Claim No. 340137

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Killam Properties Inc. v. Patriquin, 2012 NSSM 1

Between:

Killam Properties Inc.

APPELLANT

and -

Mark Patriquin

RESPONDENT

Adjudicator: David TR Parker
Heard : December 5, 2011
Decision: January 3, 2012

Counsel: Lloyd R Robbins represented the Appellant
I. Claire McNeil Senior Counsel and Michele Squires, Senior Law Student represented the Respondent

DECISION and ORDER

This is an appeal from an Order of the director of residential tenancies dated November 17, 2010. A previous hearing took place on March 21, 2011 before this court where in the appellant/landlord made a preliminary motion that this court was without jurisdiction to hear the matter. A decision of this court on the preliminary motion was rendered on April 7, 2011 denying the motion. This decision was appealed to the Supreme Court of Nova Scotia. I am including the previous decision of the Small Claims Court with respect to the motion and as well the decision of the Supreme Court of Nova Scotia.

The Small Claims Court decision of April 7, 2011 was as follows:

Killam Properties Inc. v. Mark Patriquin [SCCH]

Counsel: Lloyd R Robbins represented the Appellant
Nikki Guichon, Senior Law Student and Cole Webber represented the Respondent

Parker:-this is an appeal from an Order of the Director of Residential Tenancies. The appeal was heard on March 21, 2011.

The Appellant made a preliminary motion that in essence stated the Small Claims Court did not have the jurisdiction to hear the Application that was originally before the Residential Tenancy Board. After hearing from both counsel I reserved on the motion until I could consider the information and analysis provided by each counsel to this court.

I shall start with the Director's Order dated November 17, 2010 and being number 201002804.

The Director's Order stated: "it is the obligation of the Landlord to maintain the driveway and walkways of the Tenants in manufactured home communities as per section 9[1] of the Residential Tenancies Act."

The Residential Tenancy Board hearing resulted in the above noted Order which was a result of an Application of the Respondent/Tenant. The Application is contained in form D and directed to the director. It was dated August 4, 2010 and was signed on behalf of the Tenant. In the Application form there is a section entitled:

"This Is an Application for:

- termination of tenancy
- payment of money
- any Action by Landlord or Tenant
- review of notice of rent increase and determination of appropriate rent increase[Applies to Mobile Home Parks Only]
- disposition of the security deposit
- repairs

- payment of rent in trust
- compliance with a lease.

Each of the above-referenced items could be checked off by the Applicant in this case the Respondent/Tenant herein. The Applicant/Tenant checked off the following clause:

"review of notice of rent increase and determination of appropriate rent increase[Applies to Mobile Home Parks Only]".

Under the heading in the same Application: Details of Claim the following was inserted by the Applicant/Tenant and Respondent herein:

"the Landlord issued a Notice of Rent Increase in May 2009 stating that the Landlord would no longer maintain driveways and walkways at the mobile home park in Amherst. The Tenant claims the paving driveways and walkways is not a service under s. 9[1][2] of the RTA and therefore the Landlord is not entitled to discontinue paving. [cont.]

Further in the Application under the wording:

- **review of notice of rent increase and determination of appropriate rent increase[mobile home parks only] the following words were inserted by the Applicant/Tenant and Respondent herein.**

'The Landlord issued a notice of rent increase in May 2009 stating that the Landlord would no longer maintain driveways and walkways at the mobile home park in Amherst.[cont.] the Tenant claims that the paving of driveways and walkways is not a service under section 9 [1][2] of the RTA and therefore the Landlord is not entitled to discontinue paving. In fact, maintenance of the driveways and walkways is necessary for the Landlord to fulfill its obligations under the Act to keep the premises in a good state of repair under s.9 [1] [1] as driveways and walkways are fixtures on the mobile home space meaning that they fall within the definition of 'residential premises' in s. 2[h] of the Act."

