SUPREME COURT OF NOVA SCOTIA
Citation: *Westphal Court Ltd. v. Herd*, 2025 NSSC 185

Date: 20250609
Docket: Hfx No. 537427
Registry: Halifax

Between:

Westphal Court Ltd.

Appellant

v.

Nicole Herd

Respondent

Docket: Hfx No. 537429
Registry: Halifax

And Between:

Westphal Court Ltd.

Appellant

v.

Eloise Graves

Respondent

D E C I S I O N

Judge: The Honourable Justice Mona Lynch

Heard: March 24, 2025, in Halifax, Nova Scotia

Counsel: Dylan MacDonald and Levi Parsche, for the Appellant
Megan Deveaux, for the Respondents

By the Court:

INTRODUCTION

[1] This is an appeal by the landlord, Westphal Court Ltd. (Westphal) from a decision of Adjudicator, Dale Darling, of the Small Claims Court. There was one decision issued by the Small Claims Court in relation to both tenants, Eloise Graves and Nicole Herd, as the matters were heard jointly in that court (*Graves v. Westphal Courts Limited*, 2024 NSSM 76). The appeals were also heard jointly in this court.

[2] Westphal is a landlord which owns and operates Woodbine Community Park which is a land-lease community (s. 2 (b) of the *Residential Tenancies Act*, 1989 R.S.N.S., c. 401(*RTA*)) commonly referred to as a mobile home park.

[3] The issue before the Small Claims Court was in relation to the landlord's rules regarding water meters and metered water, and whether those rules breached the *RTA*. The Adjudicator found that the landlord's rules were not in accordance with the *RTA* and were not reasonable rules pursuant to s. 9A(3) of the *RTA*.

[4] For the reasons that follow, the landlord's appeal is dismissed.

BACKGROUND

[5] Nicole Herd, a tenant and respondent in this matter, purchased her mobile home and became a tenant of Woodbine Park in 2019. The other tenant and respondent, Eloise Graves, became a tenant in 2021 when she purchased her mobile home. Both tenants signed a Community Guidelines document in which Westphal outlines responsibilities and rules of behaviour for tenants. These Community Guidelines form part of the lease and cover such things as the lot rent, rules about animals, parking, etc.

[6] In 2015, Westphal amended the Community Guidelines to require tenants to purchase and install a water meter as a condition of approving the sale of their home. The Community Guidelines signed by both tenants included Schedule C which was the "Wastewater Distribution System Rental Agreement/Wastewater System Rental Agreement". The Community Guidelines required any buyers of the mobile homes in Woodbine to be approved in writing by the landlord (clause 6.2). The Community Guidelines also required that all homes sold must "have a community approved water meter system installed before the sale agreement is finalized" (clause 6.6).

Schedule C based the water, wastewater, storm water rates and associated fees on the rates and fee structure set by Halifax Water. There was a place in Schedule C to record the model information of the landlord approved brand of water meter. Schedule C provided that any cost incurred for repairs and maintenance for the water meter would be the tenant's responsibility.

[7] The requirement for the water meter installation only applied at the time of the sale of the home. The tenants who already owned their homes were not required to install a water meter and continued to have water service included in their lot rent. The evidence before the adjudicator was that 301 of the 636 homes at Woodbine have water meters installed. Both respondents had water meters on their homes, and they were invoiced quarterly for water. Both respondents paid the amounts invoiced. In Nicole Herd's case the former owner installed the water meter, and she paid a $28.75 transfer fee. In Eloise Graves' case she paid $320 to have the water meter installed on her home.

[8] Things changed when the Residential Tenancies Program in Nova Scotia issued Policy 45 respecting the use of water meters in mobile home parks. Policy 45, which was effective March 1, 2023, states:

> **Water Meter Installation in Land Lease Communities**
>
> **The *Residential Tenancies Act*:**
>
> - Landlords of Land Lease Communities are permitted to establish rules that are considered reasonable. The *Residential Tenancies Act* does not consider creating a rule to compel a tenant to install a water meter and pay for the installation of the water meter a reasonable rule.
> - The Regulations indicate that utilities are included in operating expenses to operate land-lease communities.
> - If a land-lease community requests permission to increase rent by an amount greater than the annual allowable rent increase amount (AARIA), increased operating expenses, including water and wastewater, can be included.
> - Requiring a tenant to install a new water meter in a land-leased community is not permitted.
>
> **Reference:**
>
> *Residential Tenancies Act*: Section 9(2) 3.(2)
> *Residential Tenancies Act*: Section 9A
> Residential Tenancies Regulations: Sections 26(b), 28(b)(i), 28(c)(iii)
>
> **Details:**

> The Residential Tenancies Program does not consider a landlord's rule to have a water meter installed on a manufactured home to be considered reasonable equipment for a manufactured home. The cost should not be placed on the tenant for metering their water consumption.
>
> Water meters are not permitted to be installed on manufactured homes in land-lease communities. This applies to homes that do not currently have a water meter on their manufactured home. If a manufactured home has been sold, the new owner is not required to install a water meter.

