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Another Trap for Unwary Alberta Residential Tenants: Short, Rigid Appeal Periods

By: Jonnette Watson Hamilton

Case Commented On: *Afolabi v Wexcel Realty Management Ltd*, 2023 ABKB 68 (CanLII)

I have written before about the difficulties tenants face when trying to exercise their right to appeal orders granted by the Tenancy Dispute Officers (TDOs) of the Residential Tenancy Dispute Resolution Service (RTDRS); see here and here. Those posts only briefly mention the timeline for filing an appeal, which is 30 days from the filing of the RTDRS Order in the Court of King's Bench of Alberta according to section 23(1)(a) of the *Residential Tenancy Dispute Resolution Service Regulation*, Alta Reg 98/2006 (*Regulation)*. I have also written before about some other fundamental deficiencies in that *Regulation* (here and here), as has my colleague, Shaun Fluker (here). This decision by Justice Michael A. Marion provides an opportunity to discuss the trap for unwary tenants caused by the appeal timeline provisions in the *Regulation* and by related provisions in the RTDRS *Rules of Practice and Procedure* (*Rules*).

This post focuses on the impact of the short and rigid appeal period on tenants. It is true that the 30-day appeal timeline applies to tenants and landlords alike. However, the appeal period differently and disproportionately negatively impacts tenants for a number of reasons.

First, according to the *RTDRS Annual Report*, 2nd edition (March 2021 – April 2022), approximately 82% of all 12,872 applications to the RTDRS that fiscal year were landlords' applications, with 75% of them being applications to recover possession of the rented premises, i.e. evictions through a formal legal procedure (at 7). The percentages were almost identical in 2020-2021. The *RTDRS Annual Report*, 1st edition (March 2020 – April 2021) reported 82% of all 10,973 applications were by landlords, with 73% of the total being applications to recover possession (at 8). Both Annual Reports also note that the most common type of dispute is about unpaid rent (at 7 and 8, respectively).

These percentages are not out of keeping with other provinces that are much more transparent about landlord-tenant disputes than Alberta. In Saskatchewan, for example, Hearing Officers at the Office of Residential Tenancies (ORT), Saskatchewan's housing law tribunal, heard just over 1,800 evictions cases in 2020, most commonly for unpaid rent, and granted landlords the eviction orders they sought in over 90% of those cases (Sarah Buhler, "Pandemic Evictions: An Analysis of the 2020 Eviction Decisions of Saskatchewan's Office of Residential Tenancies" (2021) 35 J L & Soc Pol'y 68 at 70, 82, 84, 86).

Second, landlords tend to be familiar with the relevant legislation and the procedures of administrative tribunals such as the RTDRS and the ORT because they make repeated appearances before those tribunals. They are often represented at hearings by paid agents, such as property

managers or lawyers. In Saskatchewan, more than half of the landlords who sought evictions orders were corporate landlords, such as large national real estate investment trusts (Buhler at 94-97). Similar information is not publicly available for Alberta.

Third, tenants are much more likely not to appear at their hearings, whether those were in-person pre-pandemic or are the now-pervasive teleconference hearings. Tenants are often hourly wage employees and they may not be able to get time off work during the day. Or they may need to spend the time and money available to them on trying to find a new place to live. In Saskatchewan, almost two-thirds of tenants were not present at their eviction hearings in 2020, which, like those in Alberta, have been conducted over the telephone since the pandemic began (Buhler at 81). Similar information is not publicly available for Alberta.

Fourth, landlords are property owners and most of them therefore have a great deal more financial and other sources of power than do tenants. In Calgary, the average rent for a 1-bedroom apartment as of February 20, 2023 was $1,655/month, a 41% increase over the previous year (Calgary, AB Rent Prices), while in Edmonton the comparable figures were $1,025/month, a 10% increase (Edmonton, AB Rent Prices). Administrative tribunals such as the RTDRS often seem to be acting as government-financed collection agencies for landlords.

Fifth, tenants faced with RTDRS eviction proceedings for failure to pay rent – the most common type of proceeding – are often vulnerable for a number of different reasons. Numerous studies in Canada and elsewhere have documented the negative effects of evictions on the housing, health, employment, and education of tenants (Buhler at 76-77). In fact, the primary reason for the enactment of landlord-tenant legislation such as the *Residential Tenancies Act*, SA 2004, c R-17.1 (*RTA)* in Alberta was to address the imbalance of bargaining power between landlords and tenants that existed at common law and under previous legislation.

