August 14, 2017

Landlords, Tenants, and Domestic Violence: Who is a "Tenant" under the *Residential Tenancies Act*?

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Report Commented On: Centre for Public Legal Education Alberta, Domestic Violence: Roles of Landlords and Property Managers, Final Report, March 2017

The report, Domestic Violence: Roles of Landlords and Property Managers, a research project for the Centre for Public Legal Education Alberta (CPLEA) under the lead of Professor Lois Gander, explores the role that landlords and their property managers can play in responding to domestic violence. Appendix F of the report identifies a number of legal issues that deter landlords and their agents from providing assistance because of the uncertainty in the law or the need for reform of the *Residential Tenancies Act*, SA 2004, c R-17.1 (*RTA*). My colleague, Professor Jennifer Koshan, has already written about the privacy laws that stop landlords from getting help for victims of domestic violence in a preventative way: "Landlords, Tenants, and Domestic Violence: Clarifying Privacy Issues". This post addresses the uncertainty that, perhaps surprisingly, surrounds the question of "Who is a tenant?" Who is a tenant is an important issue in the domestic violence context because it is tenants who have both rights — such as the right to gain access to the residential premises — and responsibilities — such as the duty to pay rent. A person needs the status of "tenant" under the *RTA* in order to have the rights and responsibilities set out in the *RTA*, which take precedence over anything set out in a written lease.

Among the report's findings was that practices for determining who was a tenant and/or who had to be named on and sign a written lease varied widely among the interviewed property managers (at 16, 17, 44). In many large apartment complexes, all adult residents were required to sign a written lease. Even in those complexes, however, practices varied as to when a landlord decided that a guest had become a tenant and how diligent property managers were in having new tenants added to the written lease. Other property managers took the view that every adult residing in the rental premises was a tenant, with rights to access the residential premises, even if their name was not on the written lease.

Unfortunately, "who is a tenant?" can be a difficult question to answer in some situations. It can therefore be difficult to tell whether the *RTA* and the written lease, if any, applies to someone. The uncertainty is caused by a number of factors in the law: a residential tenancy agreement does not have to be in writing; a tenant does not have to be listed as a tenant on a written lease; a landlord's permission to occupy residential premises and thus become a tenant may be given orally, in writing, or by the landlord's conduct; and a person has to occupy the residential premises as a residence.

One thing that can be said with certainty is that the status of being a "tenant" in Alberta is not determined by whether or not a written lease has been signed. The idea that a guest or resident in

the residential premises is not a tenant unless and until they have signed a lease is a misconception, and it appears to be a misconception common to both landlords and tenants.

The term "residential tenancy agreement" — the *RTA*'s term for what most people call a "lease" — is defined in section 1(1)(m):

> "residential tenancy agreement" means a written, oral or implied agreement to rent residential premises …

It is section 1(1)(m)'s definition of residential tenancy agreement to include oral and implied agreements to rent, as well as the written leases that landlords and tenants often incorrectly assume to be decisive, that creates much of the uncertainty about who is a tenant. It also ensures the category of "tenant" is broader than it might be assumed to be. The fact that one tenant has signed a written lease does not mean that other persons occupying the residential premises are not also tenants.

The existence of the permission to occupy premises can most easily be confirmed by the landlord's signature on a written lease. However, landlords can give permission orally and their permission can be implied by their conduct towards a resident (such as by collecting rent from them), and these ways of giving permission are less certain and harder to prove.

The broad definition of "landlord" in section 1(1)(f) of the *RTA* contributes to the uncertainty surrounding the landlord's grant of permission:

> "landlord" means
> (i) the owner of the residential premises,
> (ii) a property manager who acts as agent for the owner of the residential premises and any other person who, as agent for the owner, permits the occupation of the residential premises under a residential tenancy agreement,
> (iii) the heirs, assigns, personal representatives and successors in title of the owner of the residential premises, and
> (iv) a person who is entitled to possession of the residential premises, other than a tenant, and who attempts to enforce any of the rights of a landlord under a residential tenancy agreement or this Act…

This definition means that landlords, many of whom are corporations, do not have to act personally. A landlord can act through an agent, such as a property manager who gives permission to a person to occupy the residential premises. Different agents might conduct themselves differently or say different things informally, making the existence of permission difficult to determine.

