

SUPREME COURT OF YUKON

Citation: *Kwanlin Dün First Nation v Kwanlin
Dün First Nation Judicial Council,*
2016 YKSC 35

Date: 20160802
S.C. No. 15-AP012
Registry: Whitehorse

Between:

KWANLIN DÜN FIRST NATION

Appellant

And

KWANLIN DÜN FIRST NATION JUDICIAL COUNCIL, THE ATTORNEY GENERAL
AND SOLICITOR GENERAL OF THE KWANLIN DÜN FIRST NATION JUDICIAL
COUNCIL and THERESA WARD

Respondents

AND:

15-AP013

Between:

KWANLIN DÜN FIRST NATION

Appellant

And

KWANLIN DÜN FIRST NATION JUDICIAL COUNCIL, THE ATTORNEY GENERAL
AND SOLICITOR GENERAL OF THE KWANLIN DÜN FIRST NATION JUDICIAL
COUNCIL and HONEY-STARR SIDNEY

Respondents

Before Mr. Justice R.S. Veale

Appearances:

Lino Bussoli

Counsel for Kwanlin Dün First Nation

Richard A. Buchan

Counsel for Kwanlin Dün First Nation Judicial Council

Lauren Whyte

Counsel for Teresa Ward

Honey-Starr Sidney

No one appearing

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an appeal by the Kwanlin Dün First Nation (“KDFN”) pursuant to s. 58 of the *Kwanlin Dün First Nation Judicial Council Act*, (the “*Judicial Council Act*”).

[2] KDFN appeals to dismiss two decisions of the Kwanlin Dün First Nation Judicial Council (the “Judicial Council”), dated April 10 and 11, 2015, setting aside KDFN’s termination of the tenancy agreements of Ms. Ward and Ms. Sidney (the “tenants”) for their residences on Settlement Land. The two appeals are based on similar facts and these reasons apply to both tenants.

[3] Counsel for KDFN submits that the Judicial Council has no jurisdiction to decide a matter relating to the *Landlord and Tenant Act*, R.S.Y. 2002, c. 131 (“*LTA*”), a since-amended statute which applies to this case, or the *Residential Landlord and Tenant Act*, S.Y. 2012, c. 20 (the “*RLTA*”), the current statute, as there is presently no KDFN law governing landlord and tenant relationships on KDFN settlement land.

[4] Counsel for the Judicial Council submits that the matter is one of reviewing an administrative decision and is within the jurisdiction of the Judicial Council pursuant to the Constitution of the Kwanlin Dün First Nation (the “*KDFN Constitution*”) and the *Judicial Council Act*.

THE FACTS

[5] Both tenants had written tenancy agreements with KDFN for their residences. Both tenants were terminated by written notice from KDFN. Neither tenants disputed the factual basis for the termination of their tenancies. They did however appeal the terminations to the Community Services Department of KDFN.

[6] The relevant provisions of the tenancy agreements are clauses 23 and 24 which provide as follows:

23. Termination

Either the Landlord or the Tenant may terminate this Tenancy Agreement by giving thirty (30) days notice in writing, or fourteen (14) days notice in writing for a serious breach of the Tenancy Agreement.

24. Breach and Appeal

Any breach of the terms or promises of this Agreement is cause for termination of the Lease Agreement. Any condoning by the Landlord of any breach of any of the terms or promises of this agreement by the Tenant shall not operate as a waiver of the Landlord's rights to act on any subsequent breach.

Upon being served with a notice of Termination of Tenancy, the Tenant has the right to appeal this to the Kwanlin Dun Housing Committee within 10 days of receipt of the notice, which appeal should be in writing and may be delivered to the Housing Department. The appeal will be heard at the next Housing Committee Meeting, which the Tenant may appear in person or by agent. The Housing Committee's decision is final and binding on the parties to the appeal.

[7] I note that the "final and binding" words in clause 24 were not raised as an issue in these proceedings, although the Judicial Council addressed them in their written reasons.

