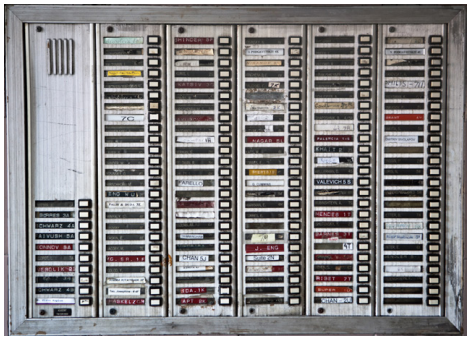
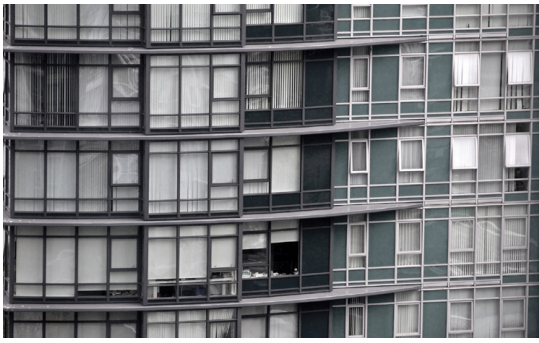
On Shaky Ground

Fairness at the Residential Tenancy Branch



By Jessie Hadley and Kendra Milne

Community Legal Assistance Society

October 2013

CLAS

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AUTHORS' SUMMARY

Our intention in creating this report is to investigate and document how the Branch is functioning in its key service areas: education, decision-making and enforcement.

We are lawyers at the Community Legal Assistance Society, a non-profit law office that advises and represents marginalized clients. One of our areas of specialty is landlord/tenant law.

Our office provides legal assistance to low-income clients with housing issues because it is one of the most important issues in their lives. In our view, tenancy relationships are different than other contractual relationships because adequate housing is a cornerstone that supports almost every aspect of an individual's well-being. Access to safe and stable housing has been repeatedly identified as a primary determinant of overall health,[1] and conversely, when housing is insecure or unsafe, there are significant consequences for both the individual tenant and the public generally.

BC's tenancy legislation sets out the rights and obligations of residential landlords and tenants. It provides a degree of security for tenants, imposes obligations to repair and maintain rental housing on landlords, and sets limits around when and how a tenancy can be terminated. The legislation also sets out a process to enforce those rights and obligations, which landlords and tenants can access via the Residential Tenancy Branch. A fair and consistent process for enforcing rights and obligations is essential for landlords *and* tenants; after all, rights that cannot be enforced quickly become meaningless.

Because of our focus on tenancy law in our legal practice, and the large volume of Residential Tenancy Branch files we review and hear about through community advocates working across BC, we are uniquely situated to identify both individual and systemic fairness issues in the Branch's operations. Our intention in creating this report is to investigate and document how the Branch is functioning in its key service areas: education, decision-making and enforcement. Our goal is to help the public and government to better understand the Branch's operations, and to suggest ways in which the system could work better to ensure the rights and obligations set out in BC's tenancy legislation continue to have meaning.

1 Canadian Medical Association, "Health care in Canada: What makes us sick?" (July 2013), pp. 6-7, cma.ca/multimedia/CMA/Content_Images/Inside_cma/Advocacy/HCT/What-makes-us-sick_en.pdf.

Our findings in this report are troubling and, in our view, reflect serious threats to the public's faith in the Branch and the efficacy of current legislative protections. In particular:

- While the Branch is doing reasonably well in providing educational services, there is room for improvement both in the accessibility and the accuracy of information provided.
- There are *significant and ongoing* problems with the Branch's adjudication services at all stages of the adjudication process, resulting in inconsistent and unreliable enforcement of the legislation.
- While the Branch has robust powers to investigate and penalize those who repeatedly violate the legislation, it is failing to make effective use of those powers.

In our opinion, many of these issues stem from the fact that the Branch is drastically underfunded when compared with other similar administrative decision-makers in the province. As a result, in recent years the Branch has prioritized efficiency and cost saving at the expense of fairness. For the rights and obligations contained in BC's tenancy legislation to have meaning, the provincial government must give the Branch a renewed focus and the necessary resources to do its job fairly and consistently. Without such a mandate, landlords and tenants alike cannot rely on the Branch to fairly determine disputes and, by extension, they cannot rely on the protections and obligations set out in BC's tenancy legislation.

— Jessie Hadley and Kendra Milne

Our findings are troubling and, in our view, reflect serious threats to the public's faith in the Branch and the efficacy of current legislative protections.

PHOTO: IMOGENE HUXHAM/FLICKR

INTRODUCTION AND FRAMEWORK

The Branch's work affects a large number of British Columbians: Statistics Canada reports that over 30% of BC's households rent their living accommodation.

The Residential Tenancy Branch is responsible for administering the legislation that governs all residential landlord and tenant relationships in BC. The Branch's work affects a large number of British Columbians: Statistics Canada reports that over 30% of BC's households rent their living accommodation.[2]

For tenancy laws to have a meaningful impact for tenants and landlords, all parties must have access to:

- A source of reliable and accurate information explaining the content of those laws;
- A reliable and just system to adjudicate their rights and obligations when legal disputes arise; and
- Effective mechanisms to enforce the law.

The Branch has a mandate to provide services in each of these areas, and its approach has a major impact on residential landlords and tenants. This is particularly true because:

- The Branch is the primary source of information on tenancy laws;
- The Branch is the only place that tenants and landlords can go to resolve tenancy disputes, and the only agency charged with enforcing the tenancy laws; and
- Tenancy disputes are not trivial; they include disputes that can and do lead to rapid homelessness, disputes relating to the health and safety of rental premises, and disputes over significant sums of money and property.

This report is an assessment of the current services provided by the Branch, with a specific focus on administrative fairness.

2 Statistics Canada, "Housing affordability for owner and renter households, showing presence of mortgage and condominium status for owner households, 2006 counts, for Canada, provinces and territories - 20% sample data (table)" (2006), www12.statcan.gc.ca/census-recensement/2006/dp-pd/hlt/97-554/T807-eng.cfm?Lang=E&T=807&GH=4&SC=1&SO=99&O=A.

BRANCH OVERVIEW

The Branch administers the two statutes that govern residential landlord/tenant law in BC, as well as their corresponding regulations.

The legislation that governs tenancies in "rental units" (such as apartments, rental suites, and houses) is the *Residential Tenancy Act*[3] and the *Residential Tenancy Regulation*.[4] The corresponding legislation governing tenancies on "manufactured home sites" (in manufactured home parks) is the *Manufactured Home Park Tenancy Act*[5] and the *Manufactured Home Park Tenancy Regulation*.[6]

The Branch is currently operated by the Ministry of Natural Gas Development. The Branch has been transferred across ministries five times in the past decade. From 2004–2013 it has also been "hosted" by: the Ministry of Public Safety and Solicitor General (2004–2005); the Ministry of Forests and Range (2005–2009); the Ministry of Social Development (2009–2011); and the Ministry of Energy, Mines and Natural Gas (2011–2013).

The Branch has approximately 90 full-time employees including its director.[7] Two key categories of Branch employees are information officers, who provide the public with information, and arbitrators (formerly known as "dispute resolution officers"), who adjudicate disputes. The Branch employs approximately 44 and 27 employees in these categories respectively, and also hires contractors to handle part of the adjudication caseload.[8]

Tenancy disputes are not trivial; they include disputes that can and do lead to rapid homelessness, disputes relating to the health and safety of rental premises, and disputes over significant sums of money and property.

PHOTO: PAUL LIM/FLICKR

3 SBC 2002, c. 78 ("RTA").

4 BC Reg 477/2003 ("RT Regulation").

5 SBC 2002, c. 77 ("MHPTA").

6 BC Reg 481/2003 ("MH Regulation").

7 Unlike most administrative tribunals which are created by statute, BC's tenancy legislation doesn't expressly create the Residential Tenancy Branch; in fact, they don't even mention it. Rather, they provide that "a director must be appointed in accordance with the *Public Service Act* for the purposes of" the two statutes. The Director is a government employee responsible for administering the legislation, and she has the ability to delegate most of her powers to others, and to appoint employees (or retain contractors) to exercise those powers. The Branch is the administrative agency within government that has developed as a result of the Director's appointments and delegations under the RTA and MHPTA. Throughout this report, for simplicity we use the term "Branch" to refer both to the Director and to the Residential Tenancy Branch as a whole.

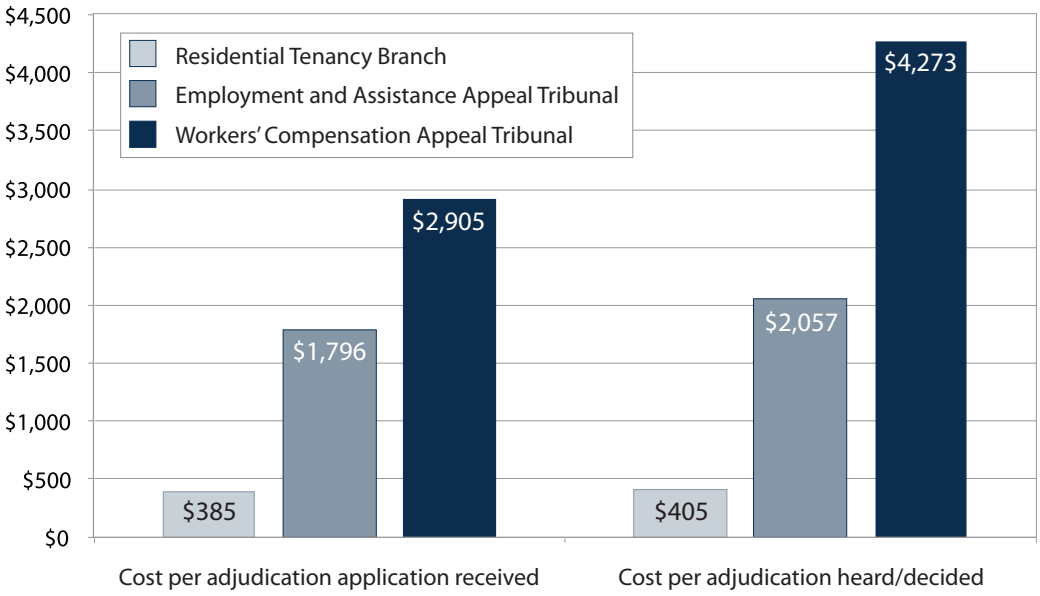
8 Telephone conversation with Cheryl May, September 17, 2013.

The Branch has a budget of approximately $8,000,000 per year. According to the government's most recent estimates (for the fiscal year ending March 2014), it is expected that out of this budget:

- $6,692,000 will go to salaries and benefits for employees of the Branch;
- $239,000 will go to contract arbitrators;
- $709,000 will go to information systems, including the Branch's teleconference, call centre, case management systems, and web hosting;
- $176,000 will go to office and business expenses; and
- $62,000 will go to legal fees for services from the Ministry of Justice.[9]

Assuming application and hearing numbers remain relatively constant, the Branch's total budget per adjudication file is approximately $400. While this does not reflect the true cost of each adjudication, it does provide a means to compare the overall budget breakdowns of other administrative decision-makers. As illustrated by Figure 1, the Branch's total budget per adjudication is very small in relation to other comparable administrative decision-makers, despite the fact that the Branch has a broader mandate than the comparable tribunals. In short, the Branch must do more with *significantly* less money.[10]

FIGURE 1: TOTAL BUDGET BROKEN DOWN PER ADJUDICATION



9 BC Ministry of Finance, Supplement to the Estimates – Fiscal Year Ending March 31, 2014, p. 32, www.bcbudget.gov.bc.ca/2013/estimates/2013_Supplement_to_the_Estimates.pdf. Thanks to Branch Director Cheryl May for explaining the figures to us in a telephone conversation on February 21, 2013.

10 Employment and Assistance Appeal Tribunal Annual Report 2011/2012, pp. 10 and 24, www.gov.bc.ca/eaat/popt/annual_reports.htm; 2012 Annual Report of the WCAT Workers' Compensation Appeal Tribunal, pp. 8 and 15, www.wcat.bc.ca/research/WCAT_publications/WCAT_reports/index.aspx. The mandates of both the Employment and Assistance Appeal Tribunal and the Workers' Compensation Appeal Tribunal do not include an education or enforcement component. The function of both is limited to adjudicating appeals.

WHY ADMINISTRATIVE FAIRNESS AT THE BRANCH IS IMPORTANT

We are interested in the services provided by the Branch, and whether those services are provided in a fair way, for three main reasons:

- **TENANCY ISSUES ARE IMPORTANT ISSUES.** Housing is critical to a person's social and economic wellbeing, and the Branch's mandate directly impacts the accessibility, security, and safety of rental housing in BC. The Branch handles disputes that determine whether a person is entitled to remain in her home, or whether her rent can be increased. It can award damages of up to $25,000. It also has the power to enforce the law to ensure that landlords maintain safe and livable accommodation. These issues are important to the individuals involved, and given the number of tenants in BC and the importance of housing security, the functioning of the Branch should also be of concern to the general public.
- **MANY PEOPLE HAVE A STAKE.** Many people in BC are landlords or tenants who rely on the Branch for information, the adjudication of disputes, or help with the enforcement of tenancy laws. The Branch website received nearly 1.3 million hits in 2011/12, and its call centre received nearly 200,000 calls.[11] The Branch received 20,756 applications for dispute resolution in 2011/12, and its arbitrators heard 19,768 arbitration hearings.[12] (For comparison, BC's Small Claims Court, which deals with civil disputes of all kinds valued at less than $25,000, had only 15,612 new cases in 2011/12.)[13]
- **THE BRANCH HAS EXCLUSIVE JURISDICTION.** Since BC's current tenancy legislation came into force in 2004, the Branch has had sole jurisdiction to adjudicate landlord/tenant issues and there are very limited appeal options. Landlords and tenants who are in conflict cannot, in most cases, have their disputes resolved by courts or any other public body. The Branch is also the only agency charged with enforcing compliance with tenancy legislation.

The Branch is a key point of interaction with the justice system for many people, and it is the only public agency charged with ensuring that BC's tenancy legislation has practical meaning for landlords and tenants.

The Branch is a key point of interaction with the justice system for many people, and it is the only public agency charged with ensuring that BC's tenancy legislation has practical meaning for landlords and tenants. For these reasons, it is imperative that the Branch operate in a fair and reliable way that leaves participants feeling like they have had their issues addressed in a professional and just manner.

11 Quarterly Activity Reports: Residential Tenancy Branch, 2011/12, Branch response to October 5, 2012 FOI request by Community Legal Assistance Society, HOU-2012-00043 ("FOI Request"), Phase 1, p. 50.

12 Laura Monner, *Residential Tenancy: Dispute Resolution Report 2007/08-2011/12* (October 5, 2012), pp. 9 and 17.

13 Provincial Court of BC, Annual Report 2011-2012, p. 15, www.provincialcourt.bc.ca/downloads/pdf/annualreport2011-2012.pdf.

STRUCTURE OF THE REPORT

To assess the functioning of the Branch, we will examine three key areas of its operation:

- **EDUCATION.** Through its information officers, website, and public presentations, the Branch provides landlords and tenants with information about tenancy law.
- **ADJUDICATION.** The Branch provides a government-run arbitration service (known as "dispute resolution") to decide disputes between landlords and tenants that cannot be resolved informally.[14] Orders made through the arbitration process are final and binding, and can be enforced through the courts.
- **ENFORCEMENT.** The Branch is empowered to investigate parties that breach the legislation and/or fail to comply with orders arising from the Branch's dispute resolution service. The Branch is also authorized to impose administrative penalties on those who break tenancy laws.[15]

This report examines three areas of the Branch's operations in detail, focusing on the period from 2006 to the date of publication, and assesses how well the Branch has been functioning.

This report examines these three areas of the Branch's operations in detail, focusing on the period from 2006 to the date of publication, and assesses how well the Branch has been functioning. We focus primarily on operational issues rather than on the possibility of amending the tenancy legislation itself. At the end of each section we make recommendations to improve the Branch's effectiveness.

Throughout this report, we consider the extent to which the Branch's operations demonstrate "administrative fairness."

WHAT WE MEAN BY "ADMINISTRATIVE FAIRNESS"

This report assesses three key functions of the Branch through the lens of administrative fairness. The term "administrative fairness," as we use it, is a broad concept that encompasses:

- Accessibility of services;
- Accuracy of information provided;
- Fairness, and perception of fairness, in all aspects of operation;
- Quality of decision-making, including transparent reasons for decisions; and
- Responsiveness to complaints and problems.

This framework for assessing administrative fairness comes primarily from two sources. First, we used the standards of fairness applied to administrative decision-makers by superior courts when they assess decisions through judicial review. These standards focus on adjudication and ensuring that each party receives a just and unbiased decision-making process. Second, we relied on the *Ombudsperson Act,*[16] which sets out the BC Ombudsperson's investigatory scope when reviewing administrative practices and services of public agencies to ensure they are fair, reasonable, appropriate and equitable.

14 Residential Tenancy Branch, "Residential Tenancy Branch," www.rto.gov.bc.ca.
15 RTA ss. 94.1-94.31, 96.1; MHPTA ss. 86.1-86.31, 88.1.
16 1996 RSBC c. 340, s. 23.

METHODOLOGY

This report draws on information from the following sources.

- **MATERIALS PUBLICLY AVAILABLE ON THE BRANCH'S WEBSITE:** We reviewed the content on the Branch's website to determine what type of information is presented, how the information is presented, and the kinds of topics covered.
- **FOI DOCUMENTS:** We made a comprehensive request under the *Freedom of Information and Protection of Privacy Act*[17] (our "FOI request"), seeking documents relating to many aspects of the Branch's operations. This request resulted in the production of just over 3,400 pages of material relating to topics such as the Branch's policies and practices; its budget; complaints from the public; staff training; and a wide range of statistical data.
- **BRANCH MATERIALS** provided to us for the specific purpose of this report: The Branch's Director provided us with two reports, not publicly available, analyzing data the Branch has collected between 2006 and 2012 on many aspects of the Branch's operations.[18]
- **STAKEHOLDER INTERVIEWS:** We reached out to all the major stakeholders that represent the interests of landlords and tenants in BC, and invited them to participate in an interview and share their observations about the Branch's operations. Stakeholders included:
    - Active Manufactured Home Owners' Association (AMHOA);
    - BC Apartment Owners and Managers Association (BCAOMA);
    - BC Housing;
    - BC Non-Profit Housing Association;
    - BC Public Interest Advocacy Centre (BCPIAC);
    - Community advocates;
    - Community Advocates Support Line;
    - Law Students' Legal Advice Program (LSLAP);
    - Manufactured Home Park Owners' Alliance of BC (MHPOA);
    - Pivot Legal Society;
    - Rental Housing Council of BC;
    - Rental Owners and Managers Society of BC (ROMS BC); and
    - TRAC Tenants Resource & Advisory Centre.

