SUPREME COURT OF NOVA SCOTIA

Citation: Killam Properties Inc. v. Frail, 2009 NSSC 419

Date: 20091221
Docket: Hfx No. 312163A
Registry: Halifax

Between:

Killam Properties Inc.

Appellant

v.

Connie Frail and Craig Poirier

Respondents

Judge: The Honourable Justice John D. Murphy

Heard: November 24, 2009, in Halifax, Nova Scotia

Written Decision: February 26, 2010
{Oral decision rendered December 21, 2009.}

Editing in written decision limited to improving grammar, paragraph reorganization, expanding reference to and properly citing authorities.

Counsel: Lloyd R. Robbins, for appellant
Donna D. Franey, for respondents

By the Court:

INTRODUCTION

[1] The appellant landlord issued to the respondent tenants a Notice to Quit on April 16, 2008, requiring them to vacate the premises at 414-456 Parkland Drive at the expiry of their lease, on July 31, 2008. This would be the end of their fourth year occupying the premises. No reasons were given in the Notice to Quit. In May of 2008, after receiving the Notice to Quit, the tenants filed a complaint with the Human Rights Commission, alleging that the landlord had discriminated by requiring them to leave their accommodations due to change in their family status. The landlord applied to a Residential Tenancies Officer for vacant possession and the tenants were ordered to vacate by Order of the Director dated November 6, 2008. The tenants appealed that Order and on May 5, 2009 a Small Claims Court Adjudicator allowed the appeal, and denied termination of the tenancy, despite the landlord's objection to the propriety of the adjudicator's dealing with allegations under the *Human Rights Act*. The factual background is reviewed in more detail under the heading "The Adjudicator's Decision", commencing at para.7.

APPEAL AND ISSUES

[2] In its Notice appealing the Adjudicator's Decision to this Court (pursuant to s.17E of the *Residential Tenancies Act*), the landlord identified extensive and detailed grounds of appeal; however, the parties have agreed that the issues should be framed as follows:

> (1) Did the adjudicator have jurisdiction to consider the reasons for the Notice to Quit on an application for vacant possession pursuant to a notice given under s.10 of the *Residential Tenancies Act*?
>
> (2) Did the adjudicator have jurisdiction to consider a human rights complaint in making his decision?
>
> (3) If the adjudicator had jurisdiction to consider the human rights complaint, was there discrimination based on family status?

STATUTORY PROVISIONS

Residential Tenancies Act, s.10 and s.20

[3] The *Residential Tenancies Act*, R.S.N.S. 1989, c.401, sets out the circumstances in which a landlord or a tenant may issue a Notice to Quit, and the procedural requirements for the Notice, at section 10:

> **Notice to Quit**
>
> 10 (1) Notwithstanding any agreement between the landlord and tenant respecting a period of notice, notice to quit residential premises shall be given
>
> (a) where the residential premises are let from year to year, by the landlord or tenant at least three months before the expiration of any such year;
>
> (b) where the residential premises are let from month to month,
>
> (i) by the landlord, at least three months.
>
> ....
>
> (4) A notice to quit residential premises shall be in writing and shall contain the signature of the person giving the notice or his agent, a description of the residential premises and the day on which the tenancy terminates.

A different regime applies to tenants who have occupied the premises for five years or more, as described at s.10(8):

> (8) Notwithstanding the periods of notice in subsection (1) or (6), where a tenant, on the eighteenth day of May, 1984, or thereafter, has resided in the residential premises for a period of five consecutive years or more, notice to quit may not be given except where
>
> (a) the residential premises are leased to a student by an institution of learning and the tenant ceases to be a student;

(b) the tenant was an employee of an employer who provided the tenant with residential premises during his employment and the employment has terminated;

(c) the residential premises have been made uninhabitable by fire, flood or other occurrence;

....

e) the Director is satisfied that the tenant is in default of any of his obligations under this Act, the regulations or the lease;

(f) the Director is satisfied that it is appropriate to make an order under Section 17A directing the landlord to be given possession at a time specified in the order, but not more than six months from the date of the order, where

(i) the landlord in good faith requires possession of the residential premises for the purpose of residence by himself or a member of his family,

(ii) the landlord in good faith requires possession of the residential premises for the purpose of demolition, removal or making repairs or renovations so extensive as to require a building permit and vacant possession of the residential premises, and all necessary permits have been obtained, or

(iii) the Director deems it appropriate in the circumstances.