Reasons for Decision of Judicial Council

[8] Both Reasons for Decision address in detail the communications between the respective tenant and KDFN, including the reasons given for the termination and the content of the tenants' appeals to the Community Services department of KDFN. The Judicial Council observed in its reasons that, despite clause 24 of the tenancy

agreements, there was no Housing Committee constituted at the time of the eviction notices. It seems, rather, that the appeal role of the Housing Committee was being fulfilled by a three-member committee made up of the Directors of Community Services, Justice and Health (para. 28 of the *Ward* decision).

[9] KDFN Community Services confirmed the termination of tenancy in each case.

[10] The tenants' Notices of Application to the Judicial Council were noted to have forestalled the requirement to vacate the premises.

The Ward Case

[11] At the hearing of Ms. Ward's case, counsel for KDFN submitted that the role of the Judicial Council "in reviewing Community Services decisions to terminate residential tenancies is to determine merely whether the decision was lawful and reasonably made".

[12] Ms. Ward did not dispute the factual grounds cited for the tenancy termination but raised "procedural fairness" generally. In her oral submissions, Ms. Ward also submitted that KDFN did not live up to its contractual obligations.

[13] The Judicial Council described its jurisdiction as follows:

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, 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.

[14] Given its determination that the appeal was largely on a question of law rather than of fact or mixed fact and law, the Judicial Council determined the review was on a standard of correctness.

[15] Under the heading “Analysis – Procedural Error”, the Judicial Council found that KDFN erred by not providing a hearing for Ms. Ward before a “properly constituted and independent Hearing Committee”. It found that the effect of the KDFN process was to deny Ms. Ward access to a first level of appeal and also found that since the Director of Community Services was the original decision-maker, his presence on any appeal committee would “give rise to concerns about bias and procedural fairness at that level of appeal” (para. 29). Judicial Council also found it noteworthy that Ms. Ward was not given an opportunity to attend before the panel and make representations in person.

[16] The Judicial Council as well concluded that the statement in para. 24 of the Tenancy Agreement, i.e. that the decision of the Housing Committee was “final and binding”, was both misleading and contrary to KDFN law.

[17] The Judicial Council set aside the Community Services decision to terminate Ms. Ward’s tenancy “by reason of lack of procedural fairness, KDFN’s failing to fulfill its obligations under the Tenancy Agreement and inconsistency with KDFN law” (para. 39).

[18] The issue of the applicability of the *LTA* was addressed by the Judicial Council in relation to Ms. Ward's submission that pursuant to the legislation, evictions were prohibited in the months of December, January and February. The Judicial Council declined to deal with the applicability of the *LTA* as a law of general application as it was unnecessary to do so given its decision to set aside her eviction for a lack of procedural fairness.

The Sidney Case

[19] The Reasons for Decision in the case of Ms. Sidney are the same as in Ms. Ward's case with respect to the issue of procedural fairness. However, the Judicial Council also addressed Ms. Sidney's incarceration, the voluntary care agreement for her children with Family and Children's Services, and her subsequent rehabilitation in the context of KDFN "Constitutional values".

[20] The Judicial Council, in its Analysis in paras. 19-21, stated its jurisdiction over the decision made by KDFN Community Services to evict Ms. Sidney in essentially the same terms as in the Ward decision at paras. 18-20. In terms of the application of the KDFN Constitution to the eviction decision, at para. 23 Judicial Council wrote:

Constitutional documents are intended to be interpreted in an expansive and purposive manner. When one considers KDFN legislation and administrative action or decisions, these must be assessed within the context of the principles and values set out in the Constitution. Therefore, when considering whether any KDFN administrative decision or exercise of discretion 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.

[21] The Judicial Council set aside the decision to terminate Ms. Sidney's tenancy both because of the procedural unfairness as well as on additional grounds relating to whether or not she had notified KDFN of her incarceration and on the basis of a flawed exercise of the Director's discretion.

