

CANADA / JUDGMENT

Majithia v. Residential Tenancy Branch

2021 BCSC 737

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2021 BCSC 737 Majithia v. Residential Tenancy Branch

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Majithia v. Residential Tenancy Branch,

2021 BCSC 737

Date: 20210421

Docket: S2012099

Registry: Vancouver

Between:

Anoop Majithia and Plan A Real Estate Services Ltd.

Petitioners

And

Director, Residential Tenancy Branch and the Residential Tenancy Branch

Respondents

Before: The Honourable Mr. Justice Edelmann

On judicial review from: An order of the Residential Tenancy Branch dated October 28, 2020

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

April 8, 9, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 21, 2021

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Introduction

- [1] This is an application for judicial review. The Petitioners seek an order quashing findings made on October 28, 2020 by Scott McGregor, Director of Compliance and Enforcement for the Residential Tenancy Branch. Alternatively, the Petitioners seek an order prohibiting Director McGregor from deciding the matter.
- [2] The Petitioner Plan A Real Estate Services Ltd. ("Plan A") describes itself as a property management company that primarily lets furnished strata units to individuals and corporations who are looking for short-term housing for themselves or their employees. The Petitioner Anoop Mjithia is a director of Plan A.
- [3] The Residential Tenancy Act, SBC 2002, c 78 [RTA] grants the Director of the Residential Tenancy Branch authority to issue administrative penalties for violations of the RTA, and failure to follow orders. The Petitioners are the subject of an ongoing administrative penalty proceeding.

- [4] After an internal complaint from November 2, 2018, Senior Investigator Rishi Mahal was assigned to conduct an investigation into Plan A's conduct. He prepared a report recommending that a penalty be ordered against the petitioners. Investigator Mahal provided his report, recommendation, and the evidence gathered in the course of the investigation to Director McGregor. After reviewing the investigator's report, Director McGregor agreed that a penalty may be warranted.
- [5] On October 28, 2020, Director McGregor provided the petitioners with a notice entitled "Opportunity to be Heard". The Notice set out a series of findings based on the evidence before him, provided copies of that evidence, and invited the petitioners to make submissions on whether a penalty should be imposed.
- [6] On November 2, 2020, counsel for the Petitioners wrote to Director McGregor seeking a stay of the matter while they pursued judicial review. They took the position that he had made a final decision on one or more of the issues before him without giving them an opportunity to be heard.
- [7] On November 6, 2020, Director McGregor replied to Petitioners' counsel acknowledging that the language in his letter of October 28 "could have been clearer". He stated that he had not made a final decision and that he would approach the matter with an "open mind". He denied the stay and again invited the Petitioners to make submissions.
- [8] The petition was filed on November 13, 2020.
- [9] The Respondent opposes the petition primarily on the basis that it is premature as the administrative penalty process has not yet concluded, and no final decision has been made. The Respondent argues the concerns raised by the Petitioners in relation to procedural fairness should be addressed through the administrative process and it is inappropriate for the court to intervene at this stage.
- [10] I will begin by setting out the applicable administrative framework and legal principles relating to judicial review in order to address the issues before me.

Administrative Penalty Framework

- [11] Part 5.1 of the RTA establishes the framework for the imposition of monetary penalties. The legislation foresees two distinct aspects, the first investigative and the second adjudicative. Section 9 of the RTA which sets out the Director's powers and duties, makes the distinction clear:

9(4)The director may not assign or delegate to the same person both the function of conducting investigations under section 87.1 [investigations] into a matter and the power to impose penalties under section 87.3 [administrative penalties] in relation to that matter.

- [12] Section 87.1 addresses the scope of investigations:

87.1 The director may conduct investigations to ensure compliance with this Act and the regulations whether or not the director has accepted an application for dispute resolution in relation to the matter.

[13] The process at the penalty phase is set out in s.87.3:

87.3 (1) Subject to the regulations, the director may order a person to pay a monetary penalty if the director is satisfied on a balance of probabilities that the person has

(a) contravened a provision of this Act or the regulations, or

(b) failed to comply with a decision or order of the director.

(2) Before the director imposes an administrative penalty on a person, the director must

(a) give the person an opportunity to be heard, and

(b) consider all the following:

(i) previous enforcement actions for contraventions of a similar nature by the person;

(ii) the gravity and magnitude of the contravention;

(iii) the extent of the harm to others resulting from the contravention;

(iv) whether the contravention was repeated or continuous;

(v) whether the contravention was deliberate;

(vi) any economic benefit derived by the person from the contravention;

(vii) the person's efforts to correct the contravention.

