See para. 27

Case Name:

Campbell v. Maytown Inc.

Between
David Campbell, Sherry Campbell, Garnet Campbell, Vera Campbell, George Chisholm, Greta Chisholm, Clara Cole, Barbara Decaire, Deanna Dellavedova, William Fraser, Judy Fraser, Robert King, Jodi Lagrandeur, David Pellett, Sheila Brown, Fred Mannell, Dwayne Kinsman, Shelley Kinsman, Fronie Sutherland, Pierce O'Dea, Robert Rozel, Audrey Thompson, Eleanor Joslin, Danny Thomson and Dianne Thomson, (appellants/applicants), and Maytown Inc., Karen McGie and Stuart McGie, (respondents/respondents)(71732/04)

[2005] O.J. No. 5948

204 O.A.C. 136

42 R.P.R. (4th) 304

2005 CarswellOnt 4005

Ontario Superior Court of Justice
Divisional Court - Newmarket, Ontario

J.G.J. O'Driscoll, P.T. Matlow and K.E. Swinton JJ.

Heard: March 9, 2005.
Judgment: November 11, 2005.

(38 paras.)

Landlord and tenant law -- The lease -- Essential services -- The appeal of the Ontario Rental Housing Tribunal's decision was dismissed -- The landlord was authorized under s. 115(5) of the Tenant Protection Act to collect invoices for water-testing of the water provided in the mobile home park -- Tenant Protection Act, s. 115(5).

Landlord and tenant law -- Regulation -- Rental tribunals -- Powers and decisions -- The appeal of

the Ontario Rental Housing Tribunal's decision was dismissed -- The landlord was authorized under s. 115(5) of the Tenant Protection Act to collect invoices for water-testing of the water provided in the mobile home park -- The Ontario Rental Housing Tribunal lacked the jurisdiction to make an award of exemplary or punitive damages -- Tenant Protection Act, s. 115(5).

The appeal of the decision of the Ontario Rental Housing Tribunal was dismissed -- The 16 appellants were tenants in a mobile home park -- When the water in the park was found to contain carcinogens, the landlord undertook water testing, and switched the park's water supply over to that of a neighbouring mobile home park -- The landlord then presented the tenants with invoices for the testing -- The appellants appealed to the Ontario Rental Housing Tribunal, which awarded abatement of rent, but refused to order rebates or exemplary or punitive damages -- The appellants now appealed -- HELD: The appeal was dismissed -- Section 115(5) of the Tenant Protection Act did not create a conflict with the effective controls on rents and charges in the TPA as the legislature had specifically authorized the landlord to levy and collect these amounts from the tenants -- As the tribunal had found, the tribunal had no jurisdiction to award exemplary or punitive damages.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 11(2)

Ontario Water Resources Act, R.S.O. 1990, c. O-40

Tenant Protection Act, 1997, S.O. 1997, c. 24, s. 35, s. 115, s. 157(1), s. 162, s. 193(1), s. 196

Counsel:

L.M. Flemming, for the appellants/tenants;

No one appeared for the respondents.

The following judgment was delivered by

J.G.J. O'DRISCOLL J.:--

I. NATURE OF PROCEEDINGS

1 The appellants appeal to the Divisional Court under the provisions of s. 196 of the **Tenant Protection Act**, 1997, S.O. 1997, c. 24 (**TPA**), from the orders, dated March 31, 2004, May 20,

2004 and June 15, 2004 of the Ontario Rental Housing Tribunal (Tribunal).

2 The appellants are sixteen (16) tenants who reside in ten (10) mobile homes located in a mobile home park ("park") at Kilworthy, Ontario.

3 The park contains approximately fifty-two (52) sites. The appellants were part of a group of twenty-five (25) individuals residing in fifteen (15) mobile home units in the park. The park, known as Muskoka Mobile Home Park, is owned by the respondents, Karen McGie and Stuart McGie, and was managed for them by the respondent, Maytown Inc., during the relevant period from February 2001, through to September, 2003.

II. BACKGROUND

4 The appellants/tenants own their own mobile homes and rent their lots from the park owners/landlord/McGies.

5 A separate "lot lease agreement" into which are incorporated "rules and regulations" (dated June, 1999) covered each site. Under the terms of the rules and regulations:

> "2. The Management is responsible for the following:
>
> 4. Maintaining the water supply, sewage disposal, fuel, drainage and electrical system in the mobile home park in a good state of repair; water will be supplied to each Mobile home site by Management."

The park's water supply was drawn from a shallow ground water well which was neither sampled nor treated in accordance with Regulation 459/00 (filed August 8, 2000) under the **Ontario Water Resources Act**, R.S.O. 1990, c. O-40.

