

KWANLIN DÜN FIRST NATION JUDICIAL COUNCIL

Between

TERESA WARD

Applicant

And

**KWANLIN DÜN FIRST NATION
(DEPARTMENT OF COMMUNITY SERVICES)**

Respondent

Date of Hearing: April 11, 2015

Appearances:

Graham Lang
Teresa Ward

Counsel for Kwanlin Dün First Nation
Appearing on her own behalf

REASONS FOR DECISION

Introduction and Background

1. The Applicant, Teresa Ward, is a tenant residing in a house at 51 Hanna Crescent under a Tenancy Agreement dated January 7, 2014. The home is owned by Kwanlin Dün First Nation ("KDFN"), the landlord under the Tenancy Agreement. Ms. Ward's application to the Judicial Council is to seek a review of KDFN's notice to terminate the tenancy and evict her from the residence.
2. The termination and eviction notice is contained in a letter to Ms. Ward, dated February 23, 2015 (the "Termination Letter"), from Vincent Smarch, the KDFN Director of Community Services. In the letter, Mr. Smarch cited several grounds for terminating the tenancy under section 11 of the Tenancy Agreement. In particular, he referred to several subsections of section 11:
 - (c) requiring the Tenant to pay to the Landlord, upon receipt of invoice, the cost of repairing any damage to the premises caused by the willful or negligent

conduct of the Tenant or of any persons permitted on the premises by the Tenant;

(d) requiring the Tenant to conduct him/herself, and require other occupants and guests to conduct themselves, in a manner that will not disturb or be a nuisance to the other Tenants or neighbours;

(g) requiring the Tenant to promptly notify the Landlord of any defect in or damage to the premises and shall pay to the Landlord the cost of repairing damage resulting from the Tenant's failure to give such notice.

3. Citing the Landlord's right under the Tenancy Agreement to terminate the tenancy upon giving the Tenant 30 days' notice in writing, Mr. Smarch required Ms. Ward to vacate the premises by March 23, 2015 (which, it is noted, was only 28 days following the termination notice).
4. Several communications between KDFN and Ms. Ward regarding tenancy conditions preceded the February 23 Termination Letter. KDFN submitted the following communications into evidence at the hearing:
 - December 17, 2014: KDFN notice of inspection on December 19, 2014.
 - December 19, 2014: KDFN letter to Ms. Ward, with photographs attached, reporting on damage found in the house and reminding her of the Tenant's responsibility to pay for damage repair. A handwritten notation on the letter indicates that it was hand delivered on December 23, 2014.
 - December 24, 2014: Ms. Ward's letter to KDFN Housing Department to explain her circumstances and willingness to accept responsibility for repairing damage. She also indicated that she was taking steps to repair the damage to the home and to involve her teenage and adult children, who had some responsibility in relation to the damage to the premises.

- January 27, 2015: KDFN Community Services letter to Ms. Ward to give notice of a complaint received from neighbours concerning noise, disturbance and intoxicated persons on the premises. This letter contained a reminder of the Tenant's responsibilities under the Tenancy Agreement concerning appropriate conduct in and around the premises.
 - February 16, 2015: KDFN Community Services letter to Ms. Ward again giving notice of another noise/disturbance complaint. The content of this letter was substantially the same as that of the January 27 letter.
 - February 17, 2015: KDFN Community Services letter to Ms. Ward, entitled "3rd Final Noise/Community Disturbance Complaint Notice", again containing substantially the same notice of complaints regarding noise and disturbance of neighbours.
5. After receiving the Termination Letter, Ms. Ward wrote to Mr. Smarch on February 27 (Exhibit #5) to appeal Community Services' termination decision. In her letter, she explained again the family circumstances, including her efforts to encourage her children to assume more responsibility in their lives, and she pleaded for a second chance. She cited a passage from the Preamble of the KDFN Constitution: *"To protect our youth and children, instill in them an awareness of their aboriginal identity and values, promote their education and enhance their future."* She concluded her appeal letter by implying that this constitutional value or objective would not be achieved by making a family of five people homeless, and she asked for a further opportunity to meet and discuss the situation with Community Services personnel.
6. In response to this letter, Mr. Smarch wrote back to Ms. Ward on March 2, 2015, (Exhibit #7) confirming that he had received the letter of appeal, that it would be reviewed by Community Services, and that she could expect a response by March 12.

