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Don't Think Twice: The Residential Tenancies Dispute Resolution Board's Power to Correct for Procedural Unfairness

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Case Commented On: *Hewitt v Barlow*, 2016 ABQB 81 (CanLII)

It may be a good idea to accord the Residential Tenancies Dispute Resolution Board (RTDRS) the power to set aside its own orders and re-hear a dispute when it recognizes that one of its orders is the result of a procedurally unfair process. However, I am not certain that the RTDRS has the power to do so under the current legislation: the *Residential Tenancies Act*, SA 2004, c R-17.1 (the *Act*) and the *Residential Tenancies Dispute Resolution Service Regulation*, Alta Reg 98/2006 (the *Regulation*). I am almost certain that the RTDRS does not have the power to do so for the reasons set out by Master in Chambers, A. R. Robertson, in *Hewitt v Barlow*. The best remedy for the currently intolerable position that too many tenants have been put in by procedurally unfair RTDRS orders would be amendments to the *Regulation*. Helpfully, that *Regulation* expires on April 30, 2016. Although section 35 of the *Regulation* states that the purpose for its expiration is to ensure that it is reviewed for relevancy and necessity, rather than for fairness, its expiration is still an opportunity. Given the number of recent cases that have come before various Masters of the Court of Queen's Bench requiring judicial review of RTDRS orders on procedural unfairness grounds, it is to be hoped that the legislature takes this review seriously and remedies the demonstrated flaws in the *Regulation* in order to ensure better access to justice for tenants and greater certainty about the powers of the RTDRS for all.

A little background about the recent spate of written decisions judicially reviewing RTDRS orders is helpful to understanding the impetus behind Master Robertson's decision in *Hewitt v Barlow*. In chronological order, those cases are:

1. *In Boardwalk General Partnership v Montour*, 2015 ABQB 242 (CanLII), decided in April 2015 by Master W. Scott Schlosser, a RTDRS consent conditional order required payment of a certain amount on April 1, 2015 and, when that day arrived and the tenant had only paid two-thirds of that amount, the landlord changed the locks. However, the balance was supposed to be paid directly to the landlord by a government agency and that government agency had misread the order and failed to pay by the deadline. The tenant did not appeal; they only wanted a brief stay of the RTDRS order. See Anna Lund's "Case Comment: Boardwalk General Partnership v Montour, 2015 ABQB 242" on *The Access Review*.

2. *In Cardinal v Amisk Housing Association*, 2015 ABQB 503 (CanLII), decided in August 2015 by Master W. Scott Schlosser, a tenant applied to extend the one week deadline she and her five children had been given by the RTDRS to vacate the rental premises. In this case, the landlord consented to the brief extension of time that was requested.

3. In *Abougouche v Miller*, 2015 ABQB 724 (CanLII), decided in November 2015 by Master James R. Farrington, a tenant had vacated her rental premises because of flooding but she was served with notice of an RTDRS hearing asking for one month's rent by the landlord's posting of that notice on the vacated premises, as allowed by the *Regulation*. He posted the notice even though there had been significant email and text contact between the landlord and tenant after she vacated the property and even though the landlord requested an order to serve the tenant with the subsequent RTDRS order by email for the reason that email was how they communicated with the tenant. The Master decided that he had no authority to set aside the RTDRS order simply because the tenant did not receive actual notice of that hearing. See also my comment on this decision, "Setting Aside Residential Tenancy Dispute Resolution Service Orders for Problems with Service: It Can't Be Done".

4. In *Kerr v Coulombe*, 2016 ABQB 11 (CanLII), decided in January 2016 by Master W. Scott Schlosser, a tenant showed up on time and in person for an RTDRS hearing scheduled for November 27, 2015 at 1:30 p.m. and checked in with the receptionist who told him to have a seat in the waiting room and wait for them to call him. At 2:30 p.m., the tenant checked with the receptionist again, wanting to know if he should continue to wait, and was presented with a Tenancy Dispute Officer's order that found against him and noted "Tenants are not participating." The Master held that the court had an inherent jurisdiction to set aside the RTDRS order in the face of an obvious and fundamental breach of natural justice. See also my comment on this decision, "For Shame: An Obvious and Fundamental Breach of Natural Justice by the Residential Tenancies Dispute Resolution Service (RTDRS)".

