SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Graves v. Westphal Court Limited*, 2024 NSSM 76

Date: 20240813
Docket: 526689 & 525868
Registry: Halifax

On Appeal from a Decision of the Director of Residential Tenancies

Between:

Eloise Graves

Appellant

v.

Westphal Court Limited

Respondent

and

Nicole Herd

Appellant

v.

Westphal Court Limited

Respondent

Adjudicator: Dale Darling, KC

Heard: August 7, August 9, 2024, in Halifax, Nova Scotia

Decision September 13, 2024

Counsel: Nora MacIntosh, for the Appellants
Dylan MacDonald and Levi Parsche, for the Respondent

By the Court:

Introduction:

[1] Ms. Graves and Ms. Herd have both filed appeals from a decision of the Director of Residential Tenancies. As the subject matter of both decisions is substantively the same (whether the Defendant can require the Tenants to install and maintain water meters on their homes, and pay for water services, and parties are represented by the same counsel in both appeals, it was agreed to have both matters would be heard together by an adjudicator.

[2] The Defendant initially objected to the jurisdiction of this Court to hear the matter, and sought to have the appeals dismissed. Submissions were made by counsel, and on April 11, 2024 I issued a preliminary decision in which I denied the Defendant's application to dismiss the appeals. That decision is attached as Appendix A.

[3] The matter then proceeded to hearing on August 7th and 9th, 2024, with parties providing pre-hearing submissions, and a comprehensive review of the case law as it relates to the role of "policy" in judicial decision making.

Decision:

[4] The appeals are allowed. The *Residential Tenancies Act*, R.S.N.S. 1989, c. 401 (hereafter the "*RTA*") includes water as a "utility" that is to be included within the rent the Tenants pay. The March 2023 Policy issued by the Residential Tenancies Program is invalid to the extent that it prohibits Tenants who had water meters at the time of the issuance of the policy from being given the benefit of this clear intention of the *RTA*.

Background of the Dispute:

[5] Nicole Herd and Eloise Graves are both tenants owning homes in Woodbine Park, which is owned by the Defendant, Westphal Court Limited. The park operates as a "land-lease community" as defined under section 2 (b) of the *RTA*. The scheme of the *RTA* allows tenants in the park to own their homes, and rent the lot upon which their home is located. Although these homes are sometimes referred to as "mobile homes", in practice once a home is on a lot, it is generally sold to a new tenant, not moved, as happened in both of the cases in these appeals.

[6] Ms. Herd became a tenant of the park in 2019, and Ms. Herd in 2021. Westphal Court does not employ a standard form of lease such as would usually be seen under the *RTA*, but instead has prospective tenants sign a "Community Guidelines" document, which is described as constituting "part of any lease", and

outlines the expectations of the Landlord regarding Tenant responsibilities and behaviour. That document, along with the provisions of the *RTA*, guides the relationship between the parties.

[7] The Community Guidelines indicate the monthly lot rent, when increases are permitted, and establishes rules around animals, garbage, vehicles and parking, and other issues designed to explain the rules of the community.

[8] Both Ms. Herd and Ms. Graves's copy of the Community Guidelines include a Schedule "C", Wastewater Distribution System Rental Agreement/Wastewater System Rental Agreement. In summary, Schedule "C" required both tenants to agree to separate water metering if they wished to purchase a home in the Park, and stated "All water, wastewater, storm water, rates and associated fees will be based on the rates and fee structures set by Halifax Water and will change according to HRWC structure".

[9] Both Tenants have been invoiced quarterly for water since the beginning of their tenancy, and both have paid the invoiced amounts required.

[10] It is this requirement on the part of the Landlord that forms the inception of both appeals before me.

The History of the Proceeding:

[11] The Residential Tenancies Program issued Policy # 45 (the "Policy") at an unspecified exact date, although the Policy says "Updated March 2023". The Policy is so integral to the dispute between the parties, I reproduce it in its entirety:

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: Section 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 the 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.

