KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 101**

Date: **2024 05 27**
File No.: KBG-SA-00474-2024
Judicial Centre: Saskatoon

IN THE MATTER OF S. 72(1) OF *THE RESIDENTIAL TENANCIES ACT, 2006*

BETWEEN:

FAYE YEOMAN

APPELLANT

- and -

UNIVERSAL REALTY LTD.

RESPONDENT

- and -

THE OFFICE OF THE RESIDENTIAL TENANCIES

RESPONDENT

Counsel:

Nicholas R. S. Blenkinsop	for the appellant
Bernalle Loewen	for the respondent, Universal Realty Ltd.
Audrey L. Olson	for the Office of the Residential Tenancies

JUDGMENT
May 27, 2024

DANYLIUK J.

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[1] This is a statutory appeal brought by the tenant under *The Residential Tenancies Act, 2006*, SS 2006, c R-22.0001 [*RTA*]. This appeal engages genuine questions of law.

[2] For the reasons set out below, the appeal must be allowed.

Facts

[3] The *RTA* hearing was held April 16, 2024 by telephone. Gordon Mayer was the hearing officer. The landlord was seeking an order for possession pursuant to ss. 69 and 70(6) of the *RTA*. The landlord alleged the tenant was overholding despite being served with a notice terminating the tenancy. There was, and is, issue taken by the tenant as to whether the notice was proper and whether the landlord generally followed appropriate legal procedure regarding this tenancy.

[4] From the decision (2024 SKORT 972) [*Decision*] itself, it is very difficult to understand what transpired at this telephone hearing. The *Decision* runs to a page and one-half. Not much is provided in terms of a summary of the evidence, much less the legal arguments made. It is easily reproduced here. After some introductory paragraphs, the hearing officer moved to a section entitled "ARGUMENTS, EVIDENCE AND FINDINGS". This entire section is made up of seven short paragraphs:

> [5] The rental unit is located at 3B 2021 - 7th Street East Saskatoon, Saskatchewan. The monthly rent is $775.00. I accept the evidence of the Landlord that the landlord entered into a fixed term tenancy commencing April 1, 2023 and ending on September 30, 2023.
>
> [6] The landlord provided the tenant with a two month notice of intention dated July 20, 2023 to renew the lease agreement up to the end of March 2024. The tenant accepted.
>
> [7] The landlord provided the tenant with Two Month notice dated January 23, 2024 that the fixed term tenancy would end on March 31, 2024. The Tenant (s) failed to vacate the premises in accordance with the Notice.
>
> [8] I am satisfied that based on the evidence provided, the Landlord's had complied with the provisions of *The Residential Tenancies Act, 2006* and the has overheld and that an Order should be made placing the Landlord in possession of the rental premises.
>
> [9] Section 70(6) requires that I consider whether it is just and equitable to issue an order for possession. The landlord has complied with the Act, and there is no evidence of bad faith on the part of the

> landlord. I am satisfied that an order for possession accords with justice and equity.
>
> [10] This order does not preclude the Landlord from making a monetary claim against the Tenant for damages not adjudicated in this order.
>
> [11] If the Landlord wishes to keep the Tenant's security deposit, they must serve the Tenant with the approved form within seven business days of the Tenant vacating the rental unit in accordance with section 32(1) of *The Residential Tenancies Act, 2006*.

[5] That is the *Decision* in its entirety.

Issues

[6] The issues in this appeal are:

1. What is the appropriate standard of review?
2. Were the reasons of the hearing officer expressed in his *Decision* sufficient, as a matter of law?
3. Is the filing of an affidavit permissible in these circumstances?
4. Did the hearing officer give due and proper consideration to s. 70(6)?
5. Did the hearing officer fail to ensure the hearing was conducted free of bias or the appearance of bias?

1. What is the appropriate standard of review?

[7] This appeal was, of course, brought pursuant to s. 72(1) of the *RTA*. The appeal must therefore raise an issue of law or of jurisdiction. This section has consistently been interpreted such that these are appeals of record and are limited to jurisdictional and legal issues. They are not re-hearings, or trials *de novo*. These appeals are not fact-finding expeditions.