[22] Under the heading "Constitutional Values", the Judicial Council noted a number of principles and values expressed in the KDFN Constitution and made the following ruling:

32. It must be remembered that the eviction would also impact significantly on Ms. Sidney's children, and the comments in the support letters demonstrate clearly the potential adverse impacts on the well-being of Ms. Sidney and her children which would follow their being evicted from their home. These adverse effects are not consistent with a number of the above-mentioned core values and societal goals in the KDFN Constitution.

33. The Judicial Council notes that the Constitution also obliges the KDFN government and its agencies to "*administer in an effective and efficient manner all services and programs provided to Citizens*" [section 4(2)(c)], which would suggest KDFN must take a balanced approach, considering both the well-being of individual Citizens as well as the well-being of Kwanlin Dün Citizens as a group. Within the entire body of evidence received by the Judicial Council in the course of the hearing, there was nothing to suggest Community Services personnel exercised any kind of balanced approach to dealing with Ms. Sidney's difficult situation. Rather, the evidence suggests Community Services' primary objective was to enforce strictly the Tenancy Agreement with a view to "regularizing" the KDFN housing stock, as indicated by KDFN counsel in his submissions. However, this approach apparently did nothing to address the Constitutional values related to the well-being of those individual Citizens most directly and seriously impacted by Community Services' strictly enforcing the Tenancy Agreement.

34. The Judicial Council considers this evident failure to consider competing constitutional values in the

circumstances of the case to represent a flawed and wrongful exercise of KDFN discretion, which may also be considered unreasonable.

35. A reasonable alternative course of action, which would likely be more consistent with the goals of the Constitution, might have been to work proactively with Ms. Sidney to address the specific circumstances of the breaches of the Tenancy Agreement, perhaps with a view to developing a plan which would balance both the interests of Ms. Sidney and her family in maintaining a stable residence with KDFN's reasonable concern to protect its housing stock for the benefit of its citizens. If Ms. Sidney's circumstances were otherwise, and she had perhaps been guilty of numerous infractions and breaches of the Tenancy Agreement over an extended period of time, then it might have been reasonable for Community Services to be more rigorous in enforcing strictly the Tenancy Agreement. However, the circumstances here were not so extreme, and it would have been reasonable for Community Services to deal with the problem in a more humane manner.

BACKGROUND

Yukon First Nations Self-Government Act

[23] On May 29, 1993, the Council for Yukon Indians, the Government of Canada and the Government of Yukon signed the Umbrella Final Agreement ("UFA").

[24] The UFA was ratified by the parties and provided the framework for the settlement of individual Yukon First Nation land claim agreements and self-government agreements.

[25] Whenever a Yukon First Nation signs a Final Agreement, the provisions of the UFA are incorporated into that Final Agreement. Chapter 24 of the UFA states that Canada and Yukon shall negotiate and conclude First Nation Self-Government Agreements appropriate to the circumstances of the affected Yukon First Nation.

[26] The *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35 (the “SGA”), was enacted by the federal government to give effect to the negotiated self-government agreements. Section 9 states that “the powers of a first nation ... shall be exercised in accordance with the first nation's constitution and ... by the bodies and persons specified in the constitution”. The *Act* also makes it clear that a self-governing First Nation can enact laws, applicable throughout Yukon, with respect to dispute resolution outside of the courts and the provision of social and welfare services to its citizens. A First Nation can also legislate with respect to the use and administration of its settlement land. However, federal and territorial laws continue to apply to First Nation citizens and on settlement land, unless there is a First Nation enactment that makes provisions for a matter that would otherwise be governed by territorial legislation (ss. 16 and 19). In other words, the laws of the Yukon, including the territorial landlord and tenant legislation, apply to KFDN citizens and on KFDN settlement land, until KFDN legislates with respect to the same subject matter, in which case, the KFDN law supersedes the territorial law of general application.

[27] This Court is given jurisdiction to resolve disputes in s. 15 of the *Yukon First Nations Self-Government Act*:

Supreme Court of Yukon

15. (1) For greater certainty and subject to section 14, the Supreme Court of Yukon has jurisdiction in respect of any action or proceeding arising out of this Act or out of a self-government agreement of a first nation ...