The Act permits a Notice to Quit to be set aside where it is given in retaliation for the tenant's attempt to enforce rights under the Act:

Consequence of retaliatory action by landlord

20 The Director or the Small Claims Court may refuse to exercise, in favour of a landlord, the powers or authorities under this Act or may set aside a notice to quit if the Director or the Small Claims Court is of the opinion that a landlord has acted in retaliation for a tenant attempting to secure or enforce the tenant's rights under this Act or the Rent Review Act.

There is no allegation of retaliatory action in this case. Nor do the tenants fall within the five-year secure tenure rule.

***Human Rights Act*, ss.3-6**

[4] The *Human Rights Act*, R.S.N.S. 1989, c.214, provides

> 3(h) "family status" means the status of being in a parent-child relationship
>
> ....
>
> **Meaning of discrimination**
>
> 4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.
>
> **Prohibition of discrimination**
>
> 5 (1) No person shall in respect of
>
> ....
>
> (b) accommodation....
>
> ....
>
> discriminate against an individual or class of individuals on account of
>
> ....
>
> (r) family status....
>
> ....

Exceptions

6 Subsection (1) of Section 5 does not apply

....

(f) where a denial, refusal or other form of alleged discrimination is

(i) based upon a *bona fide* qualification

***Residential Tenancies Act*, ss.13-18**

[5] The *Residential Tenancies Act* provides that the Director "shall exercise such powers and perform such duties as are conferred or imposed on the Director by this Act or the regulations." (s.18A(1)) A person may apply to the Director pursuant to s.13(1) "(a) to determine a question arising under this Act" or "(b) alleging a breach of a lease or a contravention of this Act." Upon receiving an application under s.13, the Director "shall investigate and endeavour to mediate a settlement of the matter" (s.16(1)) and:

> [w]here, after investigating the matter, the Director determines that the parties are unlikely to settle the matter by mediation, the Director shall, within fourteen days, make an order in accordance with Section 17A. (s.17(1))

The types of orders the Director may prescribe are set out in s.17A:

17A An order made by the Director may

(a) require a landlord or tenant to comply with a lease or an obligation pursuant to this Act;

(b) require a landlord or tenant not to again breach a lease or an obligation pursuant to this Act;

(c) require the landlord or tenant to make any repair or take any action to remedy a breach, and require the landlord or tenant to pay any reasonable expenses associated with the repair or action;

(d) order compensation to be paid for any loss that has been suffered or will be suffered as a direct result of the breach;

(e) terminate the tenancy on a date specified in the order and order the tenant to vacate the residential premises on that date;

(f) determine the disposition of a security deposit;

(g) direct that the tenant pay the rent in trust to the Director pending the performance by the landlord of any act the landlord is required by law to perform, and directing the disbursement of the rent;

(h) require the payment of money by the landlord or the tenant;

(i) determine the appropriate level of a rent increase;

(j) require a landlord or tenant to comply with a mediated settlement. x

[6] The *Residential Tenancies Act* provides for an appeal from a decision of the Residential Tenancies Board to the Small Claims Court, and sets out the jurisdiction of an adjudicator on appeal. These matters are addressed in ss.17C and 17D of the *Residential Tenancies Act*:

Appeal to Small Claims Court

17C (1) Except as otherwise provided in this Act, any party to an order of the Director may appeal to the Small Claims Court.

...

(4) The Small Claims Court shall conduct the hearing in respect of a matter for which a notice of appeal is filed.

(5) The Small Claims Court shall determine its own practice and procedure but shall give full opportunity for the parties to present evidence and make submissions.

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.

