2016 ONSC 1542
Ontario Superior Court of Justice (Divisional Court)

Riddell v. Eldridge

2016 CarswellOnt 3312, 2016 ONSC 1542, 264 A.C.W.S. (3d) 206

Matthew Riddell, Appellant/Tenant and Dale Eldridge, Respondent/Landlord

K. Swinton J., L.A. Pattillo J., A.D. Kurke J.

Heard: March 1, 2016
Judgment: March 4, 2016
Docket: Oshawa 024/16

Counsel: Matthew Riddell, for himself
Timothy **Duggan**, for Respondent
Brian A. Blumenthal, for Landlord and Tenant Board

Subject: Evidence; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Real property

V Landlord and tenant
V.20 Residential tenancies
V.20.k Termination of tenancy
V.20.k.vii Practice and procedure
V.20.k.vii.B Appeal or review

Headnote

Real property --- Landlord and tenant — Residential tenancies — Termination of tenancy — Practice and procedure — Appeal or review

Tenant rented two-bedroom apartment in basement of house owned by landlord — Landlord lived in main and second floors of house and asked tenant not to reside in apartment with pet — Tenant agreed but subsequently moved into apartment with dog — Landlord brought successful application to terminate tenancy on basis that tenant was substantially interfering with reasonable enjoyment of residential complex because tenant's dog was affecting his asthma — Tenant appealed — Appeal dismissed — Board did not breach its duty of procedural fairness — While Board asked number of questions of witnesses, they were for purpose of clarification and did not rise to level of entering arena — It was disingenuous on tenant's part to say that he was ambushed by landlord's evidence — Board's decision to reject tenant's requests to call rebuttal evidence and make written submissions were reasonable in circumstances and did not amount to breach of procedural fairness — Heating and cooling contractor who testified as to how furnace in house operated did not testify as expert and did not need to be qualified as one — When read in their entirety along with evidence, Board's reasons met standard required of tribunal — Board's questioning did not amount to substantial interference and there was no basis to conclude reasonable person viewing matter realistically and practically would think it more likely than not that Board would not decide matter fairly — Given that Board found that landlord's severe asthma was caused or contributed to by tenant's dog, it was not necessary to address issue that landlord hated dogs — There was more than enough evidence to support Board's findings — Landlord's

evidence, including her doctor's letter and evidence of how air circulated in house, was more than sufficient to enable Board to reach findings it did.

Table of Authorities

Cases considered by *L.A. Pattillo J.*:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — referred to

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, 1976 CarswellNat 434, 1976 CarswellNat 434F (S.C.C.) — referred to

First Ontario Realty Corp. v. Deng (2011), 2011 ONCA 54, 2011 CarswellOnt 244, 1 R.P.R. (5th) 1, 330 D.L.R. (4th) 461, 274 O.A.C. 338 (Ont. C.A.) — referred to

N.L.N.U. v. Newfoundland & Labrador (Treasury Board) (2011), 2011 SCC 62, 2011 CarswellNfld 414, 2011 CarswellNfld 415, D.T.E. 2012T-7, 340 D.L.R. (4th) 17, (sub nom. *Nfld. and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 2011 C.L.L.C. 220-008, (sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*) 424 N.R. 220, (sub nom. *Newfoundland & Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board)*) [2011] 3 S.C.R. 708, 213 L.A.C. (4th) 95, (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 986 A.P.R. 340, (sub nom. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*) 317 Nfld. & P.E.I.R. 340, 97 C.C.E.L. (3d) 199, 38 Admin. L.R. (5th) 255 (S.C.C.) — followed

R. v. Mohan (1994), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 18 O.R. (3d) 160 (note), 1994 CarswellOnt 66, 1994 CarswellOnt 1155 (S.C.C.) — followed

Statutes considered:

Residential Tenancies Act, 2006, S.O. 2006, c. 17
Generally — referred to

s. 64 — considered

s. 76 — considered

s. 76(1)(b) — considered

s. 76(3) — considered

s. 183 — considered

s. 210(1) — referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22
s. 15 — considered

APPEAL by tenant of decision of Landlord and Tenant Board terminating tenant's tenancy.