Kwanlin Dün First Nation Self-Government Agreement

[28] The KFDN Self-Government Agreement was made on February 19, 2005, and includes the following:

PART I – GENERAL

...

2.0 PRINCIPLES

- 2.1 The Kwanlin Dun First Nation has traditional decision-making structures, institutions and practices and desires to integrate those structures, institutions and practices with a contemporary form of government.

...

8.0 INTERPRETATION AND APPLICATION OF LAW

...

- 8.4 Common law conflict of laws principle shall apply where a conflict of laws issue arises unless:

...

8.4.2 in the case of a conflict of laws issue arising between a law enacted by the Kwanlin Dun First Nation and a Law of General Application, the Kwanlin Dun First Nation and Government have otherwise agreed.

...

- 8.11 The Supreme Court of the Yukon Territory shall have jurisdiction in respect of any action or proceeding arising out of this Agreement or Self-Government Legislation.

...

PART II – THE KWANLIN DUN FIRST NATION

...

**10.0 THE KWANLIN DUN FIRST NATION
CONSTITUTION**

10.1 The Constitution of the Kwanlin Dun First Nation shall, in a manner consistent with this Agreement, provide for:

...

10.1.2 the governing bodies of the Kwanlin Dun First Nation and their composition, membership, powers, duties and procedures;

...

PART III – KWANLIN DUN FIRST NATION LEGISLATION

13.0 LEGISLATIVE POWERS

13.1 The Kwanlin Dun First Nation shall have the exclusive power to enact laws in relation to the following matters:

13.1.1 administration of Kwanlin Dun First Nation affairs and operation and internal management of the Kwanlin Dun First Nation

...

13.2 The Kwanlin Dun First Nation shall have the power to enact laws in relation to the following matters in the Yukon:

...

13.2.11 provision of services to Citizens for resolution of disputes outside the courts;

...

13.5.0 Laws of General Application

13.5.1 Unless otherwise provided in this Agreement, all Laws of General Application shall continue to apply to the Kwanlin Dun First Nation, its Citizens and Settlement Land.

...

13.5.3 Except as provided in 14.0 and 28.0, a Yukon Law of General Application shall be inoperative to the extent that it provides for any matter for which provision is made in a law enacted by the Kwanlin Dun First Nation.

...

13.5.5 Where the Kwanlin Dun First Nation reasonably foresees that a law which it intends to enact may have an impact on a Yukon Law of General Application, the Kwanlin Dun First Nation shall Consult with the Yukon before enacting the law.

13.5.6 Where the Commissioner in Executive Council is of the opinion that a law enacted by the Kwanlin Dun First Nation has rendered a Yukon Law of General Application partially inoperative and that it would unreasonably alter the character of a Yukon Law of General Application or that it would make it unduly difficult to administer that Yukon Law of General Application in relation to the Kwanlin Dun First Nation, Citizens or Settlement Land, the Commissioner in Executive Council may declare that the Yukon Law of General Application ceases to apply in whole or in part to the Kwanlin Dun First Nation, Citizens or Settlement Land. (my emphasis)

The Kwanlin Dün First Nation Constitution

[29] Section 21 of the KDFN Constitution provides for five branches of the KDFN: the General Assembly, the Elders Council, the Youth Council, Chief and Council and the Judicial Council.

[30] Chapter 8 of the KDFN Constitution (ss. 53 – 57) deals specifically with the Judicial Council, its composition, jurisdiction and procedures. Section 56 provides as follows:

56. Powers and Responsibilities of the Judicial Council

- (1) The Judicial Council is responsible and has authority to perform any of the following functions:

(a) exercise any authority specifically assigned to it elsewhere in this Constitution, or in Kwanlin Dün First Nation Law;

...

(c) consider an application by a Citizen for a review of any action by the Kwanlin Dün First Nation that may result in the violation of the rights and freedoms of the Citizens of the Kwanlin Dün First Nation, and make a declaratory order either

- (i) affirming the action, if it does not result in the violation of the rights and freedoms of the citizens of the Kwanlin Dün First Nation
- (ii) setting aside the action to the extent required to alleviate the violation of the rights and freedoms of the Citizens of the Kwanlin Dün First Nation.