[8] I note the traditional standard of review on such appeals was set out in *Reich v Lohse* (1994), 123 Sask R 114 (QL) (CA), where Jackson J.A. stated at paras. 18 and 20:

> **18** Our jurisdiction and that of the Queen's Bench on an appeal from the rentalsman is simply a supervisory one with respect to the interpretation of the law and the rentalsman's jurisdiction. It is not our task to pass judgment on the behaviour of either tenants or landlords as it relates to the exercise of that right. That is the function of the rentalsman.
>
> …
>
> **20** …The jurisdiction previously given to the Rent Appeal Commission has not been given to the Queen's Bench. There is no longer a full re-hearing on an appeal from the rentalsman's decisions. On this basis some deference must be shown to those aspects of the rentalsman's decisions which reflect an exercise of discretion.

[9] There has now been something of a shift in this standard as a result of recent decisions of the Supreme Court of Canada, notably *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653. This shift in the standard of review in terms of these statutory appeals was canvassed by Justice Elson in *Lansdowne Equity Ventures Ltd. v Cove Communities Inc.*, 2020 SKQB 113. In particular, I adopt what Justice Elson noted at paras. 25, 26, 30 and 31 thereof:

> [25] Recently, the Supreme Court of Canada departed from the approach described in *Dr. Q* [2003 SCC 19, [2003] 1 SCR 226]. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Court concluded that reviewing courts, hearing statutory appeals from an administrative decision-maker, are required to apply "appellate standards of review" when determining the matter under appeal. As to the nature of these appellate standards, the reviewing court must approach the matter in the same way as an appellate court considers an appeal from a judgment at trial. In this respect, the majority in *Vavilov* expressly adopted the standards and related principles set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*]. The Court's direction in this regard is set out in para. 37 of *Vavilov*:

> 37 It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision-maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen* …. at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[26] Of course, this direction in *Vavilov* requires meaningful consideration and analysis of the majority judgment in *Housen*, jointly written by Iacobucci J. and Major J. Particular reference must be given to the paragraphs identified in the above passage from *Vavilov*. At para. 8 of *Housen*, the Court stated that pure questions of law require the appeal court to review the subject decision against the standard of correctness. As for questions of fact and questions of mixed fact and law, deference is required. Specifically, an appeal court cannot intervene unless the decision-maker has demonstrated a palpable and overriding error in the finding of any relevant fact. As posited in *Housen*, this deferential standard is designed, at least in part, to serve two principal objectives: 1) to promote the economy and integrity of the proceedings at first instance; and 2) to limit the number, length and cost of appeals. It is also rooted in a presumption that the decision-maker possesses the fitness and the ability to make the required findings of fact without intervention of the court hearing the appeal.

…

[30] Such is the case in the present appeal. In s. 72(1) of the *RTA*, the Legislature has expressly limited the scope of an appeal to "questions of law or jurisdiction". As such, questions of fact or questions of mixed fact and law are beyond this Court's jurisdiction to review. In this respect, it is not simply a question of greater deference than that applied to a question of law. Even if a hearing officer makes a palpable and overriding error in a finding of fact, this Court cannot intervene unless the error of fact takes on the quality of an error of law. As

> observed by Cameron J.A., in *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149, 302 Sask R 161 [*P.S.S.*], a finding of fact will constitute an error of law where it is made on the basis of: 1) no evidence; 2) irrelevant evidence; 3) disregarded relevant evidence; 4) mischaracterized relevant evidence; or 5) an unfounded/irrational inference.
>
> [31] This analysis necessarily presumes a distinction, at least in theory, between an error of fact that discloses a palpable and overriding error, and an error of fact that actually constitutes an error of law as identified by Cameron J.A. in *P.S.S.* How a court describes that distinction in a practical way is an issue that, thankfully, does not arise on this appeal.

[10] I agree with and adopt Justice Elson's analysis of the proper standard of review.

2. Were the reasons of the hearing officer expressed in his Decision sufficient, as a matter of law?

[11] Apart from the incorrect grammar and somewhat tortured syntax in the *Decision*, it is significantly deficient in terms of sufficiency of reasons. This is a threshold issue. The tenant in this case raised other issues which may well carry the day on another occasion. I am determining that the appeal must be granted based on the *Decision* and the paucity of reasons contained therein. Further, for any person reading the *Decision* with a critical (and not necessarily a legal) eye, there are aspects that appear manifestly unfair and unjust that the Office of Residential Tenancies ought to consider for the future.