  A detailed listed of the participants is included in Appendix 1. We asked interviewees to limit their comments to matters they had directly encountered in their work.

We reached out to all the major stakeholders that represent the interests of landlords and tenants in BC, and invited them to participate in an interview and share their observations about the Branch's operations.

17 1996 RSBC c. 165.

18 Mohammad Shojaei and Laura Monner, *Residential Tenancy: Dispute Resolution Report 2006-2010* (March 17, 2011); Laura Monner, *Residential Tenancy: Dispute Resolution Report 2007/08-2011/12* (October 5, 2012).

We conducted a comprehensive review of Supreme Court judicial review decisions issued between January 2006 and December 2012 in which landlords or tenants challenged decisions of the Branch.

PHOTO: PJMIXER/FLICKR

- COURT DECISIONS. We conducted a comprehensive review of Supreme Court judicial review decisions issued between January 2006 and December 2012 in which landlords or tenants challenged decisions of the Branch.
- BRANCH ARBITRATION DECISIONS. In October 2008, the Branch began posting anonymized versions of arbitration decisions on its website. We examined a sample group of decisions posted during the 18-month period ending April 2013 to assess the quality of arbitrator decision-making.
- DOCUMENTS RELATING TO ADMINISTRATIVE PENALTIES. The Branch has rarely exercised its enforcement powers, engaging in only one investigation and issuing only one administrative penalty. We reviewed all of the key documents relating to this investigation and penalty.

With this information, we were able to gain a better understanding of the Branch's operations and how well they comply with basic elements of administrative fairness.

BRANCH FUNCTION 1:

PUBLIC EDUCATION

The tenancy legislation authorizes the Director of the Branch to provide landlords and tenants with information about their legal rights and obligations.[19] The provision of public educational services is particularly important because accurate and accessible educational material can help to avoid or resolve disputes quickly, and can encourage parties to structure their tenancy relationships in accordance with the law.

The Branch carries out its public education function in three main ways: through employees called information officers, its website, and regular public information presentations to approximately 2,000 people per year.[20] In this section of the report, we will focus on the services provided through information officers and the Branch website.

The provision of public educational services is particularly important because accurate and accessible educational material can help to avoid or resolve disputes quickly.

INFORMATION OFFICERS

The Branch currently employs approximately 44 information officers to staff the Branch's telephone information line and email service, and to answer questions in person at the Branch's offices in Burnaby and Victoria.[21] Information officers may also, at their discretion, conduct "interventions," whereby they phone one party at the request of another, to explain the rights and obligations created by the tenancy legislation.[22]

The Branch provides its information services to support successful tenancies by assisting parties to properly establish tenancy relationships, helping them to avoid or resolve disputes informally, and providing them with information about the dispute resolution process.[23]

19 RTA s. 9(5)(a); MHPTA s. 9(5)(a).
20 Telephone conversation with Cheryl May, September 17, 2013.
21 Telephone conversation with Cheryl May, September 17, 2013.
22 This is set out on the Branch's website: www.rto.gov.bc.ca/content/resolvingIssues/default.aspx.
23 Email from Cheryl May, September 6, 2013.

In our view, it is very beneficial for the Branch to have developed the website materials. In particular, the factsheets and guidelines are a useful resource for parties seeking to resolve disputes informally.

PHOTO LIVING IN MONROVIA/FLICKR

Residential Tenancy Branch website

The Branch website contains a very large amount of information on tenancy law and the Branch dispute resolution process, including:

- All of the relevant legislation;
- The Branch's rules of procedure;
- A general guide for landlords and tenants under the *Residential Tenancy Act,* and a parallel guide under the *Manufactured Home Park Tenancy Act*;
- 42 "policy guidelines" setting out how parties can expect the law to be interpreted and what kind of evidence is likely to assist them;
- 40 fact sheets giving brief explanations of key points of law and procedure;
- Copies of the Branch's forms for establishing and ending a tenancy, and applying for and responding to all types of dispute resolution; and
- A database of Branch arbitration decisions.

In our view, it is very beneficial for the Branch to have developed these materials. In particular, the factsheets and guidelines are a useful resource for parties seeking to resolve disputes informally. They also promote consistent decision-making and enable parties to effectively prepare for hearings. The courts have lent validity to the Branch's policy guidelines by taking them into consideration on judicial review; in some cases the courts have endorsed the guidelines' interpretation of the law,[24] and have referred to the guidelines as "succinctly stating the law"[25] and "providing assistance."[26]

When printed out, the materials on the Branch's website run to many thousands of pages. The Branch provides hard copies of its materials to people who do not have the ability to download and print them.

24 *Shea v. Tyrell*, 2007 BCSC 1601, paras. 10-11 (referring to Residential Tenancy Branch, *Policy Guideline 14. Type of Tenancy: Commercial or Residential*).

25 *Lawrence v. Kaveh*, 2010 BCSC 1403, para. 18 (referring to Residential Tenancy Branch, *Policy Guideline 6. Right to Quiet Enjoyment*).

26 *Clements v. Gordon Nelson Investments,* 2010 BCSC 31, paras. 15-16 (referring to Residential Tenancy Branch, *Policy Guideline 37. Rent Increases*).

Reviewing educational services

In our view, a well-functioning administrative system providing educational information must do so in a manner that is both accessible and accurate. With that in mind, we have reviewed and assessed the Branch's educational services for accessibility and accuracy.

ACCESSIBILITY OF THE BRANCH'S EDUCATIONAL SERVICES

The Branch's provision of educational information through information officers and the Branch website offers the potential for public access to comprehensive information on tenancy law. It is important that these services be reasonably accessible to everyone.

A well-functioning administrative system providing educational information must do so in a manner that is both accessible and accurate.

Accessibility must be considered in light of the fact that tenants and landlords have many different levels of knowledge and sophistication. Some landlords are large corporations with staff assigned to deal with legal issues, while others are homeowners who simply rent out basement suites. Some tenants are highly educated and capable of putting together complicated legal submissions, while others have significant disabilities or literacy barriers. Many landlords and tenants also face language barriers. Ideally, all of these people should be able to meaningfully access the Branch's educational services.

Some of the ways in which the Branch currently provides its educational services do enhance their accessibility:

- INFORMATION IS CONVEYED IN MULTIPLE WAYS. Individuals have different limitations in the way they can access educational material. Some have a functional level of literacy, while others don't. Some are comfortable using computers, while others are not. Physical limitations make visiting a Branch office difficult for some, while communicating in person is preferable for others. The variety of ways the public can access the Branch's information makes it more accessible.
- THE BRANCH'S MATERIAL IS, TO SOME EXTENT, WRITTEN IN PLAIN LANGUAGE. Many people have difficulty understanding complex legal information, and the fact that the Branch has tried to distill the contents of the governing tenancy legislation into plain language documents like fact sheets and guides does make the content more accessible.
- THE BRANCH MAKES SOME TRANSLATED INFORMATION AVAILABLE. Obviously someone who is not fluent in English will have trouble accessing legislation and educational materials presented only in English. The Branch has made some effort to translate two basic documents.[27]

While these aspects of the Branch's provision of educational services have a positive impact on the accessibility, stakeholders did identify areas needing improvement.

27 The Branch has translated its general booklet, *Residential Tenancy Act: A Guide for Landlords & Tenants in British Columbia* into three languages, and its two page general fact sheet "What Everyone Needs to Know" into 11 languages.

"After receiving a message on the Residential Tenancy Office's 1-800 telephone line that there was a 35 minute wait to talk to anyone, I decided to make my request via email…I guess I'm lucky mine isn't an emergency… [because] for those for who it is, this seems like an inordinate inconvenience." [28] **—** ***Complaint email***

Lengthy phone wait times

In 2011/2012, monthly average telephone wait times to speak to an information officer have ranged from a low of 11 minutes to a high of 28 minutes.[29] While the numbers have improved significantly in recent years, the community advocates we spoke to, most of whom make regular use of the information line in their work, reported that telephone wait times can be extremely lengthy, often well exceeding the monthly average wait times. This makes the information line essentially inaccessible, especially for callers with low incomes who are calling from pay-by-minute cell phones or using shared phones in shelters or other public agencies. Some advocates also reported their calls being dropped as they waited to speak to an information officer, which is a particular problem when wait times can be so lengthy.

The website is complex and difficult to navigate

Community advocates who had experience using the Branch's website commented that, due to the large volume of information on the website, and the text-dense nature of the site, the Branch's online materials can be difficult to find. This is true even for those familiar with the site, and especially for those who do not use the site on a routine basis.

A huge amount of information is set out in the fact sheets and policy guidelines, and much of that information is very important to prepare for the dispute resolution process. The information is scattered throughout more than 80 documents that must essentially be searched by skimming the titles and descriptions. It is very easy to miss pertinent information.

The online arbitration decision database is difficult to access

In 2008 the Branch began posting arbitrators' decisions on its website with most identifying information redacted.[30] Since then, it has increased the proportion of new decisions posted online and currently most new decisions are posted within a few weeks of being issued.

When an administrative decision-maker like the Branch posts decisions online, there are significant potential benefits, including increased accountability and consistency in decision-making. In addition, when decisions are online and can be searched by legal topic or fact pattern, litigants can see how past disputes like theirs have been decided. This can help parties resolve their disputes informally, and reduce the chance they will have to resort to arbitration.

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28 Complaint email (July 30, 2010), FOI Request, Phase 3, Part 1, p. 689.

29 Quarterly Activity Report, Residential Tenancy Branch 2007/08 to 2012/13, FOI Request, Phase 1 p. 53.

30 This is contemplated by s. 9(5)(c) of the RTA and the MHPTA.

Unfortunately, however, the benefits of posting Branch decisions are not being realized because of the limitations of the search interface. Some of the landlord and tenant stakeholders we talked to felt positively about the idea of the Branch posting arbitration decisions online, but reported that they find the current search interface so rudimentary that it is of very limited use. Its shortcomings mean that searches often yield an unmanageable and unhelpful number of search results. This means that, in practice, the decision database does not go very far toward promoting dispute avoidance.

The Branch's online/print material is inaccessible to those with language barriers, low literacy, limited computer skills, or lack of internet access

Some community advocates stressed the importance of the Branch remembering that online resources cannot be expected to fill the "information gap" for all members of the public. In addition, while the Branch has made an effort to produce publications in simple and straightforward language, much of the useful information contained in the policy guidelines and factsheets is not accessible in languages other than English.

While the Branch has made an effort to produce publications in simple and straightforward language, much of the useful information contained in the policy guidelines and factsheets is not accessible in languages other than English.

While translating legal material can be expensive, providing additional material in multiple languages would benefit some already vulnerable parties that may not have access to someone qualified to translate for them, especially on an urgent basis. This is particularly the case for Branch materials that set out urgent timelines and significant consequences if timelines are not met (for example, the materials that explain the procedure for disputing a Notice to End Tenancy, which requires the tenant to file for dispute resolution within five or ten days, depending on the type of Notice).

All in all, while the Branch makes available a good variety and volume of educational information through its information officers and through the Branch website, there are ways the information could be provided more accessibly.

ACCURACY AND RESPONSIVENESS OF EDUCATIONAL SERVICES

Even the most accessible educational materials are not effective unless they are accurate. With this in mind, we have reviewed the Branch's educational services to see whether they provide accurate information that reflects the content of the tenancy legislation.

Website content: Fact sheets and guidelines

During the time we researched this report, the Branch was reasonably responsive to input from community advocates about specific content problems that they have identified with its fact sheets and guidelines. The Branch has also appeared reasonably willing to develop new guidelines and fact sheets to address inaccuracies or confusion, although the process for doing so has been very slow.

For example, one guideline of great interest to community advocates deals with the role of agents at Branch hearings. The current guideline is problematic in that it leaves it up to arbitrators to determine whether and when community advocates may speak on their clients' behalf, without giving any guidance about how this discretion should be exercised.[31] Beginning in mid-2012 the Branch began work on amending the guideline to address this concern. As of the publication of this report, the Branch expects the guideline to be complete by the end of September 2013.[32]

While the Branch has been responsive to improving its fact sheets and guidelines to ensure they are clear and accurate, there are other aspects of the Branch's educational services that cause serious concern.

Incomplete and inconsistent information from information officers

Landlord and tenant stakeholders we spoke to felt that Branch information officers need to do a better job of providing the public with helpful, accurate information.

Many stakeholders we spoke to reported having received inconsistent or incorrect information about law and procedure from information officers.

- Many stakeholders we spoke to reported having received inconsistent or incorrect information about law and procedure from information officers. Landlord stakeholders also complained that information officers are not providing consistent information.[33] The perception among these interviewees was that, if a person calls in and speaks to two different information officers, she may well get two different answers.
- Tenant stakeholders routinely field questions from callers who have already spoken to information officers, but who were not alerted to basic information that would have answered the callers' questions. Information officers appear in such cases to have been referring callers to tenant stakeholder organizations rather than answering their questions directly.[34] One tenant stakeholder representative we spoke to stated that, based on the referrals she receives from the Branch, it seems to her that most information officers are ill equipped to grapple with manufactured home park law in particular.

Inappropriate provision of legal advice by information officers

Community advocates reported specific cases where information officers appear to have gone beyond providing information and have purported to offer legal advice to parties (for example by advising them whether or not it is worthwhile to pursue an application; advising them whether to file evidence in response to an application; or advising them on how much to claim on a monetary application). When information officers overstep their role of providing information, and inappropriately seek to advise parties on their specific case, this can seriously compromise parties' ability to pursue their rights.

31 Residential Tenancy Branch, *Residential Tenancy Policy Guideline 26. Agents* (January 2004).
32 Telephone conversation with Cheryl May, September 17, 2013.
33 We heard this from the ROMS BC and community advocates.
34 We heard this from TRAC and AMHOA.

"I have received both conflicting and incorrect advice from the RTB. Since I am part of the general public… and certainly am not an authority on the RTB or [its] Act or Regulations, it is my belief [that] I should be able to rely on the people who work for the Ministry and the employees of the RTB."[35] — *Complaint letter*

Insufficient training and excessive workload for information officers

With 185,000 to 200,000 calls and 15,000 to 18,000 email contacts per year plus in-person visits being handled by only 44 information officers, these employees must be working under intense pressure. In our view, hiring additional staff to share the heavy workload would likely improve the quality of service provided by information officers.

Our FOI request asked for all documentation regarding the nature, duration, and frequency of training of information officers, and copies of any training materials provided to information officers, from 2005 onward. The Branch's response provided us with very little material geared toward information officer training for this eight-year period. There appears to be very little systematic training on the *substance* of the tenancy legislation. Instead, the training materials available have a distinctly administrative focus (e.g. office and computer systems, client communication, and instructions for processing forms).[36] With this in mind it is in our view unsurprising that many information officers appear to find it extremely challenging to effectively fulfill their information-provision role.

The Branch's response provided us with very little material geared toward information officer training for this eight-year period. There appears to be very little systematic training on the *substance* of the tenancy legislation.

Despite the Branch's efforts to provide a wide variety of educational services, all stakeholders agreed that there are problems with the accuracy of information provided by these services.

EARLY DISPUTE RESOLUTION AND EDUCATION SERVICES

Finally, we note that one of the Branch's stated goals for providing some of its educational services, and in particular the service of information officers, is to resolve disputes before parties apply for arbitration. While this is a laudable goal and much of the educational material does assist, information officers could play a much stronger role in the early resolution of disputes, and in fact the legislation contemplates that the Branch's staff may do so.[37]

We understand from the Branch that only a small number of information officers actually have a practice of intervening in a dispute at one party's request by calling the other party to inform them about the law.[38] This means the Branch is missing opportunities to intervene in disputes at an early stage, which would likely reduce the number of matters that proceed to dispute resolution.

More active interventions by the Branch, which would be seen as objective in the dispute, would assist parties to resolve their disputes at an early stage, particularly when the dispute arises from one party's ignorance of the law.

35 Complaint letter (January 28, 2011), FOI Request, Phase 3, Part 2, p. 16.
36 FOI Request, Phase 2, Part 3, pp. 1-91.
37 RTA and MHPTA, s. 9(5)(b).
38 Telephone conversation with Cheryl May, April 15, 2013.

PUBLIC EDUCATION CONCLUSION AND RECOMMENDATIONS

To assist landlords and tenants to resolve disputes at an early stage, the Branch should train information officers to intervene in appropriate cases by telephoning parties to inform them about the law.

PHOTO: ANDREA CHURCH/FLICKR

The Branch fulfills the education component of its mandate by providing a wide range of informational materials, and those materials can be accessed in a number of different ways. The breadth of information, and the different ways that information is provided, is commendable. However, the stakeholders consulted for this report did identify room for improvement in both the accessibility and the accuracy of the Branch educational materials.

RECOMMENDATION 1: The Branch can improve the accessibility of its educational services by:

- Reducing average telephone wait times as much as possible, and ensuring that no caller must wait longer than 10 minutes to speak to an information officer;
- Making the Branch website more user-friendly so that parties can find the information they need, including significantly improving the decision search function; and
- Continuing to create plain language and translated documents, prioritizing documents that set out urgent procedures and timelines.

RECOMMENDATION 2: The Branch can improve the accuracy of its educational services by:

- Improving training and support for information officers to ensure they provide accurate and complete information, and to ensure that they do not go beyond an information provision mandate; and
- Ensuring that information lines are well staffed so that information officers have sufficient time to find accurate answers to questions from the public.

RECOMMENDATION 3: To assist landlords and tenants to resolve disputes at an early stage, the Branch should train information officers to intervene in appropriate cases by telephoning parties to inform them about the law.

