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Minimum Housing Standards for Residential Tenancies Upheld

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Cases Considered:

BPCL Holdings Inc. v. Alberta, 2008 ABCA 153

Alberta's *Residential Tenancies Act* ("*RTA*"), S.A. 2004, c. R-17.1, is generally speaking a landlord-friendly statute. It is not replete with protections for tenants. One important exception is s. 16(c), a fairly recent addition to the *RTA*. Section 16(c) requires landlords to ensure that rental premises "meet at least the minimum standards prescribed by housing premises under the *Public Health Act* and regulations." Clearly, the Legislature intended some minimal health and safety protection for tenants.

BPCL Holdings Inc. v. Alberta is the first Alberta Court of Appeal decision to deal with these minimum housing standards. The appellants were a number of related entities (collectively referred to as "Boardwalk") that own more than 10,000 rental units in Edmonton. Boardwalk had brought an application to the Court of Queen's Bench seeking a declaration that certain provisions of the *Housing Regulation*, Alta. Reg. 173/1999, and the Minimum Housing and Health Standards (the "Standards") issued pursuant to the Alberta's *Public Health Act* ("*PHA*"), R.S.A. 2000, c. P-37, were *ultra vires* as beyond the scope of regulatory authority given to the Lieutenant Governor in Council (the "Lieutenant Governor").

The disputed provisions of the *Housing Regulation* require owners to ensure that housing premises are structurally sound, in a safe condition and in good repair. The Standards, which are authorized under the *PHA*, add that owners must ensure that premises are maintained in a waterproof, windproof and weatherproof condition. The Standards also infuse detail into these general requirements. For instance, basements and cellars must be free from water infiltration and accumulation, exterior windows and doors must be capable of being locked, some bedrooms must have at least one outside window which opens easily from the inside, and stairs and porches (including balconies) must be in good repair and must comply with building code requirements.

The heart of Boardwalk's challenge to these provisions was that they are not related to public health in any way. The chambers judge disagreed [2006 ABQB 757]. According to Mr. Justice Frans Slatter, all the impugned provisions were authorized by either ss. 66(1)(n) or s. 66(1)(s) of the *PHA*. Respectively, these sections allow the Lieutenant Governor to make regulations "respecting the prevention and removal of nuisances" and "respecting the location, operation, cleansing, disinfection, disinfestation, equipping and maintaining of public places". In Justice

Slatter's view, all the disputed provisions had a real and meaningful connection to public health as required by the *PHA*. Boardwalk's application was dismissed and the provisions were upheld.

On appeal, the majority of the Court (Justices Elizabeth McFadyen and Peter Martin) agreed with the chambers judge and upheld the disputed provisions. In a partial dissent, Mr. Justice Ronald Berger upheld the provisions, but disagreed that they could be enforced in the context of individual apartment units.

Boardwalk's main argument was that Justice Slatter had erred in finding that s. 66(1)(s) of the *PHA*, which deals with "public places", applied to individual rental units in an apartment building. Boardwalk argued that an apartment is a private dwelling and, because apartment buildings and apartment units are not public places, they cannot be subject to regulations made under s. 66(1)(s). The majority of the Court rejected this argument. In their view, the definition of "public place" under the *PHA* is broad enough to capture apartment buildings and units. In fact, such an interpretation is required so as not to defeat the purpose of the legislation.

In its definition of "public place", the *PHA* includes "any place in which the public has an interest arising out of the need to safeguard the public health". Moreover, the definition specifically includes "accommodation facilities, including all rental accommodation". In the majority's view, this inclusion of "all rental accommodation" into the definition of "public place" in the *PHA* "clearly and unambiguously" granted authority to the Lieutenant Governor, pursuant to s. 66(1)(s), to make regulations "respecting the … equipping and maintaining" of all rental accommodations. Apartments rented to the public clearly fall within "all rental accommodation" and the Court could not "disregard that clear directive from the Legislature" (at para. 11).