[12] Let me explain what is wrong with this *Decision*.

[13] First, while the hearing officer notes evidence and submissions were received from the parties, there is no detail regarding same. And here, I mean there is NO detail. From the *Decision* I have no idea what evidence was submitted. I have no idea what arguments were made. Certainly, from the tenant's arguments on this appeal, it appears cogent evidence was provided and numerous arguments were made. The

hearing officer simply does not deal with these in his *Decision*. He leaves any reader, and particularly a reviewing judge on appeal, in the dark.

[14] This, in and of itself, is entirely unacceptable. It is like this is a poker game, with the stakes being very high – the tenant's basic need of shelter. Someone is deciding who wins the pot, but no cards have to be shown. The "house" is saying "Trust me, I'll tell you when you win". Or lose.

[15] This is no way to run a poker game, much less a quasi-judicial hearing involving a matter as essential as shelter. Food, clothing, shelter – the essentials for civilized people to live. That the stakes are high for tenants on these appeals is beyond dispute. That the adjudication of such issues requires a high degree of procedural fairness is also established. Both were noted in *Knapp v ICR Commercial Real Estate*, 2019 SKQB 59 at paras 69 and 70, 58 Admin LR (6th) 205:

> [69] Yet, **the informality of these proceedings cannot belie the significance of decisions rendered by ORT hearing officers. The potential ramification for a tenant of an adverse ruling is significant**, most notably, an order granting a writ of possession evicting a tenant from the rental unit in question. See especially: ss. 70(13) of the *Act* [SS 2006, c R-22.001]. **The devastating effects of such an order upon the tenants in question cannot be under-estimated. It can often result in significant dislocation for tenants and their families.**
>
> [70] Taken together, the application of the first three *Baker* [[1999] 2 SCR 817] factors persuade me that **a high degree of procedural fairness is required in a proceeding before an ORT hearing officer.** It is worth noting that courts in other provinces have come to the same conclusion in relation to landlord and tenant proceedings in those jurisdictions. See, for example.: *Two-Two-Ought-Four Dufferin Limited v Mitchell*, 2019 ONSC 276 at para 13; *Ganitano v Metro Vancouver Housing Corp.*, 2009 BCSC 787 at para 40, and *Fulber v Doll*, 2001 BCSC 891 at paras 26-30.
>
> [Emphasis added]

[16] This concern is nothing new. Various judges of this Court have been making rulings concerning the inadequacy of the reasons in these decisions (and the

manifest unfairness flowing from them) for quite some time now. I hasten to add that this pertains to some, certainly not all, hearing officers. However, those to whom these rulings pertain seem intransigent. They simply do not appear to wish to do the job properly, or follow the directions of this Court as to the proper application of the law. This is unacceptable. This has to stop.

[17] It is a basic duty of any adjudicator to provide adequate reasons. The parties to a dispute must be able to read the decision and understand why they succeeded or failed. They must be able to know what the adjudicator considered, and if he or she failed to consider some evidence or argument. It is insufficient to say "evidence was heard and arguments presented".

[18] This does not only pertain to judges. The case law makes this clear. In *Vavilov* the importance and necessity of reasons for a decision was discussed at paras. 79 to 81:

> [79] **Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter**: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. **Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power:** *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine* [2004 SCC 48, [2004] 2 SCR 650], at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker* [[1999] 2 SCR 817], "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S. A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

> [80] **The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process**: *Baker*, at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons": *Good Judgment: Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.
>
> [81] **Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision**: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Court reaffirmed that **"the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'":** para. 1, quoting *Dunsmuir* [2008 SCC 9, [2008] 1 SCR 190], at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that **the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.**
>
> [Emphasis added]

[19] In *R v R.E.M.*, 2008 SCC 51, [2008] 3 SCR 3, Chief Justice McLachlin explored the requirements for sufficient reasons. In short, they must expose the adjudicator's path of reasoning in a way that is clear and understandable. At paras. 25 and 35:

> [25] The functional approach advocated in *Sheppard* [2002 SCC 26, [2002] 1 SCR 869] suggests that what is required are reasons sufficient to perform the functions reasons serve -- to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons. …
>
> …
>
> [35] In summary, the cases confirm:

> (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey* [(1995), 22 OR (3d) 514 (CA)] at p. 524).
>
> (2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.
>
> (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.
>
> This summary is not exhaustive, and courts of appeal might wish to refer themselves to para. 55 of *Sheppard* for a more comprehensive list of the key principles.

