2007 CarswellOnt 2222
Ontario Superior Court of Justice (Divisional Court)

Puterbough v. Canada (Public Works & Government Services)

2007 CarswellOnt 2222, [2007] O.J. No. 748, 55 R.P.R. (4th) 189

Michael Puterbough (Tenant/Appellant) and Public Works & Government Services Canada (Landlord/Respondent in Appeal)

Wesley Knapp and Angelica Locilento-Knapp (Tenants/Appellants) and Public Works & Government Services Canada (Landlord/Respondent in Appeal)

Daryl S. Mogk (Tenant/Appellant) and Public Works & Government Services Canada (Landlord/Respondent in Appeal)

The Attorney General of Canada representing Public Works & Government Services Canada (Landlord/Appellant) and Gary Beelby and Wendy Beelby (Tenants/Respondents)

The Attorney General of Canada representing Public Works & Government Services Canada (Landlord/Appellant) and Robert McKay (Tenant/Respondent)

Ground, E. Macdonald, Aitken JJ.

Heard: October 16-17, 2006
Judgment: February 12, 2007
Docket: 290/05, 359/05, 407/05, 457/05, 197/06, 38/06, 518/05

Counsel: Robert Doumani for Appellants, Michael Puterbough, Wesley Knapp, Angelica Locilento-Knapp, Daryl S. Mogk
Liz Tinker for Respondent, Public Works & Government Services Canada
Robert Doumani for Respondents, Gary Beelby, Wendy Beelby, Robert McKay
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Subject: Property

Headnote

Real property --- Landlord and tenant — Residential tenancies — Constitutional issues — Miscellaneous

Federal department of Public Works (landlord) rented out 300 homes on land previously expropriated for airport which was never built — Homes in question were 50 to 100 years old and required repairs in excess of projected rental revenues — Landlord obtained orders to terminate tenancies and evict tenants under s. 69(1) of Tenant Protection Act, 1997 for some premises, but not all, intending to demolish premises — Tenants had opposed eviction on grounds landlord was in serious breach of its responsibilities under s. 84(2)(a) of Act — Ontario Rental Housing Tribunal found that landlord was in breach of obligations under Act, and ordered abatement of rent in four cases and repairs in five cases — Tribunal found landlord was in "serious" breach of responsibilities in two cases and refused to grant eviction orders — Three tenants appealed eviction orders and landlord appealed decision not to terminate two other tenancies — Although lands were federal government property, and provincial statute did not apply, landlord agreed to voluntarily abide by court order made under Act — Landlord had attorned to jurisdiction of court for purpose of appeals — Landlord was not bound to obtain municipal permits before demolishing premises — Section 71 of Act was not barrier to tribunal ordering termination of tenancies.

Real property --- Landlord and tenant — Residential tenancies — Repairs and fitness — Landlord's obligation — Statutory duty to repair

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obtained orders to terminate tenancies and evict tenants under s. 69(1) of Tenant Protection Act, 1997 for some premises, but not all, intending to demolish premises — Tenants had opposed eviction on grounds landlord was in serious breach of its responsibilities under s. 84(2)(a) of Act — Ontario Rental Housing Tribunal found that landlord was in breach of obligations under Act, and ordered abatement of rent in four cases and repairs in five cases — Tribunal ordered repairs to be effected by date preceding eviction for three tenancies, and found landord's breaches were not "serious" in those cases — Tribunal found landlord was in "serious" breach of responsibilities in two cases and refused to grant eviction orders — Three tenants appealed eviction orders and landlord appealed decision not to terminate two other tenancies — Tenants' appeals dismissed — Landlord's appeals allowed — Issue of applicability of s. 84(2)(a) and appropriate order to be made under s. 34(1) of Act was referred back to tribunal for rehearing — Tribunal correctly held that requirement for repairs and upgrades in future did not equate with landlord currently being in breach of its responsibilities — Tenants had not reported deficiencies to landlord, which was evidence that repairs were not significant — No inconsistency existed in tribunal granting eviction orders while ordering some immediate repairs while tenants still occupied premises — Tribunal made error in law in finding landlord in serious breach of duty to repair and in denying eviction orders for two tenancies.

APPEALS by tenants from decision of Ontario Rental Housing Tribunal of orders for eviction; CROSS-APPEALS by landlord of refusal to grant eviction orders.

***Aitken J.*:**

Nature of Proceedings

1 In the early seventies, the Federal Government expropriated land near Pickering ("the Pickering Lands Site") for the construction of a new airport. The airport was never built. The Queen in right of Canada, as represented by Public Works and Government Services Canada ("Public Works" or "the Landlord"), rents out approximately 300 homes on the Pickering Lands Site. In 2005, Public Works sent to some of its tenants notices of termination of tenancy for the purpose of demolition of the premises under s. 53(1)(a) of the *Tenant Protection Act, 1997*, S.O. 1997, c. 24 ("the Act"). Public Works then applied to the Ontario Rental Housing Tribunal ("Tribunal") for orders to terminate the tenancies and evict the tenants under s. 69(1) of the Act. The Tribunal granted some of the applications and denied others.

2 Five cases have come before the Divisional Court by way of an appeal from the decisions of the Tribunal. All involve long-term tenants. In three cases, *Puterbough*, *Knapp* and *Mogk*, the Tribunal terminated the tenancies and granted eviction orders. The Tenants appeal those orders. In two cases, *Beelby* and *McKay*, the Tribunal refused to terminate the tenancies. Public Works appeals those orders. In that the same legal issues exist in all five cases, the cases were heard at the same time.

3 All of the rental units involved in these appeals are 50 to 100 year-old homes on the Pickering Lands Site. All but the Knapp premises were being rented at below market rates. In 2004, Public Works obtained for the five properties building inspection, and in three cases mould investigation, reports (the "2004 Inspection Reports") from independent building inspectors and mould specialists. The 2004 Inspection Reports gave an overall rating of the functional condition of the buildings, highlighted both major and minor concerns and recommended a course of action to respond to those concerns. In each case, after considering the 2004 Inspection Reports, its own internal property assessment report and an economic analysis of each property, Public Works determined that immediate and/or future anticipated repair costs were significantly in excess of projected rental revenues, and continued use of the properties as rental units could not be justified economically. It concluded that the best economic decision would be to demolish the units. When Public Works applied to the Tribunal for eviction orders, all Tenants applied for an abatement of rent due to a breach of the Landlord's obligations under ss. 24, 25 and/or 26 of the Act. As well, all Tenants took the position that the Tribunal was obliged to refuse Public Works' applications for eviction orders under s. 84(2)(a) because Public Works was in *serious* breach of its landlord responsibilities under the Act.

4 In the five cases, the Tribunal found that, at the time of the hearing, Public Works was in breach of one or more of its obligations under ss. 24, 25 and/or 26 of the Act. In all cases but *Puterbough*, the Tribunal granted an abatement of rent. In all cases, the Tribunal ordered that certain repairs be done within a specified period. Public Works accepts the Tribunal's findings regarding its being in breach of its responsibilities, and it does not appeal the abatement orders. The only repair orders it appeals

are those in the *Beelby* and *McKay* cases. The real issue before the Tribunal in each case was whether Public Works' breach of responsibilities was *serious*, thereby preventing it from getting an eviction order.

5 At this Court, the issue remains one of statutory interpretation; namely, the meaning of the term "serious breach of the landlord's responsibilities" in s. 84(2)(a) of the Act.

Legislative Framework: the *Tenant Protection Act, 1997*

6 Section 2(1) of the *Tenant Protection Act, 1997* states: "This Act applies with respect to rental units in residential complexes, despite any other Act and despite any agreement or waiver to the contrary." The following sections are of particular relevance on these appeals:

> 24.(1) A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards.
>
> (2) Subsection (1) applies even if the tenant was aware of a state of non-repair or a contravention of a standard before entering into the tenancy agreement.
>
> 25. A landlord shall not at any time during a tenant's occupancy of a rental unit and before the day on which an order evicting the tenant is executed, withhold reasonable supply of any vital service, care service or food that it is the landlord's obligation to supply under the tenancy agreement or deliberately interfere with the reasonable supply of any vital service, care service or food. [1]
>
> 26. A landlord shall not at any time during a tenant's occupancy of a rental unit and before the day on which an order evicting the tenant is executed substantially interfere with the reasonable enjoyment of the rental unit or the residential complex in which it is located for all usual purposes by a tenant or members of his or her household.
>
> 32.(1) A tenant or former tenant of a rental unit may apply to the Tribunal for any of the following orders:
>
> . . .
>
> 2. An order determining that the landlord breached the obligations under subsection 24(1).
>
> . . .
>
> 5. An order determining that the landlord, superintendent or agent of the landlord has withheld the reasonable supply of any vital service ...that it is the landlord's obligation to supply under the tenancy agreement or deliberately interfered with the reasonable supply of any vital service,
>
> . . .
>
> (2) No application may be made under subsection (1) more than one year after the day the alleged conduct giving rise to the application occurred.
>
> 34.(1) If the tribunal determines in an application under paragraph 2 of subsection 32(1) that a landlord has breached the obligations under subsection 2(1), the Tribunal may do one or more of the following:
>
> . . .
>
> 2. Order an abatement of rent.
>
> . . .
>
> 4. Order the landlord to do specified repairs or other work within a specified time.

53.(1) A landlord may give notice of termination of a tenancy if the landlord requires possession of the rental unit in order to,

(a) demolish it;

(b) convert it to use for a purpose other than residential premises; or

(c) do repairs or renovations to it that are so extensive that they require a building permit and vacant possession of the rental unit.

(2) The date for termination specified in the notice shall be at least 120 days after the notice is given and shall be the day a period of the tenancy ends or, where the tenancy is for a fixed term, the end of the term.

. . .

69.(1) A landlord may apply to the Tribunal for an order terminating a tenancy and evicting the tenant if the landlord has given notice to terminate the tenancy under this act or under the former Part IV of the *Landlord and Tenant Act*.

. . .

71. The Tribunal shall not make an order terminating a tenancy and evicting the tenant in an application under section 69 based on a notice of termination under section 53 unless it is satisfied that,

(a) the landlord intends in good faith to carry out the activity on which the notice of termination was based; and

(b) the landlord has obtained all necessary permits or other authority that may be required to do so.

. . .

84.(1) Upon an application for an order evicting a tenant or subtenant, the Tribunal may, despite any other provision of this Act or the tenancy agreement,

(a) refuse to grant the application unless satisfied, having regard to all the circumstances, that it would be unfair to refuse; or

(b) order that the enforcement of the order of eviction be postponed for a period of time.

(2) Without restricting the generality of subsection (1), the Tribunal shall refuse to grant the application where satisfied that,

(a) the landlord is in serious breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement;

(b) the reason for the application being brought is that the tenant has complained to a governmental authority of the landlord's violation of a law dealing with health, safety, housing or maintenance standards;

(c) the reason for the application being brought is that the tenant has attempted to secure or enforce his or her legal rights;

(d) the reason for the application being brought is that the tenant is a member of a tenants' association or is attempting to organize such an association; or

(e) the reason for the application being brought is that the rental unit is occupied by children and the occupation by the children does not constitute overcrowding.