The Landlord appealed the Director's Order on November 26, 2010 citing the following reasons:

"1. The Residential Tenancy Officer erred in allowing the complaint which in fact was a review of a rental increase which was out of time to proceed under section 13[4] of the Residential Tenancies Act.[“RTA”]

2. The Residential Tenancies Officer erred in determining the walkways and driveways are part of the premises that the Landlord is obligated to maintain in accordance with section 9[1][1] of the Residential Tenancies Act."

Analysis:

The Respondent is a resident/Tenant in a Mobile Home Park and has been residing in the park since May 1994.

In 2004 Killam Properties Inc./the Appellant became the owner of the Mobile Part.

The previous owner of the Mobile Home Park paid and maintained parking spaces and walkways in the park.

After purchasing the park the Appellant/Landlord continued to maintain existing driveways and walkways.

On May 29, 2009 the Appellant sent the Respondent and other mobile home renters a "notice of rent increase Mobile Home Park Space." The Notice stated *inter alia*: effective date January 1, 2010. Any change of service? Landlord will no longer maintain driveways and walkways [discontinuing a service is a rent increase and may be reviewed.]

The Form C also stated:

"TENANTS PLEASE NOTE

You may file an Application to have this notice of rent increase reviewed within 30 days of receiving it. Any Application will be deemed to have been filed on behalf of all Tenants affected by this notice. An Application may be filed at the nearest office of service Nova Scotia and Municipal Relations."

In the preamble to the Director's Order it was noted that the Landlord/Appellant "argued that the Tenant/Respondent did not have standing to file this Application for a review of a notice to rent increase under section 11[a] 4 of the RTA because time had passed."

The motion before this court raises the same issue.

The preamble was on to say: "at the time of the hearing it was established and understood that the hearing would proceed under **Section 13(1) (a) of the Residential Tenancies Act to determine a question arising under this Act."**

The preamble remains silent as how it was established and how it was understood that the hearing would proceed under section 13(1) (a). There was no discussion in the Order or ruling on the Application being out of time as provided by section 11(a) 4 of the RTA. Instead the hearing proceeded under section 13(1) (a) of the RTA to determine a question arising under the Act.

In the order the Director's officer stated:" the question at hand is whether or not Tenant driveways and walkways are a maintenance issue or are they considered a service."

Reference in the Director's Order is also made to the Tenant's argument and the Landlord's argument. The Tenant arguing that the maintenance of driveways and walkways is not a service in the Landlord maintaining the opposite point of view.

A notice of rental increase was given in May 2009 to the Tenants by the Landlord. The rental increase was to be effective January 1, 2010.

Rental increases in mobile parks are dealt with in the RTA pursuant to section 11 of that Act which states as follows:

Rental increases in mobile home parks

11A (1) Where a Landlord of a mobile home park space intends to increase the rent payable after the first twelve-month period, the Landlord shall serve the Tenant with a notice of rent increase in the prescribed form.

(2) A Landlord of a mobile home park space may determine a date to be the rent increase date for all mobile home park spaces owned or managed by the Landlord.

(3) A Tenant of a mobile home park space who receives a notice of increase of rent on or after the twentieth day of December, 1996, but before the coming into force of this Section, may make an Application pursuant to Section 14, within thirty days of the coming into force of this Section, to have the notice of rent increase reviewed.

(4) A Tenant of a mobile home park space who receives a notice of increase of rent after the coming into force of this Section may, within thirty days of receipt of the notice, make an Application pursuant to Section 14 to have the notice of rent increase reviewed.

Under the general heading PROCEDURES the ability to review mobile home park rental increases is dealt with under section 14 of the Act which reads as follows:

Review of mobile home park rental increase

14 (1) A Tenant of a mobile home park space may apply to the Director in accordance with subsections 11A(3) and (4) for a review of a notice of rent increase received on or after the twentieth day of December, 1996, and shall serve the Landlord with a copy of the Application in the manner prescribed by regulation.