[20] In *R v M.G.S.*, 2021 SKCA 1, 397 CCC (3d) 331, Justice Leurer (as he then was) conducted a sufficiency of reasons analysis at paras. 65 to 87. At para. 67:

> [67] Appellate courts are instructed to adopt a functional approach in their review of reasons (*Sheppard* [2002 SCC 26, [2002] 1 SCR 869] at paras 24–28). In *Dinardo* [2008 SCC 24, [2008] 1 SCR 788], the Supreme Court emphasized that the inquiry "should not be conducted in the abstract, but should be directed at whether the reasons respond to the case's live issues, having regard to the evidence as a whole and the submissions of counsel" (at para 25). In *R v R.E.M.*, 2008 SCC 51, [2008] 2 SCR 3 [*R.E.M.*] the Supreme Court explained the proper approach for appellate review of trial reasons:
>
> > [15] This Court in *Sheppard* and subsequent cases has advocated a functional context-specific approach to the adequacy of reasons in a criminal case. The reasons must be sufficient to fulfill their functions of explaining why the accused was convicted or acquitted, providing public accountability and permitting effective appellate review.
> >
> > [16] It follows that courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*,

at paras. 46 and 50; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 524).

[17] These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard*. But the description in *Morrissey* of the object of a trial judge's reasons is apt. Doherty J.A. in *Morrissey*, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties *what* he or she has decided and *why* he or she made that decision" (emphasis added). What is required is a logical connection between the "what" — the verdict — and the "why" — the basis for the verdict. The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded.

[18] Explaining the "why" and its logical link to the "what" does not require the trial judge to set out every finding or conclusion in the process of arriving at the verdict. ...

[19] The judge need not expound on matters that are well settled, uncontroversial or understood and accepted by the parties. This applies to both the law and the evidence. ...

[20] Similarly, the trial judge need not expound on evidence which is uncontroversial, or detail his or her finding on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can be logically discerned.

…

[25] The functional approach advocated in *Sheppard* suggests that what is required are reasons sufficient to perform the functions reasons serve — to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons. This principle from *Sheppard* was reiterated thus in *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 31:

> The general principle affirmed in *Sheppard* is that "the effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more

> contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case" (para. 33). The test, in other words, is whether the reasons adequately perform *the function* for which they are required, namely to allow the appeal court to review the correctness of the trial decision. [Emphasis in original.]
>
> (Emphasis in original)

[21] The controlling authority remains *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869. There, the Supreme Court began with the proposition that delivering reasons for judgment is fundamental to the role of an adjudicator of first instance – a core responsibility. It was also noted that reasons explaining a decision serve several purposes. Of significant importance is that reasons amplify a decision and render it reasonably intelligible to the litigants and the public. They also provide the basis for meaningful appellate review where the correctness or appropriateness of a decision is called into question. In *Sheppard* it was further noted that while inadequate reasons do not necessarily constitute an independent ground of appeal, failure to provide adequate and intelligible reasons for judgment can amount to an error of law in some circumstances, thus may warrant appellate intervention on that issue. At para. 28 the Supreme Court stated:

> 28 It is neither necessary nor appropriate to limit circumstances in which an appellant court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. **The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent**

> **meaningful appellate review of the correctness of the decision, then an error of law has been committed.**
>
> [Emphasis added]

[22] At para. 46 of *Sheppard*, the Supreme Court provided further directions. The duty to give reasons flows from the circumstances of a particular case. Sometimes it will be clear from the record why an adjudicator has ruled the way he or she has. For example, at times it is absolutely clear why an accused has been convicted or acquitted. In such cases the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal. An appellate review is not impeded thus appellate intervention is not warranted by the sufficiency (or lack of same) of the reasons alone. In other cases, the reasons are inadequate, and the adjudicator's path is not clear, sometimes not even apparent. Other times there are significant legal issues to be dealt with but the trial judge has "circumnavigated" same and has not given any explanation for not dealing with those legal issues. In those cases, appellate intervention on the basis of the paucity of reasons is proper. Those cases support a conclusion that the lack of adequate reasons amount to an error of law, because meaningful appellate review is precluded.