Right of Appeal

7 Any person affected by an order of the Tribunal may appeal the order to the Divisional Court — but only on a question of law (s. 196(1)). On an appeal to the Divisional Court, the Court may affirm, rescind, amend or replace the decision or order; remit the matter to the Tribunal with the opinion of the Divisional Court; and/or make any other order in relation to the matter that it considers proper (s. 196(4),(5)).

Standard of Review

8 All parties are in agreement that the standard of review to be applied by the Divisional Court to the decisions of the Tribunal in these proceedings is one of correctness.

Preliminary Issues and Analysis

1. Does the Tenant Protection Act, 1997 Apply to the Crown in Right of Canada?

9 On the appeals, Public Works, relying on *Greater Toronto Airports Authority v. Mississauga (City)* (2000), 50 O.R. (3d) 641 (Ont. C.A.) and the concept of interjurisdictional immunity, argues that the Act does not apply to the Pickering Lands Site because it is federal government land and a provincial statute cannot intrude into exclusive federal jurisdiction over federal public property (s. 91(1A) of the *Constitution Act, 1867*). Despite this, Public Works acknowledges that it used the Act and the Tribunal process to manage the Pickering Lands Site and it will voluntarily abide by a court order made under the Act. Public Works, through its initiation of proceedings under the Act, has attorned to the jurisdiction of this Court and to the applicability of the Act for the purpose of these appeals.

2. Were the requirements of s. 71 of the Act met?

10 On these appeals, the Tenants do not question the good faith of Public Works in seeking possession of the premises so that it can demolish them (s. 71(a)). As well, the Tenants concede that the Crown in right of Canada is not bound by provincial or municipal laws to obtain any permits or other authority before proceeding with the demolition of the premises in question (s. 71(b)). Therefore, for the purpose of these appeals, it is assumed that s. 71 of the Act was not a barrier to the Tribunal ordering termination of the tenancies in the *Puterbough*, *Knapp* and *Mogk* cases.

3. Was Public Works in serious breach of its responsibilities as landlord under the Act?

11 This is the central issue in each of the five cases. Addressing this issue requires identifying the Landlord's responsibilities under the Act, determining whether the Landlord was in breach of any of those responsibilities and determining whether the breach was *serious*.

12 Of potential relevance on these appeals are the six landlord responsibilities enumerated in ss. 24, 25 and 26 of the Act:

- To provide and maintain the residential unit in a good state of repair (s. 24)
- To provide and maintain the residential unit fit for habitation (s. 24)
- To comply with health, safety, housing and maintenance standards (s. 24)
- Not to withhold reasonable supply of any vital service that it is the landlord's obligation to supply under the tenancy agreement (s. 25)
- Not to deliberately interfere with the reasonable supply of any vital service (s. 25)
- Not to substantially interfere with the tenant's reasonable enjoyment of the rental unit for all usual purposes (s. 26)

13 Certain preliminary comments can be made as to how "serious breach of the landlord's responsibilities" under s. 84(2)(a) should be interpreted.

(a) Strict Liability Approach v. Balanced Approach

14 The Tenants see the Act as consumer protection legislation intended to protect tenants in their dealings with landlords. They submit that a strict liability approach to defining the concept of "serious breach" is most consistent with this purpose. They argue that if the *defect or deficiency* is significant, the *breach* must be serious. By way of example, the Tenants argue that all health and safety defects or deficiencies are significant, and therefore breaches involving health or safety concerns are "serious" within the meaning of s. 84(2)(a) of the Act.

15 Public Works submits that the concept of "serious breach" should be defined through a balanced approach that takes into account the interests of both landlords and tenants and the entire context in which the breach is occurring. Under this approach, the focus is on the seriousness of the breach and not strictly the seriousness of the defect or deficiency.

16 In *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, the Supreme Court of Canada accepted as the preferred approach to statutory interpretation the "modern principle" espoused by Elmer A. Driedger in *The Construction of Statutes* [2]; namely, "... the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

17 There is no preamble to the Act, nor is there any section in the Act explaining its purpose or objects. Nevertheless, I interpret one of the Act's primary objectives as being to ensure a fair balance between the rights and obligations of both landlords and tenants in the context of an historical power imbalance in favour of landlords. [3] In this sense, the Act could be considered tenant-centred [4]. This is particularly evident in Part II of the Act which, though titled "Rights and Duties of Landlords and Tenants", focuses mainly on the enforcement of landlord responsibilities for the benefit of tenants. It is in this Part that landlord responsibilities regarding repairs, vital services and reasonable enjoyment by the tenant are stipulated.

18 However, s. 84(2)(a) is housed in Part III of the Act which achieves a fine balance between a landlord's right to regain possession of a unit for legitimate goals and a tenant's interest in remaining in the unit and being treated fairly and reasonably. Furthermore, a strict liability approach in the interpretation of s. 84(2)(a) is inconsistent with s. 53(1) of the Act which recognizes the right of a landlord to give notice of termination of a tenancy if the landlord requires possession of the premises in order to demolish them, convert them to use for a purpose other than residential premises or do repairs or renovations to them that are so extensive that they require a building permit and vacant possession of the rental unit. This section of the Act recognizes that, when faced with premises that are in need of substantial repairs or upgrading in order for the premises to continue to be usable as residential premises, the owner has the right to make a rational choice from a range of available options, one being demolition. In making that choice, the owner is entitled to consider all relevant factors — including economic factors.

19 In these appeals, the Tenants argue that, when the Crown is the landlord, there can be no economic argument justifying an eviction order for the purpose of demolition or, presumably, change of use. I do not agree. Regardless of the revenues at the Crown's disposal, the Crown is as entitled as any other landlord to make rational economic choices and to allot to the maintenance and repair of rental properties what would reasonably be expected from other landlords. The fact that the Crown is managing public funds and must do so in a responsible fashion in keeping with the public trust supports this interpretation. I can think of no public policy to be served by requiring the Crown to operate in an economically irrational fashion simply because the Crown appears to have unlimited resources.

20 The balance between landlord and tenant rights is achieved through the *caveats* contained in ss. 84(2), (3) and (4). In interpreting s. 84(2)(a), it is instructive to consider the nature of the restrictions in the other subsections of s. 84(2). Subsections 84(2)(b) to (e) deal with situations where tenants have been pursuing their legal rights as tenants, and in order to thwart their efforts, the landlord is seeking to evict them. The Tribunal is instructed not to grant an eviction order in these circumstances because the landlord is acting illegally, unfairly or in bad faith. Section 84(2)(a) should be interpreted as part of this effort to

ensure that landlords cannot thwart the legitimate rights of tenants through seeking eviction orders. Read in context, the goal of s. 84(2)(a) is to ensure that landlords cannot resort to the eviction of tenants as a method of abdicating or sidestepping their mandated responsibilities under the Act. Additionally, landlords cannot be the cause of the circumstances upon which they then rely in order to have tenants evicted from the premises.

21 To accept the Tenants' argument that all breaches of a landlord's responsibilities that raise health and safety concerns trigger s. 84(2)(a) would render meaningless the word "serious" in that subsection — at least in regard to a breach of the landlord's responsibility under s. 24(1) to comply with health and safety standards in regard to a rental unit. The Act could be worded such that any breach of a health or safety standard would require the Tribunal to deny an application for an eviction order, but it is not. Instead, in regard to all landlord responsibilities, it adds the qualifier that any breach has to be *serious* before the Tribunal is obliged to deny the landlord's application for an eviction order. Something more than the fact of a breach of one of the identified responsibilities is required to make the breach a *serious* breach.

22 Common sense also dictates that the term "serious breach", in the context of the landlord's ss. 24, 25 and 26 responsibilities, means more than the rental premises being in poor condition and in need of significant work. To accept the Tenants' strict liability interpretation would reduce eviction to an option rarely available to a landlord despite the structure being old and in need of extensive and costly repairs and the property being of insignificant value. Such an interpretation could require a landlord to make significant capital improvements to rental property simply to get permission to evict the tenants and demolish the premises. That flies in the face of common sense. In short, a serious breach of the landlord's responsibilities is not established simply by the rental premises being in need of extensive repairs.

23 This is supported by *Lypny v. Rocca* (1988), 63 O.R. (2d) 595 (Ont. Div. Ct.), a case in which the Divisional Court considered the sections in the *Landlord and Tenant Act*, R.S.O. 1980, c. 232 that virtually mirrored ss. 24, 53(1), and 84(2)(a) of the Act. One notable difference was that there was no requirement under the old s. 121(3)(a) [now s. 84(2)(a)] that the landlord's breach of responsibilities be a *serious* breach.

24 In *Lypny*, the landlord had been required by the municipality to make certain structural changes to the demised premises or to convert them to non-residential use. The landlord could not afford the structural changes, nor could she afford to correct other identified defects. She brought an application for a writ of possession on the ground that she wanted to convert the premises to non-residential use. The tenant objected and counterclaimed for an abatement of rent. The Divisional Court found that the landlord wished to terminate the tenancy for the purpose of complying with the municipal order in the only way it was possible for the landlord to do so; namely, by converting the use of the premises into a non-residential use. The Court concluded that: "a landlord who seeks possession which is essential in order to comply with s. 96 and thereby cure a breach is not ... in breach of her responsibilities" under the *Landlord and Tenant Act* within the meaning of s. 123(3)(a) of that legislation. This case focused on the landlord's response when faced with defects or deficiencies, and whether that response had been reasonable and responsible; it did not focus simply on the existence of defects or deficiencies.

25 The only case to which the Court has been referred regarding the meaning of "serious breach" in s. 84(2)(a) of the Act is *Sage v. Wellington (County)*, [2005] O.J. No. 5727 (Ont. Div. Ct.), where the Divisional Court stated:

> The term "serious breach" found in s. 84(2) of the TPA is a statutory standard. The seriousness of the breaches by the County is shown by the failure of the water supply to meet the water quality standards of the Ministry of Health and Ministry of Environment that apply throughout the province. I find that the breaches were on-going for several years, there was a causal connection between the breaches and the contaminated well water, the County took no steps to fix the cause of the contamination, and the risk to health and safety was grave. The breaches were serious for the above reasons.

26 Although the reasons are brief, they do imply that a balanced and contextual approach was adopted in interpreting s. 84(2)(a) — one that took into account such factors as the length of time during which the deficiency existed, the causal connection between the landlord's failure to repair and the resulting deficiency, the absence of any efforts on the part of the landlord to deal with the deficiency, and the severity of the health and safety risks produced by the deficiency.

27 In all but the *Puterbough* decision, the Tribunal referred to *Sage v. Wellington* and Interpretation Guideline 7 — "Relief from Eviction: Refusing or Delaying an Eviction" published by the Tribunal to assist parties in understanding the Tribunal's usual interpretation of s. 84 of the Act and to provide guidance to Members so as to promote consistency in decision-making. Members of the Tribunal are not required to follow the Guidelines, and the Guidelines have no bearing on this Court's interpretation of s. 84(2)(a). Nevertheless, it is of interest that Guideline 7 recommends that, in deciding whether a breach of a landlord's responsibility to repair is serious within the meaning of s. 84(2)(a), the Tribunal consider a variety of factors, such as whether the breach of the duty to repair has resulted in a health or safety concern, the impact any repair problem has had on the tenant, what actions the landlord has taken to deal with the repair problem, whether the tenant complained to the landlord about a long-standing repair problem, whether the landlord was aware of the problem prior to any application being brought, and whether the tenant contributed to the problem. In my view, all of these factors are relevant to a s. 84(2)(a) analysis of whether a breach of the landlord's duty to maintain premises in a good state of repair is a *serious* breach and illustrate that a pragmatic, balanced and contextual approach should be applied in the interpretation of the meaning of "serious breach of the landlord's responsibilities" under s. 84(2)(a) of the Act.

