CITATION: Gorscak v. Jarzabek, 2025 ONSC 4855
DIVISIONAL COURT FILE NO.: 374/24
DATE: 20251231

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
GORDANA GORSCAK Appellant (Tenant)	*Douglas H. Levitt & Spencer F. Toole*, for the Appellant
– and –	
EDWARD JARZABEK Respondent (Landlord)	*Calvin Zhang*, for the Respondent *Anna Solomon*, for the Landlord and Tenant Board
	HEARD at Toronto: January 20, 2025

FAIETA J.

REASONS FOR DECISION

[1] The respondent landlord commenced an application before the Landlord and Tenant Board (the "Board") to evict the appellant tenant pursuant to s. 66(1) of the *Residential Tenancies Act, 2006*, S.O. 2006, c. 17 ("RTA") as a result of causing a fire that caused extensive damage to the appellant's residential unit. The Board granted the application and terminated the tenancy (the "Eviction Order"). At the appellant's request for a review of the Eviction Order was dismissed (the "Review Order").

[2] On this appeal, the appellant tenant submits that the Board breached her right to procedural fairness, erred in law by stating the incorrect test for eviction under s. 66(1) of the RTA and erred in law by stating the incorrect test to review the Eviction Order.

Background

[3] Since 2012, the appellant has resided in a five-plex residential building that is owned by the respondent. On May 15, 2022, there was a fire in the appellant's rental unit that resulted from appellant having left cooking oil on her stove unattended. The fire caused severe smoke and water damage through the residential complex and the evacuation of the entire building. In attempting to extinguish the fire, the appellant suffered second degree burns, smoke inhalation and was hospitalized for three days. The fire caused extensive damage to the appellant's residential unit. It was repaired a cost of $212,484.71.

[4] On September 2, 2022, the respondent served a Form N7- Notice to End Tenancy for Causing Serious Problems in the Rental Unit or Residential Complex pursuant to s. 66(1) of the RTA on the grounds that her behaviour in the residential complex had seriously impaired the safety of any person. On September 7, 2022, the respondent filed an application for the appellant's eviction on the same grounds.

[5] On August 1, 2023, following the completion of its repair, the appellant resumed residing in the residential unit.

[6] The hearing of this application was held by the Board on October 2, 2023, and December 11, 2023. By Order dated December 22, 2023, the Hearing Member found that the appellant's failure to take due care while cooking caused the fire and that the fire had seriously impaired the safety of all of the tenants in the residential complex. The Hearing Member dismissed the appellant's submission that the fire was not caused by her negligence because it was caused by accident. Further, the Hearing Member found that it would not be unfair to postpone the eviction until January 31, 2024, pursuant to section 83 of the RTA. On the other hand, the Hearing Member found that it would be unfair to refuse an eviction order given that this incident continues to impact other tenants in the residential complex and that at least one tenant is worried that another fire will occur as she has subsequently seen the appellant smoking on her balcony.

[7] On January 24, 2024, the appellant filed a Request to Review on the following grounds:

(a) The Hearing Member refused to hear evidence, and to make a finding, regarding, whether the appellant was illegally locked out of the residential unit because she had not purchased tenant's insurance. The Hearing Member stated that she would "not [be] dealing with illegal lockout". As a result, the Hearing Member failed to consider "all the circumstances" under s. 83(1)(a) of the RTA in respect of whether it would be unfair to refuse to evict the appellant. Similarly, the Hearing Member failed to consider, under s. 83(3)(a) of the RTA, whether the Board was required to refuse to grant the application on the grounds that the landlord is in serious breach of the landlord's responsibilities under the RTA or of any material covenant in the tenancy agreement.

(b) The Hearing Member refused to receive certain text messages in evidence regarding the landlord failing to reply to the tenant's text messages asking about her return to the residential unit during the respondent's cross-examination of the respondent's spouse on this point, and other text messages which the appellant would have shown that the evidence of a tenant in another residential unit was not credible.