"Tenant" is defined in section 1(1)(t) of the *RTA* as follows:

> "tenant" means
> (i) a person who is permitted by the landlord to occupy residential premises under a residential tenancy agreement,

> (ii) a person who is permitted to occupy residential premises under an assignment or sublease of a residential tenancy agreement to which the landlord has consented under section 22, and
> (iii) an heir, assign or personal representative of a person referred to in subclause (i) or (ii).

The key part of the definition is clause (i), defining a "tenant" as a "person who is permitted by the landlord to occupy residential premises under a residential tenancy agreement." To be a tenant under the *RTA*, a person, not surprisingly, needs the landlord's permission to occupy the landlord's property.

The definition of "residential premises" is also necessary to the definition of "tenant" and also found in the *RTA*, in section 1(1)(l):

> "residential premises" means any place occupied by an individual as a residence…

Requiring a tenant to be someone who occupies a place "as a residence" also creates uncertainty. Someone may start out as a guest of a tenant. If they stay on for a while, then at some undefined point in time that guest will become someone who is occupying the residential premises "as a residence" and then they might become a tenant if they receive the landlord's permission.

There are whole bodies of law determining what property is a "residence" for a variety of purposes. For example, residence is important to custody and access in family law and in insurance and immigration law and for voting in elections. These bodies of law usually include their own list of factors to be considered in deciding if someone is a resident or not. There do not appear to be any decisions in the landlord and tenant context on the meaning of "residence". How permanent does the occupation have to be? Is it still an individual's residence if it is temporary? Does it matter if the person has a residence somewhere else? Does a resident have to have changed their mailing address?

Additional uncertainty seems to be introduced by the apparent assumption that only adults — individuals over the age of majority, 18 in Alberta — can be tenants. In the CPLEA report, some property managers were said to require all adults to sign a written lease (at 16, 17). But that assumption is incorrect. Unlike other provinces which clarify the age issue in their residential tenancy legislation, in Alberta we need to rely on the common law because the *RTA* is silent on the issue. According to the common law, a person under the age of majority — a minor — cannot enter into a contract or have it enforced against them. However, there is an exception if the contract provides what the law calls "the necessaries of life" for the benefit of the minor. The necessities of life usually include shelter, food, and health care (and it can include other things depending upon the circumstances). The inclusion of a place to live on this list means a person under the age of 18 in Alberta is able to sign a residential tenancy agreement and be held responsible under it if it provides a benefit, i.e., housing, for the minor.

To summarize, just who is a "tenant" may be difficult to determine for a number of reasons:

- a residential tenancy agreement need not be a written agreement

- a written agreement that names and is signed by only one of the occupants of the residential premises does not mean that other occupants are not also tenants
- a landlord's necessary permission to occupy the premises can be given in writing or orally or inferred by conduct
- a landlord includes not only owners of the residential premises but also their agents and different people may act differently towards different occupants
- a guest cannot become a tenant until they occupy the residential premises as their residence and there is no test for determining when a place becomes a residence in the *RTA* and too many tests at common law
- a person does not have to be an adult to be able to sign a lease and be held to the promises that they make in that lease

It might be thought that a landlord could add certainty by specifying that only people whose name and signature appear on the written lease will be considered "tenants." But that will not work. Because the status of "tenant" gives a person occupying residential premises rights under the *RTA*, the landlord cannot add certainty with such a provision. Such a provision would contradict the definition of "tenant" in the *RTA*, which determines who has rights under the *RTA*, and that is not allowed under section 3(1) of the *RTA*:

> 3(1) Any waiver or release by a tenant of the rights, benefits or protections under this Act is void.

One reason it matters whether a person is a "tenant" can be seen in section 36(1) of the *RTA*. It takes landlords less time and they need no good reason to evict "a person who is not a tenant but who is living in residential premises occupied by a tenant." Only 14 days notice is required. Or suppose that only the perpetrator of domestic violence is a tenant and that perpetrator no longer occupies the residential premises as their residence. In that case, the position of a non-tenant who is living there — such as a victim of domestic violence — is even more precarious. Section 33 of the *RTA* provides that, "[i]f the tenant having the right to occupy residential premises has abandoned the premises, the landlord may require a person living in the premises who is not a tenant to vacate," and only 48 hours notice is required. But the most significant reason a person needs to be a tenant is to get access to the residential premises. For example, only a tenant cannot be locked out. Section 24(2) of the *RTA* requires a landlord who changes or adds to locks on access doors to make a key available "to the tenant" as soon as the locks are changed.

