Date: 2013 11 07
Docket: S-1-CV-2013-000067

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

BEHCHOKO KO GHA K'AODEE

Appellant

- and –

MONIQUE MACKENZIE

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION AND BACKGROUND

[1] This is an appeal from a decision made by the Rental Officer following a hearing held pursuant to the *Residential Tenancies Act*, R.S.N.W.T. 1988, c. R-5 (the *Act*).

[2] The Appellant is the local housing authority that operates the public housing program in the community of Behchoko, on behalf of the Northwest Territories Housing Corporation (NWTHC). The Respondent has been one of its tenants for many years.

[3] The Respondent has occupied unit #260, a four-bedroom house, since 1994. For many years she lived there with her husband and children. She is now a widow and all her children are adults and have moved out. Since 2008, she has lived alone in unit #260.

[4] For some time, the Appellant has wanted to make unit #260 available to accommodate one of the families on its waiting list for a house that size. The Respondent has resisted this move. In July 2010, the Appellant sought an order from the Rental Officer evicting the Respondent from unit #260. The Rental Officer dismissed that application. He agreed that the Respondent was over-accommodated in unit #260 but was not prepared to evict her until she had been offered, and refused, a smaller unit. *Reasons for Decision, file #10-11544 (July 10 2010),* Record of Rental Officer, Tab 8.

[5] More recently, the Appellant has proposed that the Respondent move to unit #225B, a one-bedroom unit located in a building intended to house seniors who live independently. The Respondent has refused to move. On January 16, 2013 the Appellant made application to the Rental Officer for an order evicting the Respondent from unit #260.

[6] The Rental Officer held a hearing into the application on March 26, 2013. On April 10, 2013, he allowed the application, and ordered that the tenancy agreement with respect to unit #260 be terminated 15 days after the Respondent has been offered other suitable premises, ready for occupancy, and with an access ramp. The Appellant takes issue with the latter part of that Order.

B) ANALYSIS

1. The hearing and the Rental Officer's decision

[7] The evidence presented at the hearing was straightforward. The Rental Officer heard from Mike Keohane, the representative of the housing authority. Mr. Keohane testified about the number of families in the community who are in accommodations that are either too small or otherwise inadequate, and who are on a waiting list for a unit like unit #260. At the time of the hearing, there were 15 families on the waiting list for a 4-bedroom unit, and 30 families on the waiting list for a 3-bedroom unit.

[8] Mr. Keohane explained that unit #225B is a one-bedroom apartment located in a building that he described as a "newly constructed senior's facility". He explained the building was brand new and that the Respondent, if she moved, would be its first occupant.

[9] The Respondent testified at the hearing, with the assistance of an interpreter. She explained to the Rental Officer why she did not want to move. She said she was attached to the house, because she lived there for many years with her husband

and raised her children there. She expressed concern about the one-bedroom unit being too small for her and her possessions.

[10] At various points in her testimony she expressed concern about her ability to access to the unit. She explained that she uses a walker to get around. She said that she did not know how she would be able to get up the steep stairs at unit #225B.

[11] The Respondent's son also spoke at the hearing. He expressed concern, given his mother's age, about whether the building had fire exit doors. He also said that the stairs were very steep and that he did not think that she could go up those stairs by herself.

[12] The Respondent's daughter spoke at the hearing as well. She talked at length about her mother's attachment to the house. She expressed concerns about whether her mother would have sufficient space in the new unit, in particular for two freezers she uses to keep country food and hides for smoking and tanning. She also expressed concerns about the stairs to the proposed new unit being too steep.

[13] After hearing from the Respondent and her children, the Rental Officer asked the Respondent further questions about her mobility issues and her use of a walker. The Respondent explained that she uses a walker inside her house, and outside during the summer months, but not outside during the winter months.

[14] At the end of the hearing, the Rental Officer said he would go see the inside and outside of unit #225B before making his decision.

[15] On April 10, 2013, the Rental Officer rendered his decision. The formal Order he issued reads:

> (...) the tenancy agreement between the parties for the premises known as unit 260 Behchoko, NT shall be terminated fifteen (15) days after the respondent is offered a transfer to other suitable premises that are provided with an access ramp and ready for occupancy.

Rental Officer's Order dated April 20, 2013 (file #10-13313), Record of Rental Officer, Tab 9

[16] The Appellant takes issue with the requirement that the premises offered to the Respondent have an access ramp and seeks to have that aspect of the Order quashed. It asks that the balance of the Order remain in effect. As for the Respondent, she has not appealed the Order. According to her counsel, she is still

not pleased about having to move but has come to accept that she will have to. However, she asks this Court to uphold the requirement that there be ramp access to the unit where she will move.

2. Standard of Review

[17] In any judicial review or appeal from the decision of an administrative decision maker, the first step for the reviewing court is to decide what standard of review applies.