[8] By Order dated May 31, 2024, the Review Member found that:

My review of the hearing recording finds that the Member allowed the Tenant's representative to speak extensively, with the Tenant and her representative having substantial time to present their case.

The interruptions cited were instances where the Member sought to maintain relevance and focus during the proceedings. I find the Member's conduct did not demonstrate bias or procedural unfairness. Each party was afforded an adequate opportunity to present their evidence and arguments.

The Tenant alleges that the adjudicator made several errors in law, particularly in relation to s. 83 considerations and the Tenant's possession of the unit. The Tenant also claims that false statements were made in the final order. …

The Member considered all relevant factors, including the evidence submitted by both parties, and found no serious breaches by the landlord that warranted refusing the eviction. The claims of false statements in the order are unfounded, as the Minister accurately reflected the evidence and submissions presented.

The Tenant argues that the adjudicator improperly excluded text messages and other critical evidence necessary to counter the Landlord's claims.

The Member's decision to exclude certain evidence, such as text messages, was in accordance with the LTB practice directions and rules regarding the submission of evidence. The text messages were not submitted within the required deadlines and were not relevant to the core issues being decided. The Member provided ample opportunity for both parties to submit evidence and extended deadlines where appropriate.

Conclusion

I have considered the evidence presented and find that the tenant's request for review fails to establish that there were any serious errors of law or fact, or that there was procedural unfairness or bias affecting the outcome of the hearing. I further find, the Member conducted the hearing with the jurisdictional limits outlined by the SPPA and the Act ensuring that both parties had the opportunity to be heard.

Reviews address errors made by the Board. Reviews are not an opportunity for a party to correct their own mistakes or do a better job at presenting their evidence. The fact that the Tenant disagrees with the findings of the hearing Member are not a basis to grant a request for review.

Given all of the above, the findings by the Member were not unreasonable and it would be inappropriate to grant the Tenant's request for review on this basis. Therefore, and as a result of all of the above, I am not satisfied that there is a serious error in the order or that a serious error occurred in the proceedings. Accordingly, the Tenant's request for review is dismissed.

[9] On July 2, 2024, the appellant filed a Notice of Appeal with this court.

Standard of Review

[10] Appeals from LTB decisions are limited to questions of law. The standard of review is correctness. This was described by Shore J. in *Jedadiah Drummond v. Ridgeford Charitable Foundation*, 2024 ONSC 4658, at paras. 12-14:

> [12] An appeal from an order of the [LTB] lies to this court only on a question of law. This court does not have jurisdiction to hear an appeal on a question of fact, or of mixed fact and law.
>
> [13] The Supreme Court of Canada clarified the difference between questions of law, fact, and mixed fact and law, in *Canada (Director of Investigation and Research) v. Southam Inc*., 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 35: "Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests."
>
> [14] The applicable standard of review on questions of law is correctness.

[11] A finding of fact may give rise to a question of law in certain limited circumstances. In *Yatar v. TD Insurance Meloche Monnex*, 2021 ONSC 2507, 157 O.R (3d) 337, aff'd 2022 ONCA 446, 25 C.C.L.I (6th) 1, rev'd on other grounds, 2024 SCC 8, 489 D.L.R. (4th) 191, Swinton J. stated, at para. 28, that "[i]t is an error of law to make a finding of fact on a material point where the factual finding is based solely on (a) no evidence, (b) irrelevant evidence, or (c) an irrational inference" (citations omitted)

[12] In respect of procedural fairness, Shore J. stated in *Beyan v. IMH Pool XX LP*, 2025 ONSC 5392, at paras. 21-24, that:

> [21] Issues of procedural fairness arising from tribunal decisions where there is a statutory appeal mechanism are subject to the appellate standard of review of correctness: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, [2022] 2 S.C.R. 220. Absent an extricable question of law, the Court may not interfere with the LTB's findings of fact underlying its conclusion on procedural fairness. In other words, the LTB is entitled to control its own process and is entitled to deference on procedural matters requiring an exercise of discretion, unless there was an error in principle in how the discretion was exercised.