THE ADJUDICATOR'S DECISION

[7] At the Small Claims Court hearing, the landlord relied on ss.10(1)(b)(i) and 10(4) of the *Residential Tenancies Act*, as well as the fact that the tenants did not have security of tenure under s.10(8), acknowledging that if the tenants had security of tenure, the landlord would be limited to the reasons for seeking vacant possession that are set out in the Act. The evidence showed that Mr. Poirier had filed a complaint with the Human Rights Commission "alleging that he and his family had been discriminated against by the landlord requiring them to leave their accommodations due to the change in their family status." The adjudicator noted that an offer to lease dated July 2004 indicated that two children would occupy the apartment with the tenants, and that Mr. Poirier did not deny this. After entering the lease, the adjudicator found, the tenants had three more children. (Adjudicator's Decision, paras.24 and 25)

[8] The landlord argued at the Small Claims Court hearing that the adjudicator should not deal with the human rights violation allegation because it had not been pleaded at the Tenancy Officer level, so that there was nothing to appeal from on that issue, and no legal question to be considered. The adjudicator disagreed, and did not consider that his authority was restricted by s.17D of the *Residential Tenancies Act* to the same authority which the Tenancies Officer had exercised. The adjudicator characterized the Small Claims hearing as a *trial de novo*, and determined that the human rights issues could be argued at the Small Claims level, even though it had not been addressed at the Tenancy Officer's hearing.

[9] The adjudicator held that pursuant to s.17A of the Act, the Director had a "broad jurisdiction" over matters arising out of the landlord-tenant relationship, and that there was "no restriction per se on appeals to the Small Claims Court from an Order of the Director" pursuant to s.17C(5), which provides that the Small Claims Court "shall determine its own practice and procedure but shall give full opportunity for the parties to present evidence and make submissions." (paras.64-66) He found that the *Human Rights Act* did not provide the Human

Rights Commission with "exclusive and original authority with respect to [its] enforcement." (paras.67-70)

[10] Upon concluding that the *Human Rights Act* could be applied in the Small Claims Court proceeding, the adjudicator went on to consider s.5(1)(b) and (r), which, when read together, forbid discrimination on the basis of family status in the provision of accommodation. The term "family status" is defined at s.3(h) as "the status of being in a parent child relationship." The adjudicator interpreted this provision as follows at para.73:

> ... It appears quite clear, on the face of it, that this legislation was designed to prevent landlords from discriminating against families on the basis of their makeup. In other words, subject to other limitations of the *Act*, a landlord could not deny a family with children housing, on the basis that they had children.

[11] The adjudicator took note of s.6(f) of the *Human Rights Act*, which provides exceptions to the general prohibition against discrimination "where a denial, refusal or other form of alleged discrimination is (i) based upon a *bona fide* qualification, or (ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society." He concluded that the "overwhelming reason" for the Notice to Quit was "the increased size of [the] family over the four year term...." (paras.75-76) While there had been other issues and complaints, he found, the landlord's "primary reason ... was due to wear and tear on the unit and additional water costs", and that "had the Appellant's family size increased only to five, they would not have received a Notice to Quit." (para.76) There was, he noted, no legislation setting a maximum number of tenants who could live in an apartment.

[12] Moving to a consideration of the requirements of the *Human Rights Act*, the adjudicator interpreted the prohibition of discrimination with respect to "family status" as relating to "both a family unit with children and the numbers of children." (para.80) As such, it appears, the adjudicator considered the Notice to Quit to constitute discrimination. He went on to consider whether the discrimination was based on a *bona fide* qualification as contemplated by s.6(f)(i). He was "not convinced that four [corrected to "five" in the Adjudicator's Summary Report] children with their two parents in a three bedroom apartment is beyond reasonable." The landlord had never adopted a standard "in regards to allowable norms for family members living in their units." The adjudicator found that the

standard applied to the tenants was arbitrary and was not applied in good faith, and concluded:

> ...as I have found the landlord discriminated against Mr. Poirier and his family in respect of accommodation arising out of the size of his family, I find on [the] basis of the evidence presented by the [landlord] that such discrimination was not based upon a *bona fide* qualification. (paras.84-86)

In the alternative, if it had been necessary to decide whether the landlord made an effort to reasonably accommodate the appellants, the adjudicator found that an alternative apartment offered by the landlord did not constitute reasonable accommodation because it was "not in the school district where the Appellants wanted his [*sic*] kids to go to school." (para.86)

DISCUSSION OF ISSUES

I The adjudicator's jurisdiction to consider the reasons for the Notice to Quit on an application for vacant possession pursuant to a notice given under s.10 of the *Residential Tenancies Act* within the first five years the premises are occupied by the tenant.