6 On February 12, 2002, the Ministry of the Environment (MoE) issued a Provincial Work Order requiring the park owners to bring the system into compliance with Regulation 459/00. MoE notified the Muskoka-Parry Sound Health Unit (Health Unit) and issued a "Boil Water Advisory". An employee of the Health Unit notified the on-site manager at the park as well as the respondent management company, Maytown Inc. The Tribunal found that the notification of tenants was, in the words of counsel for the appellants, "haphazard". The landlord retained a firm to install a filtration system.

7 On March 28, 2002, the well was found to have become contaminated with carcinogens - the cause of which was never determined. The Health Unit issued a "Do Not Drink" notice for the park and instructed the on-site manager to deliver copies of the notice to each unit and display the notice in a public area. Again, in the words of counsel for the appellants, the Tribunal found that the notification of tenants was "haphazard". The Health Unit also advised Maytown Inc. to deliver

bottled water to all tenants.

8 The McGies managed to have the water system at Muskoka Mobile Home Park switched over to the well at the adjoining park, Big Pine Acres. The latter was subject to a "Boil Water" advisory which was lifted on October 1, 2003.

9 For the period in question, March 28, 2003, to October 1, 2003, the landlord invoiced the appellants for water-testing charges. Some appellants paid all or a portion of the invoices sent to them. Of those who paid, some applied to the Tribunal to have their money refunded alleging "illegal charges". The claims for refunds were dismissed.

10 The appellants applied to the Tribunal under several sections of the **TPA**. The appellants in each mobile home in this group filed at least two (2) applications to the Tribunal:

i. a T2 application About Tenants Rights, and
ii. a T6 Tenant Application About Maintenance.

11 The residents of six (6) of the fifteen (15) units also filed a T-1 Tenant application for rebate.

12 The relief sought by the tenants in the T2 and the T6 applications included:

(a) compensation for out-of-pocket expenses,
(b) rent abatement,
(c) punitive damages, and
(d) an administrative fine.

Those tenants who filed T1 applications sought a rebate of money paid by them to the landlord in respect of invoices for water testing charges.

13 The Tribunal:

1. assigned a Tribunal file to each mobile home rather than to each application, and
2. heard all the applications together over seven (7) days in October 2003 and January 2004 at Gravenhurst, Ontario together with the landlord's application for an "above - guideline increase" in rent.

14 On March 31, 2004, the Tribunal issued its order. On June 15, 2004, the Tribunal issued an amending order to correct a clerical error in the March 31, 2004, order.

15 The Tribunal issued one order which disposed of all the tenants' applications. The order included separate relief for each applicant unit. The Tribunal:

1. awarded compensation for out-of-pocket expenses and abatement of rent in each combined T2/T6 application, and

2. found that it lacked jurisdiction to award punitive damages, and
3. dismissed the six (6) applications (T1) for rebates of water-testing charges paid by those tenants.

16 On April 29, 2004, the tenants in eleven (11) units requested a review of the March 31, 2004 order. On May 13, 2004, the vice-chair of the Tribunal denied the tenants' requests to review the order under appeal.

III. THE APPEAL PROVISIONS

17 The appellants appeal under the following provisions of s. 196 of the **TPA**:

> "(1) Any person affected by an order of the Tribunal may appeal the order to the Divisional Court within 30 days after being given the order, but only on a question of law.
>
> .....
>
> "(4) If an appeal is brought under this section, the Divisional Court shall hear and determine the appeal and may,
>
> (a) affirm, rescind, amend or replace the decision or order; or
> (b) remit the matter to the Tribunal with the opinion of the Divisional Court.
>
> "(5) The Divisional Court may also make any other order in relation to the matter that it considers proper and make any order with respect to costs that it considers proper."

IV. GROUNDS OF APPEAL

a) Does the Tribunal have jurisdiction under the TPA to award punitive damages in an appropriate case?

18 The Tribunal's impugned order states at p. 7:

> "<u>Jurisdiction to award Punitive damages:</u>
>
> "Ms. Flemming submitted that the jurisdiction to award punitive damages are [sic] derived from ss. 34(1)(5) & 35(1)(e) of the **Tenant Protection Act**, which

provide that the Tribunal may 'make any other order that it considers appropriate' [sic]. Ms. Flemming filed several decisions of this Tribunal where the Members have adopted this reasoning and have awarded punitive damages. (SOT-00544 and EAT 03360) and several Court decisions (**Shaw v. Pajelle, [1985] O.J. No. 833, Daphne Whiten v. Pilot Insurance Company** [1996] O.J. No. 227, and **Manion v. Domirti-Madadi**). [1998] B.C.J. No. 2217,

"Ms. Armchuk-Ball submitted that the court decisions provided by Ms. Flemming were not on point because they pertain to the **Landlord Tenant Act** [sic] and not the current legislation. It is the Landlords' position that the Tribunal, as a creature of statute derives its authority solely from its enabling statute. Since the authority to award punitive damages is not specifically set out in the statute, Ms. Armchuk-Ball urges me to infer that the Tribunal does not have such authority. The Landlord provided a number of cases which support the view that the Tribunal does not have the jurisdiction to award punitive damages. (**Equiprop Management Ltd. v. Harris et al., [2000] O.J. No. 4552, O'Brien v. 718458 Ontario Inc.** and **Rideout v. Plasman**), [2000] O.J. No. 2166.