[23] As earlier noted, there have been a number of decisions under this legislation wherein hearing officers were advised their reasons were inadequate or deficient, or otherwise failed to properly explain the hearing officer's path of reasoning. These decisions go back for years. See, for example: *Waterman v Universal Realty Ltd.*, 2009 SKQB 462, 347 Sask R 29; *Machiskinic v Chen*, 2011 SKQB 39, 368 Sask R 169; *Creative Options Regina Inc. v Wakaluk*, 2011 SKQB 89, 369 Sask R 250; *Grey v Storozuk*, 2012 SKQB 252, 398 Sask R 312; *Moebes v Newport Property Management Ltd.*, 2012 SKQB 379; *Ottenbreit v Paul*, 2015 SKQB 326, 7 Admin LR (6th) 293; *Unwin v Bender*, 2020 SKQB 116; *Gregory v Richards*, 2020 SKQB 220; *Olson v Hergott*, 2021 SKQB 11; *Quadra Properties Ltd. v Gamble*, 2021 SKQB 16; *Williams v Elite Property Management Ltd.*, 2021 SKQB 46; *Hoth v Myers*, 2023 SKKB 231;

Lucier v Saskatoon Real Estate Services Inc., 2023 SKKB 259; *Lavendar v Saskatoon Real Estate Services Inc.*, 2024 SKKB 16; *Bell v Mainstreet Equity Corp.*, 2024 SKKB 68; and *Lasas v Weidner Investment Services Inc.* (30 April 2024) Saskatoon, KBG-SA-00383-2024 (Sask KB).

[24] This is not an exhaustive list, merely illustrative. However, one would reasonably think that with a consistent message from this Court as to the need for sufficient reasons having been delivered over the past 15 years, there would be no further need to write on this subject. One would be wrong.

[25] I repeat what I noted at para. 4 of *Lucier*:

> [4] … I fully appreciate these are summary hearings. Hearing officers are not expected to write *War and Peace* on every matter heard. Still, sufficient reasons must be articulated to let the parties know why they won or lost, and to permit meaningful appellate review. See *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869.

[26] Having regard to the entirety of this *Decision*, it does not even come close to that required standard.

[27] Justice Elson's recent decision in *Bell* bears further examination. I will not repeat large extracts of that decision. Suffice it to say I agree with my colleague and adopt and incorporate his decision into my own reasoning herein. Still, I note some passages from *Bell*, including the end of para. 39: "… this action not only defied the principles of procedural fairness, it also betrayed the hearing officer's disregard for his obligation to exercise the judicial discretion called for by s. 70(6)". Continuing his analysis at paras. 40 and 41 Justice Elson said:

> [40] Such an obligation calls for something more than passive acknowledgment that it exists. In my view, the just and equitable consideration in s. 70(6) requires the hearing officer to make inquiries that will inform its application to the case at hand. Such inquiries should be made even where the tenant does not attend the hearing, as was the case in *Lavendar*. In such an instance, the landlord may well

> have answers that will assist the hearing officer in measuring the justice and equity of a given situation.
>
> [41] Without prescribing an exhaustive or all-inclusive list, the hearing officer might reasonably be expected to inquire about such matters as:
>
> a. the length of the tenancy;
>
> b. the history of previous rent arrears;
>
> c. the circumstances causing the arrears of rent;
>
> d. the source of the tenant's income;
>
> e. possible impediments to the receipt of income from the source;
>
> f. the possibility that rent could be paid from the source directly to the landlord;
>
> g. the circumstances of any family members living with the tenant;
>
> h. whether the arrears continue to the date of the hearing; and
>
> i. whether a practice had developed between the parties for the payment of past arrears.

[28] As set out above, Justice Zerr adopted Justice Elson's reasoning a scant 11 days later in *Lasas*.

[29] Members of this Court have previously indicated that compliance with the doctrine of providing adequate reasons is not going to be onerous for hearing officers in most cases. The evidence and arguments heard should be summarized. The hearing officer should state which evidence is accepted or rejected, and why. The hearing officer should delineate any factual findings made. The hearing officer should apply the law to that factual matrix and come to transparent conclusions which explain to the litigants why the decision is as it is, and which permit meaningful appellate review.

