

CANADA / JUDGMENT

Chiodo v. John Doe

2022 BCCA 33

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 33 Chiodo v. John Doe COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Chiodo v. John Doe, 2022 BCCA 33 Date: 20220131 Docket: CA47429 Between: Vitto Chiodo and Leanne Chiodo Appellants (Plaintiffs) And John Doe and/or Jane Doe doing business as Princess Enterprises, Tia Collis Respondents (Defendants) And Westbank First Nation Intervenor Before: The Honourable Madam Justice Saunders The Honourable Madam Justice Fenlon The Honourable Mr. Justice Grauer On appeal from: An order of the Supreme Court of British Columbia, dated April 12, 2021 (Chiodo v. Doe, 2021 BCSC 658, Kelowna S126653). Counsel for the Appellants: A.M. Beddoes J.M. Wiebe Counsel for the Respondents John Doe and/or Jane Doe doing business as Princess Enterprises: L.C. Glowacki M.J. Skeels Counsel for the Respondent Tia Collis, appearing via videoconference: C.J. Wiebe Counsel for the Intervenor: M. Faille K.B. Brown Place and Date of Hearing: Vancouver, British Columbia October 22, 2021 Place and Date of Judgment: Vancouver, British Columbia January 31, 2022 Written Reasons by: The Honourable Madam Justice Fenlon Concurred in by: The Honourable Madam Justice Saunders The Honourable Mr. Justice Grauer Summary: The appellants appeal from a decision dismissing their application for judicial review of an arbitrator's decision refusing to set aside a notice to end their tenancy. They say the judge erred in: dismissing the petition for delay, concluding in the alternative that the arbitrator's findings were reasonable, and failing to consider whether the owner had obtained the requisite permits prior to delivering the notice to end tenancy. Held: Appeal dismissed. The judge considered the relevant factors in deciding whether a judicial review petition should be dismissed for unreasonable delay and was alive to the potential prejudice to the appellants. Reasons for Judgment of the Honourable Madam Justice Fenlon:

Background

- [1] For more than 18 years the appellants, Vitto and Leanne Chiodo, rented a mobile home pad from the respondent, Princess Enterprises, which operates the "Shady Rest" mobile home park on Westbank First Nation's reserve land on the shores of Lake Okanagan. They used the mobile home as their vacation property. Unfortunately for the appellants, Princess decided it needed their lot to access a well adjacent to the property to irrigate the park and delivered a notice to end tenancy. The Chiodos in turn delivered a notice to arbitrate, contending that Princess was not acting in good faith and had not complied with a Westbank First Nation law

requiring them to obtain all necessary project permits before ending a tenancy. The notice to end tenancy was upheld at arbitration and the appellants failed to overturn that decision on judicial review.

- [2] The appellants contend the reviewing judge erred by:
1. dismissing their judicial review petition for delay;
 2. concluding in the alternative that the arbitrator's finding that Princess had terminated the tenancy in good faith was reasonable; and
 3. not considering whether Princess had obtained all permits and approvals before delivering the notice to end tenancy. Standard of Review
- [3] The first ground of appeal involves a discretionary decision made at first instance by the reviewing judge and is reviewable on a deferential standard. In addressing the second and third grounds of appeal, this Court steps into the shoes of the reviewing judge and applies the appropriate standard of review to the arbitrator's decision.

Analysis

1. Dismissal of the Judicial Review for Delay
- [4] Princess served the notice to end tenancy on January 2, 2018, to take effect on January 3, 2019. The Chiodos were understandably distressed by the termination notice. They had done work on the mobile home, had spent summers there for more than 18 years, and intended to use the premises as their retirement home. The Chiodos described their lot as a prime location with 150 feet of beachfront. They applied to an arbitrator under s. 52.1 of the Westbank First Nation Residential Premises Law No. 2008-03, A Law to Regulate Residential Premises on Westbank Lands (22 March 2010) [RPL], which provides: 52.1 A tenant may apply to an arbitrator for an order setting aside a notice of the end of the tenancy agreement given or purportedly given under this Law.
- [5] An arbitrator dismissed the arbitration on March 16, 2018, but that initial arbitration decision was overturned on judicial review by Justice Horsman. Although the Chiodos had waited four months before filing for review, Horsman J. declined to dismiss the petition for unreasonable delay given the importance of the matter to the Chiodos. She concluded the arbitrator had erroneously treated an amended notice to arbitrate as a new notice falling outside the filing deadline and had improperly dismissed the arbitration for delay. In remitting the matter for arbitration on the merits, Horsman J. reminded the parties of the importance of an expeditious process and of her expectation that there should be no delay in scheduling a new arbitration hearing: 2018 BCSC 2078 at para. 62.