"Ms. Flemming in her submissions presented case law in which exemplary damages were awarded under the **Landlord Tenant Act**, [sic] the predecessor of the **Tenant Protection Act**. I do not find these cases compelling, as they are judicial decisions and were decided under different legislation. Courts, unlike Tribunals, retain residual jurisdiction to award punitive damages. I am not bound by other Rental Housing Tribunal decisions that have awarded punitive damages.

"Subsection 35(1)(c) of the **Tenant Protection Act** creates a jurisdiction in the Tribunal to impose an administrative fine on a Landlord for specific breaches of the **Act**. The purpose of exemplary or non-compensatory damages is to act as deterrence and to express the adjudicative body's disapproval of a certain course of conduct. I find that, by making specific provision for administrative fines, the legislature has expressly set out its view of how Landlord activity ought to be disapproved and deterred. Had the Legislature intended to confer the jurisdiction to award punitive damages, it would have done so explicitly. Subsection 35(1)(c), by which the Tribunal can order an administrative fine is the only section of the **Act** which clearly confers jurisdiction on the Tribunal to make a monetary award to express its disapproval of Landlord activity. It is for these reasons that I find the Tribunal does not have the jurisdiction to award punitive damages."

19 The Tribunal did not decide whether this case was an appropriate case to levy an administrative fine. However, the appellants in their "order requested" (Factum: [51]) do not ask that the question of an administrative fine be remitted to the Tribunal for decision.

20 Relevant sections of the **Courts of Justice Act**, R.S.O. 1990, c. C-43, as amended by S.O. 1996, c. 25, s. 9.

> "Section 11(2) The Superior Court of Justice has all the jurisdiction, powers and authority historically exercised by courts of common law in England and Ontario.

Relevant Sections of the **TPA**:

> '157(1) A tribunal to be known as the Ontario Rental Housing Tribunal in English and Tribunal du logement de l'Ontario in French is hereby established.
>
> '(2) The Tribunal has exclusive jurisdiction to determine all applications under this Act and with respect to all matters in which jurisdiction is conferred on it by this Act.
>
> '162.The Tribunal has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction under this Act.
>
> '193(1) The Tribunal may, where it otherwise has the jurisdiction, order the payment to any given person of an amount of money up to $10,000 or the monetary jurisdiction of the Small Claims Court in the area where the residential complex is located, whichever is greater.
>
> '(2) A person entitled to apply under this Act but whose claim exceeds the Tribunal's monetary jurisdiction may commence a proceeding in any court of competent jurisdiction for an order requiring the payment of that sum and, if such a proceeding is commenced, the court may exercise any powers that the Tribunal could have exercised if the proceeding had been before the Tribunal and within its monetary jurisdiction.'"

21 The Ontario Rental Housing Tribunal is a statutory administrative tribunal clothed with the jurisdiction given to it by the Legislature, either explicitly or by necessary implication, in the **TPA** or in other Ontario statutes. It has no inherent jurisdiction.

22 In **O'Brien v. 718458 Ontario Inc. et al.**, [1999] O.T.C. Uned. 21; [1999] O.J. No. 1270 (Gen. Div.), Thompson, J., said:

> "[16] The Ontario Court (General Division) has jurisdiction over all matters of substantive law (section 11 of the **Courts of Justice Act**), unless the court's jurisdiction is specifically ousted by clear and unequivocal legislation ...
>
> "[17] The Ontario Rental Housing Tribunal is created by the **Tenant Protection Act**. The jurisdiction of the Tribunal can only be derived from that legislation. The **Act** confers jurisdiction on the Tribunal to determine all applications made under the **Act** and with respect to all matters in which jurisdiction is conferred by the **Act**.
>
> "[18] The **Tenant Protection Act** does not govern all relationships between landlords and tenants. The **Act** does not grant general jurisdiction over landlords and tenants to the Tribunal.
>
> "[19] The **Act** catalogues particular situations, within the landlord and tenant relationship, over which the Tribunal has jurisdiction. In doing so, it presumes a valid tenancy agreement between the landlord and tenant. Nowhere does the **Act** confer jurisdiction on the Tribunal to determine whether there is a valid tenancy agreement."