[14] The procedure for providing the opportunity to be heard referred to in s.87.3(2)(a) of the RTA is set out in s.33 of the Residential Tenancy Regulation B.C. Reg. 60/2008 [Regulation]:

Opportunity to be heard

33 (1) An opportunity to be heard provided for the purposes of section 87.3 (2) (a) of the Act may be, as the director considers appropriate in the circumstances,

(a) in writing, including by facsimile transmission or electronic mail,

(b) in person, or

(c) by video conference, audio conference, telephone or other electronic means, if available.

(2) The director must give notice of an opportunity under subsection (1), which notice must include the following information:

(a) the provision of the Act or regulations the person is alleged to have contravened or the decision or order of the director with which the person is alleged to have failed to comply and the particulars of the alleged contravention or failure;

(b) the due date for written submissions or the time, date, place and manner of hearing.

(3) A notice under subsection (2) must be given not less than 21 days before the due date of a submission under subsection (1) (a) or the date of a hearing under subsection (1) (b) or (c).

(4) On application, the director may change a time or date specified under subsection (2) (b).

[en. B.C. Reg. 60/2008, Sch. s. 2; am. B.C. Reg. 19/2020, s. 2.]

[15] Section 36 of the Regulation sets a limitation period for the notice to be provided. It is the content of the notice under s.87.3(2) that is at issue in this case, and I will return to it in greater detail below.

[16] If a decision is made to impose an administrative monetary penalty, under s.87.5 of the RTA notice must be provided including:

- a. the contravention or failure to which the penalty relates;
- b. the amount of the penalty;
- c. the date by which the penalty must be paid; and
- d. the person's right to have the Director reconsider the decision imposing the penalty.

[17] Section 87.6 of the RTA requires that the decision be in writing, signed and provide reasons. Section 87.8 permits a person against whom an administrative penalty is issued to apply to the Director for review in certain circumstances.

[18] When a penalty is imposed, the decision may be published on the provincial government's website in accordance with the Residential Tenancy Branch's Policy Guideline #53 titled "Publishing Administrative Penalties" and s. 9(5) of the RTA.

Prematurity

[19] Justice Baker recently reviewed the principles relating to the prematurity of applications for judicial review in *Grimsno v Jones*, 2021 BCSC 575 at paragraphs 38-42. I adopt the summary of the law set out there.

[20] The first question before me is whether the letter of October 28 was a final decision that is properly the subject of certiorari on judicial review. The Petitioners have sought to characterize the penalty process before Director McGregor as two separate stages. The first stage is whether a person or entity is liable to a penalty, and the second stage is whether a penalty should be imposed. While I accept that in many cases it is open to an administrative tribunal to structure the process before them as they see fit, it is not clear to me that the process at issue has been set up in two distinct phases as suggested by the Petitioners.

- [21] As I will address in further detail below, I accept that the language of the letter of October 28 was problematic and contradictory in many respects. The letter contains some clearly conclusory language on the part of Director McGregor on some issues related to liability. That being said, on its face, the letter is not framed as a final decision but as an "Opportunity to be Heard". The concluding paragraphs clearly make requests for evidence and submissions before a final decision will be made. While premature findings of the nature found in the letter may raise the types of concerns about a reasonable apprehension of bias I will address below, such concerns do not transform every preliminary finding by a tribunal into a final decision subject to certiorari. I conclude that in the context of the process in this case, despite problematic language to the contrary, the letter of October 28 is not a final decision.
- [22] The remaining question before me is whether this Court should intervene in the administrative process prior to a final decision by way of prohibition. In Grismmo, Baker J. addressed the early intervention of the Court in cases of alleged bias, adopting the comments of the Alberta Court of Queen's Bench in *Montgomery v. Edmonton Police Service*, 1999 ABQB 913:
- [42] In *Montgomery*, like in the case before me, the applicant alleged personal bias on the part of the decision maker, during the course of the hearing. The court held:
- [56] The issue of whether objections relating to bias *prima facie* justify judicial review prior to the conclusion of the administrative hearing was discussed recently in *Lorenz v. Air Canada*, 1999 CanLII 9373 (FC), [1999] F.C.J. No. 1383 (F.C.T.D.). The specific issue before the court was whether an allegation of bias which arose after the hearing had commenced, but prior to its conclusion, provided a ground for judicial review.
- [57] After a careful examination of the case law, the court concluded that even when the issue involved the potential bias of the tribunal, the court retains a discretion as to whether or not it should require the applicant to proceed through the administrative process. The court further stated that
- ... the exercise of the Court's discretion here turns principally on a weighing of two competing considerations. On the one hand are the possible hardships caused to [the applicant], and the time and resources that will have been wasted, if the bias question is not determined prior to the completion of the proceeding before the adjudicator. On the other hand, there are the adverse consequences of delaying the administrative process and of countenancing a multiplicity of litigation.
- [58] The court indicated that the court may favour exercising its discretion to intervene in cases of alleged bias
- ... when the allegation reveals a very clear case of bias and the issue arises at the outset of a hearing that is scheduled to last for a significant length of time.