[22] Tribunals are owed considerable deference on their procedural decisions. This is because administrative tribunals have the experience and expertise to balance the need to ensure fair participation for all parties with the prompt determination of proceedings on their merits: *Wei v. Liu*, 2022 ONSC 3887 (Div. Ct.), at para. 9.

[23] When scrutinizing the procedural choices of a Tribunal, the reviewing Court cannot insist on the "optimal" procedure from various options that meet the standard for procedural fairness. The court is required to respect the procedural choices made by the Tribunal: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), 1999 SCC 699, [1999] 2 S.C.R. 817 at para. 27; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 231.

[24] Finally, LTB decisions are to be reviewed in the context of its high volume of applications and its statutory mandate to adopt the most expeditious method of proceeding that afford parties with adequate opportunity to know the issues and to be heard.

[13] On an appeal, the Divisional Court shall hear and determine the appeal and may:

(a) Affirm, rescind, amend or replace the decision or order; or

(b) Remit the matter to the Board with the opinion of the Divisional Court: RTA, s. 210(4).

[14] The issues raised on this appeal can be synthesized into the issues described below.

Issue 1: Did the Board fail to state the correct legal test for eviction under s. 66(1) of the RTA?

[15] The appellant tenant submits that the Hearing Member did not state the proper legal for an eviction under s. 66(1) of the RTA. This provision states:

A landlord may give a tenant notice of termination of the tenancy if,

(a) an act or omission of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant seriously impairs or has seriously impaired the safety of any person; and

(b) the act or omission occurs in the residential complex.

[16] In this context, "impairment" includes both actual impairment and a real risk of impairment: *Musse v. 6965083 Canada Inc.*, 2021 ONSC 1085, at para. 42.

[17] The appellant tenant states that the Hearing Member stated during the hearing that the appellant's representative turned on whether the fire was caused by the appellant's negligence. At page 24 of the transcript, the Hearing Member told the appellant's agent:

> I mean, the question I put to you at the beginning of this, was whether it was negligent or not. That's your argument. So that's what you need to get out in evidence.

[18] The Hearing Member found that the test under s. 66(1) of the RTA had been met in this case. In her Decision, the Board member stated:

[19] The Landlord's Agent stated and relied on the Fire Marshall's report which confirmed that the fire was started in the kitchen of the Tenant's rental unit, most likely from cooking on the stove top burner. The Landlord's Agent also stated and relied on a letter from the Landlord's insurer that confirmed the cause of loss was a result of an "accidental fire caused by a tenant's negligence." The Landlord's Agent also stated that there were extensive damages to the rental unit, as well as smoke and water damage throughout the residential complex. This evidence was supported by photos that the Tenant did not dispute. She confirmed that the rental unit had to be completely restored at a cost of $212,484.71.

[20] Based on the evidence before me, I was satisfied on a balance of probabilities that the Tenant's failure to turn off the stove burner caused this fire. There was no dispute that this fire seriously impaired the safety of all of the tenants in the building, including the Tenant herself who was seriously injured and hospitalized for three days.

[21] The Tenant argued that she was not negligent as this was an accident because she was distracted by her daughter's distress on the phone call. The definition of "negligent" is "failing to take the proper care in doing something." The fire was caused by the Tenant leaving a pot of oil unattended on the stove burner. The Tenant may have been distracted by her daughter's distress or by just being on the telephone while cooking, in either case, the Tenant still failed to take due care while cooking.

> 22. Subsection 66(1) of the Act refers to an act or omission of a tenant which seriously impaired the safety of any person. Given the above evidence, I find that the Tenant's omission, or negligence, in failing to attend to her cooking/turn off the burner seriously impaired the safety of other tenants and herself in the residential complex. [Emphasis added]

[22] Negligence need not be established in order to trigger s. 66(1) of the RTA. All that is required to be established is that a tenant's act or omission seriously impaired the safety of any person. The Hearing Member erred in law in stating that such omission must amount to negligence.

