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# The Right of a Landlord to Withhold Consent to the Sub-leasing of Residential Premises

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**Cases Considered:**

*Botar v. Mainstreet Equity Corp.*, 2010 ABQB 710

It is unusual for a residential tenancy matter to be heard in the Court of Queens' Bench of Alberta, as was *Botar v. Mainstreet Equity Corp.* Residential landlord and tenant law is intended to be accessible; the relationship is regulated by one, fairly comprehensible and comprehensive statute, the *Residential Tenancies Act*, S.A. 2004, c. R-17.1. Claims under that statute are usually heard in Provincial Court – Civil (also known as Small Claims Court), and that court has a helpful website on the Residential Tenancies Process. Accessible explanations of the process involved in making claims under the *Residential Tenancies Act* are an indication that Provincial Court – Civil is oriented toward self-represented litigants. Nevertheless, a tenant such as Andrew S. Botar might choose to represent himself in the Court of Queen's Bench or be required to do so because his claim is for more than $25,000, the upper limit on damages that Provincial Court – Civil can award. In this case, Mr. Botar's claim was for approximately $75,000. Mr. Botar had also enjoyed some success in the Court of Queen's Bench against his landlord, Mainstreet, in 2007: see *Botar v. Mainstreet Equity Corp.*, 2007 ABQB 608 and A Tenant's Right to Withhold Payment of Rent, my comment on that earlier decision. Any preference Mr. Botar might have for the Court of Queen's Bench, however, might be dissipated by this November 2010 decision by Mr. Justice J.J. Gill.

Mr. Botar sought a declaration that his residential tenancy included ten storage lockers in a basement storage room and a parking stall, as well as his apartment; an order requiring Mainstreet to consent to a sub-lease of his tenancy; and judgment for damages to compensate him for lost sub-lease income since January 2001. The initial and decisive issue required the determination of whether the ten storage lockers and parking stall were included in Mr. Botar's tenancy. If they were not leased to him, then he could not sub-lease them. (The reasons of Justice Gill indicate the first issue was also framed as a question of whether or not there was a contract for possession of the lockers that was separate from and independent of the residential tenancy agreement.) The second issue concerned whether Mainstreet had unreasonably refused to consent to Mr. Botar's subletting of his residential premises, whatever those premises consisted of, and this is the legal point I will focus on. Justice Gill chose not to consider a third issue — Mainstreet's claim that Mr. Botar's action was statute barred under the *Limitations Act*, R.S.A. 2000, c. L-12 — because Mainstreet prevailed on the merits.

Under the *Residential Tenancies Act*, section 1(1)(l), "residential premises" means "any place occupied by an individual as a residence." The question of what is included in those premises is a question of fact. Justice Gill reviewed at length (paras. 3- 45, 60-65) the evidence of Mr. Botar

and the three witnesses that he called. Essentially, Mr. Botar claimed that he and his former landlord, Nordell Holdings, reached an agreement in December 1999 entitling Mr. Botar to the ten storage lockers after Mr. Botar moved from a bachelor suite to a one bedroom apartment in the same building. Apparently, both the suite Mr. Botar was vacating and the one he was moving into needed work. The agreement Mr. Botar alleged was reached with Nordell Holdings was that if he helped to do this work he would be paid for any materials he supplied and would be compensated for his labour with an exclusive right to the use of all ten lockers in the basement storage room, which he could do with as he liked, including renting them out to other tenants.

