SUPREME COURT OF NOVA SCOTIA

Citation: *Kearley v. Eastern Mainland Housing Authority*, 2016 NSSC 61

Date: 20160217
Docket: Pic. No. 437017
SCP No. 433203
Registry: Pictou

Between:

Wendy J. Kearley

Appellant

v.

The Eastern Mainland Housing Authority

Respondent

Judge:	The Honourable Justice Patrick J. Murray
Heard:	September 9, 2015 in Pictou Nova Scotia
Written Decision:	February 17, 2016
Counsel:	Nasha Nijhawan and Kelly McMillan, for the Appellant Duane Eddy, for the Eastern Mainland Housing Authority

By the Court:

Part I – Overview of the Appeal

[1] This appeal concerns the eviction of the Appellant, Wendy Kearley, from a public housing unit. She has been residing in the same public housing unit in New Glasgow since 1989.

[2] At the beginning of her tenancy, Ms. Kearley was the single mother of three children. She is now 64 years old, and her children have grown up and moved out of her home.

[3] The Appellant suffers from a number of medical conditions, including multiple chemical sensitivity, fibromyalgia and chronic fatigue syndrome, all of which restrict her ability to leave her home and to interact with the public.

[4] The Appellant maintains her world is effectively limited to her house.

[5] Ms. Kearley faces significant challenges in maintaining a safe home, which must be kept free of environmental chemicals and pollutants that make her sick. Her present home has been carefully conditioned over many years to be safe.

[6] On February 11, 2015, Adjudicator, Ray E. O'Blenis, of the Nova Scotia Small Claims Court (the "Adjudicator") terminated the Appellant's tenancy because he found that the public housing program, administered by the Eastern Mainland Housing Authority (EMHA), did not permit the Appellant to live alone in a three-bedroom public housing unit.

[7] The EMHA has been granted an order on the basis that Ms. Kearley is now "over-housed" in her three-bedroom residence.

[8] This order was granted on an appeal of the decision of the Director of Residential Tenancies (the "Director"). The Director denied the EMHA's application to terminate Ms. Kearley's tenancy because there were documented medical reasons for the her not to move, and that other suitable accommodations were not available given the Appellant's medical conditions and income.

[9] The Adjudicator found that the Appellant did not have a right under the "public housing program" to live in a detached housing unit. Pursuant to the order terminating the her tenancy, the Appellant was required to provide vacant possession of her three-bedroom unit, on or before March 31, 2015.

[10] The enforcement of the order terminating the Appellants tenancy was "stayed" pending the outcome of this appeal. The Appellant requests that this Court quash the order terminating her tenancy.

Background

[11] The EMHA is responsible for the administration, maintenance, and management, of subsidized rental housing units, in Antigonish, Guysborough & Pictou Counties. The EMHA delivers property management services on behalf of Housing Nova Scotia, which is a provincial government corporation.

[12] Clause 2(fb) of the *Residential Tenancies Act*, RSNS 1989, c. 401, defines a "public housing program" as a rental program offered to tenants of low and modest income by reason of funding provided by the Province, among others.

[13] To be eligible for public housing in Nova Scotia applicants must demonstrate a "core need" and are required to fall within a specified "household income limit".

[14] The Canada Mortgage and Housing Corporation (CMHC) sets income limits for subsidized housing each year. The income limits reflect updated utility costs, and market rents for an appropriate sized unit in the private market. Moreover, the size of the unit by household is governed by the National Occupancy Standards.

[15] In Nova Scotia, applicants for public housing are given "special consideration" if they have been victims of family violence or they have "special needs", which may include a "physical disability".

Grounds of Appeal

[16] In her Notice of Appeal, the Appellant sets out three grounds:

> a) The Appellant has documented medical reasons why she cannot move which the adjudicator failed to consider.
>
> b) The adjudicator erred in law in failing to consider that the Respondent has not provided the Appellant with suitable public housing.
>
> c) The adjudicator erred in law in deciding that the Respondent had the right to issue the Appellant a Notice to Quit the premises known as 154C Munroe Avenue, New Glasgow by holding that the Respondent offered the Appellant subsidized housing that would meet the Appellants special needs when in fact no such suitable housing was offered.

The Facts As Found by the Adjudicator and Recorded in his Decision.

> [1] The Appellant entered into a one year lease with the Respondent landlord, Eastern Mainland Housing Authority in March 1990 for property known as 154C Munroe Avenue, New Glasgow, Nova Scotia. The lease was for a three bedroom household and at the time it was entered into, it was occupied by the Appellant

and her three children. This was not disputed by the parties, the housing unit was considered a family unit.

[2] The Lease Agreement dated March 9, 1990 provides that for the purpose of the lease, there were four (4) members in the Tenant's family living in the premises. (Tab 2 Exhibit 2).

[3] The Appellant's lease came up for renewal with Eastern Mainland Housing Authority (EMHA) on March 1, 2014 and the Respondent landlord wrote to the Appellant on November 25, 2013 to notify the Appellant she was no longer eligible for a three bedroom unit for a single individual (Tab 16 Exh 2).