7. On March 12, 2015, Mr. Smarch wrote again to Ms. Ward (Exhibit #8) to advise her that KDFN Community Services, after having reviewed her appeal letter, had decided to confirm termination of her tenancy. In the first paragraph of that letter, Mr. Smarch indicated that Ms. Ward would have 10 days to appeal the decision to the Judicial Council, and in the second paragraph he indicated that her letter of appeal should be delivered to the Judicial Council no later than March 26, which was 14 days after that letter. Mr. Smarch further stated that if Ms. Ward failed to file her appeal by that stated deadline, then she would be required to vacate the premises by April 30, 2015.
8. Ms. Ward filed her Notice of Application with the Judicial Council on March 20, 2015, which forestalled her requirement to vacate the premises by April 30, pending the Judicial Council's decision in this matter.

The Parties' Positions

9. KDFN Community Services was represented at the hearing by legal counsel, Mr. Graham Lang, who indicated that KDFN would be calling no witnesses and would rely on the documents submitted into evidence and forming part of the record before the Judicial Council.
10. Mr. Lang stated that KDFN's move to enforce the Tenancy Agreement with Ms. Ward, similar to steps taken in recent cases of other defaulting tenants, is part of KDFN Chief and Council's initiative to enforce more strictly the tenancy agreements in place with tenants occupying KDFN housing stock. He indicated that the First Nation has been experiencing significant financial losses due to tenants having breached various obligations under the Tenancy Agreement. Thus, the recent enforcement initiative is aimed at stopping or reducing the financial losses by demonstrating an expectation that tenants be held responsible.
11. KDFN's counsel submitted the Judicial Council's role in reviewing Community Services' decisions to terminate residential tenancies is to determine merely whether the decision was lawful and reasonably made. Mr. Lang emphasized review proceedings before the Judicial Council should constitute something more than simply

a second chance for tenants in breach of their tenancy obligations. If that were the case, he suggested it would not be helpful to engendering a sense of real responsibility among KDFN housing tenants for the homes they occupy.

12. For her part, Ms. Ward did not dispute the factual grounds cited for the tenancy termination. She acknowledged that some damage had been done to the premises, which she attributed mainly to her daughter's unwelcome boyfriend. She stated she was working on arrangements to get the damage repaired.
13. As for the complaints about noise and disturbance in the neighbourhood, she also admitted that had been occurring while she was working out of town, but she said she is now living back at home and is able to exercise greater control over her teenage and adult children who are co-occupants of the home.
14. Ms. Ward noted that the incidents underlying the grounds for termination all occurred in a relatively short period of time---from December 2014 until February 2015--- against which she contrasted approximately nine years of otherwise trouble-free tenancy in the premises.
15. As part of her appeal, she put several issues before the Judicial Council, both in writing and orally. In a document entitled "Notice of Appeal", dated February 28, 2015 (Exhibit #6), Ms. Ward cited lack of procedural fairness as her ground of appeal, but did not elaborate as to precisely what she meant by that allegation.
16. Ms. Ward's next written submission of issues is contained in her formal Notice of Application, dated March 20, 2015, in which she cites a breach of Yukon's *Landlord and Tenant Act* as a further ground for review of Community Services' decision to terminate her tenancy.
17. In her oral submissions, Ms. Ward testified to KDFN failing to uphold certain of its property maintenance obligations under the Tenancy Agreement, indicating that if KDFN fails to live strictly by its contractual obligations, then it shouldn't expect strict compliance by tenants.

The Judicial Council's Jurisdiction

18. The Kwanlin Dün First Nation Constitution, section 56, grants jurisdiction to the Judicial Council to review KDFN administrative decisions and, more generally, to exercise any authority specifically granted elsewhere in the Constitution or by any KDFN law.
19. Further, under section 35(4) of the KDFN *Judicial Council Act* (the "Act"), the Judicial Council has exclusive original jurisdiction to deal with applications by citizens for a review of a KDFN "administrative decision". Section 2 of the Act defines "*administrative decision*" as a final decision made by a KDFN "board, commission or other tribunal", which is defined as "*any body, person or persons exercising or purporting to exercise jurisdiction or powers*" conferred by KDFN law.
20. The Judicial Council concludes these definitions encompass the decision made by KDFN Community Services to terminate Ms. Ward's tenancy, and therefore the Judicial Council has jurisdiction to deal with this matter, including the power to either affirm or set aside the administrative decision, as well as to issue certain forms of declaratory relief, if the Judicial Council deems it appropriate to do so in the circumstances.