[13] The landlord submits that the Director and the Small Claims Court are both statutory tribunals without inherent jurisdiction. The Director's jurisdiction is found at s.17A of the *Residential Tenancies Act*, and the powers of the Small Claims Court on appeal at ss.17C and 17D. The landlord submits that s.17D – which permits the adjudicator to "confirm, vary or rescind" the Director's order, or to "make any order that the Director could have made" – limits the appellate jurisdiction to the jurisdiction that the Director would have, including the power to set aside a Notice to Quit.

[14] While acknowledging that the Director and the adjudicator can set aside a Notice to Quit, the landlord maintains that the only grounds available are that the notice has not been properly issued or served. By this reasoning, during the first five years of the tenancy the adjudicator cannot inquire into the reasons for a Notice to Quit. In **Doherty v. Dartmouth Housing Authority**, [1984] N.S.J. No. 381, the Appeal Division held at para.23 that neither the County Court nor the Appeal Division could "look behind [an] apparently valid notice to quit...." The same reasoning applied in **Schnare v. Tanner**, [1986] N.S.J. No. 326, where the

County Court held that a valid Notice to Quit could not be set aside for reasons of unfairness. In **Mandaville Court v. Muise**, [2008] N.S.J. No. 64, the Small Claims Adjudicator held that, in the case of a tenant without five-year tenure, reasons for a Notice to Quit will not be considered unless the tenant establishes that the Notice was given as a "retaliatory action" by the landlord. In my view the landlord is correct in its submission that the reasons for a landlord's Notice to Quit under s.10(1) are not properly before the Director.

[15] The tenants submit that the adjudicator had jurisdiction to consider the reasons for the Notice to Quit. They rely on s.1A of the *Residential Tenancies Act*, which states that the purpose of the Act is to "provide landlords and tenants with an efficient and cost-effective means for settling disputes." The tenants say this purpose would be impossible to carry out if the Director or the adjudicator could not consider the reasons for a Notice to Quit. I find that s.1A is a general purpose clause; I do not see how it can provide the Director with specific jurisdiction that is not found elsewhere in the Act.

[16] The tenants further argue that if a Notice to Quit did not require reasons, this would be stated in the Act. However, this ignores the fact that the Act *does* specify circumstances in which the Notice to Quit either requires reasons at the outset (in the case of five-year tenure) or may require the landlord to provide reasons (in response to an allegation of retaliation).

[17] The tenants go on to submit that **Schnare** (*supra*) leaves open the possibility of a review of a Notice to Quit on an equitable basis. In fact, the case only says that the County Court had equitable jurisdiction that "should be exercised in only the most obvious cases." Leaving aside the question of whether the Small Claims Court (not to mention the Director) has any equitable jurisdiction, this comment did not relate to any specific issue under the Act. It was essentially a general comment about the jurisdiction of the County Court.

[18] The tenants appear to agree that the cases – particularly **Doherty** and **Schnare** – deal only with procedural fairness. They also seem to suggest that the **Charter of Rights and Freedoms** provides a basis upon which to challenge the Notice to Quit. But the Charter does not directly apply to a private transaction such as a lease, and there has been no Charter challenge to the legislation in this case. More broadly, the tenants' argument (at pp.2-4 of their brief) is that the

adjudicator was required to consider the substantive issue of alleged discrimination:

> It is submitted that the Adjudicator not only had the jurisdiction to consider the reasons behind the Notice under the circumstances, but was obligated to do so under the principles of upholding human rights and protections afforded by the Charter.
>
> It is submitted that Mr. Poirier's case was one of the "obvious" cases that brought forward evidence upon which the Adjudicator was required to look at the grounds for issuance of the Notice to Vacate [sic] and assess the substantive fairness of the same. In so doing there appears to be little restriction on the ability of the Adjudicator with respect to conducting the hearing as the *Residential Tenancies Act* states in s.[17C(5)]....

[19] Subsection 17C(5) provides that the "Small Claims Court shall determine its own practice and procedure but shall give full opportunity for the parties to present evidence and make submissions." This subsection addresses procedure; on its face, it does not create substantive jurisdiction. There is no apparent legal basis for treating some Notices to Quit as "obvious" cases where the landlord's reasons could be the subject of inquiry by the Director.