***L.A. Pattillo J.*:**

Introduction

1 Matthew Riddell (the "Appellant") appeals from the final order of the Landlord and Tenant Board (the "Board") dated April 16, 2014 terminating the Appellant's tenancy effective April 30, 2014 on the basis he had substantially interfered with the reasonable enjoyment or lawful right, privilege or interest of the landlord, Dale Eldridge (the "Respondent").

2 For the reasons that follow, I dismiss the appeal. In my view, the Board did not err in granting the Respondent's application to terminate the Appellant's tenancy. The Board's findings that the Respondent had suffered and was continuing to suffer a severe allergic reaction caused or contributed to by the Appellant's dog was more than supported by the evidence and sufficient to support a termination pursuant to s. 76(1)(b) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 (the "Act"). Further, there was no breach of the duty of procedural fairness or reasonable apprehension of bias on the part of the Board.

Background

3 The Appellant rents a two-bedroom apartment in the basement of a house owned by the Respondent (the "Apartment"). At all material times, the Respondent lived in the main and second floors of the house. At the time the Appellant rented the Apartment, the Respondent asked him not to reside in it with a pet. The Appellant agreed but subsequently moved into the Apartment with a dog.

4 The Application to terminate the Appellant's tenancy dated October 15, 2013 is based on s. 64 of the Act which provides that a landlord may give a tenant notice of termination of the tenancy if the conduct of the tenant "... substantially interferes with the reasonable enjoyment of the residential complex for all usual purposes by the landlord..." Specifically the Application stated that the Appellant's dog was affecting the Respondent's asthma.

5 Section 76(1) (b) of the Act provides as follows:

> s. 76(1) If an application based on notice of termination under sections 64, 65 or 66 is grounded on the presence, control or behaviour of an animal in or about the residential complex, the Board shall not make an order terminating the tenancy and evicting the tenant without being satisfied that the tenant is keeping an animal and that,
>
> (b) subject to subsection (3), the presence of an animal of that species has caused the landlord or another tenant to suffer a serious allergic reaction;
>
> Subsection (3) provides:
>
> (3) The Board shall not make an order terminating the tenancy and evicting the tenant relying on clause (1) (b) if it is satisfied that the animal kept by the tenant did not cause or contribute to the allergic reaction.

6 After three days of hearing, the Board found, based on the evidence:

> 1. The Respondent suffers severe asthma symptoms which are triggered by the presence of dogs, among other things;
>
> 2. The dog kept by the Appellant has caused or contributed to the exacerbation of the Respondent's asthma symptoms, both in severity and frequency;
>
> 3. The central heating and central vacuum systems are both sources of pet dander and/or pet hair passing from the Apartment to the upstairs portion of the house occupied by the Respondent; and

4. It was not reasonable for the Respondent to incur the capital costs and additional operating costs required to treat and purify the air in the house.

7 The Appellant raises a number of grounds of appeal. They can be summarized as follows:

1. denial of procedural fairness/natural justice;

2. reasonable apprehension of bias;

3. misapprehension of the evidence; and

4. the decision was unreasonable and unsupported by the evidence.

Standard of Review

8 An appeal from an order of the Board lies to this Court but only on a question of law: the Act, s. 210(1).

9 Where the Board is interpreting the Act, its home statute, the deferential standard of reasonableness applies. In considering whether a decision of the Board is reasonable, the court considers whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." A standard of correctness will apply only where the question is one of true jurisdiction, or one of general law that is of central importance to the legal system as a whole and is outside the Board's specialized area of expertise. See: *First Ontario Realty Corp. v. Deng*, [2011] O.J. No. 260 (Ont. C.A.) at paras. 16 - 22.

Preliminary Matters

10 In conjunction with the appeal, the Respondent brought a motion for an order striking out the transcripts of evidence filed by the Appellant and granting her leave to file fresh transcripts. The Appellant responded with a cross-motion seeking an adjournment of the appeal.