[30] In addition to these general comments, under this issue I am compelled to mention the treatment of s. 70(6). I appreciate this is dealt with in detail under issue number 4, below. However, in this *Decision* the explanation of why it is just and equitable to grant an order is so inadequate as to be risible. As will be shown, this incredibly short and inadequate statement is repeated in decision after decision by this hearing officer. As will be further shown, this hearing officer sometimes ignores s. 70(6) altogether. This does not meet the standard for content. The appeal must be allowed on the basis of inadequate reasons from the original hearing officer.

3. Is the filing of an affidavit permissible in these circumstances?

[31] The tenant filed an affidavit on this appeal. The cases illustrate that this is to be the exception rather than the norm.

[32] This was determined in *Williams v Elite Property Management Ltd.*, 2012 SKQB 215, 397 Sask R 204. In particular, paras. 16 to 17 apply. These are appeals on the record. It may be that if bias or procedural fairness are in play, then an affidavit may have to be filed. I appreciate that in the instant appeal the tenant did bring forth such grounds. However, I had indicated early in the hearing that the sufficiency of the reasons was a threshold issue which would likely determine the appeal. In any event, while the tenant justifies the filing of an affidavit on the basis that it would be allowed in some judicial review applications, this is a statutory appeal with a distinct standard of review. I note that while performing an invaluable service to tenants, CLASSIC has a tendency to file affidavits on almost every one of these statutory appeals. This might be an opportunity for reflection on that practice.

[33] In any event, this type of appeal would be treated as a matter in the nature of a final application. This being so, affidavits sworn on information and belief – that is, containing hearsay – are generally not acceptable. Even where an affidavit is allowable on this type of appeal it must still comply with *The King's Bench Rules*.

[34] Rule 13-30 governs the contents of affidavits. Rule 13-30(1) and (2) states that affidavits must be confined to factual matters within the personal knowledge of the deponent, unless the matter is interlocutory in nature. Neither an application for judicial review nor an appeal of this type are interlocutory proceedings.

[35] The Rules and case authorities are also abundantly clear on impermissible contents of affidavits. Affidavits contain facts. They do not contain arguments, polemic, opinions, or the personal impressions and viewpoints of the deponent. In this case, the tenant's affidavit is rife with such content. She avers to her impressions of the hearing officer's understanding of what was happening at the hearing. For example, at para. 13 of her affidavit she variously says the hearing officer "… seemed confused and unclear as to why it was that …". She said, "He seemed to not understand what my lawyer was talking about …". At para. 15 she said, "The hearing officer appeared to misunderstand the issue and/or to refuse to engage with it and made comments which appeared to dismiss the issue out of hand with no reasons".

[36] These statements are opinions as to the state of mind of a third party. They are improper and, if the affidavit had been allowed into evidence, they would have been struck out.

[37] In any event, the appellant's affidavit is not required to properly dispose of this appeal, and I have disregarded it.

4. Did the hearing officer give due and proper consideration to s. 70(6)?

[38] I have already indicated the hearing officer did not do so. This is subsumed in the issue pertaining to inadequate reasons from the hearing officer. However, it is also a stand-alone issue warranting discussion.

[39] This issue centres on s. 70(6) of the *RTA*, which states:

> **70**(6) After holding a hearing pursuant to this section, a hearing officer may make any order the hearing officer considers just and equitable in the circumstances, including all or any of the following:
>
> > (a) an order directing any person found contravening or failing to comply with a tenancy agreement, this Act, the regulations or an order made pursuant to this Act to stop that contravention or failure and to so comply;
> >
> > (b) an order requiring a tenant to pay to the director all or any part of any instalment of rent otherwise payable to the landlord;
> >
> > (c) an order requiring the payment of damages, including the payment of any arrears of rent payable to the landlord;
> >
> > (d) subject to section 68, an order granting possession of a rental unit;
> >
> > (e) an order determining the disposition of a security deposit and any accrued interest pursuant to section 33;
> >
> > (f) an order determining the validity of a notice of rent increase pursuant to sections 53.1 or 54.

[40] Once again, I note that members of this Court have spoken to this issue again and again. This hearing officer appears to disregard, or at least misapprehend, the duty under s. 70(6). He is not alone in this regard. This Court sees the same treatment from other hearing officers. Let me be clear. It is insufficient to give "lip service" to the assessment of whether the granting of relief is just and equitable. There must be an **actual, meaningful analysis** of the situation, engaging the *Bell* factors and perhaps others.

