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Tenant's Insurance, Ministerial Order No SA:005/2020 and Evictions of Residential Tenants

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Case Commented On: *20005321 (Re)*, 2020 ABRTDRS 20 (CanLII)

This decision by a Tenancy Dispute Officer (TDO), J. Lambert, of Alberta's Residential Tenancy Dispute Resolution Service (RTDRS) is notable for three reasons. The first – and probably the most helpful to the widest range of landlords and tenants – is the discussion about whether or not a tenant's failure to produce evidence of tenant's insurance as required by their residential tenancy agreement is a "substantial breach" that entitles the landlord to evict the tenant. It seems that many residential tenancy agreements require tenants to obtain insurance for their own property – contents insurance – and many tenants do not bother to do so. The second reason is its consideration of Ministerial Order No SA:005/2020, which was intended to offer some help to tenants who could not pay their rent due to COVID-19. That Ministerial Order lapsed on August 14, 2020, so whatever impact it had should be apparent by now. But because of structural problems such as the small percentage of RTDRS decisions made public and the closure of courts to eviction cases at the beginning of the pandemic, we will probably never know whether or what kind of difference that Ministerial Order made. We do have a hint of its impact in the decision in *20005321 (Re)*, but it is only a hint. The third reason this decision is notable is that it is one of only 24 RTDRS decisions made public so far in 2020. The publication of some RTDRS decisions was a recent and deliberate commitment to "improved access to justice by publishing written RTDRS decisions through the CanLII database", according to the Service Alberta Annual Report 2019/2020 (at 19). This decision contributes toward that goal, but more is needed.

The residential tenancy agreement in this case was for a one-year fixed term ending November 30, 2020. The landlord had applied for an order to terminate the tenancy and for a judgment for unpaid rent, alleging four grounds (at para 1):

1. Interference with the landlord's rights by "erecting a swimming pool without the Landlord's permission which does not adhere to the bylaws for the City of Edmonton";
2. Failing to provide proof of tenant's insurance in breach of the residential tenancy agreement;
3. Failing to pay the rent for July 2020; and

4. Avoiding communication with the landlord.

I will not look at the first or fourth grounds. The discussion of each by TDO Lambert is brief and clear and neither was found to be a reason to evict the tenant.

Proof of Tenant's Insurance

The alleged breach on this ground was the tenant's failure to provide proof of insurance, rather than a failure to have insurance. The residential tenancy agreement required that the tenant get their own insurance to cover any insurable losses to their own property and then provide the landlord with a copy of that insurance policy within 21 days of entering into the agreement. The tenant admitted they had failed to provide the landlord with proof of insurance, even though they said they did have the insurance. Breach of the residential tenancy agreement was therefore proven.

However, section 26(1)(c) of the Residential Tenancy Act, SA 2004, c R-17.1 (RTA) provides:

> If a tenant commits a breach of a residential tenancy agreement, the landlord may apply to a court for one or more of the following remedies: … (c) where the breach is a substantial breach, termination of the tenancy. (emphasis added)

The failure to provide proof of insurance therefore had to be a "substantial breach" in order for the landlord to have grounds to evict the tenant.

A "substantial breach" by a tenant is defined in section 1(1)(p)(i) of the RTA to mean "a breach of a covenant specified in section 21 or a series of breaches of a residential tenancy agreement, the cumulative effect of which is substantial" (emphasis added). Section 21 lists seven covenants (i.e. promises) deemed to have been made by tenants that are automatically part of every residential tenancy agreement, such as promises to pay rent and not to do significant damage to the rented premises. However, TDO Lambert found that the tenant's failure to provide proof of insurance did not fit easily into any of the seven covenants (at para 17).

The best fit was the covenant in section 21(b) which provides "that the tenant will not in any significant manner interfere with the rights of either the landlord or other tenants in the premises, the common areas or the property of which they form a part" (emphasis added). Could failing to provide proof of insurance be interference with the landlord's contractual right to that proof? Strictly speaking, TDO Lambert conceded that it could be argued that it was (at para 18). But was that enough?

