January 19, 2016

For Shame: An Obvious and Fundamental Breach of Natural Justice by the Residential Tenancies Dispute Resolution Service (RTDRS)

By: Jonnette Watson Hamilton

Case Commented On: *Kerr v Coulombe*, 2016 ABQB 11 (CanLII)

A tenant, Gary Kerr, showed up for a hearing at the Residential Tenancies Dispute Resolution Service (RTDRS) in Edmonton. The hearing, initiated by the landlord, Betty Coulombe, against Gary and Jason Kerr, was scheduled for November 27, 2015 at 1:30 p.m. The tenant arrived on time and checked in with the receptionist. The receptionist told him to have a seat in the waiting room and said they would call him. At 2:30 p.m., the tenant checked with the receptionist again, wanting to know if he should continue to wait. The receptionist disappeared into the back and returned with an Order against the tenant. The Order stated that the landlord appeared by telephone and "Tenants are not participating." As the tenant succinctly put it in his affidavit, "I did not have a chance to speak on our behalf" (at para 3). This scenario is reminiscent of Franz Kafka's parable, "Before the Law", where the man from the country patiently sits before a gatekeeper controlling entry into the law.

What the RTDRS did to Gary Kerr was, without question, a breach of natural justice: "an obvious and fundamental failure of natural justice" (at para 14). No administrative tribunal in the Canadian legal system — no matter how "fast, inexpensive, less formal" it bills itself — can leave a party cooling his heels in the waiting room and conduct a hearing without giving him a chance to speak. It may be fast, it may be inexpensive, and it may be informal — but it is not justice.

We are not told how this bureaucratic negligence occurred, or whether safeguards have now been put in place to ensure it does not happen again. We are not told this because no one from the RTDRS was required to appear and explain what happened or to take responsibility for their bumbling. Instead, the tenant — the innocent party — was the one who had to spend his time and money to take steps to try to remedy the injustice.

If this was such an obvious breach of natural justice by the RTDRS, what was the problem? Why did the tenant have to act — and act very quickly — to remedy this injustice?

The problem lies in the *Residential Tenancies Act*, SA 2004, c R-17.1, and its provisions and regulations establishing and controlling the RTDRS. They are overly deferential to the RTDRS, providing little possibility of relief to tenants when things go wrong at the RTDRS. See, for example, "Setting Aside Residential Tenancy Dispute Resolution Service Orders for Problems with Service: It Can't Be Done", commenting on *Abougouche v Miller*, 2015 ABQB 724 (CanLII), and "Expensive, Complex Appeals from Residential Tenancy Dispute Resolution Service Orders", commenting on *Nee v Ayre & Oxford Inc*, 2015 ABQB 402 (CanLII).

There is nothing to indicate that the Tenancy Dispute Officer who issued the Order tried to remedy his or her error in making the Order when he or she found out that "Tenants are not participating" was incorrect and the tenant was still there. Did the Tenancy Dispute Officer try to contact the landlord immediately, to say that the Order was no good because the tenant had in fact been ready to participate and to say that the matter would have to be re-heard (preferably right then and there so the tenant wasn't put to any more inconvenience)?

This possible remedy was suggested by Master Schlosser in this case. He mentioned the possibility that a tenant could "more creatively, invite the RTDRS Office to re-hear the matter", dealing with it under section 19(1)(c) of the *Residential Tenancies Dispute Resolution Service Regulation*, Alta Reg 98/2006, while leaving a more thorough investigation of this possibility "for another case" (at para 16).

Section 19 of the *Residential Tenancies Dispute Resolution Service Regulation* does appear to be appropriate if the RTDRS and its Tenancy Dispute Officers are willing to show a little initiative. It states:

> 19(1) Subject to subsection (2), a tenancy dispute officer may, with or without a hearing,
>
> (a) correct typographic, grammatical, arithmetic or other similar errors in an order of that tenancy dispute officer,
>
> (b) clarify the order, and
>
> (c) deal with an obvious error or inadvertent omission in the order.
>
> (2) A tenancy dispute officer may take the steps described in subsection (1)
>
> (a) on the tenancy dispute officer's own initiative, or
>
> (b) at the request of a party, which, for the purposes of subsection (1)(b) and (c), must be made within 15 days after the order is received by the party.
>
> (3) A request referred to in subsection (2)(b) may be made without notice to the other party, but the tenancy dispute officer may order that other party be given notice.
>
> (4) A tenancy dispute officer must not act under this section unless the tenancy dispute officer considers it just and reasonable to do so in all the circumstances.

