

CANADA / JUDGMENT

Chiodo v. Doe

2021 BCSC 658

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2021 BCSC 658 Chiodo v. Doe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chiodo v. Doe,

2021 BCSC 658

Date: 20210412

Docket: S126653

Registry: Kelowna

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

Between:

Vitto Chiodo and Leanne Chiodo

Petitioners

And

John Doe and or Jane Doe doing business as

Princess Enterprises, Tia Collis

Respondents

And

Westbank First Nation

Intervenor

Corrected Judgment: The text of the judgment was corrected on the front page and at paragraph 11 on January 4, 2022.

Before: The Honourable Madam Justice Francis

On judicial review from: A decision of an Arbitrator, dated March 18, 2019

Reasons for Judgment

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Place and Date of Trial/Hearing:

Kelowna, B.C.

February 25, 2021

Place and Date of Judgment:

Kelowna, B.C.

April 12, 2021

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Overview

- [1] The petitioners own a manufactured home that is situated on a rented pad in a mobile home park called "Shady Rest", located on Westbank First Nation's Tsinstikeptum Indian Reserve No. 9. Shady Rest is operated by the respondent Princess Enterprises ("Princess" or the "Landlord").
- [2] The petitioners' tenancy is governed by the Westbank First Nation Residential Premises Law No. 2008-03, A Law to Regulate Residential Premises on Westbank Lands (22 March 2010) [RPL]. In early January 2018, Princess delivered to the petitioners a notice of the end of the tenancy agreement pursuant to s. 46.4(c) of the RPL (the "Notice"). Section 46.4(c) allows a landlord to terminate a tenancy where the landlord intends to convert the premises, in good faith and for a period not less than six months, "into a use other than a residential premises". According to the Notice, Princess intended to use the petitioners' pad site (the "Premises") to provide access to a well located immediately adjacent to the Premises for the purposes of irrigating various areas of the mobile home park.
- [3] The petitioners did not accept that Princess was acting in good faith when it issued the Notice because they did not believe that Princess intended to use the well adjacent to the Premises. They proceeded to an arbitration and were unsuccessful in having the Notice set aside. They now ask this Court to judicially review the decision of the arbitrator.

Background Facts

The RPL

- [4] Westbank First Nation ("WFN") is a self-governing First Nation pursuant to the Westbank First Nation Self-Government Agreement (the "Self-Government Agreement") and the Westbank First Nation Self-Government Act, S.C. 2004, c. 17. WFN is the legislator and administrator of, among other laws, the RPL. The RPL is part of a comprehensive set of community laws that govern the development and regulation of WFN's lands. As noted by WFN in its submissions as intervenor in this petition:

All persons residing or conducting business on reserve are subject to WFN laws, passed under the Westbank First Nation Self-Government Agreement. The existing regime is intended, among other things, to give all individuals, both members and non-members, the necessary legal clarity and certainty, and resulting commercial and consumer confidence, to develop and lease WFN lands.

- [5] The RPL governs residential tenancy matters on WFN lands. It prescribes certain circumstances in which a landlord may terminate a tenancy. One of those circumstances is described at s. 46.4(c). Section 46.4(c) sets out the following criteria that must be met before a landlord will be entitled to give notice to a tenant under that section:
- a) The landlord must intend, in good faith, to occupy or use the premises for the purpose of "converting it, for a period of not less than six (6) months, into a use other than residential premises occupied under a tenancy agreement".
 - b) The landlord must have obtained "whatever permits and approvals are required by law to demolish, convert or renovate the residential premises".
- [6] Section 46.8 of the RPL requires a 12-month notice period in cases involving manufactured home pad rentals.
- [7] Section 52 of the RPL allows a tenant to apply to an arbitrator for an order setting aside a notice of the end of the tenancy agreement. After an arbitrator's hearing takes place, according to s. 65.1(b), the arbitrator must issue a decision within thirty days. Pursuant to s. 66, a party to an arbitration may apply for leave to review an arbitrator's order or decision. Section 67.1(c) states that, in the circumstances of the case at bar, such an application must be made within 15 days after a copy of the decision or order is received by the party.
- [8] Section 48 of the Self-Government Agreement provides that the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA], is applicable to the WFN and that WFN laws, including the RPL, are "enactments" under the JRPA.