[18] The three grounds outlined in the Originating Notice filed by the Appellant to commence this appeal are that the Rental Officer incorrectly applied the *Act*, that he exceeded his jurisdiction, and that he made an incorrect decision. On its face, the wording of these grounds implies that the matter should be reviewed on a standard of correctness. However, in its written brief and at the hearing of the appeal, the Appellant conceded that the Rental Officer acted within his jurisdiction when he made his Order, and that the standard of review that applies to this appeal is reasonableness. The Respondent's position is also that the standard of review that applies is reasonableness.

[19] I agree with the parties: reasonableness is the standard of review that applies to this appeal. In my view this case does not raise a jurisdictional issue. The Rental Officer's decision was well within the purview of his powers under the *Act*. This Court has consistently held that when that is the case, the standard of review that applies to an appeal brought under the *Act* is reasonableness. *Inuvik Housing Authority* v. *Kendi*, 2005 NWTSC 46; *UNW* v. *Carriere et al.*, 2013 NWTSC 05; *Jeske* v. *Yellowknife Housing Authority*, 2013 NWTSC 17.

3. Whether the Rental Officer's decision was reasonable

[20] The Appellant argues that the part of the Rental Officer's Order that relates to ramp access was made without a sufficient evidentiary basis. The Appellant argues that this, combined with the lack of analysis and articulation on that issue in the Reasons for Decision, makes the decision unreasonable.

[21] Reasonableness is a concept that may have different meanings in different contexts, but what it means in judicial reviews and appeals is well established: in that context, reasonableness is concerned with the existence of justification, transparency and intelligibility of the decision under review. The key question is whether the decision falls within a range of possible, acceptable outcomes, which

are defensible in respect of the facts and of the law. *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at para 47.

[22] This standard of review is one that demands that deference be shown to the decision-maker's conclusions. While this does not mean blind reverence or subservience to the decision-maker's findings, it does require veritable respect for the decision-making process of administrative bodies. *Dunsmuir*, *supra*, at para. 48.

[23] Naturally, the reasons offered for the decision are an important factor to consider in assessing its reasonableness. But the adequacy of reasons is not a stand-alone basis for quashing a decision:

> Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of a decision is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analysis - one for the reasons and a separate one for the result. It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at 'the qualities that make a decision reasonable, referring to both the process of articulating the reasons and to outcomes'. [citations omitted]
>
> (...)

Newfoundland and Labrador's Nurses' Union v. *Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at para 14.

[24] This means that while reviewing courts must take into account the reasons offered by a decision maker in deciding whether the ultimate decision is reasonable, shortcomings in those reasons do not in and of themselves justify intervention. The ultimate question, always, is whether the decision falls within the range of acceptable outcomes. In making that assessment, the reviewing court should consider the decision itself, the reasons provided, and the whole of the record. *Newfoundland and Labrador's Nurses' Union* v. *Newfoundland and Labrador (Treasury Board)*, at paras 15-16.

[25] Here, the Appellant argues that the Rental Officer's reasons do not disclose the thought process and analysis that led him to order that there should be an access ramp at the unit offered to the Respondent. The Appellant argues that this aspect of his decision does not meet the criteria of justification, transparency and intelligibility that are required to render it reasonable.

[26] I do not find it difficult to understand why the Rental Officer came to the conclusion that there should be an access ramp at the premises where the Respondent would move. The Respondent herself, and her children, raised concerns about her mobility, and specifically, the steepness of the stairs leading to unit #255B.

[27] There is no question that the Rental Officer elaborated a lot more, in his Reasons for Decision, about why he was deciding that it was appropriate to require the Respondent to move out of unit #260 than he did about the issue of the ramp. That is hardly surprising, considering that the central issue at the hearing was whether the Respondent should be forced to move.

[28] At this hearing, the Rental Officer was presented with evidence and submissions about the Respondent's attachment to the house, her concerns about whether the new unit would provide her with sufficient space, and all the reasons why she did not want to move. Those reasons were all quite understandable from the perspective of the Respondent, an 84-year-old elder who had lived in that house for almost 20 years and raised her family there. Under the circumstances it is not surprising that the Rental Officer found it important to explain at length why notwithstanding those reasons, he agreed with the housing authority that she would have to move out of that house.

[29] I also do not find it difficult, in light of the record as a whole, to discern what the Rental Officer's rationale was for making the order with respect to the ramp, even if he did not spell it out in detail in his Reasons. The Respondent's mobility issues and her ability to safely access the new unit were clearly raised during the hearing, not only by her but also by her two children. The Rental Officer asked her questions to clarify the extent to which she uses her walker. The issue of access to the new unit was raised before him and clearly, he was concerned about it.

[30] Quite apart from the adequacy of the Rental Officer's Reasons, the Appellant argues that his decision with respect to the ramp was unreasonable because there was an insufficient evidentiary basis for it. The Appellant does not dispute that it was established that the Respondent has mobility issues. Rather, the Appellant argues that there was no evidence about how best to accommodate her needs, and that under the circumstances, the order for a specific accommodation method was unreasonable.