Logically, the next step in the analysis would have been to ask if the failure to provide proof of insurance interfered in a significant manner with the rights of the landlord, using the wording in section 21(b) itself. However, TDO Lambert did not take that step. Instead, TDO Lambert focused on the need for a breach to be "substantial" in order to warrant eviction. TDO Lambert held that "not every contractual breach is substantive in nature or effect" (at para 19), relying on

the judgment of Assistant Chief Judge Jerry LeGrandeur in *416566 Alberta Ltd. v Fothergill*, 2017 ABPC 96 (CanLII).

In *Fothergill*, Judge LeGrandeur had held that a substantial breach of a tenancy agreement must be "substantial in substance, not just name" in order to justify an eviction, i.e. the breach had to be proven to be "a substantial interference with or impact upon the Landlord's entitlements under the tenancy agreement" (at para 28). The breach in *Fothergill* involved overdue rent in the amount of $10.00 by the time illegal late fees were deducted, which was found to be "a trivial breach with little or no impact on the landlord" (at para 26), and not a substantial one.

TDO Lambert also relied on the fact that a tenant's failure to obtain contents insurance, and not just their failure to provide proof of contents insurance, had never to their knowledge been held to be a substantial breach (at para 19). In *Adam v The City of Edmonton Non-Profit Housing Corporation*, RTDRS Case No. E-18-61084, November 14, 2018, an unreported decision of the RTDRS which is available on The Access Review blog here, TDO Lambert noted that a colleague had held that a tenant's failure to obtain contents insurance was "probably not" a substantial breach (at para 20, citing page 3 of *Adam*). The colleague did not offer any reasons for that tentative conclusion, so *Adam* was of very little help analytically.

TDO Lambert also referenced (at para 20) the decision of the Ontario Landlord and Tenant Board in *TEL-98422-19 (Re)*, 2019 CanLII 86986 (ON LTB). In that case, the Board's Vice Chair had held that "not every breach of a tenancy agreement will justify serving notice of termination [because] … [s]ection 65 requires that the interference be 'substantial' rather than minimal" (at para 22). The Vice Chair went on to find that, given the "[t]enant's failure to obtain contents insurance prior to the hearing before the Board has had no impact on the Landlord whatsoever, it is not clear to me the test of 'substantially' has been met" (at para 22). This conclusion is backed by a reason – no impact on a landlord – which echoes the focus on impact in *Fothergill*.

This point about a contractual breach needing to be substantial would have been more persuasive had it relied upon the language in section 21(b) of the RTA. The tenant only promises that they "will not in any significant manner interfere with the rights of … the landlord" (emphasis added). So, while a "substantial breach is defined in section 1(1)(p)(i) of the RTA to include "a breach of a covenant specified in section 21" – and arguably any breach is "a breach" – section 21(b) only prohibits significant interference. In *Fothergill*, Judge LeGrandeur had to focus on whether the breach was a "substantial breach" because the breach in that case was of section 21(a), a failure to pay rent – not a significant failure to pay rent, or a failure to pay a significant amount of rent. Unlike *Fothergill*. there is no need in this case to read "substantial" into section 1(1)(p)(i) so that it reads "a [substantial] breach of a covenant specified in section 21". All that is required here is a decision on whether or not a failure to produce proof of contents insurance, in breach of the residential tenancy agreement, interferes in a significant manner with the landlord's rights.

Fortunately, TDO Lambert did go on to discuss whether a tenant's failure to provide proof of insurance was or was not significant in terms of impact on the landlord's rights and obligations. In finding a tenant's lack of contents insurance to be of no concern to the landlord, TDO Lambert mentions that a landlord would not be liable if the tenant's property was damaged by fire or other perils unless the damage was due to a breach of the landlord's obligations to the tenant (at para 21). For example, a landlord would be liable if their failure to maintain the rented premises to the minimum housing standards required by section 16(c) of the RTA caused damage to the tenant's property, and a landlord cannot contract out of that liability due to section 3 of the RTA (at paras 22-23). TDO Lambert also noted that whether or not a tenant has contents insurance would not change whether or not a landlord was liable if, for example, a child suffered harm in the tenant's pool (at paras 24-25).