[4] The three bedroom family unit was no longer occupied by any children of the Appellant when the Respondent wrote the letter of November 25, 2013, and when the Respondent issued the Notice to Quit on November 25, 2013. (Tab 16 Exh 4)

[5] The Appellant has been diagnosed with multiple chemical sensitivity (MSC) and as a result needs to be housed in an environment free from chemical and scented products and housed where she has her own washing machine and dryer.

[6] The Respondent landlord made efforts to find affordable subsidized housing for the Appellant and did discuss with the Appellant two properties that the Respondent felt met the Appellant's special needs.

[7] The first property found by the Respondent was a one-bedroom, sitting room, kitchen, living room and dining room unit in Riverton, Pictou County Nova Scotia. This was ground floor unit with a laundry room for this tenant only, located in the bathroom area, thus avoiding use of community laundry room in the six unit building. Although the rent was higher, the Respondent's evidence was that based on the Appellant's income, it probably could be arranged through Community Services for rent subsidization. This evidence was accepted.

[8] The Appellant refused to look at this unit as she stated it did not meet her requirements that it be a "detached housing" unit.

[9] The second property found by the Respondent is located in Westville, Pictou County. (Tab 22 email dated July 9, 2014 and August 29, 2014). It had the same layout as the Riverton property referred to in paragraph 7 herein, and the rent was eligible for the supplemental program. This was a four unit building that had been built approximately five years or more earlier and it, like the Riverton property, was heated by hot air.

[10] The Appellant's own evidence is that she did not bother to look at this unit as it was not a "detached" unit.

[11] The Appellant's current premises, at 154C Munro Avenue, New Glasgow is a detached-home and is heated by hot air. She has her own washer and dryer.

[12] The Appellant did not view or accept the two units offered by the Respondent housing authority because they were both semi-detached.

[13] The Appellant did not offer any evidence to support her position that maybe the two units offered had something wrong with them that would negatively impact on her sensitivities.

[22] It was clear that the tenant was an over-housed tenant.

[23] There was a demand for the size of the unit occupied by the Appellant.

[24] The Landlord made reasonable efforts to find other subsidized housing units for the tenant, Ms. Kearley that met her needs.

[25] The units offered by the Landlord were appropriately sized units available to the over-housed tenant. They were affordable and adequate in the community and they met her special needs. The tenant Ms. Kearley, did not bother to view either of these units. She felt they were not detached units and therefore were not suitable. There was no evidence to support the argument she could only live in a detached dwelling. Both units were hot air heated and had self contained washer and dryer. There was no evidence they contained mold or sensitive materials which she could react to.

[26] There was no evidence that mandated the Respondent to provide only a "detached" housing unit to the Appellant.

Issues on Appeal

[17] The Appellant has framed the issues in her appeal.

[18] The Appellant submits that the Adjudicator made the following errors of law in ordering the termination of Ms. Kearley's tenancy with EMHA:

a) The Adjudicator incorrectly applied the mandatory guidelines for the transfer of an over-housed tenant contained in the public housing policies; and

b) The Adjudicator failed to consider the impact of EMHA's duty to accommodate Ms. Kearley's disability on the decision to evict Ms. Kearley from her house.

[19] I am going to deal with the grounds of appeal by addressing these two issues as framed by the Appellant.

Standard of Review

[20] For the standard of review on this appeal I adopt paragraphs 40 - 43 of the Appellant's brief, including the standard as set out in ***Brett Motors Leasing Ltd. v. Welsford***, [1999] NSJ No 466, as follows, at paragraph 14.

> 14. One should bear in mind that the jurisdiction of this Court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. I do not have the authority to go outside the facts as found by the adjudicator and determine from the evidence my own findings of fact. "Error of law" is not defined but precedent offers useful guidance as to where a superior court will intervene to redress reversible error. Examples would include where a statute has been misinterpreted; or when a party has been denied the benefit of statutory provisions under legislation pertaining to the case; or where there has been a clear error on the part of the adjudicator in the interpretation of documents or other evidence; or where the adjudicator has failed to appreciate a valid legal defence; or where there is no evidence to support the conclusions reached; or where the adjudicator has clearly misapplied the evidence in material respects thereby producing an unjust result; or where the adjudicator has failed to apply the appropriate legal principles to the proven facts. In such instances this Court has intervened either to overturn the decision or to impose some other remedy, such as remitting the case for further consideration.

[21] Errors of law, as are alleged here, are reviewed for correctness. Findings of fact and credibility are reviewed for palpable and overriding error.

Issue #1 – Did the Adjudicator incorrectly apply the mandatory Guidelines for the transfer of an over-housed tenant as contained in the public housing policies?

[22] There is no dispute that Ms. Kearley's lease is part of a public housing program offered to tenants of low and modest means by reason of funding provided by the government. (Section 2(fb) of the *Residential Tenancies Act)*

[23] The parties agree that Ms. Kearley continues to meet the eligibility requirements of the program. Her income as found by the Director, Ms. Kennedy was $498.70 per month (combined CPP and Social Assistance).

[24] The parties disagree on the issue of whether the Appellant is an "over-housed tenant". Mainly, the parties disagree on the issue of whether the Appellant's medical condition prevents the Housing Authority from transferring her to a different unit pursuant to section 1.10 of the *Guidelines*.

