

CANADA / JUDGMENT

McLennan v. Chen

2025 BCCA 448

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 448 McLennan v. Chen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McLennan v. Chen,

2025 BCCA 448

Date: 20251212

Docket: CA50601

Between:

Neal McLennan

Appellant

(Respondent)

And

Xi Chen

Respondent

(Petitioner)

Before:

The Honourable Madam Justice Horsman

The Honourable Justice Iyer

The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated

March 25, 2025 (Chen v. McLennan, 2025 BCSC 523, Vancouver Docket S244810).

The Appellant, appearing in person:

N. McLennan

Counsel for the Respondent:

J.X. Li

Place and Date of Hearing:

Vancouver, British Columbia

October 27, 2025

Place and Date of Judgment:

Vancouver, British Columbia

December 12, 2025

Written Reasons by:

The Honourable Madam Justice Horsman

Concurred in by:

The Honourable Justice Iyer

The Honourable Justice Gomery

Summary:

The appellant is the former tenant of the respondent landlord. The landlord served a notice to end tenancy, stating that she intended to occupy the rental unit. The appellant maintained that the landlord had not accomplished this purpose within the time required by the Residential Tenancy Act. He applied to the Residential Tenancy Branch (RTB) for dispute resolution. An RTB arbitrator found that the appellant was entitled to a monetary order equivalent to 12 months' rent. On judicial review, the chambers judge set aside the decision on the ground the RTB hearing was procedurally unfair. Held: Appeal allowed. The arbitrator's decision is restored. The hearing before the arbitrator met the requirements of procedural fairness.

Reasons for Judgment of the Honourable Madam Justice Horsman:

- [1] The appellant, Mr. McLennan (the "Tenant"), rented a house on property on the west side of Vancouver owned by the respondent, Ms. Chen (the "Landlord") beginning in October 2016. The property included an 8,000 square foot main house and a smaller coach house. There was no dispute that the tenancy related to the main house, even though the tenancy agreement referred to the rental of a "basement" at the property. I will refer to the main house as the "Rental Unit" and the entire property as "the Property".

- [2] On September 16, 2022, the Landlord served a Two Month Notice to End Tenancy for Landlord's Use of Property. The Landlord indicated that the reason for the Notice to End Tenancy was "the rental unit will be occupied by the landlord or the landlord's close family member". The Tenant had until January 15, 2023, to move out of the rental unit. He had been paying monthly rent of \$6,865 by the end of the tenancy.
- [3] After moving out, the Tenant formed the view, based on his observations of the Property, that the Landlord was not occupying the Rental Unit. In August 2023 the Tenant filed an application for dispute resolution with the Residential Tenancy Branch ("RTB"). He sought a monetary order equivalent to 12 months' rent on the basis that the Landlord had not achieved the stated purpose of the Notice to End Tenancy in the time required under s. 51 of the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA]. On May 22, 2024, following a hearing, an RTB arbitrator (the "Arbitrator") issued a written decision holding that the Tenant was entitled a monetary order in the amount of 12 months' rent (\$82,380) plus reimbursement of his \$100 filing fee. The Landlord's review application was dismissed.
- [4] The Tenant lived in the Rental Unit with his spouse, Amanda Ross. Ms. Ross was not listed as the tenant on the Two Month Notice to End Tenancy and is not a party listed on the application for dispute resolution, which was signed only by the Tenant. The Landlord has not suggested that anything turns on this point. However, for reasons I will explain, Ms. Ross's status at the dispute resolution hearing is relevant to the allegation of procedural unfairness that is at the centre of this appeal.
- [5] The Landlord filed a petition for judicial review. She alleged that the Arbitrator's decision was patently unreasonable and that the RTB hearing process had been unfair because she was not permitted to call witnesses. The petition was allowed. The chambers judge concluded that the hearing had been procedurally unfair to the Landlord. She set the Arbitrator's decision aside and remitted the matter to the RTB for a new hearing.
- [6] The Tenant appeals this decision. He argues that the chambers judge erred in finding that the hearing process was unfair in the absence of any indication in the record that the Landlord had been prevented from calling evidence at the RTB hearing. He says the chambers judge also erred in allowing the Landlord to raise her complaint about fairness for the first time on judicial review when no objection was advanced by her legal counsel during the RTB hearing.
- [7] For the reasons that follow, I would allow the appeal and restore the decision of the Arbitrator. The chambers judge erred in finding that the hearing process was unfair. The Landlord had notice of the case to be met and a meaningful opportunity to be heard. The requirements of procedural fairness were met.