(b) Breach in Existence at time of Hearing

28 The wording in s. 84(2)(a) makes it clear that the landlord must be in serious breach of its responsibilities *at the time of the hearing*. This subsection is not triggered by the landlord having been in serious breach of responsibilities at some point in the past. Nor is it triggered by the potential as of the date of the hearing that the landlord will be in serious breach at some time in the future. This latter point is particularly important in the context of these five appeals. In a number of cases, inspectors warned that major repairs or renovations would have to be made to the rental unit in the near future if the unit were to continue to be used for residential purposes. This does not necessarily mean that, at the time of the hearing, the landlord was in breach of any responsibility.

Public Works & Government Services Canada v. Michael Puterbough

1. Background

29 In this case, the 2004 Inspection Report recommended the following immediate remedial steps:

- cutting trees back,
- replacing the furnace and fuel tank,
- repairing the kitchen counter,
- repairing two shower leaks,
- cleaning/repairing the eaves,
- adding a handrail to the deck and stairs to the loft,
- re-fusing, and
- adding smoke detectors on every level and carbon monoxide detectors in every sleeping area.

30 Otherwise, the report identified various repairs or upgrades to be considered in the near future, such as new siding and soffits, new windows, a new garage roof and an upgraded electrical panel.

31 Mr. Puterbough had not brought to the attention of Public Works any of the deficiencies identified in the 2004 Inspection Report, aside from the furnace. There was a problem with the propane tank in 1998 and it was not in use by 2000. The last time Mr. Puterbough had complained to Public Works about the tank was in 1999. Meanwhile in 1997, Mr. Puterbough had installed a high efficiency wood-burning unit that, according to him, was doing an adequate job heating the premises. Under

Mr. Puterbough's tenancy agreement, he was responsible to heat the premises at his own expense to a reasonable temperature at all reasonable times. In regard to the other identified deficiencies, some related to work Mr. Puterbough had done on the house on his own and without first having notified Public Works, one example being creating loft living space.

32 According to Public Works' records, the net cash flow over the period between 1992 and 2004 was $24,898. It estimated that the cost of recommended repairs and upgrades over the following year would be $54,300. The cost of maintaining adequate water quality would be $2,500 annually. The cost of demolition of the premises would be $12,000. Public Works concluded that the property was economically obsolescent and that terminating the tenancy and demolishing the building was the lowest cost option.

33 Public Works served Mr. Puterbough with notice of termination on November 17, 2004 for a termination date of March 31, 2005, and brought an application for an eviction order. Mr. Puterbough filed applications seeking a rent abatement based on Public Works' alleged breaches under ss. 24, 25 and 26 of the Act. In seeking an abatement as a result of a s. 25 breach, Mr. Puterbough alleged that Public Works had breached its obligation to supply a vital service by not providing a source of heat to the premises.

2. Decision of the Tribunal

34 In its July 4, 2005 decision, the Tribunal ordered Public Works to effect certain repairs by July 31, 2005 and terminated the tenancy effective August 31, 2005. In so doing, it concluded that the projected need for future repairs did not constitute a serious breach of the Landlord's s. 24(1) responsibility to maintain the rental unit. It gave weight to the fact that Mr. Puterbough never reported to Public Works several of the repairs identified as immediately necessary by the 2004 Inspection Report and as such the Landlord had not had an opportunity to repair them. Finally, it concluded that repairing the kitchen counter, cleaning the eaves and repairing two leaks in the bathroom were not significant enough to mean that Public Works was in serious breach of its maintenance responsibility.

35 The Tribunal denied Mr. Puterbough's applications under s. 32(2), one ground being that, under s. 32(2) of the Act, it had no jurisdiction to deal with alleged breaches of landlord responsibilities that occurred more than one year prior to the tenant's application. As well, in regard to the allegation that Public Works had denied heat to Mr. Puterbough contrary to s. 25 of the Act, the Tribunal held that "heat" was not a "vital service" within the meaning of that section and, in any event, any heating deficiency had been resolved by Mr. Puterbough installing an alternative heat source.

36 In granting Public Works' application for an eviction order, the Tribunal stated:

> It would seem obvious that this entire matter is related to maintenance ... The reason for the eviction is based on the projected expense that would be incurred to maintain the rental unit into the future. Is it right that the Tenant should be allowed to remain in the unit and use the list of expected repair items to say that many deficiencies currently exist in the rental unit. If this were the case no rental unit would ever be allowed to be torn down. The Landlord would be ordered to spend whatever is required to make the unit like new. I find it necessary to hold a balanced perspective on the condition of the rental unit versus the ideal or upgraded rental unit that would result if the Landlord did effect all the recommended changes.
>
> The Landlord had an inspection done in September 2004 and the report indicated numerous repairs that would be required for a long time residency, but this, I find does not make them a violation or breach of the Landlord's requirement to maintain the rental unit. A few items that qualify as needed repairs were never reported to the Landlord to give him a chance to repair them. Some that still remain will be ordered repaired, but they are certainly not significant enough to equate to the Landlord being in serious breach of its obligations under the Act that would result in a denial of the Landlord's application. ...

37 Mr. Puterbough sought a review of the Tribunal's decision. The Tribunal declined to undertake a review. Mr. Puterbough appeals to this Court both the Order of the Tribunal and the refusal of the Tribunal to review its decision.

3. Analysis

38 In my view, the Tribunal made no error of law in its interpretation of s. 84(2)(a) or in its refusal to grant a rent abatement in the *Puterbough* case.

39 The Tribunal looked at the context in which the Landlord's breaches existed, and applied a balanced approach in determining that they were not "serious". It found that most of the repairs identified in the 2004 Inspection Report would be required in the next few years to enable the premises to be used for residential purposes in the future. It correctly concluded that the requirement for repairs and upgrades in the future did not equate with Public Works currently being in breach of its responsibilities. Breaches must be current not anticipated. The Tribunal's decision recognized that the anticipation of significant repair costs in the future in regard to a 50-year old structure generating a low rent was a relevant factor for Public Works to take into account in concluding that it was time to demolish the premises rather than attempt to keep them in a good state of repair into the future.

40 Further, in concluding that the few repairs that needed immediate attention were not significant, the Tribunal was correct to take into account that Mr. Puterbough had not reported these deficiencies to Public Works previously. This was evidence that the breaches did not significantly impact Mr. Puterbough. It also meant that Public Works had not had the chance to do repairs earlier. The Tribunal was also correct to take into account that Mr. Puterbough himself had renovated the loft to add two bedrooms, necessitating the installation of a railing on the stairs and carbon monoxide detectors in each of the two bedrooms.

41 Contrary to Mr. Puterbough's argument, there is nothing inconsistent or illogical in the Tribunal determining that a breach of Public Works' responsibilities under s. 24(1) was not "serious" but it did warrant a repair order under s. 34(1)4. of the Act. In order to seek relief under s. 34(1), all Mr. Puterbough had to do was prove Public Works was in breach of any of its obligations under s. 24(1), even if the breach was minor. Mr. Puterbough was able to prove that; in fact, Public Works took no issue with that finding.

42 Mr. Puterbough appeals the Tribunal's refusal to award him a rent abatement, but he has pointed to no error of law in this regard. By virtue of s. 32(2), Mr. Puterbough could not rely on the absence of a functioning propane furnace on the premises as a ground for a rent abatement when there had been no functioning propane furnace on the premises for approximately five years prior to Mr. Puterbough commencing his application. In regard to other alleged breaches of the Landlord's repair and maintenance responsibilities, the Tribunal found that Mr. Puterbough had not brought any to the attention of Public Works before commencing his application. By virtue of s. 34(2) of the Act, this was a factor that the Tribunal was obliged to consider, and did consider, when deciding what remedy was appropriate under s. 34(1). It was open to the Tribunal under s. 34(1) to determine the appropriate remedy, one of which was to order the Landlord to do specified repairs within a specified time. That is what the Tribunal ordered. This was not an error of law.

4. Conclusion

43 Mr. Puterbough's appeals are dismissed.

Public Works & Government Services Canada v. Wesley Knapp and Angelica Locilento-Knapp

1. Background

44 In this case, the 2004 Investigation Reports, which included property inspection, electrical inspection, well and tank survey, water sampling and mould investigation reports, recommended the following immediate repairs:

- repair of a culvert,
- addition of a railing to the front porch,
- removal of an exterior oil tank,
- completion of a structural assessment,

- replacement of door hardware,
- cleaning of eaves and extension of downspout,
- recaulking of the chimney flashing,
- inspection of the chimney,
- reduction of moisture in the basement,
- elimination of mould in the basement,
- addition of handrails for interior staircases,
- repair of a leak in laundry area/bathroom,
- repair or replacement of the sump pump,
- replacement of missing panes of glass, and
- replacement of a missing electrical fixture in the closet.

45 The 2004 Inspection Reports also suggested numerous other repairs or upgrades would be required in the foreseeable future including a new roof, a new furnace, a new floor, new plumbing, and new structural supports. The water inspection revealed that the criteria established for safe drinking water in Ontario and Canada were not met. Public Works, and the Knapps, were advised that the well water should not be used for potable purposes. Mould was detected in the basement, which had an earth floor and suffered from high humidity levels. The mould inspector recommended that, if the house was going to continue to be used for residential purposes, any building products in the basement showing evidence of mould growth be remediated and a concrete floor and dehumidifier be installed. Overall, the building inspector considered maintenance of the property to be good and maintenance of the home fair, as the basement was being avoided.

46 Public Works determined that in the first year, $54,550 would have to be spent to implement the recommendations in the 2004 Inspection Reports, and an additional $2,500 annually would be spent to provide potable water to the Knapps. The estimated cost of demolition was $15,000. Mould remediation work had been conducted in 1998. The estimated cost of the proposed mould remediation in 2005 was $18,950. Public Works concluded that the proposed repair and upgrade expenditures were not fiscally prudent, considering the value of the home, which had been assessed at $20,000 to $30,000.

47 Public Works served the Knapps with notice of termination on February 15, 2005 for a termination date of June 30, 2005, and brought an application for an eviction order. The Knapps filed applications seeking a rent abatement based on breaches of the Landlord's responsibilities under ss. 24, 25 and 26 of the Act in that Public Works had not

- removed the mould that had been identified in the 2004 expert's report,
- remedied other deficiencies identified in the property inspection report (such as a leak in the roof, broken door handles and closers on screen doors),
- corrected the water problem identified in a 2003 report (aside from delivering bottled water to the premises), or
- removed an old oil tank from the property.

2. Decision of the Tribunal

48 In its decision issued September 23, 2005, the Tribunal found that Public Works was in breach of both its s. 24(1) and s. 25 obligations. It ordered a rent abatement of $2,800 under s. 34(1)2. and it ordered Public Works to repair the following items by October 31, 2005 under s. 34(1)4.:

- install hand railings on the exterior porch/deck,
- install hand railings on all interior staircases presently lacking hand railings,
- replace panes of glass in kitchen window,
- professionally repair/patch the holes cut in the drywall and moisture barrier by the mould consultants, and
- inspect, and repair as necessary, all electrical outlets and fixtures in the rental unit;

failing which, the Knapps were authorized to deduct 30% of their rent starting in the month of November 2005 and continuing thereafter until all of the repairs were completed. Public Works was also required to increase the amount of bottled water being delivered to the Knapps.