- [6] The second arbitration--the one underlying this appeal--was heard by arbitrator Tia Collis on January 23, 2019. On March 18, 2019, she upheld the notice to end tenancy, finding that Princess had acted in good faith and had not failed to obtain necessary permits. On the latter point, Arbitrator Collis concluded Princess did not need a well license under the Water Sustainability Act, S.B.C. 2014, c. 15 [WSA] to operate the well.
- [7] Somewhat surprisingly, given their previous experience with an application to dismiss for delay and Horsman J.'s admonition to proceed expeditiously, the Chiodos did not apply for leave to review Arbitrator Collis' decision within the 15-day time limit in the RPL. Their application for leave to review the arbitration decision was declined on the basis that it had been filed 44 days after the decision--29 days late. The Chiodos then waited a further eight months before filing the petition for judicial review.
- [8] The reviewing judge noted that, at common law, the court has discretion to deny judicial review remedies on the basis of undue delay, a discretion that has been preserved by s. 8(1) of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241: *Housewise Construction Ltd. v. Whitgift Holdings Ltd.*, 2016 BCSC 2245. She instructed herself on the factors to be considered in deciding whether a judicial review petition should be dismissed for unreasonable delay as set out in *Lowe v. Diebolt*, 2014 BCCA 280 at para. 46:
1. How does the underlying administrative scheme operate and what are its objectives?
 2. To what extent might those objectives be undermined by delay?
 3. Is the issue brought forward on the judicial review of critical importance to one or the other party?
 4. Will the delay result in hardship, prejudice or injustice?
 5. What is the effect of proceeding with judicial review or terminating it on the proper functioning of the administrative regime?
- [9] In addressing the nature of the underlying administrative regime, the judge noted the short deadlines contained in the RPL dispute resolution process. She found that Westbank First Nation's success in its real estate endeavours and in managing its lands was in large part due to an effective and economical dispute resolution process. She accepted that certainty and finality were critical values underlying Westbank First Nation's residential tenancy legal framework.
- [10] The judge addressed the interests of the parties, hardship, and prejudice collectively, concluding:
- [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. [Emphasis added.]

- [11] Westbank First Nation was granted intervenor status in this appeal to address the dispute resolution framework. It stressed the importance of the strict timelines to achieving legal and commercial certainty for all involved--tenants, landlords, and the Frist Nation itself.
- [12] The appellants submit the judge erred because she focused almost exclusively on the prejudice to Princess and the functioning of the Westbank First Nation's administrative regime and did not consider the prejudice to the Chiodos in dismissing their petition because of delay. They contend this was a mandatory and significant consideration in the delay assessment and that the judge's failure to engage in a detailed analysis of potential prejudice to the Chiodos--from dismissing what might be a meritorious judicial review--constitutes a clear error of law.
- [13] I would not accede to this argument. Although the judge did not expressly describe the nature of the prejudice to the appellants, this was a case in which the prejudice was obvious, driving as it did the entire legal proceeding. The appellants were fighting the notice to end tenancy because they were about to lose a vacation home they had enjoyed for more than 18 years.
- [14] In addition, at para. 42 of her reasons, the judge referred to that part of Horsman J.'s reasons on the earlier judicial review in which she addressed prejudice to the appellant. In part, Horsman J. had stated:
- [41] First, this petition is of obvious importance to the Petitioners who risk losing the vacation home they have had for over 18 years, and simply seek a hearing of the merits of their dispute of the Notice before the tenancy terminates. It would work a significant unfairness to the Petitioners to dismiss a meritorious application for judicial review on the basis of a delay that cannot be characterized as inordinate.
- [15] A judge is not required to describe every step in their reasoning process; it is sufficient if the basis for a decision is discernible from the reasons read in the context of the record: *R. v. R.E.M.*, 2008 SCC 51 at para. 24. In my view, the judge's reasons demonstrate that she was alive to, and weighed, the prejudice to the appellants if the judicial review was dismissed for delay, but found it was insufficient to offset the countervailing consideration of eight month's delay--a delay she found the appellants had failed to explain.
- [16] Nor do I agree with the appellants' submission that the judge misunderstood their explanation for the delay. In his affidavit filed in support of the petition, Mr. Chiodo said he "did not want to go to the expense and inconvenience of making a [judicial review] application if in fact Princess obtained a well license" and that "[in] order to make that determination it was necessary to try to determine the status of the well application". He stated that his lawyer at the time informed him that he had made "telephone inquiries on

February 4, 2020 [and] the well license application was not approved."