Procedure:

- This policy does not apply to tenants with existing water meters installed on their manufactured homes.
- This policy applies to all current and future tenants who do not have a water meter installed on their manufactured home.

[9] When Westphal became aware of Policy 45 they immediately changed their practice for the installation of water meters. New tenants were no longer required to install water meters. The tenants who had water meters installed between 2015 and 2023 continued to be charged for their water usage.

[10] The respondents each brought an application (s. 13 of the *RTA*) to the Director of Residential Tenancies seeking the removal of the water meters on their homes, and a refund of the water bills paid to date. Nicole Herd applied for a refund of the transfer fee in relation to the water meter. Eloise Graves applied to be reimbursed for the cost of the meter and reader. The applications were heard by two different Tenancy Officers, and both were dismissed in August of 2023 on the basis of Policy 45. Both respondents appealed to the Small Claims Court (s. 17C of the *RTA*). Nicole Herd's appeal was filed on August 8, 2023, and Eloise Graves appeal was filed on September 7, 2023. The appeals to the Small Claims Court were heard together on August 7 and 9, 2024. The adjudicator allowed the appeals in a decision dated September 13, 2024, and granted $2,511.02 to Nicole Herd for the meter transfer fee plus invoiced water fees. Eloise Graves was granted $1,769.00 for the meter and for the invoiced water fees.

[11] Westphal filed a notice of appeal on each matter on October 15, 2024, and the appeals were heard jointly on March 24, 2025.

ISSUES

[12] The appellant, Westphal, appeals on the basis that the Small Claims Court Adjudicator made an error of law. The parties have stated the issues to be determined differently. I find that the issues to be determined on appeal to be:

1. Did the Adjudicator err in law in concluding that Policy 45 was not legally binding?
2. Did the Adjudicator err in law in concluding that Westphal's Community Guidelines in relation to water meters and water usage were unreasonable and inconsistent with the *RTA*?

STANDARD OF REVIEW

[13] Section 32(1) of the *Small Claims Court Act*, 1989 R.S.N.S., c. 430 allows a party to appeal to the Supreme Court of Nova Scotia from an order or determination of an adjudicator on three grounds: (a) jurisdictional error; (b) error of law; or (c) failure to follow the requirements of natural justice. Here the appellant is alleging an error of law was made by the adjudicator. I see no basis to find a jurisdictional error or a failure to follow the requirements of natural justice.

[14] Questions of law are generally assessed on a correctness standard meaning that the adjudicator must be correct in her identification and application of the law (*Halifax Herald Limited v. Clarke*, 2019 NSCA 3, para. 37)

[15] The jurisdiction of the Supreme Court in Small Claims Court appeals is well established. The court is confined to questions of law which must rest upon findings of fact as found by the adjudicator. There is no authority to determine my own findings of fact from the evidence. Examples of reversible error on the part of the adjudicator include such things as a misinterpretation of a statute, or if there is no evidence to support the conclusions reached or the adjudicator has clearly misapplied the evidence in material respects, or where the adjudicator has failed to apply the appropriate legal principles to the proven facts, among others (*Brett Motors Leasing Ltd. v. Welsford* (1999),181 N.S.R. (2d) 76, para. 14). In considering whether the adjudicator erred in law the judge in *Brett Motors* found that "it cannot be said that the learned adjudicator reached an unreasonable or untenable conclusion." (para. 16).

POSITION OF THE PARTIES

Appellant

[16] Westphal's position is that all of Policy 45 is binding, and they have complied with it, therefore the adjudicator erred in law in finding that the provision which excluded homes with existing water meters from the policy was contrary to the *RTA*. The appellant submits that they followed Policy 45 and stopped the practice of requiring tenants to install water meters and stopped charging new tenants for the water. Policy 45 specifically excluded tenants who already had water meters installed on their homes and therefore Westphal continued to charge those tenants with water meters as they had prior to Policy 45. Westphal also submits that the adjudicator erred in law in finding that Policy 45 violated the *RTA* and erred in framing the issue as to whether the *RTA* authorized Policy 45 to treat classes of tenants differently as that was not before the adjudicator. Westphal says that their rules are not contrary to s. 9A of the *RTA*. Westphal also says the adjudicator erred in finding that rent under the *RTA* always includes the provision of water. They say that Westphal complied with Policy 45 and their compliance with that policy is reasonable under the *RTA*.