(As an aside, it is important to note that these are only the decisions that a Master took the time to write, rather than all recent incidents of procedural unfairness before the RTDRS. In *Hewitt v Barlow*, Master Robertson describes how the Masters of the Court of Queen's Bench "are repeatedly advised in the morning chambers by frantic tenants" trying to address RTDRS orders that the RTDRS has told them they have to go to the Court of Queen's Bench (at para 4). These four decisions are just the proverbial tip of an iceberg composed of oral decisions by Masters in Chambers and by tenants without the resources to challenge RTDRS orders in the Court of Queen's Bench.)

In three of these four decisions — all but *Cardinal v Amisk Housing Association* — the jurisdiction of the Master to hear the tenant's application for relief from the RTDRS order was challenged by the landlord. And as the four cases and their commentary point out, it is very difficult to find a basis in the law on which a Master can set aside or change a procedurally unfair RTDRS order, especially when no appeal has been filed.

Now Master Robertson, in *Hewitt v Barlow*, has proposed that the RTDRS can correct its own orders by re-hearing disputes when the orders are a result of procedural unfairness, bypassing the Court of Queen's Bench altogether and potentially saving landlords and tenants a great deal of time, money and aggravation. Master Schlosser had also hinted at this possibility in *Kerr v Coulombe* (at para 16).

The procedural unfairness in *Hewitt v Barlow* was similar to that in *Abougouche v Miller, i.e., the tenant was served with notice of the RTDRS hearing by a method permitted by the Regulation. In this case, Mr. Barlow, the tenant, worked out of town and so was absent from the rented premises. Therefore Mr. Hewitt, his alleged landlord, served Mr. Barlow with notice of*

the RTDRS hearing by taping the notice to the door of the rented premises. In this case, unlike in Abougouche v Miller, the tenant actually did learn of the hearing before its scheduled date.

Master Robertson appears to believe that the landlord obtained an order allowing for substitutional service (at paras 19, 51). However, an order for substitutional service is not necessary. Section 31(1) of the *Regulation* provides that any notice or other document required to be served under the *Regulation* must be served in accordance with section 57 of the *Act* or in any other manner directed by the administrator of the RTDRS or a Tenancy Dispute Officer. Section 57(3)(b) of the *Act* provides that, if a landlord is unable to serve a tenant because the tenant is absent from the rented premises or evading service, then service may be made *by posting the documents "in a conspicuous place on some part of the premises."* Hearings may well proceed on less secure grounds when a tenant has not been personally served, as Master Robertson notes (at para 19). However, the legislature decided that posting on the vacant premises is an appropriate method of service on absent tenants (presumably thinking of tenants who abscond and cannot be located).

In this particular case, the tenant did learn of the RTDRS hearing before the date of the hearing. A friend phoned and told him. The point that the tenant wanted to raise at the hearing was that he had an unsigned lease with Ms. Hewitt-Gumienny and had been paying rent to her and not to Mr. Hewitt, who, as it turned out, was in possession of a signed lease. Mr. Barlow telephoned the RTDRS and spoke to a clerk, explaining that he was out of town for work and that Mr. Hewitt was not his landlord. Apparently the clerk told Mr. Barlow that the hearing would likely be rescheduled but that he should send a letter. Mr. Barlow did fax a letter to the RTDRS setting out his general position. When Mr. Barlow returned to the rented premises on December 22, he again contacted the RTDRS and was told that he should expect a notice of a rescheduled hearing in the mail. However, on January 8, Mr. Barlow returned to the rented premises and found that the locks had been changed and an order taped to the door. When he called the person acting for the landlord, Mr. Barlow was told that he had been evicted and that he could not enter the premises and access his belongings. Mr. Barlow learned that the hearing had proceeded on December 9 in his absence. The RTDRS order stated that Mr. Barlow's written submission was considered.