Statutory scheme: Ending a tenancy for the landlord's use

- [8] The RTA sets out the rights, obligations, and prohibitions that apply to landlords and tenants under a residential tenancy agreement in British Columbia. The Act is administered by a director, appointed under s. 8 (the "Director"). The Director may retain and employ other persons and delegate powers and functions to them other than the power to establish rules of procedure and to delegate powers: RTA, ss. 9 and 9.1.
- [9] Pursuant to s. 49(3) of the RTA, a landlord may end a tenancy if the landlord "intends in good faith to occupy the rental unit". Section 51 requires a landlord to pay certain compensation to a tenant for ending a tenancy under s. 49. Of relevance, s. 51(2) provides that a tenant may apply for an order for compensation in an amount equivalent to 12 months' rent unless the landlord establishes two conditions. While s. 51(2) has subsequently been amended, at the time the RTB decisions in issue were made, the provision read as follows:
- (2) Subject to subsection (3), the landlord or, if applicable, the purchaser who asked the landlord to give the notice must pay the tenant, in addition to the amount payable under subsection (1), an amount that is the equivalent of 12 times the monthly rent payable under the tenancy agreement if the landlord or purchaser, as applicable, does not establish that
 - (a) the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of the notice, and
 - (b) the rental unit, except in respect of the purpose specified in section 49 (6) (a), has been used for that stated purpose for at least 6 months' duration, beginning within a reasonable period after the effective date of the notice.
- [10] To summarize, as it read at the relevant time, s. 51(2) of the RTA required a landlord to pay a tenant an amount equivalent to 12 months' rent if the landlord did not establish that: (1) the stated purpose for ending the tenancy was accomplished within a reasonable period after the effective date of notice, and (2) the rental unit had been used for that purpose for at least six months thereafter. This was subject to the discretion of the Director under s. 51(3) to excuse the landlord if their failure to accomplish the purpose of the notice was due to extenuating circumstances.
- [11] Section 58 of the RTA provides that a landlord or tenant may apply to the Director for dispute resolution where the dispute relates to the provisions of the Act or a tenancy agreement. Subject to certain prescribed exceptions, s. 58(2) of the RTA states that the Director shall not resolve a dispute if the amount claimed exceeds the monetary limit of a claim under the Small Claims Act, R.S.B.C. 1996, c. 430. There is an exception for disputes concerning a tenant's compensation under s. 51(2) of the RTA. At the time of the RTB decisions in issue, there was no monetary limit on the Director's jurisdiction to determine a dispute about compensation under s. 51(2).

- [12] Section 74(2) of the RTA provides that a dispute resolution proceeding may be conducted in person, in writing, by any audio or video means, or by any combination of these methods. Pursuant to s. 77(1)(d), the Director's decision must be given "promptly and in any event within 30 days after the proceedings conclude".
- [13] A party to a dispute resolution proceeding may apply for a review of the Director's decision under s. 79 of the RTA on one or more of the eight grounds set listed in s. 79(2). The grounds include:
- (b) a party has new and relevant evidence that was not available at the time of the original hearing and that materially affects the decision;
 - (b.2) a person who performed administrative tasks for the director made a procedural error that materially affected the result of the original dispute resolution proceeding;
 - (e) in the original dispute resolution proceeding, the director determined an issue that the director did not have jurisdiction to determine.
- [14] The Director has established Rules of Procedure that are intended, as stated in Rule 1.1, to "ensure a fair, efficient, and consistent process for resolving disputes for landlords and tenants" (the "RTB Rules of Procedure").

Proceedings before the RTB

- [15] In August 2023, the Tenant filed his application for dispute resolution, which included the evidence he relied on in support of the application. The material was served on the Landlord.
- [16] On January 23, 2024, the parties appeared before the Arbitrator by conference call for the first scheduled hearing date. The Landlord requested an adjournment as she had only recently retained new legal counsel. The Tenant did not oppose the request. The Arbitrator concluded an adjournment should be granted to allow the Landlord and her new counsel a fair opportunity to submit evidence and to be heard on the merits. She directed a timeline for the submission of evidence in the interim. The Landlord was given until February 16, 2024, to submit her evidence, while the Tenant had until March 11, 2024, to submit any additional evidence.
- [17] The Landlord subsequently served and submitted evidence consisting of:
- a) Copies of utility bills for the Rental Unit from 2023 that were in the Landlord's name.
 - b) Still photographs and videos of the Rental Unit, intended to depict her use of the rooms and the yard.
 - c) Invoices for food delivery and various services from 2023 that listed the Property address, as well as translated WeChat and text messages showing her presence at the Property.

- d) The witness statement of Mr. Chao, indicating that he had been maintaining the pool at the Property for six years. He stated that he had been at the Property 26 times in 2023 and that the Landlord had been there at least half the time. She appeared to him to be living there. Mr. Chao stated that he and the Landlord had discussed the possibility of turning the swimming pool into a garden pool because it was too expensive to maintain.