But being a tenant brings with it duties, as well as rights. The duty to pay rent is the obvious example. The recent addition of Part 4.1: Victims of Domestic Violence to the *RTA* addressed a part of the problem by allowing victims of domestic violence to terminate a tenancy early, on 28 days notice, and made them responsible only for rent to that point. Like many provisions of its type, the remedy is to terminate the tenancy for all tenants: section 47.3(5). Of course, some of the other tenants might enter into a new residential tenancy agreement with the landlord for the same residential premises, but the landlord does not have to agree, or keep the rent the same, etc.: section 47.3(5).

Being a tenant and being subject to acts of domestic violence that interfere with tenancy obligations may also make it more likely that a victim of domestic violence ends up in a

"bad tenant" database, which purports to list high and low risk tenants, as reported by landlords. These tenant screening systems appear to be gaining in popularity in Canada.

How do other Canadian jurisdictions handle the question of who is a tenant? Is there a better way?

British Columbia and Saskatchewan do not really define "tenant" in their legislation: see section 1 of the *Residential Tenancy Act*, SBC 2002, c 78 and section 2(s) of the *Residential Tenancies Act, 2006*, SS 2006, c R-22.0001. The definition in both statutes only expands the meaning of "tenant" by including the estate of a deceased tenant and, if the context requires it, a former or prospective tenant. The core of the category is left undefined. Section 3 of the British Columbia legislation and section 4 of the Saskatchewan statute say that a minor can enter into a tenancy agreement and have it enforced against them, adding a small clarification. However, in the BC definition of "tenancy agreement" (section 1), it seems that deciding who is a tenant may raise issues similar to those discussed above for Alberta:

> "tenancy agreement" means an agreement, whether written or oral, express or implied, between a landlord and a tenant respecting possession of a rental unit, use of common areas and services and facilities, and includes a licence to occupy a rental unit… (emphasis added)

That definition actually seems to raise an extra issue by including a licence to occupy, which likely requires less permanency to the occupation than does Alberta's *RTA*. The definition of tenancy agreements in the Saskatchewan statute in section 2(r) does not include a licence, but is otherwise similar.

The definition of tenant in the Ontario statute, the *Residential Tenancies Act, 2006*, SO 2006, c 17 is quite expansive. Section 2 does not pretend to be comprehensive because it defines tenant as follows:

> "tenant" includes a person who pays rent in return for the right to occupy a rental unit and includes the tenant's heirs, assigns and personal representatives … (emphasis added)

Its definition of "tenancy agreement" is as broad and ambiguous as the rest:

> "tenancy agreement" means a written, oral or implied agreement between a tenant and a landlord for occupancy of a rental unit and includes a licence to occupy a rental unit… (emphasis added)

Nova Scotia handles the question of who is a tenant differently, and does seem to add at least a little more certainty with their use of "deemed" tenants. Sections 2(j) and 3(1) and (2) of the *Residential Tenancies Act*, RSNS 1989, c 401 provides:

> 2 (j) "tenant" includes an individual who is deemed to be a tenant and an individual who is a lessee, occupant, subtenant, under-tenant, and his or their assigns and legal representatives;

> 3(1) Notwithstanding any agreement, declaration, waiver or statement to the contrary, this Act applies when the relation of landlord and tenant exists between a person and an individual in respect of residential premises.
> (2) For the purposes of subsection (1), the relation of landlord and tenant is deemed to exist in respect of residential premises between an individual and a person when an individual
>
> > (a) possesses or occupies residential premises and has paid or agreed to pay rent to the person;
> > (b) makes an agreement with the person by which the individual is granted the right to possess or occupy residential premises in consideration of the payment of or promise to pay rent;
> > (c) has possessed or occupied residential premises and has paid or agreed to pay rent to the person. (emphasis added)

The Northwest Territories seems to have one of the simplest definitions, but that does not necessarily make it one of the clearest. Section 1(1) of the *Residential Tenancies Ac*t, RSNWT 1988, c R-5 states:

> "tenant" means a person who pays rent in return for the right to occupy rental premises and his or her heirs, assigns and personal representatives. (emphasis added)

The answer to who is a tenant in the Northwest Territories seems to depend on the source of the funds to pay the rent. For example, if rent is paid by a cheque written on or an electronic transfer made from a joint account, the joint account holders would be the tenants. Most payment methods disclose the sender or the owners of the source of the money and so this provision should add certainty. The Northwest Territories statute also limits the amount of uncertainty in its description of a tenancy agreement in section 9:

> 9. (1) A tenancy agreement may be oral, written or implied.
> (2) An oral or implied tenancy agreement for a term greater than one year is deemed to be a tenancy agreement for one year only. (emphasis added)

If certainty is what is desired, to make it easier to answer the question of "who is a tenant?" and thus who must be allowed to access the residential premises, perhaps the approach in the Northwest Territories legislation should be adopted. But is certainty what is desired? Tying tenancy to the payment of the rent might exclude many victims of domestic violence from the status of tenant.

If the policy goal is to include the victims of domestic violence in the definition of tenant, then perhaps the deeming approach of Nova Scotia is preferable. (And I say "perhaps," in part, because I did not canvass the legislation in all of the Canadian jurisdictions and I did not canvass that of any jurisdictions outside Canada.) Usually a victim of domestic violence is better off being a tenant under the *RTA*. But the victim's position under the *RTA* could be improved.

It might be better to look outside the definition of "tenant" if access to the residential premises is the main concern: access by the victims of domestic violence and denial of

access to the perpetrators. If access is the main concern, then the place to look for guidance might be the recent amendments to the residential tenancy legislation in the Australian states.

Provisions such as the amendment to the *RTA* in Part 4.1: Victims of Domestic Violence that came into force on January 1, 2016 — provisions which are now found in many jurisdictions across Canada — might be thought of as the first generation of protections for victims of domestic violence who are tenants. They all address a part of the problem by allowing victims of domestic violence to terminate a tenancy early, on 28 days notice, and making them responsible only for rent to that point. However, a second generation of amendments to residential tenancy legislation in Australian states gives victims of domestic violence choices.

Recent amendments or proposed legislation in South Australia, New South Wales and Western Australia, for example, deal with the issue of access with provisions that allow for more than the early termination of leases. The following list briefly describes the remedies in this second generation of legislation. In addition to the termination of the tenancy for all tenants in the residential premises, which is what Alberta has now, these states provide for options, usually on the victim's application to an informal dispute resolution service:

- the victim of domestic violence may leave the property, terminate their responsibilities under the tenancy agreement, and have their name removed from the tenancy agreement, but without terminating the tenancy of the co-tenants
- the victim may stay in the residential premises without the perpetrator of the domestic violence
- the landlord may be forced to enter into a new tenancy agreement with the victim on the same terms as the old tenancy agreement which is terminated
- the landlord may be stopped from entering details of the victim and the victim's payment history in a "bad tenant" database
- the security deposit (a "bond" in Australia) may be apportioned among the co-tenants
- the victim may be released from any obligation to pay for damages to the residential premises by the perpetrator
- the residential tenancy dispute resolution service may be empowered to issue restraining orders where there is a risk that a co-tenant will cause serious damages to the property or commit an act of domestic violence
- the equivalents of our protection orders granted under the *Protection Against Family Violence Act*, RSA 2000, c P-27, restraining orders, peace bonds and other court orders may allow the victims to immediately change the locks without the landlord's consent

These sorts of changes to the law would not just provide options for access to the residential premises, but they would also provide options for financial responsibilities. How to draft such provisions while respecting the property rights of landlords is difficult, but the Australian amendments do have some ideas for that issue as well.

In subsequent posts, I will expand on some of these ideas by addressing the power of landlords to suspend or terminate tenancies for acts of domestic violence, the power of landlords and tenants to change locks and bar access, and the ability of landlords to recover the cost of repairs for damages caused by tenants or their guests. Jennifer Koshan will address the implications of different forms of no-contact orders for landlords and property managers in a later post.

This post may be cited as: Jonnette Watson Hamilton "Landlords, Tenants, and Domestic Violence: Who is a "Tenant" under the *Residential Tenancies Act*?" (14 August, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/08/Blog_JWH_RTA_DV_Who_is_a_Tenant.pdf