23 In my view, the Tribunal has jurisdiction to order the payment of an amount of money up to $10,000.00 for special or compensatory damages, but has no jurisdiction to award exemplary or punitive damages.

24 Section 35(1) and 35(1)(a.1) of the **TPA** speak of "compensation", "costs that the tenant has incurred" and "reasonable out-of-pocket expenses". The latter phrase also appears in ss. 115 and 35(2)(b) of the **TPA**.

25 Accordingly, this ground of appeal fails.

b) Does s. 115(5) of the TPA permit a landlord to charge tenants for ongoing water testing in the absence of a contractual agreement with the tenant to this effect?

26 The Tribunal stated at p. 5:

> "Pursuant to s. 115(5) of the **Tenant Protection Act**;

> 'A landlord shall not charge for any of the following matters, except to the extent of the Landlord's reasonable out of pocket expenses incurred with regard to those matters ... (5) the testing of water or sewage in a mobile home park.'

> "Ms. Armchuk-Ball submitted that this section permits Landlords to charge reasonable out of pocket expenses for the testing of water or sewage in a mobile home park. There were no assertions made at the hearing that the water testing charges are unreasonable.

> "I find that the plain language of s. 115(5) of the **Act** permits Landlords to charge reasonable out of pocket expenses for the testing of water in a mobile home park. I find nothing in the **Act** which would require a Landlord to contract with Tenants for such a charge. Nor do I find a requirement that reasonable water testing charges should be suspended while the water supply is not potable.

> "Tenants Campbell, Robert Rozek, Audrey Thompson and Eleanor Joslin, Fred Mannell, Garnet Campbell and Dianne Thomson's request for a rebate under s. 140(1) of the **Act** is denied."

27 The only rental agreement filed as part of the material on the appeal is that of Sutherland/O'Dea. It is dated August 1, 2005. Section 115 of the **TPA** was introduced by S.O. 1997, c. 24, and was in force at the date of the signing of the rental agreement. Everyone is deemed to know the law.

28 There is no suggestion on the record that the landlord, at any time, waived, in whole or in part, the right given to a landlord under s. 115 of the **TPA**.

29 Section 115 of the **TPA**, by its wording, applies only to mobile home parks.

30 In her factum, and before us, counsel for the appellants submitted that the net result of allowing the landlord to collect reasonable out-of-pocket expenses for ... "5. the testing of water ..." (s. 115(5) of **TPA**) was to allow a landlord the right to charge rent "greater than the lawful rent permitted under this Part".

31 In my view, this submission cannot prevail because the Legislature has specifically authorized the landlord to levy and collect these amounts from the tenants.

32 In my view, s. 115(5) of the **TPA** does not create a conflict with the effective controls on rents and charges contained in ss. 129, 130, 132 and 139 of the **TPA**. Moreover, s. 2(3) of the **TPA**

states:

> "In interpreting a provision of this **Act** with regard to a mobile home park or a land lease community, if a provision in Part V conflicts with a provision in another Part of this **Act**, the provision in Part V applies."

33 On September 4, 1997 at a meeting of the Standing Committee on General Government, Mr. Steve Gilchrist, a government member, moved that s. 108 of the **Tenant Protection Act**, 1996, Bill 96 be amended by adding:

> "5. The testing of water or sewage in a mobile home park."

Hansard records that the following then took place:

> "**Mr. Gilchrist**: Quite simply, this is an amendment to remit a landlord who charged tenants out-of-pocket expenses incurred for the testing of water or sewage effluent in a mobile home park or land-lease community. A landlord would be allowed to collect this money directly from tenants.
>
> "**The Chair**: Debate? All those in favour? Opposed? This motion is carried."

34 My answer to the question posed in the second ground of appeal is "yes". Accordingly, this ground of appeal fails.

c) Does s. 115(5) apply to regular and ongoing water testing, when this activity, under present and previous legislation, is a mandated maintenance activity required of an owner of a "non municipal year-round residential system" (formerly a "water treatment or distribution system")?

35 In my view, the words of s. 115(5) of the **TPA** are not ambiguous nor obscure and should be given their plain meaning. Section 115(5) of the **TPA** has no qualifiers, exceptions or exclusions and is reinforced by s. 2(3) of the **TPA**.

36 My answer to the question posed in the third ground of appeal is "yes". Accordingly, this ground of appeal fails.

V. RESULT

37 The appeal is dismissed.

VI. COSTS

38 The appellants did not seek costs if they were successful, and requested that no costs be

ordered against them. No one appeared for the respondents and no material was filed by the respondents. There will be no order as to costs.

cp/e/qw/qlrxl/qlmrz/qltxp

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