- [17] The judge understood Mr. Chiodo's evidence to be that he was told on February 4 that the license application was not yet approved, questioning how "the current status of any applications by [Princess], as revealed by an FOI request would in any way alleviate [the Chiodos'] stated concern that, if [Princess was] found to require a permit [under the WSA], [Princess] could simply apply for a permit and then start the eviction process all over again" (emphasis added): at para. 46.
- [18] The appellants submit the judge failed to appreciate that Princess' application for a permit had been denied, so erroneously reasoned that it was still open to Princess to apply for and obtain a permit if one was found to be required. The appellants contend that if the judge had appreciated that Princess' application for a permit under the WSA had been rejected, and that they had filed their petition one week after learning this, "the Decision may well have been different the Chambers Judge's reasons for being dissatisfied with the Chiodos' explanation would have fallen away."
- [19] With respect, it appears to be the appellants who have misapprehended the record. Mr. Chiodo's affidavit does not say that his lawyer told him Princess' application had been denied. He states only that he was told it "was not approved." The manager for the mobile home park, Mr. Osberg, provided direct evidence in his affidavit sworn March 9, 2020, responding to Mr. Chiodo's affidavit, and in support of Princess' response to the petition for judicial review, deposed that a determination had not yet been made on the application.
- [20] It was thus open to the judge to conclude that all Mr. Chiodo learned on February 4 was that the WSA permit had not yet been approved. I see no error in the judge's understanding of Mr. Chiodo's explanation for the delay in filing for judicial review, nor do I see any error in her conclusion that the explanation was inadequate.
- [21] I note as well that the arbitrator concluded Princess did not need a WSA permit, both because the WSA provided for a permit-free three-year transition period, and because of the inapplicability of the WSA to reserve lands. Even if Princess' application had been denied, the arbitrator's conclusion that a WSA permit was not required would have to be challenged before Princess's inability to obtain a permit could have any relevance to the validity of the notice to end tenancy.
- [22] In conclusion, I see no basis upon which this Court could interfere with the judge's exercise of her discretion to dismiss the judicial review for unreasonable delay. 2 and 3. Termination in Good Faith and Requirement to Obtain Permits
- [23] Having come to that conclusion, it is not necessary to address the second and third grounds of appeal. For the benefit of Mr. and Ms. Chiodo, however, I will consider these grounds briefly.

- [24] In my view, the arbitrator's conclusions that Princess issued the notice to end tenancy in good faith, and that a permit was not required under the WSA, were reasonable ones. This was not a case in which the appellants put forward conflicting evidence on the good faith issue; they simply challenged Princess' reasons for wanting to take over their lot, suggesting they were illogical, and that Princess really wanted to rent the premises to someone else. The arbitrator correctly identified the law on good faith. She reviewed Princess' evidence and its reasons for developing the well and found them to be credible. The arbitrator therefore found Princess had acted in good faith. In the context of this case, the judge's reasons were sufficient and were not conclusory.
- [25] As for the third ground of appeal--that the arbitrator's decision should be quashed because she did not consider whether permits other than the WSA license had to be obtained before the notice to end tenancy could be issued--those matters were not argued before the arbitrator, and her decision cannot therefore be found to be unreasonable for failing to consider them. As this Court observed in *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391:
- [54] To allow a party a new hearing before an administrative tribunal because it overlooked raising an issue or making an argument at the original hearing would unduly interfere with the role entrusted to such tribunals: *Alberta Teachers' Association* at para. 24. In effect, the tribunal's decision would be set aside not because it failed to pass scrutiny under the applicable standard of review, but because it did not address a point it was not asked to address.
- [26] A judge on judicial review has discretion to entertain new arguments but generally will not do so if the issue could have been, but was not, raised before the tribunal: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 23. I note that quite apart from the limited role of a reviewing court in administrative matters, which militates against addressing new issues, the respondent in this case would be prejudiced if that course were followed. The environmental assessment framework the appellants wish to rely on would require factual context to resolve--context that was not addressed at the arbitration.
- [27] In conclusion, I would dismiss the appeal with costs to Princess Enterprises. No award of costs is made either for or against the intervenor. "The Honourable Madam Justice Fenlon" I AGREE: "The Honourable Madam Justice Saunders" I AGREE: "The Honourable Mr. Justice Grauer"

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