April 14, 2014

# The Abatement of Rent Remedy under Alberta's *Residential Tenancies Act*

**Written by: Jonnette Watson Hamilton**

**Case commented on:** *Perpelitz v Manor Management Ltd.*, 2014 ABPC 63

There are few enough written decisions considering the landlord's duties under Alberta's 10-year-old *Residential Tenancies Act*, SA 2004, c R-17.1, that almost any decision considering the statute is worth bringing to the notice of the province's landlords and tenants. But this decision by Judge Gordon Yake is interesting on its own merits for a few reasons.

One is its almost exclusive reliance on the landlord's implied covenant of quiet enjoyment when rental premises are partially uninhabitable, despite the existence of the landlord's implied covenant that the premises will meet minimum housing standards and the landlord's promise in the written lease in this case that the premises would be kept in a good state of repair. Reliance on the landlord's covenant of quiet enjoyment implied by section 16(b) of the *Residential Tenancies Act* focuses attention on the tenant's right to exclusive possession, which is the right such a covenant protects. Most tenants living in flooded, bedbug infested, or other uninhabitable premises might not think of their problems in terms of exclusive possession. It is not clear why the landlord's implied obligation under section 16(c) of the *Residential Tenancies Act* to ensure that the premises meet at least the minimum standards prescribed for housing premises under the *Public Health Act*, RSA 2000, c P-37 and the *Housing Regulation*, Alta Reg 173/1999 and the *Minimum Housing and Health Standards* issued under the *Public Health Act* do not play a larger role in cases where the tenants want to remain in the premises.

However, the focus of this post is on the abatement of rent remedy available to tenants who stay in partially uninhabitable premises. That remedy is not a very generous one. Nor was Judge Yake generous in this case when it came to the awarding of costs to the tenants. However, because he did not give reasons for not making the usual award of costs to the successful party in this case there is not a lot that can be said about this aspect of his decision.

The decision of Judge Yake also tells a cautionary tale about just how persevering tenants in almost uninhabitable premises have to be in order to prevail.

## Facts

Cindy Perpelitz and Dale Wood rented a Red Deer townhouse from Manor Management Ltd. on a month-to-month basis. As part of their written residential tenancy agreement, the landlord was required to ensure that the premises remained in a reasonably good state of repair (para 21). That

same agreement also provided that the landlord would, except in the case of emergencies, give the tenants 24 hours written notice to enter to inspect the state of repairs or to make repairs to the premises (para 22). More importantly — because these implied promises by the landlord cannot be waived by tenants — the landlord made similar promises under section 16(b) and (c) and section 23 of the *Residential Tenancies Act*:

> 16. The following covenants of the landlord form part of every residential tenancy agreement:
> …
>
> (b) that, subject to section 23, 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;
>
> (c) that the premises will meet at least the minimum standards prescribed for housing premises under the *Public Health Act* and regulations.
>
> 23(1) Except as otherwise permitted in this section, no landlord shall enter residential premises rented by the landlord without the consent of the tenant or of an adult person lawfully on the premises.
>
> (2) A landlord is entitled to enter residential premises rented by the landlord without consent or notice if the landlord has reasonable grounds to believe that
>
> (a) an emergency requires the landlord to enter the premises …
>
> (3) Subject to subsection (4), a landlord is entitled to enter residential premises rented by the landlord without consent but after notice to the tenant
>
> (a) to inspect the state of repair of the premises,
>
> (b) to make repairs to the premises …
>
> (4) A landlord is not entitled to enter residential premises under subsection (3) unless
>
> (a) the notice is served on the tenant at least 24 hours before the time of entry ….

The major problems with the premises in this case appeared to be caused by water leaking from a dishwasher and from plumbing under the kitchen sink into the basement, and by water leaking from other parts of the plumbing system that were behind the interior walls (at para 33). The leaking water eventually flooded the basement and the damp conditions eventually resulted in black mould.

The tenants did not stand idly by while their rented premises became (at least in part) uninhabitable (at para 33). The female tenant handled the multiple notices to the landlord. She first notified the landlord of the leaking water early in October 2011, in a written report that was hand-delivered to the landlord's offices. Due to a lack of response, she followed up on October 18, November 1, November 16, November 25, and December 1. By December 1 she was reporting a flooded basement and ruined drywall. The tenants then took action under the *Public*

*Health Act* and called upon a Public Health inspector to inspect the premises in January 2012. The judgment is vague about what happened as a result of that inspection, but it appears that no order under section 62 of the *Public Health* was made. (An order under section 62 of the *Public Health Act*, and the landlord's non-compliance with that order, is required if a tenant wants to serve 14 days' notice on the landlord to terminate the tenancy under section 28 of the *Residential Tenancies Act*. However, these tenants did not want to terminate and so the lack of an order is irrelevant.)