11 At the outset of the appeal, we advised counsel that rather than dealing with the transcripts motion, both sides could refer to their copy of the transcripts in argument.

12 In respect of the Appellant's adjournment motion, he submitted that he wished to cross-examine the affiant on the Respondent's motion. He further stated that he had only received the Respondent's factum and authorities last week and he needed time to prepare a reply factum and a brief of supplementary authorities and to prepare his argument.

13 We refused the adjournment. As the transcript motion was effectively moot, there was no need for cross-examination. Further, notwithstanding the late delivery of the Respondent's material, it was our view that the Appellant had more than sufficient time to prepare for the argument. The Respondent's factum was only 14 pages and did not raise any new issues. Finally there is no right to file a reply factum in the Divisional Court without leave. Given how long this matter has been outstanding we were all of the view that the appeal should proceed.

Procedural Fairness/Natural Justice

14 The duty of procedural fairness is flexible and variable and depends on the context of each case. In considering whether there has been a breach of the duty, the court should have regard to the nature of the proceeding, the context of the case and the tribunal's statutory mandate (in this case the Act). See: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.).

15 Section 183 of the Act requires the Board to adopt the most expeditious method of determining the questions arising in a proceeding that affords to all persons directly affected by the proceeding an adequate opportunity to know the issues and be heard on the matter. Further, Rule 2.2 of the Board's Rules of Practice provides that the Board "may

decide the procedure to be followed for an application and may make specific procedural directions or orders at any time and may impose such conditions as are appropriate." Notwithstanding this broad discretion to conduct hearings, the Board is still required to conduct its proceedings in a manner which is fair to all parties.

16 The Appellant raises a number of issues concerning denial of procedural fairness. In my view, given the context of the case and the issues raised, I do not consider that the Board breached its duty of procedural fairness in respect of any of them.

17 The Appellant submits that the Board "substantially interfered" with the examination of witnesses. Specifically he points to his examination of his witness Mr. Alam on the second day of the hearing and the examination in chief of Mr. Ripchensky which took place on the third day. I have reviewed the transcript of the examinations. While the Board did ask a number of questions of the witnesses, it is clear from the transcript that they were for the purpose of clarification to understand the evidence or to expedite the proceedings. I do not consider that they rose to the level of entering the arena as submitted by the Appellant.

18 The Appellant further submits that he was "ambushed" in not having prior disclosure of the Appellant's medical evidence and the evidence of Mr. Ripchensky. It was clear from the Application that the reason for the eviction was the Respondent's medical condition. The Respondent's evidence was on day one. In light of the adjournments, the Appellant had more than sufficient time to deal with it. Similarly, Mr. Ripchensky's evidence was as a result of the Board's request at the end of day two to have someone tell the Board about the mechanics of the operation of the furnace in the Respondent's house. Mr. Ripchensky attended at the Apartment. As a result, the Appellant was well aware of the general nature of Mr. Ripchensky's evidence. He had also tendered an affidavit of an individual dealing with similar issues. In my view, it is disingenuous on the Appellant's part to say that he was "ambushed" by Mr. Ripchensky's evidence.

19 The Appellant submits that the Board denied him the right to call rebuttal evidence at the conclusion of Mr. Ripchensky's evidence and the right to make written submissions. The Board dealt briefly with both of these matters in the reasons. The decisions were well within the Board's procedural discretion. Based on the Board's reasons, I consider that the Board's decision to reject both requests was reasonable in the circumstances and does not amount to a breach of procedural fairness.

20 The Appellant submits that the Board erred in allowing the expert evidence of Mr. Ripchensky in the absence of a *voir dire* and without qualifying him as an expert. I agree with the Respondent, however, that Mr. Ripchensky did not testify as an expert. He is an experienced heating and cooling contractor who testified as to how the furnace at the Respondent's house operated, having attended there and looked at it. He also testified as to the cost to purchase and operate air purification systems, which is his business. In the absence of providing an opinion, Mr. Ripchensky did not need to be qualified as an expert.