[20] The tenants say **Doherty** and **Schnare**

> are factually distinct and did not involve the substantive rights issue of discrimination. Further, the legislature could not have intended that s.10 notice provisions would be absolute and include the right to discriminate.

They rely on **Wickham v. Mesa Contemporary Folkart Inc.**, 2004 BCHRT 134, 2004 CarswellBC 3742, where, they suggest, "the Notice to Quit was set aside by the arbitrator under the [British Columbia] *Residential Tenancies Act*" due to discrimination on the basis of family status, and, particularly, "the size of the family, which was viewed as being part of the definition of family status." While **Wickham** has some resemblance to this proceeding, I find that it is distinguishable and of limited persuasive value, let alone binding authority on the meaning of "family status."

[21] In **Wickham**, the tenants had one child and were expecting a second when they moved into the house. While living in the house, they had a third child. The landlords sought to end the tenancy

> because, in the words used in the Notice to End Tenancy ('Notice'), 'family size has increased from three to five persons, necessitating the use of the basement for bedrooms for two of the children. The basement is unsuitable to be used as sleeping or living space.' (**Wickham**, para.3)

The Notice was set aside by an arbitrator under the British Columbia *Residential Tenancy Act*. The tenants subsequently left the property, but pursued the human rights complaint. The landlords applied to have the complaint dismissed prior to hearing. To be clear, the decision under discussion was not that of the tenancy arbitrator.

[22] The British Columbia *Residential Tenancy Act* permitted the landlord to terminate a lease on the basis that the number of permanent occupants was unreasonable, and the landlord relied on that provision to argue that the Notice was not based on "family status." The British Columbia Human Rights Tribunal said:

> Family status is not defined in the [B.C. *Human Rights*] *Code*. Other human rights legislation in Canada defines it as including the status of being in a parent and child relationship.... That interpretation has been applied with respect to the *Code*. The law is also clear that discrimination on the basis of family status includes discrimination on the basis that a person is associated with children: *Micallef v. Glacier Park Lodge Ltd.* (1998), 33 C.H.R.R. D/249 (B.C. Human Rights Trib.) and *Watkins v. Cypihot*, 2000 BCHRT 13 (B.C. Human Rights Trib.). It is implicit in these cases that a decision based on the size of a family, or the number of children in a family, may amount to a breach of the *Code* on the basis of family status. The respondents' assertion of their nondiscriminatory reasons for their decision to deliver the Notice is disputed by the complainants. Resolving that dispute will require a determination of the credibility of the evidence at a hearing into this complaint. As a result, the respondents' application on this ground is dismissed. (**Wickham**, para.9)

[23] In **Micallef**, a lodge's policy of discouraging families with small children from eating in the dining room constituted discrimination on the basis of family status. Nothing in the decision appears to support the specific conclusion that "number of children" was incorporated into the definition of family status. In **Watkins**, the complainant alleged that the landlord refused to renew her lease upon

learning that her two stepsons would be moving in with her. An arbitrator under the British Columbia *Residential Tenancy Act* had decided that the landlord was not required to give reasons for refusing to renew a lease. As to discrimination on the basis of family status, the Human Rights Tribunal said at para.27:

> The law is clear that discrimination on the basis of family status includes discrimination on the basis that a person is associated with children: see, for example, *Micallef v. Glacier Park Lodge Ltd....* The onus is on the Complainant to establish that the Respondent contravened the *Code* on a balance of probabilities. In the present case, this means that Ms. Watkins must show that it is more likely than not that Mr. Cypihot refused to renew the lease in part because he learned that her stepsons were living with her.

There was some discussion in **Watkins** of whether the landlord rented to families with more than one child, but little, if any, weight was placed on this point.

[24] With respect to **Wickham**, one of the objections the landlords raised before the Human Rights Tribunal was that the substance of the complaint had been dealt with in another proceeding. The Tribunal said:

> As I understand the respondents' submission in this regard, the other proceeding referred to is the arbitration under the *Residential Tenancy Act*. The respondents submit that because the residential tenancy arbitrator set aside their Notice, the human rights issues have been resolved.
>
> I do not agree. *Residential tenancy proceedings are not intended to, and do not, address human rights issues. The impact of the alleged harassment could not be addressed in a Residential Tenancy proceeding which is intended to deal only with the landlord and tenant issues in dispute between the parties*. The fact that the Notice was set aside and that, as a result, the Wickhams were not forced to leave the premises, may well be relevant to the member designated to hear the case in assessing the appropriate remedy if the complaint is found to be justified. [Emphasis added; see **Wickham** paras.16-17.]