The first arbitration

- [9] Shortly after receiving the Notice in January 2018, the petitioners applied for arbitration pursuant to s. 52.1 of the RPL, seeking an order to set the Notice aside. An arbitration took place on March 16, 2018. The arbitrator dismissed the petitioners' application (the "First

Arbitration Decision") on the basis of a preliminary objection raised by Princess, namely that the petitioners' application for arbitration had not been submitted to the WFN residential tenancy program administrator (the "Administrator") within the 15-day time limit imposed by s. 52.2(c).

- [10] The petitioners applied to this Court for judicial review of the First Arbitration Decision. In reasons that are indexed as *Chiodo v. Doe*, 2018 BCSC 2078 [Chiodo 1], Justice Horsman concluded that the First Arbitration Decision was unreasonable because the arbitrator mistakenly treated an amendment to the petitioners' application as a new, second application and therefore concluded that the application was filed out of time. Justice Horsman quashed the First Arbitration Decision and remitted the petitioners' application for arbitration back to the Administrator to designate an arbitrator to hear the application on its merits.

The second arbitration

- [11] On January 23, 2019, a second arbitration took place before Tia Collis, an arbitrator appointed by the Administrator (the "Arbitrator"). Ms. Collis dismissed the petitioners' application on its merits (the "Second Arbitration Decision").
- [12] At the second arbitration, the petitioners argued that Princess had not met the requirements of s. 46.4 of the RPL and was therefore not entitled to issue the Notice for two reasons:
- a) Princess was not acting in good faith when it issued the Notice; and
 - b) Princess had not yet obtained the necessary permits and approvals required by s. 46.4 before a Notice may be issued.

Good faith

- [13] On the question of good faith, the petitioners submitted that the well in question was not operational. They alleged that it was impossible for Princess to use the well for the purposes stated in the Notice and that Princess simply wanted to rent their desirable Premises to someone else.
- [14] In response, Princess submitted evidence to support its intended use, specifically its plan to reactivate the well and use the Premises to run related infrastructure, including water lines and electrical work, across the Premises to a fixture in a corner of the Premises. The well water was to be used for irrigation around Shady Rest, specifically in the campground area.
- [15] The Arbitrator considered the evidence submitted by both parties. She also considered governing case authorities on the meaning of "good faith". She then concluded that the Landlord's stated intent was "an honest declaration of their intended use of the Pad", and concluded that she was "satisfied that the Landlord [was] acting in good faith".

Necessary permits and approvals

- [16] The petitioners argued that, before it could activate or use the well, Princess was required to obtain a license under the Water Sustainability Act, S.B.C. 2014, c. 15 [WSA].[1]
- [17] The WSA, which came into force in 2016, governs the use of surface and groundwater in British Columbia. Among other things, this legislation has introduced a requirement that persons who use or divert groundwater must apply for and obtain a license under the WSA. At the second arbitration, the petitioners argued that the Landlord was required to obtain a license under the WSA to use the well water prior to issuing the Notice to the petitioners.
- [18] In considering the petitioners' arguments with respect to the WSA, the Arbitrator considered the following points raised by Princess:
- a) The WSA, which is provincial legislation, does not apply to groundwater located on WFN land as a matter of constitutional law.
 - b) The Landlord did not require a permit or license under the WSA at the time the Notice was given because the WSA and its corresponding regulation were subject to a three-year transition period that did not expire until March 2019. Specifically, under the new legislative regime introduced by the WSA, no one is required to obtain a license to use groundwater until the expiry of the transition period, which had not expired at the time of the Notice.
- [19] The Arbitrator accepted the Landlord's arguments, both with respect to the constitutional issues and the transition period under the WSA. She concluded that the WSA did not apply to groundwater located on WFN land. She also held that, if the WSA did apply, the transition period would not have expired at the time of the Notice. Therefore, no permits or approvals were required by law and the Landlord had acted in accordance with s. 46.4 of the RPL.
- [20] At the final paragraph of the Second Arbitration Decision, the Arbitrator stated:
- I am satisfied from the evidence put forward that the Landlord has acted in good faith, and that no permits were required at the time the Notice to End the Tenancy was given. The Notice to End the Tenancy will take effect on March 21, 2020.

Review of Second Arbitration Decision

- [21] The Second Arbitration Decision was issued March 18, 2019. The petitioners applied for leave to review the Second Arbitration Decision on May 2, 2019. Their leave application was denied (the "Leave Decision").
- [22] The arbitrator who considered and rejected the petitioners' leave application declined to consider the merits of the application. He found that the 15-day time limit for applying for leave to reconsider had not been met, and he refused to exercise his discretion to extend the time limit. He noted that the leave application was filed 44 days after the petitioners received the Second Arbitration Decision.