BRANCH FUNCTION 2:

ADJUDICATION

The Branch's adjudicative function is at the core of its work. Unlike its public education and enforcement powers, which are not mandatory, the Branch *must* decide landlord/tenant disputes that fall under the jurisdiction of the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act*.[39] Reliable and effective adjudication at the Branch is necessary to ensure that the rights and obligations set out in the legislation have meaning.

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The tenancy legislation refers to the Branch's arbitration process as "dispute resolution." This terminology connotes a broader range of options for resolving disputes than contemplated in the previous version of the legislation (which simply referred to "arbitration"). The legislation also provides that the Branch may offer parties the opportunity to settle disputes or assist parties in settling disputes.[40]

In practice, however, dispute resolution by the Branch involves a conventional adversarial hearing process where an arbitrator hears from both sides and then decides the case. The Branch does not offer mediation services separate from the hearing process, and it only provides minimal mediation training. Arbitrators may sometimes invite the parties to attempt to settle a matter, and if the parties reach an agreement before or during a hearing an arbitrator may record the settlement in the form of a decision or order.[41]

The Branch's adjudication procedures are designed to provide efficient adjudication, and this is appropriate because many issues before the Branch arbitrators are likely to be considered time sensitive by one or both of the parties involved. However, timeliness and efficiency are not the only goals that should be kept in mind when designing an adjudicative process. As recognized by the Branch's own procedures, it is also essential that adjudication be done in a just and consistent manner.[42]

39 RTA ss. 58(2) and 61; MHPTA ss. 51(2) and 54.
40 RTA s. 63; MHPTA s. 56.
41 RTA s. 63(2); MHPTA s. 56(2).
42 Residential Tenancy Branch, Rules of Procedure, Rule 1.2.

HOW WE ASSESS ADMINISTRATIVE FAIRNESS IN ADJUDICATION

Assessing administrative fairness in adjudication by a high volume decision-maker is difficult. This is particularly true with the Branch because it typically decides legal disputes that are unlikely to result in further legal action beyond the simplified, low cost and publicly accessible Branch processes.

While the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act* do provide a limited process for the Branch to do its own internal review when parties are unsatisfied with a Branch decision, that review is very narrow: internal review by the Branch is *only* available to parties where they can show (a) they missed their hearing through no fault of their own; (b) they have discovered new relevant evidence after their hearing; or (c) their arbitration decision was obtained through fraud.[43] For parties who have any other type of problem with their arbitration decision, the review provisions in the legislation do not provide a remedy.

The internal review process does not address situations where parties believe:

- They did not get a fair hearing at the Branch;
- Their arbitration decision doesn't make sense or doesn't deal with all the issues raised in the arbitration; or
- The arbitrator has applied the law improperly, or has made factual findings that cannot be supported by the evidence.

Once a Branch decision is issued, the implications of that decision often unfold quickly, in which case there may not be enough time to seek legal advice or take further legal action.

In these kinds of situations, if a party is unsatisfied with a Branch decision, the only remaining process for challenging the decision is a judicial review before the BC Supreme Court.[44] However, it is generally unlikely that a party to a Branch decision will seek a judicial review because:

- Once a Branch decision is issued, the implications of that decision often unfold quickly, in which case there may not be enough time to seek legal advice or take further legal action;
- Without a lawyer, a judicial review can be a complicated and daunting process for many people, and particularly those with language or literacy barriers;
- There is very limited publicly funded legal aid for tenancy disputes; and
- The monetary value of Branch disputes is often quite small and never more than $25,000, so the costs of hiring a lawyer to file a judicial review, and the risk of court costs, are often disproportionate.[45]

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43 RTA s. 79; MHPTA s. 72.

44 Judicial review is available to parties who are affected by a decision of any administrative decision-maker in BC. The process of judicial review is governed by the *Judicial Review Procedure Act*, RSBC 1996 c. 241 and, in many cases, also by the *Administrative Tribunals Act*, SBC 2004 c. 45.

45 We estimate that the cost of hiring a lawyer to a typical judicial review of an arbitration decision is in the range of $5,000 to $10,000. In complex cases, the cost would be higher. If a party seeks judicial review and loses, the court can also order that the losing party pay the court costs of the other side, which can easily be several thousand dollars. Just the initial filing fee for a judicial review is $250. In contrast, the Branch awarded an average of $1,682 to landlords and $1,102 to tenants in 2011/12. See Laura Monner, *Residential Tenancy: Dispute Resolution Report 2007/08-2011/12* (October 5, 2012) at page 28.

"We do not have the resources to file a judicial review in the Supreme Court, as I was advised engaging a lawyer would be necessary as well as any fees."[46] — *Complaint letter*

Given the feedback we received from both landlord and tenant stakeholders and the outcomes of our direct review of Branch decisions explained further below, it seems unlikely to us that the relatively small number of judicial review decisions can be explained as reflecting litigants' overall satisfaction with their experience at the Branch.

In our view, all of this means that we cannot assess the quality of Branch decision-making by looking at the *number* of parties that seek judicial review, or the *number* of decisions that are overturned by higher courts. In our opinion, a better assessment of the overall fairness of the Branch's adjudicative function requires a more substantive look at three sources of information:

- STAKEHOLDER PERSPECTIVES. Through our interviews for this report, we obtained a range of stakeholder perspectives on the Branch's adjudication process. These anecdotal reports show what issues are most important to those who frequently use the Branch's adjudication process.
- JUDICIAL PERSPECTIVES. We analyzed the BC Supreme Court decisions that have been issued in judicial reviews of Branch decisions. These decisions show the kinds of problems the courts have identified.
- REVIEW OF BRANCH DECISIONS. Finally, we reviewed a sample set of Branch decisions published on the Branch website. This enabled us to methodically examine the Branch's level of compliance with the basic objective requirements of fair decision-making, and to see if any issues raised by stakeholders or the court were readily apparent.

An overview of our findings for each of these three sources of information is outlined below.

METHOD 1 FOR ASSESSING ADJUDICATION: STAKEHOLDER PERSPECTIVES

Most of the landlord stakeholders we spoke to indicated that on the whole they are satisfied with the Branch's adjudicative processes,[47] although some specific concerns were identified. In contrast, all of the tenant stakeholders we spoke to were dissatisfied with aspects the Branch's adjudication. Later sections will explore some of the specific stakeholder concerns in detail.

46 Complaint letter (March 20, 2012), FOI Request, Phase 3, Part 3, p. 160.

47 These included BC Housing, ROMS BC, MHPOA, and the Rental Housing Council of BC.

METHOD 2 FOR ASSESSING ADJUDICATION: JUDICIAL PERSPECTIVES

While the anecdotal accounts of stakeholders provide insight into Branch adjudication, so does the perspective of an objective body with no direct interest in the tenancy system: the court.

Judicial review is a legal process available to landlords and tenants who are unsatisfied with the Branch hearing and its decision in their case. In a judicial review, the unsatisfied party applies to the BC Supreme Court requesting that a judge review the arbitrator's decision, and the process that led up to it.

The court's role in a judicial review is very limited because courts are required by law to show deference to the decisions of administrative decision-makers like the Branch. This means that in a judicial review of a decision by a Branch arbitrator, the judge must keep in mind that the legislature assigned the task of deciding residential tenancy disputes to the Branch, not the courts. On judicial review, then, a judge will not simply re-determine the case for herself, but will instead examine the way the arbitrator decided it, and look to see whether there are any problems sufficiently serious to justify setting aside the decision.[48] If so, the judge typically will not re-decide the case herself, but will instead remit the case to the Branch for a re-hearing to correct the problems.

To assess the quality of Branch decision-making, we conducted a comprehensive review of every BC Supreme Court decision that we could locate for the period from January 1, 2006 to December 31, 2012 dealing with the merits of a judicial review of a Branch decision. We located 78 decisions of this kind.[49]

Concerns about the Branch's perspective on judicial review

When a court issues a decision on judicial review, that decision is a valuable piece of guidance for the administrative decision-maker involved. The judge often takes great care to craft directions for the decision-maker, so that any errors the court identifies can be corrected.

Unfortunately, in our study we did not see clear evidence that the Branch takes this judicial guidance into account in any meaningful way. In response to our FOI request, we were initially told that no one in government keeps track of judicial reviews served on the Branch.[50] Later,

48 See RTA s. 78.1; MHPTA s. 71.1, and *Administrative Tribunals Act*, s. 58.

49 We expect that there are a much larger number of cases that were commenced but did not lead to a decision on the merits: it does not include cases that were filed but then abandoned, cases that were settled, or cases that went to hearing but did not lead to a decision on the merits. Our search was also limited to cases where the court actually produced written reasons or a transcript (rather than producing only oral reasons), and to cases where the court's written reasons were available to us through the Supreme Court's database of reported decisions, through the Courthouse Library's unreported decisions database, or through our work assisting tenants.

50 Letter from Vicki Hudson to Jess Hadley (February 21, 2013) with Ministry of Justice response to October 5, 2012 FOI request by Community Legal Assistance Society.

in response to a different portion of our FOI request, we received materials that cite statistics about judicial reviews of Branch decisions. These materials appear to infer that proportionally low numbers of judicial reviews indicate generally satisfactory decision-making by arbitrators.[51] As we have already discussed, this is not a valid inference. In addition, the Branch's statistics on judicial review are internally inconsistent and did not match the number of decisions we were able to find.[52]

Because it is essential that the Branch have an accurate and systematic method for keeping track of court judgments reviewing its decisions, we were pleased to hear that the Branch began implementing a system for tracking judicial review decisions in 2011 with continuing improvements into 2012.[53] While the Branch now has a system to notify arbitrators of relevant judicial review decisions, that system appears to focus only on policy implications of the decisions. There does not seem to be a focus on procedural problems identified by the court despite the fact that, as we will explain, a high percentage of successful judicial reviews relate to problems with Branch or arbitrator procedure. To incorporate the court's guidance and ensure that errors are not repeated, the Branch's judicial review tracking system must focus on the substance of the court's decisions including any direction from the court regarding the procedures of the Branch and arbitrators.

While the Branch now has a system to notify arbitrators of relevant judicial review decisions, that system appears to focus only on policy implications of the decisions.

Overall success rate of judicial reviews: 59%

Of the 78 decisions we reviewed, a total of 46 cases (or 59%), resulted in the court finding the arbitration decision should be set aside.[54] Proportionally, a 59% success rate on judicial reviews is high.[55] To understand the significance of this statistic it is essential to remember that, in considering a judicial review of Branch decisions, the legislature has expressly required that for most issues, the court must use the *most* deferential possible standard of review (meaning it can only set aside a decision for the most serious and obvious type of error). It is in this context that a success rate of 59% indicates, in our view, that stakeholders' concerns about the quality of decision-making at the Branch are legitimate.

Figures 2 and 3 on the following page set out an annual breakdown of judicial review decisions and the proportion that succeeded.

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51 FOI Request, Phase 2, Part 2, pp. 82-83, and 86.

52 FOI Request, Phase 2, Part 2, pp. 83 and 536.

53 Telephone conversation with Cheryl May, September 17, 2013.

54 Of these 46 successful judicial reviews, 13 cases actually involved the court setting aside two different arbitration decisions at once, and one case involved the court setting aside three different arbitration decisions at once. In total, in the cases we were able to locate, the Supreme Court set aside a total of 61 arbitration decisions from 2006 to 2012. Tenants were successful in a significantly greater percentage of their judicial reviews (64%), when compared with landlord petitioners (42%). This may be because, as indicated in our stakeholder interviews, tenants seem to experience more subjective dissatisfaction with decisions by the Branch than do landlords, and decisions by the Branch are, in general, more likely to affect tenants' basic well-being than to affect landlords' basic well-being. This would support a theory that tenants are more motivated to persistently pursue their cause when they are dissatisfied with a decision by the Branch.

55 For a very rough comparison, the average rates of success in judicial decisions of the Workers' Compensation Appeal Tribunal and the BC Human Rights Tribunal were approximately 47% and 36%, respectively. See the Annual Reports of the Workers' Compensation Appeal Tribunal, 2006 to 2012, www.wcat.bc.ca/research/WCAT_publications/WCAT_reports/index.aspx; Annual Reports of the BC Human Rights Tribunal, 2006-2007 to 2011-2012, www.bchrt.bc.ca/annual_reports/index.htm.

Of the 78 decisions we reviewed, a total of 46 cases (or 59%), resulted in the court finding the arbitration decision should be set aside. Proportionally, a 59% success rate on judicial reviews is high.

FIGURE 2: BREAKDOWN OF JUDICIAL REVIEW DECISIONS ANNUALLY

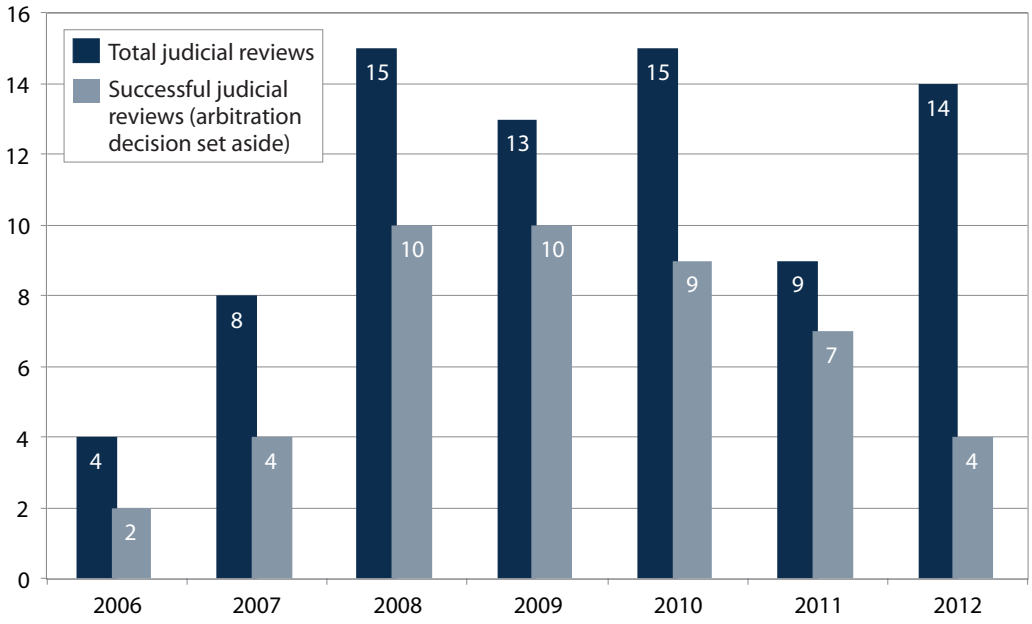
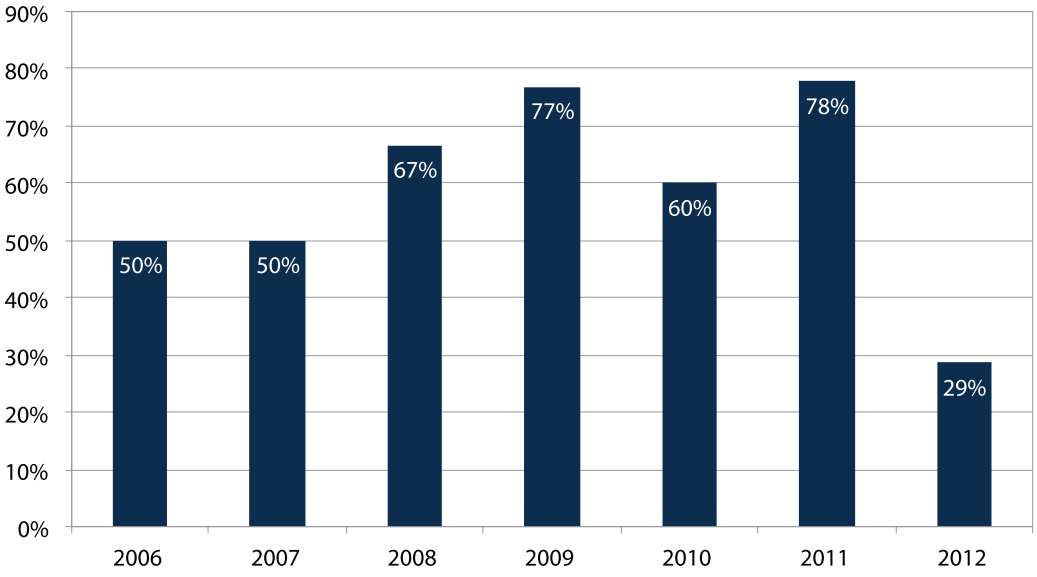


FIGURE 3: PROPORTION OF JUDICIAL REVIEWS THAT SUCCEEDED ANNUALLY[56]



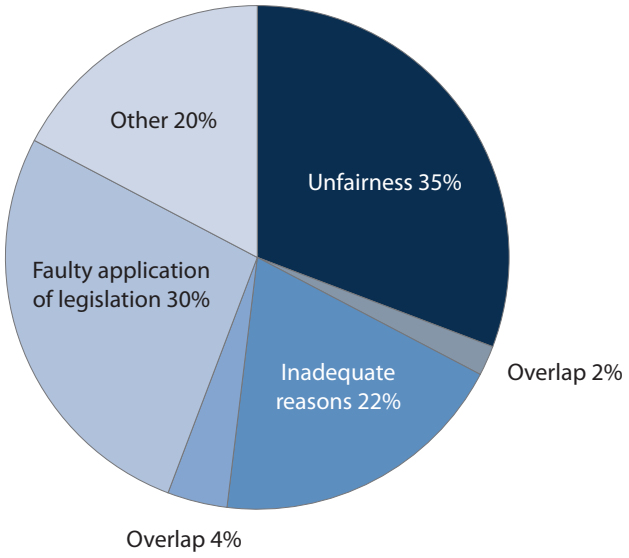
56 There was a noticeable drop in the percentage of successful judicial reviews in 2012. The cause of this decrease, and whether the drop indicates a sustained improvement in the Branch adjudication process, was unknown at the time of writing.

Grounds for judicial review

Most important of all in terms of providing insight into the Branch's decision-making, we investigated the most common grounds (reasons) for setting aside Branch decisions on judicial review. We identified three broad grounds of review that the courts commonly relied on when setting aside arbitration decisions. They are:

- Unfairness;
- Inadequate reasons; and
- Serious errors in the application of the legislation.

