IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

INUVIK HOUSING AUTHORITY

Appellant

-and-

MARILYN KENDI

Respondent

REASONS FOR JUDGMENT

[1] This is an appeal from a decision of the Rental Officer appointed pursuant to the *Residential Tenancies Act*, R.S.N.W.T. 1988, c. R-5. At first blush this appeal addresses a relatively simple issue pertinent only to the parties to this case. Counsel for the appellant, however, stressed that this appeal has broader implications touching as it does on the scope of the Rental Officer's decision-making and the appropriate standard of review of those decisions.

Facts:

[2] The appellant is a housing authority, operating under the auspices of the Northwest Territories Housing Corporation, which provides subsidized housing to low-income individuals and families. The respondent occupied rental premises provided by the appellant. In January, 2004, the respondent was relocated to different premises. After the relocation, the appellant discovered that the original premises were damaged. An inspection report was completed which detailed all of the damages. The report was signed by the respondent. The appellant proceeded to repair the damage and then invoiced the respondent for the cost of those repairs, being $1,322.95. The respondent refused to pay.

[3] The appellant then applied to the Rental Officer seeking termination of the tenancy and an order directing payment for the repairs. A hearing was held in Inuvik on October 25, 2004. The respondent appeared at the hearing.

[4] The appellant provided the inspection report to the Rental Officer and filed photographs of the damage. It also filed a repair estimate originally prepared by the appellant which estimated the cost of repairs at $1,360.00. Evidence was presented as to how the repair work was put out to competitive tender. The actual costs were, as noted previously, $1,322.59.

[5] The Rental Officer considered the evidence and issued a decision on November 4, 2004. The Rental Officer held that the repairs could have been completed for a more reasonable price; that the bulk of the work could have been done by unskilled labour at much lower rates; and, that, in his opinion, all of the required work could have been completed at a cost of $500.00. The Rental Officer therefore issued an order requiring the respondent to pay compensation to the appellant in the sum of $500.00. He refused to terminate the tenancy.

[6] Nothing was paid by the respondent and, shortly thereafter, the respondent moved out of the premises that she then occupied. She then left Inuvik.

[7] The *Residential Tenancies Act*, in s.87, provides a right of appeal to this court. The appeal must be launched, however, within 14 days of service of the Rental Officer's order. The time may be extended. In this case, the application to extend the time limit to file the appeal was not filed until December 16, 2004, some 20 days after expiry of the appeal period.

[8] The respondent was served with notice of the application to extend time to appeal and the initial appeal documents. She did not appear at the initial return date nor did she appear at the hearing before me. There was evidence that she was aware of the appeal and that she had moved out of the jurisdiction.

Extension of Time to Appeal:

[9] Section 87(3) of the *Act* provides that a judge of this court may, before or after the expiration of the time for the appeal, extend the time within which the appeal may be made. The standard to be applied is much the same as in other situations where such an extension is permitted. It is a discretionary power that must be exercised in the interests of justice: *Corrigan v. Scott*, [1990] N.W.T.J. No. 42 (S.C.).

[10] There are three questions to ask: (1) Did the applicant exhibit a bona fide intention to appeal while the right of appeal existed? (2) Is there at least an arguable case that the decision appealed from is wrong? and, (3) Is there a reasonable explanation for the delay?

[11] In this case, based upon the evidence submitted at the hearing, I am satisfied that the time to appeal should be extended. The appellant's manager had, immediately upon receiving the Rental Officer's decision, sought authorization from the Northwest Territories Housing Corporation to appeal. Authorization was required because the Corporation provides the funding for the appellant. It is dependent on the Corporation. Once that authorization was received, the appellant moved expeditiously to launch the appeal.

[12] Having regard to the relatively short period of time that elapsed after the expiry of the appeal period, and the nature of the arguments presented on this appeal, I am satisfied that the interests of justice support the request for extension of time. An order will issue accordingly.

Grounds of Appeal:

[13] As I noted previously, s.87 of the *Act* provides a right of appeal to this court. It is an extremely broad right. The judge hearing the appeal may receive additional evidence, oral or written, that is relevant to the issues on the appeal: s.87(5). The judge may allow the appeal or dismiss it, or he or she may vary or set aside the order made by the Rental Officer: s.89.

[14] In this case, the essential argument made by the appellant is that the Rental Officer erred in setting the compensation for the repairs at $500.00. In the appellant's submission, this determination was made in a completely arbitrary fashion without any evidence whatsoever. Thus, no matter what standard of review is applied, the decision cannot stand since there was no evidence to support it.

Standard of Review:

[15] The Supreme Court of Canada, in a series of recent cases, has clearly stated that in any case where the court is called upon to review a decision by a statutory decision-maker, whether it is by way of an application for judicial review or a statutory right of appeal, the court must begin by determining the standard of review by applying a pragmatic and functional approach: *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.