[18] The Tenant's evidence included the following:

- a) The Tenant's direct observations of the Property over the course of many months after he and Ms. Ross moved from the Rental Unit to another home in the neighbourhood. Their observations included: the window shades were always drawn; the outdoor mail slot was routinely clogged with mail; no garbage bins were put out on garbage collection day; no outdoor furniture was put out during the summer; and the outdoor pool had turned green with debris and algae due to neglect. The Tenant provided photographs to support these observations.
- b) Information conveyed to the Tenant by neighbours living directly adjacent to the Property. The neighbours advised the Tenant that no one appeared to be living at the Property, and that they had been unsuccessful in contacting the Landlord to discuss a construction project they were attempting to plan.
- c) Facebook Marketplace and hotel listings located by the Tenant as of January 2024 that appeared to offer several rooms in the Rental Unit for rent.
- d) A short-term rental business licence issued by the City of Vancouver to the Landlord and/or her agents on June 22, 2023. The Tenant stated that he was advised by a representative of the City that an application for a business licence typically took eight to 12 weeks to process. From this, the Tenant surmised that the Landlord likely applied for a business licence in March or April 2023.
- e) The Tenant also provided evidence in response to the Landlord's evidence, including that:
 - i. many of the photographs submitted by the Landlord were of the coach house and not the Rental Unit;
 - ii. utility invoices had been issued in the Landlord's name throughout the Tenancy, and she routinely used the Rental Unit as her mailing address during the currency of the tenancy agreement; and
 - iii. Mr. Chao's witness statement did not make sense because he did not service the pool while the Tenant lived at the Rental Unit, yet he stated that he had been looking after the pool "for at least six years".

[19] There was no dispute over the service of the evidence. At the hearing, the Tenant confirmed that he served his original evidence on the Landlord on August 24, 2023, and then additional evidence on March 8, 2024, after he had received the Landlord's evidence. Counsel for the Landlord confirmed service of her material on the Tenant on February 14, 2024. A large volume of evidence was submitted in advance of the hearing, including a disc provided by the Landlord containing 11 videos.

The original decision

[20] On May 17, 2024, the hearing proceeded before the Arbitrator by conference call. The Tenant and Ms. Ross attended on the same phone line. They did not have counsel. The Landlord attended with legal counsel and a Mandarin interpreter. The hearing was scheduled for one hour but ran overtime. The Landlord and Tenant both gave oral evidence and provided submissions. The Landlord's counsel made submissions on her behalf.

[21] At the outset of the hearing, a woman named "Cynthia" dialled into the conference call and identified herself as a witness for the Landlord. The Arbitrator excused the witness and indicated that she could be called back when needed. Cynthia was not recalled during the hearing. This is the focus of the Landlord's claim of procedural unfairness. I will address the events of the hearing more fully later in this judgment in considering the arguments on appeal.

[22] On May 22, 2024, the Arbitrator released reasons for decision on the Tenant's application (the "Original Decision"). The Arbitrator indicated that she had reviewed the evidence submitted by the parties and their testimony. The Arbitrator outlined the Landlord's position that she had occupied the Rental Unit since February 2023. Prior to that, she lived with her mother. The Landlord's evidence was that she had intended to live at the Property permanently after marrying her fiancé, but the relationship eventually ended. After the break-up, the Landlord travelled for several weeks. The Arbitrator summarized the Landlord's evidence of her use of the Rental Unit as follows in the Original Decision at 3-4:

Counsel stated that the Landlord had initially used the rental unit as a secondary space because, as counsel urged, the Act does not require full-time occupancy of a rental unit by [a] landlord in order to accomplish the stated purpose for a Two Month Notice. The Landlord's testimony was she slept in the coach house but would use the kitchen in the main house. She stated there was only a mattress in the cottage. The Landlord explained that renovations were required in the main house; namely, painting walls in the bedroom and living room, appliances required repair, and some repair to the flooring. The Landlord did not specify in greater detail the repairs or renovations other than to say that her mother advised her against staying in the home overnight while the interior walls were painted. The Landlord stated that she would receive her guests in the main house, not the cottage house. Nevertheless, despite the painting, the Landlord would spend her cooking and leisure time in the main house "because there was no ventilation in the small house." Upon inquiry from her counsel, the Landlord stated she moved her personal property into the main house: a sofa, pots and dishes, a movie projector and toiletries. The

Landlord testified that she lived "full-time" in the main house from approximately late-April 2023. The Landlord also stated that she began to run a short-term vacation rental of the rooms in the main home commencing January 2024, but continued to use the kitchen in the home, sharing it with guests. Thereafter, at the end of February, 2024, the Landlord went overseas where she states she permanently resides.

