

CANADA / JUDGMENT

Xu v. Jin

2025 BCSC 307

COURT

Supreme Court of British Columbia

DECIDED

25 February 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 307 Xu v. Jin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xu v. Jin,

2025 BCSC 307

Date: 20250225

Docket: S243377

Registry: Vancouver

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

Between:

Yue Xu

Petitioner

And

Xiaoyu Jin

Respondent

Before: The Honourable Justice Latimer

On judicial review from: Orders of the Residential Tenancy Branch, dated March 27, 2024 and April 5, 2024 (RTB File No. 910131503)

Reasons for Judgment

Counsel for the Petitioner:

A. Ehteshami

S. Benary

Counsel for Respondent:

Z. Yang

Place and Date Hearing:

Vancouver, B.C.

February 5, 2025

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2025

Table of Contents

Introduction.. 3

Issues. 4

Analysis. 5

Standard of Review.. 5

Procedural Fairness. 5

Was the Landlord deprived of the opportunity to know the case against them and respond to that case?. 7

Is there a reasonable apprehension that the first arbitrator's decision was arrived at through a biased lens?. 12

Remedy. 14

Costs. 14

Introduction

- [1] The petitioner ("Landlord") applies for judicial review from two decisions of Residential Tenancy Branch ("RTB") arbitrators made under the Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA].
- [2] The Landlord entered into a residential tenancy agreement with the respondent ("Tenant") to rent a home in North Vancouver ("Rental Unit") commencing in November 2021.

- [3] On September 1, 2022, the Landlord issued the Tenant a Two-Month Notice to End Tenancy ("Two-Month Notice") under s. 49(3) of the RTA. At the relevant time, s. 49(3) permitted a landlord to end a tenancy with two full months' notice if the landlord or a close family member of the landlord intended in good faith to occupy the rental unit. The Two-Month Notice specified a vacancy date of October 31, 2022.
- [4] The Tenant disputed the Two-Month Notice and, after a hearing before the RTB, agreed to vacate the Rental Unit on or before the end of November 2022. The Tenant vacated the Rental Unit on or around November 27, 2022.
- [5] On October 20, 2023, the Tenant brought an application for dispute resolution seeking compensation pursuant to s. 51 of the RTA. At the relevant time, s. 51 allowed a tenant whose tenancy was ended under s. 49 of the RTA to seek compensation if the rental unit was not used for the landlord's stated purpose within a reasonable time and for at least six months' duration.
- [6] On February 9, 2024, the RTB convened a hearing of this matter. The parties raised issues regarding the service of records. Arbitrator Massah adjourned the hearing to March 4, 2024, and set a deadline of February 25, 2024 for the parties to exchange the evidence they had already submitted to the RTB ("Interim Decision").
- [7] On March 4, 2024, the RTB convened a hearing on the merits. In a decision dated March 27, 2024 ("Merits Decision"), Arbitrator Massah concluded that the Landlord had failed to establish that their close family member occupied the Rental Unit for a period of at least six months. Arbitrator Massah, therefore, granted the Tenant a monetary order for the equivalent of 12-months' rent and compensation for the filing fee pursuant to s. 72 of the RTA, in the total amount of \$25,300.
- [8] The Landlord sought a review of the Merits Decision at the RTB pursuant to s. 79 of the RTA. The sole ground for review advanced by the Landlord was that there was new and relevant evidence not available at the time of the hearing leading to the Merits Decision.
- [9] In a decision dated April 5, 2024 ("Review Decision"), Arbitrator Smit dismissed the Landlord's application for a review consideration of the Merits Decision. With respect to some of the additional documents submitted by the Landlord, Arbitrator Smit concluded they were unlikely to change the outcome of the Merits Decision. With respect to other additional documents submitted by the Landlord, Arbitrator Smit concluded they were not new and could have been obtained prior to the merits hearing.
- [10] On this judicial review, the Landlord argues that the process leading to the Merits Decision was procedurally unfair and that both the Merits Decision and Review Decision are patently unreasonable. The Landlord asks this Court to substitute its own decision for that of the RTB or, in the alternative, to remit the matter to the RTB.
- [11] The Tenant opposes the judicial review application.