FIGURE 4: MOST COMMON GROUNDS FOR GRANTING JUDICIAL REVIEW



(total exceeds 100% due to overlap)[57]

In the cases we reviewed, there was not always a clear boundary between these different grounds of review. In some cases the court specified it was granting judicial review on the basis of one or two grounds, but nevertheless made noteworthy comments on other aspects of the Branch's decision-making.[58] In our statistical analysis we have only considered the reasons that the court actually gave for setting aside an arbitrator's decision, and not any additional comments that the court may have made on other problems with the decision.

57 On this chart, where inadequate reasons were found to justify judicial review in combination with another ground classified as "other," decisions are classified under "inadequate reasons" only.

58 For example, in *Falc v. Mainstreet Equity Corp*, 2009 BCSC 410, the court granted judicial review on the basis of a failure to apply the legislation properly combined with a faulty damages analysis, which the court found made the arbitrator's decision patently unreasonable. However, the court also commented on its view that the arbitrator's reasons were confused and failed to provide a principled basis for the arbitrator's conclusion.

METHOD 3 FOR ASSESSING ADJUDICATION: REVIEW OF BRANCH DECISIONS

While stakeholder and judicial perspectives provide insight into what kinds of fairness problems arise in Branch adjudication, we wanted to get an idea of the breadth of these problems. To do so, we undertook a systematic review of a discrete selection of arbitrators' decisions at the Branch to obtain concrete information about the consistency and quality of arbitrators' decision-making and decision writing.

To do this, we chose a distinct sample topic with a clear and well-defined statutory test and carefully reviewed all the decisions on that topic posted on the Branch's website during the 18-month period from October 15, 2011 to April 14, 2013.[59] In reviewing the resulting 35 decisions, we focused on objective and well-established hallmarks of fairness and good decision-making that can be assessed from the decision alone:

We reviewed 35 decisions applying the same well-defined statutory test to determine whether concerns identified by stakeholders and the court were also apparent in this discrete set of decisions. The results were sobering.

- Whether the decision cites the applicable legislation;
- Whether the decision accurately states the legal test to be applied;
- Whether the decision applies the correct legal test;
- Whether the decision contains a finding that each element of the statutory test was met (or, if the application was denied, whether it states that at least one necessary element of the test was not met);
- Whether the decision contains at least some analysis to explain the arbitrator's findings; and
- Whether the decision consistent with the applicable Branch policy guideline.[60]

If the answer to any of these questions is "no," there is an objective problem with the fairness and quality of the decision.

Our intention in doing this review was not to evaluate a statistically representative sample of all Branch decisions. Given the high volume of decisions, the variety of issues that arise in adjudications, and the inaccessibility of the Branch's decision database, such an undertaking was impossible within the scope of this report.

Instead, our goal in reviewing 35 decisions applying the same well-defined statutory test was to determine whether the concerns identified by the stakeholders and the court were also apparent in this discrete set of Branch decisions. For additional information about the topic we chose, why we chose it, and the method we used, please see Appendix B.

59 Our review was limited to the decisions only; it was not part of our review to examine the parties' documentary evidence and written submissions in each case (as the Branch's privacy policies prevent them from releasing complete files) or the parties' testimony and oral submissions (as the Branch does not record or transcribe its hearings). We reviewed the decisions that were *posted* between October 15, 2011 and April 14, 2013, and excluded outlier decisions that were decided over 3 months earlier than October 15, 2011.

60 While Branch policy is not binding on arbitrators, and arbitrators' discretion cannot be fettered by policy, parties should be able to expect that by and large, arbitrators' decisions will tend to be consistent with the Branch's policy guidelines.

In over 70% of the Branch decisions reviewed, the decision exhibited at least one objective problem with basic fairness.

Results

The results of our review broke down as follows:

ACCEPTED HALLMARK OF FAIRNESS	YES	NO
Does the decision mention or cite the applicable legislation so that the parties know on what basis their case was decided?	18 (51%)	17 (49%)
Does the decision accurately state the legal test to be applied?	21 (60%)	14 (40%)
Does the decision apply the correct legal test (instead of importing a legal test not found in the legislation)?	29 (83%)	6 (17%)
Does the decision contain a finding that each element of the statutory test was met?	18 (51%)	17 (49%)
Does the decision contain at least some analysis to explain the arbitrator's findings?	19 (54%)	16 (46%)
Is the decision consistent with the policy guideline?	17 (49%)	18 (51%)
Total decisions missing one or more of the above hallmarks of fairness:	25 (71%)	

These results are sobering. In over 70% of the Branch decisions reviewed, the decision exhibited at least one objective problem with basic fairness. It is particularly concerning that *nearly half* of the Branch decisions we reviewed failed to contain a finding on each element of the legal test set out in the legislation, which is the core of what the arbitrator is assigned to decide.

With this in mind, we will now turn to the specific fairness problems that were identified by the stakeholders, the judicial perspectives, and our review of Branch arbitration decisions. We will look at fairness in each of these three stages of the arbitration process:

- Leading up to the arbitration hearing;
- At the arbitration hearing itself; and
- After the arbitration hearing.

FAIRNESS LEADING UP TO AN ARBITRATION HEARING

We first examined the portion of the adjudication process leading up to a dispute resolution hearing. This portion involves commencing the process using Branch forms; serving Branch documents; filing and serving any evidence and submissions a party intends to rely on; responding to an application; and preparing for the dispute resolution hearing. In short, it includes everything from filing the initial application to ensuring that all parties and the arbitrator are ready to proceed with the hearing.

The first area of the adjudication process we reviewed for fairness was the process of applying for and responding to a dispute resolution proceeding. The stakeholders we spoke to who tend to represent the most marginalized litigants were most concerned about accessibility of the dispute resolution process.[61] They reported the following issues.

Practical obstacles to picking up hearing documents

The experience of many community advocates is that Service BC staff make an attempt to help clients, but seem to lack training, sometimes do not know how to assist with forms, and do not always give accurate information on procedure.

Parties who have filed an application for dispute resolution and wish to proceed to hearing must pick up a hearing package in person from the Branch.[62] To do so they must attend at either a Branch office or a local Service BC Centre. These offices are open only during regular business hours, usually 9:00 am to 4:00 pm with a lunch break. These limited hours can create a barrier to the working poor since attending the office within business hours will often require them to take time off work. This problem is compounded by the fact that when a person submits his or her application in person, it often takes until the next day for the package to be processed, meaning that he or she must attend the office a second time to pick it up.

Quality of service at Service BC Centres needs improvement

The Branch has two full-service offices, in Burnaby and Victoria, and two offices in Vancouver with more limited services. Parties can go to these offices to obtain and submit the necessary forms to apply for dispute resolution, and to either the Burnaby or Victoria office to submit evidence for the dispute resolution hearing.

For landlords and tenants who live outside Burnaby, Victoria, and Vancouver, Service BC Centres (local government agents with no specialization in residential tenancy issues) are the only point of contact to take care of these tasks in person.

Both landlord and tenant stakeholders expressed concern about the consistency of the service being provided via the Service BC offices. According to the ROMS BC, its members have reported Service BC offices making occasional but fairly serious mistakes about timing and receipt of documents for landlord/tenant files. Meanwhile, the experience of many community advocates is that Service BC staff make an attempt to help clients, but seem to lack training, sometimes do not know how to assist with forms, and do not always give accurate information on procedure. From the point of view of both ROMS BC and community advocates, errors by Service BC have led to major problems in applications for dispute resolution.

61 We heard this from community advocates and Pivot Legal Society.

62 The package contains a notice of hearing, a copy of the application for dispute resolution, and a Branch fact sheet explaining the dispute resolution process, all of which must be served on the opposing party.

Branch dispute resolution forms require clarifications

In addition to simple access issues, the stakeholders also identified difficulties with the Branch's forms. The Branch website provides fillable, printable versions of all of the forms that landlords and tenants may need to use in the course of a tenancy, from blank standard tenancy agreements, to condition inspection reports, to various types of notices to end tenancy, to all of the forms needed in the dispute resolution process.

Through our research we identified the following problems with two of the Branch's current forms:

- Some of the Notice to End Tenancy forms do not clearly set out the potential consequences of a notice to end tenancy and the timelines for responding. This increases the risk that tenants, especially those with low literacy and language barriers, will not appreciate the seriousness of a Notice to End Tenancy. This is of particular concern given that the legislation deems the tenant to accept the eviction and allows the Branch to grant the landlord an order of possession without a hearing (through a "direct request" process) when a tenant fails to dispute a Notice to End Tenancy.[63] The forms in question (Forms 31, 32, 33) set out timelines and consequences in ten point font on the back of the form in a block of dense text.
- The Notice to End Tenancy for Cause form does not give any detail about the nature of the cause being alleged. The current form simply requires landlords to tick a box indicating which provision in the *Residential Tenancy Act* or *Manufactured Home Park Tenancy Act* they say was breached. There is no room on the form for the landlord to give any details — even though there is a statutory requirement that an application for dispute resolution must provide full particulars of the dispute.[64] This means the tenant must apply to dispute an eviction without knowing the specific basis for the eviction, and may not learn the landlord's specific grounds until the hearing itself, at which point it is too late for the tenant to gather evidence to respond to the allegations.

In 2011/2012, which is the most recent year for which the Branch was able to provide data, the average wait time for a hearing was 40.4 days.

Timeliness of dispute resolution hearings

The Branch's data shows that annual average wait times for a hearing have ranged from a high of 63.4 days in 2009/10 to a low of 33.6 days in 2007/08. In 2011/2012, which is the most recent year for which the Branch was able to provide data, the average wait time for a hearing was 40.4 days.[65]

The Branch reports that for certain types of disputes that the Branch considers "urgent," the wait times are shorter, ranging from an average of 10.4 days to 24.1 days in 2011/12, depending on the type of urgent file.[66] It is in our view efficient and appropriate to use triage to expedite urgent matters.

63 RTA s. 55(4); MHPTA s. 48(4).

64 RTA s. 59(2)(b); MHPTA s. 52(2).

65 Laura Monner, *Residential Tenancy: Dispute Resolution Report 2007/08-2011/12* (October 5, 2012), page 22.

66 Laura Monner, *Residential Tenancy: Dispute Resolution Report 2007/08-2011/12* (October 5, 2012), page 23. The numbers cited are from the date the file is created, to the date of the hearing.

"The system does not work, as it should, with hearing dates so far in the future. We fear that if things get worse, and dates are even further in the future, applying for Dispute Resolution may become pointless."[67] — *Complaint letter*

Having said that, community advocates pointed out that there is no transparent process for actually requesting an expedited hearing in urgent circumstances — for example, where a tenant has been illegally locked out of her rental until without due process. (An illegal lock-out constitutes a personal emergency for tenants, especially those with children or those who require access to medication or work tools in their rental unit, and a hearing scheduled weeks into the future will be of little use in such cases.) While there is a specific statutory process for landlords to request an urgent end of tenancy and advocates reported that Branch management is receptive to advocates' specific requests for quicker hearings in individual cases, the concern remains that marginalized tenants may not be aware of the possibility of pressing for an earlier hearing. Such tenants may suffer irreparable harm while waiting for a hearing, and are likely to give up on asserting their rights at the Branch if they lose their housing.

There is no transparent process for requesting an expedited hearing in urgent circumstances, for example, where a tenant has been illegally locked out of her rental until without due process.

The non-profit landlord stakeholders we spoke to also felt that, for some types of cases, the current wait times are too long. In particular, the BC Non-Profit Housing Association indicated that non-profit housing providers generally want to have eviction cases adjudicated as quickly as possible, so that they can move waitlists along in order to house tenants in need. BC Housing also noted that delay can compromise a landlord's ability to quickly address behavioral/safety issues (e.g. violence, criminal activity) in non-profit housing; this is a particular concern for landlords whose tenant population is relatively vulnerable.

SUBMITTING AND SERVING EVIDENCE PRIOR TO A HEARING

The next stage of the dispute resolution process we reviewed was the portion after the dispute is filed and leading up to the actual dispute resolution hearing. In particular, we looked at how the Branch process functions when the parties submit and serve the evidence they intend to reply on at the hearing.

Illogical and inconsistently applied rules for serving and submitting evidence

Rules 3.5 and 4.1 of the Branch's rules of procedure provide timelines for parties to exchange evidence before a hearing and to submit their evidence to the Branch. The deadlines are the same for both the applicant and the respondent: both parties are required to file and serve their evidence at least five days before the hearing (which, in the case of a recipient that is a business office, the Branch defines as five business days before the hearing). The rules of procedure provide that evidence filed after these deadlines is only accepted at the discretion of the arbitrator.

67 Complaint letter (February 25, 2010), FOI Request, Phase 3, Part 1, p. 616.

Community advocates reported having difficulty with this system, as did the UBC Law Students Legal Advice Program. In particular:

- It does not make sense for both parties to be exchanging evidence on the same date, since a respondent's evidence must respond to that of the applicant. Community advocates and LSLAP suggested it would make more sense to have staggered timelines.
- While the Branch's rules of procedure provide that an arbitrator may accept evidence late and provide guidance on how this discretion will be exercised, community advocates complained that arbitrators do not follow the rules of procedure, giving the impression of arbitrariness.[68]

Unreliable handling of evidence

In order for a hearing at the Branch to proceed fairly, it is essential that the Branch process documentary evidence in an organized, timely way. This is necessary to ensure that the appropriate materials are all available to the arbitrator at the start of the hearing, and to ensure the arbitrator knows whether participants have been properly served with the opposing party's evidence.

Many community advocates reported severe problems with the Branch's handling of evidence. In particular, advocates reported cases where evidence was lost or misplaced by the Branch and was not available to the arbitrator during the hearing, even when the evidence had been submitted on time. Advocates reported the problem was exacerbated because in some cases arbitrators failed to go over evidence and ensure parties had the same material in front of them at the start of the hearing. These problems were confirmed by the Community Advocate Support Line lawyer.

In combination, these problems create a severe risk that matters will have to be adjourned or reconvened to ensure that the arbitrator has access to all the information, or alternatively, that parties will not have a fair hearing on the facts of their case. Indeed, the court has granted judicial review on procedural fairness grounds as a result of the above problems.[69]

FAIRNESS DURING THE DISPUTE RESOLUTION HEARING

Arbitrators bear the responsibility of running hearings and ensuring the dispute resolution process is orderly, fair, and respectful. To this end, they have the power to decide procedural issues as they arise in a hearing.[70] They do this in a context where:

- **HEARINGS ARE ALMOST ALWAYS DONE BY TELECONFERENCE.** This creates challenges for arbitrators and for the parties, as will be discussed in greater detail below.
- **HEARINGS ARE TYPICALLY VERY SHORT.** The Branch's statistics show that between 2007 and 2012, between 92% and 94% of all hearings annually took place in less than an hour, and 68% to 70% took place in less than 30 minutes.[71]

68 Residential Tenancy Branch, Rules of Procedure, Rule 11.5.
69 *Kinney v. Wilkinson*, 2009 BCSC 1045.
70 RTA s. 64(3); MHPTA s. 57(3).
71 FOI Request, Phase 1, p. 62.

- **ARBITRATORS HANDLE LARGE NUMBERS OF HEARINGS EACH WEEK.** We understand that most full-time arbitrators handle 15 hearings per week, in addition to decision-writing time.[72]

Among the stakeholders we spoke to, the community advocates and legal organizations that represent tenants at hearings universally reported a strong sense of frustration with arbitrators' approach to the hearing process. In general, these stakeholders felt that hearings at the Branch do not reliably provide a dignified and fair adjudicative process. Rather, these stakeholders felt that hearings at the Branch are unpredictable and at times disorganized, disrespectful, and unfair.

Of the successful judicial review decisions we reviewed, 35% were granted because of procedural unfairness serious enough to invalidate the original hearing and justify a new hearing. The judicial review decisions recognized a number of forms of unfairness. For example, the court found that unfairness justified setting aside an arbitrator's decision where:

Community advocates and legal organizations that represent tenants at hearings universally reported a strong sense of frustration with arbitrators' approach to the process, noting that hearings are unpredictable and at times disorganized, disrespectful, and unfair.

- An arbitrator proceeded with a hearing and issued a decision even though one party had never been notified of the hearing;[73]
- One party was unable to connect to the teleconference, and the hearing went ahead in her absence;[74]
- An arbitrator conducted a hearing without ensuring both parties had received all of the documentary evidence that was being considered;[75]
- One party was not permitted to present its case, or was not permitted to challenge the other side's case;[76]
- An arbitrator decided the case on an issue that neither of the parties had raised or argued, without giving the parties an opportunity to make submissions;[77] and
- The Branch allowed one party to communicate with an arbitrator post-hearing without giving the other party a chance to respond.[78]

In each of these situations, the Branch breached the basic premise that, in order to meet basic requirements of procedural fairness, an administrative decision-maker must give both parties a fair chance to hear the case against them, and to respond to that case.

The courts have long recognized that the requirements of fairness vary depending on the context of the decision, keeping in mind such factors as the importance and nature of the decision being made, and the parties' expectation of fairness.[79] BC courts have applied this

72 Telephone conversation with Cheryl May, May 17, 2013.

73 *Nichols v. British Columbia (Residential Tenancy Act),* 2008 BCSC 884; *Hughes v. Pavlovic,* 2011 BCSC 990; *Pavlovic v. Hughes,* 2012 BCSC 79.

74 *Ross v. British Columbia*, 2008 BCSC 1862; *Ganitano v. Metro Vancouver Housing Corporation*.

75 *Fernandez v. Sakr*, 2012 BCSC 1024.

76 *Erickson & Turner v. The Attorney General of British Columbia et al.,* 2007 BCSC 353; *MacAndrew v. Hendrick* (14 May 2008), Penticton 30432 (B.C.S.C.); *Kikals v. British Columbia (Residential Tenancy Branch),* 2009 BCSC 1642; *Sismey v. MacDonald Commercial RES,* 2010 BCSC 499; *Owers v. Viskaris,* 2012 BCSC 1534.

77 *Amacon Property Management Services Inc. v. Dutt*, 2008 BCSC 889.

78 *Gichuru v. Palmar Properties Inc.*, 2011 BCSC 827.