(2) An Application filed pursuant to subsection (1) shall be in the prescribed form and all Tenants of the Landlord referred to in subsection (1) who pay the same

amount of rent and who have received notice of the same rent increase are deemed to be parties to the Application.

(3) The Landlord shall, within fifteen days of receipt of the Application, provide the Director with the information required by regulation.

(4) If the Landlord does not provide the information required by subsection (3), the Director may make an order denying the rent increase.

(5) In exercising authority pursuant to this Section, the Director may determine and adopt the most expeditious method of determining the rent increase.

(6) In reviewing a notice of rent increase, the Director shall consider

(a) the guidelines prescribed by regulation; and

(b) any information provided or submissions made by the Landlord or Tenant.

(7) The Director may make an order pursuant to Section 17A determining a rent increase which may be made retroactive to the date of rent increase in the notice given by the Landlord and, if the order is made retroactive, it is deemed to have come into force on the date to which it is made retroactive.

Pursuant to the Act a Tenant "may, within thirty days of receipt of the notice, make an Application pursuant to Section 14 to have the notice of rent increase reviewed." The date of the rental increase notice was May 29, 2009." The date of the Application to the Director which makes reference to rental increase is dated August 4, 2010 which in essence is over a year. The Application itself commingles rental increase with maintaining driveways and walkways at the mobile home park in Amherst.

The duties and powers of the Director are outlined under sections 16 and 17 of the RTA.

Duties and powers of Director

16 (1) Upon receiving an Application pursuant to Section 13, the Director shall investigate and endeavour to mediate a settlement of the matter.

(2) Where a matter is settled by mediation, the Director shall make a written record of the settlement which shall be signed by both parties and which is binding on the parties and is not subject to appeal.

(3) Where a matter is settled by mediation, the Director may, if a party fails to comply with the terms on which the matter was settled, make an order pursuant to Section 17A.

1997, c. 7, s. 7.

Order by Director

17 (1) Where, 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.

(2) The Director is not disqualified from making an order respecting a matter by reason of having investigated or endeavoured to mediate the matter.

1997, c. 7, s. 7.

Contents of order

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.

The Tenant or Landlord may appeal a Director's Order pursuant to section 17 of the RTA which in effect allows the Small Claims Court to hear the entire matter once again. This is known as a trial de novo. The power of the Small Claims Court is no greater than the Director. The Small Claims Court may confirm vary or rescind the order the director or make an order that the director could have made.

The entire thrust of this motion is that the Application made by the Tenant/Respondent involved a review of rental increase under section 14 and as that rental increase review Application was outside the 30 day review period. The Tenant/Respondent has no standing to be heard before the director and as a consequence before this court. This is a greater question than merely increasing the rent. According to the Act a Landlord can discontinue a service, privilege, accommodation or thing and anyone of those elements that are discontinued can deemed to be a rent increase. A determination has to be made whether maintaining driveways and walkways is a service, privilege, accommodation or thing which the Landlord provides or is it a condition of the premises which the Landlord is required to keep in a good state of repair and fit for habitation. That basic question still has to be answered. If this court on hearing the evidence determines that the maintaining of the driveways and walkways in the mobile home park is a service then the Landlord has every right to invoke section 11(5) of the RTA which reads as follows:

11 (5) Where a Landlord discontinues a service, privilege, accommodation or thing and such discontinuance results in a reduction of the Tenant's use and enjoyment of the residential premises, the value of such discontinued service, privilege, accommodation or thing is deemed to be a rent increase for the purpose of this Section.

At which time the Landlord may argue that the Tenant/Respondent at this late date should not be allowed to make an Application for a rent increase review.

There are two reasons therefore why I will not grant the Appellant's Motion and they are as follows:

1. The Application to the Director co-mingles rental increase and maintaining walkways and driveways as a condition of the premises, and

2. it is necessary to determine whether maintaining walkways and driveways is a service or a condition of the premises.