[12] A review of the formation of the dispute between the parties, is necessarily redundant given that I did so in my preliminary decision in this matter, and so I will reproduce it verbatim below:

> [9] Ms. Herd filed a Form J, Application to the Director May 30, 2023, stating:
>
> > When I purchased the trailer in 2019, the former owner was forced to install a water meter. I am being charged for using water. I also had to sign a Schedule C that states that the park is not responsible for any water issues linked to water quality or quantity. I feel treated unfairly, two of my direct neighbors don't pay for water usage at all. They moved into the park years ago. Based on the new bylaw, new park tenants are also not being charged for water in addition to the regular lot rent. The water charges each month include a monthly water base rate, monthly water consumption and monthly wastewater discharge rate, monthly wastewater-based rates, and for quarterly stormwater charges.
>
> [10] Ms. Graves filed a Form J, Application to the Director July 2, 2023, which states:
>
> > When I purchased my house in my land lease community, a water meter and reader was demanded by the landlord. This is landlord equipment, I have received no receipt or warranty paperwork. I want my water meter and reader removed and be reimbursed for the meter and reader $320. I also want a refund for the water bills I have received from the landlord ($759.78 paid to date). Operational costs like water are covered in the lot rent. I should not be charged for water with a water bill. All residents are to be treated equally in a land lease community and being charged for water and the costs of meters and readers while others are not, is not equal.
>
> [11] Officer Jason Warham issued a decision regarding Ms. Herd application on August 1st, 2023, and the last paragraph of that decision states:
>
> > This Policy [Policy # 45] is not aligned with previous jurisprudence on the issue. The landlord testified they were not made aware of this Policy and only found out about it after a few months. Ms. Scott [the representative for Westphal] described it as an "overnight slap". The Policy also fails to establish a clear demarcation line of when it takes effect. It lacks a proclamation date like laws. Be that as it may, the Policy exists and the tenants say this is unfair to her and other tenants. Such sentiments are

> understandable of course, but unfortunately the application fails. The Policy states it does not apply to existing tenants with water meters. The jurisdiction of previous matter holds that water meters are reasonable. Unfortunately, the tenant is caught in the middle without a remedy. The application will be dismissed.

[12] Officer Sheila Briand issued a decision regarding Ms. Grave's application on August 31st, 2023, and also dismissed the application. The last paragraph of that decision states:

> Based on the foregoing, the tenant's application is dismissed. The Policy states it does not apply to existing tenants with water meters. The jurisdiction of previous matters holds that water meters are reasonable. Unfortunately, the tenant is caught in the middle without a remedy.

[13] Both decisions were appealed to this Court, with Ms. Herd's filed August 8th, 2024, stating the reason for appeal as:

> I pay for my water usage while other tenants in the park don't pay. I would like to get reimbursed for the water charges as well Have the water meter removed from my home at no cost to me.
>
> The amount of my water bills from 2019 until today is $1890.56.

[14] Ms. Grave's appeal was filed Sept 7, 2023. Her reasons are more fulsome than Ms. Herd's but argue that Policy 45 creates unequal treatment among tenants, and also that the practice of metering water constitutes a violation of section 9A of the *RTA* which requires that Landlords rules be reasonable, and is contrary to section 26 (1) of the Residential Tenancy Regulations, which requires that operating expenses be included in an application for rent increases in land lease communities.

Facts Presented in the hearing and Overview of the Dispute:

[13] Both of the Appellants gave evidence before me.

[14] Ms. Herd has lived in Woodbine Park, one of six land lease parks owned by the Defendant, since 2019.

[15] She signed a document entered into evidence headed “Community Guidelines”. Article 6.6 of that document states:

> 6.6 All homes sold on Community premises must have a community approved water meter system installed before the sale agreement is finalized. See Schedule “C” for Rates and Fees section.

[16] Schedule “C” of the Community Guidelines is titled “Water Distribution System Rental Agreement/Wastewater System Rental Agreement. Under “System Rental Fees” it states “All water, wastewater, storm water rates and associated fees will be based on the rates and fee structure set by Halifax Water and will change according to HRWC structure.

[17] Schedule “C” makes the tenant responsible for costs of meter accuracy testing, and for any repairs or maintenance of the meter. The Schedule further states “quantity and quality not guaranteed”.

[18] In Ms. Herd’s case, the water meter had been installed by the previous tenant, and so she paid $28.75 as a transfer fee. In her evidence she says she “thought it was normal”, although she later discovered that some neighbours did not have meters. After that, she received and paid quarterly invoices issued by the Defendant. The amounts charged were water daily base rate, water consumption rate, wastewater discharge rate, wastewater daily base rate, quarterly stormwater charges.

[19] Eloise Graves has lived in Woodbine Park since September of 2021. Her seller had purchased a water meter, and she purchased a "reader" from the Park administration, for which she paid $320.00, which she did not question as she was "under the impression she had to do it".

[20] She expressed her frustration at the situation that has arisen, as she had told her realtor of her desire to be on city water, although she did agree that she understood that upon purchase her water would be administered by the Park.

