

SET ASIDE MOTIONS AND THE HUMAN RIGHTS CODE

Disclaimer: This article is written for informational purposes only and should not be relied upon as legal advice. In each case, specific advice should be obtained which will be responsive to the circumstances of the individual requiring it.

You may have read about the Tribunal decision from Toronto this week, which appears to make landlords' lives harder with respect to Tribunal evictions. I have attached the September 27th [Toronto Star story](#) as a PDF file for you to read. Despite all the sensational headlines, Adjudicator DeBuono of the Ontario Rental Housing Tribunal did NOT find that the Tenant Protection Act is discriminatory. What he found is that one small part of the Act and rules #8 and #10 of the Tribunal's Rules of Practice were inconsistent with the provisions of Ontario's Human Rights Code in the specific fact situation that was presented to him. The decision was not a win for tenants, any more than it was a loss for landlords. I have read the decision, and it is a generally well-reasoned decision applying the law properly, but again, limited to that fact situation in the case at bar. Adjudicators have the jurisdiction to declare a section of an act contrary to the Charter or the Human Rights Code, but such a finding does not strike down the act or a provision of the act, except as it applies to the case before them.

I thought the analysis of the facts and exercise of discretion considering the facts of the case was a bit misguided and far-fetched. The Adjudicator did not explain how it was that the tenant Ms. Reid managed to find the time to file the request for extension of time, and for a set aside of the order after the eviction had been filed for, but was somehow unable to file a dispute, despite the fact she had a fax machine in the office where she worked. She had also filed disputes before with the Tribunal. Both his findings and exercise of discretion become unreasonable when these facts are considered. He failed to mention that the majority of disputes of applications simply read "I dispute" or something similar. It does not take a lot of time or thought to draft a dispute.

The decision of an adjudicator at the Tribunal is not binding on anyone, not fellow Tribunal members, not even him or herself. There is no precedential value in an order of a quasi-judicial Tribunal. Adjudicator DeBuono's reasoning follows a case cited as *Ava Wolch v. Walmer Developments* in 2003, which was appealed to the Divisional Court from an Ontario Rental Housing Tribunal decision which evicted the tenant for various illegal acts. On review, the Court found that landlords are subject to the *Human Rights Code*, as is the Tribunal, in making findings, handing out discretionary relief from eviction and in their processes and procedures. Neither landlords nor the Tribunal may engage in constructive discrimination, that is, imposing a condition on a tenant which is difficult or impossible to meet by virtue of the tenant's disability as enumerated in section 2 of the Human Rights Code. Section 2 of the *Tenant Protection Act* says that if any law other than the *Human Rights Code* is inconsistent with the *Tenant Protection Act*, the *Tenant Protection Act* prevails. But the Code is paramount, as it is viewed as quasi-constitutional legislation, and adjudicators are correct to at very least, turn their minds to the code in making findings and applying discretion. They have no choice in the matter, as unlike their judgments, the decision of the Divisional Court in *Walsh v. Walmer* is binding on them.

But this doesn't make the decision any easier to digest for landlords. The landlord is severely prejudiced by this type of decision. From a public policy perspective, landlords will be seriously impaired financially believing that their default orders can be enforced by the Sheriff after the 10 day set-aside period has elapsed and the order becomes effective for eviction, usually on the 11th day following the date of the order. Once the Sheriff's fees are paid, landlords have paid, to that point, the \$150 cost of the application, the cost of representation, and a fee amounting to about \$330 to the Sheriff to enforce the order. None of these costs, with the exception perhaps of the application fee, can be restored by arbitrarily overturning decisions in this manner.

So the sky is not falling for landlords nor is a new day dawning for tenants. Adjudicators may still continue to make decisions, set aside default orders and grant relief from eviction based on the facts before them, and applying their discretion in a manner appropriate to the evidence. However, there is a rumour that there is a Tribunal initiated review of the order in the works. The landlord may also decide to file a review of the order. Stay tuned!