While this may be *orbiter* I only mentioned that the appeal time in which to review rental increase may be directory and not mandatory, but that is for another time and discussion.

The parties should contact the clerk of the Small Claims Court, subject to an appeal of this decision to have a court date for the continuation of this hearing.

The appellant Killam Properties Inc. appealed the decision of the Small Claims Court to not grant a motion concerning the jurisdiction of the Small Claims Court to the Supreme Court of Nova Scotia. The Supreme Court of Nova Scotia decision on the appeal of Killam Properties Inc. was as follows:

Killam Properties Inc. v. Patriquin [2011] N.S.J. No. **502; 307** N.S.R. (2d) 170

Civil litigation — Civil procedure — Courts — Jurisdiction — Provincial and territorial courts — Superior Courts — Appeal by the landlord from a Small Claims Court decision finding that the Small Claims Court had jurisdiction to hear the tenant's application for a review of rent increase brought after 30 days dismissed — The Supreme Court had no jurisdiction to hear an interlocutory appeal from a Small Claims Court ruling on a preliminary motion.
Statutes, Regulations and Rules Cited:

Residential Tenancies Act, R.S.N.S. 1989, c. 401, s. 13(1), s. 14

Small Claims Court Act, R.S.N.S. 1989, c. 430, s. 32, s. 32(1), s. 33

Counsel:

Lloyd R. Robbins, for the appellant.

I. Claire McNeil, for the respondent.

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1 G.G. McDOUGALL J. (orally):— This is an appeal from a decision of a Small Claims Court adjudicator given on April 7, 2011. The grounds for appeal as stated in the Notice of Appeal are:

- (a)

  jurisdictional error; and

- (b)

  error of law

2 The particulars of the error or failure as set out in the appellant's Notice of Appeal are:

- 1.

  The Adjudicator made an error of law and was in excess of jurisdiction in determining that the Small Claims Court had jurisdiction to hear the application of the respondent for a review of rental increase.

- 2.

  The effect of the Adjudicator's decision is that he is now hearing an application for declaratory relief. It is respectfully submitted that the Adjudicator of the Small Claims Court sitting on an Appeal of an Order of the Director of Residential Tenancies does not have the jurisdiction to grant Declaratory Relief.

3 In his brief, counsel for the appellant, Killam Properties Inc., raised three issues:

- 1.

  Does the Director of Residential Tenancies or an Adjudicator on an appeal of a Director of Residential Tenancies decision have the jurisdiction to hear a Residential Tenancies Act Section 14 review

of a rent increase that has not been commenced within 30 days of notice of the rent increase?

- 2.

  Does the Adjudicator have the jurisdiction to amend the Section 14 application of the Respondent and hear it as a Section 13(1) application?

- 3.

  Does an Adjudicator have the jurisdiction to grant Pure Declaratory Relief?

4 In her brief, counsel for the respondent raises two preliminary procedural issues:

- (1)

  The Court has no jurisdiction to hear interlocutory appeals; and

- (2)

  The Court has not given leave to the appellant to file new evidence and as such the affidavit of Kevin Arbuckle, Director of Property Management for Killam Properties Inc., cannot be considered.

5 I will first deal with the issue of whether or not the affidavit of Mr. Arbuckle is properly before the Court and whether or not it should be considered on the merits of the appeal.

6 With regard to affidavit evidence, clearly, the Small Claims Court Act appeal provisions do not provide for the submission of any new evidence. The appeal is not a hearing de novo. It is a hearing based on the record. By record, I mean the contents of the Small Claims Court file which is requested and provided to our court when a notice of appeal is filed. The entire record, including any exhibits filed in the hearing before the Small Claims Court, are all included in that file and they are all open to review by this Court. In addition to that, the adjudicator is requested to provide a summary report of findings of law and fact made on the case on appeal. So, in addition to the decision or order of the adjudicator, the summary report is also provided to this court and is used in determining the merits of the appeal.