[12] Both parties seek costs.

[13] The RTB has filed a petition response setting out applicable legal principles. The RTB takes no position on the merits of the judicial review but opposes any order of costs being made against it. The RTB did not appear at the hearing of the judicial review.

Issues

[14] For reasons that I explain below, I find that:

- a) The process leading up to the Merits Decision was procedurally unfair.
- b) The proper remedy that flows from that is to remit the matter back to the RTB for a rehearing on the merits.
- c) Given my decision in respect of procedural fairness, I need not address the additional arguments raised by the petitioner in respect of whether either decision was patently unreasonable.
- d) Each party will bear their own costs.

Analysis

Standard of Review

[15] There is no contest between the parties in respect of the applicable standard of review.

[16] Questions of procedural fairness must be reviewed on a standard of fairness, as required by section 58(2)(b) of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA]. The question to be answered is whether, in all the circumstances, the tribunal acted fairly.

Procedural Fairness

[17] As the Court of Appeal set out in *Athwal v. Johnson*, 2023 BCCA 460:

[23] It is trite law that an administrative decision resulting from an unfair process cannot stand. A determination of what constitutes an unfair process requires a "contextual approach" that looks to the decision being made and its statutory, institutional and social context: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 [Baker] at para. 22; *Cariboo Gur Sikh Temple Society (1979) v. British Columbia (Employment Standards Tribunal)*, 2019 BCCA 131 at para. 13.

[18] It is unnecessary for the reviewing Court to determine whether the denial of an unfair hearing would likely have resulted in a different administrative decision. The focus is on the right to a fair process, which is an independent, unqualified right that all persons affected by an administrative decision are entitled to have: *Zuria v. Mission Institution (Warden)*, 2011 BCCA 452 at para. 17, citing *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at para. 23.

- [19] At para. 24 of Athwal, the Court of Appeal adopted Justice Sewell's assessment of what constitutes fairness in the RTB context from *Ndachena v. Nguyen*, 2018 BCSC 1468. I also adopt that assessment:
- [56] The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker.
- [57] Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself. This list is not exhaustive.
- [58] I am satisfied that the petitioners were entitled to a high level of procedural fairness in the Dispute Resolution Applications. The issues before the Arbitrator were adversarial with serious financial consequences to the petitioners. The statutory scheme under the RTA vests the RTB with the same powers in residential tenancy disputes to grant monetary judgments as the provincial court has in other matters.
- [59] The RTB Rules govern Dispute Resolution proceedings. They contemplate a high level of procedural fairness. Any person dealing with the RTB would have a reasonable expectation that the RTB Rules would be complied with.
- [60] Rule 1.1 states that the objective of the RTB Rules is to ensure a fair, efficient and consistent process for the resolution of disputes between landlords and tenants.
- [20] I also note this Court's observation that in the context of RTB hearings where lay participants appear without assistance or advice, as the Landlord did in this case, extra care must be taken to ensure fairness and the appearance of fairness: *Kikals v. British Columbia (Residential Tenancy Branch)*, 2009 BCSC 1642 at para. 37.
- [21] Thus, in the present case, in light of the decision being made and its statutory, institutional and social context, I am of the view that the parties were entitled to a high level of procedural fairness.
- [22] The Landlord argues that the process leading to the Merits Decision was procedurally unfair because:
- a) The timing of the exchange of materials prior to the Merits Decision deprived the Landlord of the opportunity to know the case against them and respond to that case; and additionally, or in the alternative,

b) Arbitrator Massah lacked impartiality.

Was the Landlord deprived of the opportunity to know the case against them and respond to that case?

[23] It is a basic tenant of procedural fairness that a person is entitled to know the case against them, and be able to respond to that case: *City2City Real Estate Services Inc. v. Wang*, 2024 BCSC 1267 at para. 23, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 28.

[24] Given the high level of procedural fairness required in RTB proceedings such as this which carry with them serious financial consequences, I conclude that this right includes the right to respond to the applicant's evidence. As I will explain in some detail below, this view of the requirements of procedural fairness is also consistent with the Rules that the RTB has set for the exchange of documentary and digital evidence and the reasonable expectation of the parties that those rules and procedures will be followed.

