July 16, 2015

# Expensive, Complex Appeals from Residential Tenancy Dispute Resolution Service Orders

**By: Jonnette Watson Hamilton**

**Case Commented On:** *Nee v Ayre & Oxford Inc,* 2015 ABQB 402 (CanLII)

The decision by Justice Donald Lee in *Nee v Ayre & Oxford Inc* is one of several decisions that he has made dismissing tenants' appeals of Residential Tenancies Dispute Resolution Service (RTDRS) orders because the tenant failed to file a transcript of the oral hearing that took place before an RTDRS officer. This decision builds on Justice Lee's prior judgment in *Herman v Boardwalk Rental Communities*, 2011 ABQB 394 (CanLII), as it reproduces twelve paragraphs of his *Herman* decision to provide the reasons for dismissing Ms. Nee's appeal. It is also very similar to Justice Lee's decisions in *Zibrowski v Nicolis*, 2012 ABQB 236 (CanLII). Although *Nee v Ayre & Oxford Inc* does not make any new legal points, it is worth a post because it once again highlights how complex and expensive appeals from RTDRS orders are, especially for many self-represented litigants who are, after all, the people for whom the RTDRS process was designed.

What exactly does that complex and expensive appeal process entail?

The rules regulating the RTDRS are set out in the *Residential Tenancy Dispute Resolution Service Regulation*, Alta Reg 98/2006. Appeals are governed by sections 23 to 29 of that regulation. In order to appeal an order, the dissatisfied landlord or tenant must do all of the following things:

- Appeal to the Court of Queen's Bench (section 23(1)), a court that is more expensive and formal and less user-friendly than the Provincial Court of Alberta (see for example, the Provincial Court's numerous web pages describing the "Residential Tenancies Process" in plain language, aided by easy to follow flowcharts and downloadable forms).
- Appeal on "a question of law or of jurisdiction" (section 23(1)), even though the distinction between questions of law or jurisdiction, on the one hand, and questions fact or of mixed fact and law, on the other hand, has bedeviled courts and lawyers for decades (see, for example, the summary of these categories in Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012) 50 Osgoode hall Law Journal 317 at 331- 342)
- Within 30 days of the RTDRS order, the landlord or tenant appealing must:
    - File a Notice of Appeal in the Court of Queen's Bench that sets out the questions of law or of jurisdiction that are the basis of the appeal (section 23(1)(a)(i);
    - Pay the Court of Queen's Bench fee for filing a Notice of Appeal from a RTDRS order, which appears to be $200, although this information is difficult to come by in Schedule B, Division 1 of the Alberta Rules of Court, AR 124/2010, and the fee may now be $250 under the Court Fees Amendment Regulation AR 71/2015, section 3(3)(a)(i); and

    - Serve the Notice of Appeal on the other party, the RTDRS, and anyone else the Court of Queen's Bench orders them to serve (section 23(1)(a)(ii)).
- Within seven days of the last day allowed for service of the Notice of Appeal, the landlord or tenant appealing must file three more documents in the Court of Queen's Bench:
    - An Affidavit of Service of the Notice of Appeal (section 23(1)(b)(i));
    - A copy of their requisition to the RTDRS for a transcript of the oral hearing before the RTDRS officer — see Alberta Services Transcript Request Form (section 23(1)(b)(ii); and
    - Either a receipt for their payment of the transcript, or written confirmation from the RTDRS that a transcript is not available(section 23(1)(b)(ii)(A) or (B).
- Within three months of the date the Notice of Appeal is filed, file a copy of the transcript unless either the Court of Queen's Bench orders otherwise or the RTDRS said a transcript was not available (section 23(2)).

How is service to be made? According to section 31(1) of the Regulation, service of the Notice of Appeal must be done the way section 57 of the *Residential Tenancies Act*, SA 2004, c R-17.1 requires it be done. Section 57 of the Act requires that a notice be served personally, by registered mail (at a cost of $9, in addition to the normal postage price) or by certified mail (which is no longer a service offered by Canada Post). Section 57 tells you what address to use, what to do if a tenant is evading service, and what other statutes to look at if a landlord or tenant is a corporation. (The RTDRS has a helpful tip sheet of "RTDRS Document Service" how-to's, and even though it is about starting RTDRS applications, not appealing them, it does explain registered mail service and other alternatives to personal service).)

A "Generic Affidavit of Service can be found under "Other Forms" under "Publications and Forms" on the Court of Queen's Bench web site and an "Affidavit of Service by Tenant" is available on the Service Alberta RTDRS web site under "Application and Forms". Then all that is needed is a Commissioner of Oaths before whom the Affidavit of Service must be sworn or affirmed. If you are in Calgary or Edmonton, Commissioners of Oaths are available at the RTDRS offices. All lawyers are Commissioners of Oaths and other individuals are too, but most of them charge for the service (see, for example, the $84 cost for non-members charged by the Calgary Chamber for their Commissioner of Oaths services).