[21] She testified that in late 2022 she realized that her neighbours did not pay based on invoices, and at that point she started to consider what action to take.

[22] She had hoped that "Policy 45" might resolve the issue, but it has not. It is her belief that she is getting "double billed" for water, as her PAD fee should be capturing it. She was disappointed that Policy 45 did not provide a remedy for people in her position.

[23] Heather Scott is the Property Manager and President of Westphal Court ("Westphal"). She oversees operations and Policy setting for six trailer parks, of which Westphal Court is one.

[24] In 2015, Westphal began installing water meters, by having meters required in the homes as they were sold. She explained that it was done this way as to do

otherwise (metering existing tenants) would be, she had been advised, an “illegal rent increase”.

[25] Ms. Scott says that metering was done because Westphal Park “felt it was a fair way to distribute expense”. She spoke of issues with tenants who ran their taps all winter rather than fix the heat tape under their homes, and cited one example of a person who ran a power wash business from his home (an issue which the Park took to Residential Tenancies in an unsuccessful application, she says). She says that metering was intended to decrease water use, and to discover where leaks were.

[26] For those tenants who purchased after the change occurred in 2015, meters were billed quarterly. Tenants who predated the change in 2015 were subject to “normal” rent increases and have water “included”. Finally, after Policy 45 was issued, new tenants were not required to have water meters, and initial rental rates, which are not subject to current caps in the legislation, are set to reflect the cost of water. All tenants are subject to yearly rent increases within the parameters of the current rental increase cap in Nova Scotia, currently 5%.

[27] Jacqueline Shears is the office administrator for all 6 parks. One of her responsibilities is the management of rental fees for the homes. There are 626

units at Woodbine, or varying sizes, not all of which are occupied. 301 homes have water meters.

[28] She testified that a range of lot fees exist, from $357.75 for pre 2015 tenants, to $500.00 for post Policy 45 tenants, with water a consideration in the new rates.

[29] Prior to Policy 45, Westphal was charging $320.00 to install a meter, and $28.75 if the meter was installed and the account was to be changed to a new owner and the software updated.

[30] Ms. Shears explained that water for Woodbine is provided by Halifax Water. There is in evidence a decision from 2019 from the Utility and Review Board confirming that the Defendant in providing water acts as a private utility and is therefore subject to the governance of the *RTA*, not the UARB.

[31] Her billing process for post Policy-45 tenants, she says, comes from metered data, and the new tenant rate is approximately $60 per month, which is part of the rent established for the new tenant.

[32] She explained that Halifax Water sends monthly invoices for her to pay, and she sends invoices to those with meters for:

- Water Monthly base rate

- Water Consumption rate
- Wastewater discharge rate
- Wastewater monthly base rate

[33] She explained that storm water is billed on a separate invoice, which is divided by the 626 homes in the park and billed quarterly.

[34] Of these amounts, the invoice provided for the Appellants Ms. Herd and Ms. Graves show the same unit price for all items, with some increases over the years, and water consumption charges fluctuating based upon metering.

The Legislative Scheme:

[35] Section 17 of the *RTA* allows an Order of the Director of Residential Tenancies to be appealed to the Small Claims Court:

> *Appeal to Small Claims Court*
>
> 17C (1) Except as otherwise provided in this Act, any party to an order of the Director may appeal to the Small Claims Court.
>
> *Duties of Court on appeal*
>
> 17D (1) Within fourteen days of holding a hearing pursuant to subsection 17C (4), the Small Claims Court shall
>
> (a) confirm, vary or rescind the order of the Director; or

> (b) make any order that the Director could have made.
>
> (2) The Small Claims Court may award to a successful party to an appeal the cost of the fee paid pursuant to subsection 17C (2) and any costs awarded to that party pursuant to clause 17A(k), but no other costs associated with the appeal. 1997, c. 7, s. 7; 2002, c. 10, s. 27;

[36] As I explained in my preliminary decision in this matter, the Small Claims Court is a statutory Court tasked by the provisions of the *RTA* to adjudicate appeals from decisions of the Director. In that role, this Court conducts a new hearing and is bound not by the decision already made, but by the requirements of the Small Claims Court Act and the *RTA*.

[37] The Court has the power to "confirm, vary or rescind" the decision. Acting through a statutory Court without inherent jurisdiction, the Small Claims Adjudicator must in every instance ground their decision in the wording of the *RTA*.

[38] In these appeals, the question in summary to be answered by this Court is, does the *RTA* allow or prohibit water metering in land lease communities, and charging for water separate from payment of rent?