7 As Justice Beveridge indicated in his decision of Lacombe v. Sutherland, [2008] N.S.J. No. 603 at para. 29, there are occasions when additional affidavit evidence may be admitted. Again, I use the word "may" because it is a discretionary thing. It depends on the particular judge who hears the appeal. A request has to be made to that particular judge to adduce fresh evidence. If it is evidence that would help to establish a

jurisdictional error or a breach of natural justice the request might be found to have merit. Any additional type of affidavit evidence would only be admitted if truly exceptional circumstances exist.

8 The Small Claims Court Act and its Regulations do not contemplate an appeal by way of trial de novo. It is based on the record. This is not a carte blanche refusal to admit additional evidence but it would only be in very rare and exceptional circumstances that further affidavit evidence would be admitted. There are good policy reasons for this. If affidavits were routinely accepted the appeal would soon morph into a trial de novo. It would be tantamount to an appeal based on a transcript. The Small Claims Court is not required to record the evidence. There is no transcript. To allow affidavit evidence to be filed on appeal to the Supreme Court would add unnecessarily to the expense of the proceeding. It would also defeat the principle purpose for the Small Claims Court which is to provide an inexpensive and informal venue for people to present cases without the need to incur the expense of legal representation.

9 In terms of the particular affidavit that has been tendered here, I do not accept that it is of any assistance in deciding the merits of this particular appeal. I do not see it as going to the alleged jurisdictional error that is cited as one of the grounds of appeal. If counsel wished to tender additional evidence, notice would have to be provided to the court and to opposing counsel. That was not done in this case.

10 I will now deal with the other preliminary objection regarding the court's jurisdiction to hear an appeal from an interlocutory ruling prior to a final determination of the matter.

11 Appeals to this Court are governed by section 32 of the Small Claims Court Act, R.S.N.S. 1989, c. 430 which states:

- Appeal
- 32(1) A party to proceedings before the Court may appeal to the Supreme Court from an order or determination of an adjudicator on the ground of
    - (a)

      jurisdictional error;
    - (b)

      error of law; or
    - (c)

      failure to follow the requirements of natural justice, by filing with the prothonotary of the Supreme Court a notice of appeal.

...

12 I also make reference to the decision of Justice Duncan Beveridge (as he was then) in Lacombe v. Sutherland, supra, paras. 26, 27 and 28:

- 26 There are not appeals as of right. There is no inherent right accorded to a litigant to appeal or for a superior court to entertain an appeal. Appeals are entirely creations of statute. Typically an appeal is not a re-hearing of the dispute between the parties.

- 27 In Nova Scotia the Small Claims Court Act provides an appeal as a right to the Nova Scotia Supreme Court. Section 32 sets out the grounds of appeal that can be raised. Oddly enough the Act does not set out the powers that the Supreme Court has if it finds an error of law, jurisdiction or breach of natural justice. Typically the case law in Nova Scotia is that where any such error is found a re-hearing is ordered before a different adjudicator.

- 28 It is well established that in the ordinary course, absent some special power on appeal, such as an appeal by way of a hearing de novo, the appellate court does not engage in a re-hearing of the dispute. Findings by the court below are accorded considerable deference. They can only be interfered with in this regime if the appellant makes out one of the three grounds for an appeal. That is, an error in law, jurisdiction or a breach of natural justice. Even in an ordinary civil case an appellate court can only intervene if the trial court made an error of law or an error of fact that amounts to a clear and palpable error.

13 Justice Beveridge makes it very clear that if there is a right of appeal it is created by statute and in this particular instance by s. 32 of the Small Claims Court Act, supra.