Justice Gill held that Mr. Botar failed to prove that he had any kind of agreement with Mainstreet that gave him possession of the ten storage lockers, finding (at para. 59) that Mr. Botar's evidence was not believable for five different reasons. First, letters written by Mr. Botar at the time he alleged the verbal agreement between himself and Nordell Holdings was reached indicated there was no such agreement. Mr. Botar's letter of January 13, 2000 to Nordell Holdings claimed the cost of the materials he had supplied but made no reference to the storage lockers as compensation for his labour. Mr. Botar's letter of December 8, 2000 to Nordell Holdings referred to the ten storage lockers in the basement of the apartment building and then stated:

> One of these is mine (it was assigned to my apartment suite, and it is included in the rent). [emphasis added]

As Justice Gill concluded (at para. 67), "[t]hese two (2) letters written contemporaneously to the events are compelling evidence that the Applicant believed that (at most) he had use of one locker." Second, neither of the two written leases Mr. Botar signed with Nordell Holdings in 2000 referred to storage lockers. Third, Nordell Holdings had sold the apartment building to Mainstreet in December 2001. Even if there was a verbal agreement between Mr. Botar and Nordell Holdings, Mainstreet was not a party to that alleged agreement and did not acknowledge it in any way. Fourth, Mainstreet bought the apartment building with no knowledge of any alleged agreement with respect to the lockers. Fifth and finally, and even if there had been an agreement as alleged, Mr. Botar had failed to prove he suffered any damages because he failed to prove there was any market for the storage lockers.

Outside the *Residential Tenancies Act* context, Justice Gill's third and fourth reasons would be references to the lack of privity of contract between Mr. Botar and Mainstreet. They would be relevant if the first issue was whether or not there was a contract for possession of the lockers that was separate from and independent of the residential tenancy agreement. However, if the first issue is a question of what is included in Mr. Botar's residential premises, Mainstreet would be bound by the residential tenancy agreement between Nordell and Mr. Botar. The definition of "landlord" in section 1(f) of the *Residential Tenancies Act* includes the owner of residential premises and "the heirs, assigns, personal representatives and successors in title of the owner of the residential premises." The landlord promises, under section 16(b), that neither the landlord "nor a person having a claim to the premises under the landlord will in any significant manner disturb the tenant's possession or peaceful enjoyment of the premises." Disputing Mr. Botar's entitlement to, or disrupting Mr. Botar's exclusive possession of, the ten storage lockers would be a breach of section 16(b) if the storage lockers were part of his tenancy.

As for the parking stall, Mr. Botar claimed an assigned stall and the right to sub-lease it to third parties. He did sub-let the stall to third parties from at least 2002 to 2007, when the practice came to Mainstreet's attention and Mainstreet put a stop to all sub-leasing of parking stalls. Justice Gill

found that Mr. Botar was provided with a parking stall as part of his lease but that he did not have the right to sublet his parking stall.

Why Mr. Botar did not have the right to sublet the one storage locker it seems may have been part of his residential premises or the one parking stall he was assigned is not explained. Neither did Justice Gill apply section 22 of the *Residential Tenancies Act* to the one storage locker or parking stall issue.

The second issue was therefore narrowed to the question of whether Mainstreet had unreasonably refused to consent to Mr. Botar's subleasing of his residential premises, which Justice Gill had decided consisted of his one bedroom apartment only. The answer to this question depends on the interpretation of section 22 of the *Residential Tenancies Act*, which provides:

> 22(1) Subject to subsection (4), no assignment or sublease of a residential tenancy agreement by a tenant is valid without the written consent of the landlord.
>
> (2) A landlord shall not refuse consent to an assignment or sublease unless there are reasonable grounds for the refusal.
>
> . . .
>
> (4) If a landlord does not respond to a request for a consent within 14 days after receiving the request, the landlord is deemed to have given consent.
>
> (5) A landlord who refuses to give consent shall provide the tenant who requested consent with written reasons for the refusal.

The interesting question is what amounts to "reasonable grounds" for refusing consent in the context of residential premises?

Mr. Botar claimed damages because he was prevented by Mainstreet from subletting his apartment in 2006 to his friend, Mr. Wilson. Mr. Botar and Mr. Wilson had initially leased the one bedroom suite together in 1999. There is no indication in the recitation of the evidence as to when Mr. Wilson moved out.