The problem is that the power granted to a Tenancy Dispute Officer by section 19(1) is the power to do some fairly trivial and uncontroversial things, namely, to "(a) correct typographic, grammatical, arithmetic or other similar errors in an order of that tenancy dispute officer, (b) clarify the order, and (c) deal with an obvious error or inadvertent omission in the order." The more general phrase in subsection (c) must be read in the context of the more specific clauses (a) and (b). The Tenancy Dispute Officer's power is probably limited to correcting errors or omissions of a minor or clerical nature. The power of the Tenancy Dispute Officer to re-hear a dispute should be expressly provided for. Even if Master Schlosser (or another Judge or Master) decides that errors, such as the one that occurred in this case (or something sufficiently similar), do fall within section 19(1)(c) and give a Tenancy Dispute Officer the power to deal with the error and re-hear the dispute, section 19(1) leaves it up to the Tenancy Dispute Officer to act or not. The power is crafted in terms of what they "may" do. Would they take the initiative?

But, as Master Schlosser said, the possibility of the RTDRS correcting its own errors "remains for another case" (at para 16). In this case, what Master Schlosser crafted was a fifth type of interim relief for the tenant. But before getting to the first (or first to fourth) types of relief, let me digress for a moment.

Despite how badly this matter went before the RTDRS and how frustrating this whole situation must have been, there was some good news for the tenant. First, Brian Summers, Q.C., a commercial litigator with Dentons, appeared as Amicus counsel, i.e., as a volunteer lawyer who could explain the complicated jurisdictional issues in this case as a friend of the court. Pro Bono Law Alberta launched the Court Assistance Program — the Queen's Bench Amicus Program — in Edmonton in March 2015. The purpose of this program is to improve access to justice for self-represented litigants who appear in Chambers before Masters and Justices of the Court of Queen's Bench by providing volunteer lawyers who act as 'amicus curiae' and help the court understand the facts, issues and arguments of the unrepresented litigants. Second, the tenant's application was heard by Master W. Scott Schlosser, who has taken an interest in remedying injustice handed down by the RTDRS and the time to produce written judgments that show other tenants how to proceed. This judgment in *Kerr v Coulombe* is his third in the last ten months. He also decided *Boardwalk General Partnership v Montour*, 2015 ABQB 242 (CanLII) (*Montour*) last April and *Cardinal v Amisk Housing Association*, 2015 ABQB 503 (CanLII) (*Cardinal*) in August 2015. Those two cases were where Master Schlosser pointed out the first to fourth types of interim relief for tenants.

Interim relief? Why interim? Interim before what? As Master Schlosser noted in *Montour*, an order of a Tenancy Dispute Officer "is binding on the parties to the dispute unless it is set aside or varied on appeal": section 21 of the *Residential Tenancy Dispute Resolution Service Regulation*. Section 23 of the same regulation provides for appeals that might set aside or vary the Order. There are numerous problems with this appeal provision, including:

- The appeal from an RTDRS Order has to be heard by a Justice of the Court of Queen's Bench because a Master has no power to hear appeals: section 9(1)(a)(i) *Court of Queen's Bench Act*, RSA 2000, c C-31
- The appeal can only be for a question of law or jurisdiction: section 23(1) *Residential Tenancy Dispute Resolution Service Regulation*
- A Notice of Appeal setting out the grounds of appeal must be filed and paid for and normally a transcript of the evidence heard at the RTDRS hearing must be provided: section 23(1) and (2) *Residential Tenancy Dispute Resolution Service Regulation*
- New evidence is not permitted on an appeal, e.g., evidence that the tenant was denied his right to be heard because he was left sitting in the waiting room of the RTDRS: section 25(1)(a) *Residential Tenancy Dispute Resolution Service Regulation*, although the evidence in this case is arguably evidence of a kind not contemplated by section 25(1)(a), i.e., not evidence that the tenant could have placed before the Tenancy Dispute Officer.
- An appeal does not act as an automatic stay of the RTDRS Order. Instead, an application must be made to the Court of Queen's Bench to stay enforcement of the RTDRS Order pending the hearing of the appeal.
- In the absence of an appeal, the Court of Queen's Bench can give no relief: *Thomas v Beyer*, 2006 ABQB 892 (CanLII) at para 5, per Trussler, J. and *Zibrowski v. Nicolis*, 2012 ABQB 236 (CanLII) at para 8, per Lee, J.

- Where possible, any application that involves a matter within the Masters' jurisdiction should be heard by the Masters in Chambers and not a Justice of the Court of Queen's Bench, and that includes applications for stays: Alberta Rules of Court, Alta Reg 124/2010, Rule 13.5(2); Court of Queen's Bench of Alberta "Notice to the Profession: Court Applications and Master's Jurisdiction" (Revised July, 2015)
- "RTDRS appeals are not usually dealt with on short notice because of the court schedule and the logistical requirements necessary to perfect an appeal. The Regulations contemplates up to three months. By the time the appeal can be heard, many of the issues are likely to be moot": *Montour* at para 13.

The result of those rules and realities is that it is usually only the interim relief that tenants want or need or are eligible for, i.e., a stay of enforcement of the RTDRS Order: *Montour* at para 13. Take this case. The tenant could seek to have the RTDRS Order set aside for the obvious breach of natural justice and would no doubt be successful — but why bother? The dispute could not and need not be decided on its merits. The tenant just needs to get his belongings and square up accounts with the landlord. He needs a stay of the RTDRS Order that makes a landlord amenable to a negotiated resolution. After all, this whole dispute was settled by the Master within two weeks of the RTDRS Order.

