Date: 20010410
Docket No.: CA 165682

NOVA SCOTIA COURT OF APPEAL

[Cite as: MacDonald v. Demont, 2001 NSCA 61]

Freeman, Bateman and Oland, JJ.A.

BETWEEN:

JAMES MACDONALD

Appellant

- and -

CALVIN DEMONT

Respondent

REASONS FOR JUDGMENT

Counsel:	Claire McNeil and Kymberly Franklin, for the appellant Judith Gass, for the respondent
Appeal Heard:	March 26, 2001
Judgment Delivered:	April 10, 2001
THE COURT:	The appeal is dismissed without costs per reasons for judgment of Freeman, J.A.; Bateman and Oland, JJ.A. concurring.

FREEMAN, J.A.:

[1] The appellant James MacDonald rented residential premises from the respondent landlord Calvin Demont; he says Mr. Demont entered the apartment while he was in the hospital and threw out most of his belongings, for which he has claimed the value.

[2] His application for redress under s. 13(1) of the **Residential Tenancies Act**, R.S.N.S. 1989, c. 401 (as amended in 1992, 1993 and 1997) was to the Director of Residential Tenancies, who is authorized to investigate, mediate, and, if the parties are unlikely to settle the matter, make an order. The Residential Tenancies Officer representing the Director found, "upon investigation of the submissions and review of all the evidence and materials submitted," there was insufficient evidence to substantiate the tenant's claim. She also found that the appellant had exceeded the one-year limitation period for bringing an application by 11 days. She concluded that there had been a verbal, month to month tenancy which was terminated on December 10, 1998; the application was dated December 21, 1999. These conclusions were set out in the Director's order.

[3] Mr. MacDonald appealed from the Director's order to a Residential Tenancies Board. In his notice of appeal Mr. MacDonald stated:

> I was still living at 62 Queen St. #6 after the date indicated on the order, Dec. 10, '98 "new evidence to substantiate that I was still in possession of apt. at 62 Queen St. after 21day of Dec.'98."

[4] At a hearing on February 4, 2000, the Board held:

> As no new evidence was presented at the hearing, the Director's Order dated January 12, 2000 is upheld.

[5] An appeal lies from a Board decision to the Supreme Court of Nova Scotia on a question of law or jurisdiction under s. 17E of the **Act**. Mr. MacDonald's appeal was dismissed by Saunders, J. of the Supreme Court, as he then was. On a further appeal to this court the appellant suggested the brevity of the Board's conclusion gave rise to an apprehension of unfairness in its proceedings and a concern that a matter of importance to the parties had not been seriously considered. This court was invited to review the procedures of the Board in light of relatively recent amendments to the **Residential Tenancies Act**.

[6] The purpose of the **Act** is stated in s. 1A, a 1993 amendment:

> 1A The purpose of this Act is to provide landlords and tenants with an efficient and cost-effective means for settling disputes.

[7] The relevant sections for this appeal are ss. 16, 17, 17A, 17B, 17C, 17D and 17E, amended in 1997.

[8] Section 16 sets out the duties and powers of the Director, who in practice delegates them to Hearing Officers. The Director has authority to investigate and endeavour to mediate disputes. When a matter is settled by mediation the Director makes a written record of the settlement which is signed by both parties and which is not subject to appeal. When a settlement is unlikely, or a party fails to comply with the terms of the settlement, the Director may make an order exercising broad powers set out in s. 17A. A right of appeal lies to a Residential Tenancies Board under s. 17C, which provides:

> 17C(1) Except as otherwise provided in this Act, any party to an order of the Director may appeal to the appropriate board.
>
> (2) An appeal may be commenced by filing with the Director, within ten days of the making of the order, a notice of appeal in the form prescribed by regulation accompanied by the fee prescribed by regulation.
>
> (3) The appellant shall, in the manner prescribed by regulation, serve a copy of the notice of appeal and the notice of hearing on all parties to the order.
>
> (4) The board shall conduct the hearing in respect of a matter for which a notice of appeal is filed.
>
> (5) The board shall determine its own practice and procedure but shall give full opportunity for the parties to present evidence and make submissions.
>
> (6) The board may conduct a hearing orally, including by telephone, or in writing or partly in writing and partly orally.
>
> (7) Evidence may be given before the board in any manner that the board considers appropriate and the board is not bound by rules of law respecting evidence applicable to judicial proceedings.

> (8) The evidence at a hearing shall not be recorded.

[9] The Board is empowered by s. 17D(1) to confirm, vary or rescind the order of the Director or make any order that the Director could have made. Section 17E provides for an appeal to the Supreme Court of Nova Scotia, but only on a question of law or jurisdiction. Section 17D(2) deals with the record for the court:

> 17D(2) The board shall compile a record of a hearing consisting of
>
> (a) the order of the Director that was appealed from;
>
> (b) the notice of appeal to the board
>
> (c) the notice of hearing by the board;
>
> (d) any written submissions and exhibits received by the board; and
>
> (e) the order of the board and any reasons for the order.

[10] The appellant submits that the hearing before the Board is the first stage at which considerations of procedural fairness come into play. The Director's order could be based on information that arose in the course of the Director's investigation, or mediation attempts, to which the parties may have had no notice or opportunity to reply. Therefore the Board should not consider any information received as the result of proceedings before the Director, and the Board cannot adopt or defer to the Director's conclusions. While the statute does not specify that the hearing before the Board be a hearing *de novo*, such a hearing is the only means of ensuring that the evidence considered by the Board is not tainted by unfairness.