[25] Section 89 of the RTA, s. 43 of the Residential Tenancy Regulation, B.C. Reg. 477/2003 [Regulation]; and the RTB's Rules of Procedure [RTB Rules], set out the rules for service of documents in a residential tenancy dispute.

[26] As noted by Sewell J. in *Ndachena* :

[61] The RTB Rules contain specific provisions for the giving of notice of evidence to be relied upon at a Dispute Resolution hearing. Rule 2.5 requires an applicant for Dispute Resolution to submit copies of all documentary and digital evidence to be relied upon at the hearing of the Dispute Resolution Application. Once the RTB gives notice of the date of the Dispute Resolution hearing, an applicant must serve the other party with copies of all documents required to be filed under Rule 2.5. Rule 3.5 requires the applicant to demonstrate that each respondent was served with all evidence required by the RTB Rules.

[27] When the process operates as it is supposed to, pursuant to Rule 3.14, the applicant's documentary and digital evidence (the Tenant in this case) is due 14 days before the RTB hearing. Pursuant to Rule 3.15, the respondent's documentary and digital evidence (the Landlord in this case) is due 7 days before the RTB hearing. The benefit of this staggered approach to the exchange of materials is that the responding party has an opportunity to know the case against them and to marshal evidence in order to meet that case.

[28] In this case, as noted above, both parties raised issues with respect to service of evidence at a hearing on February 9, 2024. In the Interim Decision, Arbitrator Massah explained the problem as follows:

The Landlord acknowledged receipt of the Tenants' application by pre-agreed email, but not any of the Tenants' evidence. The Tenants submitted a copy of the email they sent to the Landlord. The email does not include their evidence. Pursuant to the Landlord's acknowledgement and the Tenants' documentary evidence, I find that, pursuant to section 71(2)(b), the Landlord has been sufficiently served with the Tenants' application for the purposes of the Act.

I informed the Tenants of the documentary evidence submitted to the Residential Tenancy Branch by the Landlord. X.J. testified that they have all the documents except for one. This testimony went unopposed by the Landlord.

I cannot find that the Tenants have served their substantial records, beyond the Proceeding Package, to the Landlord. The Landlord did not dispute the Tenants' claim that one or more of their documents also has not been served.

(Emphasis added)

[29] The Tenant argues that the bolded text indicates that the Landlord acknowledged that they had received all the documents except for one prior to the Interim Decision. However, this is a misreading of the Interim Decision. "X.J." refers to the Tenant, not the Landlord. The underlined passages make clear that the arbitrator accepted that the Landlord had not received any of the Tenant's "substantial records" on the date the Interim Decision was issued.

[30] The Rules contemplate adjournment to allow for evidence to be exchanged when 3.14 and/or 3.15 have not been complied with. In particular, the Rules provide in relevant part:

3.17 Consideration of new and relevant evidence

Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC Office in accordance with the Act or Rules 2.5 [Documents that must be submitted with an Application for Dispute Resolution], 3.1, 3.2, 3.10.5, 3.14, 3.15, and 10 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence.

The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice.

Both parties must have the opportunity to be heard on the question of accepting late evidence.

If the arbitrator decides to accept the evidence, the other party will be given an opportunity to review the evidence. The arbitrator must apply Rule 7.8 [Adjournment after the dispute resolution hearing begins] and Rule 7.9 [Criteria for granting an adjournment].

3.19 Submitting evidence after the hearing starts

No additional evidence may be submitted after the dispute resolution hearing starts, except as directed by the arbitrator. In providing direction, the arbitrator will:

- a) specify the date by which the evidence must be submitted to the Residential Tenancy Branch directly or through a Service BC Office and whether it must be served on the other party; and
- b) provide an opportunity for the other party to respond to the additional evidence, if required.

In considering whether to admit documentary or digital evidence after the hearing starts, the arbitrator must give both parties an opportunity to be heard on the question of admitting such evidence.