21 Further, and even if Mr. Ripchensky could be considered an expert, the Board is not bound by the test set out in *R. v. Mohan*, [1994] S.C.J. No. 36 (S.C.C.). Section 15 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 gives the Board wide powers concerning the admission of evidence, including experts. While the factors in *Mohan* remain relevant, in my view, they were met in this case albeit on a more informal basis.

22 The Appellant submits that the Board failed to provide adequate reasons. His complaint is essentially that the Board failed to address his evidence and provided no insight into the Board's assessment, analysis and reasoning process on the primary issue in the case. Reasons for decision are not required to deal with every issue and every argument raised by the parties. What is required is that the reasons enable the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of reasonable outcomes: *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 (S.C.C.) [hereinafter Newfoundland Nurses] at para. 16. In my view, when read in their entirety along with the evidence, the Board's reasons in this case meet the standard required of a tribunal as set out in *Newfoundland Nurses*.

Reasonable Apprehension of Bias

23 The Appellant submits that the Board's "substantial interference" gives rise to a reasonable apprehension of bias. I disagree. First and as noted, I do not consider the Board's questioning to amount to "substantial interference". Further, upon review of the transcript, there is no basis to conclude a reasonable person viewing the matter realistically and practically would think it more likely than not that the Board would not decide the matter fairly: *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at 394-5. The questions by the Board were directed to the witnesses from both parties.

24 The Appellant points to one spot during the hearing where the Board was trying to understand the Appellant's reasons for wanting to remain a tenant. The Board summarized what she thought was the Appellant's position and characterized it as unreasonable. The Appellant corrected the Board and explained his position whereupon the Board responded with "ok" and the hearing continued. When considered in its context, that one exchange by itself does not give rise to any reasonable apprehension of bias.

Misapprehension of the Evidence

25 The Appellant submits that the Board misapprehended his evidence dealing with what he submits is the real reason the Respondent doesn't want him as a tenant, because she hates dogs. The Board was clearly alive to that evidence and referred to it in the reasons. In my view, however, given that the Board found that the Respondent's severe asthma was caused or contributed to by the Appellant's dog, it was not necessary to address that issue.

26 Having reviewed the transcripts and the reasons, I do not consider that the Board misapprehended any evidence.

The Decision was Unreasonable and Unsupported by the Evidence

27 The Appellant submits that the Board's decision was wrong given that there was no direct evidence of dog hair and dander inside her portion of the house and there was no evidence of a serious allergy as required by s. 76 of the Act.

28 In our view there was more than enough evidence to support the Board's findings. Section 76(1) (b) does not require that the landlord establish that there was actual dog hair in her portion of the house. It requires that the Board be satisfied that the Respondent suffered a serious allergic reaction which was caused or contributed to by the Appellant's dog. The Respondent's evidence, including her doctor's letter and the evidence of how the air circulated in the house, was more than sufficient to enable the Board to reach the findings it did.

Conclusion

29 For the above reasons therefore, the appeal is dismissed. The Appellant shall vacate the Apartment no later than March 31, 2016.

30 The Respondent may file this order with the Court Enforcement Office (Sheriff) at any time. However, the Court Enforcement Office (Sheriff) is directed not to enforce the order and give vacant possession of the Apartment to the Respondent until on or after April 1, 2016.

31 The Respondent is entitled to her costs of the appeal. In that regard, counsel has provided us with a Cost Outline seeking partial indemnity costs of $13,590.45. Part of that amount is made up of $2,000 in respect of the transcripts motion and disbursements of $3,944.88. More than half of the disbursements is for the second set of transcripts.

32 I agree with the Appellant that proportionality is an important factor to take into consideration in assessing costs in a case like this. By the same token, however, the costs surrounding the transcripts motion were not necessary if the complete transcript had been ordered in the first place.

33 Having regard to the issues in the appeal, I fix the Respondents' partial indemnity costs at $10,000 inclusive of disbursements and taxes, payable forthwith.

34 As requested by the Respondent's counsel, the Appellant shall be provided with a copy of our draft order but his approval as to form and content is dispensed with.

Appeal dismissed.

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