With these reasons for focusing on the impact of appeal periods on tenants in mind, I now turn to the decision in *Afolabi v Wexcel Realty Management Ltd.*

The Decision

There was more than one proceeding in this case, as the landlord had originally applied to recover possession of the rented premises. However, the proceeding that led to this decision by Justice Marion was a cross-application for damages, made by the tenants on May 14, 2022, alleging a breach of the *RTA* by the landlord. On November 24, 2022, a TDO dismissed the tenants' cross-application. The TDO found that the landlord did breach the residential tenancy agreement but held that the breach was too insignificant to warrant a remedy (at para 11).

The TDO's November 24, 2022 order was filed with the Court of King's Bench a day later, on November 25. The tenants tried to file a Notice of Appeal of that order in the Court of King's Bench on January 9, 2023 but could not do so because they were told they were out of time. They therefore applied for permission to file their Notice of Appeal, even though it was late, on the basis that they had misunderstood and miscalculated the 30-day time period within which their appeal had to be filed. The tenants thought that the 30 days did not include Sundays or holidays. Their application for permission was denied because Justice Marion concluded he had no authority to

extend the 30-day appeal period and, even if he did have such authority, there was no point in him extending it because the appeal would fail in any event.

Sections 23 and 28 of the *Regulation*, about appeals from the RTDRS to the Court of King's Bench, and s 22 of the *Interpretation Act*, RSA 2000, c I-8, about how to calculate time, are the basis for Justice Marion's conclusion that the tenants' application for permission to file their Notice of Appeal should be denied. The relevant provisions in the *Regulation* provide:

> 23(1) Any party who is subject to an order of a tenancy dispute officer may appeal the order on a question of law or of jurisdiction to the Court of King's Bench
>
> (a) within 30 days after the order is filed, by
>
> (i) filing with the Court of King's Bench a notice of appeal setting out the grounds of appeal, and
>
> (ii) serving a copy of the filed notice of appeal on
>
> (A) the respondent,
>
> (B) the Dispute Resolution Service, and
>
> (C) any other person that the Court of King's Bench directs, (emphasis added)
>
> …
>
> 28 If an appellant fails to comply with the requirements of section 23, the appeal shall be dismissed by the Court of King's Bench. (emphasis added)

The relevant *Interpretation Act* provisions specify:

> 22(1) If in an enactment the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday.
>
> …
>
> (7) If an enactment provides that anything is to be done within a time after, from, of or before a specified day, the time does not include that day. (emphasis added)
>
> 28(1)
>
> (x) "holiday" includes
>
> (i) every Sunday,

(ii) New Year's Day, Alberta Family Day, Good Friday, Easter Monday, Victoria Day, Canada Day, Labour Day, Remembrance Day and Christmas Day,

…

(iv) December 26, or when that date falls on a Sunday or a Monday, then December 27,

…

The first of the two issues that Justice Marion considered was when the appeal period for filing a Notice of Appeal started and ended. Although s 23(1)(a) does not explicitly say so, it is the filing of the TDO order at the Court of King's Bench that starts the 30-day appeal period (at para 17, citing *Scarlett v Wang*, 2019 ABCA 72 (CanLII) at para 37). Applying s 22(7) of the *Interpretation Act*, the 30-day appeal period in this case began to run on November 26, 2022, which was the day after the TDO order had been filed at the Court of King's Bench. The 30-day time period would therefore have ended on December 25, 2022. Applying s 22(1) of the *Interpretation Act*, but without reference to the definition of "holiday" in s 28(1)(x), Justice Marion determined that, "[a]t the very latest, the next day that the Court was open that was not a holiday was January 3, 2023" (at para 22). The phrase "at the very latest" is likely an acknowledgment that the date required by s 22(1) of the *Interpretation Act* was December 28, 2022, given the definition of "holiday" in the same Act, but the Court was closed December 24, 2022 through January 2, 2023.

Justice Marion did consider whether the TDO order had to be served on potential appellants, such as the tenants in this case (the losing party on their RTDRS cross-application), as well as being filed at the Court of King's Bench. He noted that s 23(1)(a) of the *Regulation* is clear that the appeal period is "within 30 days after the order is filed" and there is no mention of service (at para 19, emphasis added). He noted the contrast with s 22(2) of the *Regulation*, which states that a TDO order "does not take effect until it is filed under subsection (1) and served" (at para 19, emphasis added). He also noted that under s 53(1) of the *RTA*, the appeal period for Provincial Court orders made under the *RTA* is within 30 days after those orders are entered at the Court of King's Bench under section 54 and served (at para 20).