[41] In this *Decision*, the hearing officer's decision on s. 70(6) was anything but an actual and meaningful analysis. It appears to be a rote statement, something designed to facially comply with a legal requirement that is more avoidance than anything else. For ease of reference, this is all the hearing officer said on s. 70(6):

> [9] Section 70(6) requires that I consider whether it is just and equitable to issue an order for possession. The landlord has complied with the Act, and there is no evidence of bad faith on the part of the

> landlord. I am satisfied that an order for possession accords with justice and equity.

[42] I note this conflates the onus. The hearing officer treated s. 70(6) as something the tenant had to prove. The hearing officer imported a requirement that the tenant demonstrate "bad faith" on the landlord's part. There is no such requirement in this subsection. This is a misapprehension of the law. The hearing officer put the tenant in a position she ought not to have been in. This, in itself, was an error in law. Section 70(6) is an overarching provision, calling for a true analysis of the apposite factors irrespective of whose application is before the hearing officer.

[43] Here, there is no true analysis of s. 70(6). There is something of a recital of a mantra, an incantation. The evidence provided by the tenant is not even mentioned in the *Decision* regarding s. 70(6). The hearing officer did not apply the proper test, which led to an analysis that was entirely lacking, which in turn is an error of law.

[44] I have already dealt with insufficiency of the reasons in this *Decision*. This finding applies in a more focussed sense with respect to this narrower issue. The treatment given to equitable considerations is at best described as cursory.

[45] In the analysis of the next issue, below, I deal with the allegation of bias. I find I do not have to determine same. However, there are issues within that consideration that overlap with the inadequacy of the reasons given by this hearing officer.

[46] By this I am referring to the analysis of Justice Elson in *Bell* and in particular the analysis that begins at para. 17. Justice Elson looked at the 19 decisions provided, all of which were conducted by the same hearing officer (in that case Randall King) on a single day. Justice Elson determined that the use of the type of wording that appears in para. 9 of the decision in the instant case was used in all those decisions.

[47] I am not analyzing bias here. However, using a standard template and absolutely nothing more suggests a lack of true analysis of s. 70(6). It connotes a rote application of a standard, "one size fits all" clause. Looking at his recently reported decisions on CanLII, I found that between April 4 and May 17, 2024 hearing officer Gordon Mayer made 61 decisions. That's right, 61 reported written decisions in about six weeks.

[48] It is difficult to imagine that full hearings with corresponding full reasons and analyses can be delivered in this many decisions within that time frame.

[49] Further, in those 61 decisions some bear no mention of s. 70(6) at all, notwithstanding this Court's rulings which (see below) go back years and years. I read all 61 of these decisions. They were all made in a time frame when hearing officers should have been well aware of the need to properly address s. 70(6). By my count there is absolutely no mention of s. 70(6) considerations in at least 50 of those 61 decisions. In a few of these decisions there is the inadequate, two-line statement referred to earlier. In reviewing all 61 decisions, sometimes this hearing officer (not expressly citing s. 70(6)) says he finds it is "not grossly inequitable" to make the order he makes. With respect, that is not the test in s. 70(6). "Grossly inequitable" is not the measure of the applicability of that section. This, too, is legal error on a wholesale basis.

[50] This is a huge problem. In a number of these decisions it is stated the hearing officer determined it was just and equitable to **proceed** with the hearing – but that is not what s. 70(6) mandates. The equitable considerations are substantive as opposed to purely procedural. In a number of other decisions some sort of "grossly inequitable" test was used, which is not compliant with the language of the statute. In a substantial number of these decisions damages or returns of damage deposits were claimed, yet there is no mention of equitable considerations. Section 70(6)(b), (c) and (e) all expressly pertain to monetary concerns and all are subject to the preamble in

subsection (6). This is a legal error in statutory interpretation.

[51] All this is not new. This Court has spoken to these principles on numerous prior occasions. These decisions set out the obligation of hearing officers to consider what is just and equitable before making any order in an *RTA* matter. These include *Grey v Storozuk,* (paras 14 and 17); *Hart v Hunchak,* 2015 SKQB 117 (paras 11-14); *Eastview Housing Association Ltd. v Gerard*, 2016 SKQB 98 (para 8); *Unwin v Bender*, (paras 31-34); *Eagle Heart Centre Inc. v Pratt,* 2021 SKORT 2222; *Williams v Elite Property Management Ltd.* (2021) (paras 21-31); *River Bank Dev. Corp. v Pacquette and Anor,* 2021 SKORT 1083 (para 14); and *James v Saskatoon Housing Authority,* 2023 SKKB 135 (paras 10-13). I note there are a great many SKORT decisions wherein these cases, and others, were followed so as to ensure true compliance with s. 70(6). This is not such a case.