Unfortunately, this part of the decision is more complex than it need be because it is a discussion of the "substantial" in substantial breach, rather than of the "significant manner" in interference with the landlord's rights. In addition, TDO Lambert does not state expressly that, if a failure of a tenant to obtain contents insurance is of no concern to the landlord because it makes no functional difference to the landlord if the tenant has or does not have that insurance, then the failure of the tenant to provide proof of that insurance – which is the contractual breach in this case – is also of no concern to the landlord. It is implied, but not stated.

Ministerial Order No SA:005/2020

The third ground for evicting the tenant was the failure to pay the rent for July 2020. As I have already noted, failure to pay rent – or at least an entire month's rent – is, under section 21(a) of the RTA, a substantial breach. Termination of the tenancy was therefore available as a remedy for this breach under section 26(1)(c) of the RTA.

The tenant indicated that she had lost her job due to the pandemic and that was why she could not pay July's rent. This is where and why Ministerial Order No SA:005/2020 becomes relevant. I have written about this Ministerial Order previously – in "Residential Tenancies in Alberta: Evictions for Non-Payment of Rent No Longer Suspended" and in "Can an Alberta Landlord's Duty to Make Reasonable Efforts to Negotiate a Meaningful Payment Plan with Residential Tenants before Evicting Tenants be Enforced?" – and so I will be brief about this now-spent amendment to the RTA.

The Ministerial Order modified the RTA by adding sections 26(1)(c.1) and 29(1.1) to the act. The additions prohibited landlords from evicting tenants or recovering arrears of rent unless tenants had breached an agreed payment plan or the landlord made reasonable efforts to enter into a meaningful payment plan. The Ministerial Order is no longer in effect. By its own terms, it lapsed on August 14, 2020.

For this issue about a failure to pay July's rent, the question was whether the landlord had fulfilled their duty to make reasonable efforts to enter into a meaningful payment plan. The

landlord had to prove that their efforts were reasonable and that any payment plans that were proposed were meaningful.

However, the landlord seemed to be unaware of their duty or their need to prove that they had complied with the Ministerial Order. It appears that it was the tenant who proposed a payment plan, suggesting that the landlord use the security deposit as July's rent and allow repayment of the security deposit in instalments made monthly until the end of the residential tenancy agreement. The landlord seems to have simply rejected that proposal (at para 27).

TDO Lambert notes that it is unclear what a "meaningful payment plan" is or what "reasonable efforts" would amount to (at para 28). TDO Lambert did not take any steps towards resolving the uncertainty, merely stating that perhaps the landlord's rejection of the tenant's repayment plan was reasonable, and perhaps it was not (at para 28).

It is difficult to say much about such a scant account of the parties' attempts to negotiate a payment plan. However, if the tenant put forward a proposal that would see them paying the entire amount of the rent and security deposit by the end of the residential tenancy agreement on November 30, and if all the landlord did was say "no," then it seems pretty clear that the landlord did not make reasonable – or any – efforts to negotiate any kind of repayment plan.

The question of whether the landlord fulfilled their duty may have received little attention because the tenant made a second proposal at the hearing itself. The tenant stated they were able to pay the rent in biweekly instalments for August and September from the EI they were receiving and then they would be able to pay the rest of the rent in full and on time from student assistance.

In response to this offer, TDO Lambert looked to the reason for the Ministerial Order, as set out in the preamble to the order itself. The Ministerial Order states that the application of section 26(1)(c), which allows the termination of a tenancy for failure to pay rent, was not "in the public interest because tenants face unforeseen financial circumstances wherein they may be unable to pay rent on time unless and until they receive financial assistance, but it may be unsafe for them to leave their places of residence if they are self-isolating or in quarantine." Based on that acknowledgment that the normal operation of the RTA was not in the public interest and the harshest consequences of the pandemic should be ameliorated in the short-term, TDO Lambert held that it was within the normal discretion granted TDOs to allow the tenancy to continue on the basis of the tenant's proposal (at para 30).