[16] The pragmatic and functional approach requires a consideration of four factors: (a) the presence or absence of a privative clause or right of appeal; (b) the expertise of the decision-maker relative to the court with respect to the issue in question; (c) the purpose of the legislation and of the particular provision in question; and (d) the nature of the question, i.e., one of law, fact, or mixed law and fact. No single factor is determinative. All four factors are pertinent and must be considered in context to determine the level of deference owed to the decision under review. There are three standards of review corresponding to varying degrees of deference: correctness, reasonableness, and patent unreasonableness. Also, the same standard of review will not necessarily apply to every ruling made by the same decision-maker: *Voice Construction Ltd. v. Construction & General Workers' Union*, [2004] 1 S.C.R. 609 (at para.19). It can vary depending on the interplay of the four factors.

[17] The appellant submits that, in this case, the pertinent factors militate against any deference to the decision of the Rental Officer: the broad right of appeal, the lack of any expertise relative to that of the court, the fact that the Rental Officer is primarily required to decide fact-specific disputes between private parties, as opposed to engaging in a balancing of competing policy interests, and the fact that the decision under appeal is a question of fact. These factors, in the appellant's submission, point to correctness as the appropriate standard of review.

[18] I think the appellant makes some strong points. For example, the *Act* sets out an extremely broad right of appeal. The judge may even receive evidence that was not before the Rental Officer. This certainly suggests that little or no deference need be shown to the original decision.

[19] This type of appeal is commonly referred to as an "appeal by way of rehearing", as that term is explained by Bastarache J., in his dissenting judgment in the recently released case of *H.L. v. Canada*, [2005] S.C.J. No. 24 (at paras. 173-179). On this type of appeal the court is not limited to a scrutiny of the original decision but is expected to form its own judgment on the issues. But it is not an actual rehearing or a hearing *de novo.* An appeal by way of rehearing does not involve a completely fresh hearing. Instead, as stated by Bastarache J. at para.176, the court "proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits". But there is still a degree of deference owed to the original decision-maker since the original decision, and the reasons therefor, cannot be disregarded.

[20] Also, this right of appeal must be considered in light of the jurisprudence previously developed by this court. In *Galtee Mountain Holdings Ltd. v. Wilson*, [1991] N.W.T.R. 230 (S.C.), deWeerdt J. made the point that, while the legislation gives the judge the authority to receive evidence, that is not to say that the judge is either obliged to do so nor that it is something that should be routinely done. To do so would "only encourage parties to withhold evidence from the Rental Officer, relying on a further opportunity to adduce it on appeal" and would be "contrary to the plain intention of the Legislative Assembly in providing for the speedy and informal disposition of residential tenancy disputes before a Rental Officer" (as per deWeerdt J. in *Galtee* at pp. 236-237).

[21] On the first factor, therefore, while little deference need be shown, there should still be some deference since it is still an appeal, as opposed to a completely new hearing.

[22] On the second factor, the *Act* does not require that a Rental Officer possess any particular expertise. No qualifications are specified as necessary pre-requisites for appointment. Therefore, this factor points to a low level of deference. But, the Rental Officer inevitably develops some expertise simply because of the frequency with which he or she deals with recurring issues between landlords and tenants. He or she is granted wide discretionary powers to resolve disputes. Also, one must keep in mind

the apparent purpose of the position of the Rental Officer as reflected in the *Act* (and as noted by deWeerdt J. in *Galtee)*: to provide an expeditious, summary, cost-effective means to resolve landlord-tenant disputes. The legislature entrusted significant decision-making authority to the Rental Officer. This suggests to me that there should still be some deference shown to decisions made by a Rental Officer notwithstanding the absence of any particular expertise.

[23] The third factor is the purpose of the statute. Where the legislation is intended to resolve and balance competing policy interests or the interests of various constituencies, or is concerned with public welfare issues, normally greater deference is demanded. The *Residential Tenancies Act* addresses a matter of public welfare, the relationship of landlords and tenants, but it does not call on the Rental Officer to decide issues of policy or to balance competing societal interests. The Rental Officer is called on to decide, within the statutory parameters, specific disputes between a specific landlord and a specific tenant. Hence, a low level of deference is implicated.

[24] The final factor is the nature of the question in issue. A reviewing court will apply greater scrutiny to pure questions of law, or questions of general application, and less scrutiny to questions of fact or of mixed fact and law. In this case the question before the Rental Officer was the amount of compensation to be paid for the cost of repairs. This was a question of pure fact. Thus, this factor militates in favour of showing more deference to the Rental Officer's decision.