The inclusion of rental units into the definition of "public place" in the *PHA* is justified for another reason as well. According to the majority, the language used in the *PHA* indicates that the definition of "public place" must be given precedence over that of "private place". Rather than the broad language used for "public place" in the *PHA*, the language in the definition of "private place" suggests a limited scope for that term. A "private place" is defined to "mean" a "private dwelling" and "privately owned land, whether or not it is used in connection with a private dwelling". By contrast, "public place" is given the widest possible scope in the *PHA* and encompasses property that could otherwise fall within the definition of "private place". For example, as noted by the majority, places of business, dining and entertainment facilities, etc. fall within the definition of "public place" even though most are undoubtedly also "privately owned land".

In the majority's view, a broad interpretation of "public place" in the *PHA* accords with the objective of that Act, being the preservation of public health. If, as Boardwalk submitted, the definition for "private place" were to take priority over the definition for "public place" in the *PHA*, "nothing, other than government owned property, would qualify as a public place" (at para. 12). Such a narrow interpretation would defeat the object and purpose of the *PHA*.

As for the distinction made in the *PHA*'s inspection provisions (ss. 59 and 60) between "private" and "public" place, the majority held that these deal with enforcement only and do not touch

upon, or otherwise limit, the scope of the regulatory powers granted to the Lieutenant Governor by s. 66(1)(s), nor do they purport to define the terminology used in the *PHA*.

By way of conclusion, the majority noted that there is a rational basis for the different regulatory schemes set out in the *PHA* between private owner occupied dwellings and rental accommodation (*i.e.*, privately owned premises offered for rent to members of the public). Because prospective renters generally have little or no control over the state of repair of the premises either at the start of the tenancy or later, the ability and responsibility to deal with conditions or hazards that could impact public health lie with the owner and not the tenant. By contrast, the owner of a residence that he or she occupies does not require any assistance from others to correct any condition that may be injurious to health and safety. Thus, at the end of the day, the majority held that rental accommodations, whether occupied by a tenant or not, are "public places" for the purpose of the regulatory powers conferred on the Lieutenant Governor in s. 66 of the *PHA*. Consequently, the majority upheld the disputed provisions of the *Housing Regulation* and the Standards as validly enacted public health measures.

In a spirited dissent, Mr. Justice Berger agreed that the impugned provisions are validly enacted public health measures, but disagreed that they can be enforced in the context of a rented apartment unit. To his mind, a unit occupied by a tenant falls more properly within the definition of a "private" and not "public" place in the *PHA*. While it is true, he said, that dining facilities (*i.e.*, restaurants) may be privately owned, the kitchen and dining room facilities of a privately-owned condominium were not within the contemplation of the Legislature as "public places", no more so for those of a tenant renting the same condominium. Justice Berger focused on the enforcement provisions of the *PHA* (ss. 59 and 60) and highlighted that they distinguish between private and public places. He concluded that the public corridors and lobby of an apartment building may be regulated under s. 66(1)(s) with respect to the "equipping and maintaining" of these areas, but not the tenant's private residence. Consequently, in his view, the *Housing Regulation* and the Standards preclude inspection of an apartment occupied by a tenant when the complaint is properly characterized as one of "equipping and maintaining" the residence.

The majority decision in this case must be correct. As emphasized by the majority, the definition of "public place" in the *PHA* expressly includes "all rental accommodation". It is difficult to understand what role this phrase plays in Mr. Justice Berger's understanding of the *PHA*. Could the lobbies and corridors of a privately-owned apartment complex ever amount to "rental accommodation"? Likely not. Even in the case of rentals of government owned property, the individual units occupied by tenants would, in Justice Berger's interpretation, amount to a "private place" under the *PHA*. So what would "all rental accommodation" in the "public place" definition capture?

By contrast, the majority decision correctly gives meaning to the phrase "all rental accommodation" in the definition of "public place" in the *PHA*. In doing so, the Court has upheld the right of tenants in Alberta to at least some minimal protections with respect to the condition of residential premises.

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