...

(e) consider an application by a Citizen for a review of an administrative decision by the Kwanlin Dün First Nation affecting that Citizen, and make a declaratory order either:

- (i) affirming the administrative decision; or
- (ii) setting aside the administrative decision. (my emphasis)

The Judicial Council Act

[31] The *Judicial Council Act* is a KDFN law enacted on October 4, 2005. In Part 6, it provides for both concurrent and exclusive original jurisdiction to the Judicial Council as follows:

relief against Nation and Council

33. Except as otherwise provided in the *Constitution*, this Act or any other Kwanlin Dün First Nation law, the Judicial Council has concurrent original jurisdiction in all cases in which relief is claimed against the Kwanlin Dün First Nation or the Council.

cases

34. Without restricting the generality of section 33, the Judicial Council has concurrent original jurisdiction, except as otherwise provided by law, in all cases in which

...

- (2) the claim arises out of a contract entered into by or on behalf of the Kwanlin Dün First Nation or the Council and a Citizen;

...

exclusive jurisdiction

35. The Judicial Council has exclusive original jurisdiction to hear and determine the following matters:

...

- (2) an application by a Citizen for a review of any action by the Kwanlin Dün First Nation;

...

- (4) an application by a Citizen for review of an administrative decision of Kwanlin Dün First Nation affecting that Citizen;

...

*relief in favour of the Kwanlin Dün First Nation or Council
against officer*

37. The Judicial Council has concurrent original jurisdiction:

(1) in proceedings of a civil nature in which the Kwanlin Dün First Nation or Council claims relief against a Citizen.

...

(3) to issue a declaratory order in the nature of an injunction, *certiorari*, prohibition, *mandamus* or *quo warranto*, or grant declaratory relief against any board, commission or other tribunal.

remedies to be obtained on application

38. The remedies provided for in sub-section 37(3) may be obtained only on an application for judicial review made under section 39. (my emphasis)

[32] Judicial Council has the following judicial review jurisdiction:

application for judicial review

39. An application for judicial review may be made by the Attorney General, the Solicitor General or by anyone directly affected by the matter in respect of which relief is sought.

...

powers

41. On an application for judicial review, the Judicial Council may:

(1) order the Council, a board, commission or other tribunal to do any any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or,

- (2) declare invalid or unlawful, or quash, or set aside and refer back for determination in accordance with such and directions as it considers to be appropriate, or prohibit or restrain a decision, order, act or proceeding of the Council, a board, commission or other tribunal.

grounds of review

42. The Judicial Council may grant relief under subsections 41(1) and (2) if it is satisfied that the Council, board, commission or other tribunal:
 - (1) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise jurisdiction;
 - (2) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
 - (3) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
 - (4) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
 - (5) acted, or failed to act, by reason of fraud or perjured evidence;
 - (6) acted in any other way that resulted in the violation of the rights and freedoms of the Citizens of the Kwanlin Dün First Nation;
 - (7) on any ground set out in section 47(1) of the *Constitution*; or,
 - (8) acted in any other way that was contrary to Law. (my emphasis)

Yukon First Nation Constitutions and Laws of General Application

[33] This is not the first case that raises the issue about the legislative jurisdiction of First Nations.

[34] In *Edzerza v. Kwanlin Dün First Nation*, 2008 YKCA 8, the Yukon Court of Appeal considered whether a trial judge exercised his discretion appropriately in staying proceedings commenced by a KDFN Citizen to challenge certain KDFN Election Rules. Section 52(1) of the KDFN Constitution provides that a person must exhaust any other procedures established by Kwanlin Dün legislation before challenging the validity of a KDFN law in the court. The Court of Appeal dismissed the appeal as it concluded that the trial judge exercised his discretion appropriately on a correct principle of law.