[23] An error of law must be material to the result in order to warrant the court's intervention. Errors that are inconsequential or do not result in a substantial wrong or miscarriage of justice are insufficient to justify appellant intervention: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6) ("CJA"): *Maple Leaf Acres Members' Association v. Ellig*, 2023 ONSC 3940, at para. 23. The Hearing Member went further than needed in finding that not only had the appellant's omission (namely, her failure to turn off the stove burner) had seriously impaired her safety of other tenants as

well as herself but also that such omission was negligent. The error of law was inconsequential and thus does not warrant this Court's intervention.

Issue 2: Did Board deny the appellant tenant procedural fairness by denying her the opportunity to adduce relevant evidence regarding the possession of the rental unit when the respondent's application was filed?

[24] The fire occurred in May 2022. The appellant resumed residing in the apartment in August 2023. The landlord stated that after the fire, her insurer refused to renew her policy unless tenants held tenant insurance. As a result, she requested all tenants including the appellant to purchase insurance. In their preliminary submissions, the appellant's representative submitted to the Hearing Member that the repairs had been completed much earlier and that the tenant had been illegally locked out of her apartment because she refused to purchase tenant insurance. Counsel advised that although it is not required under the lease, the appellant has now purchased tenant insurance. In any event, the Hearing Member directed that the issue of whether the tenant had been illegally locked out was irrelevant.

[25] The appellant tenant submits that the Hearing Member refused to permit her to lead evidence that she was illegally locked out of her apartment for a period of time following the completion of the repairs and that this circumstance was relevant under s. 83 of the RTA for purposes of determining whether the application for an eviction.

[26] On the second day of the hearing, at pages 50-5l of the transcript, the Hearing Member refused to permit the tenant to be examined on the issue of whether the landlord had refused to permit her to return to the apartment. The Hearing Member stated:

> BOARD MEMBER: Okay. Okay. Where are we going with this? What does it matter where she's been? What's the relevance?
>
> O. WIAFE: The relevance is that, you know, the landlord refused to, you know, allow her back in.
>
> BOARD MEMBER: Well, that's not before me. What's before me is whether or not she's going to be evicted for causing a fire, either on purpose or negligent.
>
> O. WIAFE: All right.
>
> BOARD MEMBER: That's the only issue before me.
>
> O. WIAFE: Okay. All right. Then, then I will....
>
> BOARD MEMBER: It's an eviction hearing, right?
>
> O. WIAFE: All right. Yeah, of course, I understand that.
>
> BOARD MEMBER: Do you want her, do you want her to give her Section 83?

O. WIAFE: Yes. Okay.

BOARD MEMBER: Get that on record.

O. WIAFE: Yes, I would have, but I just wanted to, because I understand that the Act also puts the responsibility that, you know, the, the whole case must be taken into consideration. So that is why I wanted to give the, the picture of what is happening and what happened. Not just the question of the eviction, but also the other issues that are, you know, around these things, you know.

BOARD MEMBER: Yeah, but the other issue is that she's been living somewhere else for almost a year, right?

O. WIAFE: Well, she, she was living there.

BOARD MEMBER: I mean, she found a place to live, right?

O. WIAFE: Yeah. Well, but, but, but it was somebody's responsibility to get her back in quicker, which doesn't....

BOARD MEMBER: I'm not dealing with whether or not the landlord's responsibility to get her back in quicker or not. You can sue the landlord if you think that it was too long. I can't deal with that.

O. WIAFE: All right.

BOARD MEMBER: My test is whether or not you should be evicted for what happened.

O. WIAFE: I understand. I understand.

BOARD MEMBER: That's what I'm deciding.

[27] In their final submissions, the appellant tenant asked that the LTB refuse the application for eviction because of "the breach of conduct by the landlord where it took a year for the tenant to get back in" due to an insistence on the purchase of tenant insurance.