The Positions of the Parties:

[39] The Appellants through their counsel Ms. MacIntosh say that requiring the Tenants to install meters and pay for water:

1. Breaches section 9A of the *RTA* as an unreasonable rule;

2. Breaches Statutory Conditions 1 and 3 of section 9A by restricting the rights of tenants to sell their manufactured home, or purchase goods and services from the person of their choice;

3. Violated the prohibition in section 6 of the *RTA* prohibiting "application fees" as a condition of sale; and

4. Violates the *RTA* because water services are included as "rent" in the scheme of the *RTA*.

[40] The Appellants also say that the Landlord is overcharging for the water services provided.

[41] Mr. MacDonald on behalf of the Landlord focuses upon the specific remedy sought by the Appellants. He says that the Landlord has complied with the requirements of Policy 45 going forward.

[42] The Landlord says that "Policy 45 is law", and for this Court to order the relief sought by the Appellants would be to challenge the validity of the Policy, which is beyond the jurisdiction of this Court.

Analysis:

[43] To some extent, it appears that both sides to this dispute are not disputing the Policy's interpretation of the *RTA* on the merits of the legality of water metering, but differ as to who should receive the benefit of that interpretation.

[44] I agree that the Policy is correct in its interpretation of the *RTA* in respect to the legality of water metering.

[45] The Policy says that a rule requiring a Tenant to install a water meter and pay for its installation is not a reasonable rule, and the Policy says (to summarize) that utilities are "rent". In testimony from the respondent Landlord, Ms. Scott confirmed that once the Policy became known, the Landlord brought their practice into what the Policy told them was to be done, and evidence herself and Ms. Shears confirms that is the case.

[46] From the evidence of Ms. Scott, I find that the rule requiring the installation of meters fails to meet the statutory requirements of section 9A of the *RTA*, as described in section 9 A (3):

> *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

[47] With respect to "abuse of property", "fair distribution of services", the meters were apparently required based upon the Landlord's belief as stated by Ms. Scott that Tenants were wasting water, and that metering would change that. However, other than anecdotal evidence with no "before and after" findings, there is no evidence to confirm that water has been saved or was indeed being wasted before.

[48] As for the statutory requirement that under 9A 3(c) rules must apply in a "fair manner to all tenants", partial metering achieved exactly the opposite, instead creating two "classes" of tenants in relation to water, those who "paid" and those who, it would seem, did not.

[49] Ms. Scott says that those who purchased after 2015 and requiring metering were given a lower starting lot rent, but that does not change the fact that previous tenants were treated differently, and not subject to a separate payment scheme.

[50] The Policy is therefore correct that installing meters was an unreasonable rule.

[51] The Policy also referenced that the *RTA* includes "utilities" in "operating expenses. The point of that, is that the Policy says that the *RTA* considers water services "rent" when they are provided by the Landlord.

[52] I agree that the Policy is correct in this analysis. That this is the case is made obvious by the fact that under both section 26 of the *RTA* Regulations says that "operating expenses" are to be considered in any application for a rent increase greater than the annual allowable amount, and section 28 (b) (i) of the *RTA* Regulations include under "operating expenses" "(b) the following utilities (i) water and sewer". *RTA* Regulations section 28 (c) states "the following grounds and maintenance services expenses …" (iii) water and sewer testing maintenance".

[53] Form O, "Financial Information in Support of a Rent Increase Greater than Annual Allowable Rent Increase Amount", requires that the Landlord indicate

whether “water” and “sewage” are “services provided”, and if so, that they provide the cost of these services for two years.

[54] Given this regime, it would be absurd to conclude that the Act contemplates that the Defendant could under the *RTA* carve out a portion of what is considered rent, and subject tenants to changes in the amounts payable on as often as a monthly basis, without reference to either the requirement that rent only be increased every year, and that the provincial rent cap be observed.

[55] It is contrary to interpretative principles to require that water and sewage costs be included in an application for a rent increase, and yet come to the conclusion that they are not "rent".

[56] This conclusion is further supported by the position taken by the Landlord when they first began the process of meter installation, in that they did not require installation on the homes of existing tenants as that would be an “illegal rent increase”. However, installing meters as tenants enter the park does not change the inexorable conclusion that the provision of water and sewage services by Westphal, are, and should be considered, a part of their rent.

[57] Moving to the Policy’s denial of a remedy for the Appellant in this matter, the Respondent argues that just as the rest of the policy is enforceable, so to is the

section titled “Procedure”, by which the benefits of the Policies interpretation are denied to the Appellants.