- [23] The petitioners have now applied to this Court for judicial review of the Second Arbitration Decision. The petitioners argue that the Second Arbitration Decision was unreasonable and cannot withstand judicial review.

Issues to be Determined in this Petition

Constitutional issues

- [24] The question of whether Princess required a permit under the WSA requires consideration of issues of constitutional law because the parties do not agree whether the WSA, a provincial law of general application, applies on reserve land.
- [25] The Arbitrator accepted the Landlord's submission that the WSA does not apply to groundwater under WFN reserve lands. She also accepted the Landlord's argument that, to the extent there was a conflict between a provincial law of general application, namely the WSA, and the RPL, the RPL must prevail.
- [26] The petitioners have questioned that conclusion on the basis that the Arbitrator did not conduct an independent analysis of the constitutional issues. Instead, according to the petitioners, she merely re-stated the arguments of the Landlord and accepted their position.
- [27] The Attorney General of British Columbia (the "AG") responded to the petition on the constitutional questions only. The AG notes in his response to petition that a Notice of Constitutional Question was not served on the AG prior to the second arbitration in accordance with s. 8 of the Constitutional Questions Act, R.S.B.C. 1996, c. 68.
- [28] The AG submits that the Arbitrator was required to conduct a division of powers analysis on a complete evidentiary record before she could determine whether the WSA applies to groundwater on WFN lands. The record before the Arbitrator was incomplete in this regard and that analysis did not occur as it should have.
- [29] At the outset of the hearing before me, the parties advised that they had reached an agreement to sever the constitutional issues from the remaining issues in this judicial review. After hearing the submissions of the parties, I was satisfied that this is an appropriate case to exercise my discretion to determine the non-constitutional issues separately. This is primarily because, if this judicial review can be disposed of without engaging in a division of powers analysis, that is preferable on the basis that the court should avoid answering constitutional questions that do not squarely arise for decision and are not essential for determination of a case: *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 at para. 176.
- [30] As a result, the AG did not participate in the substantive part of the hearing and the petition was argued on the basis of the non-constitutional issues only.

Remaining issues

[31] Specifically, the issues raised for determination in this application are:

- a) whether this petition for judicial review should be dismissed for unreasonable delay; and
- b) whether the Arbitrator's decision on the non-constitutional issues was reasonable.

Timeliness

[32] Princess argues that I should dismiss this petition for unreasonable delay. It notes that the leave application, filed 44 days after the Second Arbitration Decision, was dismissed by an arbitrator for lack of timeliness. The petitioners then waited another eight months after the leave decision to file this petition. Princess says that this makes a mockery of the tight timelines under the administrative scheme at play and should not be countenanced by the court. Princess points out that the petition was filed 330 days after the Second Arbitration Decision and 260 days after the Leave Decision.

[33] At common law, the court has discretion to deny judicial review remedies on the basis of undue delay. That discretion has been preserved by s. 8(1) of the JRPA: *Housewise Construction Ltd. v. Whitgift Holdings Ltd.*, 2016 BCSC 2245 at para. 34 [Housewise].

[34] In *Lowe v. Diebolt*, 2014 BCCA 280 at para. 46, our Court of Appeal considered the "constellation of factors" that may be relevant to considering whether a judicial review proceeding should be dismissed for unreasonable delay:

The court must consider the underlying administrative scheme - how does it operate and what are its objectives? To what extent might those objectives be undermined by delay? The court must also consider the interests of the parties - is the issue brought forward on the judicial review of critical importance to one or the other party? On the other hand, will the delay result in hardship, prejudice, or injustice? Because judicial review is concerned with matters of public law, the effect of proceeding with the judicial review or of terminating it on the proper functioning of an administrative regime must also be considered.

Underlying administrative scheme

[35] The dispute resolution process of the RPL sets out short deadlines that ensure that residential tenancy disputes are resolved expeditiously. These short deadlines provide certainty and finality to the parties.

[36] In considering the underlying administrative scheme, it is appropriate to look not only at the provisions of the RPL, but to situate that legislation in the context of the broader land management framework established by WFN.