Another point of significance about **Wickham** is that the Notice given by the landlord under s. 36(1) of the *Residential Tenancy Act* may have been in the nature of an eviction, rather than a refusal to renew a lease.[1] The decision only refers to a

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[1] While the *Wickham* decision cites the *Residential Tenancy Act* as S.B.C. 2002, c. 78, it appears that the Tribunal was actually referring to R.S.B.C. 1996, c. 406. Section 36 of the 2002 statute deals with the return of

notice to terminate the lease; it does not indicate that what occurred was a refusal to renew a lease.

[25] With respect to the First Issue, I have concluded that the reasons for which a landlord gives a Notice to Quit in respect of a lease under s.10(1) of the *Residential Tenancies Act* are not subject to review under the Act. In effect, a landlord may give notice for no reason at all. The Act *does* specify particular circumstances where reasons are required, namely, where the tenant has tenure of five years or more under s.10(8) or (potentially) where the Notice to Quit constitutes a retaliatory action by the landlord for a tenant's attempt to enforce rights under the Act. Under s.10(1), the reasons for a landlord issuing a Notice to Quit are not properly before an officer or the Director under the *Residential Tenancies Act,* or before the Small Claims Court. I therefore find that the adjudicator did not have jurisdiction to consider reasons for the Notice to Quit with respect to the application which was before the Tenancies' Officer.

II The adjudicator's jurisdiction to consider the human rights complaint.

[26] The tenants say the adjudicator was obliged to apply the whole law, including human rights law, to matters properly before him. As a general principle, it is correct to say that

> administrative bodies that do have that power may presumptively go beyond the bounds of their enabling statute and decide issues of common law or statutory interpretation that arise in the course of a case properly before them, subject to judicial review on the appropriate standard. (**Martin v. Nova Scotia (Workers' Compensation Board)**, 2003 SCC 54, [2003] 2 S.C.R. 504, 2003 CarswellNS 360, at para.45)

The question is whether the issue of discrimination was properly before the adjudicator. My view, as set out above, is that the reasons for a landlord's issuance of a Notice to Quit were not properly before the Residential Tenancies Officer. It is not clear therefore how in this case the Small Claims Court Adjudicator could have the power to consider such an issue during a Residential Tenancies' Appeal.

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damage deposits. Subsection 36(1) of the 1996 Act, however, provided that a landlord "may, at any time, give the tenant a notice of the end of the tenancy agreement in accordance with subsection (2)" if certain events occurred. See, e.g., *Fulber v. British Columbia (Arbitrator Appointed Pursuant to The Residential Tenancy Act, R.S.B.C. 1996, c. 406)*, 2001 BCSC 891, 2001 CarswellBC 1435, at para. 6, where s. 36 of the 1996 version is quoted in part.

[27] The tenants say the adjudicator properly "applied the values and principles of the *Human Rights Act* to determine whether the Notice to Vacate was based on a ground of discrimination on the basis of family status." They cite **Tranchemontagne v. Ontario (Director, Disability Support Program)**, [2006] 1 S.C.R. 513, 2006 SCC 14, where it was held at para.40 that in deciding on eligibility for income support, the decision maker "is presumed able to consider any legal source that might influence its decision on eligibility," including human rights legislation.

[28] The landlord takes the position that an adjudicator on a residential tenancy appeal can consider the *Human Rights Act*, but only in the context of an issue properly before the adjudicator. The landlord says the human rights complaint was not properly before the adjudicator, because he had no jurisdiction to consider the reasons for the Notice to Quit. In my view, the landlord is correct; the adjudicator's powers are limited to confirming, varying or rescinding the order of the Director, or making any order that the Director could have made. (*Residential Tenancies Act*, s.17D(1)) There is no indication that the adjudicator on appeal may consider issues that are not within the Director's jurisdiction. I also agree with the argument made by the landlord in Small Claims Court that there was really no appeal to the adjudicator on the human rights issue, because it was not and could not have been dealt with at the Residential Tenancies level.