- [23] The Arbitrator described the Landlord's documentary evidence, including the photographs, food delivery invoices, translated text messages, and utility bills.
- [24] The Arbitrator also reviewed the Tenant's evidence and testimony. This included his evidence about the Landlord's short-term vacation advertisements for the Rental Unit and her business licence; the Landlord's practice of leaving utility bills in her name during the tenancy; and his observation that many of the photographs submitted by the Landlord were of the coach house.
- [25] The Arbitrator began her analysis by referencing s. 51(2) of the RTA and the Residential Tenancy Policy Guideline that applied to claims for compensation under this provision. The Arbitrator noted that where a landlord ends a tenancy for the landlord's use of a rental unit, they must "occupy" the unit; that is, they must use the rental unit as living accommodation or as part of their living space. The term "occupy" does not include vacant possession.
- [26] The Arbitrator concluded that the Landlord's evidence did not establish her occupation of the Rental Unit. The Arbitrator identified the following deficiencies in the Landlord's evidence:
- a) The Landlord did not provide any documentary evidence, such as invoices from painters or repairpersons, to show there were repairs to the Rental Unit that prevented her from fully moving in;
 - b) there was no evidence that repairs to one area of the Rental Unit would have prevented her from living in other areas;
 - c) there was also no documentary evidence, such as receipts for rental trucks, to show that she moved her personal belongings into the Rental Unit;
 - d) the Landlord was corrected by the Tenant as to the numbers of bedrooms and bathrooms in the Rental Unit, which suggested that the Landlord lacked familiarity with the Rental Unit;
 - e) many of the photographs and videos submitted by the Landlord were of the coach house and not the Rental Unit;
 - f) photographs that were of the Rental Unit, taken primarily in August 2023, did not establish the Landlord's occupation of that space; and
 - g) the copies of utility bills and her BC Services card submitted by the Landlord did not establish occupancy in light of the Tenant's evidence that the Landlord used the Rental Unit as her mailing address during the tenancy and also left the utility bills in her name.

- [27] The Arbitrator concluded that the Landlord had failed to provide sufficient evidence that she had accomplished the stated purpose for the Notice to End Tenancy within a reasonable time after the effective date of the Notice for a six-month period. She found that "[a]t most, the Landlord's testimony was that, from time to time, she used the kitchen in the main house", however, the use of one room in a house did not constitute occupation or residence: Original Decision at 7. The Arbitrator ordered that the Tenant was entitled to a monetary order in the amount of \$82,380 (12 x monthly rent of \$6,865), plus his \$100 filing fee.

The review decision

- [28] The Landlord applied under s. 79 of the RTA for a review of the Original Decision. She argued that the decision was reviewable on three grounds: (1) new and relevant evidence not available at the time of the hearing; (2) procedural error; and (3) no jurisdiction for the issue determined. In relation to the first two grounds, the Landlord asserted that she had wished to call two witnesses at the hearing--one being Cynthia--and the Arbitrator did not recall these witnesses to testify at the hearing or permit an adjournment to allow them to testify at a later date. The third ground was based on the assertion that the decision maker had failed to consider the Landlord's culture, age, ethnicity, and individual needs, as required to achieve substantive equality.
- [29] The review application was dismissed by an RTB adjudicator (the "Adjudicator"). On the first ground, the Adjudicator found that it was the Landlord's responsibility to ensure that their evidence and witnesses are presented, and in any event the evidence of the two witnesses was not new evidence because it was available at the time of the original hearing. On the second ground, the Adjudicator found that a procedural error is reviewable only where RTB staff made an error in performing administrative tasks. As the Landlord's complaint was about the Arbitrator's procedural decisions during the dispute resolution process, this did not fall within the scope of the review jurisdiction. On the third ground, the Adjudicator found that the Arbitrator had jurisdiction to decide the issues arising on the dispute resolution.

The chambers judgment

- [30] The Landlord filed a petition for judicial review, alleging that the hearing before the Arbitrator was procedurally unfair and the Original Decision was patently unreasonable. She did not pursue the third ground raised on her review application before the RTB, which concerned the Arbitrator's alleged failure to consider the Landlord's culture, age, ethnicity, and individual needs. The Tenant filed a response to the petition and appeared on the judicial review hearing. The Director also filed a response to the petition but did not attend the judicial review hearing.