(Emphasis Added)

[31] In light of the defect in the service of the evidence of both parties in this case, the arbitrator decided to adjourn the hearing on their own motion under Rules 6.1, 7.8-7.9. In so doing, Arbitrator Massah held:

I Order both parties to serve their counterparty with all records submitted to the Residential Tenancy Branch, by Email by no later than February 25, 2024.

This adjournment [sic] not an opportunity for either party to submit any additional evidence to the Residential Tenancy Branch.

(Emphasis in Original)

[32] The Landlord argues that the terms of the adjournment did not cure the prejudice suffered by the Landlord from the lack of service of the Tenant's evidence.

[33] The problem is said to arise because although there was an adjournment to permit the exchange of materials, the parties were not permitted to submit any additional evidence. The Landlord's evidence had been assembled without seeing the Tenant's evidence. The Landlord argues that they therefore had no opportunity to respond to the Tenant's evidence.

[34] Neither party requested the adjournment that the arbitrator granted in the Interim Decision. However, the adjudicator rightly recognized that an adjournment was necessary to protect the fairness of the process. There is no question that the Landlord was entitled to know and respond to the case against them. An adjournment to permit the simultaneous exchange of evidence was not sufficient to cure the procedural unfairness that arose from the defect in service in this case. Unfortunately, the additional term imposed by the arbitrator which restricted the parties to the evidence that they had already submitted to the RTB effectively deprived the Landlord of the ability to respond to the documentary and digital evidence advanced by the Tenant because the Landlord's evidence up to that time had been marshalled without the opportunity to review the Tenant's evidence.

- [35] It is well accepted that allegations of procedural fairness cannot be raised for the first time on judicial review "if they could reasonably have been the subject of timely objection in the first-instance forum": *Athwal v. Johnson*, 2023 BCCA 460 at para. 55.
- [36] One of the grounds for review set out in s. 79 of the RTA is a procedural error. As noted above, the Landlord did not advance this ground for review. Instead, the Landlord attempted to resolve the issue directly by asking to lead new and relevant evidence not available at the time of the hearing leading to the Merits Decision. As the Review Decision made clear, at the review stage, it was too late to tender this documentary evidence, much of which was available at the time of the merits hearing. The Review Decision concluded that some of that additional documentary evidence would not have impacted the outcome of the Merits Decision. However, with respect to other documentary evidence tendered for the first time on review, the Review Decision was silent as to its possible impact on the outcome of the case. Those records included evidence such as a car reservation, flight information, passport stamps and photographs aimed at substantiating that the Landlord's close family member had indeed occupied the Rental Unit for a period of at least six months.
- [37] The Review Decision did not consider whether there had been a procedural error because that issue was not raised. However, as I have noted, the Landlord was unassisted by counsel at the hearings before the RTB. Despite this, procedural unfairness was a live issue before the RTB. Although the RTB made efforts on its own motion to address the unfairness that arose as a result of the defect in service that occurred, unfortunately, its efforts did not go far enough to ensure the parties knew the case against them, and were able to respond to that case.
- [38] It would be unrealistic to expect a self-represented party to object to the specific terms imposed by the arbitrator in the Interim Decision in a context such as this. Particularly when the Landlord believed they could address the issue directly by tendering the additional documents on review. Only on judicial review to this Court, with the assistance of counsel, did the Landlord frame their concerns with the Merits Decision as a procedural fairness issue.
- [39] I am satisfied that this is a situation where the interests of justice require the Court to scrutinize the procedural defect alleged to ensure fairness and the appearance of fairness in this administrative proceeding which carried serious consequences for the parties.
- [40] I conclude that the procedural defect impacted the fairness of the RTB proceeding. As the Court of Appeal noted in *Zuria*, on a procedural fairness analysis, it is unnecessary for the reviewing Court to determine whether the procedural defect likely affected the outcome of the administrative decision. The focus is on the right to a fair process, which is an independent, unqualified right that all persons affected by an administrative decision are entitled to have. That right includes the right to know the case against you and respond to it. The Landlord was deprived of that right in this case.

Is there a reasonable apprehension that the first arbitrator's decision was arrived at through a biased lens?

