Citation: Manitoba Housing v Gabriel et al, 2017 MBCA 64 Date: 20170629
Dockets: AI17-30-08761-74;
AI17-30-08777-79;
AI17-30-08780-90

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

MANITOBA HOUSING	)	***D. Gabriel*** *and*
	)	***R. Roulette***
(Landlord) Respondent	)	*on behalf of the Applicants*
	)	
	)	***A. J. Ladyka***
	)	*for the Respondent*
	)	
- and -	)	***M. T. Green***
	)	*on a watching brief for the*
	)	*Residential Tenancies*
	)	*Commission*
	)	
DONNA GABRIEL et al	)	*Chambers motions heard:*
	)	***April 28, 2017***
(Tenants) Applicants	)	
	)	*Decision pronounced:*
	)	***June 29, 2017***

MACINNES JA

[1] The applicants seek leave to appeal orders granted against them by the Residential Tenancies Commission (the Commission) in favour of Manitoba Housing.

Background

[2] Twenty-eight motions for leave to appeal have been filed by 14 applicants. Each filed two separate motions, one respecting an order of

possession and the other respecting an order of compensation, made against each of them.

[3] The Commission held a combined hearing respecting 13 of the 14 applicants. A separate hearing by a different panel of the Commission was held in respect of the applicant, Alphonse Catcheway (Catcheway). The reasons for decision in the Catcheway matter dated February 28, 2017, stated that they incorporated by reference the reasons for decision respecting the 13 other applicants.

[4] Each of the 28 motions for leave contain the same proposed grounds of appeal, and the materials filed and submissions made by the representatives of the parties to this proceeding, pertained to the proposed grounds for appeal.

History

[5] All of the applicants, except Laura Amyotte, were removed from Waterhen First Nation on May 19, 1996. For a brief period following their removal, many of them were provided with emergency shelter. Ultimately, in early July 1996, having stated that they were not willing to be separated as a group, they were moved to Portage la Prairie, Manitoba, where they took up residence in a Manitoba Housing complex.

[6] Each family was allocated a rental unit and signed tenancy agreements on July 12, 1996. Over time, most of the individuals moved into different rental units for various reasons. When that happened, a new tenancy agreement was signed.

[7] The history of this entire matter is set out in considerable detail in the Commission's decision dated February 22, 2017, amended March 15, 2017, to add order numbers omitted from the original reasons.

[8] Throughout the period July 1996 to the present, the applicants have paid rent from time to time, but for most of the period, have not paid rent. In the fall of 2010, notices of termination were issued by Manitoba Housing to each of the applicants. The applicants did not move out of their residences and accordingly, Manitoba Housing applied for orders of possession and of compensation for unpaid rent.

[9] Thereafter, matters proceeded slowly, the particulars of which, with one exception, I need not outline in this decision.

[10] The exception is that Manitoba Housing's initial applications were before the Residential Tenancies Branch (the Branch). The Branch held separate hearings for each of the 13 applicants and granted orders of possession and of compensation against each of them. The applicants appealed those orders to the Commission. The Commission consolidated 12 of the 13 appeals. The other one, having been received considerably later than the other 12, was held in abeyance pending the outcome of the appeals.

[11] On October 19, 2012, the Commission determined that it did not have jurisdiction to hear the appeals as it found that the accommodations were provided to temporarily shelter persons in need and were therefore excluded under section 3(1)(e) of *The Residential Tenancies Act*, CCSM c R119 (the *Act*). Manitoba Housing obtained leave and appealed the Commission's decision to this Court which determined that the Commission's interpretation of section 3(1)(e) was not reasonable. Given

that the Commission's decision only addressed the issue of jurisdiction, the Court referred the matters arising from each appeal back to the Commission for further adjudication. See *Manitoba Housing v Amyotte et al*, 2014 MBCA 54.

[12] Ultimately, 13 appeals were heard together in one hearing. The hearing took place over 12 days in 2016 and included testimony of 14 witnesses. Several of the applicants testified. As well, other individuals gave evidence on behalf of the applicants. Four individuals testified on behalf of Manitoba Housing. The Commission, which consisted of the Chief Commissioner sitting alone, reserved its decision which it delivered on February 22, 2017, amended March 15, 2017. The Commission granted orders of possession and of compensation for unpaid rent in respect of all 13 applicants, as well as costs.

[13] A separate panel of the Commission, following the hearing in respect of Catcheway, granted an order of possession, together with costs, against him.

[14] It is from those decisions that these motions for leave to appeal come before me.

The Law

[15] Section 175(1) of the *Act* provides a right of appeal from the decision or order of the Commission to the Court of Appeal. However, the right of appeal is a limited one. Section 175(2) provides:

> **Appeal with leave**
> **175(2)** An appeal under subsection (1) may be taken only on a

> question of jurisdiction or of law and only with leave obtained from a judge of the Court of Appeal.

[16] The test to be applied by the judge of the Court of Appeal in determining whether to grant leave to appeal to the Court is stringent. The regime and test has been enunciated in many decisions of this Court.