Although a plumber hired by the landlord telephoned on November 10, no plumber actually visited the premises until January 26, 2012 — almost 4 months after the tenants' first report of trouble. Carpet cleaners, plumbers, builders, mould removers, and others hired by the landlord showed up to work on the premises at the end of January and in February, usually on short notice or no notice (para 33). Those visits without proper notice were all breaches of section 23(4) of the *Residential Tenancies Act*, as well as clause 11 of the parties' agreement.

Eventually, the kitchen and bathroom floors and subfloors were torn out and replaced, the kitchen countertops and cupboards were removed and replaced, the dishwasher was replaced, and plumbing fixtures were replaced, as was drywall in the basement. Except for a period of 3 days in February when the landlord paid for the tenants to rent a hotel room, the tenants occupied the rented townhouse during all of this work. It appears they could not afford to go elsewhere (at para 33(bb)). Then the furnace quit working, and between March 13 and April 2 the premises were very cold. Finally, to top it all off, the landlord's contractors left a mess and the tenants spent 112 hours painting, carrying drywall, carrying chip board, removing garbage, and otherwise cleaning the premises — all work that was the landlord's responsibility.

The tenants initially applied to the Residential Tenancy Dispute Resolution Service in December 2012, but were unable to resolve the issues in the telephone conference that service provided in January 2013.

**Abatement of Rent**

The tenants then applied to the Provincial Court under section 37(1) of the *Residential Tenancies Act* for abatement of their rent and for compensation for performing some of their landlord's duties with respect to the townhouse. Judge Yake did grant them compensation for the 112 hours they spent painting, carrying drywall, carrying chip board, removing garbage, and otherwise cleaning the premises at $20 per hour, for a total of $2,240 (at para 42). That claim seemed uncontroversial.

The abatement or withholding of rent remedy was more controversial. Under the *Residential Tenancies Act*, a tenant is not allowed to withhold rent and abandon the premises if they become uninhabitable. The withholding of rent by a tenant is not a self-help remedy. A tenant must pay rent unless and until a court relieves him or her of that obligation in whole or in part under section 37 of the *Residential Tenancies Act*:

> 37(1) If a landlord commits a breach of a residential tenancy agreement or contravenes this Act, the tenant may apply to a court for one or more of the following remedies:
>
> …
>
> (b) abatement of rent to the extent that the breach or contravention deprives the tenant of the benefit of the residential tenancy agreement; [emphasis added]

The tenants had first asked for abatement of their rent on November 1, 2011. It took almost 2 ½ years to get it. The hearing in Provincial Court started on May 9, 2013, continued on July 30 after an adjournment of a June 12 date, continued on December 17 after an adjournment of an October 22 date, and concluded on December 31. The tenants were self-represented throughout the proceedings, with the male tenant taking the lead. He did an excellent job according to Judge Yake (at paras 28-32), based on contemporaneous, careful and comprehensive notes he had made over the years and corroborating photographs and other exhibits. Whenever the evidence of Mr. Wood conflicted with that of the landlord's representative, the judge accepted Mr. Wood's testimony, as well as his other evidence.

Judge Yake found that the landlord was in breach of its obligations under sections 23(4) (requiring 24 hours' notice of entry) and section 16(b) (requiring the landlord to refrain from significantly disturbing the tenant's possession or peaceful enjoyment of the premises) of the *Residential Tenancies Act*, as well as its contractual obligations to give notice and to maintain the premises in a reasonably good state of repairs under the lease (at para 34).

Oddly enough, Judge Yake did not find a breach of section 16(c) of the *Residential Tenancies Act*, which requires that the landlord ensure the premises meet at least the minimum housing standards prescribed by the *Public Health Act*. Section 16(c) is not even mentioned in the Judge's list of relevant statutory provisions (at paras 15-20). As previously mentioned, however, an order under the *Public Health Act* is only required if a tenant wants to serve 14 days' notice on the landlord to terminate the tenancy under section 28 of the *Residential Tenancies Act*. A tenant can apply for an abatement of rent under section 37 of the *Residential Tenancies Act* based on the landlord's breach of section 16(c) alone. It is true that, as Judge B.R. Hougestol said in a different *Residential Tenancies Act* case, *Yang v. Brett*, 2011 ABPC 112 (CanLII) at para 4, "the landlord's bare obligations are negligible" under section 16(c): "[a]ll the landlord has to do is to keep the property habitable" (at para 16). Still, it is difficult to believe that premises which required the extensive replacements of flooring, drywall, cupboards and plumbing that these premises required are habitable or meet the minimum housing standards.