And what about transcripts, the stumbling block for the tenant in this case and in the other cases cited in the first paragraph of this comment? The Alberta Services RTDRS web site includes a Transcript Request Form under "Application and Forms." That form tells landlords and tenants the following:

> The appeal process includes providing a transcript to the Court of Queen's Bench. A transcript is an exact written record of the hearing. To get a transcript, you must hire a transcription business to convert the RTDRS audio recording into a transcript. These are the steps to take to obtain a transcript:
>
> 1. Choose a transcription business. You will find a list of these businesses under "Court Reporters" or "Transcription" in telephone directories or on the internet. You may wish to contact several of these businesses to review their fees and availability. It is your responsibility to pay for the transcript.

2. Submit the attached Audio Recording Request form to RTDRS by fax, email or in person at our Calgary or Edmonton offices. We will accept requests by letter, provided that it contains all of the same information as the form.

3. Ask your chosen transcription business to submit a letter (on letterhead) to the RTDRS that confirms:
- that you have hired them to transcribe the audio recording and
- the RTDRS case numbers for the requested audio recordings.

4. When the Audio Recording Request form and the letter from the transcription business are received by the RTDRS, the audio recording of the hearing is burned to a CD-ROM. RTDRS then advises the transcription business that the CD-ROM is ready for pick up at the RTDRS office. The transcription business arranges for a courier to pick up the CD-ROM and a copy of the Order (required for spelling names).

5. The transcription business will contact you about the finished transcript. They will return the CD-ROM and Order copy to the RTDRS by courier.

So . . . "Choose a transcription business. . . . It is your responsibility to pay for the transcript." translates into costs along the following lines. The Alberta Courts Transcript Management Services specifies how much a transcript will cost. It is based on a per character rate set out in the Alberta Rules of Court that varies by how quickly the transcript must be produced. If a transcript is required in two working days, the fee is $0.0072/character. If it is not required earlier than 30 calendar days, the fee is $0.0040/character. The Alberta courts website provides a handy formula for estimating costs:

> To determine the approximate cost of your transcript use the following formula:
> "X" Minutes x 900 (Characters/Minute) x Rate = Estimate
> "X" Minutes x 54,000 (Characters/Hour) x Rate = Estimate

RTDRS hearings are normally scheduled for 30 minutes, unless the applicant wants more time (and even then they are usually limited to one half day). So if an RTDRS oral hearing lasts 30 minutes, and a tenant puts in a timely request in order to receive the lowest rate, the cost for transcripts would be 30 x 900 x $0.0040, or $108. However, an hour-long hearing quickly brings the costs over $200. A half-day hearing would cost substantially more, even at the lowest rate: 180 x 900 x $0.0040 = $648.

Even assuming a no-charge Commissioner for Oaths, service by the tenant by registered mail, a short 30 minute RTDRS hearing, and no time off work to serve documents, hire a transcription service, etc., a tenant is looking at over $300 to start an appeal of an RTDRS order. The costs could easily be double that, depending on the length of the oral hearing.

And a transcript, if available, is essential to an appeal of an RTDRS order. That is what Justice Lee determined in *Nee v Ayre & Oxford Inc*: failing to file a copy of a request for a transcript with the RTDRS and provide a receipt for the payment of that transcript was enough, by itself, to dismiss an appeal (para 6).

A transcript is essential for two reasons. First, because section 25(1) of the *Residential Tenancy Dispute Resolution Service Regulation* states that "no evidence other than the evidence that was submitted to the Dispute Resolution Service may be admitted" on the appeal. And second,

because section 28 of the same Regulation states that "If an appellant fails to comply with the requirements of section 23, the appeal shall be dismissed by the Court of Queen's Bench" (emphasis added).

On the first and more substantive point, Justice Lee noted in *Herman v Boardwalk Rental Communities* (at para 20), and reiterated in *Zibrowski v Nicolis* (at para 6) and now in *Nee v Ayre & Oxford Inc* (at para 6), because section 25(1) provides that the only evidence admissible in the appeal is the evidence before the RTDRS officer, if there is no transcript of that evidence:

> To make a decision without all of the evidence before the Tribunal, including the representations and admissions made by both the Landlord's representative and the Tenant/Appellant is an exercise fraught with problems which include requiring the Court to enter into the area of speculation as to what occurred at the RTDRS hearing and encouraging the improper rehearing of the case on appeal. In many instances hearing such an incomplete appeal also represents a breach of the principles of natural justice since the parties do not know the case that has to be met. (emphasis added)

As an aside, that does leave up in the air what happens when the RTDRS confirms a transcript is not available, as they are expected to do at least occasionally under section 23(1)(b)(ii)(B) of the Regulation. Perhaps a not-so-improper rehearing of the case would be required, given that the requirement of section 23 would be complied with.