Master Robertson indicates that it would have been appropriate for the Tenancy Dispute Officer to have heard what Mr. Barlow had to say about the lease, given that he or she knew that the tenant alleged he had an unsigned lease that showed somebody else as landlord (at para 29). Master Robertson indicates that the mere existence of a signed lease showing Mr. Hewitt as the landlord "should not have been the end of the inquiry" (at para 30).

The issue that the tenant wanted to raise was the issue of who was his landlord. The Tenancy Dispute Officer states that he considered the tenant's written submission raising that very issue. Master Robertson's criticisms seem to go more towards the weight of the evidence, i.e. the merits, rather than to any procedural unfairness. Certainly if there is any procedural unfairness it is far less egregious in this case than in *Abougouche v Miller or Kerr v Coulombe*.

Master Robertson nonetheless builds his analysis upon the right to be heard as a part of the rules of natural justice (at para 31). He also locates a correlative duty to hear both sides in section 13(2)(b) of the *Regulation*:

13(2) For the purpose of the hearing,

(a) evidence may be given
(i) in person,
(ii) orally, including by telephone,
(iii) electronically,
(iv) in writing, or
(v) in any other manner the tenancy dispute officer considers appropriate,

and

(b) a party to the hearing is to be given an opportunity to respond to what was presented by the other party or witness at the time of the hearing and in the matter the tenancy dispute officer considers appropriate.

However, it is not clear that the tenant, Mr. Barlow, was "a party to the hearing" on December 9, even though he was served in accordance with the *Act*.

Master Robertson admits that section 19(1) of the *Regulation* only allows a Tenancy Dispute Officer "to correct typographical, grammatical, arithmetic or other similar errors" in an order, clarify the order, and deal with "an obvious error or inadvertent omission in the order." As such, it is inapplicable to breaches of the rules of natural justice (at para 38).

However, Master Robertson finds that the authority of a Tenancy Dispute Officer to correct an order is not limited to section 19 of the *Regulation*. He relies on section 15(4) of the *Regulation* which sets out what he calls the "broad authority of the Tenancy Dispute Officer" (at para 39).

> 15(4) Subject to this regulation, a tenancy dispute officer may grant any remedy that a judge of the Provincial Court may grant under part three or four of the *Act*. [emphasis added]

On the basis of this provision, Master Robertson considers the scope of the authority of a Provincial Court judge (at paras 40-41). However, it seems like a leap to go from a provision which gives an RTDRS Tenancy Dispute Officer authority to grant a remedy specified in sections 26 to 47 of the *Act* to an examination of the broader authority of a Provincial Court judge under the *Provincial Court Act*, RSA 2000, c P-31 and the *Alberta Rules of Court*, Alta Reg 124/2010, which is what Master Robertson does (at paras 41-48). Section 15(4) of the *Regulation* does not state that the Tenancy Dispute Officer has the same authority as a Provincial Court judge. It states that a Tenancy Dispute Officer may grant the same statutory remedies, found in parts three and four of the *Act*, which a Provincial Court judge can grant. The phrase "that a judge of the Provincial Court may grant" appears to simply narrow the list of remedies that a Tenancy Dispute Officer can grant from those remedies listed in part 3 and 4 of the *Act*. It does not say that a Tenancy Dispute Officer has the same power and authority as a Provincial Court judge when it comes to residential tenancy matters.

Nonetheless, Master Robertson goes on to indicate that, if this matter had come before a Provincial Court judge, the Provincial Court judge would have authority to hear the application to set aside the order and schedule a re-hearing based on rule 9.15 of the *Alberta Rules of Court*, which allow the setting aside of an order made without notice or following a hearing. Rule 9.15

of the *Alberta Rules of Court* is the same rule that was considered by Master Farrington in *Abougouche v Miller*. Master Robertson agrees with Master Farrington that rule 9.15 is not available to a Master to set aside a decision of the RTDRS. However, in Master Robertson's view, a Tenancy Dispute Officer can invoke rule 9.15 because of section 15(4) of the *Regulation* which, to his mind, gives a Tenancy Dispute Officer the same authority as a Provincial Court judge in residential tenancy matters (at para 52).