The breach of section 16(b) — the significant disruption of the tenants' possession or peaceful enjoyment of the rented townhouse — was found to be the most significant breach. The covenant of quiet (or peaceful) enjoyment is the promise that protects a tenant's right to exclusive possession of rented premises. Under section 37 of the *Residential Tenancies Act*, abatement of rent is available whenever a landlord breaches any of its covenants in a written lease or the 3 covenants implied by section 16. However, in Alberta, abatement of rent seems to be confined to cases where the breach is of the covenant of quiet enjoyment in section 16(b). In *Boardwalk Rental Communities v Ravine*, 2009 ABQB 534 (CanLII), for example, a bedbug infestation was found (at para 17) to be a significant breach of a landlord's obligation to provide peaceful enjoyment of the premises because the infestation was a physical interference with the tenant's use of the premises, one of the two things a covenant for quiet enjoyment protects against: *581834 Alberta Ltd v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 47 (CanLII) at para 9. It may be that finding a breach of the covenant of peaceful enjoyment is easier than finding a breach of other obligations because a landlord who is not negligent or unreasonable in dealing with problems can still be found to be in breach of that covenant if the tenant cannot occupy all or a part of the premises: *Boardwalk Rental Communities v. Ravine* at para 20.
The landlord's right to enter the premises, on proper notice, to make repairs — found in section 24(3)(b) of the *Residential Tenancies Act* — does compromise the tenant's right to exclusive possession to some extent. A breach of the exclusive possession promise was easy to find in this

case because the landlord did not give proper notice. Even if the landlord had given proper notice, a landlord who acts reasonably when renovating or repairing may still be liable to a tenant if the tenant's ability to use and enjoy the premises is diminished by the renovations or repairs, as Judge Yake notes (at para 24).

Judge Yake awarded the tenants only $3,011 on their abatement of rent claim (at paras 37-39). Because they were renting the premises for $1,075 a month, this abatement is the equivalent of just under 3 months' rent. It does not seem like much for putting up with what these tenants put up with.

It is important to note that Section 37(1(b)) of the *Residential Tenancies Act* restricts the amount of rent a court can abate by saying it can only do so "to the extent that the breach or contravention deprives the tenant of the benefit of the residential tenancy agreement." Judge Yake relied (at para 25) on *Brown v Libertas Property Management Inc*., 2011 ABPC 148 (CanLII) at para 24 for an interpretation of section 37(1)(b). In *Brown*, Judge Ingram held:

> An abatement claim is a claim for breach of express or implied terms of a tenancy agreement. Damages are limited to the difference between the rental value of the premises if they had not been subject to the 'deprivation of benefit'… The intent of abatement of rent is that the tenant should pay only reduced rent if the property is of lesser benefit and therefore diminished value compared to the value at which it was rented.

How much rent is abated depends on the degree of interference with a tenant's possession and use of the premises. It does not appear that the courts are very generous in their application of this provision. In *Boardwalk Rental Communities v Ravine* at paras 1 and 11, only half a month's rent was abated following a bedbug infestation that was found to render the premises uninhabitable. In *Brown v Libertas Property Management Inc* at para 2, a tenant paying $1,520 per month was only awarded a $1,000 abatement of rent even though an order had been made under the *Public Health Act* and the landlord had not corrected the deficiencies, which included an absence of screens on kitchen and bedroom windows, an unusable deck, and mould in a bathroom from a leaky toilet.

In this case Judge Yake found that the tenants lost the entire use of the basement for 5 months and, because the basement amounted to roughly half of the premises' normally used space, he awarded the tenants an abatement of $475/month of their $1,075/month rent — 44 percent or roughly half — for November 1, 2011 to April 2, 2012 (at para 37). The tenants also lost the use of a large portion of their main floor, including their kitchen and the upstairs bathroom, in February and March 2011 (at para 38). Judge Yake awarded them $300/month for two months for that loss. How the amount of $300 was reached is not explained, but it is half of the $600/month the tenants were left to pay after the abatement for the loss of the use of the basement.

Total rent abated was therefore $3,011, much less than the tenants claimed. There was no abatement of rent for the lack of heat for three weeks in March and April, 2012, although heat is normally a necessity in early spring in Alberta. It is difficult to believe that rented premises lacking heat, a kitchen, two bathrooms and a basement was worth $400/month. It appears that not much is required to raise rented premises from "no benefit" to "lesser benefit".

In addition to an hourly wage for performing the landlord's work and the equivalent of less than three months' rent abated, Judge Yake also granted the tenants some minor amounts for a table destroyed by the landlord's contractors (at para 43) and the cost of the their filling fee with the Residential Tenancy Dispute Resolution Service (at para 45). That was it. He decided that the landlord had already compensated them fully for their hotel costs (at para 44).

**Costs**

Although Judge Yake granted the tenants the cost of their filing fee with the Residential Tenancy Dispute Resolution Service, he did not award them costs for their Provincial Court action (at para 45). No reasons were given for not awarding those costs.