But remember that the *Residential Tenancies Act* and the *Residential Tenancy Dispute Resolution Service Regulation* say RTDRS Orders are binding on the parties unless and until set aside or varied on appeal to a Justice of the Court of Queen's Bench. What if there is no appeal? How does a Master give interim relief (short of an appeal) in the face of such difficulties in the legislation? What is the source of the Master's jurisdiction, i.e., his or her power to act?

Based on a belief that it cannot have been the intention of the legislature to leave the parties without any remedy on facts such as those in *Montour*, *Cardinal* and *Kerr v Coulombe*, Master Schlosser has outlined five possible sources of jurisdiction when the timing of payments need to be changed a little, or the deadline to vacate the rental premises needs to be extended a tiny bit, or the lack of a hearing requires a remedy:

1. RTDRS Orders have no effect until they are entered in the Court of Queen's Bench (section 22(1)(2) *Residential Tenancy Dispute Resolution Service Regulation*), but once they are filed with the court — typically by a landlord seeking to enforce an order for payment — Rule 9.17(1) of the *Alberta Rules of Court* and section 17 of the *Judicature Act*, RSA 2000, c J-2, apply and the Court has discretion to grant a stay of proceedings on any terms that the Court may prescribe: *Montour* at paras 16-19.
2. Once an RTDRS Order is filed with the Court of Queen's Bench and the landlord seeks to enforce it, section 5 of the *Civil Enforcement Act*, RSA 2000, c -15 also applies and the court can, among other things, stay enforcement: *Montour* at para 19.
3. Once an RTDRS Order is filed with the Court of Queen's Bench and the landlord seeks to enforce it, substance prevails over form in the *Alberta Rules of Court.* Rule 1.5 allows the Court to cure irregularities in documents such as those commencing proceedings if there is no prejudice, so the Application could be treated as the required Notice of Appeal and, once the Master deals with the interim relief application, the appeal could be treated as abandoned: *Montour* at paras 23-25.

4. Once an RTDRS Order is filed with the Court of Queen's Bench and the landlord seeks to enforce it, Rule 13.5(2) of the *Alberta Rules of Court* allows a court to stay, extend or shorten a time period that is specified in an order or judgment or agreed on by the parties: *Cardinal* at paras 7-9.
5. The *Residential Tenancies Act* does not entirely cover the field. For example, RTDRS Orders have to be filed with the Court of Queen's Bench to be enforced. As a result, the Court "has an inherent jurisdiction to stay or set aside an Order or a Judgment obtained in breach of natural justice", such as an order that rules against someone without hearing them (*Kerr v Coulombe* at para 11). Such an "obvious and fundamental failure of natural justice warrants an interim stay without more" (*Kerr v Coulombe* at para 14).

None of these five ways of providing relief without an appeal is a sure thing, although the last one, the inherent jurisdiction approach, looks the sturdiest. As Master Schlosser has said, what is really needed is a "small repair" to the Regulations: *Montour* at para 26.

One of the saddest aspects of this whole case is how unnecessary it was in the end. We are not actually told what the landlord sued for, or what order the Tenancy Dispute Officer made. It appears that the tenants had not paid rent for November 2015 when the Tenancy Dispute Officer heard from the landlord and made the Order on November 27. The tenant admitted being behind on the rent because of a work slowdown — something all too common in Alberta today. But by the time the tenant swore his affidavit, sometime between November 27 and December 1, the November rent had been paid, together with a $50 late fee. He offered to move out December 3 and noted that they had paid first and last month's rent when they moved in, so December's rent was already paid (at para 3). The tenant acted quickly enough to get his application before the Master on December 1. Somewhat ironically, his application was adjourned in order to ensure that the landlord had notice and a chance to appear. The Tenancy Dispute Officer's Order was stayed in the meantime. But unfortunately, not everyone was acting as expeditiously as the tenant and the landlord did not learn about the Master's December 1st order in time. She hired a civil enforcement agency to enforce the Tenancy Dispute Officer's Order and they changed the locks on the rental premises. When the matter was heard on the merits by Master Schlosser on December 9, an arrangement had to be worked out so that the tenants could get into the rental premises and retrieve their belongings. They had found another place to live, as they said they would. But they had to pay the civil enforcement agency's costs and a per diem rate for a portion of December's rent.

I wonder if the RTDRS has a fund that would enable them to repay the tenants for those civil enforcement agency costs and any other out-of-pocket expenses they incurred in applying to the Court of Queen's Bench and trying to correct the injustice perpetrated by the RTDRS? I hope the RTDRS at the very least gave the tenants a written apology for all the trouble and frustration they caused and did not fix. And I hope the help that the tenant received from the Amicus counsel and the Master, and the mostly positive results that followed from his persistence and quick acting, left him feeling better about the Alberta legal system than did his original encounter with the RTDRS.