- [31] The chambers judge's reasons on the judicial review are indexed at 2025 BCSC 523 (the "RFJ"). The chambers judge framed the two issues to be decided as: (1) whether the hearing was conducted in a procedurally unfair manner, and (2) whether the Arbitrator's decision was patently unreasonable. I note that the Landlord and the Respondent both applied to adduce further evidence on the judicial review. The chambers judge declined to admit the evidence. Neither party renews their application to adduce further evidence on the appeal.
- [32] On the issue of procedural unfairness, the chambers judge focussed on the Arbitrator's failure to recall the Landlord's witness Cynthia, after excusing her at the outset of the hearing. The chambers judge found it "troubling" that Cynthia was excused and noted that the Arbitrator provided no reasons why she should be excused: RFJ at para. 43. The chambers judge contrasted this with the Arbitrator's treatment of Ms. Ross who was allowed to attend the hearing despite her presumed status as a witness. The chambers judge found that the Arbitrator "likely forgot" about Cynthia: RFJ at para. 45. The chambers judge rejected the Tenant's argument that it was not the Arbitrator's obligation to remind the Landlord to call her witness. She reasoned as follows:
- [46] [I]n the context of the informal hearing structure and purpose of RTB hearings, I find procedural fairness in these circumstances does require a party's witness to be heard. It matters not whose responsibility it was to ensure the witness provided evidence, as the fact remains that the landlord had a witness who called in to the hearing, ready to testify, and was excused by the arbitrator.
- [47] This was a significant monetary judgment. It was important to both parties. The landlord had a legitimate expectation that she would be able to call her witness to provide evidence during the hearing. It is difficult to find that the landlord's right to be heard has been met when she did not have an opportunity to present evidence that she wanted the arbitrator to hear.
- [33] For this reason, the chambers judge found that the hearing was procedurally unfair to the Landlord.
- [34] The chambers judge also addressed the Landlord's argument that the Arbitrator's decision was patently unreasonable. She found no merit in the argument. The chambers judge concluded that the inferences drawn by the Arbitrator were open to her on the evidence and were not "openly, clearly, evidently unreasonable": RFJ at para. 50.
- [35] In light of her finding that the hearing was procedurally unfair, the chambers judge set aside the Original Decision and remit the matter for a new hearing.

On appeal

- [36] The Tenant argues that the chambers judge erred in determining that the hearing before the Arbitrator was procedurally unfair. He seeks an order restoring the Arbitrator's decision.

[37] The Landlord argues that the chambers judge was correct to conclude that the hearing was procedurally unfair. She does not argue, in the alternative, that the chambers judge erred in finding that the Original Decision was not patently unreasonable.

[38] Accordingly, the sole issue on appeal is whether the chambers judge was correct in her finding of procedural unfairness.

Analysis

Which decision is the subject of the judicial review?

[39] There is no dispute that the power of reconsideration under s. 79(2) of the RTA was not wide enough to encompass the allegation of procedural unfairness in this case. As found by the review Adjudicator, the proposed new evidence was available at the time of the original hearing and therefore did not fit within the review ground listed in s. 79(2)(a). The alleged unfairness was also not a procedural error within the meaning of s. 79(2)(b.2).

[40] As the alleged error could not be remedied on review under s. 79(2) of the RTA, the Original Decision is the proper subject of the judicial review: *Middlegate Development Ltd. v. Acosta*, 2023 BCCA 459 at paras. 35-36, citing *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at paras. 38-39.

Standard of review

[41] The appellate court owes no deference to the chambers judge's identification and application of the standard of review on an appeal from a judicial review decision. Unless the chambers judge was called upon to make an original finding of fact, the appellate court effectively steps into the shoes of the judge below and reviews the original administrative decision: *Campbell v. The Bloom Group*, 2023 BCCA 84 at para. 11.

[42] Under ss. 5.1 and 84.1 of the RTA, s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA] ("standard of review with privative clause"), applies to decisions of the Director. Where principles of procedural fairness are invoked, s. 58(2)(b) of the ATA provides that "questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the Tribunal acted fairly".

[43] An appellate court will review questions of procedural fairness on the basis of "correctness, sometimes termed 'fairness'": *Athwal v. Johnson*, 2023 BCCA 460 at para. 22, citing *R.N.L. Investments Ltd. v. British Columbia (Agricultural Land Commission)*, 2021 BCCA 67 at para. 57.

Procedural fairness

[44] In its recent decision in *Athwal*, this Court helpfully summarized the principles of procedural fairness that apply in the context of a tenant's claim for compensation under s. 51(2) of the RTA. By way of summary, the following principles emerge from *Athwal*:

- a) In determining whether a process is unfair, courts adopt a "contextual approach" that looks to the decision being made and its statutory, institutional and social context: Athwal at para. 23, citing *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 at para. 22, and *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal)*, 2019 BCCA 131 at para. 13.
 - b) A landlord subject to a potential monetary order under the RTA is entitled to a high level of procedural fairness given that a dispute resolution proceeding is adversarial and the financial consequences to a landlord may be serious. This is consistent with the RTB Rules of Procedure, which contemplate a high level of procedural fairness: Athwal at para. 24, citing *Ndachena v. Nguyen*, 2018 BCSC 1468 at paras. 58-61.
 - c) An affected party's right to know the case against them is foundational to participatory rights and the principle of audi alteram partem: to hear one side or let the other side be heard: Athwal at para. 28, citing *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536, 1995 CanLII 52 at para. 27; *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781, 1995 CanLII 102 at para. 29.
 - d) Where a party has important interests that may be materially affected by an administrative decision, procedural fairness also requires that they have a meaningful opportunity to present their position and have it fully and fairly considered: *Baker* at para. 30; *A.(L.L.)* at para. 27; *Telecommunications Workers Union* at para. 29.
 - e) A tenant's claim for compensation under s. 51(2) of the RTA has both a compensatory and a punitive, or deterrent, nature. The quantum of compensation claimed by a tenant will often be significant and requires careful consideration by an RTB adjudicator based on a sufficient evidentiary record: Athwal at para. 73
- [45] In Athwal, the appellant landlord had been ordered to pay the tenant an amount equivalent to 12 months' rent under s. 51(2) of the RTA. There was no question in that case that the landlord had delayed moving into the rental unit to carry out substantial renovations. The issue was whether the renovations excused the delay. This Court found that the process before the RTB had been procedurally unfair because the landlord had not received a copy of the tenant's handwritten application for dispute resolution containing particulars of the claim in advance of the hearing.

The hearing before the Arbitrator

- [46] A transcript of the hearing before the Arbitrator formed part of the record on judicial review. I will review the transcript in some detail given its centrality to the issue of procedural fairness.

[47] The hearing began with the parties introducing themselves. The Landlord was present with her legal counsel Ms. Li, and an interpreter. The Tenant stated that his wife Ms. Ross was with him. A participant was then announced who identified herself as Cynthia. The following exchange ensued:

THE ARBITRATOR: All right. Who is Cynthia?

CYNTHIA: Hi.

THE ARBITRATOR: This is the Arbitrator. Who are you, Cynthia?

CYNTHIA: I'm Ms. Chen's witness.

THE ARBITRATOR: Okay. So, perhaps Ms. Li, you can - I'm going to excuse your witness now. And if we need her, she can call back in. Is there some way that you can reach her?

CNSL J. LI: I can ask Ms. -

THE ARBITRATOR: Okay. We can only one speak at a time. So - and I understand the interpreter's assisting. Can the witness be excused and call back in when needed?

CYNTHIA: Okay. Okay.

AUTOMATED SPEAKER: Participant exiting. My name is Cynthia.

INTERPRETER: Okay.

[48] The Arbitrator then indicated she would administer the oath to the remaining participants requiring witnesses to affirm to tell the truth. She administered the oath to the Tenant and to Ms. Ross. The Arbitrator referred to the Tenant and Ms. Ross collectively as "the tenants" and "the applicants". She also administered the oath to the Landlord.

[49] The Arbitrator asked clarifying questions of the Tenant. The Tenant summarized the information contained in his evidence package regarding his observations of the Property and the time frame of those observations. The Arbitrator then invited submissions from counsel for the Landlord. The Landlord's counsel began by inquiring about the timing of the hearing:

CNSL J. LI: Before I start, Madam Arbitrator, I just have a question about timing. I see that we only got 30 minutes left. If we don't finish -

THE ARBITRATOR: I'll have to go over. Yeah. No. I'll -

CNSL J. LI: Okay.

THE ARBITRATOR: I don't want to adjourn. I would - I do have some extra time that I can devote to this hearing. Not endless -

CNSL J. LI: Okay.

THE ARBITRATOR: -- of course. But I am willing to give - you know, I think 20 minutes to each side should be sufficient.

Just so everyone knows, I have reviewed all the evidence. So you don't need to go into great detail concerning the evidence.

CNSL J. LI: Okay.

THE ARBITRATOR: I've reviewed all of the photographs, for instance. So you can just summarize that for me if you like.

CNSL J. LI: Thank you.

THE ARBITRATOR: All right. So, Ms. Li, do you think 15, 20 minutes at your end would - and I'll - at that time, I would like to reserve a little bit for closing; okay?

CNSL J. LI: Yes. Yes.

THE ARBITRATOR: All right.

CNSL. J. LI: I think 20 minutes for my submissions and maybe a little bit for my closing would be enough. Thank you very much.

[Emphasis added.]