[58] In that reasoning, the Respondent refers to the reasoning in *Greater Vancouver Transportation Authority v. Canadian Federation of Student – British Columbia Component*, 2009 SCC 31.

[59] I agree with the Respondent that the Supreme Court has established that policies can be broadly “legislative or administrative”. In *Greater Vancouver* the Court considered whether *Charter* guarantees of freedom of expression was violated by a transit policy prohibiting political advertising on public transit vehicles. The Honourable Justice Deschamps in writing for the majority explained the distinction between legislative and administrative policies:

> [58] *Government policies come in many varieties. Oftentimes, even though they emanate from a government entity rather than from Parliament or a legislature, they are similar, in both form and substance, to statutes, regulations and other delegated legislation. Indeed, as a binding rule adopted pursuant to a government entity's statutory powers, a policy may have a legal effect similar to that of a municipal by-law or a law society's rules, both of which fall within the meaning of "law" for the purposes of s. 1. Other government policies are informal or strictly internal, and amount in substance merely to guidelines or interpretive aids as opposed to legal rules. The question that arises is this: Does a given policy or rule emanating from a government entity satisfy the "prescribed by law" requirement? It can be seen from the case law that a distinction must be drawn between rules that are legislative in nature and rules that are administrative in nature.* [Emphasis added].

[60] This Policy seems to occupy some middle ground between the legislative and administrative described by the Court. The substantive part of it reads like an

administrative "guideline or interpretive aid" to the *RTA*, but those are usually internal in nature, which this Policy clearly is not.

[61] As I explained above, to the extent that the Policy explains how water should be interpreted in land lease communities, I believe it is correct and in accordance with the *RTA*. I conclude that it should be considered a "legal" policy in that analysis. The position taken in the Policy is supported by the language of the Act.

[62] Where I part company with the Landlord in terms of the legal effect of the Policy, is where it ceases to interpret the *RTA*, and concludes by excluding a class of tenant (those with water meters) from their established rights under the Act.

[63] No subordinate directive, such as the Policy surely is, can be valid if it is inconsistent with its parent statute. I must therefore consider if any authority exists under the Act by which the Policy gains the authority to prevent one class of tenant from the benefit the Policy confers on other tenants.

[64] Statutory interpretation is always informed by the Nova Scotia *Interpretation A*ct, R.S.N.S. 1989, c. 235. Section 9 reduces to statutory form decades of guidance from the common law regarding the correct approach:

> *Interpretation of words and generally*

> 9(1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> …
>
> (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[65] Adopting the guidance provided by the Interpretation Act, I note that the stated purpose of the *RTA* is to "provide landlords and tenants with an efficient and cost-effective means for settling disputes". However, I consider that the larger "object to be obtained" is to provide clear guidance to both Landlords and Tenants as to the rights and responsibilities arising out of a residential lease.

[66] Courts are always required in statutory interpretation to avoid interpretation that would result in absurdity.

[67] I therefore find that it cannot be in accordance with the *RTA*, that a two tiered (and now three tiered) system with respect to payment of rent to this Landlord should exist, such that pre-2015 tenants pay rent in accordance with the

terms of the *RTA*, tenants from 2015 to 2023 pay rent contrary to the terms of the *RTA*, and post 2023 tenants pay rent in accordance with the *RTA*.

[68] The result is a community with multiple payment models with different results. No rationale or reason is given in the Policy for creating this bifurcation, and there is nothing in the Act that authorizes such an inconsistent result.

[69] I add that this is not a "retroactive" application of a policy or of the *RTA*. The Appellants have always had these rights under the Act. As stated in the Interpretation Act, legislation, in this case the *RTA*, is "always speaking" for everyone it applies to, and they benefit accordingly.

[70] I therefore find that the use of a metered payment system, that required the tenant to install and pay for a meter, is not in accordance with the *RTA*.

[71] I also find that the Policy, in excluding a specific class of tenant from a remedy (those having water meters) from the correct interpretation of the Act, is in violation of the *RTA*, and that that portion is of no effect as a result.

[72] I note that counsel for the Appellant argues that the Appellants have been overcharged for water, in effect, that the Landlord is charging Tenants more than Halifax Water is billing.

[73] I do not consider that this claim forms part of the appeals as filed, and therefore make no finding on it. In any event, the only evidence regarding billing was provided by Ms. Shears, who says she divided up the invoices from Halifax Water, and there is insufficient evidence before me to reach any conclusions regarding how water is monetized once it is provided by Halifax Water.