79 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

principle and have determined that in the context of Branch decisions, a high degree of fairness is typically required due to the judicial nature of the process, the lack (in most cases) of any internal appeal within the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act*, and (in many cases) the importance of the decisions to the parties involved.[80]

RELIANCE ON TELECONFERENCE TECHNOLOGY

The *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* permit the Branch to conduct dispute resolution hearings in person, via teleconference, or in writing. Since 2007, the Branch has increased the proportion of hearings conducted via telephone until, in 2011/12, only 1% of all hearings were conducted face to face.[81] The heavy reliance on teleconference technology for adversarial legal hearings comes with significant risks, and it is up to the arbitrators running each hearing to ensure that those risks are handled appropriately.

Since 2007, the Branch has increased the proportion of hearings conducted via telephone until, in 2011/12, only 1% of all hearings were conducted face to face.

The stakeholders we spoke to had, overall, very different views about the pros and cons of the Branch's move toward holding teleconference hearings in the vast majority of cases.

- Among the PRIVATE LANDLORD STAKEHOLDERS we spoke to, the ROMS BC took the view that the move toward teleconference hearings has been an entirely positive development. In their experience teleconference hearings are nearly always more efficient than in-person hearings. They also felt that a teleconference hearing could actually reduce the amount of conflict between parties. They also pointed out that teleconference hearings are more convenient for parties in remote locations.

- The NON-PROFIT HOUSING STAKEHOLDERS we spoke to were not convinced that in-person hearings are desirable in all cases. The BC Non-Profit Housing Association's view was that while telephone hearings work well for some tenants, they do not work well for others; telephone hearings are, in their view, a particular risk in disputes where the tenants experience challenges such as language barriers, disabilities, and addictions. In some cases, the BC Non-Profit Housing Association felt it would be important to offer an in-person hearing, so that the arbitrator can see and understand the tenant and the landlord. BC Housing also had the impression that many tenants would prefer a face-to-face hearing.

- Meanwhile, TENANT STAKEHOLDERS had primarily negative feedback about the move toward telephone hearings, and many of these concerns have been substantiated by the court on judicial review. While Pivot Legal recognized that in many cases teleconference hearings are convenient for parties, especially for marginalized individuals who would have difficulty traveling to a Branch office for a hearing, they and the other groups we spoke to all expressed strong concern about the following points.

80 *Ganitano v. Metro Vancouver Housing Corporation,* 2009 BCSC 787 at para. 40.

81 Laura Monner, *Residential Tenancy: Dispute Resolution Report 2007/08-2011/12* (October 5, 2012), p. 20.

"Four minutes before the appointed time I commenced attempting to join the conference using my home phone and all [I] got was a dial tone. Then I switched to my cell phone. Many attempts were made to connect to no avail. On each attempt after entering the password I got music then a Telus operator would come on the line and tell me to hang up and try again."[82] — *Complaint letter*

Technical difficulties associated with phone hearings

Many community advocates reported technical problems connecting with the teleconferences; one advocate estimated she experienced technical problems in one out of every 20 calls she handles. Others reported disconnections. The Community Advocate Support Line lawyer reported that these kinds of problems were more frequent when the teleconference system was first put in place, but seem to have abated somewhat. The Branch advised us that operators with Telus (the company that handles the Branch's teleconference system) are available to assist people with technical problems, and that an operator is automatically summoned when the phone system senses certain types of problems.[83] However, in our view the Branch does not give parties adequate notice that help is available: the instructions for connecting to an operator are printed in small font in the middle of the Notice of Hearing form rather than being placed prominently, and the teleconference system itself does not tell callers how they can connect with an operator if they need to.

On judicial review, the court has stated clearly that when a hearing proceeds despite the fact that one party had technical difficulties in calling into the teleconference, that means the hearing was unfair and the Branch decision may be set aside.[84]

Parties who lose their case after being unable to connect to the teleconference have the option to apply for review on the basis that they were unable to attend the hearing for reasons beyond their control.[85] However, when a party initiates a review application alleging a problem with the teleconference system, that party is required to provide evidence to support the review application. Unless the Branch retrieves the phone system records and provides them for the reviewing arbitrator, parties must request and obtain phone records, and then submit them as evidence on an application for review, which must be filed in as little as two business days.

82 Complaint letter (September 16, 2010), FOI Request, Phase 3, Part 1, p. 390.
83 Letter from Cheryl May to Jess Hadley (April 18, 2013).
84 *Ross v. British Columbia*; *Ganitano v. Metro Vancouver Housing Corporation*.
85 RTA s. 79(2)(a); MHPTA s. 72(2)(a).

Negative impact on the quality of adjudication

A number of stakeholders stressed that on telephone conferences, arbitrators cannot see parties' body language and other visual cues; this gives the arbitrator an impoverished set of information to work with, especially when deciding credibility issues.[86] The unavailability of visual cues is of particular concern for people with language barriers who may rely more on gestures and facial expression to get their message across.

Problems with assessing evidence

Several Branch decisions have been set aside on judicial review because of problems with documentary evidence. These include cases where the arbitrator is missing documents, or one of the parties is missing evidence submitted by the other side.[87] When parties are not meeting in the same room, fairness requires that arbitrators take great care to ensure that documentary evidence is handled in a fair manner.

Community advocates noted that on the phone, it is much more difficult (and sometimes impossible) to ensure that the parties and the arbitrator all have the same package of documentary evidence in front of them, and that they are all looking at the same documents at the same time. They also pointed out it is not possible to present physical evidence (such as a damaged personal possession) at a phone hearing.

Undeniably, telephone hearings are more convenient than in-person hearings, and can in many ways be more efficient. However, this must be weighed against the significant potential disadvantages of a teleconference hearing.

Accessibility problems in telephone hearings

Community advocates were concerned that telephone hearings are likely to be inaccessible to people with cognitive disabilities or who are hard of hearing, or to those who are uncomfortable using the conference call technology (for example, older adults). While it is possible to request an in-person hearing for accessibility reasons, and in some situations it is required under the BC *Human Rights Code*,[88] the process for making such a request is not obvious or transparent.[89] Advocates also pointed out that, for some tenants, the cost of mobile phone use for an hour-long hearing can be prohibitive.

Undeniably, telephone hearings are more convenient than in-person hearings, and can in many ways be more efficient. However, this must be weighed against the significant potential disadvantages of a teleconference hearing. In our view, in-person hearings are desirable wherever they are feasible, as they provide a more orderly, dignified adjudicative process and a better opportunity for the arbitrator to assess the documentary and oral evidence.

86 We heard this from community advocates, AMHOA, BCPIAC and Pivot.

87 *Fernandez v. Sakr*; *Kinney v. Wilkinson*.

88 1996 RSBC, c. 210.

89 The only reference to the option of an in-person hearing in the Branch's materials is at page 41 of the 51 page *Residential Tenancy Act: A Guide for Landlords and Tenants*. It is not set out on the Application for Dispute Resolution forms or any of the other many Branch publications that a party might consult when applying for a hearing.

ARBITRATORS' APPROACH TO HEARINGS

Both the court on judicial review and the stakeholders we consulted set out concerns about Branch arbitrators and the hearing process. The primary concerns are set out below.

Lack of a consistent framework for hearings

Advocates expressed frustration that, while some arbitrators handle hearings in an organized and appropriate way, others routinely fail to take basic steps that would promote an orderly and fair hearing, including:

- Explaining the process at the outset of the hearing so parties know what to expect;
- Checking that everyone has the same evidence at the outset;
- Having each witness swear or affirm before giving evidence;
- Excluding witnesses so that they do not hear the other witnesses' evidence before they give their testimony; and
- Ensuring that parties have a full opportunity to present their case and challenge the other side's case before the hearing concludes.

Advocates expressed frustration that, while some arbitrators handle hearings in an organized and appropriate way, others routinely fail to take basic steps that would promote an orderly and fair hearing.

Failing to routinely take basic steps like confirming all the participants have the same documentary evidence in front of them, or that all parties were properly served the evidence the arbitrator will rely on, have caused the court to set aside Branch decisions on judicial review.[90]

In addition, community advocates reported that arbitrators sometimes refuse to let them question witnesses or make legal arguments on behalf of their clients (despite the fact that both the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* expressly permit parties at a hearing to be represented by an "agent or lawyer"[91]). Since mid-2012, the Branch has been in the process of developing a revised policy guideline to address this. As of the publication of this report, the Branch expects the guideline will be completed by the end of September 2013.

Parties not being heard, and not feeling heard

Tenant stakeholders reported that arbitrators do not consistently ensure that both parties have a full opportunity to present their case, and to challenge the other side's case before the hearing concludes. Most tenant stakeholders complained that hearings are often hurried, and that arbitrators do not always ensure hearing time is fairly allocated between the parties.

On judicial review, the court has set aside Branch decisions because one party did not have an opportunity to present its case or challenge the other side's case, or because the arbitrator inappropriately considered arguments a party did not have an opportunity to respond to.[92]

90 *Fernandez v. Sakr*; *Kinney v. Wilkinson*.

91 See RTA s. 74(4); MHPTA s. 67(4).

92 *Erickson & Turner v. The Attorney General of British Columbia et al.*; *MacAndrew v. Hendrick*; *Kikals v. British Columbia (Residential Tenancy Branch)*; *Sismey v. MacDonald Commercial RES*; *Owers v. Viskaris*; *Amacon Property Management Services Inc. v. Dutt*; *Gichuru v. Palmar Properties Inc*.

"I am not trying to blame the officer involved. Perhaps she doesn't have time to read the submissions and there is probably a rule stating the conference call cannot exceed one hour. If you are understaffed that is beyond my control but I hope you can understand my frustration. I do not believe my submission was read and I do not feel that I 'have been heard'."[93] **— *Complaint letter***

Stakeholders reported a perception that some arbitrators come to the hearing with a preconceived idea of what the outcome should be, or decide the case halfway through the hearing, and steer the hearing toward that outcome. Overall, tenant stakeholders report that tenants' most frequent complaint about dispute resolution hearings is that they feel they have not been heard.

Arbitrator conduct and lack of accountability

Nearly all of the tenant stakeholders we spoke to reported having experienced rudeness and a lack of courtesy from arbitrators. They described arbitrators behaving, at times, in an authoritative, rude, impatient, dismissive, chastising, and sometimes even verbally abusive manner during hearings. Dispute resolution hearings can often be intense and emotional, and this is intensified when they occur on a tight timeline. Tenant stakeholders reported that not all arbitrators appear to be well-equipped to deal with difficult interpersonal dynamics in such hearings.

Nearly all of the tenant stakeholders we spoke to reported having experienced rudeness and a lack of courtesy from arbitrators.

Advocates noted that because teleconference hearings are not recorded, there is little accountability when parties feel they have experienced any of the above problems with an arbitrator's approach to their hearing. Overall, community advocates had little faith that they could count on an arbitration hearing to lead to a fair and justifiable outcome.

Landlord stakeholders were not entirely satisfied with arbitrators' conduct of hearings, either. In particular, the ROMS BC reported hearing from its members about some of the same concerns that tenant stakeholders identified (for example, arbitrators chastising parties for not knowing a provision of the law, or allocating time unfairly so that landlords do not have a full chance to make their submissions). ROMS BC also noted the lack of accountability because the hearings are not recorded.

93 Complaint letter (March 7, 2011), FOI Request, Phase 3, Part 2, p. 123.

PUBLIC COMPLAINTS TO THE BRANCH MIRROR THE STAKEHOLDERS' CONCERNS

"I felt that my side of the case was not adequately understood, as my explanations were repeatedly cut-off by the officer, even when it was my turn to speak."[94]

"There were many problems, largely stemming from the hostility and impatience of the DRO, as well as her apparent aversion to the parties to a dispute being represented. The DRO was hostile to me from the beginning of the hearing."[95]

"We found the DRO to be completely unprofessional and the only person arguing and raising their voice was the DRO."[96]

"I was constantly snapped at, ridiculed, and the estimate I provided was openly laughed at."[97]

"I understand [the Dispute Resolution Officer] had a strict time schedule to keep. However, he knew that I had a [redacted] disability and throughout the hearing, he intentionally chose to ignore it. Cutting me off before I finished my evidence was unnecessary and a humiliating experience for me."[98]

"I found the arbitrator to be condescending, dismissive, rude and he seemed to have his mind made up before I could even present my case. I feel that this kind of conduct should not be displayed by someone who represents the government or is supposed to be unbiased. From the onset of the meeting he verbally berated me, and made me feel like I was less than human."[99]

"This case to date has been handled poorly right from the outset, mostly because of the attitude of the DRO. This person has been rude, arrogant, aggressive and very unprofessional in her manner. It is not acceptable behaviour in any industry, but especially a government service."[100]

"At one point in the call [redacted] and I both said 'wow', we were so taken aback by the RTO Rep's forceful response. I could expect upset behaviour from the landlord, but of everyone in attendance on the phone call, it was the RTO Rep that was behaving in a hostile manner."[101]

"Throughout the hearing the officer was hostile, biased and rude. She shouted at me and wouldn't listen."[102]

"Overall, I found Mr. Arbitrator to be rude, impatient, interruptive, disrespectful, sarcastic, demeaning, biased, ill informed and thoroughly unprofessional."[103]

"...I want you to understand that if I lose a case because I am considered wrong in the eyes of the law or have no legitimate legal claim, then so be it. If I lose a case because I have not brought proper evidence or my evidence is too weak or insufficient to prove my case, then so be it. But if I lose a case because I was prevented by the Dispute Resolution Officer from presenting my case, never allowed to give evidence, refute claims, or speak freely when it was my turn to speak, how can I accept this?"[104]

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94 Complaint letter (October 26, 2010), FOI Request, Phase 3, Part 1, p. 471.
95 Complaint email (November 18, 2010), FOI Request, Phase 3, Part 1, p. 501.
96 Complaint letter (January 20, 2011), FOI Request, Phase 3, Part 2, p. 8.
97 Complaint letter (May 13, 2011), FOI Request, Phase 3, Part 2, p. 315.
98 Complaint letter (July 29, 2011), FOI Request, Phase 3, Part 2, p. 408.
99 Complaint email (September 13, 2011), FOI Request, Phase 3, Part 2, pp. 694-5.
100 Complaint letter (December 20, 2011), FOI Request, Phase 3, Part 2, p. 630.
101 Complaint email (November 17, 2011), FOI Request, Phase 3, Part 2, p. 671.
102 Complaint letter (received February 9, 2012), FOI Request, Phase 3, Part 3, p. 26.
103 Complaint letter (May 10, 2012), FOI Request, Phase 3, Part 3, p. 199.
104 Complaint email (August 14, 2012), FOI Request, Phase 3, Part 3, p. 336.

"This hearing was the most uncivil 20 minutes of harassment abuse from a civil servant that I ever experienced in 62 years."[105] — *Complaint letter*

Finally, Branch arbitrators may invite the parties to discuss a settlement at any point in a hearing.[106] This is outside of normal practice for settlement discussions in legal disputes. Usually, in order to encourage parties to have meaningful settlement discussions about potential compromises or concessions, settlement discussions do not take place in the presence of the final decision-maker. This ensures the decision-maker is not influenced by the settlement discussions. Because Branch arbitrators are put in the position of assisting the parties to settle *during a dispute resolution hearing*, and then issuing a final decision if the matter does not settle, they walk a very difficult line to maintain actual and perceived impartiality. This makes their conduct all the more important.

BRANCH WRITTEN DECISIONS

A written explanation of a legal decision in the form of a written decision is essential to the parties' perception of whether their case was adjudicated carefully and fairly.

A written explanation of a legal decision in the form of a written decision is essential to the parties' perception of whether their case was adjudicated carefully and fairly.

Ideally, written decisions can promote fair and transparent decision-making by setting out a clear and simple explanation of the reasons behind the decision. Not only do such written decisions help the decision-maker to think through the case and avoid making an arbitrary or unjustifiable decision, they also demonstrate to the parties that the issues have been carefully considered, which reinforces public confidence in the decision-maker.[107] Good quality written decisions play a particularly important role for the losing party. As the court has said:

> *… In order that faith may be maintained in the legal system, it is necessary that losing parties be satisfied that they have been fairly dealt with, that their position has been understood by the judge, and that it has been properly weighed and considered. It is, therefore, important that the reasons for a decision be stated, and stated in language that the party who has been dealt the blow can comprehend.*[108]

Aside from the role that written reasons play in maintaining confidence and trust in the legal system, Branch arbitrators should give carefully written explanations for their decisions for three other reasons:

1. The legislation requires that in each case the arbitrator's decision (a) be in writing, (b) be signed and dated, (c) include the reasons for the decision, and (d) be given within 30 days after the proceedings conclude.[109]

105 Complaint letter (January 28, 2010), FOI Request, Phase 3, Part 1, p. 603.
106 RTA s.63; MHPTA s.56; FOI Request, Phase 2, Part 1, pp. 89.
107 Sara Blake, (2006). *Administrative Law in Canada* (4th ed.). Markham: LexisNexis Canada Inc., pp. 88-89.
108 *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services* (1985), 51 O.R. (2d) 302 (Ont.H.C.), pp. 310-311.
109 RTA s.77; MHPTA s.70.

2. Arbitrators are legally required to provide sufficient reasons so that their decisions can be considered "reasonable." At common law, a tribunal is legally required to provide reasons that demonstrate "justification, transparency and intelligibility."[110] In other words, reasons must contain sufficient information to allow the parties (or the court on judicial review) to understand the decision in light of the evidence and the tribunal's statutory task.[111]

3. The *Ombudsperson Act* provides that, when issuing decisions, public authorities should give adequate and appropriate reasons in relation to the nature of the matter and should do so in a just, un-oppressive manner that is not arbitrary or based on error of law or fact.[112]

In their decision-making, Branch arbitrators are called on to analyze complex and often conflicting evidence, and to arrive at well-reasoned factual findings. They must also apply a complex body of legislation. And they are routinely called upon to apply a wide range of common-law principles relating to tort and contract law, damages, and many other issues. As noted near the beginning of this report, arbitrators' decisions have a significant impact on the parties involved. With all this in mind, to promote fairness and a public perception of fairness, it is essential that arbitrators issue decisions that are coherent, well-reasoned, consistent, and easy to understand.

Most landlord and tenant stakeholders we spoke to expressed dissatisfaction with the decisions produced by arbitrators. Several articulated the view that with the very same case, two arbitrators could be expected to reach substantially different outcomes.

