

## A Tenant's Right to Withhold Payment of Rent

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### Cases Considered:

*Botar v. Mainstreet Equity Corp.*, [2007 ABQB 608](#)

This appeal illustrates how difficult it can be to evict a residential tenant who has not paid rent for the better part of a year. It also illustrates how well a self-represented litigant can do in the superior courts, the Alberta Court of Queen's Bench in this case.

*Botar v. Mainstreet Equity Corp.* is an appeal from a decision of a Master of the Court of Queen's Bench. The Master had ordered a trial to deal with a residential tenancy question raised by the tenant, Andrew S. Botar. The Master had also directed Mr. Botar to pay Mainstreet the sum of \$3,150 in rental arrears by October 31, 2007 and the sum of \$350 per month from and after October 1, 2007. Mr. Botar's appeal from the Master's order was heard in November 2007 by Mr. Justice Donald Lee.

Mr. Botar had applied to be allowed to live rent free in an apartment that he had been occupying since 2000. He did so on the basis of what is now section 17(2) of the Residential Tenancies Act, S.A. 2004, c. R-17.1, but was section 16 of the Residential Tenancies Act, R.S.A. 2000, c. R-17. Section 17 provides as follows:

17(1) If a residential tenancy agreement is in writing and the tenant has signed and returned the written residential tenancy agreement to the landlord, the landlord shall, within 21 days after the written residential tenancy agreement is returned to the landlord, serve on the tenant a copy of the written residential tenancy agreement signed by the landlord.

(2) A tenant may withhold payment of rent until the tenant is served with a copy of the residential tenancy agreement under subsection (1) [emphasis added].

Section 17 sets out the only circumstances under which a tenant may withhold rent as a self-help remedy. In all other situations, a tenant must apply to the court for an order for abatement of rent.

Apparently Mainstreet had purchased the residential apartment building from Nordel Holdings sometime in the past seven years. It was Nordel Holdings who had entered into a written residential tenancy agreement with Mr. Botar in May of 2000, a copy of which was apparently never provided to Mr. Botar. No written residential tenancy agreement was ever signed by

Mainstreet and Mr. Botar. After his written lease with Nordel Holdings expired, Mr. Botar stayed on as a month-to-month tenant as provided for in that lease and in section 13 of the Residential Tenancies Act.

Mr. Justice Donald Lee concluded that the Master's order represented "a reasonable middle ground between these parties on an interim basis." He therefore dismissed the appeal of the Master's order. However, there are some fairly strong hints in his decision that Mainstreet is likely to prevail in the end. Mr. Justice Lee noted that the landlord's position is "an arguable one" based on section 13 of the Residential Tenancies Act. He also pointed out that Mainstreet cannot be in breach of section 17(1) because it has never had a written residential tenancy agreement with Mr. Botar.

Nevertheless, with the affirmation of the Master's order, this matter is heading to trial. As a result, Mr. Botar, a self-represented litigant who claimed that he was impecunious, asked Mr. Justice Lee to determine who should be responsible for paying the \$600 fee to set this matter down for trial. The judge ordered Mainstreet, who could afford it, to pay the filing fees to start the action against itself, pouring a little salt on what must be by this time a festering wound.

Residential landlord and tenant law is one area that is intended to be consumer friendly. However, such disputes are usually heard in the lower courts and those courts are much more used to dealing with self-represented litigants. In Alberta, the Provincial Court – Civil hears a large number of applications from both landlords and tenants involving amounts up to \$25,000. The small claims court has a very informative [web site](#) guiding landlords and tenants step-by-step through its processes. Despite this, Mr. Botar, as is his right, chose to apply to the Court of Queen's Bench. Although a less user-friendly process for self-represented litigants, Mr. Botar has done quite well for himself so far. The \$350 per month in interim rent that the master ordered him to pay was the rent for the apartment back in 2000. There had been various increases since then and the current rent is \$675 per month. Assistance to self-represented litigants is becoming a major topic in judicial ethics. How much and what kind of assistance from a judge is reaching out and not over-reaching?