Remedies Provided:

[74] I note that I am seized only with these appeals, and so the remedies order will be specific in nature for each Appellant.

[75] Ms. Herd shall have judgement in the amount of $28.75 for the meter transfer fee plus $2482.27 in invoiced fees, for a total of $2511.02.

[76] Ms. Graves shall have judgement in the amount of $320.00 for the meter, plus $1449.00 in water fees, for a total of $1769.00.

[77] Pursuant to section 17A(c) of the *RTA*, which gives the Director the power to require a (landlord or tenant) to "take any action to remedy a breach", the Landlord is ordered to remove the water meters and any associated equipment from the homes of Ms. Herd and Ms. Graves, and to make any necessary repairs necessitated by the removal of this equipment.

[78] The Landlord is directed that nothing in this Order creates a new Lease between the parties. Rental increases between the Appellants and the Respondent continue to be subject to the requirements of the provincial rent cap.

[79] I wish to thank counsel for their through canvassing of the issues before me. A separate Order will issue for each Appellant.

Dale Darling, KC, Small Claims Court Adjudicator

APPENDIX A

SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Graves v. Westphal Court Limited*, 2024 NSSM 75

Date: 20240411
Docket: 525868
Registry: Halifax

Between:

Nicole Herd

v.

Westphal Court Ltd.

-and-

Date: 20240411
Docket: 526689
Registry: Halifax

Between:

Eloise Graves

v.

Westphal Court Ltd.

Adjudicator: Dale Darling, KC

Heard: By written submission, completed by both parties on or before February 21, 2024

Decision: April 15, 2024

Counsel: Dylan A.F. MacDonald for the Applicant Landlord
Nora MacIntosh for the Respondent Tenants

By the Court:

Introduction:

[80] This decision is being issued in response to an application made by the Respondent Landlord to dismiss two residential tenancy appeals, one by Nicole Herd (SCCH 566689), and the other by Eloise Graves (SCCH 525868).

[81] The Landlord argues that this Court lacks jurisdiction to determine the issues raised by these appeals, or to provide the remedy sought by the Appellants.

[82] Having reviewed and considered the submissions of the parties, I am denying this application for dismissal. The *Small Claims Court Act*, R.S.N.S. 1989, c. 430, and the *Residential Tenancies Act*, R.S.N.S. 1989, c. 401, create an unambiguous regime for hearing appeals such as these, where the Tenants allege that the Landlord is in violation of the requirements of the *Residential Tenancies Act (RTA)*. These appeals are within the jurisdiction of the Small Claims Court to hold a hearing *de novo*. The consideration by the Director of an internal policy of the residential tenancies program, is a factor in the decision that does not change the essential nature of the inquiry, that being, whether the Landlord as breached the provisions of the *RTA*. My reasons follow.

The Background to the Applications to the Director of Residential Tenancies:

[83] Proceedings of the Nova Scotia Small Claims Court is now primarily heard either by telephone or video conference, and as a result parties make two appearances, one in a pre-trial to address any preliminary matters and confirm whether the matter is ready to be set down, after which the hearing is scheduled for a second appearance.

[84] These two matters having been assigned to one adjudicator for hearing, these parties appeared in a pretrial telephone conference before me on January 17, 2024, at which time Mr. MacDonald on behalf of his client raised this preliminary objection. This preliminary matter has been dealt with by the parties filing written briefs and a significant body of authorities for their position.

[85] The background facts are not in dispute. The Applicant Westphal Court is the owner and operator of the manufactured home park in Beaverbank, Nova Scotia, where both Respondent tenants have leases, Ms. Herd since December of 2019 and Ms. Graves since August of 2021.

[86] In March of 2023, the Residential Tenancies Program issued “Policy # 45”, titled “Water Meter Installation in Land Lease Communities”. The Policy

references the provisions of the *RTA* which allow Landlords to establish rules that are considered reasonable, and states:

> "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."

[87] The Policy prohibits Landlords of Land Lease Communities from requiring current or future tenants to have a water meter installed on their manufactured home. The Policy does not apply to tenants who already have water meters installed, and Ms. Herd and Mr. Graves fall into this category.

[88] Ms. Herd filed a Form J, Application to the Director May 30, 2023, stating:

> When I purchased the trailer in 2019, the former owner was forced to install a water meter. I am being charged for using water. I also had to sign a Schedule C that states that the park is not responsible for any water issues linked to water quality or quantity. I feel treated unfairly, two of my direct neighbors don't pay for water usage at all. They moved into the park years ago. Based on the new bylaw, new park tenants are also not being charged for water in addition to the regular lot rent. The water charges each month include a monthly water base rate, monthly water consumption and monthly wastewater discharge rate, monthly wastewater-based rates, and for quarterly stormwater charges.