[25] The decision of the Director issued on October 30, 2014 denied the EMHA's application to terminate Ms. Kearley's tenancy. In deciding that the Landlord was not entitled to terminate her tenancy the Director stated:

> The Residential Tenancies Program Policy #22 states that Public Housing Policies must be taken into account by a Residential Tenancy Officer when they form part of the lease.
>
> Because of Ms. Kearley's medical condition and low income other suitable accommodations are not available.

[26] According to the *Guidelines* there are four (4) pre-conditions that must be met prior to the EMHA exercising its right to transfer over-housed tenants to other accommodations. The *Guidelines* state that eviction of a tenant is a serious matter and that all other options should be exhausted prior to issuing or seeking approval for a notice to quit. (*Guideline 1.11*)

Over-housed Tenancy

[27] Under the *Lease Administration Guidelines*, tenants are considered "over-housed" when, a three bedroom unit is "occupied by a single person or couple and one (1) dependant or less". (*Guideline 1.10*)

[28] The Appellant takes issue with the finding that she is an over-housed tenant. This is contrary to the finding of the Director. While the Director found she did not have to transfer to another accommodation, she did find that the Appellant was "over-housed".

[29] In her decision the Director, Ms. Kennedy, stated as follows:

> Ms. Kearley meets the income requirement but she does not meet the family composition for a three bedroom unit.

[30] In oral argument her counsel stated that the Appellant requires additional room for storage due to her medical condition. If this were accepted, this would reduce her present occupancy to that of a two bedroom unit.

[31] The Appellant argues the EMHA accepted that an extra room was required when it offered the accommodations in Riverton and Westville, which were both two bedroom units.

[32] Under the *Guidelines* a two bedroom unit occupied by a single person would still be considered over-housed.

[33] The Adjudicator found at paragraph 18 that when the unit was first occupied in 1990, her family consisted of herself and her three children. He then found at paragraph 19 that since the summer of 2013, it has been occupied by only Ms. Kearley.

[34] Consequently, he found that the family composition had changed and that she no longer qualified for a three bedroom family unit. Notably, the Adjudicator stated "there is no dispute by the parties to this fact".

[35] The Adjudicator found it was clear that Ms. Kearley was an over-housed tenant. (Paragraph 22 of stated case)

[36] I would suggest and so find there is little dispute in the record that the tenant was over-housed. Accordingly this finding of the Adjudicator should be respected.

[37] As previously stated, even allowing for a second bedroom, as the EMHA seemed prepared to do, the Appellant would still be considered over-housed under the *Guidelines*.

Acceptable Medical Reason

[38] The main argument of the Appellant on this issue is that the Adjudicator erred in law in failing to consider all of the mandatory pre-requisites to transfer an "over-housed tenant" under the *Guidelines*.

[39] Those pre-requisites as contained in policy 1.10 are as follows:

i) There is a demonstrated demand for the size of the unit occupied by the over-housed tenant;

ii) An appropriately sized unit is available for the over-housed tenant;

iii) When the housing authority does not have an appropriately sized unit to offer, there must be affordable and adequate housing available in the community; and

iv) There is no acceptable documented medical or social reason why the tenant should not move.

[40] Turning to the first pre-condition, the Adjudicator found at paragraph 23 that there was a demand for the size of the unit occupied by the Appellant. He did so by accepting the Respondent's evidence.

[41] *Guideline 4.4* states that when a tenant is known to be under-housed, a transfer will be considered whenever a suitable unit becomes available.

[42] In terms of the second pre-condition the Adjudicator found further at paragraph 25 that the units offered by the Landlord were appropriately sized and available.

[43] Regarding the third pre-condition, the Adjudicator found at paragraph 25, that there were affordable and adequate housing units within the community.

[44] It is the fourth pre-condition that is in contention on this appeal.

[45] In Paragraph 53 of the Appellant's factum her counsel submits:

> 53. The Adjudicator quoted and considered the first three preconditions for the exercise of the EMHA's discretion to request a transfer of an "over-housed" tenant in his Summary Report. **However, the Summary Report contains no consideration of the final requirement: that there be no acceptable documented medical or social reason why the tenant should not move.** (Emphasis added)

[46] The Appellant argues that the Adjudicator's Summary of Findings is "entirely silent" on the fourth (iv) condition.

[47] Ms. Kearley could be transferred only if there was no acceptable documented medical or social reason why the tenant should not move.

[48] The main issue for the Adjudicator therefore was whether there was an acceptable documented medical or social reason why the tenant should not move? The issue here is a medical reason.

[49] At paragraph 27 the Adjudicator discussed the letter from Ms. Livingston noting that "objective confirmation of the condition of MCS was not possible". He did find however, that while there was no objective confirmation, he was satisfied and found that the Appellant suffered from medical conditions that affect her health. (Paragraph 28)

[50] Ms. Livingston's letter dated May 23, 2014 stated as follows:

> A detached dwelling with a separate area for storing her belongings away from her living and sleeping space **would be advised**. (Emphasis added)

[51] In assessing the evidence the Adjudicator found there was no evidence that the Appellant could only live in a detached dwelling and he found there was no evidence that mandated the Respondent to provide only a "detached" housing unit to the Appellant. (Paragraphs 25 and 26 of the Summary)

[52] There was the evidence of Ms. Livingston that a detached dwelling was advised. The Appellant submitted that this meant a detached unit was "required".