- [41] Given my determination on the first issue of procedural fairness, it is not necessary to decide whether Arbitrator Massah lacked impartiality. However, I have decided to address this matter both because it may impact the question of costs and because the Landlord's argument raises a serious allegation against an administrative decision-maker.
- [42] The Landlord argues that Arbitrator Massah was biased and that the bias manifested itself in how Arbitrator Massah interpreted the evidence. For example, it is argued that Arbitrator Massah approached the evidence through a biased lens by:
- a) accepting the evidence of the Tenant's witness, LS, and giving it more weight than the evidence of the Landlord's witness, XL;
 - b) requiring corroboration of oral testimony by the Landlord's witnesses with documentary evidence;
 - c) taking fault with the documentary evidence submitted by the Landlord by pointing out additional documentary evidence that was not submitted.
- [43] An essential component of procedural fairness is a lack of apparent bias. In assessing an administrative decision-maker's impartiality, the test is "whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator": *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at 636.
- [44] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific. Further, a presumption of impartiality, not easily displaced, imposes a high burden on the party alleging bias: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, at paras. 25-26.
- [45] Bias or lack of impartiality should be raised in the first instance before the administrative decision-maker or tribunal, and should not be raised in the first instance on judicial review: *Bajwa v. British Columbia Veterinary Medical Association*, 2010 BCSC 848, at para. 74. In order for a reviewing court to entertain an argument of bias in the first instance, the allegation must be so clear and strong that it overrides the compelling concerns regarding the reputation of the tribunal and the ability of the tribunal to set out its position: *Eckervogt v. British Columbia*, 2004 BCCA 398, at paras. 46-48.
- [46] The Landlord acknowledges that allegations of bias were not raised at the hearing before Arbitrator Massah.
- [47] Even if it was open to the Landlord to raise these issues for the first time on judicial review, I do not agree that the Merits Decision reveals bias or partiality as suggested.

- [48] The Landlord's assertions of bias come down to the suggestion that Arbitrator Massah did not give the Landlord's evidence the weight that the Landlord thought was appropriate. Without commenting upon whether the arbitrator's reasoning process was flawed, a flawed reasoning process does not necessarily mean that the reasoning process was biased. Here, the arbitrator reached conclusions and made findings based on the evidence they accepted. As I review the evidentiary record and decision of the arbitrator, I reject that there is any evidence of bias or partiality.

Remedy

- [49] Section 5 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, provides that where an application for judicial review is allowed, the court may direct the tribunal to reconsider and determine the matter giving rise to the successful review. While the provision is permissive, the general rule is that where a party succeeds on judicial review, the appropriate disposition is to order a rehearing or reconsideration before the administrative decision-maker, unless exceptional circumstances indicate the court should make the decision the legislation has assigned to the administrative body: *Workers' Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, para 51.
- [50] No such exceptional circumstances exist in this case and I am satisfied that the appropriate remedy is to set aside the Merits Decision and remit the application to the RTB for reconsideration.

Costs

- [51] The general rule is that no costs are payable by a decision maker to an applicant who is successful on judicial review, absent evidence of misconduct or perversity in the proceedings before the decision maker or inappropriate argument on the merits of the judicial review application. While a breach of procedural fairness may, in some cases, justify a costs award against a tribunal, not all breaches of procedural fairness will be sufficient. Cases considering this issue have indicated that there is a high standard for misconduct and perversity. The rationale for this immunity is that government agencies have a duty to act and should not be punished for carrying out their duty absent unreasonable actions or special or exceptional circumstances: *Ball v. Beacham*, 2024 BCSC 21 at paras. 92-95.
- [52] Although I have found procedural unfairness in that the arbitrator did not allow the Landlord to respond to the case against them, I have rejected allegations of bias. The unfairness that arose in this case does not justify a departure from the usual rule that no costs are payable by the decision maker to the applicant who is successful on judicial review.
- [53] The parties shall bear their own costs of this judicial review.

"Latimer J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/03/2025BCSC0307.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/xu-v-jin-2025>

Prepared on 29 October 2026 · Esheria