- [37] WFN comprises five reserves totaling approximately 5,340 acres. There are approximately 855 WFN members, the majority of whom reside on reserve. Approximately 10,000 non-members also reside on WFN reserve land. Indeed, more non-Indigenous people live on WFN land than on any other First Nation in Canada. Commercial and residential real estate constitute the most significant source of revenue for WFN.
- [38] WFN has been enormously successful in its real estate endeavours, notwithstanding the reluctance of many non-members to lease homes and businesses on reserve land. In their submissions, WFN directly tied the success of this First Nation in land development to the robust and comprehensive set of community laws it has enacted to govern the development and regulation of WFN land. WFN submits that the existence of "an effective and economical dispute resolution process" is critical to providing the necessary "clarity, certainty and confidence" in order for WFN to continue its success in managing its lands. I accept WFN's submissions in this regard, and particularly I accept that certainty and finality are critical values underlying its residential tenancy legal framework.
- [39] As noted by Justice Smith in *Housewise Construction* at para. 42 with respect to small claims judgments:

Successful parties have a legitimate interest in certainty and finality. A successful defendant is entitled to conduct his or her affairs free from the claim, just as a successful claimant is entitled to proceed with obtaining the fruits of a judgment. If the unsuccessful party wishes to bring that certainty and finality into question, he or she is obliged to do so promptly.

- [40] I find Smith J.'s comments to be equally applicable to the scheme under the RPL and to the interest both parties have in certainty and finality with respect to arbitration decisions regarding the termination of tenancies.
- [41] As noted by the Court of Appeal in *Lowe*, I must consider how delays might impact the scheme of the RPL. It appears to me that a delay of eight months from the Leave Decision to the filing of this petition undermines the certainty and finality in the resolution of tenancy disputes that the RPL otherwise provides.

Interests of the parties, hardship and prejudice

- [42] In *Chiodo 1*, Horsman J. declined to dismiss for delay the petition seeking judicial review of the First Arbitration Decision. She found that a delay of four months to commence a petition "could not be characterized as inordinate" and she found the balance of prejudice weighed in favour of allowing the petitioners to proceed with their application for judicial review: *Chiodo 1* at paras. 41-43.

- [43] In this petition, the facts are not the same as they were before Horsman J. in Chiodo 1. In that case, the petitioners' delay in seeking judicial review of the First Arbitration Decision was considerably shorter: approximately four months elapsed between the refusal of leave to review the arbitrator's decision and the filing of a judicial review application. In this case, the delay between the Leave Decision and the filing of this petition was approximately twice that length of time.
- [44] The arbitrator who authored the Leave Decision in this case expressly declined to consider the merits because, in the context of the scheme of the legislation, he considered a 44-day period between the Arbitrator's decision and the application for leave constituted undue delay. In these circumstances, it is perplexing that the petitioners did not move with haste to file their judicial review application, and rather waited another eight months before taking further steps.
- [45] The petitioners submit that there was a reason for the delay. Specifically, Mr. Chiodo has deposed that he delayed filing the petition because he wanted to wait for the results of an FOI request that had been made by a neighbour. As I understand his evidence, he did not want to incur the cost of a judicial review petition if Princess was going to obtain a WSA permit and then be able to issue a new notice and evict the petitioners in any event. The FOI request would allow him to know whether Princess had applied for a permit and this would inform his decision as to whether to seek judicial review.
- [46] While the petitioners may have had strategic reasons for wanting to wait to see the fruits of the FOI request before commencing their judicial review petition, I am not persuaded that this excuses or even properly explains their delay. If the judicial review turned on the question of a permit (i.e. if this Court found that it was unreasonable for the Arbitrator to decide that Princess had not required a permit under the WSA before it could issue the Notice), it was always open for the Landlord to apply for a permit after such a finding by the court and issue a new notice. In other words, the current status of any applications by the Landlord, as revealed by an FOI request, would not in any way alleviate the petitioners' stated concern that, if found to require a permit, the Landlord could simply apply for a permit and then start the eviction process all over again.
- [47] In all the circumstances, I do not find that the petitioners have provided a compelling explanation for the significant delay in bringing their petition for judicial review. In light of the evidence provided by WFN about the importance of clarity and certainty to WFN's ability to manage its land for the benefit of members and non-member residents alike, I find that this is a case where the proper functioning of the administrative regime weighs heavily. To countenance a complete abandonment of the timely dispute resolution process set out in the RPL would undermine the proper functioning of this administrative scheme.
- [48] As a result, I find the petitioners' delay in bringing their petition to be unreasonable in the circumstances and I dismiss the application for judicial review on that basis.

Was the Arbitrator's Decision Reasonable?