[11] The appellant submits that the Manitoba legislation is similar to our own and relies on **Shams v. Wiebe,** [2000] M.J. No. 155 (Man. C.A. in Chambers) where it was found that similar procedural considerations dictated that proceedings such as the Board hearing in the present appeal be considered hearings *de novo*.

[12] It was submitted that the Board was under a duty to give reasons. While the language of s. 17D(2)(e) would appear to make reasons discretionary, I would consider that reasons can be avoided only when it is concluded that the evidence is so inadequate that findings of fact are not possible. If that is the case it should be

so stated; an appellant body should not be left to guess. Where the keeping of a record of testimony is precluded by statute, as by s. 17C(8), I would consider the need for a Tribunal to state reasons to be even more compelling than the requirement found by Justice Chipman in **Future Inns Canada Inc. v. Labour Relations Board (N.S.)** (1997), 160 N.S.R. 241 at pp. 249-50 (N.S.C.A.). He cited the decision of Reed, J. of the Federal Court, Trial Division, in **Williams v. Canada (Minister of Citizenship and Immigration)** (1996), 121 F.T.R. 212; 139 D.L.R. (4th) 658 (T.D.) at p 672:

> The absence of jurisprudence with respect to the requirement of written reasons in Canada may exist because, in most cases, where s. 7 interests (or even lesser interests) are involved, there are statutory requirements that written reasons be given. The giving of reasons serves several purposes. First and perhaps most importantly, it gives some assurance to the individual concerned that his or her submissions have been considered (the absence of reasons can create a disturbing impression of injustice). Secondly, it provides a meaningful basis on which an assessment can be made as to whether or not to appeal the decision or to seek judicial review when that is the appropriate remedy. Thirdly, from the perspective of a reviewing court, indeed, in the case of judicial review, it is very difficult, often impossible, to know on what basis a decision was made if reasons are not given. Reasons are not as important when a full right of appeal exists. In such circumstances the reviewing court can consider all the evidence and determine whether in its view errors exist with respect to the conclusions drawn. In the case of judicial review, however, a reviewing court starts with a presumption that deference must be accorded to the decision maker.
>
> A person is entitled to some assurance that all factors have been considered, and to a fair opportunity to exercise his or her right of judicial review with respect to decisions made inadequately. Reasons allow both the person concerned and a court, on judicial review, to know whether the

> appropriate legal test has been applied by the decision maker. (emphasis added by Chipman, J.A.)
>
> Reed, J., has referred to three specific purposes served by the giving of such reasons. I would add another which would be obvious to any judge. When one sits down to prepare the reasons to support of a conclusion tentatively reached, the articulation of the reasons tests the validity of the conclusion. At times, the writer is compelled to change the result. The preparation of supporting reasons is the best self-assessment a decision-maker can make of his or her decision.
>
> The greater the protection from judicial review accorded to a Tribunal, the greater may be the need for reasons.

[13] Reed, J.'s observation that reasons are less important when the appeal court owes deference to the maker of the decision appealed from do not apply in the present circumstances if one accepts, as I do, the appellant's argument that deference should not be accorded by the Board to the decision of a Director under the **Residential Tenancies Act** for reasons of procedural fairness.

[14] The appellant emphasizes that the Director's conclusions as to the lateness of the application were insufficient because they failed to establish facts upon which the termination date of the tenancy could be founded. There is no finding as to what caused the tenancy to be terminated, or any reference to a notice to quit. While the brief conclusion of the Board may have referred to both branches of the Director's finding, the finding as to the limitation issue is not necessary to the determination of the appeal. The Board appeal was dismissed on the basis of insufficient evidence, and this was upheld by Justice Saunders.

[15] Justice Saunders does not appear to have accepted the appellant's argument that the Board's reference to "no new evidence" implied that the Board had access to evidence heard on the application to the Director which was not available to the appellant. Justice Saunders stated:

> I take the Chair's findings to mean that there was nothing in the evidence presented at the second hearing to justify any variation or recision of the initial decision.

[16] This is clearly a reasonable interpretation, a conclusion that the Board, on

the evidence presented before it, found that the appellant has not discharged his burden of proof. It was acknowledged on the appeal that the Residential Tenancies Board heard evidence that was not before the Director. Its reasons should have established at least that a hearing *de novo* was held, if such was the case, rather than forcing appeal courts to the lame conclusion that the contrary was not proven: that is, to the inference that the Board on the evidence before it arrived independently at the same conclusion as the Director. Justice Saunders was presented with the bare minimum by way of a decision by the Board but nevertheless reached a reasoned conclusion that the evidence presented to the Board did not justify it in varying or rescinding the Director's result. This does not raise a question of law or jurisdiction. There is nothing in the record before us which suggests error on the part of Justice Saunders, whose judgment I would endorse.

[17] I would also endorse the closing reminder of Huband, J.A. in **Shams v. Wiebe** (supra):

> I would, however, recommend (if it is not already the practice) that when the decision of a Residential Tenancies Officer [our Director, represented by a Hearing Officer] is appealed, the notice of appeal should clearly indicate that the hearing before the Commission is an entirely new hearing where the parties must tender the evidence which they rely upon and that failure to appear and provide the evidence is likely to be fatal to their case.

[18] I would add that a Board hearing an appeal from a Director's order should, as a minimum, include in its record for the court reasons establishing that a hearing *de novo* has been held and an independent adjudication made of issues raised before the Director, that evidence was received from which specified findings of fact were made or, in the alternative, that no evidence was presented which would support findings of relevant facts.

[19] The appeal is dismissed without costs.

Freeman, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.