Mainstreet's process for subletting was described (at para. 48, 54-56, and 73). The landlord required a tenant to make a written application. All such applications went to Mainstreet's head office for the approval of a Regional Manager. All requests to sub-lease were treated as applications to become a co-tenant. The head office conducted credit, background and employment checks. If the proposed sub-lessee or co-tenant qualified after their review process, consent to the sub-lease or co-tenancy was granted. The purpose of this process was said to be "to address liability issues" (para. 54). Justice Gill also noted (at para. 56) Mainstreet's CEO testified that Mainstreet "wanted to have control over the selection of tenants so existing tenants are not negatively affected" and wanted to have "a direct contractual relationship with the occupants" in the event that damages occurred.

Justice Gill concluded that Mainstreet's subletting policy was a reasonable policy. He did not state why it was reasonable or what test he applied to determine that it was reasonable. He merely repeated (at para. 73) the rationales that Mainstreet gave to justify their policy: they

wanted "to know who was living in the building in order to avoid problems for existing tenants and also to have a direct contractual relationship with all the tenants to minimise liability issues."

These rationales justify the process Mainstreet put in place; they say nothing about what would amount to "reasonable grounds" for a refusal to consent. One of the consequences of the Court of Queen's Bench hearing a *Residential Tenancies Act* matter that one might hope for is a little more law on this point.

At common law, a tenant's premises are freely alienable. Unless there is a term in the lease to the contrary, a tenant may sublease or assign. When the landlord-tenant relationship is one to which the *Residential Tenancies Act* applies, section 22(1) of that Act requires a tenant to get the written consent of the landlord. Section 22(2) states that written consent cannot be refused without reasonable grounds. The common law used to provide that a landlord's consent could be withheld only if the landlord had a legitimate concern about the personality of the new tenant or the use to which the premises would be put by the new tenant. Such restraints on alienation were interpreted narrowly. Their purpose was seen to be one of protecting landlords from having their premises used or occupied in an undesirable way or by an undesirable tenant or assignee. See the decision of the English Court of Appeal in the leading case of *Houlder Brothers & Co Ltd v Gibbs*, [1925] Ch 575. However, in Alberta, at least in the context of commercial leases, landlords have been granted much more latitude: *Sundance Investment Corp. v. Richfield Properties Ltd.*, [1983] 2 W.W.R. 493 (Alta. C.A.). In the commercial lease context, the standard of what is "reasonable" on the part of the landlord is not tied to the occupation of the leased premises by the proposed tenant; instead the reasons could be entirely personal to the landlord. In *Sundance*, the majority of the Court of Appeal held that the test for reasonableness was: What would a reasonable landlord do in the circumstances?

The basis on which the landlord of residential premises might refuse consent has not yet been determined. Mainstreet's credit, background and employment checks are directed toward the "undesirable tenant" basis. Their concern about avoiding problems for existing tenants might refer to "undesirable uses." Justice Gill's reasons hint that the test he was thinking of is the test of what a reasonable landlord would do in the circumstances. However, because the issue of reasonable withholding of consent never really arose in his case, the question of what test should apply in the residential tenancies context was not addresses explicitly and no law on the point was referred to. In this context of residential premises, one might hope that the relationship between the landlord and tenant counted for something and that the test would consider more than the landlord's self-interest.

Unfortunately, the application of Mainstreet's policy was not an issue in this case. Apparently Mr. Botar did not provide any credible evidence of his requests for Mainstreet's consent to his proposed sub-lease. He did not follow Mainstreet's process. And because that process was part of a reasonable policy, Mr. Botar's claim that he suffered a loss due to Mainstreet's refusal to consent to a sub-lease was dismissed. It was not even clear that Mainstreet did refuse to consent to a sub-lease.

It appears that this application involved four days of hearings in the Court of Queen's Bench, from October 25 to 28, 2010. A twelve-page written judgment was then rendered on November 16. That judgment ends with Justice Gill dismissing Mr. Botar's claims with costs and inviting the parties' brief written submissions about the amount of costs that should be awarded. When the issue of costs is decided, Mr. Botar may find out why most tenants use Small Claims Court.