14 The question that has to be asked is: "Has there been 'an order or determination' of an adjudicator from which to appeal?" Reference should be made to the ruling of the adjudicator on the preliminary motion raised by the Landlord's counsel at the outset of the Small Claims Court appeal of the order of the Director of Residential Tenancies. The motion was heard on March 21, 2011. The hearing was suspended pending a ruling which was delivered in writing on April 7, 2011. On page 9 of the decision, the adjudicator made it clear that he was ruling on the preliminary motion only. It was not a final decision as he invited the parties to "contact the clerk of the Small Claims Court, subject to an appeal of this decision to have a court date for the continuation of this hearing." [emphasis added].

15 It is unfortunate that the adjudicator added the clause "subject to an appeal of this decision." It appears to open the door for an appeal which would expand the right of appeal found in s. 32 of the Small Claims Court Act. The adjudicator cannot confer jurisdiction on this Court, the Supreme Court, to entertain an appeal of an interlocutory

ruling. An appeal to the Supreme Court under s. 32 of the Small Claims Court Act is "from an order or determination of an adjudicator." I interpret that to mean a final order or determination. An interlocutory appeal from a ruling on a preliminary motion is not what is meant by this statutory provision.

16 I refer to the decision that I rendered in the case of Her Majesty the Queen v. Christopher Wayne Primrose, 2009 NSSC 241. Although that decision arose in the context of a Summary Conviction Appeal under the Criminal Code, and although s. 830 of the Criminal Code uses the phrase "or other 'final' [emphasis mine] order or determination" which the Small Claims Court Act does not despite that, I am still of the view that the reasons for refusing to entertain an interlocutory appeal in that decision are also applicable to the case that is before me.

17 I decline to hear the appeal and refer the matter back for a continuation before the same Small Claims Court adjudicator who made the ruling on the preliminary motion.

18 There are policy reasons as well for making this particular ruling today. The Small Claims Court Act as is the Residential Tenancies Act, is meant to be an informal and inexpensive means of having issues that affect the parties adjudicated. It is intended to allow people to present their own arguments without the necessity of engaging or retaining lawyers to represent them. That does not mean that parties are prevented from engaging counsel and probably in many instances they are wise to do so, but if this Court was to entertain an appeal of an interlocutory ruling it would result in delays in having matters heard and would likely result in increased costs to the litigants.

19 The right to appeal a final decision of a Small Claims Court adjudicator on an issue involving residential tenancies is still open to be brought to this court. Nothing in my decision will prejudice or preclude any of the parties to this particular action from launching an appeal if they feel aggrieved by the final decision that the adjudicator makes.

20 The matter is sent back to the Small Claims Court. Arrangements can be made to have the hearing continued before the same adjudicator.

21 With regard to Mr. Robbins fear that he might be precluded from launching an appeal of the ruling because of the statutory limitation of 30 days, I do not share his concerns. This is simply a ruling given during the course of a hearing. It is not a final order or determination made by a Small Claims Court adjudicator. This particular issue or the issues that he wishes to raise pertaining to jurisdiction could be included in any appeal that is launched if the ultimate decision is not in favour of the current appellant, Killam Properties Inc. Obviously a decision to appeal will have to await the final decision of the adjudicator after all of the evidence is heard. I note that an appeal from a decision of the Director or his agent to the Small Claims Court is, in fact, a re-trial. It is a re-hearing of the facts. It is not the same as an appeal to our court which relies on the record from the court below.

22 After hearing from the parties on costs, I Order Killam Properties Inc. to pay the sum of $50.00 to Dalhousie Legal Aid as counsel for Mark Patriquin.

Analysis:

This is a continuation of the original appeal of a Director's Order dated November 17, 2010 in which the director Ordered that:

"It is the obligation of the landlord to maintain driveways and walkways of the tenants in manufactured home communities as per section 9(1)1 of the Residential Tenancies Act."

In simple terms the appellant/landlord is asking the Director's Order to the overturned and conversely the respondent/tenant is asking that the Director's Order be confirmed.