Unfortunately, the Branch's written decisions have been plagued by significant and ongoing problems in recent years.

Stakeholders' perspectives reveal inconsistency and feeling unheard

Most of the landlord and tenant stakeholders we spoke to expressed dissatisfaction with the decisions produced by arbitrators.[113] In fact, for many of these stakeholders, their primary concern about the Branch's operations was *inconsistency in the substance of arbitrators' decision-making*. Several of the landlord and tenant stakeholders we spoke to articulated the view that if the very same case were to go before two different arbitrators, the two arbitrators could be expected to reach two substantially different outcomes. Most of the stakeholders we spoke to expressed the view that the Branch's decision-making depends a great deal on which arbitrator is handling any given case, and that it was impossible to accurately predict outcomes, even for cases that ought to be clear-cut.

Parties on both sides of the landlord/tenant divide seem to be united in wanting more consistency and predictability in substantive outcomes. Although the legislation provides that arbitrators are not legally bound to follow decisions by other arbitrators,[114] this does not preclude the Branch from seeking to improve consistency in arbitrators' decision-making.

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110 *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 47.

111 *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 18. Historically, the adequacy of reasons was viewed as an issue of fairness (which makes intuitive sense, since reasons enable the parties to understand why they won or lost), but as of the *Newfoundland* case in 2011, the courts have held that reasons should not technically be thought of as an element of fairness *per se*, but rather as a necessary component of a "reasonable" decision.

112 *Ombudsperson Act*, s.23.

113 This includes the Rental Housing Council of BC, ROMS BC, BC Housing, and the BC Non-Profit Housing Association, as well as community advocates, LSLAP, TRAC, Pivot and BCPIAC.

114 RTA s. 64(2); MHPTA s. 57(2).

In addition to the above concerns about the content of arbitrators' decisions, community advocates also experienced frustration with the written decisions their clients receive from the Branch. They observed the following patterns in arbitrators' decision-writing that, in their view, cast doubt on whether their clients' cases are being considered fairly and thoroughly:

- Failure to deal with all of the issues that are material to the application;
- Failure to provide any reasoning to explain the basis for the arbitrator's factual and/or legal conclusions;
- Failure to explain negative credibility findings;
- Failure to address legitimate arguments that the parties presented at the hearing;
- Failure to explicitly address relevant evidence that the parties presented;
- Failure to mention procedural objections that parties made at the hearing;
- Inclusion of excessive detail on points that are unnecessary or immaterial; and
- Poorly written decisions that appear hastily drafted, sometimes with spelling or numerical errors.

Improving the standard of written reasons would go a long way to improving parties' confidence in the hearing and decision-making process.

Some of the above problems, when present, make a Branch decision vulnerable to judicial review, while others do not. However, all of these problems reduce public confidence in Branch decision-making. Advocates emphasized that their clients' primary concern after a hearing is that they want to feel they have been heard, and that their evidence and arguments have been fairly considered. Improving the standard of written reasons would go a long way to improving parties' confidence in the hearing and decision-making process.

Judicial perspective: Branch reasons found to be inadequate

The adequacy of reasons for Branch decisions has also been of concern to the court in many judicial reviews. Indeed, the court has set aside arbitrators' decisions in the past when they:

- Failed to deal with all the issues that were material to the application;[115]
- Failed to provide any reasoning to show a basis for the arbitrator's factual and/or legal conclusions;[116] or
- Failed to explain negative credibility findings.[117]

115 *Rutherfoord v. Affordable Housing Society*, (17 December 2012), Vancouver S123244 (B.C.S.C.).

116 *Ross v. British Columbia (Residential Tenancy Act Dispute Resolution Officer)*; *Lobo v. 568570 B.C. Ltd.*, 2011 BCSC 1474; *Collard v. British Columbia (Residential Tenancy Act Dispute Resolution Officer),* 2011 BCSC 136; *Andree v. Bentley*, 2011 BCSC 641.

117 *Chartrand v. 0810867 B.C. Ltd* (24 March 2009), Nanaimo 55039 (B.C.S.C.).

In reviewing Branch decisions, the court has repeatedly acknowledged that Branch arbitrators fulfill their duties within a system designed to be efficient and informal, and that they should not be held to the same standards for written decisions as, for example, a judge of the court.[118] However, the court has repeatedly made very pointed comments about Branch decisions, including:

- *…errors in adjudicative writing could lead one to conclude that there was a complete lack of attention to detail in adjudicating the case*;[119]
- *…even when they are considered in a realistic and tolerant way, these reasons fall short in the two important respects I have identified*;[120]
- *In my view, the decision of the Dispute Resolution Officer in the case at bar is a classic example of confused reasoning that appears on the face of it and is patently unreasonable in a number of respects;* [121]
- *… How the application has been supported and proven, and the reasoning process by which the DRO arrived at this conclusion, remain a mystery*;[122]
- *Here, there is no roadmap in the decision. There is no reference to the legislation that defines the scope of authority for a hearing, there is nothing setting out the test that Ms. Collard had to meet in order to allow the DRO to conclude that the Act did give such authority, there is no recital of any submissions made, and there is no explanation of the conclusion reached. Rather, there is only the stark unsupported conclusion…* [123]

Many of these judicial reviews involved extremely basic errors. The most basic we reviewed involved arbitrators who had completely ignored the applicable provisions in the legislation.

Judicial perspective: Arbitrators make serious errors in applying the legislation

The court has set aside decisions for not explaining how an adjudicator reached a conclusion, and also because of obvious errors in the conclusions stated. In 28% of successful judicial review decisions, the Supreme Court found arbitrators had failed, in one way or another, to actually apply the relevant sections of the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act*.

Many of these judicial reviews involved extremely basic errors. The most basic errors identified on judicial review involved arbitrators who had completely ignored the applicable provisions in the legislation. For example:

- In a case where a landlord wanted to evict tenants in order to do renovations to their units,[124] the arbitrator's decision was set aside because it focused on the cost-effectiveness, convenience, economics and timeliness of the proposed renovations, instead of considering the test actually set out in the statute (i.e. whether vacant possession of units was required).

118 *Lobo v. 568570 B.C. Ltd.*; *Andree v. Bentley*.

119 *Ross v. British Columbia (Residential Tenancy Act, Dispute Resolution Officer)*. In this case the decision omitted the file number for one of the two review cases being decided; listed the arbitrator by surname only; and incorrectly identified the landlord and the tenant.

120 *Lobo v. 568570 B.C. Ltd.*

121 *Falc v. Mainstreet Equity Corp*.

122 *Wiebe v. B&D Stinn Enterprises Ltd.* (4 May 2010), Vancouver S100134 (B.C.S.C.).

123 *Collard v. British Columbia (Residential Tenancy Act Dispute Resolution Officer)*.

124 *Allman v. Amacon Property Management Services Inc.*, 2006 BCSC 725, considering RTA, s. 49(6)(b).

- In a series of cases dealing with landlords' applications for exceptional rent increases, the arbitrators failed to address the statutory factors that a landlord must meet to qualify for a rent increase.[125] In these cases, the arbitrators either based their decision on factors not set out in the legislation, or else failed to consider all the factors that the legislation stipulates must be considered.
- In a case where a tenant's right to quiet enjoyment was evidently at issue on his application, the legislative provision granting a right of quiet enjoyment was not considered at all by the arbitrator.[126]
- In a case dealing with a tenant's claim for damages, the arbitrator applied a different mitigation test than is set out in the legislation.[127]
- In a case where the timeliness of an application for review was at issue, an arbitrator failed to apply the correct statutory timelines.[128]
- In a case where a tenant challenged a notice to end tenancy for cause, the arbitrator upheld the eviction based on factors not set out in the legislation.[129]

In our review of sample Branch decisions, we found that over 70% of the decisions had some form of problem with the written decision that departed from the basic hallmarks of good decision-making.

Review of Branch decisions revealed basic errors

As set out previously, in our review of sample Branch decisions, we found that over 70% of the decisions had some form of problem with the written decision that departed from the basic hallmarks of good decision-making. The problems mirrored some of those identified by the court on judicial review, and included:

- Misstating the relevant legal test in a material way, or deciding the case on factors that are not in the legislation;[130] and
- Deciding the case without making any findings that the relevant legal test had been met.[131]

These are extremely basic errors and in our view this indicates an unacceptably low standard of decision-making at the Branch.

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125 *Doughty v. Whitworth Holdings Ltd.,* 2008 BCSC 801; *Clements v. Gordon Nelson Investments, Inc.*; and *Wiebe v. B&D Stinn Enterprises Ltd.*; *Barosso v. Fraser Plaza Ltd.*, 2011 BCSC 1448. See also *Mochizuki v. Whitworth Holdings Ltd.*, 2008 BCSC 802.

126 *Rutherfoord v. Affordable Housing Society*.

127 *Falc v. Mainstreet Equity Corp*.

128 *Sharma v. The Director Residential Tenancy Office* (4 August 2009), Vancouver S093652 (B.C.S.C.).

129 *Desjarlais v. A Lafleur* (February 18, 2008), Penticton 30063 (B.C.S.C.), where the arbitrator upheld an eviction based on behaviour by a third party that had not been permitted on the rental premises by the tenant. Under the applicable section of the RTA (s. 47(1)(d)) eviction was only justified where the conduct in question was by "the tenant or a person permitted on the residential property by the tenant."

130 For example: Decision 1111_022012 (March 6, 2012); Decision 1006_032012 (April 4, 2012); Decision 1007_032012 (April 4, 2012); Decision 1034_032012 (April 4, 2012); Decision 2062_062012 (June 25, 2012); Decision 2620_092012 (October 11, 2012); Decision 2114_122012 (December 12, 2012); Decision 2133_122012 (December 27, 2012); Decision 2333_022013 (February 19, 2013) (decisions are listed by PDF file name as stored on Branch website, with the date of the decision in parenthese).

131 For example: Decision 1111_022012 (March 6, 2012); Decision 1006_032012 (April 4, 2012); Decision 1007_032012 (April 4, 2012); Decision 1034_032012 (April 4, 2012); Decision 2062_062012 (June 25, 2012); Decision 2629_122012 (January 11, 2013).

TRAINING FOR ARBITRATORS

Several of the concerns set out above indicate that the Branch needs to improve its training for arbitrators, with respect to the skills required to run a fair hearing and write a reasonable decision. In an effort to better understand how the Branch is currently supporting its arbitrators to do their adjudicative work, our FOI request asked for all the Branch's training materials for arbitrators from 2005 onward. The Branch's response to this request revealed the following things about the Branch's training.

Training of new arbitrators is minimal

The Branch has a "RTB New Hire" process that appears to have been used from 2011 onward. Although the training appears to vary slightly between Branch offices, all offices appear to have a two-week training period for new arbitrators. After one day of introductions to the Branch and the tenancy legislation, a new arbitrator adjudicates one hearing per day in week 1, two hearings per day in week 2, and from week 3 onwards, carries the regular caseload of three hearings per day. New arbitrators observe hearings, and have a buddy arbitrator sit in on at least one of their own hearings. Beyond these general guidelines, there appears to be little in the way of structured training.[132]

Ongoing training contains mixed messages

Ongoing training for arbitrators has consisted of one or two days' annual in-house professional development, and additional informal training sessions from time to time.[133] In recent years, arbitrator training has covered procedural fairness during hearings and effective decision writing, among other topics. While it is good that the training has focused on these troublesome areas, the training unfortunately sent arbitrators mixed messages that, in our view, may underpin some of the problems we have identified.

With respect to fairness during a dispute resolution hearing, arbitrators received training on the basic requirements of procedural fairness. For example, the training materials cover the need to give each party the opportunity to know the case against her and to respond to it, and the need to be unbiased when making decisions.[134] However, the training materials also stressed the importance of keeping hearings under one hour and avoiding or minimizing procedural delays like adjournments — despite that fact that a longer hearing or an adjournment are in some cases necessary to ensure fairness.[135] Many of these instructions appear to be based on administrative concerns about scheduling and efficiency, at the expense of fairness.

132 Branch response to October 5, 2012 FOI request by Community Legal Assistance Society, Phase 2, Part 1, pp. 1-4 and 57-58.

133 December 20, 2012 letter from Lesley Pollard, Branch response to October 5, 2012 FOI request by Community Legal Assistance Society, Phase 2, Part 1, p. 114.

134 Various training materials, FOI Request, Phase 2, Part 1, p. 108; Phase 2, Part 2, pp. 43-61; 271-305; 319-325; 366; 372-384; 647-651.

135 Various training materials, FOI Request, Phase 2, Part 1, pp. 67, 89-90; Phase 2, Part 2, pp. 366-367.

With respect to written decisions, arbitrators received several in-depth training sessions on how to write effective decisions.[136] The training instructed adjudicators to take the time they need to draft and then review their decisions. However, there was also a strong focus on issuing concise decisions in an expedient manner.[137] For example, the materials for the 2009 training expressly suggested adjudicators keep decisions short because:

- Writing a lengthy decision might cause an arbitrator to change her own mind on the outcome of the dispute by the end of the decision; and
- A longer decision increases the likelihood that a party will apply for a review of the decision.[138]

Given that written decisions are intended to improve transparency and help the decision-maker to think through her decision, these instructions are troubling. We were pleased to hear that these materials are no longer being used in training and do not reflect current Branch training practices.[139] Issuing short, generalized decisions to avoid revealing errors runs contrary to the purpose of issuing written decisions in the first place.

It is also noteworthy that the Branch has provided minimal structured training to inform adjudicators about judicial review decisions issued by the court. Much of the formal training that did occur with respect to judicial reviews was plagued by the problems set out in the section of this report entitled "Concerns about the Branch's perspective on judicial review."[140]

Most full-time arbitrators handle 15 dispute-resolution hearings per week, and any time spent reviewing evidence and submissions, conducting research, writing decisions, and taking care of other administrative tasks must be fit in between those 15 hearings.

Arbitrators have very limited time to write decisions

The amount and quality of training provided to arbitrators is inconsequential if they do not have adequate time to implement what they learn in the training. It appears that in trying to strike a balance between adjudication that is not only efficient, but also just and consistent, efficiency wins the day in Branch decision-making.

Most full-time arbitrators handle 15 dispute-resolution hearings per week, and any time spent reviewing evidence and submissions, conducting research, writing decisions, and taking care of other administrative tasks must be fit in between those 15 hearings.[141] This is a very high volume of hearings and decisions to handle each week, with very little time available for review of evidence and submissions, research or decision writing.

Under the legislation, Branch arbitrators must issue their written decisions within 30 days of a dispute resolution hearing.[142] This timeframe is long when compared to other administrative decision-makers in BC, particularly those that are adjudicating other time-sensitive matters. For example, the Employment and Assistance Appeal Tribunal, which determines eligibility

136 Various training materials, FOI Request, Phase 2, Part 1, pp. 6-7, 109-113; Phase 2, Part 2, pp. 147; 150-244; 245-254; 255-266; 306-311; 326-344; 367; 386-421; 428-535; 537-591; 653-656; 664-665.

137 Various training materials, FOI Request, Phase 2, Part 1, pp. 6-7, 90, 109; Phase 2, Part 2, pp. 147, 366-367, 386, 648.

138 Document entitled "Decision Writing," FOI Request, Phase 2, Part 1, p. 109; Phase 2, Part 2, p. 386.

139 Telephone conversation with Cheryl May, September 17, 2013; email from Cheryl May, September 17, 2013.

140 FOI Request, Phase 2, Part 2, pp. 83 and 536.

141 Telephone conversation with Cheryl May, May 17, 2013.

142 RTA s. 77(1); MHPTA s. 70(1).

for social benefits, must issue its decisions within ten business days of an appeal hearing, with the possibility of extending that time period to 20 business days.[143]

Unfortunately, it appears that arbitrators rarely take advantage of the available legislative timeframe when crafting their written decisions. In 2011/12, the average time between a Branch dispute resolution hearing and the issuing of a Branch decision was 1.1 days, including both urgent and non-urgent disputes. For urgent disputes, the average time between the hearing and issuing a decision was 0.5 days.[144] We expect it is extremely difficult for arbitrators to review their hearing notes, review documentary evidence, complete any research that might be required, and write their decisions within this very short period of time.

In our view, these incredibly short decision turnaround times, which are not mandated by the legislation, likely have a negative impact on the quality of arbitrators' decisions.

While we recognize the value of efficiency and the fact that decisions may be easier to write when evidence is fresh in the arbitrators' minds, writing a clear, reasoned and transparent decision takes some time. In our view, these incredibly short decision turnaround times, which are not mandated by the legislation, likely have a negative impact on the quality of arbitrators' decisions.

ARBITRATION CONCLUSION AND RECOMMENDATIONS

Stakeholders' comments, the court's judgments, and our own review of Branch decisions all point to significant concerns about unfairness in the Branch adjudication process. These problems permeate all stages of the adjudication process. The Branch seems to prioritize efficiency, particularly *during and after* the dispute resolution hearing, at the expense of basic administrative fairness.

RECOMMENDATION 4: To ensure that the process *leading up to a dispute resolution hearing* is fair and accessible, the Branch should:

- Improve in-person services by extend opening hours for the Branch offices and, if possible, for Service BC offices, so that they are accessible outside of regular business hours. The Branch should also provide adequate training for government agents handling residential tenancy matters.
- Improve all Branch Notice to End Tenancy forms so that they clearly flag information about timelines and consequences, and so that they provide all the information necessary to respond.
- Minimize the harm from delayed hearing scheduling by creating a transparent process for seeking an expedited hearing in urgent cases, especially where health and safety are at issue.
- Improve the handling of evidence by: (1) implementing staggered timelines for evidence so that the respondent has adequate time to respond to the applicant's evidence, and (2) creating a reliable system to ensure that all evidence submitted by the parties gets to the arbitrator before each hearing.

143 *Employment and Assistance Regulation*, B.C. Reg. 263/2002 s. 87.