Respondents

[17] The respondents see things differently. They argue that the adjudicator did not find that some portions of Policy 45 were law, she simply found that some portions of Policy 45 were in accordance with the *RTA* and some portions were not. The portions of Policy 45 that were not in accordance with the *RTA* cannot stand. The portions that cannot stand are the portions of Policy 45 which say it does not apply to tenants who had already installed water meters. The respondents also state that Westphal's Community Guidelines as they relate to water meters are not reasonable rules and therefore cannot be enforced as they are contrary to s. 9A 2(3) of the *RTA*.

ANALYSIS

Did the Adjudicator err in law in concluding that Policy 45 was not legally binding?

[18] Westphal submits that Policy 45 is binding and legislative in nature. However, one of the requirements for a policy to be binding or "hard law" is that authority to make the law has been granted *Thamotharem v. Canada (Minister of Citizenship and Immigration) (F.C.A.),* 2007 FCA 198, para. 62; *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, para. 64). The *RTA* and the regulations under the *RTA* contain no authority

for the Residential Tenancies Program to enact laws. Therefore, the policies are not law or legally binding but are administrative in nature. The adjudicator erred in law in finding that Policy 45 was a mixture of legislative and administrative policy (para. 60 and 61). The adjudicator found that the portion of Policy 45 that was legislative policy was the portion which stated that a landlord's rule requiring the installation of water meters was an unreasonable rule. She agreed that was an unreasonable rule and was correct in her analysis and conclusion on that point despite the error in finding it was legislative in nature. It is not that portion of the policy that Westphal takes issue with. It is the portion of the decision that found the exclusion of those tenants who already had water meters to be an unreasonable rule that Westphal says is an error of law.

[19] The policies on the webpage are said to "help landlords and tenants understand the *Residential Tenancies Act*, and are used by the program to make decisions, mediate and settle disputes between tenants and landlords. They are also said to "ensure that issues are addressed consistently" (Residential tenancy policies - Government of Nova Scotia[1]). Those goals are laudable and in keeping with authorities on the role of policy guidelines such as *Thamotharem*:

> [60] The use of guidelines, and other "soft law" techniques, to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Board, which sit in panels; in the case of the RPD, as already noted, a panel typically comprises a single member.
>
> [61] It is fundamental to the idea of justice that adjudicators, whether in administrative tribunals or courts, strive to ensure that similar cases receive the same treatment. This point was made eloquently by Gonthier J. when writing for the majority in *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282 at 327 ("*Consolidated-Bathurst*"):
>
> > It is obvious that coherence in administrative decision-making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one". [Citation omitted in original]

[1] https://beta.novascotia.ca/documents/residential-tenancy-policies

[20] A policy or soft law cannot, as stated by the adjudicator, (para. 63) be inconsistent with its parent statute, here the *RTA*, (*Maple Lodge Farms Ltd. v. Canada,* [1982] 2 SCR 2) or as stated: "A non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation" (*Ainsley Financial Corp. v. Ontario (Securities Commission)*, 1994 CanLII 2621 (ONCA)). Westpha's submission is that the exclusion of the tenants with water meters already attached to their homes in Policy 45 should be considered binding. However, a guideline cannot fetter a decision maker's discretion (*Thamotharem*, para.78). The *RTA* itself states in s. 3(1) that the *RTA* applies when the relation of landlord and tenant exists notwithstanding any agreement, declaration, waiver or statement to the contrary.

[21] The adjudicator did not err where she found that Policy 45 was not legally binding.

Did the Adjudicator err in law in concluding that Westphal's Community Guidelines in relation to water meters and water usage were unreasonable and inconsistent with the *RTA*?

[22] There are two parts of Policy 45 that were under consideration in the court below. The first is the statement in Policy 45 that the *RTA* "does not consider creating a rule to compel a tenant to install a water meter and pay for the installation of the water meter a reasonable rule". Going along with that statement is the provision that the cost should not be placed on the tenant for metering their water consumption. The second part under consideration is the exception of tenants with existing water meters installed on their manufactured homes and limiting application of the policy to homes without water meters. The adjudicator agreed with Policy 45 in respect to the statement that compelling a tenant to install and pay for the installation should not be considered a reasonable rule for landlords in a land-lease community (para.44). Policy 45 is clear in saying the *RTA* does not consider creating a rule to compel a tenant to install a water meter and pay for the installation of the water meter a reasonable rule." (Policy 45). The adjudicator found that requiring the installation of meters fails to meet the statutory requirements of s. 9A of the *RTA* (para 46). Section 9A of the *RTA* is the section which deals with landlord's rules and reads:

> **Landlord's rules**
>
> 9A (1) A copy of reasonable rules established by a landlord that apply to the residential premises shall be given to a tenant prior to executing a lease.