[53] The Adjudicator found the only reason the Appellant did not view these units because they were not detached and therefore were not suitable (paragraph 25).

[54] In addition to the evidence of Ms. Livingston there was evidence of Dr. Fox. He stated a move from her present accommodation with her level of sensitivity, would be problematic for the Appellant. Further, he stated in a letter dated March 5, 2012, that she was diagnosed with MCS / Fibromyalgia / Chronic Fatigue.

[55] There was also the opinion of Dr. Forbes. In his letter of October 3, 2012 he stated a move to a different accommodation "would undoubtedly prove troublesome for her".

[56] In a further letter dated April 15, 2014 Dr. Forbes stated that, "changing her home environment may cause exacerbation of her symptomatology". He asked the Authority to consider leaving her in her present housing.

[57] This medical information is contained in Ms. Kearley's Affidavit, at Tabs 5 – 13.

[58] In the initial decision of the Director, she relied on this medical evidence to refuse the Landlord's application to terminate the lease. In her decision she stated:

> Tabs 5 through 13 of Exhibit 1T are documented medical reasons why the tenant should not move.

[59] The Adjudicator discussed the medical condition of the Appellant throughout his decision and in particular the evidence of the Appellant's witness, Heather Livingston.

[60] At paragraph 5 he accepted the evidence of Ms. Livingston, and the diagnosis of MCS, including her need to be housed in a chemical and scent free environment, and housed where she would have her own washing machine and dryer.

[61] At paragraph 27, the Adjudicator again referred to Ms. Livingston's letter of May 23, 2014 concerning the patient's history as well as her earlier letter of January 29, 2014, stating that the Appellant needed to be housed in an environment that is safe for her, and in an area tolerated by her with her own washer and dryer.

[62] Both the decision of the Director and the Adjudicator recognized the Appellant had special needs. The difference in the two decisions is that the Director found those needs had not been met and therefore the Appellant should not move. The Director stated:

> Section 16 of Exhibit 2T stated that: Special consideration is given to individuals with special needs such as: physical disability or victims of family violence.

[63] At paragraphs 7 and 8 of his decision the Adjudicator specifically discussed the two units available and offered to Ms. Kearley. He discussed their attributes as they related to her needs. He found further at paragraph 29 that the Landlord had proven that the housing offered to her was affordable and available.

[64] The Adjudicator found as a fact in paragraphs 8 and 10 of the stated case, that the Appellant did not bother to look at either unit. For this finding the Adjudicator accepted the Appellant's evidence.

[65] At Tab 22 of the Appellant's affidavit is an email written to her advising her of the "Westville Rent Supplement unit", and outlining the ways in which it complied with Dr. Livingston's letter. The email states as follows:

> Hi Wendy,
>
> It appears that this unit does comply with Heather Livingston's letter. Pet free and smoke free – two bedrooms so an extra room for your personal belongings.
>
> You can take your own washer and dryer and your own water filtration system and no carpets. Please let me know what your thoughts are on this.
>
> Thanks Jane

[66] In her reply Ms. Kearley referenced the third paragraph of Ms. Livingston's letter as follows:

> Dear Jane,
>
> I refer you to the third paragraph of the letter dated May 23 2015 from Heather Livingston of Integrated Chronic Care, "a detached dwelling". You haven't mentioned whether the previous tenants have used scented products or chemicals or not.
>
> Sincerely
>
> Wendy Kearley

[67] It is not disputed that the Appellant refused to look at either unit and that her objection to them was based mainly on the fact they were not "detached units".

[68] In her affidavit Ms. Kearley stated at paragraph 59, that all units offered by the EMHA were semi-detached, but that she required detached housing. Paragraph 59 is as follows:

> 59. That all units offered to me by the Eastern Mainland Housing Authority were semi-detached **and I require detached housing, as confirmed in the letter from Heather Livingston at the Integrated Chronic Care Service dated May 23, 2014**, a true copy of which is attached hereto as Exhibit "10". (Emphasis added)

[69] For the sake of accuracy I shall provide in full the third paragraph of Heather Livingston's letter as follows:

> Housing for the patients with multiple chemical sensitivity needs to be based on the severity of the MCS as some patients are mildly affected while others severely. Current recommendations include no recent renovations [within last six months to year], separate laundry facility from other tenants, windows that open that are away from any emissions (from dryer, furnace etc), solid surface flooring, no oil based paints used in unit and no

> mould present. **A detached dwelling with a separate area for storing her belongings away from her living and sleeping space would be advised.** (Emphasis added)

[70] Ms. Livingston is a Registered Nurse. From her designation she appears to hold a Masters in Nursing and is also a Nurse Practitioner. She is employed with Capital Health in their Integrated Chronic Care Service.

[71] The Adjudicator found as a fact that the EMHA made reasonable efforts to find affordable sized housing for the Appellant and discussed with her the two properties that it believed met her "special needs".

[72] I find the Adjudicator did address the fourth pre-condition in the *Guidelines*, in considerable detail in paragraphs 22 - 28 of the summary. He acknowledged that the Appellant has medical conditions, but he also found they did not prevent her from moving. The key words in the *Guidelines* are "acceptable documented medical reasons why the tenant should not move."