49 The Tribunal granted Public Works' application for an eviction order but, using its discretion under s. 84(1)(b), delayed enforcement of the order under April 30, 2006.

50 In arriving at its decision regarding a s. 24(1) breach, the Tribunal found that there were 43 maintenance/repair issues identified in the 2004 Inspection Reports. It found that, while Public Works had installed a new furnace, a new sump pump, and a new iron/sulphur filter and UV system after the 2004 Inspection Report had been received, it had not done any further repairs and had not done a follow-up inspection. The Knapps had fixed the leaking shower, without help from Public Works.

51 In arriving at its decision regarding a s. 25 breach, the Tribunal made the following findings of fact. Since July 2001, Public Works had supplied the Knapps with bottled water. In November 2004, over the objections of the Knapps, it had reduced the amount from four to three bottles per week. The Tribunal found that Public Works had taken reasonable remedial action to address the fact that the well water was not potable by providing bottled water and by installing a UV system on the water supply; however, by reducing from four to three the number of bottles of water being delivered to the Knapps each week, Public Works had arbitrarily and unreasonably withheld a reasonable supply of a vital service contrary to s. 25 of the Act.

52 In spite of these findings, the Tribunal concluded that Public Works was not in *serious* breach of its responsibilities at the time of the hearing. It based this decision on the following additional findings of fact. The failure to install hand railings and address various electrical issues was a breach of Public Works' obligation to repair under s. 24(1) of the Act and constituted a potential risk to the health and safety of the Knapps, but the risk was not grave in nature. The presence of mould in the basement, the leaking roof and the foundational concerns would be problematic if the unit continued to be occupied on a long-term basis but did not materially impact on the Knapps' ability to safely reside in the rental unit at the time of the hearing. More particularly in regard to mould, the Knapps had not been aware of the presence of mould until the issuance of the 2004 Inspection Report and had not alleged that they had suffered any ill health as a result of it. The Knapps only used the basement, where the mould was located, for storage purposes. The presence of an old oil tank on the property, while an environmental hazard and unsightly, did not affect the Knapps' actual use of the property at the material time.

53 The Knapps' requested review of the Tribunal's decision was denied by the Tribunal on October 27, 2005. The Knapps appeal both the Tribunal's decision and the refusal of the Tribunal to review that decision.

4. Analysis

54 In my view, the Tribunal made no error of law in its interpretation of s. 84(2)(a) in the *Knapp* case.

55 The Tribunal correctly took direction from the existing Divisional Court jurisprudence that supports a balanced, contextual approach to a determination of whether a breach of landlord's responsibilities is serious. The factors the Tribunal considered significant were relevant to this determination. The good physical condition of the house was evidence that in an overall sense the Landlord was meeting its obligation to keep the house in a good state of repair. The absence of any grave health and safety risks to the Tenants was evidence that any breach of obligations was not serious. Considered both objectively and from the perspective of the tenants, problems that existed as a result of the Landlord's breaches of the duty to repair were not materially impacting the habitability of the premises. Public Works had replaced the furnace and the sump pump following receipt of the 2004 Inspection Report. As well, it had undertaken a mould remediation program in 1998. Presence of mould in the basement at the time of the hearing suggested that it was not something that could easily be eradicated. Finally, there was no evidence that on-going breaches of Public Works' duty to repair had created the situation which it was then relying on as its reason for wanting to demolish the premises.

56 I reject the Knapps' argument that there is a logical inconsistency in the Tribunal's decision when it found the breaches were not "serious" under s. 84(2)(a) but at the same time it stated that Public Works' failure to address certain health and safety issues in a timely manner was inexcusable and certain items had to be dealt with immediately. The Tribunal's comments about the breaches of obligations under ss. 24(1) and 25 were made in the context of its considering the Knapps' applications for relief under s. 34(1). The Act is not crafted such that a breach of landlord's responsibilities warranting relief under ss. 34(1) must be considered "serious" under s. 84(2)(a). The purpose of s. 34(1) is to assist tenants in obtaining their rights through on-going enforcement and compensation, where appropriate. The purpose of s. 84(2)(a) is to prevent landlords from regaining possession of their rental property when they are acting contrary to the Act or tenancy agreement. The test to invoke s. 84(2) is rightfully more onerous than that to invoke s. 34(1).

57 There is no inconsistency with the Tribunal granting Public Works an eviction order effective April 30, 2006 while at the same time ordering some immediate repairs. Those repairs represented Public Works' on-going responsibility to keep the premises in a good state of repair during the course of the tenancy; it was not entitled to ignore that responsibility simply because the tenancy would come to an end seven months hence pursuant to the eviction order.

4. Conclusion

58 The Tribunal made no error of law. The Knapps' appeals are dismissed.

Public Works & Government Services Canada v. Daryl S. Mogk

1. Background

59 The 2004 Inspection Reports for the Mogk home stated that, in comparison to other homes of similar vintage in the vicinity, the functional condition of the building was below average — the lowest rating possible. The inspector concluded that the house had serious structural problems that were too extensive to repair. There was wood rot in all structural elements, all floor joists and windows were in need of replacement, the foundation walls leaked, the roof sagged, and the heating system was inadequate to provide a comfortable home in the winter. He suggested the following repairs:

- installation of eaves troughs to reduce moisture in the basement,
- residing of two sides of the house,
- replacement of exterior electrical work, and knob and tube wiring in the basement,
- insulation of the attic, and
- additional support to the roof rafters.

60 In August 2005, the Mogks' were advised to use only bottled water. A water tank was installed on the property and hooked up to the house

61 Shortly after Mr. Mogk had taken possession of the property in 1991, he had undertaken extensive repairs and renovations to the house, without prior formal approval from Public Works. Inspections of the premises had been done by Public Works in 1993 and 1997. In 1995, Public Works had replaced the Mogks' roof, eaves troughs and fascia, and Mr. Mogk had installed a dormer and had shored up the main floor by installing temporary floor joists, wood beams and steel posts in the basement. A foundation draining system was installed by Public Works in 1998.

62 Following receipt of the 2004 Inspection Report, Public Works installed a water tank and two missing handrails and completed some electrical work but otherwise did not address any other items. It determined that it would have to spend $118,500 in the first year to install a new well and deal with the other maintenance issues raised by the inspector. According to its own analysis, the premises were already operating at a loss and Public Works would never be able to recoup the cost of recommended initiatives. The value of the building was $30,000 and the cost of demolition was $8,291. Public Works decided that demolition was the only economically responsible step to take.

63 Public Works served Mr. Mogk with notice of termination on February 15, 2005 for a termination date of June 30, 2005, and brought an application for an eviction order. In seeking a rent abatement, Mr. Mogk alleged that Public Works had breached its responsibilities under ss. 24 and 25 in that it had not repaired the foundation sub-floors, beams and joists, despite knowing of their deteriorated condition for approximately 15 years; was not supplying a vital service, namely water; had not repaired malfunctioning faucets, the roof and the rear windows; had not installed new eaves troughs, had not replaced old knob and tube wiring in the basement; and had not provided Mr. Mogk with either a smoke detector or carbon monoxide detectors (though Mr. Mogk had installed his own).

2. Decision of the Tribunal

64 In its decision issued March 21, 2006, the Tribunal found that Public Works was in breach of its obligation under s. 24(1) of the Act to maintain the premises in a good state of repair and ordered it to pay a lump sum rent abatement of $1,800 under s. 34(1)2. of the Act. Its findings were based on the fact that the foundation, sub-floors, beams and joists were severely deteriorated and Public Works had become aware of this condition through inspections in 1993, 1997 and 2004, but had made inadequate attempts to address it. Mr. Mogk was not responsible for and did not contribute to the deterioration of the structure; in fact, he had taken steps to stabilize it. The Tribunal's findings were further based on the fact that Public Works had replaced neither the eaves troughs that had fallen off in 1995 nor two failed windows on the ground floor, despite being aware of these problems from the 2004 Inspection Report. That Mr. Mogk had failed to complain in writing about these two items prior to filing his applications did not relieve Public Works of its obligation to repair the deficiencies once it had become aware of them through the inspection reports. The Tribunal ordered Public Works under s. 34(1)4. to repair the windows by April 11, 2006, failing which, Mr. Mogk was authorized to deduct 20% of his rent starting in the month of May 2006 and continuing thereafter until all of the repairs were completed.

65 The Tribunal concluded that Public Works had not breached its s. 24 obligations with respect to the knob and tube wiring in the basement or the failure to provide smoke and carbon monoxide detectors. It found that there was no evidence the wiring constituted a current safety issue or that it did not work and that such wiring is common in older houses. Further, Public Works' failure to provide smoke or carbon monoxide detectors was not a contravention of its s. 24(1) obligations because Mr. Mogk had installed them himself without ever telling Public Works that they were missing.

66 The Tribunal found that the evidence was inadequate to prove that the faucets in the kitchen and bathtub leaked or that there was a leak in the roof. Finally, Mr. Mogk had not established that the heating system was inadequate for his purposes. When the tenancy commenced, the rental unit was heated with a wood stove and electric baseboard heaters. Without Public Works' knowledge, between 1997 and 1999, Mr. Mogk replaced these heat sources with a propane heater. Although the 2004

Inspection Report noted Mr. Mogk felt that the heat source was inadequate in cold winters, Mr. Mogk did not include this as an issue in his applications and had never previously complained about the heat to Public Works.

67 The Tribunal also found that Public Works was not in breach of its s. 25 obligations with respect to the supply of water. The Tribunal found that since July 2001, Public Works had supplied Mr. Mogk with bottled water for consumption purposes. Until October 2005, Mr. Mogk had used a well on the property for non-consumption purposes. At that time, Public Works installed a water tank with potable water because it was determined that the well water was unsafe for any purpose. Prior to the application to the Tribunal, Mr. Mogk had never complained about an inadequate supply of potable water. The Tribunal found that Public Works had acted prudently and reasonably in supplying bottled water and then a tank of water.

68 The Tribunal found that Public Works' breaches under s. 24 were not serious breaches under s. 84(2)(a) and granted Public Works' application for an eviction order, terminating the tenancy agreement and ordering the Mogks to move out of the premises by July 1, 2006. In granting the eviction, the Tribunal determined that the deterioration of the foundation would have to be addressed if the tenancy were to continue for an extended period of time; however, Public Works' failure to perform the necessary repairs to the foundation did not significantly impact on the Mogks' ability to reside in the premises in their current condition. The Tribunal also found that the remaining maintenance issues identified in the 2004 Inspection Report were not significant in nature or effect on the Mogks, as evidenced by the lack of complaints on their part. It found that the characterization of the premises in the inspection report as "below average" related to the scale and expense of the repairs that would be necessary should the premises continue to be occupied on a long-term basis; that label did not relate to the Mogks' ability to safely inhabit the rental unit in its current condition.