The driveway in question was the driveway used by the respondent for his vehicle and a pathway leading into his mobile home. The respondent argued that this part of the trailer park was owned by the appellant and it was the appellant's responsibility to keep and maintain and service this driveway for the respondent. The Respondent argues that there is nothing to say it is not part of what the respondent is paying for and it is the appellant's duty whether it is the common area or the respondent’s area to take care of these areas. It is part of the capital costs associated with the appellant in maintaining the mobile park. Replacements of the driveways are not services they are fixed and any improvement to same goes to the benefit of the landlord/appellant.

The main argument or at least one of the main arguments of the respondent is that the driveway as part of the real estate and not part of the tenant’s ownership. Conversely one of the main arguments of the appellant is that it is part of the respondent’s mobile space which he rents from the appellant and therefore it is the respondent’s responsibility to maintain and care for same as he would his mobile home.

The appellant purchased this mobile park in which the respondent's mobile home is located in 2004. The previous owners of the Mobile Park paved and maintained the driveways within the Park as well as the common areas. The appellant carried on the same practice after purchasing the property in 2004. In May of 2009 the appellant sent the respondent a notice of rent increase. The notice stated that as of January 2010, the appellant would no longer be maintaining the driveways and walkways in the Park. The respondent in an application to the Director of Residential Tenancies and dated August 16, 2010 stated the tenant claims the paving of driveways and walkways is not a service under section 9(1) (2) of the RTA and therefore the landlord is not entitled to discontinue paving. The tenant claims that the paving of the driveways and walkways is not a service under s. 9(1) (2) of the RTA and therefore the landlord is not entitled to discontinue paving. In fact, maintenance of the driveway and walkways is necessary for the landlord to fulfill its obligations under the Act to keep the premises in a good state of repair under section 9(1) (1) as driveways and walkways are fixtures on the mobile home space, meaning that they fall within the definition of residential premises in s. 2(h) of the Act.

It is my view that this Application by the respondent dealt primarily with a rental increase. If the tenant/respondent was able to show that it was not a service therefore sections 11(4) and (5) would not apply and therefore the notice of rental increase would not be applicable. The overall context of the Application dealt with rental increase and the time for appealing that rental increase had passed therefore the Director could not deal with the Application in terms of a rental increase. However this is only so if what the landlord was withdrawing was a service. As is clear from the Application by the landlord it was no longer going to maintain driveways and walkways. This has morphed during this trial into paving driveways. If maintaining the driveway and walkways is not a service but rather a requirement of the landlord to maintain then the landlord would have no right to stop such maintenance on the pretense it was not going to raise the tenant's rent. It is understandable why the tenancy officer got into this distinction resulting in the director's order of November 17, 2010. The officer at the residential tenancy hearing in fact had to deal with the same question that this court has to deal with and that was

reflected in paragraph 4 of the Director's Order which stated: "the question at hand is whether or not tenant driveways and walkways are a maintenance issue or are they considered a service." As I stated if the maintenance of driveways and walkways is a service then the landlord has a right to withdraw the services pursuant to the rental increase sections of the residential tenancy act.

Under the provisions respecting mobile homes the Residential Tenancy Act states that the tenant is responsible for compliance with municipal bylaws in respect of the tenants

1. Mobile home and

2. The mobile phone space on which it is located

to the extent that the landlord is not responsible.*[Emphasis added]*

Then referring to the Mobile Home Park Bylaw of the Town of Amherst it states under section 15(b) it is responsibility of the occupant of each mobile home space to keep his or her mobile home space in good condition.

Mobile home space is given a specific definition under the definition section of the Residential Tenancy Act wherein it states "mobile home space means a plot of ground within a mobile home park designed to accommodate one mobile home.

Referring back to the mobile home park bylaws of the town of Amherst, mobile home space is required to be of and in a specific area for the tenant. The bylaw states under section 8 "mobile home spaces in a mobile home park shall abut an internal or public Street and shall have a minimum of 18 meters of frontage and a minimum area of 560 ft.^{2}, and each space shall be clearly defined by permanent markers showing the number assigned to each space."