[25] There is a further point that militates in favour of more deference. Section 42(1) of the *Act* imposes an obligation to repair on the tenant. Section 42(3)(e) states that, where the Rental Officer determines that a tenant has breached this obligation, the Rental Officer may make an order requiring the tenant to pay any *reasonable* expenses associated with the repair. The discretion to determine what is reasonable suggests that a greater degree of deference should be shown by the reviewing court.

[26] In the *Dr. Q.* case (at para.35), McLachlin C.J.C., on behalf of the Supreme Court, wrote that, once the pertinent factors have been considered, the reviewing court must settle on one of the three recognized standards of review:

> Where the balancing of the four factors above suggests considerable deference, the patent unreasonableness standard will be appropriate. Where little or no deference is called for, a correctness standard will suffice. If the balancing of factors suggests a

> standard of deference somewhere in the middle, the reasonableness *simpliciter* standard will apply.

[27] I have concluded that the appropriate standard in this case is one of reasonableness. Some factors militate in favour of correctness, in particular the broad right of appeal, but the reasonableness standard is appropriate because of the nature of the question, a fact-based one that itself empowers the Rental Officer to exercise a judgment as to what is reasonable.

[28] It may even be argued that a decision made pursuant to s.42(3)(e) of the *Act*, a decision as to the *reasonable* expense of repairs, carries a self-defining standard of review. If the decision purports to reflect what is reasonable, then it could be said that any review must be one done to assess the reasonableness of that decision.

The Reasonableness of the Decision Under Appeal:

[29] In the *Ryan* case, the Supreme Court explained (at para. 47) that the question to ask when the standard of review is reasonableness is whether, after a somewhat probing examination, the reasons given for the decision under review can support the decision. It is not a matter of the reviewing court undertaking its own analysis to decide what the correct decision ought to be. The *Ryan* judgment went on to explain (at para. 55):

> A decision will be unreasonable only if there is no line of analysis within the given reasons that would reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. [...] This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.

[30] In the decision under appeal, the Rental Officer wrote as follows:

> In my opinion, the evidence does not support the costs of cleaning or repairs. The estimates prepared by the applicant include the replacement of three light bulbs at an estimated cost of $84, of which $69 is attributed to labour. The photographic evidence regarding the appliance does not, in my opinion, indicate a major cleaning job, nor does the stain on the tile floor. The applicant stated that the work was put out to competitive tender. I can not accept that the work could not have been

> completed for a more reasonable price. The cost claimed appears typical of skilled trade costs. Surely the landlord could have located persons to clean appliances, replace light bulbs, and rehang light shades at a more reasonable rate. Other than the minor wall patching, some of which may not even be tenant damage, all of the work could have been completed by relatively unskilled labour. In my opinion, all of the required work could have been completed at a cost of $500. Section 42 of the *Residential Tenancies Act* obligates a tenant to repair damages which are caused by the tenant's negligence. When a tenant fails to repair a rental officer may, on the application of a landlord, require a tenant to pay any *reasonable* expenses directly associated with the repair. The tenant's breach of the obligation to repair does not entitle the landlord to actual costs of repair, regardless of the amount. [Emphasis in original]

[31] The appellant submits that there was no evidence to support the conclusion that the work could have been done for a lower price. I do not agree. The Rental Officer had before him the written estimates and photographs of the damage. Because the *Act* empowers the Rental Officer to determine the *reasonable* expense for the repairs, the Rental Officer is per force entitled to express his opinion as to that expense. Admittedly there was no evidence to say that the repairs could actually have been done at a cost of $500.00. But that is not what the Rental Officer was required to decide. No matter what the actual cost is, the Rental Officer may determine the *reasonable* expense to be paid by the tenant. The reasons quoted above provide a tenable explanation for the conclusion. In that sense, I cannot agree that the decision is arbitrary.

[32] It is not the $500.00 decision in isolation that must be examined. That would be the application of the correctness standard. No matter what I may think of that conclusion, it is the reasons in support of that decision that must be reviewed in the context of the evidence that was before the Rental Officer and the inferences that were open to be drawn from that evidence.

[33] There is no doubt that a decision made on the basis of no evidence is one that cannot stand. But, as noted in the *Dr. Q.* case (at para. 22), it is not sufficient to simply identify a categorical error, such as no evidence. Rather, the identification of the appropriate standard of review will determine the analysis to be undertaken. Here, in my opinion, the reasons given by the Rental Officer can withstand the somewhat probing examination that the reasonableness standard calls for. There was evidence from which the Rental Officer could form certain common sense opinions to enable the determination of the reasonable expenses for repairs to be paid by the respondent.

[34] For these reasons, the appeal is dismissed. There will be no order for costs.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT
this 2nd day of May, 2005.

Counsel for the Appellant: Glenn Tait
No one appearing for the Respondent.