[89] Ms. Graves filed a Form J, Application to the Director July 2, 2023, which states:

> When I purchased my house in my land lease community, a water meter and reader was demanded by the landlord. This is landlord equipment, I have received no receipt or warranty paperwork. I want my water meter and reader removed and be reimbursed for the meter and reader $320. I also want a refund for the water bills I have received from the landlord ($759.78 paid to date). Operational costs like water are covered in the lot rent. I should not be charged for water with a water bill. All

> residents are to be treated equally in a land lease community and being charged for water and the costs of meters and readers while others are not, is not equal.

[90] Officer Jason Warham issued a decision regarding Ms. Herd application on August 1st, 2023, and the last paragraph of that decision states:

> This policy [Policy # 45] is not aligned with previous jurisprudence on the issue. The landlord testified they were not made aware of this policy and only found out about it after a few months. Ms. Scott [the representative for Westphal] described it as an "overnight slap". The policy also fails to establish a clear demarcation line of when it takes effect. It lacks a proclamation date like laws. Be that as it may, the policy exists and the tenants say this is unfair to her and other tenants. Such sentiments are understandable of course, but unfortunately the application fails. The policy states it does not apply to existing tenants with water meters. The jurisdiction of previous matter holds that water meters are reasonable. Unfortunately, the tenant is caught in the middle without a remedy. The application will be dismissed.

[91] Officer Sheila Briand issued a decision regarding Ms. Grave's application on August 31st, 2023, and also dismissed the application. The last paragraph of that decision states:

> Based on the foregoing, the tenant's application is dismissed. The policy states it does not apply to existing tenants with water meters. The jurisdiction of previous matters holds that water meters are reasonable. Unfortunately, the tenant is caught in the middle without a remedy.

[92] Both decisions were appealed to this Court, with Ms. Herd's filed August 8th, 2024, stating the reason for appeal as:

> I pay for my water usage while other tenants in the park don't pay. I would like to get reimbursed for the water charges as well Have the water meter removed from my home at no cost to me.
>
> The amount of my water bills from 2019 until today is $1890.56.

[93] Ms. Grave's appeal was filed Sept 7, 2023. Her reasons are more fulsome than Ms. Herd's but argue that Policy 45 creates unequal treatment among tenants, and also that the practice of metering water constitutes a violation of section 9A of the *RTA* which requires that Landlords rules be reasonable, and is contrary to section 26 (1) of the Residential Tenancy Regulations, which requires that operating expenses be included in an application for rent increases in land lease communities.

Decision:

[94] I have devoted some time in this decision to explaining the details of the dispute between the parties, because those details are the basis upon which I must determine whether this Court has jurisdiction.

The Statutory Regime:

[95] Section 17 of the *RTA* stipulates that an Order of the Director of Residential Tenancies can be appealed to the Small Claims Court:

> Appeal to Small Claims Court
>
> 17C (1) Except as otherwise provided in this Act, any party to an order of the Director may appeal to the Small Claims Court.
>
> (2) An appeal may be commenced by filing with the Small Claims Court, within ten days of the making of the order, a notice of appeal in the

> form prescribed by regulations made pursuant to the Small Claims Court Act accompanied by the fee prescribed by regulations made pursuant to the Small Claims Court Act.
>
> [sections 3 and 3A are omitted]
>
> (4) The Small Claims Court shall conduct the hearing in respect of a matter for which a notice of appeal is filed.
>
> (5) The Small Claims Court shall determine its own practice and procedure but shall give full opportunity for the parties to present evidence and make submissions.
>
> (6) The Small Claims Court may conduct a hearing orally, including by telephone.
>
> (7) Evidence may be given before the Small Claims Court in any manner that the Small Claims Court considers appropriate and the Small Claims Court is not bound by rules of law respecting evidence applicable to judicial proceedings.
>
> (8) The evidence at a hearing shall not be recorded.
>
> Duties of Court on appeal
>
> 17D (1) Within fourteen days of holding a hearing pursuant to subsection 17C(4), the Small Claims Court shall
>
> (a) confirm, vary or rescind the order of the Director; or
>
> (b) make any order that the Director could have made.
>
> (2) The Small Claims Court may award to a successful party to an appeal the cost of the fee paid pursuant to subsection 17C(2) and any costs awarded to that party pursuant to clause 17A(k), but no other costs associated with the appeal. 1997, c. 7, s. 7; 2002, c. 10, s. 27;