69 Mr. Mogk appeals the eviction order granted by the Tribunal.

3. Analysis

70 I find that the Tribunal made no error of law in its interpretation of the meaning of "serious breach" in s. 84(2)(a) of the Act and in its choice of factors to consider in deciding that no serious breach existed in this case. What must be "serious" under s. 84(2)(a) of the Act is the landlord's *breach* of responsibilities, not the problem that exists. There is no doubt that there was a major structural problem due to extensive deterioration of the unit's foundation, sub-floors, beams and joists. No one would describe that problem as anything other than a "serious" problem, within the normal meaning of that word. However, the question to be decided by the Tribunal was not whether the structural *deterioration* was serious but whether, at the time of the hearing of the application for an eviction order, the Landlord was in serious *breach* of its responsibilities under the Act. It is conceptually possible for a serious problem to exist at a rental unit, but for the landlord not to be in serious breach, or for that matter, in any breach, of its responsibility to maintain the unit in a good state of repair, fit for habitation, and safe.

71 Under s. 24(1), the Tribunal determined that Public Works was in breach of its responsibility to keep the unit in a good state of repair through inadequate attempts to deal with the deteriorated foundation, sub-floors, beams and joists; by failing to replace eaves troughs; and by failing to replace two failed windows. Consequently the rent abatement was allowed. In arriving at this conclusion, the Tribunal did not consider whether the premises were habitable or whether they complied with health or safety standards. These are separate categories of responsibilities under s. 24(1), and the Tribunal recognized that.

72 However, in considering whether the Landlord was in serious breach of its responsibility to keep the unit in a good state of repair at the time of the hearing, the Tribunal was entitled to consider the impact that the breach had on the Tenants — both objectively and from the Tenants' perspective. It was in this context that the Tribunal took into account that, as of the date of the hearing, the breach of the duty to maintain the unit in a good state of repair had not impacted the habitability of the premises, nor had it put the health or safety of the Mogks in jeopardy. Furthermore, the Mogks themselves had not felt impacted by the breach, as evidenced by their failure to formally complain to Public Works prior to the commencement of the application.

73 In arriving at its conclusion regarding the seriousness of the breach under s. 84(2)(a), the Tribunal was also entitled to consider, as it did, what caused the structural deterioration, the steps taken by Public Works in the past to rectify the problem, and what, if anything, could be done by Public Works to rectify the problem. There was evidence that the high moisture level in

the basement had caused the wooden structures to rot. Public Works' architect, Sharon Fitzsimmons, testified that the condition of the rental unit was due, in part, to water seepage that had occurred due to the location of the home at the bottom of a valley. Her opinion was that the foundation could not be repaired; instead, the building would have to be lifted up and a new foundation installed, if the goal was to maintain the building in the long-term. Ms. Fitzsimmons testified that the new drainage system installed by Public Works after the 1997 inspection report served to alleviate pressure on the foundation, but did nothing to reverse the gradual deterioration of the foundation. The deteriorated foundation allowed moisture into the basement, which in turn lead to rot in the sub-floor, beams and joists.

74 It is arguable that, if the remedial work required to deal with a deteriorating foundation is to lift the house off the foundation and install a new foundation, that goes beyond the concept of "repair", as that would is normally used. It falls within the concept of renovation, upgrade or improvement. In our view, to require a landlord to embark on major capital renovations, upgrades or improvements in order to perpetuate a residential use for a rental property goes beyond the landlord's responsibility to *maintain* the rental unit in a good state of repair as contemplated in s. 24(1). Putting that possibility aside, and accepting the Tribunal's finding that Public Works was in breach of its duty to maintain the Mogk home in a good state of repair by not adequately addressing the foundation issues prior to the hearing, the fact that a major capital expenditure would be required to improve the foundation was a significant factor for the Tribunal to consider in deciding whether, under s. 84(2)(a), Public Works was in serious breach of its responsibilities. The nature of the remedial action that would be required was part of the context that helped to inform the seriousness of the Landlord's failure to adequately address an identified maintenance issue.

75 It must also be noted that, under s. 84(2)(a), the onus is on the tenant to establish on a balance of probabilities that, at the time of the hearing, the landlord is in serious breach of one of its responsibilities. Evidence is required to support such a finding. It is not apparent from the record that any evidence was adduced as to what Public Works could and should have done during the Mogks' occupation of the premises to deal with the deteriorating foundation, aside from installing a new draining system (which it did in 1997), installing new eaves troughs (which it was faulted for not having done), and lifting the house and replacing the foundation (which entailed a major capital expense not immediately required for health or safety purposes).

76 In regard to the structural problems, the Tribunal was also entitled to consider, as it did, that Mr. Mogk had stabilized the structural problems by installing temporary floor joists, wood beams and steel posts, thereby obviating the need for Public Works to do so. Public Works could not be considered in breach of its duty to repair if the repairs had already been completed as of the date of the hearing, even if the repairs had been undertaken by the Tenants.

77 For the same reasons provided in the *Knapp* case, there is no inconsistency with the Tribunal granting Public Works an eviction order effective June 30, 2006 while at the same time ordering the immediate replacement of two windows.

4. Conclusion

78 Mr. Mogk's appeal is dismissed.

Public Works & Government Services Canada v. Gary and Wendy Beelby

1. Background

79 The 2004 Inspection Report stated that, in comparison to other homes of similar vintage in the vicinity, the functional condition of the Beelby home was below average — the lowest rating possible. The inspector concluded that the house was in such poor condition it was probably not worth repairing. He observed that the roof (including soffitt and fascia), furnace and oil tank were all at the end of their functional lives and should be replaced. He observed that the kitchen and bathroom were in marginal condition and he recommended major remodelling in the near future. For safety reasons, he recommended the installation of a handrail on the basement stairs and lights on the exterior. The foundation wall required repair at one corner and the driveway needed additional gravel. He estimated the total cost of these initiatives would be $19,500. Once Public Works received the inspection report, it took steps to install the basement handrail, add exterior light fixtures, repair a broken door and repair a leak in the roof. Otherwise, it did not undertake any further repairs or renovations.

80 An independent mould report indicated the presence of mould in the kitchen, the bathroom, one bedroom and the basement. Aging asphalt shingles and clogged eaves troughs on one side of the house were identified as possible reasons for moisture penetration on the second floor. No other potential sources of moisture penetration were observed. Various remediation measures were recommended including renovation of the bathroom, the installation of a bathroom fan, removal of materials with mould from the ceiling and wall in one bedroom and installation of a dehumidifier in the basement.

81 Public Works estimated that the cost of all recommended maintenance work would be $78,500 in the first year, including connection of the premises to the community well. According to its own analysis, the premises were already operating at a loss and Public Works would never be able to recoup the cost of recommended initiatives. The value of the building was $25,000 and the cost of demolition was $16,971. Public Works decided that the proposed expenditures were not fiscally prudent and that demolition was the only economically responsible step to take.

82 Public Works served the Beelbys with notice of termination on February 15, 2005 for a termination date of June 30, 2005, and brought an application for an eviction order. The Beelbys filed applications seeking a rent abatement based on breaches under ss. 24, 25 and 26 of the Act. In seeking an abatement, the Beelbys alleged that Public Works had not connected the home to the community well (as promised in 2003), had not taken any remedial measures for mould, had not repaired the roof (as promised in 2003), and had not undertaken numerous other repairs recommended in the inspection report.

2. Decision of the Tribunal

83 In its decision issued December 19, 2005, the Tribunal denied Public Works' application for an eviction order, gave the Beelbys a lump sum rent abatement of $1,500 for the previous year and ordered Public Works to undertake various repairs by February 28, 2006, failing which a 30% rent abatement would be allowed.

84 The Tribunal found that Public Works was in breach of its obligation under s. 24(1) of the Act to maintain the premises in a good state of repair. Of greatest significance was the presence of mould in several rooms. Other outstanding maintenance issues included a deteriorated garage, rotting kitchen countertop and a walkway/driveway in poor condition. The Tribunal concluded that these maintenance issues were a direct result of Public Works' failure to adequately repair and maintain the rental unit during the course of the tenancy.

85 In arriving at its decision, the Tribunal highlighted the following evidence. Aside from an electrical inspection conducted in 1992, no inspection of the property had been done from 1992 to 2004. In the years prior to the 2004 inspection, the Beelbys had brought to Public Works' attention the following maintenance issues: a roof leak, shingles falling off the roof, clogging of the external water tank, a vandalized basement door, a rotting footbridge over a creek, and rot in the kitchen counter. As well, the Beelbys had requested that the premises be attached to a community water supply. At the time of the hearing, the garage doors were falling off, the cement walkway and stairs were cracked and separated and the exterior wood trim required painting. The Beelbys had not brought these items to the attention of Public Works because it had not responded to the Beelbys' earlier complaints. Ms. Beelby had noticed mould in the basement several years earlier, but had not been particularly concerned about it and, as a result, had not reported its presence to Public Works. Ms. Beelby believed that, with the exception of the roof and water supply, the premises were in good shape.

86 The Tribunal reviewed the mould inspection report and the inspector's list of possible factors contributing to the presence of mould; namely, past clogged eaves troughs, aging asphalt roof shingles, a roof leak, lack of an exhaust fan in the washroom, an improperly sealed tub surround and high humidity levels in the basement. It noted that in December 2004, Public Works notified the Beelbys that it was reviewing a mould remediation strategy and would contact them shortly with a recommended course of action; however, it took no further steps in this regard before the hearing in September 2005.

87 The Tribunal reviewed the repair and maintenance work that had been done by Public Works over the years. In approximately 1997, a concrete platform, eaves troughs, fascia and windows were replaced. Aside from the provision of water to the premises, no further maintenance or repairs of any significance had been done until after Public Works received the 2004 Inspection Report. Between September 2004 and September 2005, Public Works did minor electrical work, installed exterior

lighting, installed railings on the basement stairs and on the exterior concrete deck, removed a rotting footbridge and stairs, reshingled over a section of the roof and repaired the basement door.

88 As a result of Public Works being in breach of its s. 24(1) obligations, the Tribunal ordered it to complete the following repairs by February 28, 2006:

- undertake the mould remediation and reinstatement recommended in the November 2004 mould report;
- repair, replace or remove the external garage;
- replace soffit/fascia;
- repair foundation wall at northeast corner;
- repair walkway/driveway;
- repair/replace rotting kitchen countertop;
- install GCFI electrical receptable in the bathroom;
- ensure that the kitchen and bathroom were functional and safe — repair or replace as necessary; and
- ensure that the roof, furnace and oil tank were functional/operational at all times.

89 In making these orders, the Tribunal was critical of Public Works not addressing certain maintenance issues highlighted in the inspection report and addressing others only approximately one year after the report had been received.

90 In regard to the Beelbys' water supply, until 2002, they had used water from a well located on the property. The well was decommissioned in 2002, and since then Public Works had been supplying the Beelbys with bottled water for drinking purposes and a tank of water for other purposes. In 2002 and 2003, Public Works advised the Beelbys that the water tank was just a temporary measure and soon they would be connected to a community water supply; however, by 2004, it had determined that such a step was technically difficult to achieve and would cost in excess of $20,000 to install and $5,000 annually to maintain. The Tribunal found that the amount of water that was supplied to the Beelbys was adequate for their purposes, and consequently, even though they may have preferred connection to a community well, Public Works had not interfered with the supply of a vital service contrary to s. 25 of the Act. In the Tribunal's view, Public Works had acted prudently and reasonably in installing a water holding tank and supplying bottled water.