> (2) Rules may be changed or repealed upon four months notice to the tenant prior to the anniversary date in any year.
>
> (3) A rule is reasonable if
>
> (a) it is intended to
>
> (i) promote a fair distribution of services and facilities to the occupants of the residential premises,
>
> (ii) promote the safety, comfort or welfare of persons working or residing in the residential premises, or
>
> (iii) protect the landlord's property from abuse;
>
> (b) it is reasonably related to the purpose for which it is intended;
>
> (c) it applies to all tenants in a fair manner; and
>
> (d) it is clearly expressed so as to inform the tenant of what the tenant must or must not do to comply with the rule.

[23] I find no error in law in the adjudicator's finding that the landlord's (Westphal) rule requiring the installation of water meters to be an unreasonable rule as stated in Policy 45.

[24] The issue for Westphal is the adjudicator's finding that the exclusion of those who already had installed water meters on their homes, is an unreasonable rule and an unreasonable provision in Policy 45.

[25] Westphal takes issue with the adjudicator finding that she was not satisfied on the evidence she heard that the water meter rules were required to prevent abuse of property and to provide a fair distribution of services. While the adjudicator mentioned that the evidence on those provisions was anecdotal and there were no "before and after" findings (para. 47), her reason for finding that the provision in the policy which excepted those who already had water meters installed was unreasonable, was based on it not applying in a fair manner to all tenants (s. 9A(3)(c) of the *RTA*).

[26] The adjudicator found, on the evidence, that the rules of the landlord did not apply "to all tenants in a fair manner" as required by s. 9A(3)(c). The adjudicator found that instead of applying fairly to all tenants it created two or three different classes of tenants in Woodbine. There were those who paid for water on a metered basis and those who did not. There were also those who paid more for lot rent after Policy 45 and those who neither paid higher lot rent to account for water nor paid

for water on a metered basis. While the rules do not have to apply to all tenants in the same manner, they must be fair to be found reasonable. Having one group of tenants who are subject to what has been stated by the *RTA* program and found by the adjudicator to be an unreasonable rule, is not consistent with a rule being applied to all tenants in a fair manner. Policy 45 and the landlord's rules apply to all current and future tenants who do not have a water meter installed on their manufactured home, leaving only tenants in the position of the respondents required to have water meters and to pay for water based on those meters. As stated by the Tenancy Officers in both the Nicole Herd and Eloise Graves decisions "Unfortunately, the tenant is caught in the middle without a remedy". Tenants, such as the respondents, are excepted from the benefit of Policy 45 and are subject to the unreasonable rule of their landlord. It cannot be fair to be subjected to an unreasonable rule which is the position the respondents and other like tenants find themselves in.

[27] I find no error of law in the adjudicator's analysis and finding that the exclusion of those who already had water meters installed to be unreasonable because it does not apply to all tenants in a fair manner. The rule requiring the installation of a water meter was found by the *RTA* Program and the adjudicator to be an unreasonable rule. It is not reasonable for that unreasonable rule to continue to apply to the respondents.

[28] The landlord is not without recourse. Section 11(b) of the *RTA* applies to land-lease communities. While landlords are not permitted to impose a rent increase greater than the allowable amount, the landlord can apply to the Director of Residential Tenancies for permission to increase rent by a greater amount. In considering such an application the Director is to consider operating expenses. Operating expenses include the utilities of water and sewer.

[29] I find no error of law in the finding of the adjudicator that one portion of a policy is consistent with its parent statute and therefore valid or reasonable while another portion of the same policy is inconsistent with the parent statute and therefore invalid or unreasonable. I find no error of law in these findings of the adjudicator; they were not unreasonable or untenable conclusions.

[30] The appellant and respondents made submissions regarding whether the landlord was required to provide water and whether water was included as part of the rent. While the adjudicator discussed those issues, her decision rested on her finding that the landlord's rules were unreasonable and contrary to the *RTA*. There

was no error in law made in reaching those conclusions. Having found no error in law on those issues, the other matters need not be considered.

CONCLUSION

[31] The appeal is dismissed with costs, as prescribed in the Small Claims Court regulations, to the respondents. There should be two orders prepared by respondents' counsel, one for each respondent.

Lynch, J.