However, in *Nee v Ayre & Oxford Inc*, we have the more typical scenario of failure to file a request for the transcript and a receipt paying for the transcript, and a failure to file the transcript itself, all as required by section 23. And section 28 states such failures mean "the appeal shall be dismissed by the Court of Queen's Bench" (emphasis added).

The production of transcripts has always been considered personal and not up to the courts or tribunals such as the RTDRS: *Taylor v St. Denis*, 2015 SKCA 1 (CanLII) at para 60. But arguments have been made recently, as in the *Taylor v St. Denis* case, that self-represented litigants should be exempt from the cost of mandatory trial transcripts because that costs prevents people from accessing courts. See Sarah Burton's *ABlawg* comment, "A Constitutional Right to Free Transcripts?" The argument is an extension of the Supreme Court of Canada's decision in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 that found a hearing fee scheme unconstitutional because it prevented people from accessing courts. Transcript fees were distinguished in *Taylor v St. Denis* from hearing fees because the former are not government fees; they are fees charged by private businesses. However, as Ms Burton noted, an argument could have been made that the privatization of transcription services is a government policy.

In British Columbia, there are two Court of Appeal cases holding that there is no authority supporting a general right of access to justice that extends to transcripts: *Pavlis v. HSBC Bank Canada*, 2009 BCCA 450 (CanLII) at paras 8-9 and *Allart v. Alec's Automotive Machine Shop (2003) Ltd.*, 2014 BCCA 242 (CanLII) at para 23. Nevertheless, it should be noted that in the

lower court decision in the latter case — *Allart v. Alec's Automotive Machine Shop (2003) Ltd*., 2014 BCSC 476 (CanLII), dismissed for lack of evidence —Justice Bruce identified the costs of transcripts as an access to justice issue in the small claims context and "urge[d] the government to investigate ways in which the cost of appeal transcripts could be offset where the circumstances warrant such extraordinary measures" (at para 32). See also Ian Mulgrew, "Access-to-justice transcripts costs appeal rejected by B.C. Court of Appeal: Disabled woman needed to offer more proof that $750 fee was prohibitive".

To make matters worse for many tenants, the *Residential Tenancy Dispute Resolution Service Regulation* provides in section 26 that "[t]he commencement of an appeal under this Part does not stay the order being appealed, unless the Court of Queen's Bench on application stays enforcement or proceedings of the order pending appeal." So a typical order for eviction of a tenant, as in this case, is still in effect unless the tenant brings a separate application. The tenant may have to leave the premises before the appeal can be heard, making the appeal rather pointless, as pointed out in a recent comment by Anna Lund in *The Access Review* about the decision in *Boardwalk General Partnership v Montour*, 2015 ABQB 242 (CanLII) on an application to stay an RTDRS order. (Ms. Lund also notes that the RTDRS appeal process can be prohibitively expensive for tenants who arrange for a transcript of the hearing to be prepared and filed as they can easily cost in excess of $200 and up to $1000 or more in exceptional cases.)

The steps in the appeal process might not seem like much to lawyers or even to repeat players such as property management companies or landlords with numerous rental properties. But try to imagine a tenant unfamiliar with legal language and court procedures contemplating doing the following: figure out a question of law or jurisdiction; write up a Notice of Appeal; file the Notice of Appeal, paying the filing fee; serve the Notice of Appeal on the landlord and the RTDRS; write up an Affidavit of Service; find a Commissioner of Oaths; swear the Affidavit of Service before a Commissioner of Oaths; fill in and file the Transcript Request Form with the RTDRS; find a few transcription businesses and get quotes; pick a transcription service and ask them to contact RTDRS; pay for the transcript, filing the receipt with the court; and file the transcript with the court. That is a rather intimidating list.

The RTDRS appeal process is too expensive and too complex for a system designed to be used by people who are self-represented. The informality of the RTDRS hearing and the complex and expensive appeal process both favour repeat players such as property management companies and landlords with multiple properties. The requirement for a question of law or jurisdiction is particularly chilling. A new appeal process would be a welcome small piece in increasing access to justice in the residential tenancy context. One piece of a new process and a way to alleviate the transcript cost burden could include a requirement that the RTDRS file its record, including a transcript, with the appeal court when the RTDRS is served with a Notice of Appeal.