91 The Tribunal went on to find that the Landlord's breach of its s. 24(1) responsibilities was "serious" within the meaning of s. 84(2)(a) and, as a result, the eviction order was refused. In arriving at this conclusion, the Tribunal relied on the following additional findings of fact. By failing to take the remediation measures recommended by the mould consultants, Public Works failed to provide the Beelbys with a safe living environment. The maintenance issues raised in the general inspection report had not arisen only in the last year, but rather were the product of Public Works' failure to adequately maintain the rental unit over a number of years. Ms. Fitzsimmons' evidence was that routine maintenance costs in respect of a single family dwelling such as the rental unit could be between $2,000 and $2,500 annually, but Public Works' actual maintenance expenditures over the previous eleven years had been significantly less than that. Public Works was responsible for the poor condition of the rental unit by failing to devote the resources necessary to adequately maintain it. The Beelbys were in no way responsible for the poor condition of their premises.

92 The Tribunal also considered the effect on the Beelbys of the condition of their home. It noted that the Beelbys had complained about some, but not all of the deficiencies found by the inspectors. As well, Ms. Beelby had testified that, in her view, the house was in good shape with the exception of the roof and water supply. The Tribunal considered this evidence that the Beelbys were not concerned about many of the deficiencies. Nevertheless, the Tribunal concluded that, under s. 84(2)(a), it is for the Tribunal and not the tenant to determine whether or not the landlord is in serious breach of its maintenance

responsibilities. The Tribunal observed that s. 84(2)(a) of the Act is intended to prevent landlords from allowing their property to fall into a state of disrepair and then obtain termination on the ground that performing the necessary repairs would be too costly.

93 Public Works does not take issue with the findings of the Tribunal that it was in breach of its obligation to repair under s. 24(1), and it does not appeal the Tribunal's decision in regard to the rent abatement. Public Works' position is that the Tribunal erred in law in denying it an eviction order and in making an order for significant repairs.

3. Analysis

(a) Differential Treatment for Crown as Landlord

94 Public Works argues that, in interpreting s. 84(2)(a), the Tribunal should have taken into account that Public Works is not running a business, but is holding land for a public purpose; that the money Public Works spends is public money and, as such, there are budget and other policy issues determined by Parliament with which private landlords do not contend. I reject this argument.

95 When the Crown chooses to enter the residential tenancy market in Ontario, it is bound by the same rules as all other residential landlords, unless the law specifically provides that different standards apply. There are no provisions in the Act itself that suggest that a different standard should be applied to the Crown as a landlord, and I am not persuaded that there are any policy reasons mandating a different standard of conduct for the Crown.

(b) One-year time limit

96 Public Works argues that it was not appropriate for the Tribunal to allow tenants seeking to rely on s. 84(2)(a) to raise maintenance issues that are well over a year old to frustrate a landlord's efforts to deal with a rental unit, when the tenant has not commenced an application for redress under the Act within one year of the landlord's alleged breach. I reject this argument.

97 Although there is a one-year time limit in s. 32(2) of the Act, there is no time limit incorporated in s. 84(2)(a). The timing of when the alleged breach first occurred and what has transpired since are relevant factors in a s. 84(2)(a) analysis. It is up to the Tribunal to decide what weight to assign to these factors.

(c) Evidence Regarding Impact of Mould

98 Public Works argues that there was no evidence before the Tribunal that proved on a balance of probabilities that the presence of mould in the Beelby household posed any health or safety threat to the Beelbys; therefore, it was not open to the Tribunal to conclude that Public Works, in not taking any steps to remediate the mould problem between receipt of the November 2004 mould report and the hearing in September 2005, was in serious breach of its responsibilities. I reject this argument.

99 The Tribunal considered the presence of mould in several rooms in the Beelby house as the most serious maintenance issue under s. 24(1). Under s. 24(1), a landlord is required to maintain the rental unit (1) in a good state of repair, (2) fit for habitation, and (3) in compliance with health, safety, housing and maintenance standards. These are three separate and distinct requirements.[5] There was evidence before the Tribunal that Health Canada recommends that remediation measures be undertaken when mould is discovered in residential premises. The mould inspector recommended that remediation work be done if the premises were continuing to be occupied. It was open to the Tribunal to consider this evidence when deciding that failure to take remediation steps in a timely manner was a breach of the Landlord's responsibility to maintain the premises in a good state of repair. The Tenants were not obliged to prove that their premises were unsafe, unhealthy or uninhabitable.

100 When considering whether Public Works' breach of its repair obligations was serious under s. 84(2)(a), the Tribunal correctly took into account the finding in the 2004 Inspection Reports that there was a causal connection between the growth of mould and past clogged eaves troughs, aging asphalt roof shingles, a roof leak, lack of an exhaust fan in the washroom, an improperly sealed tub surround and high humidity levels in the basement. That Ms. Beelby had earlier notified Public Works

of the deteriorated condition of the roof, that she had not reported the presence of mould in the basement and that Public Works had not done regular inspections on the property were other relevant factors that the Tribunal rightly considered.

(d) Complaints by the Tenants

101 Public Works argues that the finding of a serious breach is not justified in circumstances where the Tenants have failed to notify Public Works about a number of maintenance items on which they relied under s. 84(2)(a). I reject this argument.

102 Quite rightly, the Tribunal considered the Beelbys' failure to report certain maintenance issues as evidence that the Beelbys did not consider these items serious and that Public Works had been unaware of these problems until it had received the 2004 Inspection Reports. It was also evidence relevant to the question of whether the Tenants were partially responsible for the premises deteriorating over time due to the Landlord not being aware of the existence of deficiencies requiring attention. This finding, however, was not determinative of the applications; it was one fact, among many, that created the context in which the Tribunal had to decide whether Public Works' breaches were serious. It was for the Tribunal, and not this reviewing Court, to decide how much significance to assign to this finding.

(e) Habitability of the Premises

103 Public Works argues that the fact that it did not repair the premises after it received the 2004 Inspection Reports should not have been identified by the Tribunal as a reason why it was in serious breach of its maintenance responsibilities. Once aware of the condition of the premises, Public Works moved promptly to assess whether it was cost effective to address the maintenance issues and, when it decided that it was not, to terminate the Beelbys' tenancy. Public Works argues that, if a landlord discovers a rental unit is in poor condition, and the landlord decides to demolish the unit due to its condition, it makes no sense for the Tribunal to use the condition of the rental unit to find the landlord in serious breach of its maintenance obligations, unless the maintenance items seriously affect the habitability of the rental unit. If this were not the case, rental properties in poor condition would always have to be fixed up prior to demolition. In our view, the habitability of the premises between the date the inspection reports were received and the date of the hearing was a relevant factor for the Tribunal to consider in its s. 84(2)(a) analysis, and more particularly in assessing the reasonableness of Public Works' reaction to the 2004 Inspection Reports.

104 However, habitability of the premises is not an automatic trump card for landlords; it is one factor — in certain contexts an important factor — for the Tribunal to consider when determining whether a landlord is in serious breach of its obligation to repair. Other considerations come into play under s. 84(2)(a), including the length of time during which a repair issue has been outstanding, whether complaints were made to the landlord, whether the landlord ever undertook any independent inspections, whether the landlord made any attempts to deal with the issue, and the extent to which the problem impacts on the tenants' health, safety, use and enjoyment of the premises. Therefore, in deciding whether a landlord is responding reasonably and responsibly to the circumstance of its rental unit requiring major work in order to continue as a rental unit, the Tribunal should consider the habitability of the premises at the current time. However, the fact that the premises continue to be habitable does not necessarily mean that the Landlord is acting reasonably and responsibly in not making certain repairs while it takes steps to regain possession of the premises for one of the purposes in s. 53(1).

105 I are satisfied that the Tribunal did take into account the habitability of the premises in arriving at its s. 84(2)(a) decision.

(f) Improper Reasoning

106 Public Works argues that the Tribunal made an error in law through improper reasoning; namely, that since the Beelby premises were in poor condition and would require major expenditures if they were to continue to be used as residential premises in the future, and since Public Works in the past had spent less on maintenance than what its representative acknowledged would be a reasonable amount to spend, Public Works must have breached its duty to repair and that breach must be considered serious. Based on paragraphs 81 and 82 of the Tribunal's decision, I agree that this is how the Tribunal reasoned. This was an error of law.

(i) Historical Repair Budgets

107 The level of resources spent on a rental unit is not, in and of itself, an appropriate basis for finding that a landlord is in serious breach of its maintenance responsibilities. What Public Works had spent on routine repairs and maintenance of the Beelby premises in the years predating the hearing was one relevant factor to be considered by the Tribunal in determining whether the breaches under s. 24(1) were serious. This information is part of the context that helps to define and explain the Landlord's actions or inactions. The Tribunal made no error in taking into account what had been spent and what one might reasonably expect to spend on maintenance over the years leading up to the hearing; however, it did err in law in concluding that, simply because Public Works had not spent on routine maintenance what one might have expected it to spend, it must be responsible for the poor condition of the rental unit. The Tribunal was obliged to consider how, if at all, not spending money on repairs and maintenance in the past had contributed to the current poor condition of the premises before summarily concluding that the lack of spending must be the cause of the current poor condition.

(ii) Repair v. Renovation

108 There any many reasons why rental premises may be in poor condition aside from the landlord's neglect of its duty to maintain them in a good state of repair. Those reasons include the age of the unit, the materials used to construct it, the method of construction, the way a tenant uses the unit and the failure of a tenant to report deficiencies in a timely fashion. It is an error of law for the Tribunal to decide that a landlord is in breach of its duty to maintain and repair simply because, at the time of the hearing, many of the major elements in the home have arrived at the end of their useful lifespan and have not been replaced by the landlord. A landlord is entitled to wait until a major element has reached the end of its normal lifespan before replacing it; provided it remains functional while the premises are occupied by a tenant. In the case at hand, as of the date of the hearing, all of the major elements requiring replacement were still functional. The concern expressed by the inspector was that they would not continue to function for long.

109 Section 53(1) of the Act makes it clear that, when faced with a rental unit that requires major capital expenditures if it is to continue as a rental unit, the landlord may consider demolition, converting the use for a purpose other than residential, or undertaking extensive repairs or renovations requiring possession of the premises. In this case, Public Works was faced with premises that required in the immediate future a new roof, soffits, fascia, furnace, oil tank, kitchen, bathroom and possibly septic field because these important elements in the home had come to the end of their normal lifespan. The anticipated cost of this work was $60,000, in addition to the cost of mould remediation and the provision of water. The inclusion of s. 53(1) in the Act indicates the intention of the legislature to afford a landlord, faced with high projected maintenance costs and a low rate of return, the ability to make a rational economic decision about the future of the rental premises. Interpreting s. 84(2)(a) in such a way as to require a landlord to replace all major elements that have come to the end of their useful lives before the landlord can regain possession of the premises to pursue demolition or a change of use of the premises, would be contrary to that intention and would render s. 53(1) meaningless. Moreover it would produce an absurd result. It is a well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. [6]

110 The reasons of the Tribunal, when read as a whole, lead me to conclude that, in finding that Public Works was in *serious* breach of its duty to repair, the Tribunal relied on the fact that, if the Beelby home was to continue as rental premises, major renovations would have to be undertaken in the near future. This was an error in law.