Master Robertson further concludes that, had the hearing in this case taken place before a Provincial Court judge, that judge would have scheduled a re-hearing on the basis of "insufficient notice of the hearing" (at para 50). I have already noted Master Robertson's incorrect assumption that substitutional service was granted by order; instead, the *Act* itself specifically authorized the landlord to post notice of the hearing on the door of the rented premises in the absence of the tenant. The legislature has decided that such notice is "sufficient" so I am not so sure that a Provincial Court judge would schedule a re-hearing.

In the end, Master Robertson directed a stay of the enforcement of the RTDRS order and directed that the dispute be referred back to the RTDRS, so that a different Tenancy Dispute Officer could hear the tenant's application for a re-hearing (at para 54). He indicated that the RTDRS was mistaken in its belief that its authority did not extend to a re-hearing (at para 60). This application for a re-hearing was apparently scheduled for February 2, 2016. I wonder what happened.

Any breach of natural justice in this particular case is, as I've already noted, not nearly as egregious as it was in *Abougouche v Miller or in Kerr v Coulombe*. Indeed, it is not clear that there was a breach of natural justice, given that the tenant was served in accordance with the *Act* and that his written submission to the RTDRS was considered.

Nonetheless, the RTDRS has now been told by a Master of the Court of Queen's Bench that it has the jurisdiction and authority to hear applications to set aside its own orders and to schedule re-hearings (at paras 49-52). When do they have that authority, according to Master Robertson? That is not clear. It may be when the RTDRS has "failed to follow the rules of natural justice" (at para 52). Or it may be when the RTDRS has failed to give either a landlord or a tenant "an opportunity to present evidence, submit arguments and question the other parties" (at para 53).

Hewitt v Barlow appears to have introduced more uncertainty into procedures for setting aside and changing RTDRS orders, rather than achieving its goal of coming up with a pragmatic solution to procedural unfairness by the RTDRS. It would be interesting to know whether the RTDRS has accepted the interpretation of its authority and jurisdiction given by Master Robertson. Has it instructed its Tenancy Dispute Officers to set aside their own orders if they leave a tenant sitting in the waiting room and conduct a hearing without him, as one did in *Kerr v Coulombe? Has it instructed its Tenancy Dispute Officers to investigate more thoroughly all instances in which tenants are served with notice of hearings under s*ection 57(3)(b) of the *Act*, i.e., by posting of the notice in a prominent place on the rented premises? Is the RTDRS reviewing and rewriting its "Rules of Practice and Procedure" in light of this decision?

These uncertainties lead me back to where I started, namely, proposing that the statutory review of the *Regulation* be a far-reaching one that reviews the *Regulation* for unfairness, and not just relevancy and necessity.

It is at least arguable that, because a tribunal such as the RTDRS is a creature of statute, it needs to be expressly given the power to set aside its own orders on the basis of natural justice. Provincial tribunals have been given a range of powers to reconsider their own decisions. For example, section 33 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5, sets out a fairly limited power:

> 33(1) If there is new evidence available that was not available or that for good reason was not presented before the human rights tribunal in the first instance, the tribunal may, on the application of any of the parties or on its own motion, reconsider any matter considered by it and for that purpose has the same power and authority and is subject to the same duties as it had and was subject to in the first instance [emphasis added].

On the other hand, section 42 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 describes a very broad power:

> 42 The Regulator may, in its sole discretion, reconsider a decision made by it and may confirm, vary, suspend or revoke the decision. [emphasis added]

There is nothing like either section 33 of the *Alberta Human Rights Act* or section 42 of the *Responsible Energy Development Act* in the *Act* and *Regulations*. Perhaps there should be in order to expeditiously handle the types of unfairness revealed by recent court decisions. Maybe an express provision allowing the RTDRS to reconsider a matter would not simply become another barrier in tenants' attempts to access justice — another step they have to take before they can get relief from the Court of Queen's Bench. An express provision would at least confirm the legal basis for an internal review or an application to reconsider, without requiring the Court of Queen's Bench to try to piece something together as Master Robertson has done in this case. Such provisions would also add transparency by letting the parties know reconsideration by the RTDRS is available to them and telling them how they can access it — presumably in a timelier and less costly manner than resorting to the Court of Queen's Bench.