[50] The Landlord's counsel provided opening submissions on behalf of the Landlord, following which she put questions to her. The Landlord testified that starting in February 2023, she slept in the coach house and spent most of the day in the Rental Unit. She stated that she did not sleep in the Rental Unit because it required repairs and she needed to repaint the walls. Her mother told her that the smell of paint was not good for her health. The Landlord described moving personal items into the Rental Unit. She explained the timing of the break-up with her fiancé. After these topics were covered, the Arbitrator intervened:

THE ARBITRATOR: I know I interrupted you a couple of times, Ms. Li. But we're at 20 minutes or very, very close to. So

CNSL J. LI: Can I just follow up with, like, one or two question quickly?

THE ARBITRATOR: Okay. Just want to let you know.

[51] The Landlord's counsel posed a series of further questions to her relating to the timing of her move into the Rental Unit, and the Arbitrator asked clarifying questions. At this point, there was the following exchange:

THE ARBITRATOR: All right. Thank you. I - I would like to turn to the tenants now to hear from them. Did you have one more question for your client?

CNSL J. LI: I think we're good here.

[Emphasis added.]

- [52] The Tenant provided his evidence, which included going through the documents he had submitted and responding to the Landlord's evidence. At the end of the Tenant's evidence, the Arbitrator asked Ms. Ross if she had anything to add. Ms. Ross indicated that she did not.
- [53] The Landlord's counsel then requested, and was granted, the opportunity to conduct re-examination of the Landlord. Following the re-examination questions the Landlord's counsel stated, "I would like to make my closing submission here". She then proceeded with her closing submissions. The Landlord's counsel argued that the evidence submitted by Landlord and the timeline she provided established on a balance of probabilities that the Landlord had occupied the Property within a reasonable time period, and for at least six months, after the Tenant moved out. The Arbitrator interjected during the Landlord's submissions to remind her counsel of the time:

THE ARBITRATOR: I - do need to - yeah. I don't mean to cut you off. I do need to move along. I have to close out this hearing, and I need to give an opportunity for Mr. McLennan's closing. So I'll give you 30 more seconds, Ms. Li, in case there's an additional point that you'd like to raise. But then I would like to turn to the tenant. And I have some closing comments as well.

CNSEL J. LI: Sure.

- [54] After the submissions had completed, the Arbitrator stated that "[i]f there are no further questions at this time, I will be closing out the hearing." Neither of the parties asked further questions, and the hearing concluded.

Was the hearing procedurally unfair?

- [55] The Tenant raises a preliminary objection that the Landlord should not be permitted to raise a complaint of procedural fairness for the first time on judicial review. It is a well-established principle that an allegation of procedural fairness should be raised in the first instance before the original decision maker so that the decision maker has an opportunity to remedy the unfairness: *Athwal* at para. 55. It does not appear that the Tenant raised this objection in the court below.
- [56] I would not accede to this preliminary objection in the circumstances of this case. The Landlord's position on appeal is that she did raise her concerns about timing with the Arbitrator. The Arbitrator's failure to provide more time for the hearing forms part of the Landlord's complaint about procedural fairness on appeal. The arguments should be dealt with on their merits.
- [57] The Landlord's first argument on appeal is that the Arbitrator's failure to call Cynthia back to testify at the hearing was a breach of procedural fairness because it deprived the Landlord of an opportunity to be heard. This was the basis for the chambers judge's finding of a breach of procedural fairness.

- [58] For the reasons that follow, I am of the view that the chambers judge was incorrect in finding that the Landlord "did not have an opportunity to present evidence that she wanted the arbitrator to hear": RFJ at para. 47.
- [59] The alleged unfairness of the Arbitrator's treatment of Cynthia's potential evidence must be placed in context. There is no issue that the process required by the RTB Rules of Procedure was followed in this case. The Tenant filed and served his application for dispute resolution in August 2023 along with documents he relied on in support of his application. The hearing originally scheduled for January 23, 2024, was adjourned by the Arbitrator to accommodate the Landlord's recent change of counsel. The Landlord was given additional time to submit her responding evidence to the RTB and to serve it on the Tenant. The Landlord's evidence package totalled approximately 150 pages, including witness statements, which were not from Cynthia. This is not a case like Athwal where the landlord did not know the case to be met at the hearing.
- [60] It is true, as the Landlord emphasizes, that R. 7.21 of the RTB Rules of Procedure anticipates that a party may call witnesses at the hearing. There is no explicit requirement in the RTB Rules of Procedure that a witness statement be provided in advance. If an RTB arbitrator prevented a party from calling a witness, that could conceivably be a breach of procedural fairness depending on the context. However, that is not what occurred in this case. The Arbitrator excused Cynthia at the outset of the hearing on the understanding that she could be called back if needed. The Landlord did not ask for Cynthia to be recalled, and the Arbitrator did not raise the issue again.
- [61] The chambers judge found it "troubling" that Cynthia was excused by the Arbitrator at the beginning of the hearing: RFJ at para. 43. She did not explain why this was troubling. Witnesses are routinely excused at the outset of an adversarial hearing process to ensure that their evidence is not influenced by the evidence of other witnesses. Rule 7.22 of the RTB Rules of Procedure expressly provides that "The arbitrator may exclude witnesses from the dispute resolution hearing until called to give evidence." It was for the Arbitrator to decide whether to make an order excluding witnesses and she did not need to give reasons for this type of procedural direction. The wisdom of such an order was apparent in a dispute resolution hearing that would clearly turn on the resolution of conflicting evidence about the Landlord's use and occupation of the Rental Unit.
- [62] The chambers judge contrasted the treatment of Cynthia with the Arbitrator's treatment of Ms. Ross--described by the chambers judge as the Tenant's "witness"--who was permitted to remain on the line throughout the hearing. However, it is clear from the transcript that the Arbitrator considered Ms. Ross as having a status akin to that of a party. She referred to the Tenant and Ms. Ross as "the tenants" and "the applicants". This is understandable given that Ms. Ross is married to the Tenant and they lived in the Rental Unit together. Ms. Ross was on the same telephone line as the Tenant when he dialled into the hearing. While it may have been incorrect for the Arbitrator to refer to Ms. Ross as an "applicant", this error was of no consequence. Ms. Ross did not give evidence or make submissions. The fact that the