[73] In ***Brett Motors***, Justice Saunders reminded us that the jurisdiction of this Court is confined to questions of law and that this Court does not have the authority to go outside the facts as found by the Adjudicator. In other words, it is not permissible for this Court on appeal to determine from the evidence its own findings of fact.

[74] Justice Saunders further explained that an error of law may be committed i) if there was a clear error on the part of the Adjudicator in the interpretation of documents or other evidence; ii) or where there is no evidence to support the conclusions reached; iii) where the Adjudicator clearly misapplied the evidence in material respects thereby producing an unjust result, or iv) where the Adjudicator has failed to apply the appropriate legal principles to proven facts. (***Brett Motors***, paragraph 14)

[75] In this appeal, the Adjudicator made several clear findings at paragraphs 25, 26, 30, and 31. Those paragraphs are as follows:

> [25] I found on the evidence, the units offered by the Landlord were appropriately sized units available to the over-housed tenant. I also found they were affordable and adequate in the community and they meet her special needs. The tenant Ms. Kearley, did not bother to view either of these units. She felt they were not detached units and therefore were not suitable. I found no evidence to support the argument she could only live in a detached dwelling. Both were hot air heated and had self contained washer and dryer. There was no evidence they contained mold or other sensitive materials which she could react to.
>
> [26] I found there was no evidence (sic) that mandated the Respondent to provide only a "detached" housing unit to the Appellant.
>
> [30] I found the Landlord made reasonable efforts to find accommodations that would address Ms. Kearley's concerns.

> [31] I found the Landlord had the right to issue the Notice to Quit as the tenant (Appellant) was in an over-housed accommodation and it made reasonable efforts to transfer Ms. Kearley to other accommodations that would have addressed her health concerns.

[76] Section 1.6 of the *Lease Administration Guidelines* states that special consideration is to be given to individuals with special needs.

[77] The Adjudicator found that the accommodations offered the Appellant were affordable, adequate and did meet her special needs. These are essentially findings of fact, which this Court has no authority to disturb unless they are clearly wrong.

[78] The Adjudicator weighed and considered the evidence including the evidence of Ms. Livingston. I do not find that he misapplied the evidence in any material respect.

[79] In the end result, he concluded that the accommodations offered would have addressed the Appellant's health concerns. He found there was no provision in the *Act* or *Guidelines* to mandate the Landlord to provide detached dwellings to a tenant in subsidized housing.

[80] The Appellant has therefore not satisfied me there has been a clear error on the part of the Adjudicator or that the evidence did not support his conclusions.

[81] On the whole of the record, I see no reason to disturb the findings of fact made by the Adjudicator, which are entitled to deference, absent a palpable and overriding error.

[82] I find for the above reasons that the Adjudicator made no error of law.

[83] I am therefore dismissing this ground of appeal alleging that the Adjudicator incorrectly applied the *Public Housing Policy Guidelines*.

Issue #2 – Did the Adjudicator fail to consider the impact of the EHMA's duty to accommodate the Appellant's disability on the decision to evict her?

[84] In order that this issue will be placed in the proper context, there are several statutory and legal provisions that must be considered.

[85] Sections 7 and 8 of the *Residential Tenancies Act* are attached hereto in Appendix "A" as well as other provisions relevant to this Appeal.

[86] Sections 7 and 8 are relevant to this proceeding. Section 7 states that tenants who are leasing pursuant to a public housing program shall continue to meet the qualifications of the program. Section 8 states that those qualifications shall include income and family composition.

[87] This is further confirmed in the lease itself. Clause 4(aa) of the lease executed between the EMHA and the Appellant reads:

> The tenant covenants with the Landlord:

> (aa) To accept any change of accommodation… as a consequence of a change in the number of persons residing in the premises… **when appropriate alternative accommodation may be given to the Tenant.** (Emphasis added)

[88] From this clause, it may be taken that the Tenant agreed to accept a change in her accommodations if the number of persons residing in the premises changed. In turn, the Landlord agreed to provide appropriate alternative accommodation.

[89] The overarching argument of the Appellant under this issue is that the Adjudicator failed to apply equitable principles (referred to as charter values and discrimination law principles) in his decision to allow the EMHA to enforce its policy to remove Ms. Kearley from her residence at 154C Munroe Avenue.

[90] The Appellant argues the "whole law" must be applied and this includes both the *Human Rights Act*, RSNS 1989, c. 214, and the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[91] The Appellant submits that "decision makers are empowered to look beyond their enabling statues to decide questions of law". The notion would be equality guarantees in relation to tenancy issues properly before them. (***Killam Properties Inc. v. Frail***, 2009 NSSC 419)

[92] Neither party to this Appeal disputes that the Notice to Quit was lawfully and properly before the Residential Tenancies Officer or the Small Claims Court.

[93] The Respondent does take issue with the Appellant's argument that the *Charter* and *Human Rights Act* are properly before this Court on appeal. The EMHA submits that the matters and issues raised by the parties before the Director and the Small Claims Court did not include allegations of discrimination or issues pertaining to the *Charter*.

[94] A proper analysis of these positions requires an examination of the specific arguments the Appellant wishes to make on this appeal.