Justice Marion acknowledged that it might seem counter-intuitive that the appeal period starts before a potential appellant is served and before the TDO order becomes effective (at para 12). Nevertheless, he held that such an interpretation was the most reasonable interpretation given the wording in the *Regulation*. He assumed that the drafters of the *Regulation* made a decision to require filing and service of a TDO order at the Court of King's Bench before the order could be enforced but to require only filing before starting the time period to appeal a TDO order (at para 20).

The second issue Justice Marion considered was whether the tenants should be granted permission to file their Notice of Appeal even though the 30-day appeal period had expired. Did he have the discretion to do so? He noted that there is nothing in s 23(1) of the *Regulation* that gives the Court of King's Bench the discretion to vary or extend the 30-day appeal period, in contrast with s 23(2) which does expressly give the Court the discretion to vary the date for filing transcripts of the RTDRS hearing (at para 24). And although the *Alberta Rules of Court*, Alta Reg 124/2010 give courts a general power to extend or vary timelines, Justice Marion held that the use of such a general power in the face of the specific requirements of s 23 of the *Regulation* was precluded by

s 28.1 of the *Judicature Act*, RSA 2000, c J-2, s 28.1(3) and the discussion of that section by the Alberta Court of Appeal in *Rana v Rana*, 2022 ABCA 270 (CanLII) at paras 27, 29-30 (at para 25).

Finally, Justice Marion also noted that even if he had the discretion under the *Alberta Rules of Court* to extend the 30-day appeal window, there was still s 28 of the *Regulation* to contend with (at para 27). Section 28 is uncompromising: "[i]f an appellant fails to comply with the requirements of section 23, the appeal shall be dismissed by the Court of King's Bench." (emphasis added). Previous court decisions had, unsurprisingly, interpreted this language as mandatory (at para 24, citing *Nee v Ayre*, 2015 ABQB 402 (CanLII) at para 18). Section 28 requires that any appeal be dismissed if it does not comply with s 23, and so there was no point in allowing a Notice of Appeal to be filed (at para 27).

Discussion

I think Justice Marion is correct in his analysis and his conclusion. In the face of the straightforward and uncompromising appeal provisions in the *Regulation*, the tenants' failure to file their Notice of Appeal within the 30-day appeal period was decisive. I am not as sure that the drafters of the *Regulation* made a conscious decision to require only filing before starting the time period to appeal a TDO order, as opposed to requiring filing and service for the TDO order to take effect and for appeals from Provincial Court. I could also take issue with Justice Marion's failure to mention s 10 of the *Interpretation Act* with its requirements that all statutes and regulations "shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects." Coupled with the objective of the *RTA* to address the imbalance of bargaining power between landlords and tenants, the *Regulation* must be interpreted in tenants' favour, if possible. But the drafting of these provisions in the *Regulation* leaves no possibility of anything other than the one interpretation that Justice Marion came to.

The fault is in the drafting of the *Regulation* and, to a lesser degree, the practices of the RTDRS.

Justice Marion warned that potential appellants of TDO orders will have to be "vigilant in monitoring the date" that a TDO order is filed in the Court of King's Bench (at para 21). I doubt that most potential appellants – almost always tenants – know how to check whether a TDO order has been filed at the Court of King's Bench. That is a fairly onerous burden to place on them, whether deliberately or inadvertently, especially when the Court's public counters were closed due to the pandemic. However, potential appellants do not actually need to monitor the filing of TDO orders. Instead, they need to read the *Rules*.

Section 23(1) of the *Regulation* does not say who must file the TDO order; the sentence uses the passive voice. It used to be that the winning party had to file and serve TDO orders on the losing party; no one did it for them. And this could take a while, depending on the location of the landlord (usually) and whether the hearing was in-person or by telephone. However, the RTDRS has, since April 2020, taken it upon itself to file all of its TDO orders at the Court of King's Bench by "direct-filing" by email, often the same day the orders are granted or else the next business day. The *RTDRS Annual Report*, 1st edition (at 12) and the *RTDRS Annual Report*, 2nd edition (at 10) both explained that:

> Due to limited public access to courthouses as a result of the COVID-19 pandemic, in April 2020 the RTDRS began direct-filing its orders by email to the Court of Queen's Bench. This additional service has been greatly appreciated by applicants, and the RTDRS has made it part of standard practice.