[35] Mr. Justice Tysoe, writing for the court, stated the following:

[7] The Constitution contains processes for resolving disputes. Section 21 of the Constitution establishes five branches of government. Two of the branches are the Council (including the Chief) and the Judicial Council. Section 47 of the Constitution provides that a citizen may request the Council to reconsider any of its decisions on the grounds, among others, that the decision was inconsistent with the Constitution and that the decision was made in a manner inconsistent with the procedures described in the Constitution for the enactment or amendment of Kwanlin Dün First Nation law.

[8] Chapter Eight of the Constitution deals generally with the Judicial Council, including its composition, powers and responsibilities. Section 56(1)(d) authorizes the Judicial Council to consider an application challenging a decision of the Council on any ground set out in section 47.

[36] In the *Edzerza* case, the election rules were clearly KDFN law and so distinguishable from the case at bar, which is a challenge to the jurisdiction of the Judicial Council to decide an issue that arises out of a landlord/tenant dispute and

subject to territorial legislation. Nevertheless, the *Edzerza* case is helpful in its guidance on constitutional interpretation:

[24] In interpreting a statute, one should read the words in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, its object and the intention of the body enacting it (see *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 para. 26). In my opinion, the same approach should be undertaken in interpreting the Constitution.

[25] Giving the words of section 52 their grammatical and ordinary sense, it is my view that the proper time to determine whether a person has exhausted other procedures established by Kwanlin Dün legislation is the time of the hearing before the Supreme Court. It is at that time the person is challenging the validity of the law "in the Yukon Supreme Court". If it had been the intention for the relevant point in time to be the commencement of the proceeding, the first phrase of subsection (2) would have read something to the effect of "Before a person may commence a proceeding to challenge the validity of a Kwanlin Dün First Nation law in the Yukon Supreme Court"

[26] This literal interpretation of section 52 is consistent with the purpose and intent of the Constitution, the federal and territorial Acts and the self-government agreement among Kwanlin Dün and the two levels of government. It has been agreed and legislated that Kwanlin Dün is to be a self-governing first nation, and section 52 should not be given a narrow interpretation that restricts the ability of Kwanlin Dün to be self-governing. The Supreme Court should exercise its jurisdiction only if the prerequisite contained in section 52(2) has clearly been satisfied. (my emphasis)

[37] Thus, the interpretation given to the Constitution of Kwanlin Dün should not be a narrow one that restricts its ability to be a self-governing First Nation.

[38] In *Kluane First Nation v. Johnson*, 2015 YKTC 20, the First Nation sought to regain possession of the residence of one of its citizens located on settlement land. Judge Chisholm concluded that the Kluane First Nation had not enacted any law of

general application to supplant the *LTA*, nor did it consult with the Yukon about any KFN law that could impact on a law of general application. I observe that KDFN seems to be in the same situation. There is no legislation supplanting the territorial landlord and tenant regime and there does not appear to have been any consultation about the potential for the KDFN *Judicial Council Act* to impact on the *LTA* or *RLTA*. I note as well that there has been no declaration by the Commissioner in Executive Council that the *LTA* does not apply to KDFN citizens or settlement land, as required by the KDFN Self-Government Agreement.

[39] In the circumstances of his case, Judge Chisholm concluded that the First Nation's rental housing policies do not supersede territorial landlord and tenant legislation and thus Kluane First Nation had to apply to the Court pursuant to the *LTA* to regain possession of a residence on Settlement Land.

POSITIONS OF THE PARTIES

Position of Kwanlin Dün First Nation

[40] Counsel for KDFN submits that the Judicial Council has no jurisdiction to determine residential tenancy disputes as a result of s. 56 of the KDFN Constitution, and s. 13 of the *SGA*. Section 56(1)(e) permits the Judicial Council to consider an application by a Citizen to review an "administrative decision" of KDFN. An "administrative decision" is defined in the *Judicial Council Act* as a final decision made by a KDFN "board, commission or other tribunal", which, counsel submits, does not apply to the Housing Committee.

[41] Counsel for KDFN also submits that pursuant to s. 13.5.0 of the *SGA*, the *LTA* is law of general application, which has not been replaced, by a KDFN law. Thus, s. 96(1)

of the *LTA* required the applications of Ms. Ward and Ms. Sidney to be made to a judge of the Supreme Court or Territorial Court.