[29] The landlord also submits that the human rights complaint was not properly before the adjudicator due to the operation of s.15 of the *Small Claims Court Act*, which provides:

> **Claim before other court**
>
> 15 The Court does not have jurisdiction in respect of a claim where the issues in dispute are already before another court unless that proceeding is withdrawn, abandoned, struck out or transferred in accordance with Section 19.

According to the landlord, s.15 prevented the adjudicator from considering the complaint because it was already before another court. However, a Human Rights Tribunal is not a court and I do not find that s.15 assists the landlord.

[30] The tenants note that s.29(4)(d) of the *Human Rights Act* contemplates that a complaint may be dismissed if "the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding." As such, they submit, the *Human Rights Act* "contemplates that matters may be resolved in other forums." This does not mean that it is properly the subject of a proceeding under the *Residential Tenancies Act*.

[31] The position advanced by the tenants does not represent sound policy. In my view, tenancy officers, who are not obligated to have legal experience, should not be required to interpret the *Human Rights Act*.

[32] The tenants' position is that the *Residential Tenancies Act* must be read in accordance with their preferred interpretation of the definition of "family status" in the *Human Rights Act*. This requires the Director (and the Small Claims Court) to interpret the latter Act. That interpretation, they submit, would then be applied so as to require the Director (or a tenancy officer) to investigate the substantive reasons for a Notice to Quit that is procedurally sound. This power cannot be found within the *Residential Tenancies Act*. If the tenants' complaint is that the *Residential Tenancies Act* is inconsistent with the *Human Rights Act*, in that it theoretically permits a landlord to discriminate in issuing a Notice to Quit, this may be more properly a matter for a constitutional challenge to the Act.

III If the adjudicator had jurisdiction to consider the human rights complaint, was there discrimination based on family status?

[33] Although my conclusions that the adjudicator did not have jurisdiction to consider either the reasons for the Notice to Quit or the human rights complaint are sufficient to dispose of this Appeal, I will address the final issue. The landlord maintains that if the Small Claims Court Adjudicator did have jurisdiction to consider the human rights issue, the adjudicator erred in finding that discrimination had occurred.

[34] A complainant raising a human rights issue is required to establish a *prima facie* case of discrimination. This having been done, the onus shifts to the respondent to show justification. The landlord submits that (a) the adjudicator had no jurisdiction to broaden the definition of "family status" that appears in the *Human Rights Act*, and (b) the adjudicator did not carry out the analysis required by the Act to determine whether discrimination has occurred.

[35] On the question of whether the adjudicator carried out the proper analysis, the tenants cite **B. v. Ontario (Human Rights Commission)**, [2002] 3 S.C.R. 403, 2002 SCC 66, [2002] S.C.J. No. 67, where the majority said at para.57:

> [I]t is a misconception to require the complainant to demonstrate membership in an identifiable group made up of only those suffering the particular manifestation of the discrimination. It is sufficient that the individual experience differential treatment on the basis of an irrelevant personal characteristic that is enumerated in the grounds provided in the Code. It is not necessary to embark on the artificial exercise of constructing a disadvantaged sub-group to which the complainant belongs in order to bring one's self within the ambit of marital or family status within the meaning of the Code.

Based on this passage, the tenants' position is that it is not necessary to identify a comparator group, but that it is sufficient that they experienced "differential treatment on the grounds of an irrelevant personal characteristic that is enumerated in the grounds."

[36] The tenants go on to argue that the definition of "family status" should be read broadly. They again cite **B. v. Ontario**, where the majority held at para.4 that:

> adopting a broad meaning of "marital status" and "family status" is supported by the words of the statute, the applicable principles of interpretation, and the weight of existing discrimination jurisprudence. Most importantly, we find that the broad goal of anti-discrimination statutes, namely, preventing the drawing of negative distinctions based on irrelevant personal characteristics, is furthered by embracing the more inclusive interpretation of the grounds in question.

The statute in question, the Ontario *Human Rights Code*, contained substantively the same definition as the Nova Scotia *Human Rights Act*, citing the existence of a parent-child relationship. However, the issue in **B v. Ontario** was *not* whether numbers alone are sufficient to found a complaint of "family status" discrimination.