The RTDRS's new and "greatly appreciated" practice of direct-filing its TDO orders was only made public fifteen months later. In the July 2021 version of the *Rules* (available here), and in each of the six subsequent versions of the *Rules* up to the current version dated January 13, 2023, Rule 17.3 has provided as follows (with only a name change to the Court from Queen's Bench to King's Bench):

> 17.3 The RTDRS will file the order directly with the Court of King's Bench and send a copy of the filed order to the applicant only. If the applicant choses, they may file the order with the Courts themselves but, either way, it is recommended the order be filed as soon as possible. The applicant must serve the filed copy of the order on the respondent. (emphasis added)

This change in practice – so "greatly appreciated" by the applicants, 82% of whom are landlords – means that since April 2020 the 30-day appeal period usually starts on the day the TDO made the order or the day after, as in this case. Oddly enough, that used to be the law. Section 23(1) of the *Regulation* used to say that the appeal period started when the TDO granted the order, but it was amended by the *Residential Tenancy Dispute Resolution Service Amendment Regulation*, Alta Reg 83/2017, s 10, a point which Justice Marion noted (at para 16). That 2017 amendment to the law – which made the law more tenant-friendly in practice – has, in effect, been repealed by the RTDRS changing their internal procedures. These new procedures allow landlords to get possession and collect rent more quickly and with less fuss.

One last point. In both the *RTDRS Annual Report*, 1st edition, March 2020 – April 2021 (at 13) and the *RTDRS Annual Report*, 2nd edition, March 2021 – April 2022 (at 10), the RTDRS reported that "fewer than 1 per cent of all RTDRS orders were the subject of an application for judicial review or an appeal to the Court of Queen's Bench." That statistic suggests that the TDOs are deciding landlord-tenant disputes so well that losing parties only very rarely question their orders. Maybe they are, but we cannot assess that for a few reasons.

First, we do not know who the TDOs are or the backgrounds and experience of individual TDOs. We do not know what qualifications TDOs are required to have, if any, although based on a June 2022 eluta.ca advertisement seeking more TDOs I do know that a law degree is not considered a necessary qualification for interpreting and applying the *RTA* and *Regulation* (see a copy of this ad here). Second, hearings are not public. Instead, they are telephone conference calls between the TDO, parties, and their witnesses only. Third, only about half of one percent of their orders and the reasons for those orders are made public, according to the information in the two *Annual Reports* about published orders versus filed orders: just over 50 published versus 7,890 filed in 2021-2022 (at 12) and 46 published versus 9,087 filed in 2021-2022 (at 10). Fourth, there has never been an evaluation of whether the RTDRS is fulfilling its purpose, despite the fact it has been in existence since 2006.

The fact that each TDO conducts between five and thirteen hearings per day (*Annual Report* 2021-2022 at 7) – even if they are all teleconference hearings – most likely affects their ability to provide written reasons for their decisions. They have large workloads and short turnaround times. It would be helpful to know how many of these telephone hearings are attended by only the applicant – usually the landlord – as that would likely impact the perceived need for written reasons.

In addition to the short and rigid 30-day appeal period, there are other structural reasons why a "fewer than 1 per cent" appeal rate may be literally true but nevertheless of no importance or substance. A party wanting to appeal needs to prove an error of law or jurisdiction (neither of which are easy for those with legal training to figure out, never mind usually self-represented tenants). They need to pay a $600 court fee to file a Notice of Appeal. They need to figure out procedures and forms in the Court of King's Bench, which offers no help or forms for RTDRS appeals. The volunteer lawyers with the King's Bench Court Assistance Program are available to assist members of the public trying to access that Court. Indeed, Justice Marion noted that a volunteer from the King's Bench Court Assistance Program was present to assist the tenants in this case on their application for permission to file a late Notice of Appeal (at para 2).

But the biggest structural barriers to tenants appealing TDO orders are money and time. Bearing in mind that the most common RTDRS applicants are landlords suing for possession of the rented premises because of non-payment of rent, can tenants afford the $600 filing fee for a Notice of Appeal in addition to the security deposit and first month's rent for a new place to live? Can they afford to spend the available time they have trying to figure out how to calculate the appeal period, what "errors of law or jurisdiction" are, and what a Notice of Appeal needs to say or do they need to spend it looking for a new place to live?

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