[31] I recognize that accommodating disabilities in general, and mobility issues in particular, can be complex. But in this case, the concerns expressed at the hearing were in relation to the steepness of the stairs, and the Order is for the Respondent to be offered a unit that has a ramp access. That is a fairly generic order. Ramps are widespread and often available, as an alternative to stairs, to access buildings. Often they are available at public buildings. They are intended to assist people with mobility issues generally, and not designed with specific individuals and specific needs in mind.

[32] The Rental Officer specifically noted that this building, while it had been described as a senior's facility, did not have ramps, grab handles, wheelchair access, which he considered to be features normally associated with a senior's facility. These observations were not unreasonable. I too find it somewhat surprising that a building designed specifically to house seniors would not have those types of features to start with.

[33] The Appellant has referred the Court to the *Local Housing Organizations (LHO) Tenant Relations Manual* (the *Manual*) in support of its position that there was insufficient evidence before the Rental Officer for him to make the order with respect to the ramp. The *Manual* is an Exhibit to the Affidavit of Ioan Astle, the Manager of Housing Programs and District Operation with the NWTHC. He deposes that the *Manual* is used "to address matters with respect to tenancies".

[34] The *Manual* appears to be intended to determine eligibility for housing. It also creates a points system to establish priorities among those who are eligible for public housing.

[35] The *Manual* provides that persons with disabilities may be assigned points for prioritization purposes but section 6.24 states that to receive points under this heading, "the applicant household must provide written documentation by a medical and/or medical health professionals of a physical, sensory, cognitive, intellectual or learning disability". *Ioan Astle's Affidavit*, Exhibit "A".

[36] Mr. Astle also deposes that from time to time, the NWTHC modifies units to adjust for a tenant's changing circumstances, such as decreased mobility. Before it does so, it requires documentation from a medical or health professional. This requirement, Mr. Astle says, is due to the varying nature of disabilities and the various forms of potential modifications.

[37] It appears that the NWTHC strives to be consistent in its approach to taking disabilities into account in the delivery of its program: medical records are required both before disability is taken into account to prioritize applications for public housing, and before a unit is modified in order to accommodate a person with a disability.

[38] The NWTHC is free to develop policies to administer its housing programs. But those policies are not binding on the Rental Officer. The fact that the NWTHC requires supporting medical evidence before it will undertake modifications to a unit does not mean that the Rental Officer has to require medical evidence before requiring that this particular tenant be provided ramp access to her unit. The Rental Officer is governed by the *Act*, and nothing else. The Rental Officer is a decision-making authority that operates independently from any party who appears before him, including government agencies such as the NWTHC.

[39] The Rental Officer was not made aware of the NWTHC's policy at this hearing but even if he had been, he would have been under no obligation to require the Respondent to provide medical documentation dealing with her mobility issues before making the decision that he did. Not having required such supporting evidence does not render his decision unreasonable.

[40] It is apparent from the record that the Rental Officer recognized that it was not justifiable to allow the Respondent to remain in unit #260, given the pressing need for this type of accommodation in the community. But it is equally apparent that he was also very concerned that the Respondent not be required to move out of unit #260 unless she was offered other suitable accommodation. He had made that very clear when he dismissed the Appellant's 2010 application for an eviction order against the Respondent:

> It would appear that the Respondent is occupying a unit which is considerably larger than she requires. It is essential in subsidized public housing that the inventory of units be utilized to provide housing to the greatest number of persons in need. It is not acceptable for the respondent to continue to occupy a four bedroom unit when larger families on the waiting list are overcrowded. However it must be recognized that the respondent is in need of subsidized public housing. I am not willing to terminate her tenancy agreement unless she is offered and refuses a smaller unit. That has not occurred.

Reasons for Decision, file #10-11544 (July 16, 2010), supra, p.3.

[41] In the Appellant's 2013 application, the Rental Officer was, again, asked to order that this elderly tenant be relocated from the unit she had lived in for over 20

years to a different one. He heard, from different sources, about her mobility issues and about concerns about how steep the stairs were to unit #255B. He observed that this building, described to him as a newly designed senior's home, lacked many features, including a ramp, that he would have ordinarily expected to see at a seniors' home.

[42] Given all of this, it was not unreasonable for the Rental Officer to order that there be a ramp access at the unit offered to the Respondent. It was especially not unreasonable to order such a measure considering where the Appellant was proposing the Respondent would move, and how the Appellant characterized the building and its intended clientele.

[43] Given this conclusion, I need not address the issue of whether this was a case where it would have been possible for the Court to uphold one aspect of the Rental Officer's Order and not the other.

[44] The appeal is dismissed. If parties wish to make submissions as to costs, they should communicate with the Registry within ten days of the filing of this Memorandum of Judgment so that the issue can be addressed.

L.A. Charbonneau
J.S.C.

Dated this 7th day of November 2013.

Counsel for the Applicant: Trisha Paradis
Counsel for the Respondent: Jeannette Savoie

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