111 In the section of its decision dealing with s. 24(1), the Tribunal, although reviewing all of the recommendations in the 2004 Inspection Reports, including those dealing with major expenditures required in the future, specifically identified the presence of mould, a deteriorated garage, a rotting kitchen countertop and a walkway/driveway in poor condition as maintenance issues which were a direct result of Public Works' failure to adequately repair and maintain the rental unit during the course of the tenancy. It did not refer to all of the elements that would require replacement in the future as evidence of a breach of Public Works' duty to repair as of the date of the hearing.

112 In the section of its decision dealing with s. 84(2)(a), the Tribunal referred to the need to replace various major elements of the house as a repair or maintenance issue. At the end of its s. 84(2)(a) analysis, the Tribunal stated: "I also agree with the Tenants' counsel that paragraph 84(2)(a) of the act is intended to prevent Landlords from allowing their property to fall into

a state of disrepair and then obtaining termination of the ground that performing the necessary repairs is too costly". The cost complained of by Public Works in its arguments regarding the applicability of s. 84(2)(a) was the cost of the major expenditures that would be required if the property were to continue to be used as residential rental premises in the future; it was not the cost of routine repairs and maintenance.

113 I conclude that, although the Tribunal may not have relied on the fact that major elements of the house had arrived at the end of their normal life to conclude that Public Works was in breach of its duty to repair under s. 24(1), it did rely on this fact to conclude that Public Works was in *serious* breach of its duty to repair. This was an error in law. The age of the premises, the need for major elements to be replaced, upgraded or retrofitted and the projected cost of those anticipated capital expenditures were relevant factors explaining the context in which the applications were brought and informing any determination as to whether the Landlord was acting in a reasonable and responsible fashion in seeking an eviction order for the purpose of demolition. They were not directly relevant to the issue of whether Public Works was in serious breach of its duty to maintain the premises in a good state of repair. The fact that a major element required replacement would be relevant to this determination if the reason why it required replacement was not simply due to the passage of time but instead resulted in part from the Landlord's failure to repair or maintain it. Although in paragraph 83 of its decision, the Tribunal states: "The evidence suggests the condition of the rental unit is due to normal wear and tear and usage by the Tenants over the past 25 years, *and the Landlord's failure to perform regular and routine maintenance over that period of time*", the only specific finding of fact to this effect made by the Tribunal was that in paragraph 56, namely, that the Landlord had failed to adequately deal with the mould, the deteriorated garage, the rotting kitchen countertop and the walkway/driveway. No finding was made by the Tribunal that the Landlord had failed to adequately maintain the roof, soffits, fascia, furnace, oil tank, kitchen (aside from the countertop), bathroom or septic field and this had contributed to an immediate need to replace them. The Tribunal's findings of fact did not support its conclusion that there had been a serious breach of the Landlord's duty to repair.

(g) Public Works' Appeal of Order for Repairs

114 Public Works also seeks to overturn the Tribunal's order under s. 34(1)4. that certain repairs be done. Public Works argues that several of the repairs, if required to be done by Public Works before it could get an eviction order, would render s. 53(1) meaningless and would lead to an absurd result.

115 The Tribunal found that Public Works was in breach of its s. 24(1) obligations by not addressing a number of items that were raised in the 2004 Inspection Reports prior to the hearing of the applications. It identified mould as the most serious issue and said that other outstanding maintenance issues raised in the evidence of Ms. Beelby or in the 2004 Inspection Reports *included* the deteriorated garage, the rotting kitchen countertop and the poor condition of the walkway and driveway. This finding gave the Tribunal jurisdiction to make an order for repairs under s. 34(1)4.

116 The Tribunal's order under s. 34(1)4. had to relate back to its findings regarding how Public Works had failed to maintain the rental unit in a good state of repair, as it was required to do under s. 24(1). The Tribunal does not have the authority to order a landlord to do repairs in regard to matters where the landlord has not been found to be in breach of its responsibilities. Furthermore, the Tribunal does not have the authority to order a landlord to take proactive measures to ensure that in the future the landlord will not be in breach of its duty to repair. The problem with the Tribunal's findings in regard to s. 24(1) is that it was not precise in identifying which items from Ms. Beelby's testimony and the 2004 Inspection Reports Public Works had been obliged to deal with prior to the hearing. One interpretation is that Public Works only had to deal with the specific items referred to in paragraph 56 of the Decision. Another is that paragraph 56 offered examples of a wider range of items that the Tribunal concluded Public Works should have addressed but did not prior to the hearing. To the extent that the Tribunal's repair order dealt with items not properly relied on by the Tribunal as being the basis for its findings under s. 24(1) or to the extent that the Tribunal's repair order required Public Works to replace a major element on the premises that was functional at the time of the hearing, the order went beyond the authority of the Tribunal under s. 34(1).

4. Conclusion

117 Public Works' appeals are granted and the issue of whether s. 84(2)(a) is applicable in this case and the appropriate order to be made under s. 34(1) is referred back to the Tribunal for a rehearing with the benefit of the opinions expressed in these Reasons.

Public Works & Government Services Canada v. Robert McKay

1. Background

118 In the *McKay* case, the 2004 Inspection Report stated that, in comparison to other homes of similar vintage in the vicinity, the functional condition of the building was below average — the lowest rating possible. The inspector concluded that the house was in such poor condition that it should be demolished. He observed that there was a high probability of certain parts of the roof and flashings requiring replacement. He recommended:

- installation of gutters and downpipes everywhere,
- replacement of all exterior windows and doors,
- immediate replacement of a rear deck that was unsafe,
- replacement of exterior lighting fixtures at the front and back,
- addition of a GFCI receptacle in the bathroom,
- cleaning of the air ducts and filter,
- installation of a carbon monoxide detector,
- replacement of the oil tank,
- repair of leaking pipes at the kitchen and bathroom sinks,
- refurbishing floor coverings, windows and interior doors,
- installation of structural supports for the roof,
- flue cleaning,
- major remodelling of the bathroom, and
- major remodelling of the kitchen.

119 The inspector's summary recommendation was that the building be removed and the garbage cleaned up around the property because there was nothing worth repairing or saving.

120 An independent November 2004 mould report indicated that mould was observed in the kitchen, bathroom and two bedrooms. Factors identified as contributing to the presence of mould were poorly sealed door and window frames, roof leaks, absence of an exhaust fan in the washroom, a possible past toilet leak, an improperly sealed tub surround and "sweating" pipes under the kitchen sink. Various remediation measures were recommended.

121 Public Works estimated that the cost of all recommended maintenance work would be $123,500 in the first year, including digging a well. According to its own analysis, the tenancy was already operating at a loss and Public Works would never be able to recoup the cost of recommended initiatives. The value of the building was $20,000 and the cost of demolition was $19,936. It decided that the proposed maintenance expenditures were not fiscally prudent and that the lowest cost option was demolition.

122 Public Works served Mr. McKay with notice of termination on February 16, 2005 for a termination date of June 30, 2005, and brought an application for an eviction order. Mr. McKay filed applications seeking an abatement of rent based on Public Works' alleged breaches under ss. 24, 25 and 26 of the Act. In seeking an abatement, Mr. McKay alleged that Public Works had not removed the mould, corrected the deficiencies identified in the inspector's report, provided adequate safe water and removed old oil storage tanks on the property.

2. Decision of the Tribunal

123 In its decision issued November 28, 2005, the Tribunal denied Public Works' application for an eviction order, gave Mr. McKay a lump sum rent abatement of $1,770 for the previous year and ordered Public Works to undertake various repairs by January 28, 2006, failing which a 30% rent abatement would be allowed.

124 The Tribunal found that Public Works was in breach of its obligation under s. 24(1) to maintain the premises in a good state of repair. Of greatest significance was the unsafe deck and garage, the presence of mould in several rooms, an oil tank in need of replacement, deteriorated carpeting and leaking pipes. The Tribunal concluded that these maintenance issues were a direct result of Public Works' failure to adequately repair and maintain the rental unit during the course of the tenancy. It highlighted the following evidence.

125 Public Works' representative was unaware of any inspection having been done of the property prior to the 2004 Inspection Reports. Mr. McKay believed that an inspection had been done four or five years earlier, but had not resulted in any repair work being undertaken by Public Works. Mr. McKay testified that he had brought several maintenance issues to the attention of Public Works five to ten years earlier, including a non-functioning sliding door and lack of storm windows in the kitchen and one of the bedrooms. The Landlord had not responded. However, in approximately 2000, Public Works had replaced some roof shingles, installed eaves troughs and installed siding. Public Works records showed expenditures of $49,000 relating to the repair, maintenance and water-quality issues. Its records showed that since 2000, it had spent $8,000 repairing and maintaining the property. Ms. Fitzsimmons conceded that Public Works' failure to address certain of the outstanding maintenance issues, such as replacing the doors and repairing the roof, might have contributed to the growth of mould on the premises. In a letter to Mr. McKay dated December 8, 2004, Public Works indicated that it was reviewing a remediation strategy for the mould and would contact Mr. McKay shortly with a recommended course of action. Public Works did not contact Mr. McKay subsequently in regard to this issue. No action was taken because, in the opinion of Public Works, the mould inspection report did not reveal any issues that seriously impacted the habitability of the premises or otherwise required immediate attention.

126 The Tribunal was critical of Public Works not addressing any of the maintenance issues highlighted in the 2004 Inspection Reports during the year between its receipt of the report and the hearing in August 2005. It found that the lack of a response on the part of Public Works warranted an abatement of rent in regard to the 12-month period preceding the filing of Mr. McKay's application. According to Mr. McKay, at the time of the hearing, the deck, certain windows and much of the flooring required immediate attention, and something needed to be done about the well pump freezing in the winter. The deck had fallen into a state of disrepair because Public Works had torn up a portion of the deck to investigate the condition of the well and had failed to restore the deck to its original condition. In the winter of 2004/2005, Mr. McKay had had to do necessary repairs to the oil tank on the property before the oil company retained by Public Works would deliver oil to the premises. On February 3, 2005, Public Works had advised Mr. McKay in writing that the oil tank on the property would be replaced; this was not done prior to the hearing. During the course of the mould investigation, small holes had been cut in the walls and kitchen floors that had not been repaired as of the date of the hearing.

127 As a result of Public Works being in breach of its s. 24(1) obligations, the Tribunal ordered it to complete the following repairs by February 28, 2006:

- repair, replace or remove wood deck;
- repair or replace front and rear doors;

- repair or replace interior doors;
- install storm windows on all windows presently lacking storm windows;
- retain qualified personnel to determine if the rental unit requires additional collar ties/structural support;
- replace floor coverings throughout the rental unit;
- repair or replace roof, gutters, down pipes, and roof/wall flashings;
- install GCFI electrical receptable in the bathroom;
- clean and service air cleaner/filter and air ducts;
- install carbon monoxide detector;
- replace oil tank;
- repair leaks to water supply line leaks;
- repair leaks to kitchen and bathroom sinks;
- professionally repair/patch the holes cut in the drywall and moisture barrier by the mould consultants;
- repair, replace or remove the external garage;
- ensure all windows are functional and safe — repair or replace as necessary; and
- ensure that the kitchen and bathroom are functional and safe — repair or replace as necessary.