[52] Here, the hearing officer dealt with the s. 70(6) analysis as a matter of form, not substance. It is obvious he was aware of the requirement to conduct this analysis. But from this *Decision* it cannot be said there was any true substantive consideration of equitable principles and factors pursuant to s. 70(6). In this *Decision* regarding s. 70(6) the adjudicator did nothing more than provide a bald conclusion.

[53] This case falls into the same category as *R v C.R.C.,* 2009 SKCA 13, 324 Sask R 37 and *Abouhamra v Prairie North Regional Health Authority*, 2016 SKQB 293, 16 Admin LR (6th) 265. In those decisions it was determined more was required by way of explanation as to how the adjudicators' decisions were arrived at. The decision under appeal essentially provided no explanation at all. This *Decision* provides no rationale as to why the hearing officer felt it was just and equitable to grant an order for possession of the leased premises.

[54] Treating s. 70(6) as a stand-alone consideration, the hearing officer failed miserably at providing cogent reasons for granting the landlord its relief was just, or

equitable. This appeal would succeed purely on an analysis of how s. 70(6) was dealt with.

5. Did the hearing officer fail to ensure the hearing was conducted free of bias or the appearance of bias?

[55] I have already indicated I am not going to determine this appeal on the basis of bias. Tenant's counsel made a spirited argument in this regard, but the other issues govern the day and a decision on bias is unnecessary.

[56] Counsel for ORT specifically opposed a finding of widespread bias. At this hearing I indicated I would not be making such a finding in light of the other live issues on this appeal.

[57] However, there are some factors that could militate in support of the tenant's argument. With the right case, and the right facts, an allegation of bias might gain some traction.

[58] One such factor is the short shrift consistently given to the s. 70(6) analysis by this hearing officer and others. Generally speaking, that section will operate to tenants' benefit. By failing to give it proper consideration, tenants generally suffer.

[59] This is bolstered by other factors often appearing in the decisions of hearing officers. One is the citing an unreported, very short flyleaf fiat from Prince Albert as blanket support for the proposition that if a tenant does not show up for the hearing, the hearing officer does not have to pursue the tenant. A reasonable effort to make contact with a tenant would not be untoward. But coupled with this refusal to make any effort for tenants' benefit is the provision of something akin to advice to landlords as claimants. Rather than adjudicating squarely on the issues, a number of hearing officers point out to landlords that they may pursue monetary claims in separate proceedings and provide something of a blueprint in how to do so. This is very

interesting as those paragraphs of advice to landlords are more detailed than is the s. 70(6) analysis. This, coupled with conducting as many as 19 hearings in a day (see *Bell*), does not suggest that fairness, justice and impartiality are embraced.

[60] This is *obiter* but a case could be made that these hearings are not fair or at least have the appearance of unfairness about them. As I raised with ORT counsel during chambers, it may be that some ORT hearing officers would benefit from some in-house education. That is not for me to decide, but I have certainly been left with the impression that landlords and tenants are not treated even-handedly by all hearing officers.

[61] The ORT may want to seriously consider some of the current practices employed by some of its hearing officers: the strictly time-limited telephone hearings; the high number of hearings in a day (19 in *Bell*); the indiscriminate use of templates and inadequate standard language in decisions; the regular provision of reasons which fall far below the acceptable legal standard; the refusal to accommodate tenants while in the next breath giving advice for further claims to landlords. It could be open to a judge to question whether this delivers justice, equity and fairness.

[62] However, this is an argument and a decision for another day. All I am doing is alerting the ORT and its counsel that there could be future problems brewing.

Conclusion

[63] The appeal is granted. The *Decision* of the hearing officer dated April 17, 2024 is hereby quashed and any order or writ of possession issued pursuant to that *Decision* is also quashed. The matter is remitted back to the Office of Residential Tenancies for a new hearing, before a different hearing officer.

_____J.
R.W. DANYLIUK