[28] At the hearing, the appellant tenant submitted that an eviction order would be unfair. On the issue of whether the appellant tenant was locked out, the Hearing Member stated:

37. The Tenant's Legal Representative submits that the actions of the Landlord and their alleged breaches should be considered in providing relief from eviction. Pursuant to section 83(3)(a) of the Act, I must refuse to grant eviction if "satisfied that, the landlord is in serious breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement."

38. The Tenant's Legal Representative submitted that the Landlord was in breach by failing to allow the Tenant to return to the rental unit unless she obtained insurance and relied

upon the decision in [*Puterbough v. Canada (Public Works & Government Services*), [2007] O.J. No. 748]

39. There was no evidence presented during testimony of this issue. This issue was presented only as assertions from the Tenant's Legal Representative during preliminary and final submissions. In any event, the Tenant has returned to the unit and has been residing there since August 1, 2023 without purchasing the required insurance. [Emphasis added]

[29] There was no evidence presented on this issue because, as noted above, the Hearing Member refused to permit such evidence.

[30] The RTA states:

83 (1) Upon an application for an order evicting a tenant, the Board may, despite any other provision of this Act or the tenancy agreement,

(a) refuse to grant the application unless satisfied, having regard to all the circumstances, that it would be unfair to refuse; or

(b) order that the enforcement of the eviction order be postponed for a period of time. 2006, c. 17, s. 83 (1).

(2) If a hearing is held, the Board shall not grant the application unless it has reviewed the circumstances and considered whether or not it should exercise its powers under subsection

(3) Without restricting the generality of subsection (1), the Board refused to grant the application, were satisfied that:

(a) the landlord is in serious breach of the landlord's responsibilities under this Act or of any material covenant in the tenancy agreement.

(b) the reason for the application being brought is that the tenant has complained to a governmental authority of the landlord's violation of a law dealing with health, safety, housing or maintenance standards.

(c) the reason for the application being brought is that the tenant has attempted to secure or enforce his or her legal rights.

(d) the reason for the application being brought is that the tenant is a member of a tenants' association or is attempting to organize such an association; or

(e) the reason for the application being brought is that the rental unit is occupied by children and the occupation by the children does not constitute overcrowding. [Emphasis added]

[31] In *Musse v. 6965083 Canada Inc.,* 2021 ONSC 1085, at paras. 52-58, C. Boswell J. stated:

> 52 Section 83 mandates the Board to consider all of the prevailing circumstances before ordering an eviction, having regard to whether it would be unfair to refuse to evict.
>
> 53 Section 83 reflects the remedial nature of the legislation, and its tenant protection focus. See *Honsberger v. Grant Lake Forest Resources Ltd*., 2019 ONCA 44 (Ont. C.A.) at para. 19.
>
> 54 While the granting of relief under s. 83 is discretionary, the consideration of all of the prevailing circumstances is not.
>
> 55 In my view, the Member did not take into account all of the relevant circumstances she was mandated to do. …
>
> 57 Eviction is a remedy with obviously serious consequences for the tenant. This is particularly so in a very difficult rental market like that in Toronto, where available, affordable rental units are often few and far between, especially for low-income families like that of the tenant.
>
> 58 Section 83 plays an important role in the framework of the legislation and in mitigating the harsh realities of an eviction. It can only properly function in its intended role if the Board takes into account all relevant circumstances, as it is mandated to do. A failure to do so is an error in law. [Emphasis added]

[32] I find that the Hearing Member erred in law did not take into account all of the circumstances, as required by s. 83(1) of the RTA. The Hearing Member's refusal to permit the appellant to lead evidence of an alleged illegal lockout was a denial of procedural fairness.