[17] In *Manitoba Housing Authority v Horvat*, 2010 MBCA 43, Freedman JA accurately described both as follows (at para 3):

> The *Act* provides the applicant with a very limited opportunity to appeal a decision or order of the Commission to this court. Appeals are limited to questions of jurisdiction or law, and an applicant needs leave to appeal. Three factors are considered by a judge in determining whether to grant leave. See *Pelchat v. Manitoba Public Insurance Corp.*, 2006 MBCA 90, 40 C.C.L.I. (4th) 46 (at para. 2):
>
> ….
>
> 1. The question must be truly one only of jurisdiction or of law, and not one which "involve[s] the court in an assessment or analysis of conflicting factual issues" (*Shersty v. Manitoba Public Insurance Corp.* (2002), 43 C.C.L.I. (3d) 35, 2002 MBCA 108 (Man. C.A. [In Chambers]), at para. 2, *Fillion v. Manitoba Public Insurance Corp.* (2004), 10 C.C.L.I. (4th) 182, 2004 MBCA 61 (Man. C.A.), and cases cited therein).
>
> 2. The case must be one that warrants the attention of the court. "The issue must be one of importance; not just for the immediate case, but in determining other similar disputes which are apt to arise in [the] future" *(Wuziuk v. Manitoba (Director of Social Services) (No. 2)* (1979), 3 Man. R. (2d) 81 (Man. C.A.), at para. 7).
>
> 3. There must be an arguable case of substance; i.e., one with a reasonable prospect of success (see *Lejins v. Manitoba*

> *Public Insurance Corp.* (2003), 50 C.C.L.I. (3d) 1, 2003 MBCA 95 (Man. C.A. [In Chambers])).

Argument and Decision

[18] I turn then to deal with the present motions.

[19] The applicants advanced three proposed grounds of appeal: 1) that the Commission failed to interpret and make a ruling on section 80(3) of the *Act*; 2) that the Commission failed to apply or consider section 153(2) of the *Act*; and 3) that the Commission failed to apply or consider the doctrine of *res judicata*.

[20] As to the first proposed ground of appeal, section 80 of the *Act* provides as follows:

> **Restriction on termination of tenancy**
> **80(1)** A tenancy may not be terminated except in accordance with this Part.
>
> **Restriction on recovery of possession**
> **80(2)** Unless a tenant has vacated or abandoned the rental unit, the landlord shall not regain possession of the rental unit, except in accordance with a writ of possession issued under subsection 157(2).
>
> **Exception**
> **80(3)** When possession by an occupant of a rental unit is not pursuant to a tenancy agreement, the landlord is not required to regain possession in accordance with subsection (2), but may elect to do so.

[21] The Commission found that each of the applicants had entered into a tenancy agreement with Manitoba Housing. Having made that finding, Manitoba Housing was not entitled to proceed other than pursuant to

section 80(1) of the *Act* (which it has done), and section 80(3) therefore has no application to the proceeding.

[22] The finding by the Commission that each tenant entered into a tenancy agreement with Manitoba Housing is a determination of a question of mixed fact and law. It is not a question of pure law. Therefore, it is not a finding that can be appealed from the Commission to this Court. See *Lafreniere et al v Senyk et al*, 2013 MBCA 18.

[23] The second proposed ground of appeal engages consideration of sections 152(1.1), 153(1) and 153(2) of the *Act* which read as follows:

> **Application**
> **152(1.1)** A person who wishes to have a question or matter determined shall make an application to the director.
>
> **Mediation**
> **153(1)** On receiving an application under subsection 152(1.1), the director shall investigate and, subject to subsection (3), endeavour to mediate a settlement of a matter.
>
> **Where dispute settled**
> **153(2)** When a matter is settled by mediation, the director shall make a written record of the settlement which is binding on the parties and is not subject to appeal.

[24] The facts here are that no application was made under section 152(1.1) by any of the applicants to have the director investigate and endeavour to mediate a settlement of the matter. As no application was ever made, there was no investigation or mediation undertaken, nor any determination made from which an appeal could be advanced. There is therefore no basis whatsoever to grant leave to appeal in respect of this proposed ground of appeal.

[25] The third proposed ground of appeal is that the Commission did not apply or consider the doctrine of *res judicata*.

[26] As previously noted, there had been an earlier hearing of these applications before the Commission. Several arguments had been made by the applicants in that hearing pertaining to jurisdiction. One I have already referred to (see para 11 of these reasons).

[27] Another jurisdictional argument raised was that the applicants' treaty and aboriginal rights superseded any application of the *Act*. The panel dismissed that argument. The applicants did not appeal that aspect of the decision and the Court of Appeal made no comment with respect it.

[28] On the hearing from which these motions for leave to appeal arise, the applicants again raised the argument that their treaty and aboriginal rights superseded any application of the *Act* in respect of them. Manitoba Housing argued that this submission was *res judicata* in as much as it had been made before the original commission panel, had been decided against the applicants, and had not been appealed by them. Notwithstanding that argument, the Commission here ruled against Manitoba Housing and proceeded to hear this argument. However, it concluded, upon review of all of the evidence, that there was no merit to the argument and dismissed it.

[29] Again, this conclusion is one of mixed fact and law and hence, is not appealable to this Court.

[30] In conclusion, the Commission provided the applicants with a full hearing and permitted them to place before it all of the evidence which they wished and to make full argument in respect thereof. After a lengthy hearing

and submissions, the Commission provided a thorough, and in my view, sound decision on the issues before it. The proposed grounds for the intended appeal do not raise questions of jurisdiction or of law and accordingly, the decision is not appealable to this Court.

[31] I would therefore dismiss the motions for leave to appeal filed by the applicants.

MacInnes JA