Arbitrator understood Ms. Ross to be a party rather than a witness was not indicative of unequal treatment of the witnesses, as the Landlord argues.

- [63] The chambers judge concluded that it did not matter whose responsibility it was to ensure that Cynthia provided evidence. I disagree. The question of who had responsibility to recall Cynthia is at the heart of the allegation of procedural unfairness. The responsibility to recall the witness was that of the Landlord and not the Arbitrator. A dispute resolution proceeding before the RTB is adversarial and party driven. The Landlord was represented by counsel who had every opportunity to request that Cynthia be recalled to provide evidence. While the chambers judge inferred that the Arbitrator forgot about Cynthia, it was for the Landlord, through her legal counsel, to decide how best to present her case. The Landlord's failure to request that Cynthia be recalled is not a breach of the Arbitrator's duty to provide a fair hearing process.
- [64] On appeal, the Landlord raises the additional and related argument that the hearing process was unfair because she had insufficient time to present her case. The Landlord describes the hearing process this way in her factum:
25. [The Landlord's] counsel raised the issue that the allotted time was insufficient for [the Landlord] to present her case and gave the arbitrator the opportunity, at the first instance, to correct this procedural error by granting an adjournment when natural justice requires it. However, the arbitrator overruled it, denied the adjournment, and imposed a time limit she considered sufficient. Counsel had no choice but to abide by that ruling and proceed. It would have been inappropriate to second guess or challenge the ruling after it was made; the proper course is to seek appeal or review.
- [65] This characterization is not borne out on any reasonable review of the hearing transcript. As is evident in the transcript extracts I have reproduced, the Landlord did not ask for an adjournment of the hearing. At the outset of her opening submissions, Counsel for the Landlord did inquire about timing and raised the possibility that the hearing would not complete. The Arbitrator responded that she did not want to adjourn, but that she could give the parties extra time. She offered to give each party 20 minutes extra and asked the Landlord's counsel if that would be okay. Counsel answered "yes" and said that 20 minutes for submissions and a bit extra for her closing "would be enough". At no time after that did the Landlord object that she had insufficient time to make her case. The Arbitrator did not breach the rules of procedural fairness by failing to grant an adjournment that the Landlord did not ask for and did not appear to need.
- [66] Hearings before an RTB arbitrator are undeniably a more informal and time constrained method of dispute resolution than would be provided if the claim was litigated in court. As the Landlord emphasizes on appeal, but for the RTA a claim for \$82,000 would have to be filed in the Supreme Court of British Columbia, and subject to pre-trial procedures that include discoveries and a trial management conference. However, I do not consider the comparison to in-court dispute resolution to be apt for the purpose of determining the

procedural requirements of an RTB hearing. The fact is that the legislature assigned jurisdiction to the RTB to adjudicate this claim. While the Landlord is entitled to a high level of procedural fairness, the content of the process rights must be assessed within the statutory and institutional context. The RTB hearing process is designed to be informal, efficient, and timely. It is also designed to ensure that parties are treated fairly, have an opportunity to be heard, know the case to be met, and understand the reasons for the decision. In my view, the requirements of procedural fairness were met in this case.

[67] As the Landlord does not argue, in the alternative, that the Original Decision was patently unreasonable, my conclusion that there was no procedural unfairness is enough to dispose of this appeal.

Disposition

[68] I would allow the appeal and restore the Original Decision of the Arbitrator.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Justice Gomery"

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