The Residential Tenancy Act also imposes upon the landlord certain statutory conditions respecting mobile homes. In particular it states that the landlord is responsible for compliance with municipal bylaws in respect of the common areas of the mobile home park and the services provided by the landlord to the tenants in the mobile home park.

Kevin Archibald director of property management for the appellant stated in cross examination "driveways and walkways are common areas. I do not know how tenants think of it." Referring back to the town of Amherst bylaws under the definition sections, section j states in part "… Ownership and responsibility for the maintenance of internal streets, services, communal areas and buildings, together with general park maintenance including but not restricted to, snow clearance and garbage collection, remains with the owner.[Owner here refers to the landlord]

After hearing from the parties it is apparent that the driveway is within the area which the appellant is to provide each tenant in the mobile home park. The appellant must meet these minimum standards of space for each tenant. The bylaw also imposes upon the tenant an obligation and that obligation is to keep that space in good condition and that would include the driveway and walkway. There is no obligation upon the appellant to keep that space in good condition. That space would include everything upon that space. However the landlord also owns all of that space which the tenant/respondent rents. And if that space turns out to be in such a state that it no longer is fit for habitation then it may be necessary for the landlord to step in and rectify that problem. This does not mean that the landlord has to enter onto the mobile space to ensure the spaces in good condition that is the tenant’s responsibility. The landlord's responsibility relates to the maintenance of the driveways.

The landlord/appellant is responsible to maintain the common areas and this would include the driveways which it rents to the respondent. This is more than a service it is a requirement. This does not mean that the landlord has to plow driveways during the winter season but it must keep the driveways in a good state of repair. The good state of repair does not mean that the driveway has to be perfect or paved even but it must be in such a state as to allow a tenant to have ingress and egress to his mobile home. At the same time is incumbent upon the tenant to comply with the bylaws of the municipality as reflected in section 9(2)5 of the Residential Tenancies Act. That is to say the tenant is responsible to keep the driveway in good condition. This does not mean that the tenant has to keep the driveway in a good state of repair but rather the tenant must ensure that it is maintain in good condition and this will vary on the type of driveway that exists.

Therefore if the driveway is not in a good state of repair the tenant has the opportunity to make an application To the Director of Residential Tenancies. The landlord has to consider of course its costs in operating a mobile park and if those costs include repairs to driveways they will be reflected in rental increases. If the tenant refuses to keep the driveway in good condition then it has breached the Residential Tenancies Act by not complying with the bylaws of the municipality and the landlord would have its remedies under the Residential Tenancies Act.

I have referred to the extensive briefs provided by counsel for which I am most grateful. The comment from Justice Halliburton found in paragraphs 13 and 14 of Surette v. Capital Group Atlantic [1992] NSJ No. 621 I found most appropriate in summing up what I have verbosely stated above:

"13.it seems to me implicit that since the landlord is offering to lease a home site, then the site must be developed to the point where no capital investment is required from the tenant involving the expenditure of a considerable amount of money to construct a pad that would be part of the real estate. Such a requirement could be reasonably expected to unjustly enriched the landlord at the expense of the tenant, especially where, as here, the tenant has no tenure.

14. I would emphasize that these observations are made in context of a tendency where there is no agreement between the parties as to who will pay for the installation of such a Pad and where there is no lease setting out the respective rights of the parties."

Driveways and walkways could just as easily been substituted or included with the word pad. As well the landlord has the opportunity of dealing with the cost of maintenance through rental increases or agreements between themselves and the tenants.

While I may have come to the decision in a slightly different fashion than the officer residential tenancy I would confirm the Order and only vary it to this extent:

It Is Ordered That it is the obligation of the landlord/appellant to maintain the driveways and walkways of the tenant/respondent.

Dated at Halifax's third day of January 2012