[37] The tenants cite a number of cases which, they submit, support a broad and purposive definition of family status. More specifically, these cases stand for the proposition that "discrimination on the basis of family status includes discrimination on the basis that a person is associated with children." (**Watson v.**

Cypihot 2000 BCHRT 13) Among those they cite are various arbitration awards and decisions of Human Rights Tribunals and boards of inquiry. For instance, in **C.S.U. v. C.U.P.E.**, 2006 CarswellNS 583 (N.S. Arb. Bd., Christie Arb.), the arbitrator said:

> ‘family status’ includes having a parent, and whatever that involves, to the same extent that it includes having a child, and whatever that involves under the extended meaning given to the concept by the courts.

In **Leadley v. Oakland Developments Ltd.**, 2004 CarswellNS 609 (N.S. Bd.Inq.), the landlord refused to rent to the complainant because she had children. **Leadley** and the cases cited therein certainly address the general principle that “family status” will encompass a parent-child relationship as a basis for a finding of discrimination. They do not appear, however, to make out the more specific principle that “family status” can be reduced to the number of persons in a family.

[38] Ultimately, the tenants’ position is that **Wickham** supports the view that “[i]t is enough to ground discrimination for the respondent to show that the tenancy was terminated due to the family size or composition.” In the present case, however, the Respondents’ tenancy was not terminated; rather, it was not renewed. This was not an eviction. The concerns associated with applying **Wickham** to this case have been discussed above at paras.20-24.

[39] In response to the suggestion that renting to the tenants (who then had two children) in the first place demonstrates that the landlord did not discriminate, the tenants say that “all this really shows is that the Appellant did not blatantly discriminate ... on the basis of family status at the application stage.”

[40] The landlord’s position is that the Notice to Quit was based on the number of occupants, not on family status. The tenants say:

> this argument is flawed in that it denies the special protections given to the family unit under Human Rights legislation to not be subjected to decisions that discriminate based on family status including size.

They cite **Leadley**, where the Board of Inquiry referred to the following statement from **Cunanan v. Boolean Developments Ltd.** (2003), 47 C.H.R.R. D/236, 2003 HRTO 17 (Ont. Human Rights Trib.):

> The purpose of prohibiting discrimination on the basis of family status with respect to the occupancy of accommodation is to remedy the hardship experienced by families with children, who have traditionally experienced difficulty in obtaining equal access to the rental of living accommodation, particularly in high-density urban areas. The importance of enforcing the prohibition reflects the reality that: (i) the family is the natural and fundamental group unit of society; and (ii) housing represents a basic need of every individual in our society. (**Cunanan** at para.77, cited in **Leadley** at para.67)

Even if it is accepted that the phrase "family status" is entitled to a broad and purposive interpretation in human rights law, this does not lead inexorably to the conclusion that a landlord cannot, under residential tenancy law, give a Notice to Quit where there are an excessive number of residents, simply because the residents are in a family relationship. In effect, this is the principle advanced by the tenants.

[41] I conclude that the landlord's position is correct – the Notice to Quit was based on the number of occupants, not family status, and the adjudicator's finding that discrimination occurred was in error.

ORDER

[42] At the hearing, the landlord advised that if the appeal succeeded, it would not seek immediate possession, in order that the tenants have a reasonable opportunity to obtain alternate accommodation. When delivering this decision orally on December 21st, I suggested that three months would be an appropriate notice period, given the holiday season, the tenant's children's school attendance, and the three-month period prescribed by s.10(1)(a) of the *Residential Tenancies Act*, which although not directly applicable, provided guidance. After a short discussion, counsel for the parties agreed to the terms to be included in the Order, which issued as follows:

1. The Appeal herein be allowed and the Decision of the Residential Tenancies Officer dated November 6, 2008, as set out in the Order of the Director of Residential Tenancies, is restored.

2. The Respondent tenants shall vacate the premises located at 456 Parkland Drive, Apartment 414, Halifax, Nova Scotia on March 31, 2010 unless the parties agree to an earlier date to vacate. The tenants shall continue to pay

rent for the premises at the rate of $975/month, which is currently paid up-to-date. If a monthly rental payment is not made when due on the first of any month, the date to vacate shall be advanced to the 15th day of that month, unless payment is brought up-to-date by that day.

3. By agreement of the parties, there shall be no costs of this appeal.

J.