[33] The LTB submits that it routinely interprets and apply s. 83(3) of the RTA to mean that the breach of the landlord's responsibilities under the RTA must be ongoing in order to engage the mandatory relieving power under s. 83(3) of the RTA. However, that provision is subject to the broader discretion under s. 83(1) of the RTA to refuse to grant an eviction application unless it would be unfair to refuse to do so in the circumstances. The fact that the usual remedy for a tenant's illegal lockout from their apartment is damages or a rent abatement under T2 application does not mean that it is an irrelevant circumstance under s. 83(1) of the RTA. Such an interpretation would be inconsistent with the "tenant protection focus" of the RTA: *Honsberger v. Grant Lake Forest Resources Ltd*., 2019 ONCA 44, at para. 19.

[34] Finally, the respondent landlord submits that this error of law did not result in a substantial wrong or miscarriage of justice sufficient to justify appellant intervention. I disagree. This issue of being locked out was a significant theme of the appellant tenant's case. Even though the LTB is owed considerable deference in respect of its procedural decisions, the appellant tenant should have been permitted to present evidence, and cross-examine the landlord's representative, so that she could have made her case that the eviction should be

refused under s. 83(1) of the RTA (and possibly s. 83(3) of the RTA) on the grounds that she had been illegally locked out during her tenancy. Without that evidence, I cannot assess the strength of the argument nor the likelihood that it would have resulted in a refusal to grant an eviction or that it might have resulted in other relief being granted. Accordingly, I am not prepared to find that s. 134(6) of the CJA should be applied.

Issue #3: Did the Review Member fail to state the correct legal test for review?

[35] The appellant submits that the Review Member misstated the test for review by stating during the hearing that the test is whether the Board Member made "serious errors of law".

[36] At the outset of the review hearing, the Review Member stated:

> So again, Mr. Wiafe, so, so the test is not whether or not you disagree with the Member's decision. The test is whether they're serious errors of law. So, I'm assuming that you're going to tell me where the serious error of law existed in the Member's decision. (CaseLines, page A280).

[37] The respondent submits that reference to "serious error of law" was a shorthand reference to the full test. Further, the respondent submits that the Review Member's decision was comprehensive and no reviewable errors of law in the review decision have been identified.

[38] The Board's Rules of Procedure made pursuant to s. 176 of the RTA and s. 25.1 of the SPPA implement the authority afforded by s. 21.2 of the SPPA for a tribunal to review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order. An Order may be reviewed on the basis that the requesting party was not reasonably able to participate in the proceeding: RTA, s. 209(2). In addition, an Order may be reviewed if there was a "serious error": See s. 26.8(e) of the Board's Rules of Procedure. A "serious error" includes an error of jurisdiction (such as when the Board exceeds its authority), a procedural error, an unreasonable finding of fact on a material issue which would potentially change the result of the Order, new evidence which was unavailable at the time of the hearing and which is potentially determinative of a central issue, an error of law such as an order interpreting the RTA which is clearly wrong and unreasonable, an unreasonable exercise of discretion which results in an order outside the usual range of results: See Review of an Order - Interpretation Guideline 8 – December 15, 2018 – Tribunals Ontario – Landlord and Tenant Board.

[39] I find that the Review Member misstated the test for review of an Order. Nevertheless, I would not set aside the Review Order on that basis alone as there is no suggestion that any issues raised by the appellant would have been properly before the Review Member if the correct test for review had been applied.

Conclusions

[40] The appeal is allowed. Both the Eviction Order and the Review Order are set aside. I remit this matter to the LTB for a further hearing should the respondent landlord wish to pursue an eviction order. I find it fair and reasonable for the respondent landlord to pay the

appellant her costs in the amount $9,000.00, inclusive of disbursements of $3,828.95 (largely for transcripts) and taxes.

_____

Faieta J

Dated December 31, 2025

CITATION: Gorscak v. Jarzabek, 2025 ONSC 4855
DIVISIONAL COURT FILE NO.: 374/24
DATE: 20251231

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

GORDANA GORSCAK

Appellant

– and –

EDWARD JARZABEK

Respondent

REASONS FOR DECISION

FAIETA J.

Released: December 31, 2025