- [23] I find this approach consistent with the comments of the Nova Scotia Court of Appeal in relation to the remedy of prohibition in *Psychologist Y v. Nova Scotia Board of Examiners in Psychology*, 2005 NSCA 116:
- [21] Prohibition is a drastic remedy. It is to be used only when a tribunal has no authority to undertake (or to continue with) the matter before it. Unless a lack of jurisdiction or a denial of natural justice is clear on the record, prohibition is also a discretionary remedy. As Sara Blake says in her text, *Administrative Law in Canada*, 3rd ed. (Butterworths, 2001) at 200, it may be refused if the existence of jurisdiction is debatable or turns on findings of fact that have yet to be made. It must be clear and beyond doubt, she writes, that the tribunal lacks authority to proceed.
- [24] As I will set out in more detail below, the primary concern in the matter before me is whether there is a reasonable apprehension of bias insofar as Director McGregor appears to have prejudged the matter before him.

Reasonable Apprehension of Bias

- [25] The Court of Appeal addressed circumstances similar to the ones before me in *McLachlan v. Burrard Yacht Club*, 2008 BCCA 271, in which a Yacht Club had sent a letter to a member about potential expulsion. Justice Saunders. outlined the law on the question of prejudging a matter:
- [37] The question of prejudging a matter is an aspect of the general principle that a body should not proceed where there is a reasonable apprehension of bias. The test for reasonable apprehension of bias was set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716. Although he wrote dissenting reasons, his articulation of the test for bias was subsequently endorsed by the majority of the Supreme Court of Canada in, for example, *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161; *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, 64 C.C.C. (3d) 513; and *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, 130 D.L.R. (4th) 1.
- [38] Mr. Justice de Grandpré stated the test at pp. 394-95:
- [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is 'what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'

The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'.

- [39] Mr. Justice de Grandpré recognized that prior knowledge of a case, preconceptions or prejudgments are not, per se, a reason to disqualify a person for bias, and drew a distinction between a preconception of principle or policy and a prejudgment concerning issues of fact. Although National Energy Board was a case involving a statutory tribunal, it is instructive as to the nature of prejudgment that will be considered a serious flaw in the process.
- [40] The question of whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that the decision-maker had predetermined the matter incorporates consideration of the context in which the question is asked. Here, the context is a social club to which only minimal procedural safeguards are afforded a member. Yet, even here, the right of an opportunity to be heard pre-supposes that the issue is not determined and that a reasonable person would not conclude it is determined.
- [26] In the letter of October 28, Director McGregor sets out in some detail the allegations against the petitioners. I include below some lengthy excerpts in order to provide a clear sense of the overall tone of the letter. I have underlined the portions that in my view are indicative the author has already formed strong views about the evidence before him:

While PLAN A has argued at hearings that the "Travel Accommodation Tenancy Agreement" is mutual and signed by both parties acknowledging that the Act does not apply, this does not refute the fact that PLAN A created this document knowing that the terms are akin to contracting outside the Act because their terms establish residential tenancies under the Act and Regulation. It is unconscionable to presume that an uninformed tenant would be aware of the intricacies of what constitutes a tenancy under the Act, but regardless, it is not a defense to argue ignorance of the law on the part of the tenant if that was truly the case. The evidence is clear that PLAN A was fully aware that their "Travel Accommodation Tenancy Agreement" was establishing tenancies where the Act applied.