Position of the Judicial Council

[42] Counsel submits that s. 13.5.3 of the Self-Government Agreement provides that a Yukon law of general application is inoperative to the extent that it provides for “any matter” for which provision is made in law enacted by KDFN. He submits that the KDFN *Judicial Council Act* provided the Judicial Council concurrent original jurisdiction for claims arising out of a contract between KDFN and a Citizen (s. 34(2)), exclusive original jurisdiction to review any action by KDFN and any administrative decision of KDFN (ss. 35(2) and (4)), and concurrent original jurisdiction in proceedings of a civil nature in which KDFN claims against a Citizen (s. 37(1)).

[43] Counsel submits that the Court of Appeal in the *Edzerza* case ruled that the KDFN Constitution should not be given a narrow interpretation that restricts the ability of KDFN to be a self-governing First Nation.

ISSUES

[44] The following issues will be addressed:

1. What is the standard of review for this Court?
2. What jurisdiction, if any, does the Judicial Council have in residential tenancy disputes?
3. Did the Judicial Council exceed its jurisdiction in its decision in either Ms. Ward’s or Ms. Sidney’s case?

ANALYSIS

Issue 1: What is the standard of review for this Court?

[45] The issue before this Court is whether the Judicial Council had jurisdiction to hear the appeals of Ms. Ward and Ms. Sidney from the decisions of the KDFN Community Services department.

[46] In my view, this is not a question of the Judicial Council's interpretation of its enabling statute but rather a question of true jurisdiction, which must be reviewed on a standard of correctness. See *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 59.

Issue 2: What jurisdiction, if any, does the Judicial Council have in residential tenancy disputes?

[47] It is ironic that KDFN, as a self-governing First Nation, is applying to give a narrow interpretation to the jurisdiction of its own Judicial Council. Nevertheless, KDFN wishes to clarify the role of its Judicial Council and the extent to which it can review KDFN decisions about its citizens, especially in relation to residential tenancy agreements on Settlement Land.

[48] There is no doubt that the *LTA* (and its successor, the *RLTA*) is a law of general application that would apply to a First Nation and its Citizens on Settlement Land. It is clear that KDFN has not legislated a landlord and tenant law that would make the *LTA* inoperative as a law of general application on KDFN Settlement Land.

[49] However, KDFN has given significant jurisdiction to its Judicial Council both in its Constitution and in the *Judicial Council Act*, pursuant to which it can review both actions and administrative decisions of KDFN (see s. 56 of the *Constitution*, ss. 34 and 35 of the *Judicial Council Act*).

[50] Judicial Council in these matters was considering an appeal of an administrative decision and exercising its judicial review jurisdiction. In my view the Housing Committee (and here the appeal panel that stood-in for it) is an example of a board, commission or other tribunal. The Judicial Council's jurisdiction in judicial review proceedings is set out in ss. 41 and 42 of the *Judicial Council Act*.

[51] In the KDFN Self-Government Agreement, ss. 13.1, 13.2 and 13.3 grant the power to KDFN to enact laws on its settlement land or with respect to its Citizens, while s. 13.5 confirms that laws of general application continue to apply to KDFN Citizens and on Settlement Land. Section 13.5.3 carves out an exception to the general principle in that a Yukon law of General Application shall be inoperative to the extent it provides for any matter for which provision is made in a KDFN law. This is also stated in s. 19 of the *Yukon First Nations Self-Government Act*. In my view, the *Judicial Council Act* is a KDFN law which does not supplant the *LTA*, but provides for an application to the Judicial Council to review administrative decision by the KDFN, including those which it makes in a landlord and tenant context. The Judicial Council, by virtue of the Constitution and the *Judicial Council Act*, has jurisdiction to determine whether KDFN has complied with its own Constitution and laws in making an administrative decision that affects a Citizen. The Constitution and *Judicial Council Act* do not detract from the jurisdiction of the courts under the *LTA* or the director under the *RLTA*, and neither, in my view, do they give Judicial Council the power to decide or apply a law of general application, at least to the extent that any such application could affect the exercise of the authority of the courts or the director under territorial legislation.