This part of the decision may turn out to be the only publicly available discussion of the impact of Ministerial Order No SA:005/2020 in preventing evictions. As such, it is disappointing. It says nothing about what kind of efforts landlords should have been making. It says a little more about what a reasonable repayment plan might look like, perhaps because of the acceptance of the tenant's second proposal. Nevertheless, this decision does indicate a willingness on the part of

one RTDRS TDO to look to the purpose of the Ministerial Order and give a tenant a small break by allowing the full amount of July's rent to be paid three months late.

Whether other TDOs did the same while the Ministerial Order was in effect, or did more or less, we will probably never know unless the RTDRS accounts to the Minister and then Service Alberta makes the impact known in its next annual report.

The Publication of RTDRS Decisions and Access to Justice

As I indicated in the introduction to this post, the publication of some RTDRS decisions in the ABRTDRS database is a recent – and welcome – initiative. According to the Service Alberta Annual Report 2019/2020 (at 19 and 21), the purpose of publishing some decisions is to enhance "transparency and access to justice, by having the RTDRS written reasons for decisions, publicly accessible on the free database (CanLII)." How does publication enhance transparency and access to justice? The Annual Report goes on to state that "[p]arties to an application before the RTDRS, have the opportunity to be better informed about how the *Residential Tenancies Act* is interpreted and applied by RTDRS, and to use this information to resolve disputes or prepare for an upcoming hearing" (at 21).

This particular case fulfills this RTDRS goal by giving reasons for the one interpretation and application of a number of RTA provisions. To some extent, however, this purpose is in conflict with the fact that "[t]he decisions of RTDRS tenancy dispute officers are specific to the facts of each case and are not binding precedents" – a sentence that appears at the end of each published decision. Unlike judges presiding in courts, RTDRS TDOs do not have to decide similar cases in the same way. At most, each published RTDRS decision might be an example of how to interpret and apply the RTA.

Another problem with fulfilling the access to justice goal is that only a very small fraction of RTDRS decisions are published. As I mentioned in my February 2020 post on "Are Landlords' Late Payment Fees Enforceable?", the intention was to publish reserved decisions that resulted in written reasons from January 1, 2019 onward. The vast majority of the thousands of RTDRS decisions made each year are written orders with oral reasons given to the parties at the end of the hearing. TDOs normally only reserve their decisions if the dispute includes a large amount of conflicting evidence or involves a complicated legal issue. However, only those reserved decisions which can be redacted to ensure the anonymity of the parties will be published and publication will also depend on RTDRS resources.

According to that same Service Alberta Annual Report (at 17), the RTDRS conducted 12,223 hearings during the government's 2019-2020 fiscal year. The ABRTDRS database contains 49 decisions between April 1, 2019 and March 31, 2020. That is less than half of one percent of the decisions being made. It is difficult to know how much so few decisions can tell landlords and tenants about how the RTA is interpreted and applied by RTDRS.

Another problem is that, for unknown reasons, some TDOs are over-represented in the ABRTDRS database. For example, of the 47 published decisions in 2019, TDO Lambert authored 14 of them, or almost 30%. TDO Young was even more prolific, being responsible for 28 of the 2019 decisions, or almost 60%. Together, the two of them have written the vast majority of the 2020 decisions to date – 80%. Only 4 other TDOs have either one or two decisions published. I am not sure how many TDOS there are in the RTDRS, but the Government Staff Directory lists eleven of them, meaning at least five have not published any of their decisions.

Do TDOs have a unified approach to the interpretation and application of the RTA? Is it possible to say, as the Service Alberta Annual Report does, that "[p]arties to an application before the RTDRS, have the opportunity to be better informed about how the *Residential Tenancies Act* is interpreted and applied by RTDRS" (at 21). We have a pretty good idea how two TDOs interpret and apply the RTA, but little or not idea about what the others do.

Certainly, publishing even half of one percent of the RTDRS decisions is better than publishing none. But how much is transparency and access to justice is enhanced by publishing so few decisions, the vast majority of which are written by only two of the TDOs? If one of the goals of this publication initiative is to have parties use the information about how the RTA is interpreted and applied to prepare for hearings, how well is that goal being met currently?

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