128 The Tribunal found that Public Works had not interfered with the supply of a vital service contrary to s. 25 of the Act. It found that until 2001, Mr. McKay had used water from a well located on the property. Since 2001, Public Works had been supplying Mr. McKay with bottled water for all potable purposes. Mr. McKay had continued to use the well water for bathing and washing dishes. Mr. McKay was satisfied with the supply of bottled water. The Tribunal concluded that the amount of water supplied to Mr. McKay had been adequate for his purposes.

129 The Tribunal went on to find that Public Works' breach of its s. 24(1) responsibilities was "serious" within the meaning of s. 84(2)(a). In doing so, the Tribunal relied on the following additional findings of fact. The deficiencies existing at the McKay property were numerous and significant; nevertheless, only two represented an immediate risk to Mr. McKay's health and safety — the rear deck and the garage. The maintenance issues arose over time, and not just in the year prior to the 2004 Inspection Reports. The maintenance issues were the product of Public Works not having spent an adequate amount on the repair and maintenance of the property in recent years. Since 2000, Public Works had spent less than $1,500 annually, whereas by its own estimate, ongoing maintenance and water quality costs would amount to $4,500 per year. The deficiencies were not caused by any action or inaction on the part of Mr. McKay, but were the result of normal wear, tear and usage by Mr. McKay over 25 years and Public Works' failure to perform regular and routine maintenance over that period. Mr. McKay complained to Public Works about certain maintenance issues approximately five years earlier. In the previous five years, Mr. McKay complained only about emergency issues, such as leaking pipes and a frozen water pump. Mr. McKay's failure to complain to Public Works did not cause Public Works to be ignorant of the rental unit's state of repair. Public Works was aware of the condition of the premises at least since August 2004, and still failed to address any of the deficiencies. Nevertheless, Mr. McKay's failure to report deficiencies in the last five years, and his statement to Public Works after receiving the notice of termination that he was willing to reside in the premises even if no repairs were undertaken, was evidence that Mr. McKay did not consider the deficiencies a serious breach of Public Works' maintenance obligations.

130 Because the Tribunal concluded the Landlord's breach of s. 24(1) was serious, the denial of Public Works' application to terminate the tenancy and evict Mr. McKay was automatic and mandatory.

131 Public Works does not take issue with the findings of the Tribunal that it was in breach of its obligation to repair under s. 24(1), and it does not appeal the Tribunal's decision in regard to the rent abatement.

3. Analysis

132 As in the *Beelby* case, Public Works puts forward numerous arguments why the Tribunal made an error in law in denying its eviction order under s. 84(2)(a) and in ordering it to make numerous repairs under s. 34(1)4.

133 First, a building inspection report is a planning tool to assist a property owner in deciding what to do with a house. In deciding whether something is a necessary repair, a landlord, as owner of the property, is entitled to take into account whether the item remains functional even though it has come to the end of its estimated lifespan, whether a non-functioning item seriously impacts the tenant and whether it is cost effective to repair or replace the item instead of choosing another option such as demolition or change of use.

134 Second, a number of deficiencies relied on by the Tribunal in denying an order of eviction were items that were still functional (e.g. roof), items that did not affect the habitability of the premises (e.g. flooring), or items requiring major capital expenditures (e.g. kitchen, bathroom, windows, roof). Before embarking on this type of expensive repair or renovation, Public Works was entitled to decide whether demolition was the response that was most appropriate from an economic perspective.

135 Third, in deciding not to repair various items between the date of the inspection report and the date of the hearing, Public Works relied on the letter from Mr. McKay stating that he was perfectly willing to remain in the premises without repairs being done or to move to one of a number of other unoccupied premises on the Pickering Lands Site.

136 Fourth, the unsafe condition of the deck was not sufficient to warrant a finding that Public Works was in serious breach of its s. 24(1) obligations because (1) the deck was not necessary living space, (2) Mr. McKay had not complained about the deck over the previous five years even though he had been aware of the problem, and (3) Mr. McKay continued to use the deck even though he was aware that it was unsafe. In response to this argument, Mr. McKay relies on s. 2(1) of the Act which states that the Act applies to rental units despite any agreement or waiver to the contrary.

137 Fifth, the Tribunal found that the poor condition of the house was the product of Public Works' failure to spend adequate funds on maintenance since 2000. There were numerous problems with the way the Tribunal arrived at this conclusion: (1) This conclusion did not take into account the age and type of house; just because a house is in "poor condition" does not mean that a landlord is in breach of its maintenance obligations. (2) In any event, Public Works had conducted an earlier inspection and had undertaken repairs. (3) Mr. McKay testified that when he called Public Works with a complaint, usually about plumbing matters, they responded promptly in addressing the problem. (4) Any earlier complaints that Mr. McKay had made to Public Works regarding leaking doors, carpeting and the lack of storm windows had not been documented and were raised only on the eve of the hearing at a time when Public Works could not refute the allegations. (5) It was incorrect to state that after Public Works became aware of the problems highlighted in the inspection reports, it did nothing to address them. Public Works acted reasonably and responsibly in deciding to demolish the premises rather than to repair them. The lack of repairs between the date of discovery and the Tribunal hearing should not be a basis for finding a landlord is in serious breach of its maintenance obligations when the house is still habitable during this period. Both Public Works and Mr. McKay considered the premises still habitable. (6) The Government is not running a business, but is holding land for a public purpose. The money the Government spends is public money and, as such, there are budget and other policy issues determined by Parliament with which private landlords do not contend. This is part of the context that the Tribunal should have considered when doing a s. 84(2)(a) analysis.

138 On behalf of Mr. McKay, it was argued that for policy reasons, a landlord should not be allowed to let a rental unit fall into a serious state of disrepair and then use the cost of remedying the deficiencies as an excuse to demolish the premises and oust the tenant from his home. Such an interpretation of s. 84(2)(a) would be contrary to the purpose and intent of the Act.

As well, the fact that the Government is the landlord is a neutral factor: it does not reduce the maintenance obligations on the landlord under s. 24(1) of the Act.

139 The analysis of the Tribunal in the *McKay* case is virtually identical to its analysis in the *Beelby* case. For the same reasons elaborated upon in the *Beelby* appeal, I conclude that the Tribunal erred in law in its s. 84(2)(a) analysis in the *McKay* case.

140 First, the Tribunal assumed that, since the McKay home was in poor condition and would require major expenditures if it was to continue to be used as residential premises in the future, and since Public Works in the past had spent less on maintenance than its representative acknowledged would be a reasonable amount to spend, Public Works must have breached its duty to repair and that breach must be considered serious. This reasoning ignored numerous other reasons, not relating to wrongdoing on the part of the Landlord, that could have impacted on the home's current poor condition. The Tribunal's reasoning was evident in the following excerpt from its decision responding to the argument advanced on behalf of Public Works that it would make no sense to require a landlord to repair a rental unit in order to bring it up to a satisfactory state before being allowed to demolish it:

> 93. As noted above, section 53(1)(a) permits a landlord to terminate a tenancy where the landlord intends to demolish the rental unit, whereas paragraph 84(2)(a) of the Act requires the Tribunal to deny a landlord's application to terminate a tenancy where the landlord is in serious breach of its responsibilities. The application of these two sections means that where a landlord is in serious breach of its responsibilities to maintain a rental unit the landlord is not permitted to demolish the rental unit, while a landlord is permitted to demolish a rental unit that is in a satisfactory state of repair.
>
> 94. While this result may seem absurd and contrary to common sense at a certain level, it must be presumed that the drafters of the Act considered the rights and obligations of landlords and tenants in respect of applications to demolish a rental unit, and purposely denied the landlord the ability to obtain an order terminating a tenancy *where the rental unit is in such poor condition that the landlord is in serious breach of its responsibilities* under the act. I agree with the Tenant that this limitation serves the important purpose of discouraging landlords from neglecting their rental properties and then seeking to terminate the tenancy in order to avoid performing the necessary repairs. [Emphasis added]

141 Secondly, the Tribunal failed to differentiate between, on the one hand, defects or deficiencies that had not been repaired when in need of repair, and on the other hand, elements coming to the end of their lifespan that would require replacement in the immediate future. Rental premises may be in poor condition as a result of either, or both, of these circumstances. Only the former implies wrongdoing on the part of the landlord that requires the strong message given under s. 84(2)(a).

142 Thirdly, the Tribunal failed to apply a balanced approach to the s. 84(2)(a) analysis. It failed to consider the reasonableness of the Landlord's decision to demolish the premises in light of their age, the need for major elements to be replaced, upgraded or retrofitted, and the projected cost of those capital expenditures. Demolition may be a reasonable and responsible step for a landlord to take when, for economic grounds, it would not make any sense to invest further in the rental premises. This is assuming, of course, that the landlord is not in serious breach of its responsibilities as a result of past behaviour, the effects of which are evident at the time of the hearing.

143 Finally, in regard to the order for repairs to be undertaken by Public Works, the Tribunal's Reasons for its decision suffer from imprecision. In paragraph 57 where the Tribunal concludes that Public Works was in breach of its obligation to keep the McKay premises in a good state of repair under s. 24(1), the Tribunal refers to "a significant number of serious maintenance issues" identified in Mr. McKay's evidence and in the 2004 Inspection Reports, but highlights only a few. It is unclear whether the finding that the maintenance issues are a direct result of the Landlord's failure to repair relates to all issues raised in Mr. McKay's evidence and the 2004 Inspection Reports, or just the particular items highlighted. Consequently, it cannot be determined from the Tribunal's Reasons if it ordered repairs to be done beyond those relied on for the s. 24(1) finding, which would be improper. In addition, however, many of the repairs ordered related to recommendations made by the inspector for the replacement or remodelling of elements of the home, such as the oil tank, floor coverings, roof, gutters, down pipes, windows, kitchen and bathroom. It is unclear from the Reasons which of these items were no longer functional or were in their current condition due to inadequate maintenance on the part of the Landlord and which were functional but had reached the end of their normal

lifespan. Ordering proactive measures to ensure that in the future the landlord will not be in breach of its duty to repair is not part of the Tribunal's mandate under s. 34(1)4.

4. Conclusion

144 Public Works' appeals are granted and the issue of whether s. 84(2)(a) is applicable in this case and the appropriate order to be made under s. 34(1) is referred back to the Tribunal for a rehearing.

Costs

145 If the parties are unable to agree on costs, written submissions, of no more than five pages in length, may be made within two weeks of the release of these Reasons.

Appeals dismissed; cross-appeals allowed.

Footnotes

1 Under s. 1(1) of the Act, "vital service" means "fuel, hydro, gas or hot or cold water".

2 (Toronto: Butterworths, 1974), at p. 67. See *Sullivan and Driedger on the Construction of Statutes* (Toronto: Butterworths, 2002, at p. 1.

3 Donald H.L. Lamont, *Residential Tenancies* 6th ed. (Toronto: Carswell, 2000), at p. 3.

4 See *Metropolitan Toronto Housing Authority v. Godwin* (2002), 161 O.A.C. 57 (Ont. C.A.) at para. 14 where Cronk J.A. described the Act as tenant-centred through its design to protect tenants while easing rent control restrictions on landlords.

5 See *Quann v. Pajelle Investments Ltd.* (1975), 7 O.R. (2d) 769 (Ont. Co. Ct.); *Dobis v. Lowther*, [2001] O.J. No. 2193 (Ont. S.C.J.) at para. 10.

6 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 27. No. 2