[] I have determined from the evidence that in 49 travel accommodation receipts provided by PLAN A that G.S.T. appears to have not been collected. Although it is not clear from the evidence, what the term for each of these tenancies were, it does raise into question whether PLAN A is providing travel accommodations which would invite the G.S.T. requirement or residential tenancies (Appendix D.6.2). I am satisfied that these 152 tenancy agreements establish residential tenancies and are therefore subject to compliance with the Act and Regulation. []

[T]he evidence clearly demonstrates that you changed or omitted the tenancy agreement terms and tenancy agreement addendum terms in such a manner as to create a facade of legitimacy intended to confuse an uninformed tenant. Based on the evidence gathered to date I have determined that section 1 of the Plan A Travel Accommodation Agreement attempts to avoid and contract outside of the Act and Regulation contravening section 5 of the Act and section 1 of the Schedule (Appendix C.3, E.2). I consider this flagrant disregard of the Act and Regulation to represent a clear and deliberate intention to avoid the tenancy laws of B.C. []

Based on the evidence, I have determined that in at least six cases you have terms in your travel accommodation addendum (the addendum) that include charging fees beyond the amount prescribed and/or fees that are not prescribed, and this change exemplifies the remaining 146 tenancy agreements. []

Based on the evidence, all 152 tenancy agreements include a provision that the tenant must move out on a certain date or sign a new tenancy agreement. This is a clear and deliberate contravention of section 13(1) and 13.1 of the Regulation. All these tenancy agreements were signed within a year of each other. One could not reasonably claim that you ended any of these tenancies in accordance with section 13.1 of the Regulation as it would require you or a close family member to live in the residence after the tenancy ended. []

This letter is notice to you, Plan A Real Estate Services Ltd and Anoop MAJITHIA, that you may be subject to administrative penalties pursuant to section 87.3 of the Act for your serious, deliberate and repeated contraventions of section 5, 13(2)(a), 14(1) and 20(e) of the Act and section 6, 7, 11, 12, 13(1) and 13.1 of the Regulation and section 1 and 9 of the Schedule of the Regulation.

You have the right to make submissions [].

These submissions should relate to your repeated failure to comply with the Act and Regulation and your failure to comply with the decisions of the Director since January 2019. Your submissions are not an opportunity to re-argue your case, or a rehearing of the evidence that was before any arbitrator who made decisions or orders.

[Emphasis added.]

[27] The Respondent has sought to provide some context with respect to portions of the underlined passages, framing them as "preliminary findings" and poorly worded expressions of the case the Petitioners needed to meet. In particular, the Respondent seeks to place significant emphasis on a paragraph found near the end of the letter:

If, after reviewing your written submission, I am satisfied on a balance of probabilities that you have contravened a provision of the Act or the Regulation or have failed to comply with a decision or order of the Director, I will proceed with making a determination about whether a \$5,000.00 administrative penalty should be levied against you in each of Matter 1 and Matter 2.

[28] The Respondent also argues that the letter of November 6 written in response to the Petitioner's request for a stay pending judicial review clarifies the October 28 letter. The November 6 letter says in part:

I have reviewed the Opportunity To Be Heard letter I sent on October 28, 2020. Upon review I can understand why you may have formed the impression that I had already conclusively determined certain matters and had made a decision to levy an administrative penalty against your client. I want to assure you and your client that I have not made any final findings of fact or decisions and no order has been made against your client at this time. My intent was to inform your client of my preliminary determinations based on the evidence I currently had before me and what the

findings would be if no submissions were provided in response. I wanted to ensure that your client not only had the evidence that was before me but also understood the case to meet; I acknowledge, though, that I could have been clearer in how this was set out in my letter.

I have not reached any final conclusions at this juncture since your client has not yet had an opportunity to respond. I can assure you that if your client chooses to make submissions and present evidence, I will consider everything with an open mind. I will also determine whether in light on the submissions and evidence submitted by your client, the matter can be decided solely on the basis of written materials or whether a further viva voce hearing is needed....