144 Laura Monner, *Residential Tenancy: Dispute Resolution Report 2007/08-2011/12* (October 5, 2012), pp. 22 and 23.

RECOMMENDATION 5: To address concerns about fairness *during the hearing itself*, the Branch should:

- Ensure that the use of telephone hearings does not lead to unfairness. At a minimum, in-person hearings are necessary in all cases where: (1) a party cannot handle a teleconference hearing due to disability or language barriers, or where (2) issues of credibility are central to the decision. The Branch should also create a transparent and accessible process for requesting an in-person hearing.
- Improve arbitrator conduct during dispute resolution hearings by providing training to increase their sensitivity to procedural fairness issues, and to improve their skills in handling the interpersonal and logistical challenges of a telephone hearing. This training should ensure that arbitrators are encouraged to:
    - Explain, at the start of the hearing, the nature of the proceeding and how it will proceed.
    - Minimize the likelihood of fairness issues relating to documentary evidence by checking that all parties have the same documentary evidence in front of them before the hearing starts. If any evidence is accepted late, the arbitrators should be directed to apply the applicable rules of procedure.
    - Maximize the quality of oral evidence by: (1) having each witness swear or affirm before giving evidence, and (2) excluding witnesses from the hearing, wherever possible, before they testify.
    - Improve fairness by ensuring that both parties have a fair opportunity to present their case and challenge the case against them.
- Finalize a clear policy on when and how community advocates (and other similar representatives) will be permitted to help parties to present their case at hearing.
- Record a certain percentage of all teleconference hearings, to be reviewed on a random basis by Branch management to evaluate arbitrator performance.

RECOMMENDATION 6: To improve the quality of written decisions issued by Branch arbitrators:

- Continue training arbitrators on how to write effective decisions, and promote comity among arbitrators by providing training on areas of uncertainty and encouraging them to follow policy guidelines (while making clear that the guidelines do not fetter arbitrators' discretion).
- Employ a qualified person to systematically review a random sampling of each arbitrator's decisions, on an ongoing basis, to ensure decision quality.
- Ensure that arbitrators have sufficient time in their workday to write effective decisions, and encourage them to take the time to do so.

RECOMMENDATION 7: Improve the fairness of all stages of the dispute resolution process by continuing to implement a reliable and accurate system to track judicial reviews involving Branch decisions and inform arbitrators of both the policy and procedural guidance provided by the court.

Improve the fairness of all stages of the dispute resolution process by continuing to implement a reliable and accurate system to track judicial reviews involving Branch decisions and inform arbitrators of both the policy and procedural guidance provided by the court.

BRANCH FUNCTION 3:

ENFORCEMENT

The ability to enforce the rights and obligations set out in tenancy law, and the Branch's own decisions, is key to ensuring the legislation is taken seriously.

In addition to the Branch's power to provide information about landlord/tenant law and its power to adjudicate landlord/tenant disputes, the Branch also has important regulatory and enforcement powers that enable it to investigate, penalize and deter non-compliance with the legislation.

The ability to enforce the rights and obligations set out in tenancy law, and the Branch's own decisions, is key to ensuring the legislation is taken seriously. To encourage compliance, there must be consequences for non-compliance.

This part of our report will explain the nature of the Branch's enforcement powers and review the Branch's exercise of those powers.

ENFORCEMENT POWERS OF THE BRANCH

When a party applies to the Branch for dispute resolution, an arbitrator may (as part of the Branch's adjudicative function) make any orders necessary to give effect to the legislation, including orders for compensation, and orders requiring compliance with the legislation.[145] Where a party wishes to enforce an order of the Branch in an individual case, that party can do so by filing the order in BC Supreme Court or BC Provincial Court (depending on the nature of the order), and pursuing the enforcement proceedings available in those courts.[146] But the legislation also gives the Branch its own enforcement powers, which it may exercise outside the arena of individual dispute resolution cases.

First, the legislation empowers the Branch to **conduct investigations** for the purpose of ensuring compliance.[147] The Branch's investigative powers are broad; there is no statutory limitation on what the Branch can investigate, or how, provided that the purpose of the investigation is to ensure compliance with the legislation.

145 RTA ss. 62(3), 65 and 67; MHPTA ss. 55(3), 58 and 60.

146 RTA ss. 84 and 85; MHPTA ss. 77 and 78.

147 RTA s. 96.1; MHPTA s. 88.1. In our view, compliance with the legislation likely also includes compliance with a binding order of the Branch, since RTA s. 77(3) and MHPTA s. 70(3) expressly state that, unless otherwise provided for in the legislation, an order by the Branch is final and binding on the parties.

The legislation also provides two avenues that the Branch can pursue where, through an investigation or otherwise, it comes to the Branch's attention that a party is violating the legislation or a Branch order.

The Branch may issue an **administrative penalty** against a party that has contravened the legislation or breached an order of the Branch. These penalties can be up to $5000 per day of the violation, so they have the potential to serve as a powerful deterrent. The legislation requires the Branch to hear from any party they propose to penalize, and to consider the following factors before issuing an administrative penalty:

(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; and

(vii) the person's efforts to correct the contravention.[148]

The legislation provides that, instead of enforcing an administrative penalty, the Branch may enter into an agreement with the person who would otherwise be liable for the penalty.[149]

Finally, where certain legislative provisions are breached, these breaches can be **prosecuted as offences**.[150] The Branch has the ability to lay an information, which commences a prosecution under the *Offence Act*.[151] The legislation provides that a person convicted of an offence under the tenancy legislation is subject to a fine of up to $5000 per offence.

The legislation gives the Branch its own enforcement powers, which it may exercise outside the arena of individual dispute resolution cases.

PHOTO MACDAWG/FLICKR

148 RTA ss. 94.1-94.31; MHPTA ss. 86.1-86.31.

149 RTA s. 94.1(4); MHPTA s. 86.1(4).

150 RTA s. 95 and RT Regulation s. 32; MHPTA s. 87 and MHPT Regulation s. 53. See also the *Offence Act*, RSBC 1996, c. 338. Note that RTA s. 94.11 and MHPTA s. 86.11 provide that where a person is subject to an administrative penalty she may not be charged with an offence, and vice versa.

151 *Offence Act*, s. 25.

The legislative provisions about investigations, administrative penalties and offences combine to give the Branch significant powers to actively monitor parties' compliance with BC's tenancy legislation and to either directly penalize parties who fail to comply, or to refer them for prosecution under the *Offence Act*.

PURPOSE OF THE ENFORCEMENT PROVISIONS

While the legislation does not require the Branch to exercise any of its enforcement powers, the government created these powers with a clear intention that the Branch would actively use them. In the legislative debates regarding the enforcement provisions in the *Residential Tenancy Act*, the Minister responsible for housing expressly said that:

- The public could expect the Branch to start using the offence provisions to pursue individuals who breach the Act;[152]
- The administrative penalty provisions would enable the government to "actually levy significant fines for bad behaviour, rather than having to go to the court system, and have a more proactive system with regards to bad behaviour on behalf of the parties under this Act";[153] and
- Staff would be hired to exercise the investigation powers in the legislation, and Branch investigations would help ensure tenants' rights were protected quickly and efficiently, and would lead to fines where appropriate.[154]

While the legislation does not require the Branch to exercise any of its enforcement powers, the government created these powers with a clear intention that the Branch would actively use them.

BRANCH POLICIES ON ENFORCEMENT

The legislative provisions on offences and investigations have been in effect since January 2004 and October 2006, respectively. As part of our FOI request, we asked for any policies the Branch has on when and how these provisions are to be implemented. While the Branch's response to our FOI request did include a set of undated draft policies on how investigations would be conducted, and undated draft terms of reference for hiring private investigators, it appears these policies were never finalized.[155] To date the Branch has not actually implemented any policies regarding offences and investigations.[156]

Meanwhile, the legislative provisions on administrative penalties came into effect in March 2008, and in 2012, the Branch created a policy guideline and a factsheet on administrative penalties, which are inconsistent in their approach to the subject.[157] The factsheet and guideline are the Branch's only formal policies regarding administrative penalties.[158]

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152 British Columbia, Legislative Assembly, Official Report of Debates of the Legislative Assembly (Hansard) Vol. 10, No. 5 (November 7, 2002) at 4416 (Hon. R. Coleman).

153 Hansard, Vol. 12, No. 6 (May 18, 2006) at 5022 (Hon. R. Coleman).

154 Hansard, Vol. 12, No. 6 (May 18, 2006) at 5026-5027 (Hon. R. Coleman).

155 FOI Request, Phase 2, Part 4, pp. 195-206 and 320-321.

156 Email from Catherine May to Michelle Beattie (December 21, 2012), FOI Request, Phase 2, Part 4, p. 316.

157 Residential Tenancy Branch, *Landlord and Tenant Fact Sheet: Administrative Penalties*, #RTB-142 (March 2012); and Residential Tenancy Branch, *Policy Guideline 41. Administrative Penalties*, (January 2012). The two documents are inconsistent because the Branch's factsheet indicates the Branch intends to apply administrative penalty provisions narrowly, while the policy guideline reflects the broad intent of the legislation.

158 Email from Catherine May to Michelle Beattie (December 21, 2012), FOI Request, Phase 2, Part 4, p. 316.

IN PRACTICE: USE OF BRANCH ENFORCEMENT POWERS

To date, the Branch has never made use of the offence provisions of the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*. No one has ever been charged with an offence under either Act.[159]

Meanwhile, the Branch has exercised its investigation and administrative penalty powers in only one case.[160] This was the matter of landlord Gurdyal Sahota and his three-storey apartment building at 12975 – 106th Avenue, Surrey ("Kwantlen Park Manor").

The Branch began an investigation into the landlord's conduct at this property in late 2011. Specifically, the Branch investigated Mr. Sahota's non-compliance with an arbitrator's order requiring repairs to Kwantlen Park Manor. Underlying the decision to investigate in this case is a lengthy history:

- In February 2010 a tenant at the property applied to the Branch after her landlord refused to repair leaks and address dangerous structural problems, which she said breached the landlord's obligation to repair and maintain the property.[161] The tenant sought relief including an order for "global" repairs to fix problems that affected the building as a whole.
- On July 19, 2010 Arbitrator K. Miller declined to order global repairs on the basis that the *Residential Tenancy Act* only gave her authority to order repairs that directly affected the tenant's particular rental unit.[162]
- The tenant sought judicial review. On February 4, 2011 the BC Supreme Court set aside Arbitrator Miller's decision, disagreeing with her finding that the Branch lacked jurisdiction to order global repairs. The Court ordered a new hearing.
- The Branch arranged a re-hearing and on May 20, 2011 Arbitrator T. Mitchell issued a new order, requiring the landlord to hire a building envelope professional to prepare a comprehensive report with timelines for doing the necessary repairs by June 30, 2011, *and* to comply with the recommendations in the report.
- As of August 2011 the landlord had not provided the report required by the May 20, 2011 order. The tenant wrote to the Branch requesting that an administrative penalty be levied. The tenant made detailed submissions explaining the history of the landlord's conduct at Kwantlen Park Manor and also at other residential properties.[163]
- At about the same time, the tenant also applied for dispute resolution seeking assistance from the Branch; on November 10, 2011 she obtained a decision finding that the landlord had breached the May 20, 2011 order and requiring him to comply.[164]

The Branch has exercised its investigation and administrative penalty powers in only one case.

159 Letter from Cheryl May to Jess Hadley (May 14, 2013).
160 Letter from Cheryl May to Jess Hadley (May 14, 2013).
161 RTA s. 32.
162 *Susan Collard v. Waterford Developments (a.k.a. Waterfront Developments) and Bilesh Liyenge and Gurdyal Singh Sahota*, RTB File 750222 (May 20, 2011).
163 Letter from Kirsty MacKenzie to Suzanne Bell (August 17, 2011).
164 *Susan Collard v. Waterford Developments and Gurdyal Singh Sahota*, RTB File 778944 (December 9, 2011).

- In early December 2011 the Branch produced an investigation report setting out information relevant to a potential administrative penalty, including details about the May 20, 2011 order; whether or not the landlord had taken steps to comply; and notes on the circumstances that the legislation requires be taken into account before the Branch imposes an administrative penalty.[165] The Branch's method of investigation was to review past decisions from dispute resolution hearings between this landlord and tenants at Kwantlen Park Manor and other properties. The Branch did not conduct its own inspections or interview anyone.
- After giving the landlord an opportunity to respond to its investigation report, the Branch issued a decision on March 16, 2012 imposing an administrative penalty of $115,000 on the landlord, payable within 60 days.[166] The sum was calculated as $500 per day for an eight month period of non-compliance with the Branch's order. The Branch also specifically found that the landlord had acted deliberately in failing to abide by the Branch's order.[167]
- The landlord did not comply with the requirement to pay the administrative penalty within 60 days. Instead, on May 15, 2012 the landlord filed a judicial review challenging the March 16, 2012 administrative penalty decision. The landlord apparently never proceeded with this judicial review.
- In August 2012 the Branch reached a negotiated agreement with the landlord instead of enforcing the administrative penalty.[168] This agreement says the Branch will waive the entire $115,000 administrative penalty provided that the landlord complies with a revised repair schedule and does not receive any additional administrative penalties in the two year period following the March 16, 2012 penalty. The agreement states that if these requirements are not met, the administrative penalty will become due and payable.[169]

While the agreement timeframe has not yet concluded, provided the landlord continues to comply with its terms, the $115,000 penalty will be waived.

The community advocates we spoke to who discussed the topic of administrative penalties were, as a group, extremely concerned that agreements like the one render administrative penalties meaningless. As many stakeholders commented in our interviews, the landlord in this case has received no penalty despite having intentionally delayed complying with the terms of an order of the Branch for many months, potentially putting the tenants' health and safety in jeopardy. The case sends the message that landlords can continue to breach the legislation and Branch orders until an administrative penalty is issued, and then avoid any consequences simply by agreeing to comply with what they were initially ordered to do.

In short, the administrative penalty provisions have not been used in a way likely to motivate landlords to comply with the law or with Branch orders, particularly for expensive building maintenance issues.

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165 These are the factors in s. 94.1(2)(b) of the RTA.

166 *Re: 201, 12975 – 106 Avenue, Surrey, British Columbia and Gurdyal Sahota*, RTB file 246292 (March 16, 2012), www.rto.gov.bc.ca/documents/APDecisions/1001032012.pdf.

167 *Re: 201, 12975 – 106 Avenue, Surrey, British Columbia and Gurdyal Sahota*, RTB file 246292 (March 16, 2012), p. 23.

168 A copy of the agreement is available www.rto.gov.bc.ca/documents/APDecisions/1001032012A.pdf.

169 The agreement notes that this is "subject only to the landlord's petition for judicial review in that regard, and any proceedings arising."

"Without the ability to investigate landlords with multiple complaints or to enforce the rulings, RTB has no teeth and tenants have no justice."[170] — *Complaint letter*

ENFORCEMENT CONCLUSION AND RECOMMENDATIONS

The enforcement provisions of the *Residential Tenancy Act* and *Manufactured Home Park Tenancy Act* empower the Branch to meaningfully monitor and enforce the legislation. But in practice, the Branch has made very limited use of its enforcement powers.

Many tenants are vulnerable to landlords who breach the Acts or fail to comply with orders of the Branch. This is particularly true for those reliant on low-cost housing and whose income is already stretched to cover their rent. Such tenants often have few other options when faced with a landlord who breaks the law, as it is difficult for them to find alternative housing that they can afford. Few are willing and able to engage in a lengthy battle to enforce their rights. These more marginalized tenants rely heavily on the Branch to protect them from unscrupulous landlords. The Branch needs to make effective use of the enforcement provisions in the legislation, as the Legislature contemplated it would.

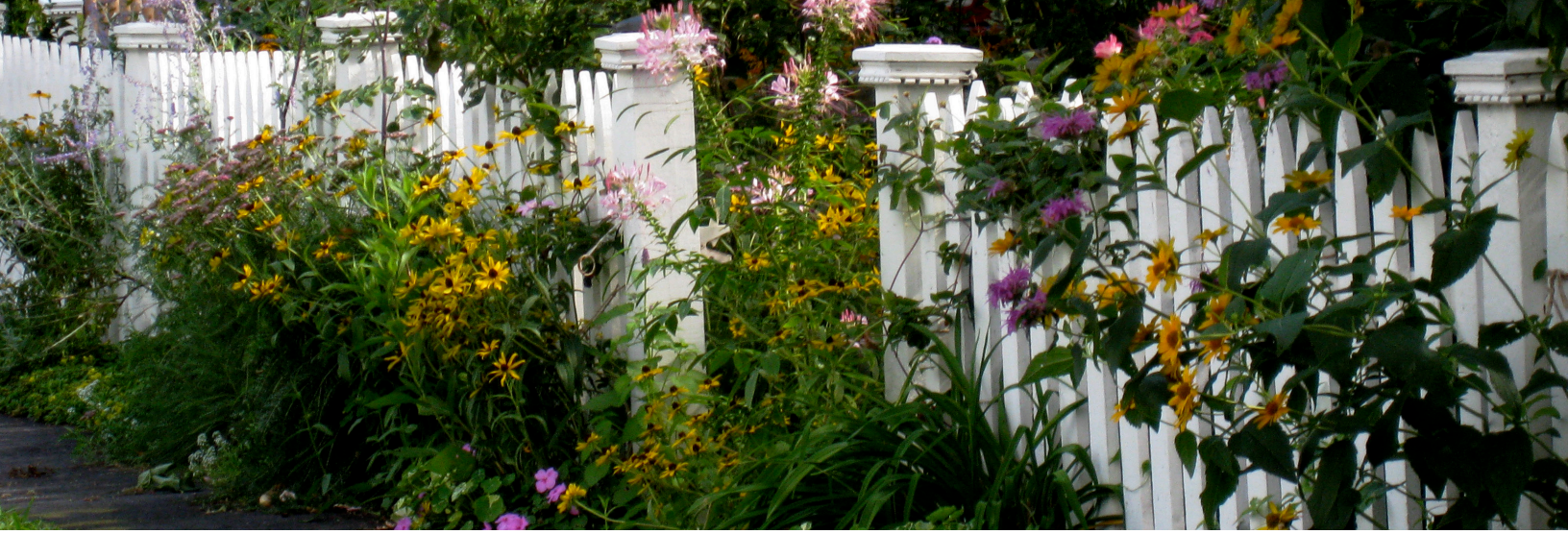
The Branch's enforcement practices fall short in three ways:

First, the Branch has seldom used its enforcement provisions. The Branch has never pursued an offence under either tenancy statute, and has only imposed one administrative penalty. The Branch's one administrative penalty was imposed only after an affected tenant persistently pressed the Branch to attend to the problems at her building, via multiple dispute resolution proceedings, a judicial review, a re-hearing, and written requests for administrative penalties. Most tenants, especially low-income or marginalized tenants, would be unlikely to pursue administrative penalties with the persistence that this tenant showed.