[52] Counsel for the Judicial Council submitted that s. 19(1) of the *SGA* applied in this case to the extent that the *LTA* and the *Judicial Council Act* by the First Nation “make provision for the same matter”. I do not find that the KDFN in its *Judicial Council Act* is in any way making provision with respect to landlord and tenant relationships. However, I do find that KDFN has enacted a parallel procedure to that provided for in the *LTA* and has jurisdiction to do so. Thus, the *LTA* can operate contemporaneously with the KDFN Constitution and the *Judicial Council Act*, provided that if there is a direct conflict, for example with respect to strict timelines in the context of eviction notices, the Yukon law of general application must be complied with. I note that while the section of the *LTA* dealing with residential tenancies did not have strict timelines around court applications, the *RLTA* is considerably more structured in this respect.

[53] I note as well that there is nothing in the legislation, as in the *Edzerza* case, that required the landlord (KDFN) or the tenant to exhaust another procedure before proceeding to court under the *LTA* to seek a remedy. Nor do I find that such wording would have been appropriate in this case. The process implemented here simply reflects KDFN’s decision, as a self-governing First Nation, to grant the Judicial Council jurisdiction to review its administrative decisions and ensure that its Constitution and laws are complied with. It does not permit the Judicial Council to have any final word over a landlord and tenant dispute. In my view, it would take too narrow a view of the KDFN Constitution to decide that a law of general application displaces Judicial Council’s jurisdiction to rule on KDFN’s consideration of Constitutional values and procedural rights in the context of reviewing an administrative decision.

Issue 3: Did the Judicial Council exceed its jurisdiction in its decision in either Ms. Ward's or Ms. Sidney's case?

[54] In both cases heard by the Judicial Council, there was no dispute about the factual circumstances underlying each termination. Both Ms. Ward and Ms. Sidney admitted that the facts were not in dispute. Thus, there was no necessity for the Judicial Council to rule on the specific landlord-tenant issues, nor do I think they have jurisdiction to do so. However, that specific issue is not before the court and the Judicial Council declined to address it in the context of the Ward and Sidney cases.

[55] In both cases, the Judicial Council found that procedural fairness was not accorded to the Citizens, as there was no Kwanlin Dün Housing Committee in existence and Ms. Ward and Ms. Sidney were not permitted to appear in person to make submissions appealing the termination of their housing contracts. Those are procedural errors that the Judicial Council has jurisdiction to address. I take no issue with the decisions of the Judicial Council to set aside the decision of the three-member committee that did consider the appeal of Ms. Ward and Ms. Sidney. However, in my view, the KDFN eviction decision cannot be set aside but rather the decision of the three-member committee to confirm the eviction. In other words, the decision of KDFN to evict stands, but Ms. Ward and Ms. Sidney are entitled to have their appeal heard again, in-person, before a properly constituted Kwanlin Dün Housing Committee.

[56] The Judicial Council also addressed KDFN's failure to consider Constitutional values in the case of Ms. Sidney and I believe acted within its jurisdiction in doing so. The Housing Committee must address those values in its consideration of Ms. Sidney's appeal. It is my view that for First Nation Self-Government to have meaning, the KDFN

Chief and Council must apply the reasoning of the Judicial Council in interpreting the constitutional rights of its Citizens. This does not mean that the Housing Committee must reach the same conclusions as the Judicial Council on Constitutional values in its reconsideration of the Sidney case, but it must address them.

It is also my view that the Kwanlin Dün Housing Committee must give their decision in writing, not necessarily as formally as the Judicial Council, but given the interests at stake, the Committee should at least confirm that they have heard the submissions of the Citizen and articulate their reasons for either confirming or revoking the decision to evict.

SUMMARY

[57] I therefore order that the appeals of the cases as set out in the tenancy agreements should be heard by a properly constituted Kwanlin Dün Housing Committee, should Ms. Sidney and Ms. Ward wish to proceed in that forum.

VEALE J.