- [49] If I had not dismissed this petition on the basis of undue delay, I would have dismissed it on its merits. This is because I find that the Arbitrator's decision was reasonable in the circumstances.
- [50] All parties agree that the standard of review in this case is reasonableness and that I am bound to follow the reasoning of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov]. The petitioners argue that the Second Arbitration Decision cannot survive the reasonableness analysis as set out in Vavilov.
- [51] The petitioners argue that the Second Arbitration Decision was unreasonable due to "a failure of rationality internal to the reasoning process" in the Arbitrator's decision. They also argue that the decision is "untenable in light of the factual and legal constraints that bear on it". I am not persuaded by either argument.
- [52] With respect to the first point, the petitioners' complaint arises from what they say was "cutting and pasting" by the Arbitrator of Princess' argument into the Second Arbitration Decision. They allege that the reasons do not reveal a rational chain of analysis, as expressly required by Vavilov, and instead simply regurgitate someone else's argument.
- [53] There are two central components to the Arbitrator's decision on the non-constitutional issues: she found that the Landlord was acting in good faith, as required under the RPL, and she found that the Landlord was not required to obtain a permit under the WSA because the Notice was issued during the three-year transition period under that legislation.
- [54] With respect to the question of good faith, the Arbitrator considered the facts in light of the legal authorities that consider the meaning of "good faith." She concluded that the Landlord was indeed acting in good faith. Her reasons demonstrate a line of analysis that could reasonably lead to her conclusion.
- [55] With respect to the requirement for a permit under the WSA, the Arbitrator considered the provisions of the WSA. She summarized the landlord's argument on this point as follows:

In addition, the Landlord did not require a permit or license under the Water Sustainability Act at the time the Notice was given. It was submitted that the Water Sustainability Act and the corresponding Regulation were subject to a three year transition period extending to March 1, 2019. "A person using, storing, or diverting groundwater (pursuant to s. 140(1) of the Water Sustainability Act) has until March 1, 2019 to file an application for an authorization authorizing the person's diversion and use of groundwater from an aquifer." Counsel submitted that the Landlord may submit an application for authorization to divert and use water from the aquifer before March 1, 2019, which in fact he has done so. If the act applies on Reserve (which is denied), the three year transition period provided for in the provincial regime would apply to the Landlord. The provincial statutory regime did not require the Landlord to apply for, or hold, an authorization to use groundwater at the time the Notice was issued or on its effective date one year later. [Emphasis in original.]

- [56] The Arbitrator therefore concluded that, should the WSA apply to this case, a permit was not required before the Notice was issued.
- [57] The petitioners argue that the Arbitrator's conclusion on this point was unreasonable, because under s. 46.4 of the RPL, a landlord must have already obtained "whatever permits and approvals are required by law" before a notice is issued. In this case, even if the transition period applies, Princess will eventually need authorization under the WSA to operate the well, and therefore has not met the requirement of s. 46.4 of the RPL that a landlord must obtain "whatever permits and approvals are required by law" before issuing a notice under that section.
- [58] At the time the Notice was issued, no permits or approvals were required under the WSA. Indeed, even at the end of the notice period one year later, the transition period was still in effect and no permits or approvals were required by law in order for Princess to use the groundwater in the well. If the WSA did apply, Princess would only be required to have authorization under the WSA after the transition period had ended. The transition period now ends March 1, 2022: Water Sustainability Regulation, B.C. Reg. 187/2020, s. 55(1).
- [59] On the question of the necessity of a permit under the WSA, there is clearly a line of analysis within the reasons that could reasonably lead the Arbitrator from the evidence before her to the conclusion at which she arrived. At the time the Notice was issued in January 2018, a person using, storing, or diverting groundwater had until March 2019 to file an application for a permit. It was therefore reasonable for the Arbitrator to conclude that, at the time the Notice was issued, there was no requirement for the Landlord to have a permit to use the groundwater in the well. While the Arbitrator quoted extensively from the submissions of Princess, she explained her conclusions in her own words.
- [60] Because I find that the Arbitrator was reasonable in concluding that the Landlord did not require a permit under the WSA, it is not necessary to consider the division of powers issues about whether the WSA applies to groundwater on WFN land. I also need not consider the petitioners' application to admit new evidence, as none of the evidence they seek to submit is relevant to the determinations I have made in this petition.
- [61] The petition is dismissed. Should the parties be unable to agree on costs, they may make arrangements to appear before me to speak to same.

"Madam Justice Francis"

- [1] All parties concede that the Arbitrator was mistaken when she referred to the WSA as "new evidence" rather than a legal argument, although nothing turns on her mistaken characterization.

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