[95] The Appellant's counsel in their brief make the following submissions:

> i) The Adjudicator had a duty to apply *Charter* values and discrimination law principles to the question of whether the EMHA could enforce its policy; and
>
> ii) The Adjudicator erred by failing to consider or address whether the EMHA had accommodated Ms. Kearley to the point of undue hardship.

Charter Values and Discrimination Law

[96] Dealing with item i) above, the Adjudicator's duty to apply charter values and discrimination law principles, the Appellant argues that an issue will be considered on appeal as long as it was canvassed in the lower court, even if in a slightly different format. (***R v. Brown***, [1993] 2 S.C.R. 918)

[97] The Appellant submits that the Director was "alive" to the human rights issues, as evidenced by her finding that there were documented medical reasons for the tenant not to move.

[98] The Appellant argues that human rights and the duty to accommodate apply at all steps of the Appellant's tenancy, whether or not they are mentioned in the public housing policies.

[99] In fact, the *Lease Administration Guidelines* for public hearing (*Policy Guidelines*) references the *Human Rights Act*. The *Guidelines* in section 1.2 state that discrimination is prohibited against applicants for accommodation, stating that "all applications will be accepted and assessed for eligibility".

[100] The Respondent argues that section 1.2 applies only to "applicants" and not ongoing tenancies. In my view, eligibility is an ongoing issue even for existing tenants. In such case, the *Act* then could apply to existing tenants, as eligibility issues arise. I do not find this appeal is an appropriate forum to make such a ruling.

[101] The *Charter of Rights and Freedoms* or the *Human Rights Act* were not mentioned in either of the decision of the Director or the Adjudicator. Neither statute was cited in the grounds of appeal to the Small Claims Court or to this Court.

[102] The Appellant in her brief states:

> [72] The Over-Housed Tenants Policy itself reveals an intention to protect tenants from discrimination on the basis of disability, and anticipated that decisions of the EMHA and its reviewing bodies will be informed by human rights principles. As outlined above, the Policy prohibits the transfer of an over-housed tenant where doing so would result in an adverse effect for a "medical or social reason".

[103] In ***Killam***, the court considered whether the Adjudicator had jurisdiction to consider a human rights complaint in making its decision.

[104] In ***Killam***, Murphy J, held that the Adjudicator's powers on appeal were limited to confirming, vacating, or rescinding the order of the Director, or making any order that the Director could have made. (Section 17D(1)(a)&(b) of the *Residential Tenancies Act*)

[105] This is not to say the Adjudicator cannot consider the *Human Rights Act*. The Adjudicator can consider human rights issues, but only in the context of an issue properly before him.

[106] It is my view, neither of the *Charter of Rights and Freedoms* were squarely before the Director or the Adjudicator in these proceedings. No *Charter* violation was pleaded. No complaint was made under *Human Rights Act* alleging discrimination.

[107] This is not to say that equitable principles or charter values were not considered in the decisions below. Indeed, the findings of the Adjudicator in respect of the Appellant's special needs is some evidence that they were considered.

[108] The case law suggests that only in the clearest of circumstances, should courts permit a new issue on appeal. That is, where it would otherwise be unjust not to deal with that issue.

[109] The Appellant argues that the enforcement of the *Policy Guidelines* is prima facie evidence of discrimination on the basis of Ms. Kearley's disability.

[110] Policy #22 of the *Guidelines* requires that public housing policies (must) be taken into account by a Residential Tenancy Officer when they form part of the Lease. (Tab H of the Appeal Book)

[111] In the context of the *Guideline 1.10* states that the tenant is entitled to:

- An explanation that the housing authority had to make the most efficient use of all the units its administration and meet the demands of its waiting list;

- An opportunity for the tenant to explain any problem(s) that may be aggravated by the move; these should be documented to the housing authority.

[112] The Appellant suggests that applying the policy amounts to discrimination, by permitting the Landlord to issue a notice to quit. With respect I do not agree. In my view, this may be more properly a matter for a constitutional challenge as stated in ***Killam*** at paragraph 32.

[113] I am not satisfied that the duty to apply charter values and discrimination law principles as such, was an issue properly before the Adjudicator, except insofar as the *Guidelines* called for the application of equitable principles. The Adjudicator had a duty to apply these principles in the context of the *Guidelines*.

[114] The Appellant's position throughout the Small Claims adjudication was that the EMHA had a duty to accommodate her on the basis of her MCS condition.

[115] In ***M v. Oxford Properties***, [2011] N.S.J. No. 228, Adjudicator Stone discussed the duty to accommodate in the context of a residential tenancies appeal involving similar medical issues.

[116] I am satisfied that the duty to accommodate and the EMHA's efforts to meet that duty was a matter properly before the Adjudicator and therefore properly before this Court on appeal.

[117] In the result, I shall deal only with the Appellant's second submission (in paragraph 95) that the Adjudicator erred by failing to consider whether the EMHA had accommodated Ms. Kearley to the point of undue hardship.

Duty to Accommodate

Did the Adjudicator err by failing to consider or address whether the EMHA had accommodated Ms. Kearley to the point of undue hardship?

[118] In order to answer this question completely, it must first be determined whether the Adjudicator failed to consider or address whether the EMHA had accommodated Ms. Kearley.