Judge Yake reviewed the legal principles governing awards of costs in the Civil Division of Provincial Court in a February 2014 judgment in *Horn v Hoyda*, 2014 ABPC 34 (CanLII). He summarized the eight principles (at para 7) as follows:

> (a) the ordinary rule in civil matters in *Provincial Court* [RSA 2000, c P-31] is that costs are awarded to the successful party unless there are special circumstances which might dictate a different outcome;
>
> (b) section 44 of the *Provincial Court Act* states that when judgment is given, the judgment shall include costs;
>
> (c) pursuant to section 9.8(1) of the *Provincial Court Act* this Court may at any time in any proceedings and on any conditions that the Court considers proper award costs in respect of any matter coming under Part 4, which governs Civil Claims in Provincial Court;
>
> (d) pursuant to section 2 (L) of the *Provincial Court Fees and Costs Regulation*, A.R. 18/91 (as amended) upon application or hearing, this Court may award payment for additional costs;
>
> (e) there are published "Guidelines for Costs in Provincial Court" (the "Guidelines") which relate to party and party costs and are not intended to fully indemnify the successful party;
>
> (f) although the trial judge has a broad discretion with respect to the nature and amount of costs to be awarded, that discretion is not unlimited;
>
> (g) the factors to be considered by the Court when awarding costs are described in the Guidelines; and
>
> (h) when determining costs to be awarded the Court may also take into consideration the matters described at Rule 601(1) of the *Alberta Rules of Court.*

Subparagraph (e) above refers to published "Guidelines for Costs in Provincial Court" but they are not available on the Alberta Courts: Provincial Courts website. A document called "Guidelines for Costs in Provincial Court – Civil Division" was reproduced seven years ago in *Laforce v. Kaye*, 2007 ABPC 245 (CanLII) at para 8 and it appears to be the most recent publicly available version. These Guidelines indicate that parties appearing without counsel should be

awarded five percent of the amount in issue, as well as $150 for an opposed application and, presumably, the filing fee of $200. However, the Guidelines quoted in *Laforce v. Kaye* also note that "Costs are in the discretion of the court and are intended to provide a degree of indemnification with respect to the actual expense incurred or which it would be reasonable to incur in conducting litigation having regard to the amount" and that consideration ought to be given to the following factors:

> 1. The complexity of the cause of action;
>
> 2. Difficulties encountered in respect of service;
>
> 3. Adjournments or delays and who has responsibility;
>
> 4. Attendances upon application for adjournment and whether Witnesses are present;
>
> 5. Expert witness (where properly required-Disbursement to a maximum of $150.00 for each witness);
>
> 6. Time engaged in preparation for trial; or preparation of written argument where ordered by the court;
>
> 7. The type of disbursements and whether or not they are necessary;
>
> 8. The necessity of a trial when there was no valid cause of action or defence.

Because no reasons were given by Judge Yake for not awarding costs to the successful tenants in this case, it is futile to speculate on the possible reasons. However, the lack of an award seems out of keeping with the judge's praise for Mr Wood's testimony and its basis (at para 28), his finding that the tenant's testimony and evidence was to be preferred to that of the landlord whenever there was a conflict (at paras 28 and 32), his criticism of the landlord's conduct in failing to produce relevant records and witnesses with first-hand information (at paras 29-31), and the adjournments and delays that caused the hearing of the tenants' application to stretch over 6 court dates between May 9 and December 31, 2013, only one of which was due to the tenants and only then because Mr Wood was in an accident shortly before an October court date (paras 6-14).

**Conclusion**

A total of $5,826 does not seem like much for putting up with the kind of conditions that these tenants put up with for more than 6 months, especially considering they paid $600/month rent for 4 of those months and $300/month rent for 2 of those months, and especially considering that a

huge chunk of that amount was $20/hour wages for the hard work of painting, carrying drywall, carrying chip board, removing garbage, and otherwise cleaning the premises after the landlord failed to do so. Consider also the 15 months that it took them to pursue the landlord though the Dispute Resolution Service and the Provincial Court. From Judge Yake's account, these tenants seemed to have done everything right. They gave prompt and adequate notice to the landlord of the problems. They took careful and contemporaneous notes of all the problems and backed them up with photographs. Requesting a Public Health inspection was found to be a reasonable course of action (at para 33(n)). Judge Yake even found the tenants took all reasonable steps to mitigate their losses (at para 33(gg)).

Such stingy compensation is apparently all that the *Residential Tenancies Act* will allow. Alberta is not exactly known for tenant-friendly legislation. A landlord was not even responsible for making sure rented premises continued to be habitable until 2004. Compared to the pre-2004 legal situation, I suppose these tenants will have to be grateful for small mercies.