- [29] At first blush, it is unclear what is to be made of the letter of November 6. Although the petition before this Court was not filed until November 13, the letter of counsel to Director McGregor on November 2 made it clear that the Petitioners were seeking judicial review and were seeking a stay. Counsel for the Respondent concedes that a tribunal can generally not supplement a decision under review. However, given my finding that there was no final decision, the question before me is whether the court should intervene in an ongoing administrative process. Given the exceptional nature of such a remedy, I find it is appropriate to consider the attempt by the administrative body to alleviate the problems raised in the petition.
- [30] Reviewing the letter of October 28, I have no hesitation in finding that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that Director McGregor had predetermined several of the issues he was to decide. He in fact says so directly in many of the underlined passages above. I find that the paragraph near the end of the letter inviting submissions gives little comfort that Director McGregor would be approaching the case with an open mind given the numerous statements to the contrary in the letter. The letter must be read as a whole and the overwhelming message is that Director McGregor has already formed strong views and conclusions about the very issues he would be called upon to decide. This is not a circumstance where there was a poorly drafted sentence or an unfortunate turn of phrase.
- [31] The letter of November 6 does not alleviate these concerns. In effect, Director McGregor acknowledges the language used in the letter of October 28 was problematic, stating that he "could have been clearer". To the contrary, I find that he was very clear and unequivocal in expressing strong personal views and conclusions. In my view, a belated assertion by Director McGregor that he "will consider everything with an open mind" is far from an adequate remedy in the circumstances.
- [32] I accept that a tribunal should generally consider issues of apprehension of bias in the first instance. However, I am satisfied this is not a case in which further evidence or consideration by the decision maker will serve any useful purpose. The November 6 letter of Director McGregor concedes what was said in the October 28 letter and is little more than an assertion that he didn't mean what he said. If this matter were to continue before him, Director McGregor could do little more than make further attempts to retract what was said

in his October 28 letter or give further assurances of the nature provided in the November 6 letter that he will disabuse himself of the conclusions he had previously reached. In the circumstances of this case, I do not see how such assurances could justify having Director McGregor remain as the decision maker.

- [33] When asked during submissions, counsel for the Respondent declined to provide an example of a rationale or process that could possibly justify Director McGregor hearing this matter. The Respondent concedes that other decision makers are available and there is no reason this matter could not be delegated to one of them. In my view, the assignment to another decision maker is the only defensible path forward in the circumstances. I find it to be in the interests of justice and efficiency for all parties that I make such an order now rather than risk having them expend resources in a process that could not be upheld in this Court in a future judicial review.
- [34] I note that the Petitioners have also raised a number of other concerns, in relation to both the process of the investigation and the imposition of a penalty. To the extent the Petitioners are alleging the conduct of the investigation would render the penalty process unfair, these issues should be raised before the new decision maker. I also decline to comment on the other complaints raised about the process, including the application of the limitation period in s.36 of the Regulation. These are all issues more appropriately raised at first instance in the administrative process.
- [35] For the reasons above, Director McGregor is prohibited from deciding the matters described in the "Notice of Opportunity to be Heard" of October 28, 2020.

Costs

- [36] The Petitioners have sought that costs be awarded against the Respondent. In 18320 Holdings Inc. v. Thibeau, 2014 BCCA 494 the Court of Appeal addressed costs orders in the administrative context:
- [55] The leading case here is the decision of this Court in Lang. Mr. Justice Donald, writing for the Court, noted that subject only to certain exceptions, there is a traditional immunity protecting quasi-judicial tribunals from costs awards (at paras 45-46). He summarised two of those exceptions so (at para. 2):
- [2]
3. If the decision in question is set aside, costs should not be levied against the tribunal unless:
- (a) the tribunal exhibited misconduct or perversity in the proceedings before it; or
 - (b) made submissions on the merits of the judicial review application and did not limit itself to jurisdiction.

- [56] Clearly, in noting the exception to costs immunity where "the tribunal argues the merits of a judicial review application", Mr. Justice Donald was referring to cases where the tribunal has improperly done so. [emphasis in original]
- [37] The Court went on to address the question of whether a finding of a reasonable apprehension of bias could justify an order of costs:
- [68] In my view, conduct which gives rise to a reasonable apprehension of bias can amount to "misconduct or perversity" sufficient to justify an award of costs against a tribunal, even without evidence of actual bias.
- [69] As noted, all costs awards are discretionary. I do not mean to suggest that a finding of a breach of natural justice or procedural fairness will automatically result in an award of costs against the responding tribunal. The context of the particular case must be considered. However, it seems fair to say that the closer the case is to one of a significant breach of the rules of procedural fairness in a case where those rules clearly apply, the stronger will be the case for a costs award.
- [38] I have decided in the interests of efficiency and fairness to order what I see as the only procedurally fair result in this case. However, I also recognize that the tribunal was not given the opportunity to address the issue itself. The Petitioners did not seek to have Director McGregor recuse himself, nor were other remedies sought before coming before the court. While I accept that on the facts of the case I may well have discretion to award costs, I decline to do so in the circumstances.

"Edelmann J."

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