that the Supreme Court would hear the matter if it refused an application to transfer the dispute to the Director.

[33] In short, an interpretation of the current version of s. 58(4) that does not require an originating application to invoke the Supreme Court's jurisdiction over an *RTA* dispute is a strained one that does not give effect to all of the words used in the subsection.

[34] It is somewhat puzzling that the requirement to apply by way of petition on notice to the Director to have a matter heard in the Supreme Court remains in place given that the current version of the *RTA* expressly recognizes jurisdiction in the Supreme Court over certain categories of claims and expressly prohibits the Director from hearing those disputes: s. 58(2). Indeed, the 2021 amendments to the *RTA* were described by then Attorney General David Eby as intended to clarify "when the director does not have jurisdiction to resolve a dispute": "Bill 7, Tenancy Statutes Amendment Act, 2021", 1st reading, *Legislative Assembly of British Columbia Debates*, 42-1, No 16 (1 March 2020) at 1340.

[35] Nonetheless I conclude that, although the 2021 amendments to the *RTA* clarify the jurisdictional line between the RTB and the Supreme Court, they have not simplified the procedure to be followed to bring *RTA* disputes before the Supreme Court—even though those disputes fall within the exclusive jurisdiction of the Supreme Court and are ones that the Director "must not hear," at least at first instance.

[36] In short, the procedural steps prescribed in *Gates* continue to apply. If the moving party wishes to raise an *RTA* dispute in Supreme Court that falls within one of the exceptions listed in s. 58(2), they must invoke the jurisdiction of the court under s. 58(4) by way of petition on notice to the opposing party and the Director, in accordance with Rules 2-1(2)(b) and 16-1(3). If they fail to do so the responding party may apply under s. 58(4), again on notice, to have the matter heard by the Director.

2024 BCCA 410 (CanLII)

[37] It follows that, if the claim in the present case is determined to be an *RTA* dispute, it should have been commenced by petition on notice to the Director. However, as I have already noted, that irregularity would not be fatal and does not provide a basis to dismiss the claim.

Disposition

[38] For the reasons given, I would dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Donegan"

I AGREE:

"The Honourable Justice Riley"