[119] In ***M v. Oxford Properties***, 2011 NSSM 26, the court stated at paragraph 25:

> 25. It is important to emphasize that where the Landlord is able to show that it would be a undue hardship to accommodate the disability, either because of the expense or the disruption to other tenants, then the duty has been met and the Tenant faces the unenviable choice of moving out and seeking accommodation elsewhere, or simply putting up with the less than ideal situation.

[120] Only if the Landlord failed to accommodate the Tenant would the Court need to address whether (the failure to accommodate) was to the point of undue hardship.

[121] Without repeating my reasons given earlier, the finding of the Adjudicator was that the "special needs" of Ms. Kearley had been met. This suggests to me there was no failure by the Landlord to accommodate the Tenant. On the contrary, the Adjudicator found the units offered did meet her needs. (Paragraphs 25, 26, 30 and 31 of Summary)

[122] The Appellant also argued that a prima facie case of discrimination had been made out. One of the reasons given for this was that Ms. Kearley experienced an adverse impact with respect to a "service".

[123] In ***Central Okanagan School District No. 23 v. Renaud***, [1992] SCJ No 75, the court held that commensurate with a search for reasonable accommodation is a duty of the complainant to facilitate the search and thus the conduct of the complainant must be considered. (Paragraph 43)

[124] The Adjudicator found as a fact that the Tenant, Ms. Kearley, did not bother to view either of these units.

[125] In ***Oxford***, the court stated in all cases where the duty to accommodate is engaged, there needs to be an exchange of information.

[126] Here, there was an exchange of information, including the medical evidence provided by the Appellant, which she felt supported her need to remain in her current residence.

[127] The refusal to view either of the units however, did not facilitate the search for accommodation in terms of the duty upon the Appellant.

[128] The Appellant submits the Adjudicator found as a fact that the Appellant suffered from MCS. At paragraph 28 of the stated case the Adjudicator found:

> 28. While objectively there is no finding of MCS, I was satisfied and found she suffers from medical conditions that effects (sic) her health.

[129] With this finding the Adjudicator qualified the Appellant's condition, but nonetheless he found that Ms. Kearley has suffered from medical conditions that affected her health.

[130] In ***Oxford***, the court stated at paragraph 21 that "MCS is a condition that engages the reasonable accommodation requirements of Human Rights statutes".

[131] The Adjudicator found that the EMHA clearly made reasonable efforts to find accommodations that would address the Appellant's needs and concerns. (Paragraphs 24, 30 and 31 of the Summary)

[132] I am satisfied that the Adjudicator in these circumstances did consider whether the EMHA had accommodated Ms. Kearley. He did so based on findings of fact made by him, and concluded that there was no failure to accommodate Ms. Kearley.

[133] The Appellant further submitted that the she faced adversity because of her inability to transfer from her home, due to her condition.

[134] Further, the Appellant's brief states at paragraph 94:

> The evidence of Ms. Kearley's health care providers, for instance, demonstrated that Ms. Kearley's multiple chemical sensitivities would make the process of moving to a new residence harmful to Ms. Kearley.

[135] The Appellant submits that the Adjudicator did not consider her "mobility issues", and rejected the evidence of Dr. Forbes in Exhibits 12 and 13. These were letters citing the difficulties facing the Appellant with a move to a different location. These letters appear to address "a move" in terms of taking up occupancy in a different home as opposed to the process of moving itself.

[136] The evidence shows that the Appellant is essentially house bound and does not attend gatherings of any kind. She did not attend he daughter's wedding due to her conditions.

[137] The focus of the medical evidence was on that given by Ms. Livingston. Her letter at Exhibit 10 did not mention that Ms. Kearley would be unable to tolerate the move itself.

[138] The Appellant's argument is that evicting her is likely to cause her real harm. This argument does not accord with the findings made by the Adjudicator. He found that the reason the Appellant did not view or accept the units because they were both semi-detached. (Paragraph 12 of Summary).

[139] The weighing of evidence, credibility findings and factual conclusions call for considerable deference on appeal.

[140] I find the Adjudicator did not fail to consider the impact of ECMA's duty to accommodate Ms. Kearley. In the result, I find he did not err.

Conclusion

[141] For all of the above reasons I find no error of law by the Adjudicator, nor do I find a palpable or overriding error on the factual conclusions reached by him.

[142] In the result, the Appeal is dismissed with all due respect to the Appellant and her counsel by whom she was well served.

Murray, J.

Appendix "A"

Residential Tenancies Act

Interpretation

2(fb) "public housing program" means a rental program offered to tenants of low and modest income by reason of funding provided by the Government of Canada, the Province or a municipality or any agency thereof;

Entitlement to documents and information

7 (1) No landlord shall grant a lease or possession or occupancy of residential premises to a tenant unless the landlord has provided the tenant with a copy or reproduction of this Act without cost within ten days of the earliest of:

(a) the date specified in the lease as the start of the tenancy;

(b) the date upon which the tenant signs the lease;

(c) the date upon which keys to the residential premises are delivered to the tenant by the landlord; and

(d) the date upon which the tenant takes possession of the residential premises or occupies those premises.