[96] Central to the Landlord's argument is that since the Director's decisions arguably rely upon interpretation of a departmental policy, which may have the force of legislation, only judicial review is available to the Tenants, and should

have been undertaken instead of the appeal to the Director, as explained in their brief:

> A grant of statutory authority and decision-making power is confined to the scope of the legislation conferring it. As stated in *Johnson v Sarty*, 2019 NSSC 209, the Residential Tenancies Act, supra, grants authority for the DRT to adjudicate disputes between landlords and tenants. It does not, however, allow for the DRT to question the validity of policies enacted by the Minister. For further clarity, the decision-making power granted to the DRT does not include the authority to make policy, only to adjudicate disputes that may arise in light of the policies made by the distinct and separate decision-making authority granted by the Minister.

[97] I should clarify that the *Johnson* case says nothing about review of policies by the Director.

[98] Counsel for the Tenant in her brief responds, citing *Viaguard Accu-Metrics Laboratory v. Standards Council of Canada*, 2023 FCA 63, for the proposition that judicial review is a "remedy of last resort, with Justice Stratas citing *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, at paragraph 5 of Viaguard as follows:

> C.B. Powell stands for the proposition that judicial review is a remedy of last resort: if an effective remedy can be available in an administrative or other process, that process must first be pursued. As part of that process, the administrative decision maker will determine whether it has the jurisdiction to grant the remedy requested and, if so, whether it will grant the remedy. This respects the demarcation of function between administrative decision makers and reviewing courts that the Supreme Court emphasized in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

[99] The Respondent concluded:

> These findings affirm the Courts longstanding position that judicial review is available where there is no other available remedy for a faulty administrative decision. In the current appeals before this court, the parties are operating under the procedures of the RTA, which grants the statutory right of appeal of the decision at first instance. The parties have not exhausted this appeal process.
>
> To override the statutory right of appeal would require a clear legal authority to do so. There is no such legal authority in these matters to require that the tenants seek a remedy through judicial review rather than by appeal through the Small Claims Act.

[100] I agree with the Respondent's summation of the law arising out of *Vavilov.* The governing principle of the Nova Scotia *Small Claims Court Act*, R.S.N.S. 1989, c. 430, is found in Section 2, the "Purpose" section of the Act, which states:

> It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively, but in accordance with established principles of law and natural justice.

[101] The Small Claims Court is a statutory court, as opposed to a court of inherent jurisdiction, but section 2 dovetails with the jurisdiction given to the Small Claims Court via Section 17 of the *RTA*, to provide a hearing *de novo* to decisions made by the Director, that are accessible to self represented litigants, as both Tenants and Landlords often are.

[102] Hearings before this Court hear evidence anew regarding the applications made (in this case) by the Tenants, and are in no way fettered in decision making by the decision made by the Director in the first instance. The question for this

Court is, have the Tenants shown on a balance of probabilities that the Landlord is in violation of the *RTA*?

[103] I find that none of the authorities provided to me, address the question before me, which is whether a Small Claims Court Adjudicator is actively prohibited from fulfilling the statutory duty created by a properly filed appeal under section 17 of the *RTA* to hear the appeal *de novo*.

[104] I that both the Applicant, and in response the Respondent, devoted a significant portion of their briefs to consideration of whether Policy #45 has the force of legislation.

[105] I find that while that question is relevant to the merits of this case, it is not relevant to the question before me, that being, my jurisdiction to adjudicate the dispute between these parties.

[106] It is "putting the cart before the horse". The question on this motion is whether the Court has the jurisdiction to consider whether the Landlord has violated the *RTA*, as the Tenants claim in their appeal. The fact that part of that analysis will be hearing argument on the meaning and effect of Policy #45 does not extinguish that jurisdiction.

[107] There is nothing in this case that would require the Tenants to instead file a motion for judicial review against the Director under Civil Procedure Rule 7, in order to replicate the remedies available in Small Claims Court in a more complex setting.

[108] The Act, I find, is clear: I have the statutory duty to confirm, rescind or vary the decision of the Director. The presence of possibly novel or unusual questions of law, such as the application of a policy, are just that – questions of law, and they fall within my jurisdiction to determine.

[109] For all these reasons, the application to dismiss the claims is therefore denied, and both matters will proceed to hearing.

Dale Darling, KC, Small Claims Court Adjudicator