KDFN Constitutional Context & Standard of Review

21. Before addressing the specific issues raised by the parties in this proceeding, it is appropriate to consider the larger constitutional context within which KDFN creates laws and acts in relation to its Citizens. As stated in the Constitution, it is the supreme law of the Kwanlin Dün First Nation, and any law enacted by the KDFN that is found to be inconsistent with the Constitution may be held to be of no force and effect.
22. As constitutional documents are intended to be interpreted in an expansive and purposive manner, narrow or technical interpretations should be avoided. When one considers KDFN legislation and administrative action or decisions, these must be assessed within the broader context of the principles and values set out in the Constitution. Therefore, when considering whether any KDFN administrative decision

or action has been done reasonably or lawfully, one must include the principles and values of the Constitution as part of the analysis. Similarly, those persons exercising administrative decision-making powers also need to consider their actions in light of those same constitutional principles and values, since the decision-making authority for KDFN officials must be found, explicitly or implicitly, within KDFN law.

23. In matters involving the review of an administrative decision by KDFN authorities, the Judicial Council's standard of review will, according to the nature of the issues presented, entail either a reasonableness standard or a correctness standard, both of which apply in accordance with common law principles of judicial review. Where the principal question to be addressed is a legal question, then the standard is correctness; whereas when the issue involves a question of mixed fact and law, then the standard of reasonableness may be applicable.

24. For the reasons discussed below, the issues before the Judicial Council in this case are predominantly legal in nature, and so the standard applied is correctness.

Analysis -- Procedural Error

25. The central issues in Ms. Ward's application to the Judicial Council relate to the procedure by which KDFN Community Services acted to terminate her tenancy, and in this regard, the starting point for the analysis is the Tenancy Agreement itself. Since a contractual agreement represents a bilateral relationship, both parties to the agreement are expected to honour the obligations, both expressed and implied, imposed by the agreement.

26. In her Notice of Appeal, Ms. Ward claims a lack of procedural fairness associated with the process by which Community Services terminated her tenancy and gave her notice of eviction. Although not detailing specifically the procedural errors to which she referred, Ms. Ward pointed out that KDFN had failed to abide by its own obligations in several respects, while at the same time citing her breaches as grounds for terminating the tenancy. Since paragraph 24 of the Tenancy Agreement sets out the appeal procedures, the Judicial Council takes this as the basis for Ms. Ward's concerns.

27. Paragraph 24 of the Tenancy Agreement states that a tenant who has been served with notice of termination may appeal in writing to the Kwanlin Dūn Housing Committee within 10 days of receipt of the notice. It then states that the appeal will be heard at the next Housing Committee meeting, where the tenant may appear in person or by agent to make submissions. Interestingly, the Tenancy Agreement goes on to state the Housing Committee's decision is final and binding, without referring to any recourse to the Judicial Council, as provided elsewhere in KDFN law.

28. While there was little evidence at the hearing concerning the status of the Housing Committee, legal counsel for KDFN did concede the Housing Committee is not currently functioning as an appeal body for the purposes of the Tenancy Agreement. This fact alone would seem to constitute a breach on the part of the landlord for not providing a contractually-agreed appeal mechanism for the benefit of tenants. However, in responding to a question from one of the Judicial Council members, Mr. Lang stated that the Housing Committee's appeal role was being fulfilled instead by a committee made up of KDFN senior directors comprising the Directors of Community Services, Justice and Health. There was no evidence put before the Judicial Council to indicate any lawful basis by which this ad hoc committee could replace the Housing Committee for the purposes of appeals under the Tenancy Agreement.

29. Moreover, since Vincent Smarch, the Director of Community Services, was the original decision-maker who terminated Ms. Ward's tenancy, his presence on an appeal committee would in any event give rise to concerns about bias and procedural fairness at that level of appeal.

30. On February 27, 2015, Ms. Ward sent a letter to Community Services [Exhibit # 5] in which she appealed the decision to terminate her tenancy. In his March 12 response, Vincent Smarch stated that Community Services had reviewed her letter of appeal and decided to confirm the tenancy termination. Mr. Smarch stated Ms. Ward would have 10 days to appeal that decision to the Judicial Council. It is noteworthy that Ms. Ward was not given an opportunity to attend and make representations in person in connection with her appeal, as would have happened if her appeal had been considered by the Housing Committee under paragraph 24 of the Tenancy Agreement.