(1A) For the purpose of subsection (1), where there is more than one tenant occupying residential premises, delivery of the copy or reproduction of this Act by the landlord is compliance with that subsection if it is made to any one of those tenants.

(2) A landlord, with respect to every written tenancy agreement entered into, shall when the tenancy agreement is initially entered into, or if it is entered into before the first day of February, 1985, on the anniversary date thereof, provide the standard form of lease as prescribed by regulation for both the landlord and tenant to sign and a copy signed by both the landlord and tenant shall be retained by the tenant at the time of the signing or given to the tenant within ten days thereof.

(3) Where a landlord fails to provide a copy or reproduction of this Act in accordance with subsection (1) or a copy of a written lease in accordance with subsection (2), the tenant

(a) at any time before the tenant receives a copy or reproduction of this Act or the written lease from the landlord; or

(b) within one month after the tenant receives a copy or reproduction of this Act or the written lease from the landlord, may give notice to the landlord that the tenant will quit and deliver up the premises on a specified day within a period of three months from the day the notice is given.

(4) A tenant may apply to the Director for permission to pay the rent in trust to the Director until the landlord provides the tenant with an executed copy of the lease and a copy or reproduction of this Act.

(5) When a landlord provides an executed copy of the lease or a copy or reproduction of this Act, the landlord may request the tenant to execute an acknowledgement that the copies have been received.

(6) The landlord shall provide the tenant in writing with
(a) the landlord's name;
(b) the landlord's address; or
(c) the name and telephone number of a person responsible for the premises.

(7) Tenants who are leasing pursuant to a public housing program shall, with respect to that public housing program,
(a) provide income verification as required; and
(b) continue to meet the qualifications required pursuant to the provisions of that public housing program.

(8) For the purpose of subsection (7), qualifications required pursuant to the provisions of a public housing program means income and family composition and those qualifications shall be attached to the lease.

Standard form of lease

8 (1) In addition to the statutory conditions, a landlord and tenant may provide in a standard form of lease for other benefits and obligations which do not conflict with this Act.

(2) An additional benefit or obligation under subsection (1) is void unless it appears on both the landlord's and tenant's copies of the standard form of lease.

(3) Any alteration of or deletion from provisions that a standard form of lease is required by regulation to contain is void.

(4) On or after the first day of February, 1985, a landlord and a tenant who enter into a written tenancy agreement or renew a written tenancy agreement and who do not sign a standard form of lease are deemed to have done so and all provisions of this Act and the standard form of lease apply.

(5) A landlord and tenant who have an oral tenancy agreement and who do not sign a standard form of lease are deemed to have done so and all provisions of this Act and the standard form of lease apply.

Duties of Court on appeal

17D (1) Within fourteen days of holding a hearing pursuant to subsection 17C(4), the Small Claims Court shall
(a) confirm, vary or rescind the order of the Director; or
(b) make any order that the Director could have made.

Lease Administration Guidelines

1.2 Discrimination

The Human Rights Act prohibits discrimination against an applicant in respect to an application for accommodation on any f the following grounds: race, religion, creed, color, national origin, ethnic origin, sec, physical handicaps, or source of income. Housing authorities will accept all applications for housing and will assess the eligibility of each applicant.

1.6 Eligibility

Public housing is principally intended for households of lower and modest income. Applicants must meet the criteria of: core need and household income limits. Special consideration is given to individuals with special needs, such as: physical disability or victims of family violence… applications may be considered "ineligible" for housing if they are…

1.10 Over-housed Tenant

The Residential Tenancies Act provides that "Tenants must continue to meet the qualifications required to pursuant to the provisions of that "Public Housing Program". More specifically "qualifications" means income and family composition; therefore when a tenant is over-housed, the housing authority can require a tenant to transfer to another unit.

Tenant households are considered to be over-housed when the following conditions exist:

- Two Bedroom: Occupied by a single person, a married couple, or a couple deemed to have a common law marriage.
- Three Bedroom: Occupied by a single person or couple and one (1) dependent or less.
- Four Bedroom: Occupied by a single person or couple, and two (2) dependents or less.
- Five Bedroom: Occupied by a single person or couple, and three (3) dependents or less.

Prior to the housing authority exercising its right to transfer over-housed tenants other accommodations, the following conditions will exist:

- There is demonstrated demand for the size of the unit occupied by the over-housed tenant.
- An appropriately sized unit is available for the over-housed tenant.
- When the housing authority does not have an appropriately sized unit to offer, there must be affordable and adequate housing available in the community.
- There is no acceptable documented medical or social reason why the tenant should not move.

1.11 Terminating the Lease

General: Lease agreements are terminated in one of the following ways:

- The housing authority providing notice to the tenant;
- The tenant provides notice to the housing authority; or
- The housing authority evicts the tenant.

4.4 Housing Authority Initiated Transfer

The housing authority may request a tenant transfer in the following circumstances:

- Under/Over Housed Tenants – When a tenant is known to be under-housed, a transfer will be considered whenever a suitable unit becomes available.
- Barrier-Free Unit – When a tenant or family member no longer requires accessible, barrier-free unit and the housing authority has an applicant requiring this type of unit, a transfer should be considered.
- Operational Circumstances – e.g. renovations, redevelopment, re-profiting, transfer of ownership.