RECOMMENDATION 8: Advertise the possibility of administrative penalties more widely; proactively investigate breaches of the legislation; and impose penalties in more cases in order for administrative penalties to operate as an effective deterrent.

Second, the Branch's administrative penalty investigation was limited in that it only reviewed Branch decisions and did not actively inspect the property or meet with affected tenants. While the Branch gave the affected landlord an opportunity to respond to its investigation report, it did not request any input from the affected tenants. Not only did this limit the information available to the Branch in analyzing the administrative penalty issue, it also left tenants feeling excluded and unheard.

170 Complaint letter (April 13, 2012), FOI Request, Phase 3, Part 3, p. 170.



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RECOMMENDATION 9: Hear from affected tenants when deciding an administrative penalty case. A simple way of doing this would be to share the investigation report with affected tenants, and invite them to send in written submissions.

Third, the Branch entered into an agreement with the landlord, potentially waiving the consequences for non-compliance if the terms of the agreement are met. While an agreement may be appropriate in some cases, the resulting agreement required the landlord to take the same steps that the Branch's order had required it to take at the very outset, with little or no penalty for the ongoing delay and non-compliance with Branch orders. This rendered the administrative penalty meaningless and ineffective because it sent the message that there are no practical consequences for failing to comply with Branch orders.

RECOMMENDATION 10: When the Branch imposes an administrative penalty and the penalty is unpaid by the due date, promptly commence enforcement proceedings to collect the debt, or impose a second administrative penalty, or both.[171] For administrative penalties to have a deterrent effect, the Branch should only enter into agreements with respect to penalties if those agreements maintain a consequence for the original non-compliance with Branch orders.

171 RTA s. 94.31 and MHPTA s. 86.31 provide that an administrative penalty is a debt due to government. Interestingly, the Branch's response to our FOI request included an undated flow chart relating to administrative penalties which, although it is not part of the Branch's formal policy, seems to indicate an intention to either begin collections or impose a second administrative penalty when there is non-compliance with an administrative penalty order. See Chart, FOI Request, Phase 2, Part4, p. 322.

CONCLUSION

The Branch's arbitrators, like all administrative decision-makers, perform a difficult job: to be more efficient than the courts, but at the same time maintain the basic standards of fairness that are foundational to the legal system. It is challenging to do both at the same time.

A fast, low-cost system for determining legal disputes comes at a price. Costs are reduced if parties do not require lawyers, but for that to be possible, procedures must be simple and informal. Parties will then be increasingly reliant on educational services to make their case, and on decision-makers to ensure they receive a fair process and a just outcome.

Similarly, while it is efficient to hear and determine a large number of disputes each day, decision-makers may be compromised in their ability to handle hearings well, carefully consider each case, and write decisions that adequately explain how the parties' rights have been adjudicated. All of this may erode parties' faith in the decision-makers and public confidence in the laws being applied.

The balance between fairness and efficiency is not easy to strike and the Branch has clearly chosen to prioritize efficiency. Its adjudication mandate is focused primarily on high-volume, fast, informal, and low-cost decision-making. Meanwhile, it has been able to allocate only limited resources to its enforcement mandate and has therefore been unable to create any deterrent for landlords who routinely break the law. And while the Branch provides a high-volume public education service, there are concerns about the quality of information, especially through information officers. Increased efficiency comes with significant costs for the parties involved in disputes before the Branch, and for landlords and tenants across BC.

Branch adjudicators and staff need a renewed mandate with a focus on the basic elements of administrative fairness.

In our view, Branch adjudicators and staff need a renewed mandate with a focus on the basic elements of administrative fairness:

- Accessibility of services;
- Accuracy of information provided;
- Fairness, and perception of fairness, in all aspects of operation;
- Quality of decision-making, including transparent reasons for decisions; and
- Continued responsiveness to complaints.

Finally, the Branch needs increased financial resources to meaningfully improve its standards of administrative fairness. With a budget per adjudication of between 10% and 20% of comparable administrative decision-makers, the Branch is currently being asked to do the impossible, and it is no surprise that it is struggling to do so.

APPENDIX 1: ACKNOWLEDGEMENTS

This project was generously funded by the Law Foundation of BC.

The current Director of the Branch, Cheryl May, kindly made herself available to answer our questions throughout this project.

The report benefited immensely from the thoughtful review and commentary of our reviewers: Kaity Cooper, Devyn Cousineau, Didi Dusfrense, Seth Klein, Eugene Kung, Kevin Love, David Mossop, Q.C., Andrew Sakamoto, Kris Sutherland, Lindsay Waddell, and Alison Ward.

We are very grateful to all of our stakeholder participants for providing information about their experiences with the Branch.

Tenant-oriented stakeholders

- **ACTIVE MANUFACTURED HOME OWNERS' ASSOCIATION (AMHOA):** AMHOA is a grassroots organization that, among other things, provides the public with information regarding manufactured home tenancy law. AMHOA has 400 members and fields approximately 450 information requests a year, mostly from tenants. We spoke with Secretary/Treasurer Joyce Klein on February 15, 2013.
- **BC PUBLIC INTEREST ADVOCACY CENTRE (BCPIAC):** BCPIAC is a non-profit law office with a specialty in anti-poverty law, including housing issues. BCPIAC has represented tenants in hearings at the Branch and in judicial reviews of Branch decisions, and has advised tenants regarding the Branch's approach to administrative penalties. We spoke with staff lawyer Eugene Kung on April 4, 2013.
- **LAW FOUNDATION COMMUNITY ADVOCATES:** The Law Foundation funds several dozen community advocates across BC to represent low-income people, including in residential tenancy disputes. These advocates are very familiar with how the Branch's processes work in practice for people of limited means, who often experience other forms of marginalization as well. A total of 27 community advocates from across BC participated in our study.[172] We also spoke to Alison Ward, the Community

172 We held a focus group at the Law Foundation's annual training conference for advocates in November 2012, where we invited advocates to describe their experiences with the Branch, focusing on issues of concern that they had personally encountered in the course of their work. 26 advocates participated and we also interviewed one advocate after the focus group. The 27 advocate participants in our study were: Nighat Afsar (BC Centre for Elder Advocacy and Support); Gillian Andrew (Powell River Community Services Association); Gali Bar (Motivation, Power and Achievement Society); Ilena Candiani (Abbotsford Community Services Society); David Desautels (Penticton and Area Women's Centre); Vivienne Gorringe (Wachiay Friendship Centre); Rob Grant (Salt Spring and Southern Gulf Islands Community Services Society); Susan Henry (First United Church Mission); Bryan Horn (ARA Mental Health); Terry Intermela (Prince Rupert Unemployed Centre Society); Parveen Khtaria (TRAC); Kim Kirkpatrick (Abbotsford Community Services Society); Brenda Kobzey (Vancouver Island North Women's Resource Society); Yuka Kurokawa (Together Against Poverty Society); Emma Lazo (TRAC); Janet McAllister (BC Housing); Don McConnell (NCAA); Zuzana Modrovic (Kamloops and District Elizabeth Fry Society); Carin Morrish (Community Connections Society of Southwest BC); Lee Murphy (Sources Community Resources Society); Natasha Nair (Sources Community Resources Society); Amber Prince (Atira Women's Resource Society); Tara Rogers (Active Support Against Poverty); Stephanie Smith (MOSAIC); Laura Stannard (Jewish Family Services Agency); Stacey Tyers (Terrace and District Community Services Society); and Scott Waters (Kettle Friendship Society).

Advocate Support Line lawyer funded to supervise the community advocates on October 2, 2012.

- **LAW STUDENTS' LEGAL ADVICE PROGRAM (LSLAP):** Run by students at the UBC Faculty of Law, over the past five years LSLAP has provide advice and representation to an average of about 250-300 clients per year on landlord/tenant matters, including representing clients at hearings on a regular basis. We spoke with supervising lawyer Sarah Marsden on October 25, 2012.
- **PIVOT LEGAL SOCIETY:** Pivot Legal Society is a non-profit legal organization based in the Downtown Eastside of Vancouver. Its lawyers are particularly knowledgeable about how the Branch functions for economically marginalized people living in very low-cost housing. Its lawyers have represented clients both at the Branch and in judicial reviews of Branch decisions. We spoke with staff lawyers Doug King and Scott Bernstein on October 23, 2012.
- **TRAC TENANTS RESOURCE & ADVISORY CENTRE (TRAC):** TRAC is a non-profit society whose information hotline fields about 8,000 calls per year from tenants across BC. TRAC also meets quarterly with management at the Branch, as a representative of tenants. We spoke with Executive Director Andrew Sakamoto and with TRAC senior staff members Russ Godfrey and Tom Durning on November 18, 2012. Mr. Sakamoto also provided us with invaluable ongoing input and assistance.

Private landlord-oriented stakeholders

- **BC APARTMENT OWNERS' AND MANAGERS ASSOCIATION (BCAOMA):** BCAOMA has over 1,000 landlord members who collectively own and manage approximately 81,000 residential rental units throughout BC. BCAOMA also meets quarterly with management at the Branch, as a representative of landlords. We spoke with BCAOMA Executive Director Valerie McLean, who advised that the Rental Housing Council of BC would speak on her organization's behalf, on January 28, 2013.
- **MANUFACTURED HOME PARK OWNERS' ALLIANCE OF BC (MHPOA):** MHPOA represents over 360 manufactured home park owners across BC. We spoke with MHPOA director Jay Goudreau on April 2, 2013.
- **RENTAL HOUSING COUNCIL OF BC (RHC BC):** The Rental Housing Council of BC represents more than 3,000 rental housing providers. Its members provide rental accommodation to 160,000 households.[173] We spoke with President and CEO Amy Spencer on March 22, 2013.
- **RENTAL OWNERS AND MANAGERS SOCIETY OF BC (ROMS BC):** ROMS BC represents over 2,300 rental owners and managers that collectively manage over 50,000 rental units. They are affiliated with local landlords' associations in Kelowna, Prince George and Nelson as well as the MHPOA. ROMS BC also meets quarterly with management at the Branch, as a representative of landlords. We spoke with CEO Al Kemp on February 15, 2013.

173 In July 2013, BCAOMA, ROMS BC and RHC BC merged to form one organization called the Rental Housing Council. It is likely that RHC BC's membership listed here overlaps with the memberships listed for BCAOMA and ROMS BC.

Non-profit landlord-oriented stakeholders

- **BC HOUSING:** BC Housing is a Crown agency mandated to "undertake programs and actions relating to the provision of housing in British Columbia."[174] As part of this, its Operations Branch oversees property management services for 7,200 public housing units, and provides financial and management consulting services to non-profit and co-op housing providers responsible for an additional 59,100 units. We spoke with Executive Regional Director Dale McMann on January 31, 2013 and Regional Operations Manager Janet McAllister on February 14, 2013.
- **BC NON-PROFIT HOUSING ASSOCIATION:** The BC Non-Profit Housing Association represents non-profit housing providers across BC. It has over 500 members, most of whom are non-profit housing societies. Its members also include organizations and individuals interested in affordable housing. We spoke with Executive Director Karen Stone and Director of Member Services Jacqui Mendez on January 31, 2013.

The following people also assisted us greatly in our research, either by providing information about their experiences with the Branch, or by referring us to others who could help: Sean Antrim (Vancouver Renters' Union); April Katz; Margaret Carter-Pyne; Sue Collard; and Matt Chritchley (Justice Access Centre).

The following law students volunteered their time to do invaluable background research for this project: Kayla Dobko; Zach Pashley; Shelton Stewart; Derek Yee. We also wish to thank our articling student Dante Abbey for helping us with difficult research tasks.

174 *Government's Letter of Expectations between the Minister of Housing and the Chair of the BC Housing Management Commission for 2012/13*, p. 2, http://www.bchousing.org/resources/About%20BC%20Housing/Government-letter-of-expectations.pdf.

APPENDIX 2 – BRANCH DECISION REVIEW METHODOLOGY

To assess the quality and fairness of the Branch's adjudicative function, we undertook a systematic review of a sample of Branch decisions. We chose a sample topic, additional rent increases pursuant to s. 23(1) of the Residential Tenancy Regulation and s. 33(1) of the Manufactured Home Park Tenancy Regulation, and thoroughly reviewed all the Branch decisions on the Branch website issued between October 25, 2011 and April 14, 2013.

While additional rent increase applications represent a small portion of Branch adjudication cases, we chose this topic because:

- Relatively few decisions have been made on landlord applications for additional rent increases. This made it feasible for us to do a comprehensive review of *all* decisions that the Branch has published on this specific topic during an 18-month period.[175]
- By focusing on decisions under legislative provisions that are applied relatively infrequently, our review gives a strong insight into arbitrators' capacity to handle the wide range of challenging issues that they face in their overall decision-making work. When faced with a relatively unfamiliar issue such as this one, arbitrators cannot apply a rote analysis and must actively exercise basic decision-making skills, such as the ability to identify the correct legal test; the ability to weigh the evidence against each element of the test; and the ability to draft reasons that make it possible to understand the outcome in light of the legal test and the evidence.
- Additional rent increase applications require arbitrators to apply a multi-part statutory test to the facts of each case. The test is clear from the face of the statute; arbitrators do not have to apply any unusual or esoteric legal principles. As well, it is generally possible to see from the face of the decisions whether or not the test has been applied.
- The Branch has issued a detailed policy guideline that sets out how the Branch says parties can expect arbitrators to apply the legislation governing additional rent increases.[176]
- Between 2008 and 2011, the BC Supreme Court overturned five different Branch decisions on applications for additional rent increase.[177] Thus the Branch, and the arbitrators deciding the cases we reviewed, has had an opportunity to be alerted to any challenges in deciding this type of application.

175 In any case it would have been unfeasible for us to do a statistically valid sampling of more common types of Branch decisions, due to the inconsistent coding of the decisions on the Branch's website and the limitations of the Branch's online search template (see the section of the report on educational services).

176 Residential Tenancy Branch, *Residential Tenancy Policy Guideline 37. Rent Increases* (updated August 9, 2007).

177 *Doughty v. Whitworth Holdings Ltd.*; *Mochizuki v. Whitworth Holdings Ltd.*; *Clements v. Gordon Nelson Investments, Inc.*; *Wiebe v. B&D Stinn Enterprises Ltd.*; and *Barosso v. Fraser Plaza Ltd*. In *Mochizuki* and *Weibe*, the court found the arbitrators had failed to provide adequate reasons; and in *Doughty, Clements* and *Barosso*, the court found the arbitrators had failed to consider all of the relevant statutory criteria.

Applications of this nature raise the question whether a landlord should receive an additional rent increase on top of the usual annual allowable increase. The legislation governing applications for an additional rent increase contains:

- A set of threshold criteria that a landlord must meet before an arbitrator can even consider an additional rent increase; and
- A set of factors the arbitrator must consider, if the above criteria are met, in deciding whether or not to grant an additional rent increase.[178]

Method

To obtain our set of decisions for review, we used the Branch website's decision database and searched for the phrase "additional rent increase" in three different case permutations.[179] Due to coding problems, most of the (several hundred) decisions generated by this search did not actually relate to landlord applications for an additional rent increase. We combed systematically through our search results and located those decisions that actually dealt with landlords' applications for additional rent increases. We then removed all decisions that did not end up dealing with the merits of the landlord's application (usually because the parties reached an agreement on the rent increase dispute, or because the application was dismissed for procedural reasons).

This left us with 35 decisions that actually dealt with the merits of the landlord's application for an additional rent increase. We then reviewed each of these decisions in detail. Our review was not geared toward determining whether decisions would be reviewable by a court if a party chose to seek judicial review. Rather, we examined each decision and asked the following six questions, each of which goes to a key aspect of good decision-making:

1. Does the decision actually mention or cite the applicable legislation so that the parties know on what basis their case was decided? It is good practice for decision-makers to cite or mention the legal authority on which their decisions turn. This way, the parties know on what legal basis their rights are being adjudicated.
2. Does the decision accurately state the legal test to be applied? It is essential for good decision-making that the decision-maker begin with an accurate understanding of the test to be applied, and articulate the test correctly and completely in the decision. This practice ensures that the arbitrator and the parties are clear about what is being decided.
3. If the decision accurately states the legal test to be applied, does the decision actually use that test in its analysis (rather than importing a test not found in the legislation)? Good decision-making requires not only that the correct legal test be stated, but also that the correct test be applied. Where a decision states the correct test but then applies a different one, the parties' rights are not being adjudicated according to the law.

178 RT Regulation s. 23; MHPT Regulation s. 33.

179 We searched for "additional rent increase"; "Additional Rent Increase"; and "Additional rent increase."

4. Does the decision contain a finding that each element of the statutory test was met (or, if the application was denied, does it state that at least one necessary element of the test was not met)?[180] To grant relief for an exceptional rent increase, an arbitrator must find, either explicitly or implicitly, that all the statutory (or other legal) requirements are met. The arbitrator must also make a finding about how to exercise her discretion in light of any mandatory factors set out in the legislation. If these findings are not articulated in the arbitrator's decision, the parties have no assurance that their rights are being properly adjudicated according to the law.

5. Does the decision contain at least some analysis to explain the arbitrator's findings? While the legal duty to provide reasons has been narrowed in recent years, good basic decision-making practice still requires a decision-maker to articulate at least some reasoning to support her conclusions.

6. Is the decision consistent with the applicable policy guideline? While Branch policy is not binding on arbitrators, and arbitrators' discretion cannot be fettered by policy, parties should be able to expect that by and large, arbitrators' decisions will tend to be consistent with the Branch's policy guidelines.

In our view, if the answer is "no" to any of the above questions, there is a serious problem with the quality of the decision under review.

180 We considered whether each decision contained findings on: (1) whether the various elements of the threshold test in s. 23(1) of the RT Regulation and s. 33(1) of the MHPT Regulation were met, and (2) whether, in light of the mandatory factors set out in s. 23(3) of the RT Regulation and s. 33(3) of the MHPT Regulation, a rent increase should be granted.

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