31. Without the Housing Committee hearing appeals, it appears that KDFN Community Services confused the Housing Committee's appellate role with that of the Judicial Council for the purposes of paragraph 24 of the Tenancy Agreement. This conclusion is based on Mr. Smarch stating that the time for filing an appeal would be 10 days, which is the time referred to in paragraph 24 of the Agreement, but much less than the 30 days allowed under the *Judicial Council Act* for appeals to the Judicial Council.
32. Community Services' approach to terminating Ms. Ward's tenancy and issuing the eviction notice is wrong in two respects. First, KDFN cannot unilaterally take away the first level of appeal provided to the tenant by paragraph 24 of the Tenancy Agreement. By failing to have in place a properly constituted and independent Hearing Committee to hear tenant appeals, KDFN itself breached the Tenancy Agreement, thus depriving Ms. Ward of her first level of appeal.
33. In the face of this breach, it is no answer to say that by referring Ms. Ward to the Judicial Council for the purpose of her appeal, KDFN was providing an adequate substitute for the Hearing Committee, as Ms. Ward would have had a second level of appeal to the Judicial Council as a right in law.
34. It is also notable that the Tenancy Agreement purports to make the Housing Committee's decision final and binding; whereas the jurisdiction of the Judicial Council, both under the KDFN Constitution [section 56 (1)(e)] and the *Judicial Council Act* [section 35 (4)] allows the Judicial Council to review any KDFN administrative decision at the request of a citizen affected by that decision. By stating the decision of the Housing Committee (assuming it were properly constituted and functioning) is final and binding, the Tenancy Agreement is both misleading and contrary to KDFN law.
35. The second error in Mr. Smarch's March 12 letter was to state that Ms. Ward had only 10 days to appeal the termination decision to the Judicial Council. In this regard, he appears to have confused the appeal period of 10 days under paragraph 24 of the Tenancy Agreement with the lawful appeal period of 30 days provided under section 40 of the *Judicial Council Act*. While it is not the Judicial Council's purpose in this decision to direct KDFN Community Services to re-draft its standard form Tenancy

Agreement, it might be wise for Community Services to review all aspects of the Tenancy Agreement to ensure it is not in conflict with KDFN law.

36. Because of KDFN's failure to provide Ms. Ward with the first level of appeal to the Housing Committee, as required by the Tenancy Agreement, KDFN itself was in a position of contractual breach and was therefore not in a good position to enforce strictly Ms. Ward's obligations relative to the breaches upon which the termination was grounded. Under the circumstances, it was not lawful, fair nor reasonable for KDFN Community Services to proceed in the way it did. As a result, the proper remedy is to set aside the administrative decision to terminate Ms. Ward's tenancy.

Yukon's Landlord and Tenant Act

37. In her Notice of Application to the Judicial Council, Ms. Ward also claimed relief based on the alleged applicability of Yukon's *Landlord and Tenant Act*, which states that evictions may not occur in the months of December, January and February. At the hearing, however, she did not argue this point, nor did Mr. Lang, on behalf of KDFN, deal with the issue.

38. As the Judicial Council has decided to allow Ms. Ward's application on other grounds, it is unnecessary at this time to deal with the question of the applicability of laws of general application in the circumstances of this case. It is better to leave that issue for another occasion.

Conclusion

39. For the reasons expressed above, the Judicial Council finds KDFN Community Services' decision to terminate the Tenancy Agreement and evict Ms. Ward and her children from their home should be set aside by reason of lack of procedural fairness, KDFN's failing to fulfill its obligations under the Tenancy Agreement, and inconsistency with KDFN law.

40. While the standard of review applied is correctness, the Judicial Council's decision could also be based on the standard of reasonableness when one considers the limited timeframe within which the tenancy breaches of the Tenancy Agreement occurred against the harsh consequences imposed by KDFN, particularly in light of KDFN's own failures to honour its obligations under the Tenancy Agreement.
41. No one should conclude that the intent or effect of this decision is to condone damage to KDFN residential premises or to create a nuisance to neighbours due to excessive noise and disturbance. Nor does this decision affect any responsibility or legal liability Ms. Ward may have in respect of the damage alleged to have occurred to the home during her tenancy.
42. The import of this decision is to emphasize that the rights, obligations and enforcement procedures contained in KDFN's standard form of Tenancy Agreement must be interpreted correctly and applied fairly in accordance with the KDFN Constitution and other applicable legislation.
43. As a final comment, the Judicial Council notes that the community values and ideals expressed in the KDFN Constitution might be better realized if KDFN decision-makers were to communicate more pro-actively with citizens involved in problematic situations with the First Nation. While rigorous administrative action may be appropriate in cases where collaborative efforts have failed, such action taken from the outset of a problem may not fulfill the values expressed in the Constitution. Although this observation does not form the basis of the present decision, the Judicial Council feels it worthy of consideration for future KDFN administrative action and decision-making.

Order issued April 11, 2015, and Reasons for Decision reserved until this date: May 23, 2015,

BY THE FOLLOWING MEMBERS OF KWANLIN DÜN FIRST NATION JUDICIALCOUNCIL:

Original signed by Debra Thibodeau

Debra Thibodeau, Chair

Original signed by Kristel Vance

Kristel Vance

Original signed by Judith Kuster

Judith Kuster

Original signed by William D. Webber

William D. Webber